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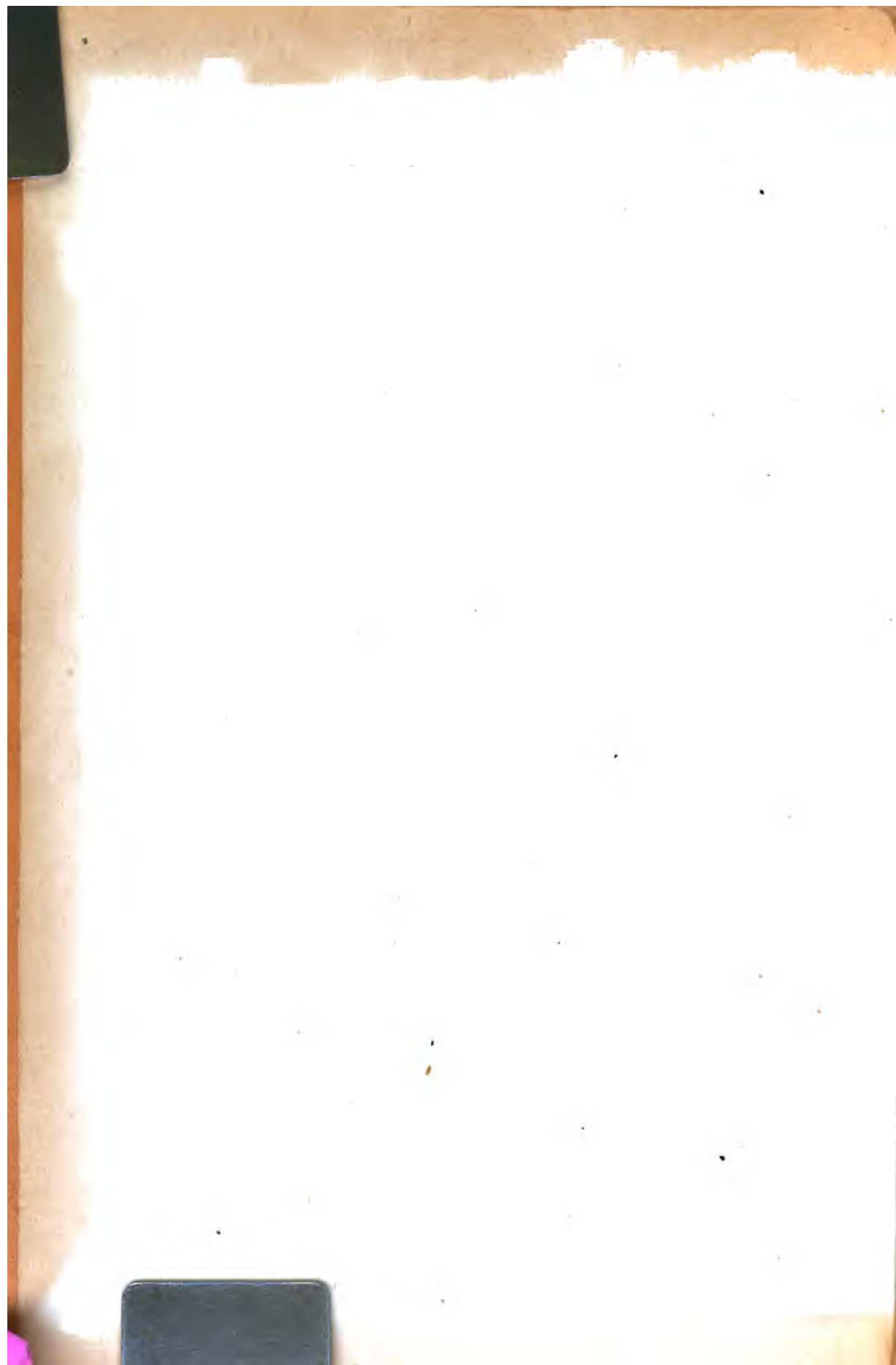
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1908

**THE
CODES OF CALIFORNIA**

**AS AMENDED AND IN FORCE AT THE CLOSE OF THE
THIRTY-SIXTH SESSION OF THE LEGISLATURE,
1905, AND SPECIAL SESSION OF 1906**

IN FOUR VOLUMES

**FULLY ANNOTATED BY
JAMES M. KERR**

**VOLUME TWO
CIVIL CODE
IN TWO PARTS
PART ONE—SECTIONS 1-1425**

**SAN FRANCISCO
BENDER-MOSS COMPANY
LAW-BOOK PUBLISHERS**

1908

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1905

FOREWORD.

In the preparation of this annotated edition of the California codes, the requirements of the bench and bar of the state have been kept constantly in view; and no feature has been omitted which promises to be assistful in a busy office or to an overworked judge. An attempt has been made to do the work better than was ever before attempted, in this or any other state. To accomplish this object neither labor, pains, nor expense has been spared. The sure test of practical use will determine whether our high ideal has been attained.

Some of the features are new, and a practical knowledge of some of the wants of a busy law office leads the editor to believe they will be found helpful. Among the prominent features are:

ANNOTATED CODES AND DIGEST combined, is what our California codes really furnish. Every case in point, **reported and unreported**, from volume 1 to and including volume 145 of the California Supreme Court Reports, and volumes 1 to 80 of the Pacific Reporter, is digested and arranged according to the classification adopted by the commissioners who framed the California codes; so that in the annotations to the various sections of the four codes will be found digested and assembled the bulk of the decisions of the California supreme court, together with many hundreds of cases from sister states, making the work, on the whole, by far the most valuable working-tool accessible to the profession in California and the Pacific Coast states—economizing money, time, and labor.

ANALYSIS OF STATUTES in such a manner as to enable one to grasp at a glance the provisions of any section, or to go directly to the part of the section wanted, by the discreet use of bold-faced type to emphasize each point. Where a section contains two or more provisions, or a provision accompanied by qualifications or conditions, and, likewise, where a provision requires two or more things to render an act legal and binding,—each of these particulars is emphasized by placing before it, in bold-faced type, in brackets, the figures [1] [2] [3], etc. Where necessary, words in bold-faced type, in brackets, are introduced into the text; but an effort has been made to designate the analysis by simply emphasizing the words themselves.

HISTORY OF EACH SECTION, showing its sources and evolution, so far as traceable, together with the various amendments thereof, if any, is given immediately under the section, together with the dates.

CASES CITING THE SECTION are all collected and cited in a paragraph entitled **Applied, cited, construed, referred to, etc.**, in which it is noted whether the reference to the section is in the majority or dissenting opinion, whether decision or dictum, and just what use the court made of the section; that is, whether it was applied, cited, construed, merely referred to in the discussion, or “held but not decided” applicable or inapplicable, and the like.

ERRORS CORRECTED in the cases cited, typographical and otherwise. It is an unfortunate fact that the California Reports are full of typographical errors,¹ and other errors,² which are frequently embarrassing, requiring time and trouble to correct. In all instances these errors are pointed out and the proper corrections noted.

ANNOTATIONS OF THE SECTIONS are systematic, thorough, and exhaustive—every California case upon the point, reported and unreported, together with the decision of the court, is given. Not only the decisions of the court, but also the holdings, where a case is “held but not decided,” are incorporated, as are also many obiter enunciations and important dissenting opinions. In this state time and again the doctrine laid down in a dissenting opinion has become ultimately the law of the state, and the editor has deemed it proper to anticipate future fluctuations of like character.

That which is simply “held but not decided,” or which is dictum or dissent, is distinguished respectively as such, so that no one can possibly be misled by its presence. It is regarded as the duty of the editor to collect everything,—whether it is decision, dictum, dissent, or “holding,”—to the end that a full and complete history of the doctrine may be presented. It is not regarded as a part of the duty of the editor to criticize doctrines laid down, or to reconcile conflicting decisions of the supreme court.

Doctrine being unsettled in this state, announced by a divided court, or settled against the weight of decision in other states having similar codes and laws, outside decisions are incorporated to indicate what the doctrine probably will be, or, in the light of other decisions, it is thought it may ultimately become. Outside decisions are also referred to whenever it is thought they may be helpful, as where there is a dearth of decision in this state.

The decisions given in the annotations are arranged chronologically. When decisions are squarely on the point given they follow each other, separated by a semi-colon (;) merely. If not directly on the point, but are thought to have a bearing on the question and to be worthy of consideration by the careful searcher, they follow the word “see.” Authorities from other states usually follow thus. Where authorities from other states are introduced they are given chronologically by states, following each other alphabetically; then the United States supreme court cases, followed by the federal circuit court and district court cases, ending with the Canadian and English cases cited, if any.

The system of law and procedure in the thirteen Pacific states and territories being founded largely upon the law and procedure in California,—in many cases the codes being practically adopted bodily from the California codes,³—we have been especially liberal in the insertion of cases therefrom, not only for the advantage of

¹ *Sharon vs. Sharon*, 75 Cal. 1, 69, § 5 erroneously cited for § 4 Civ. Code; *Swan vs. Thompson*, 124 Cal. 193, 197, 199, § 43 by error for § 46 Civ. Code; *Redfield vs. Oakland Consolidated Street Railway Co.*, 110 Cal. 277, 289, § 337 Code Civ. Proc. for § 377.

² In the divorce case of *Herman Norman vs. Jennette Thomson Norman*, 121 Cal. 620, the running title of the case in the official report is *Norman vs. Thomson*.

³ Sometimes by a roundabout road. Thus, the Oklahoma Statute of 1893, § 2968, which is iden-

tical with our Civil Code, § 153, was adopted from Dakota, which took it from our code. The court in *Cooper vs. Bank Indian Ter.*, 4 Okla. 633, 46 Pac. Rep. 475, in construing Okla. Stat. § 2968, say: “This is a California statute, which was adopted into the laws of the territory of Dakota, and adopted from that territory into the laws of this territory, and which has been retained as a part of the laws of the states of North and South Dakota, and has been frequently construed.” Whereupon the court proceeded to hold that a note executed by a married woman jointly with her husband is

FOREWORD.

the bench and bar of those states and territories, but for the further reason that those decisions are of the highest persuasive authority with our own courts; in like manner as the decisions of our own courts are first resorted to in those states and territories.

Black-letter catch-lines, and systematic analysis, in the larger annotations, are used for the purpose of assisting the searcher. Subordination is shown by different sized bold-faced type. These black-letter catch-lines, so far as practicable, are arranged alphabetically. The alphabetical, or the logical classification or arrangement, each has its disadvantages; but the arrangement adopted, it is thought, will more readily facilitate search, and give more general satisfaction.

Double citations are given in each instance where the case is found reported in one or more series of reports, reporters, or selected cases. Obsolete and decadent reporters, such as the West Coast Reporter, the Central Reporter, and other similar reporters, have been studiously excluded in all cases where the decision is elsewhere published, and reference made only to live and accessible reports and reporters. The narrow bigotry of the publisher, which causes a case to be cited merely by the title thereof and the date on which handed down, cannot be too strongly condemned; such citation does not mislead any one; bench and bar alike know the case is taken from the West's National Reporter System. The only end such spleen and short-sightedness accomplishes is to cause the bench and bar to waste much valuable time trying to find the exact place where the case is reported.

It is not because of any partiality for the publishers of any series of reporters or reprints that we give these double citations, but because we wish to serve the bench and bar by calling their attention to the exact place in the books which they may have on their shelves, where they may find the authority or the aid sought; and, for the purpose of lessening their labor as much as practicable, not only the first page of the case, but also the page on which the point is discussed, is uniformly given.

Practice points receive especial attention in both the Political Code and the Civil Code. Although all questions of pleading and procedure are fully treated in the Code of Civil Procedure, there are numerous instances in which important points of procedure or practice arise and receive specific application in connection with discussions of questions of substantive law, and cannot be well divorced therefrom.

Useless duplications of annotations are studiously avoided by giving the annotation of each point at the place where it properly belongs in the proper code, and then cross-referring thereto from other parts of the same code and from the other codes; so that the same note, or substantially the same annotation matter, will not be found in any two of the codes.

Unreported cases have been carefully examined, and, when in point, are cited for what they are worth. There are numerous unreported decisions of the supreme court of this state, and some points are found discussed in these decisions only. The number of these unreported cases, found in the Pacific Reporter, is in the neighbor-

binding upon her, citing as authority *Marlow vs. Barlow*, 53 Cal. 456; *Alexander vs. Bouton*, 55 Cal. 15; *Good vs. Moulton*, 67 Cal. 536, 8 Pac. Rep. 65.

The California construction placed upon this statute (§ 158 Civ. Code) in the case of *Good vs. Moulton*, 67 Cal., is quoted from, approved, and

followed by the supreme court of North Dakota in *Colonial and U. S. Mortg. Co. vs. Stevens*, 3 N. D. 265, 55 N. W. Rep. 578; and likewise by the supreme court of South Dakota in *Colonial and U. S. Mortg. Co. vs. Bradley*, 4 S. D. 158, 55 N. W. Rep. 1108, and in *Granger vs. Roll*, 6 S. D. 611, 62 N. W. Rep. 970.

hood of three thousand. These cases have all been examined and included, but the unreported cases prior to the Pacific Reporter have not been incorporated, for the reason that they are not accessible generally to the bench and bar of the state.

THE INDEX has received especial attention; everything, whether in the section or in the annotation matter, being designated by specific reference, so that the searcher is enabled to turn to the exact point wanted, whether it be in the code section or in a paragraph of the note.

The whole body of the respective codes and the annotations appended thereto have been so tied together in arranging the matter of the index, by cross-references, that it is thought the searcher will be able to readily find his exact point, no matter under what head of the subject he may look.

KEEPING THE CODES UP TO DATE, fully annotated, will be a simple matter, and inexpensive to the profession; the **pastor nuisance** will be obviated, and become a thing of the past. Immediately after the adjournment of each biennial session of the legislature all changes in and amendments to the codes and General Laws will be speedily printed, preserving the original paging of the session laws, in the same general style as the present edition of the codes.

The **biennial volume**, fully annotated, will contain every decision or "holding," reported and unreported, of our supreme court, from the date of publication of the codes and General Laws to the date of publication of the biennial volume. This work will be done after the same manner adopted in this edition of the codes and General Laws, so that the annotations will in each instance constitute an addition to the proper section and the paragraph of the annotation thereunder, and form a symmetrical whole,—whether such decision enforce, qualify, limit, doubt, deny, or overrule the former decisions.

To illustrate: Under section 1459 of the Civil Code, paragraph 3 of the annotation shows that in *Fork vs. Bushard*, 116 Cal., it was "held but not decided" that a non-negotiable contract or instrument in writing may be assigned pendente lite, and the assignee thereof permitted to file a supplemental complaint. Should this point in the mean time come again before our supreme court, the decision thereon will be noted under section 1459 of the Civil Code, in paragraph 3 of the annotation in the biennial volume.

Always up-to-date dovetail annotations will thus be secured, and a symmetrical and continuous whole guaranteed. Succeeding biennial volumes will, in the same manner, reprint all amendments and additions to the codes and General Laws, with full annotations. The annotations in each succeeding biennial volume will contain all the annotations in the last and all preceding fellow volumes, so that there will never be more than one biennial volume to consult; the preceding volumes will be serviceable and valuable only as taking the place of the session laws of the legislature.

ORIGINAL CODE literally reproduced, where not amended, and all amendments literally reproduced from the original acts; in both instances the punctuation has been retained, however inaccurate or amateurish it may be; the original headings of chapters and the catch-lines to sections are retained, because resorted to by the court in construction.

JAMES M. KERR.

San Francisco, Cal., October 15, 1905.

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CIVIL CODE
OF THE
STATE OF CALIFORNIA.
IN FOUR DIVISIONS.

AN ACT TO ESTABLISH A CIVIL CODE.

[Approved March 21, 1872.]

The people of the state of California, represented in the senate and assembly, do enact as follows:

TITLE OF THE ACT.

§ 1. This act shall be known as the Civil Code of the State of California, and is in four divisions, as follows:

- I. The first relating to persons.
- II. The second to property.
- III. The third to obligations.
- IV. The fourth contains general provisions relating to the three preceding divisions.

History: Enacted March 21, 1872.

1. Civil Code one statute.
2. All the codes one statute.
3. Construction of Civil Code.
4. 5. Amendments to Civil Code.
6. Same—Retroactive effect when.
7. Cited, referred to, and amended how.

1. **CIVIL CODE ONE STATUTE.** The Civil Code purposes to be, and in fact is, one statute; it was passed through both houses of the legislature and signed by the governor as a single statute.—See Earle vs. Board of Educ. San Francisco, 55 Cal. 489, 494.

See Pol. Code, § 4478 and note.

2. **ALL THE CODES ONE STATUTE,** with relation to each other in their construction.—See Pol. Code, § 4480 and note.

3. **CONSTRUCTION OF CIVIL CODE.** The four codes are to be construed as if parts of a single statute, so far as relates to the provisions of the various codes and their reconciliation.—See Pol. Code, §§ 4480-4484 and notes.

4. **"AMENDING SECTIONS SO AS TO READ** in a given way is a form of amendment which was adopted for the purpose of adjusting them [the amendments] to the original enactments,

so that when the system should, after repeated amendments, become complete, the different parts might be put together without further revision, and thus form a perfect code. The portions of the amended sections which are merely copied without change are not to be considered as repealed and then again enacted, but to have been the law all along; and the new parts, or the changed portions, are not to be taken to have been the law at any time prior to the passage of the amended act. . . . The theory of amendments, made in the form adopted in the present instance, we take to be this: The portions of the sections which are repealed are to be considered as having been the law from the time they were first enacted, and the new provisions are to be understood as enacted at the time the amended act took effect. In short, we attribute no effect to the plan of dovetailing the amendments into the original section, except the one above suggested, of preserving a harmonious text, so that when future editions shall be published the scattered members shall easily adjust themselves to each other. In other words, we consider the amendment as only equivalent to an independent statute declared in general

language that an appeal may hereafter be taken from an order granting a new trial on complying with the conditions mentioned."—*Ely vs. Holton*, 15 N. Y. 596, 598, 599 (quoted with approval in *Central Pac. R. Co. vs. Shackelford*, 63 Cal. 261, 265, 266). See *People ex rel. Warfield vs. Sutter St. R. Co.*, 117 Cal. 604, 613, 49 Pac. Rep. 736. *Nev. State ex rel. Blossom vs. Horton*, 21 Nev. 300, 306, 30 Pac. Rep. 376. *Fed. The Louis Olson*, 52 Fed. Rep. 652, 654.

5. EFFECT OF AMENDMENT of a statute made by enacting that the "Act is hereby amended so as to read as follows," and then incorporating the changes or additions with that portion of the former act that is retained, is not that the portions of the amended act which are merely copied from the original act are to be considered as having been repealed and again enacted, it being a fundamental rule that repeals of statutes by implication are not

avored in law. To constitute a repeal of an act of the legislature by implication, the new statute must cover the whole subject-matter of the old one. There must be an irreconcilable repugnancy between the two acts, and the repugnancy must be plain and unavoidable.—*State ex rel. Blossom vs. Horton*, 21 Nev. 300, 306, 30 Pac. Rep. 376.

6. Retroactive effect not to be given to the code or amendments thereto, unless it is expressly declared within the section or amendment that it shall be retroactive.—*Central Pac. R. Co. vs. Shackelford*, 63 Cal. 261, 264-5. See *Webber vs. Clarke*, 74 Cal. 11, 19, 15 Pac. Rep. 431; *Teralta Land and Water Co. vs. Shaffer*, 116 Cal. 518, 522, 58 Am. St. Rep. 194, 196, 48 Pac. Rep. 613. See post § 3 note para. 10, 11.

7. CITED, REFERRED TO, AND AMENDED HOW.—See post, § 21.

CIVIL CODE

OF THE

STATE OF CALIFORNIA.

PRELIMINARY PROVISIONS.

- § 2. When this code takes effect.
- § 3. Not retroactive.
- § 4. Rules of construction.
- § 5. Provisions similar to existing laws, how construed.
- § 6. Actions, etc., not affected.
- § 7. Holidays.
- § 8. Same.
- § 9. Business days.
- § 10. Computation of time.
- § 11. Certain acts not to be done on holidays.
- § 12. Joint authority construed.
- § 13. Words and phrases, how construed.
- § 14. Certain terms defined.
- § 15. Good faith, what constitutes (repealed).
- § 16. Degrees of care and diligence (repealed).
- § 17. Degrees of negligence (repealed).
- § 18. Notice, actual and constructive.
- § 19. Constructive notice, when deemed.
- § 20. Effect of repeal.
- § 21. This act, how cited.

§ 2. WHEN THIS CODE TAKES EFFECT. This code takes effect at twelve o'clock noon on the first day of January, eighteen hundred and seventy-three.

History: Enacted March 21, 1872.

- 1. Effect of codes generally.
- 2. Effect of Civil Code.
- 3. Statutes prevail over codes when.
- 4, 5. Same—Codes considered passed the first day of the term—Exception.
- 6. Similar provisions.
- 7. Publication of codes.

1. Effect of codes generally, and their proper construction,—as to, see Pol. Code § 4478 et seq. and notes.

2. Effect of Civil Code,—as to, see post §§ 2-19 and notes.

3. Statutes prevail over codes where passed at same session of legislature at which the codes were adopted.—*Babcock vs. Goodrich*, 47 Cal. 488, 510; *Ex parte Newton*, 53 Cal. 571, 572.

See Pol. Code § 4478 and note para. 2-4, and § 4479, and note par. 2.

4. Same—Codes considered passed on first day of session of legislature at the term at which adopted.—See Pol. Code § 4478 and note para. 2, 4.

5. Exception as to revenue provisions, in regard to which the codes are considered as passed on the last day of the session.—*Mitchell vs. Crosby*, 46 Cal. 97, 98-9.

See Pol. Code § 4478 and note par. 2, and § 2391 and note.

6. Similar Provisions in the other codes,—as to, see § 2 of the respective codes.

7. Publication of the codes—as to, see Pol. Code § 4494 and note para. 1, 2.

§ 3. NOT RETROACTIVE. No part of it is retroactive, unless expressly so declared.

History: Enacted March 21, 1872.

- 1. Applied, cited, construed, referred to, etc.
- 2, 3. Construction—Not retroactive.
- 4. Same—Amendment of code—Not retroactive.
- 5-11. Same—Change of construction by decision.
- 12. Retroactive effect of statute—Determined by construction, when.
- 13. Same—Impairing vested rights.
- 14. Same—Law enlarging period of limitation—Not retroactive.
- 15. Same—Marriage previously contracted—Not affected.

16. Same—Registry laws—Not retroactive.

17. Same—Statutes not retroactive, when.

18. When code silent what law governs.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Sharp vs. Blankenship*, 59 Cal. 288, 289 (construed); *Central Pac. R. Co. vs. Shackelford*, 63 Cal. 261, 263 (applied); *Allen vs. Allen*, 95 Cal. 184, 201, 30 Pac. Rep. 213, 27 Id. 30, 16 L. R. A. 646 (construed in dis. op.); *Bank of Ukiah vs. Moore*, 106 Cal. 673, 680, 39 Pac. Rep. 1071 (construed); *Estate of Richards*, 133 Cal. 524, 527, 65 Pac. Rep. 1084 (applied).

2. CONSTRUCTION—Not Retroactive, unless expressly so made.—*Sharp vs. Blankenship*, 59 Cal. 288, 289; *Central Pac. R. Co. vs. Shackelford*, 63 Cal. 261, 263; *Allen vs. Allen* (dis. op.), 95 Cal. 184, 201, 30 Pac. Rep. 213, 27 Id. 30, 16 L. R. A. 646; *Bank of Ukiah vs. Moore*, 106 Cal. 673, 680, 39 Pac. Rep. 1071; *Estate of Richards*, 133 Cal. 524, 527, 65 Pac. Rep. 1034.

Code Commissioners cited in support of this section. *Von Schmidt vs. Huntington*, 1 Cal. 55; *Thorne vs. San Francisco*, 4 Cal. 127; *Gates vs. Salmon*, 28 Cal. 320. *Ind.* *Lewis vs. Brackenridge*, 1 Blackf. (Ind.) 220, 12 Am. Dec. 228. *Me.* *Lewis vs. Webb*, 3 Me. 326. *Mass.* *Holden vs. James*, 11 Mass. 396, 6 Am. Dec. 174. *N. Y.* *Dash vs. Van Kleeck*, 7 John. (N. Y.) 477, 5 Am. Dec. 291. *Fed.* *United States vs. Heth*, 7 U. S. (3 Cr.) 399, bk. 2 L. ed. 479; *Harvey vs. Tyler*, 69 U. S. (2 Wall.) 328, bk. 17 L. ed. 871; *Prince vs. United States*, 2 Gall. C. C. 204, 19 Fed. Cas. 1330.

3. "Decisions of the state courts ought not to give them," the statutes, "a retroactive effect and allow them to render invalid contracts entered into."—*Taney, C. J.*, in *Ohio Life Ins. and Trust Co. vs. Debolt*, 57 U. S. (16 How.) 416, 432, bk. 14 L. ed. 997, 1003; *Rowan vs. Runnels*, 46 U. S. (5 How.) 134, bk. 12 L. ed. 85.

4. SAME—AMENDMENTS TO THE CODES are not retroactive unless expressly so declared.—*Hibernia Sav. and Loan Soc. vs. Hayes*, 56 Cal. 297, 299. See *Sharp vs. Blankenship*, 59 Cal. 288; *Central Pac. R. Co. vs. Shackelford*, 63 Cal. 261.

5. SAME—CHANGE OF CONSTRUCTION BY DECISION of the supreme court of the state. As to existing contracts, the construction of a statute received from the state authorities at the time it was made, is to govern in determining the validity of the contract.—*Taney, C. J.*, in *Ohio Life Ins. and Trust Co. vs. Debolt*, 57 U. S. (16 How.) 416, 431, bk. 14 L. ed. 997.

6. "Every one is presumed to know the law, although the courts in the land often have great difficulty and labor in finally determining what the law is. The courts cannot make or repeal a law."—*Allen vs. Allen*, 95 Cal. 184, 199, 30 Pac. Rep. 213, 27 Id. 30, 16 L. R. A. 646.

7. "They can say what a law means; and if afterwards they see that they have made a mistake, they can correct their error by an overruling of a former decision, the consequence of which overruling is that the blunder is thenceforward deemed never to have been law."—*Allen vs. Allen*, supra, quoting *Bishop on Cont.*, § 569.

8. "It has been held here, that although it appears the parties have entered into a contract relying upon the previous decision of the supreme court, they would not be relieved from the obligations thereof because of a subsequent decision by the same court overruling the former one, and declaring a different rule upon the same subject."—*Allen vs. Allen*, 95 Cal. 184, 199, 30 Pac. Rep. 213, 27 Id. 30, 16 L. R. A. 646; *Kenyon vs. Welty*, 20 Cal. 637, 81 Am. Dec. 137.

9. "The construction given to a statute by the highest tribunal in the state, whether sound or not, must be taken as correct, so

far as contracts made under the act are concerned, and no subsequent decision, altering the construction, can impair their validity. The construction becomes a part of the statute,—as much so as if it were an amendment made by the legislature."—*Allen vs. Allen*, supra, citing *Gelpcke vs. Dubuque*, 68 U. S. (1 Wall.) 175, bk. 17 L. ed. 520; *Thompson vs. Lee Co.*, 70 U. S. (3 Wall.) 327, bk. 18 L. ed. 177; *Douglass vs. Pike Co.*, 101 U. S. 677, bk. 25 L. ed. 968; *Louisiana ex rel. Southern Bank vs. Pillsbury*, 105 U. S. 278, bk. 26 L. ed. 1090.

10. Same—Change of construction of statute affects only subsequent contracts.—*Anthony vs. Jasper Co.*, 101 U. S. 695, bk. 25 L. ed. 1007; *Ralls Co. vs. Douglass*, 105 U. S. 733, bk. 26 L. ed. 958; *Taylor vs. Ypsilanti*, 105 U. S. 72, bk. 26 L. ed. 1012; *Louisiana ex rel. Southern Bank vs. Pillsbury*, 105 U. S. 278, bk. 26 L. ed. 1090; *Green Co. vs. Conness*, 109 U. S. 105, bk. 27 L. ed. 872, 3 Sup. Ct. Rep. 69; *Anderson vs. Santa Ana*, 116 U. S. 361, bk. 29 L. ed. 635, 6 Sup. Ct. Rep. 413; *Marshall vs. Elgin*, 3 Fed. Rep. 787, 3 McC. C. C. 41.

11. "The sound and true rule is, that if the contract, when made, was valid by the laws of the state, as then expounded by all the departments of its government, and administered in the courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the state, or decision of its courts, altering the construction of the law."—*Taney, C. J.*, in *Ohio Life Ins. and Trust Co. vs. Debolt*, 57 U. S. (16 How.) 416, 432, bk. 14 L. ed. 997, 1004. See *Gelpcke vs. Dubuque*, 68 U. S. (1 Wall.) 175, bk. 17 L. ed. 520; *Havemayer vs. Iowa Co. Supvrs.*, 70 U. S. (3 Wall.) 295, bk. 18 L. ed. 38; *Lee Co. vs. Rogers*, 74 U. S. (7 Wall.) 181, bk. 19 L. ed. 160; *Kenosha vs. Lamson*, 76 U. S. (9 Wall.) 477, bk. 19 L. ed. 72; *Olcott vs. Fond du Lac Co. Supvrs.*, 83 U. S. (16 Wall.) 678, bk. 21 L. ed. 382; *Douglass vs. Pike Co.*, 101 U. S. 677, bk. 25 L. ed. 968; *Weightman vs. Clark*, 103 U. S. 256, bk. 26 L. ed. 392; *Taylor vs. Ypsilanti*, 105 U. S. 60, bk. 26 L. ed. 1008; *Louisiana ex rel. Southern Bank vs. Pillsbury*, 105 U. S. 278, bk. 26 L. ed. 1090; *Burgess vs. Seligman*, 107 U. S. 20, bk. 27 L. ed. 359, 2 Sup. Ct. Rep. 10; *Anderson vs. Santa Ana*, 116 U. S. 356, bk. 29 L. ed. 653, 6 Sup. Ct. Rep. 413; *German Sav. Bank vs. Franklin Co.*, 128 U. S. 526, bk. 32 L. ed. 519, 9 Sup. Ct. Rep. 159.

Discussion of constitutional question, with full collection of authorities, in note by H. P. Farnum in 16 L. R. A. 646.

12. RETROACTIVE EFFECT OF STATUTE, must be so by express language of the enactment; but the determination as to whether a statute or amendment is in fact retroactive may rest in construction.—*Tulley vs. Traynor*, 53 Cal. 274, 279.

13. Impairing vested rights,—as to, see *Pol. Code* § 8 and note.

14. "Law enlarging period of limitation upon existing contracts is not retroactive, and impairs no vested rights."—*Allen vs. Allen*, (dis. op.), 95 Cal. 184, 201, 30 Pac. Rep. 213, 27 Id. 30, 16 L. R. A. 646.

See *Code Civ. Proc.* § 312 note pars. 126-130.

15. Marriage previously contracted is not affected by statute subsequently passed.—*Estate of Richards*, 133 Cal. 534, 537, 65 Pac. Rep. 1034.

16. "Registry laws are usually not held with a retroactive effect, except so far as they affect vested rights."—*Bank of Ukiah vs. Moore*, 106 Cal. 673, 680, 39 Pac. Rep. 1071.

17. Statute operating on future rights only, is not retroactive.—*Dunne vs. Mastick*, 50 Cal. 244, 247.

18. WHEN CODE IS SILENT the common law governs.—*Estate of Apple*, 66 Cal. 432, 434, 6 Pac. Rep. 7. See *In re Neagle*, 39 Fed. Rep. 333, 14 Sawy. C. C. 264.

See post § 4 note para. 19, 20.

§ 4. RULES OF CONSTRUCTION. The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. The code establishes the law of this state respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice.

History: Enacted March 21, 1872; amended by the Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 332; amendment declared unconstitutional in *Lewis vs. Dunne*, 134 Cal. 291, 86 Am. St. Rep. 257, 66 Pac. Rep. 478, 55 L. R. A. 833. See Code Civ. Proc., Pt. I, introductory note.

1. Applied, cited, construed, referred to, etc.
2. Code Commissioners' note.
- 3, 4. Construction—Common-law rule—Not applicable.
- 5, 6. Same—Same—Reason for change of rule.
7. Same—English rules, etc.—Not applicable.
- 8-10. Same—Liberal construction of codes.
11. Same—Same—Statutes in affirmance of common law.
- 12, 13. Same—Same—Statutes in derogation of common law.
14. Same—Same—Statutes in substitution for common law.
15. Same—Same—Re-enacted statutes.
- 16, 17. Same—Same—Remedial statutes.
18. Same—Design to abrogate rule of strict construction.
- 19, 20. Same—Code silent—Common law governs.
21. Same—Construction of codes relative to each other.
22. Deed—Rule for construction of—Estate conveyed.
- 23-26. Laws of state—Codes establish.
27. Statutes in derogation of common law.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *McLean vs. Blue Point Gravel Mining Co.*, 51 Cal. 255, 258 (applied); *Ashley vs. Olmstead*, 54 Cal. 616, 619 (applied); *Estate of Apple*, 66 Cal. 432, 434, 6 Pac. Rep. 7 (cited as controlling); *Lux vs. Haggin*, 69 Cal. 255, 370, 10 Pac. Rep. 674 (applied); *Goldtree vs. Swinford*, 74 Cal. 586, 590, 16 Pac. Rep. 493 (applied); *Sharon vs. Sharon* (dis. op.), 75 Cal. 1, 56, 16 Pac. Rep. 345 (cited as controlling); *In re Johnson*, 98 Cal. 531, 551, 33 Pac. Rep. 460, 21 L. R. A. 380 (construed); *Barnett vs. Barnett*, 104 Cal. 293, 299 (applied as controlling), 302 (referred to), 37 Pac. Rep. 1049; *Robinson vs. Southern Pac. R. Co.*, 105 Cal. 526, 558, 38 Pac. Rep. 94, 722, 28 L. R. A. 773 (applied); *In re Comassi*, 107 Cal. 1, 4, 40 Pac. Rep. 15, 28 L. R. A. 414 (cited); *Sun Ins. Co. vs. White*, 123 Cal. 198, 201, 55 Pac. Rep. 902 (cited); *Hite vs. Hite*, 124 Cal. 389, 397, 57 Pac. Rep. 227, 45 L. R. A. 793 (cited); *McKay vs. McKay*, 125 Cal. 65, 68, 57 Pac. Rep. 677 (cited with other sections); *Blakeman vs. Miller*, 136 Cal. 138, 142, 89 Am. St. Rep. 120, 68 Pac. Rep. 857 (cited with other sections).

2. CODE COMMISSIONERS' NOTE.—"The common-law rule is correctly stated in the first sentence of this section."—*Hotaling vs. Cronise*, 2 Cal. 60; *Turner vs. Tuolumne Water Co.*, 25 Cal. 397.

"However sound may be the arguments in favor of this rule, when applied to ordinary acts of the legislature, it is apparent that it would be improper to apply it, in all its severity, to a system of laws intended, in a great measure, to take the place of the common law, and having in view, as its leading object, the furtherance of justice and a disregard of technical strictness. The provisions of such a system ought to be construed in the same manner, and with like force and effect, as they would be were the principle enunciated resting in the unwritten law, and it was to this end that the section has been made part of each of the codes."

2. CONSTRUCTION—COMMON-LAW RULE requiring statutes in derogation to be strictly construed, does not apply to the codes of this state, which are to be liberally construed.—*Ashley vs. Olmstead*, 54 Cal. 616, 619; *Lux vs. Haggin*, 69 Cal. 255, 370, 10 Pac. Rep. 674; *Robinson vs. Southern Pac. R. Co.*, 105 Cal. 526, 558, 38 Pac. Rep. 94, 722, 28 L. R. A. 773; *In re Blythe*, 112 Cal. 689, 693, 45 Pac. Rep. 6.

As to construction of codes relative to each other, see par. 21, this note.

4. The common-law rule, which was in force in this state prior to the adoption of the codes, is abrogated by the above section.—See *Hotaling vs. Cronise*, 2 Cal. 60; *People vs. Buster*, 11 Cal. 215; *Turner vs. Tuolumne Water Co.*, 25 Cal. 397; *Pina vs. Peck*, 31 Cal. 359; *In re Jessup*, 81 Cal. 417, 420, 422, 21 Pac. Rep. 976, 22 Id. 742, 1028, 6 L. R. A. 594; *In re Blythe*, 112 Cal. 689, 693, 45 Pac. Rep. 6.

5. SAME—SAME—REASONS FOR THE CHANGE OF RULE are given by the Code Commissioners in a note appended to this section.—See par. 2 this note.

6. SAME—SAME—FURTHER REASONS AND DISCUSSION are found in the note appended by the Code Commissioners to § 4 of the Code of Civil Procedure.—See Code Civ. Proc. § 4 note par. 2.

7. **SAME—ENGLISH RULES, etc., DO NOT APPLY.**—"Nor can rules established in England, or elsewhere, be regarded as obtaining under our law, which is to be regarded as establishing a new scheme or system."—*Blakeman vs. Miller*, 136 Cal. 133, 143, 39 Am. St. Rep. 120, 63 Pac. Rep. 537.

8. **SAME—LIBERAL CONSTRUCTION** to be given to the code in order to promote justice and effect its object.—*Goldtree vs. Swinford*, 74 Cal. 588, 590, 16 Pac. Rep. 493; *In re Johnson*, 98 Cal. 531, 551, 33 Pac. Rep. 460, 21 L. R. A. 380; *Kramm vs. Bogue*, 127 Cal. 122, 126, 59 Pac. Rep. 394.

9. "The rule for a liberal construction is applicable only to the provisions of the code, and is limited to the objects sought to be effected."—*In re Johnson*, 98 Cal. 531, 551, 33 Pac. Rep. 460, 21 L. R. A. 380.

10. "Liberal construction does not mean enlargement or restriction of the plain provision of a written law. If a provision of the code is plain and unambiguous, it is the duty of the court to enforce it as it is written. If it is ambiguous or doubtful, or susceptible of different constructions or interpretations, then such liberality of construction is to be indulged in as, within the fair interpretation of its language, will effect its object and promote justice."—*In re Jessup*, 81 Cal. 408, 419, 21 Pac. Rep. 976, 22 Id. 742, 1028, 6 L. R. A. 594; *In re Johnson*, 98 Cal. 531, 551, 33 Pac. Rep. 460, 21 L. R. A. 380.

11. Statutes in affirmance of common law are to be construed in accordance with the rules of that law.—See Code Civ. Proc., § 4, note par. 21.

12. Statutes in derogation of common law are to be strictly construed; they are not to be extended by construction beyond the letter of their provision; it is not to be presumed the legislature intended any innovation on the common law, where such intention is not clearly manifested.—*Brown vs. Fiffeld*, 4 Mich. 322, 326; *Johnson vs. Hahn*, 4 Neb. 144.—See Code Civ. Proc. § 4 note par. 22.

Criticism of *Brown vs. Fiffeld*, supra, by Judge Cooley in his work on Constitutional Limitations, * 61, collecting cases in note.

13. "Presumption legislature in the enactment of statute does not intend to overthrow long-established principles of the law, unless such intention is made to clearly appear, either by express declaration or by necessary implication."—*In re Garcelon*, 104 Cal. 570, 584, 38 Pac. Rep. 414, 32 L. R. A. 595.

14. Statutes in substitution for the common law are to be liberally construed.—See Code Civ. Proc. § 4 note par. 24.

15. Re-enacted statutes are to be construed according to the principles in force at the time of re-enactment.—See Code Civ. Proc. § 4 note para. 25, 29, 30.

16. Remedial statutes are to be construed in favor of the remedy.—See Code Civ. Proc. § 4 note par. 28.

17. "The letter of remedial statutes may be extended to include cases clearly within the

mischief they were intended to remedy, unless such construction does violence to the language used."—*Kramm vs. Bogue*, 127 Cal. 122, 126, 59 Pac. Rep. 394.

18. **SAME—DESIGN TO ABROGATE OLD RULE OF STRICT CONSTRUCTION** and substitute therefor the rule of liberal construction, is manifest in the codes. This applies alike to the provisions of all the codes, Penal as well as Civil, Political, and Code of Civil Procedure.—*Ex parte Gutierrez*, 45 Cal. 429; *People vs. Mortimer*, 46 Cal. 114, 117; *People vs. Soto*, 49 Cal. 67, 70.

See also § 4 of each of the other codes, and the notes thereto.

19. **SAME—CODE BEING SILENT**, the common law governs.—*Estate of Apple*, 66 Cal. 432, 6 Pac. Rep. 7. See *In re Neagle*, 39 Fed. Rep. 855, 14 Sawy. C. C. 264.

20. Common-law rule of decision,—as to, see para. 25, 26, this note; and also Pol. Code § 4468 and note para. 3-7.

21. **SAME—CONSTRUCTION OF CODES WITH RELATION TO EACH OTHER**, and reconciling conflicts,—as to, see Pol. Code § 4478 and note, and § 4480 and note.

22. **DEED—RULE FOR CONSTRUCTION OF** furnished by this section, to determine estate conveyed.—*Barnett vs. Barnett*, 104 Cal. 298, 302, 37 Pac. Rep. 1049. See *Bodine vs. Arthur*, 91 Ky. 53, 56, 24 Am. St. Rep. 162, 14 S. W. Rep. 904.

23. **LAW OF THE STATE—CODES ESTABLISH** on subjects to which they relate.—*McLean vs. Blue Point Gravel Mining Co.*, 51 Cal. 255, 258; *Ashley vs. Olmstead*, 54 Cal. 616, 619; *Lux vs. Haggin*, 69 Cal. 255, 370, 10 Pac. Rep. 674; *Sharon vs. Sharon* (dis. op.), 75 Cal. 56, 16 Pac. Rep. 345; *Barnett vs. Barnett*, 104 Cal. 298, 299, 37 Pac. Rep. 1049; *Robinson vs. Southern Pac. R. Co.*, 105 Cal. 526, 528, 38 Pac. Rep. 94, 772, 28 L. R. A. 773; *In re Comassi*, 107 Cal. 1, 4, 40 Pac. Rep. 15, 28 L. R. A. 414; *Sun Ins. Co. vs. White*, 123 Cal. 196, 201, 55 Pac. Rep. 902; *Hite vs. Hite*, 124 Cal. 389, 397, 52 Pac. Rep. 227, 45 L. R. A. 793; *McKay vs. McKay*, 125 Cal. 65, 68, 57 Pac. Rep. 677.

24. This does not mean that there is no law with respect to such subjects, except that embodied in the code; but when the code speaks its provisions are controlling.—*Estate of Apple*, 66 Cal. 432, 434, 6 Pac. Rep. 7.

25. The common law, in so far as it does not contravene the provisions of the constitution of the United States, or of the state, and has not been done away with or suspended by statute, has been adopted in this state.—See Pol. Code § 4468 and note.

26. "The common law referred to in our statutes, is such only as conforms to our institutions and form of government, and is applicable to the habits and conditions of society."—*Kennedy vs. Burnap*, 120 Cal. 488, 494, 52 Pac. Rep. 443, 40 L. R. A. 476. See *Cooley Const. Lim.* 52.

27. **STATUTES IN DEROGATION OF COMMON LAW—CONSTRUCTION OF**,—as to, see para. 2, 12, 13 this note.

§ 5. PROVISIONS SIMILAR TO EXISTING LAWS, HOW CONSTRUED.

The provisions of this code, so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof, and not as new enactments.

History: Enacted March 21, 1872; amended March 16, 1901, Stats. and Amdts. 1900-1, p. 332; unconstitutional, see history, § 4 ante.

1. Applied, cited, construed, referred to, etc.
2. Construction—Section does not restrain.
3. Continuation not new provisions, when.
4. Marriage settlements—Presumptions.
5. Repeal does not revive old law.

this country.—Kennedy vs. Burnap, 120 Cal. 488, 493, 52 Pac. Rep. 843, 40 L. R. A. 476.

2. "Construed," as used in this section, means "regarded" or "considered."—Churchill vs. Pacific Impr. Co., 96 Cal. 490, 493, 31 Pac. Rep. 560.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc.,** in: Sharon vs. Sharon, 75 Cal. 1, 69, 16 Pac. Rep. 345 (erroneously cited for § 4); Corker vs. Corker, 87 Cal. 643, 647, 25 Pac. Rep. 922 (applied); Churchill vs. Pacific Impr. Co., 96 Cal. 490, 493, 31 Pac. Rep. 560 (construed); Claiborne vs. Castle, 98 Cal. 30, 33, 32 Pac. Rep. 807 (applied); In re Garcelon, 104 Cal. 570, 584, 38 Pac. Rep. 414, 32 L. R. A. 595 (referred to by the court as in harmony with construction given); Kennedy vs. Burnap, 120 Cal. 488, 491, 493, 52 Pac. Rep. 843, 40 L. R. A. 476 (construed, contention of counsel not sustained); In re Campbell, 130 Cal. 380, 382, sub nom. Campbell vs. Wright, 62 Pac. Rep. 613 (construed); Blakeman vs. Miller, 136 Cal. 138, 142, 89 Am. St. Rep. 120, 68 Pac. Rep. 587 (cited in connection with other sections).

4. **CONTINUATIONS NOT NEW PROVISIONS.**—Statutes substantially the same as existing statutes, or the common law, must be construed as continuations thereof, and not as new enactments, when not opposed thereto.—Churchill vs. Pacific Impr. Co., 96 Cal. 490, 492, 51 Pac. Rep. 560; Claiborne vs. Castle, 98 Cal. 30, 33, 32 Pac. Rep. 807; Kennedy vs. Burnap, 120 Cal. 488, 494, 52 Pac. Rep. 843, 40 L. R. A. 476; Eads vs. Kessler, 121 Cal. 244, 246, 53 Pac. Rep. 656; In re Campbell, 130 Cal. 380, 382, sub nom. Campbell vs. Wright, 62 Pac. Rep. 613.

2. **CONSTRUED**—Section does not restrain from following generally accepted doctrine in

5. **MARRIAGE SETTLEMENT—PRESUMPTION** OF same as marriage contract, under provisions of this section.—Corker vs. Corker, 87 Cal. 643, 647, 25 Pac. Rep. 922.

6. **REPEAL DOES NOT REVIVE** pre-existing law.—See Pol. Code § 18 and note.

§ 6. ACTIONS, ETC., NOT AFFECTED. No action or proceeding commenced before this code takes effect, and no right accrued, is affected by its provisions.

History: Enacted March 21, 1872.

1. As to similar provisions in other codes.
2. Accrued rights—Effect of codes on.
3. Actions or proceedings commenced—Effect on.
4. Claim barred by statute—Revived by legislation.
5. Code rule applicable, when.
6. Construction—Clear implication.
7. Effect of codes on pending actions.
8. Legislature—Revival of claims barred by statute.
9. Limitation of actions—Power of legislature over.
- 10, 11. Remedial rights—Vested, when.
12. Rules of code—Applicable, when.
13. Vested rights—Not affected by the code.

1. **Similar provisions in other codes,**—as to, see Pol. Code § 8 and note; Code Civ. Proc. § 8 and note.

2. **Accrued rights—Effect of codes on,**—See Pol. Code § 8 and note.

3. **Actions or proceedings commenced, and rights accrued, not affected by the codes; but the proceedings therein are required to conform to the requirements of the code, as far as applicable.**—See Pol. Code § 8 and note.

Code Commissioners' note cites McMinn vs. Eliza, 31 Cal. 122; People vs. Livingston, 6 Wend. (N. Y.) 530; Sedgw. on Stat. and Const. Law, 679.

4. **Claim barred by statute of limitation, legislature cannot revive.**—See Pol. Code § 8 and note; also Code Civ. Proc. § 8 and note par. 13.

5. **Code rules applicable, when,**—as to, see par. 12 this note.

6. **Construction**—"Clear implication is, that actions not commenced, and rights not vested, prior to the adoption of the codes, are to be controlled by their provisions."—Allen vs. Allen, 95 Cal. 184, 202, 30 Pac. Rep. 213, 27 Id. 30, 16 L. R. A. 646.

7. **Effect of codes on pending actions and accrued rights.**—See Pol. Code § 8 and note; Code Civ. Proc. § 8 note pars. 7-9.

8. **Legislature—Revival of claim barred by statute of limitations is not permissible.**—See note to Pol. Code § 8, and to Code Civ. Proc. § 8 and note.

9. **Limitation of actions—Power of legislature over,**—as to, see Pol. Code § 9 and note; Code Civ. Proc. § 8 and note pars. 13-22.

10. **Remedial rights, as to change or modification of by legislature.**—See note to Code Civ. Proc. § 8 pars. 12 et seq.

11. **When vested, etc.,**—as to, see Pol. Code § 8 and note; Code Civ. Proc. § 8 note pars. 7-11.

12. **Rule of code—Applies unless its application would have effect of changing the con-**

tract, or impairing its obligation.—Allen vs. Allen, 95 Cal. 184, 202, 30 Pac. Rep. 213, 27 Id. 30, 16 L. R. A. 646.

13. Vested rights not affected by codes. For a full discussion of the subject, see note to Pol. Code § 8, and Code Civ. Proc. § 8 and note.

§ 7. HOLIDAYS. Holidays, within the meaning of this code, are [1] every Sunday, the [2] first day of January, the [3] twenty-second day of February, the [4] thirtieth day of May, the [5] fourth day of July, the [6] ninth day of September, the [7] first Monday of September, the [8] twenty-fifth day of December, [9] every day on which an election is held throughout the state, and [10] every day appointed by the president of the United States, or by the governor of the state, for a public fast, thanksgiving, or holiday. If the [11] first day of January, the twenty-second day of February, the thirtieth day of May, the fourth day of July, the ninth day of September, or the twenty-fifth day of December shall fall upon a Sunday, the **Monday following is a holiday.**

History: Enacted March 21, 1872; amended 1880, Stats. and Amdts. p. 9; 1889, Stats. and Amdts. p. 47; 1893, Stats. and Amdts. p. 186; 1897, Stats. and Amdts. p. 14.

1. Holidays—Exclusion and inclusion—Computing time.
2. Same—Excluded, when.
3. Same—Publication of notice on.
4. Same—Service of legal process on.

1. **HOLIDAYS—Exclusion and inclusion in computing time.**—See post § 10 and note; Pol. Code §§ 7, 8, 11 and notes; Code Civ. Proc. §§ 10-13 and notes.

2. Excluded, where the last day of perform-

ance falls on a holiday, and the act may be performed on the following secular day.—Dig- gins vs. Hartshorne, 108 Cal. 154, 165, 41 Pac. Rep. 287.

3. Publication of notice on,—as to validity of see post § 10 note par. 11; Code Civ. Proc. §§ 10-13 and notes.

4. Service of legal process on,—as to validity of, see post § 10 note par. 12; Code Civ. Proc. §§ 10-13 and notes.

§ 8. SAME (repealed).

History: Enacted March 21, 1872; repealed by Code Commission amend- ment of March 16, 1901, Stats. and Amdts. 1900-1, p. 332; held unconstitutional, see history, § 4 ante; repealed, Act Feb. 20, 1905, Stats. and Amdts. 1905, ch. XVII, p. 11.

§ 9. BUSINESS DAYS. All other days than those mentioned in section seven are to be deemed business days for all purposes.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 332; held unconstitutional, see history, § 4 ante; amended Feb. 20, 1905, Stats. and Amdts. 1905, ch. XVII, p. 11.

§ 10. COMPUTATION OF TIME. The time in which any act provided by law is to be done is computed by **excluding the first day** and including the last, unless the last day is a holiday, and then it is also excluded.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Computation of time—Generally.
- 3-7. Same—Exclusive and inclusive.
- 8, 9. Same—"From" or "after."
- 10-12. Same—Holidays—Memorial Day—Publi- cation and service on.
13. Same—Sunday—Including and excluding.
14. Same—Same—Last day of performance —General rule.
15. Same—Same—Same—Note waiving days of grace.
16. Same—Same—Same—Non-negotiable note payable in merchandise.
17. Same—Same—Same—Mechanic's lien— Rule not applicable to.
- 18-20. Same—Same—Same—In court proceed- ings—Supreme court not controlled by.

- 21-25. Same—Same—Publication of notice of intention to do street work.

26. Same—Same—Publication of summons.

- 27, 28. Fractions of a day—When considered.

- 29, 30. "Month"—Meaning of in codes.

31. Year, week, and day—Generally.

1. **APPLIED, CITED, CONSTRUED, RE- FERRED TO,** etc., in: Rauer vs. Broder, 107 Cal. 282, 284, 40 Pac. Rep. 430 (applied); Cali- fornia Impr. Co. vs. Quinchard, 119 Cal. 37, 83, 51 Pac. Rep. 24 (applied); Scoville vs. Anderson, 131 Cal. 590, 594, 63 Pac. Rep. 1013 (applied).

2. **COMPUTATION OF TIME,**—as to, see post § 11 and note; Pol. Code § 3255 et seq. and notes; Code Civ. Proc. § 12 and note. See also notes 7 Am. Dec. 250, 42 Am. Dec. 474, 48 Am.

Dec. 420, 46 Am. Rep. 410-416, 54 Am. Rep. 147, 68 Am. St. Rep. 574.

2. SAME—EXCLUSION AND INCLUSION.—

The first day is excluded and the last included.—Price vs. Whitman, 8 Cal. 412, 417; Iron Mt. Co. vs. Haight, 39 Cal. 540, 542; McFadden vs. Crawford, 39 Cal. 662; Misch vs. Mayhew, 51 Cal. 514, 515; Hagemeyer vs. Mendocino Co., 22 Cal. 214, 217, 23 Pac. Rep. 14; Landregan vs. Peppin, 36 Cal. 122, 127, 24 Pac. Rep. 859; Derby vs. City of Modesto, 104 Cal. 515, 522, 38 Pac. Rep. 900; Bates vs. Howard, 105 Cal. 173, 182, 38 Pac. Rep. 715; Rauer vs. Broder, 107 Cal. 282, 284, 40 Pac. Rep. 430; Diggins vs. Hartshorne, 108 Cal. 154, 165, 41 Pac. Rep. 283; California Impr. Co. vs. Quinchard, 119 Cal. 87, 88, 51 Pac. Rep. 24; Scoville vs. Anderson, 131 Cal. 590, 594, 63 Pac. Rep. 1013. See Ala. Goode vs. Webb, 52 Ala. 452. Ky. Headley vs. Cunningham, 12 Bush 412. Me. Westbrook Mfg. Co. vs. Grant, 60 Me. 88, 11 Am. Rep. 181. Mass. Bigelow vs. Wilson, 18 Mass. (1 Pick.) 485; Bemis vs. Leonard, 118 Mass. 502, 19 Am. Rep. 470. Mich. Warren vs. Slade, 23 Mich. 1, 9 Am. Rep. 70. Nev. Stinson vs. Sweeney, 17 Nev. 309, 222, 30 Pac. Rep. 997. N. H. Soldiers' Voting Bill, 45 N. H. 612. Tex. O'Connor vs. Towns, 1 Tex. 107. Fed. Sheets vs. Selden, 69 U. S. (2 Wall.) 177, 190, bk. 17 L. ed. 822.

See 53 L. R. A. 831; 14 Encyc. Pl. & Prac. 565 et seq.

4. In computing time from the date of an act, the day on which it is done is included.—People vs. Clark, 1 Cal. 406, 408. See Fed. Arnold vs. United States, 13 U. S. (9 Cr.) 104, 120, bk. 3 L. ed. 671, 676; Pearpoint vs. Graham, 4 Wash. C. C. 232, 240, 19 Fed. Cas. 60; and authorities in next note.

5. The doctrine as announced in the above case of People vs. Clark is in harmony with the old English rule as laid down in Bellasis vs. Hester, 1 Ld. Raym. 280, in which case a distinction is drawn between cases where time is computed from a given day, and where it is computed from a given act. In the latter case the day of the date was included. But this doctrine is not in harmony with the subsequent English decisions, or the decisions in this state and other states of the Union,—with the possible exception of Kentucky, which latter state seems to still adhere to the doctrine of Bellasis vs. Hester.—See Headley vs. Cunningham, 12 Bush (Ky.) 402; Batman vs. Migowan, 1 Met. (Ky.) 547.

6. "Of late the general rule of construction seems to have been to exclude the first day and include the last."—Price vs. Whitman, 8 Cal. 412, 417. See Comm. Weeks vs. Hull, 19 Conn. 376, 50 Am. Dec. 249; Blackman vs. Nearing, 43 Conn. 59, 21 Am. Rep. 634. Mass. Bemis vs. Leonard, 118 Mass. 508, 19 Am. Rep. 470. Mich. Warren vs. Slade, 23 Mich. 6, 9 Am. Rep. 70.

See also authorities in par. 8 this note; and also 53 L. R. A. 831 and 14 Encyc. Pl. & Prac. 565 et seq.

7. Act to be done within a given period of time after a designated act or event, the day of the date of such act or event is to be excluded in the computation of the given period of time.—Burke vs. Turney, 54 Cal. 486, 487.

8. "From" or "after" a specified date, the

day of the date is to be excluded.—See Ala. Goode vs. Webb, 52 Ala. 452. Comm. Avery vs. Stewart, 2 Conn. 69, 7 Am. Dec. 240; Weeks vs. Hull, 19 Conn. 381, 50 Am. Dec. 249. Me. Ammidon vs. Woodman, 31 Me. 580. Mass. Henry vs. Jones, 8 Mass. 48; Bigelow vs. Wilson, 18 Mass. (1 Pick.) 485; Bemis vs. Leonard, 118 Mass. 502, 19 Am. Rep. 470. N. Y. Roehner vs. Knickerbocker Life Ins. Co., 63 N. Y. 160. Pa. Taylor vs. Jacoby, 2 Pa. St. 495, 498, 45 Am. Dec. 615. Tex. O'Connor vs. Towns, 1 Tex. 107. Fed. Sheets vs. Selden, 69 U. S. (2 Wall.) 190, bk. 17 L. ed. 822. Eng. Webb vs. Fairmaner, 3 Mees. & W. 473; Lester vs. Garland, 13 Ves. 248, 15 Rev. Rep. 248; In re North, 95, 2 Q. B. 204, 274, C. A.

See also authorities in par. 6 this note.

9. "From" is exclusive; but may be construed as inclusive to prevent forfeitures, and uphold bona fide transactions.—Taylor vs. Brown, 5 Dak. 335, 249, 40 N. W. Rep. 525.

10. SAME—HOLIDAYS NOT COUNTED, WHEN.—See post, § 11, note para. 2-10. See also 20 Encyc. Pl. & Prac. 1205.

11. Memorial Day—Publication of notice on is held void in Malmgren vs. Phinney, 50 Minn. 457, 463, 52 N. W. Rep. 915, 18 L. R. A. 753. See par. 25 this note.

12. Service of process on legal holiday is invalid.—See Whitney vs. Blackburn, 17 Oreg. 564, 571, 11 Am. St. Rep. 857, 862, 21 Pac. Rep. 874.

See 20 Encyc. Pl. & Prac. 1205.

13. SAME—SUNDAY—Including and excluding,—as to, generally, see 20 Encyc. Pl. & Prac. 1202.

"Sundays" is in the plural in the engrossed copy of the constitution of 1849, art. IV., § 7 on file in the office of the secretary of state; but "Sunday," in the singular, is found in the printed copy.—Price vs. Whitman, 8 Cal. 412 415; Ex parte Newman, 9 Cal. 502, 522.

14. Last day of performance falling on Sunday, it is generally excluded, and particularly is this the case in negotiable contracts.—See Ala. Sanders vs. Ochiltree, 5 Port. 75, 30 Am. Dec. 551. Comm. Avery vs. Stewart, 2 Conn. 69, 7 Am. Dec. 240; Sands vs. Lyon, 18 Conn. 17. Mass. Thayer vs. Felt, 21 Mass. (4 Pick.) 354. Mo. Kuntz vs. Temple, 48 Mo. 75. N. Y. Commercial Bank of Ky. vs. Varnum, 49 N. Y. 269, 279, 11 Am. L. Reg. (N. S.) 407; Lindemuller vs. People, 33 Barb. 569, 21 How. Pr. 156; Salter vs. Burt, 20 Wend. 205, 32 Am. Dec. 530 (check falling due on Sunday). Ohio. Burrett vs. Allen, 10 Ohio, 426 (note payable in cloth, at fair market value, falling due on Sunday). S. D. McLaughlin vs. Wheeler, 2 S. D. 379, 388, 50 N. W. Rep. 834.

15. Note waiving days of grace not within the rule, and is due and protestable on Saturday.—Hibernia Sav. & L. Soc. vs. O'Grady, 47 Cal. 579, 581. See Banker vs. Parker, 23 Mass. (6 Pick.) 80; Doremus vs. Burton, 5 Biss. C. C. 57, 7 Fed. Cas. 917.

16. Non-negotiable note payable in merchandise, rule held not to be applicable in Kilgour vs. Miles, 6 Gill & J. (Md.) 268. See Burrett vs. Allen, 10 Ohio, 426.

17. Mechanic's lien, which must be strictly construed against the lienholder, is not within

the rule, and where expiring on Sunday is not enforceable on the following Monday.—Patrick vs Faulke, 45 Mo. 314.

18. In court proceedings.—“The last day of the period of extension fixed by an order being Sunday, it should be ‘excluded.’ That is to say, it is not to be computed as any portion of the time granted by the order, but is a supplementary day superadded by the law.”—Muir vs. Galloway, 61 Cal. 498, 506.

19. Supreme court—Not governed by the provisions of the code in this respect, being required by the constitution to be always open for the transaction of business.—Adams vs. Dohrmann, 63 Cal. 417, 420-421. See Herrlich vs. McDonald, 83 Cal. 505, 506, 23 Pac. Rep. 710; Miles vs. Edwards, 95 Cal. 41, 47, 30 Pac. Rep. 134.

See 20 Encyc. Pl. & Prac. 1203 note 1.

20. Thus, where the last day on which to make an order for hearing in bank falls on Sunday, the order cannot be made on the following Monday.—Adams vs. Dohrmann, supra; Code Civ. Proc. § 134 and note pars 5, 6.

21. SAME—SAME—PUBLICATION OF NOTICE OF INTENTION TO DO STREET WORK.—“Sundays are to be counted in the computation of the ten days during which publication of the notice of intention is directed to be made.”—Taylor vs. Palmer, 31 Cal. 240, 244; Miles vs. McDermott, 31 Cal. 271, 272; Smith vs. Hazard, 110 Cal. 145, 149, 42 Pac. Rep. 465.

22. Statute requiring resolution of intention to be “published by two insertions in one or more daily, semi-weekly, or weekly newspapers published and circulated in said city” (Act of 1855, as amended 1891, § 3, p. 196), etc., an insertion on two successive days—Saturday and Sunday—in a daily newspaper of the description designated, is a literal compliance with the statute; “a series of acts being provided for and not a publication for a designated period.”—Smith vs. Hazard, 110 Cal. 145, 149, 42 Pac. Rep. 465, citing Savings & Loan Soc. vs. Thompson, 32 Cal. 347, 353.

23. Where publication of notice is required to be made daily (except Sunday) for five days, inviting proposals for bids on street work, Sunday is to be excluded, and if the last of the five days’ publication falls on Sunday, and there is no publication the following Monday, the publication will be insufficient.—Alameda Macadam Co. vs. Huff, 57 Cal. 331, 332.

24. Where the statute requires publication to be made for five days, “Sundays and non-judicial days excepted” (Act April 4, 1870, § 3,

Stats. 1869-70, p. 890), and publication was for five days, the last day of the publication falling on Sunday, the publication of the notice was held insufficient.—City San Francisco vs. McCain, 50 Cal. 210, 211; City San Francisco vs. McCain, 51 Cal. 360, 361.

25. Same—Curative act passed to remedy such defective or insufficient publication (Act March 19, 1874, Stats. 1873-4, p. 487), does not affect cases pending at time of its passage.—Reis vs. Graff, 51 Cal. 86, 90; City of San Francisco vs. McCain, 51 Cal. 360, 361.

26. Same—Publication of summons.—“Some of the publications, including the last, were on Sunday—the paper in which publication was made being regularly issued on Sundays as well as on week-days. We do not think this fact vitiates the service on the ground that, under our statute, Sunday is dies non. The service is not actual, and is not made by a single act. It consists of a series of acts running through a long period of time, and the specific acts required by the statute have been performed according to both the letter and spirit of its provisions.”—Savings & Loan Soc. vs. Thompson, 32 Cal. 347, 353. See Smith vs. Hazard, 110 Cal. 145, 149, 42 Pac. Rep. 465.

See par. 11 this note; also 17 Encyc. Pl. & Prac. 102 note 3.

27. FRACTIONS OF A DAY CONSIDERED where necessary to protect the interests of parties, or public justice requires it.—People ex rel. Campbell vs. Clarke, 1 Cal. 406, 408; Craig vs. Godfrey, 1 Cal. 415, 416, 54 Am. Dec. 299. See Brainard vs. Bushnell, 11 Conn. 17.

See Code Civ. Proc. § 12 and note par. 10; also 12 Am. Dec. 577, 26 Am. Dec. 234n; also 3 Am. & Eng. Encyc. of L. (2d ed.) 738-743; 56 L. R. A. 671.

28. Code Commissioners’ note.—“Where the rights of parties are concerned, a day will not be considered a unit, but inquiry may be made as to the very point of time when an act was done.”—Craig vs. Godfrey, 1 Cal. 415, 54 Am. Dec. 299; People vs. Beatty, 14 Cal. 567.

29. “Month,”—as to meaning of, see post § 14 and note; Code Civ. Proc. § 17 and note par. 20.

30. As contemplated by statutes of state, “month” is a calendar and not a lunar month.—Savings & Loan Soc. vs. Thompson, 32 Cal. 347, 350. See Muse vs. London Assurance Corp., 108 N. C. 240, 243, 13 S. E. Rep. 94.

31. YEAR, WEEK, AND DAY,—as to, see Pol. Code § 3255 and note; Code Civ. Proc. § 17 and note pars. 18, 19, 21.

§ 11. CERTAIN ACTS NOT TO BE DONE ON HOLIDAYS. Wherever any act of a secular nature, other than a work of necessity or mercy, is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, it may be performed upon the next business day, with the same effect as if it had been performed upon the day appointed.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Holiday and Sunday—Generally.
3. Same—Construction—“Appointed.”
4. Same—Heir to pay on given time from date.
- 5, 6. Same—Judicial sale on.

7. Same—Last day to answer falling on.
- 8, 9. Same—Note payable given date after day.
10. Same—Policy of insurance not forfeited on.
11. Tax-sale—Appointed to be made on holiday.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Northey vs. Bankers' Life Assoc.*, 110 Cal. 547, 551, 42 Pac. Rep. 1079 (applied); *Baxter vs. Vineland Irr. Dist.*, 136 Cal. 185, 193, 68 Pac. Rep. 601 (applied); *People vs. Rader*, 136 Cal. 253, 256, 68 Pac. Rep. 707 (applied).

2. HOLIDAY—Generally.—When any act of secular nature, other than work of necessity or mercy, is appointed by the law, or by contract, to be performed on particular day, which day falls upon a holiday or Sunday, such act may be performed upon next business day, with same effect as if performed upon the day appointed.—*Blackwood vs. Cutting Packing Co.*, 71 Cal. 461, 465, 12 Pac. Rep. 493; *Northey vs. Bankers' Life Assoc.*, 110 Cal. 547, 551, 42 Pac. Rep. 1079; *Baxter vs. Vineland Irr. Dist.*, 136 Cal. 185, 193, 68 Pac. Rep. 601; *People vs. Rader*, 136 Cal. 253, 256, 68 Pac. Rep. 707. See *Conn. Sands vs. Lyon*, 18 Conn. 17, 18; *Weeks vs. Hull*, 19 Conn. 376, 50 Am. Dec. 249. *Fed. McGill vs. Bank of United States*, 25 U. S. (12 Wheat.) 511, bk. 6 L. ed. 711 (Sunday not regarded).

See ante § 10 and note; Code Civ. Proc. § 13 and note.

3. Construction—"Appointed."—Where the law has not appointed day for a tax-sale, whether a day authorized to be fixed may be said to be a day "appointed" by law, is at least doubtful (dictum).—*Baxter vs. Vineland Irr. Dist.*, 136 Cal. 185, 193, sub nom. *Baxter vs. Dickinson*, 68 Pac. Rep. 601.

4. Heir to pay a year from decease of father, last day falling on Sunday, he may pay following Monday.—*Sands vs. Lyon*, 18 Conn. 17, followed in *Weeks vs. Hull*, 19 Conn. 376, 50 Am. Dec. 249.

5. Judicial sale on.—"Whether a sale could be set for and made on a legal holiday, has not been decided in this state, so far as we have discovered."—*Baxter vs. Vineland Irr. Dist.*, 136 Cal. 185, 193, sub nom. *Baxter vs. Dickinson*, 68 Pac. Rep. 601. See *Crabtree vs.*

Whiteselle, 65 Tex. 111 (in absence of statutory inhibition, sale may be made on legal holiday).

6. According to code provision, if tax-sale cannot be made upon a holiday, then it can be made upon next business day, where the hour was fixed for both the day named and any day to which sale might be adjourned.—*Baxter vs. Vineland Irr. Dist.*, 136 Cal. 185, 193, sub nom. *Baxter vs. Dickinson*, 68 Pac. Rep. 601.

7. Last day to answer falling on holiday or Sunday, under stipulation to and including a certain day, defendant is entitled to answer any time during succeeding business day.—*Blackwood vs. Cutting Packing Co.*, 71 Cal. 461, 465, 12 Pac. Rep. 493; *Crane vs. Crane*, 121 Cal. 99, 100, 53 Pac. Rep. 433.

See Code Civ. Proc. § 13 and note.

8. Note payable given time after date, falling due on Sunday, may be paid following Monday, under code rule, which is the rule generally observed.—See *Sands vs. Lyon*, 18 Conn. 17, 18; *Weeks vs. Hull*, 19 Conn. 378, 50 Am. Dec. 249; *Taylor vs. Felt*, 21 Mass. (4 Pick.) 354; *Kuntz vs. Temple*, 48 Mo. 75; *Commonwealth Bank vs. Varnum*, 49 N. Y. 279; *Barrett vs. Allen*, 10 Ohio 426.

See ante § 10 note pars 8, 14.

9. Unless it be a legal holiday, in which case it will be payable the succeeding Tuesday.—See ante § 10 note par. 14; Code Civ. Proc. § 10 and note par. 8. See also *Hagerty vs. Engle*, 43 N. J. L. (14 Vr.) 299.

10. Policy of an insured not forfeited when last day of payment falls upon Sunday, and insured dies upon following Monday, without having paid premium.—*Northey vs. Bankers' Life Assoc.*, 110 Cal. 547, 552, 42 Pac. Rep. 1079. See *Hammond vs. American Life Ins. Co.*, 79 Mass. (10 Gray) 306; *Campbell vs. International Life etc. Soc.*, 4 Bosw. (N. Y.) 298.

11. TAX-SALE—Appointed to be made on holiday,—as to, see para. 5, 6 this note.

§ 12. JOINT AUTHORITY CONSTRUED. Words giving a joint authority to three or more public officers or other persons are construed as giving such authority to a majority of them, unless it is otherwise expressed in the act giving the authority.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Joint authority—Construction.
3. Same—Delegated for public purpose—Before the code.
4. Same—Same—Since the code.
- 5-9. Same—Same—General rule.
- 10, 11. Same—Delegated for private purpose.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Jacobs vs. Board Supv's of San Francisco*, 100 Cal. 121, 132, 34 Pac. Rep. 630 (applied).

2. JOINT AUTHORITY, words granting to three or more public officers, are construed as granting authority to majority, unless otherwise expressed in act granting the authority.—*Jacobs vs. Board Supv's San Francisco*, 100 Cal. 121, 132, 34 Pac. Rep. 630.

3. For a public purpose or interest—Before the code, board appointed by legislature to assess lands, the act providing that they should jointly view and assess, all were required to participate both in viewing and assessing; "either of these acts performed by less than all the members would be invalid."—*People vs. Coghill*, 47 Cal. 361, 363.

4. Same—Since the code, powers granted to board of supervisors consisting of three or more, are construed as giving such authority to majority of board, unless the power is otherwise limited by the grant itself.—*Jacobs vs. Board Supv's San Francisco*, 100 Cal. 121, 132, 34 Pac. Rep. 630.

5. General rule is that where the legislature has created a board of commissioners.

or other officers, to decide on a matter, and conferred discretionary powers to decide upon matters of public interest, but has made no provision that a majority shall constitute a quorum, all must be present and consult, though majority may decide, where board is such as admits of a majority.—*People vs. Coghill*, 47 Cal. 361, 363. See *N. Y. Perry vs. Tynen*, 22 Barb. 140; *Keeler vs. Frost*, 22 Barb. 400; *Babcock vs. Lamb*, 1 Cow. 239; *Ex parte Rogers*, 7 Cow. 526; *Doughty vs. Hope*, 3 Den. 253; *Parrott vs. Knickerbocker Ice Co.*, 38 How. Pr. 510, 3 Abb. Pr. N. S. 236; *Geter vs. Commissioners*, 1 John. 621; *Green vs. Miller*, 6 John. 39, 41, 5 Am. Dec. 184; *Birge vs. People*, 5 Park Cr. Cas. 13; *McCoy vs. Curtice*, 9 Wend. 17, 24 Am. Dec. 113; *Downing vs. Rugar*, 21 Wend. 173, 34 Am. Dec. 223; *Crocker vs. Crane*, 21 Wend. 211, 218, 34 Am. Dec. 228; *Oakley vs. Aspinwall*, 3 N. Y. 547, 565; *People vs. Nostrand*, 46 N. Y. 383. Fed. Peay vs. Schenck, Woolw. C. C. 146, 188, 21 Fed. Cas. 666, 672. Eng. *Grindley vs. Barker*, 1 Bos. & P. 229, 4 Rev. Rep. 787; *Rex vs. Beeston*, 3 Durnf. & E. (3 T. R.) 592, 594, 1 Rev. Rep. 777.

6. MAJORITY MAY ACT.—All being present majority may act, and their act will be the act of all.—*N. Y. McCoy vs. Curtice*, 9 Wend. 17, 24 Am. Dec. 113. See *Green vs. Miller*, 6 John. 39, 5 Am. Dec. 184. Eng. *Grindley vs. Barker*, 1 Bos. & P. 229, 4 Rev. Rep. 787; *Rex vs. Beeston*, 3 Durnf. & E. (3 T. R.) 592, 594, 1 Rev. Rep. 777; *Berry vs. Penning*, Cro. Jac. 100; *Swallows vs. Girling*, Cro. Jac. 278.

7. Presence and concurrence presumed, in absence of evidence to the contrary, where majority act, and the proceeding is regular.—*Tucker vs. Rankin*, 15 Barb. (N. Y.) 480;

Crocker vs. Crane, 21 Wend. (N. Y.) 211, 218, 34 Am. Dec. 228. See *Oakley vs. Aspinwall*, 3 N. Y. 457, 565; *Gildersleeve vs. Board Education*, 17 Abb. Pr. (N. Y.) 210; *Miller vs. Garlock*, 8 Barb. (N. Y.) 157; *Doolittle vs. Doolittle*, 31 Barb. (N. Y.) 313; *Doughty vs. Hope*, 3 Den. (N. Y.) 253; *People vs. Whiteside*, 23 Wend. (N. Y.) 15; *Woolsey vs. Tompkins*, 23 Wend. (N. Y.) 326.

8. Where two only, nothing can be done without the consent of both.—*Downing vs. Rugar*, 21 Wend. (N. Y.) 173, 34 Am. Dec. 223; *Rex vs. Warrington*, 1 Salk. 152.

9. Yet there are authorities which hold clearly that, to prevent failure of justice, one may act alone without consulting the other; as where one has died or is interested, or is absent when it is necessary to act immediately.—*Downing vs. Rugar*, supra. Eng. *Curle's Case*, 11 Co. Rep. 2; *Naylor vs. Sharpless*, 2 Mod. 23; *Rich vs. Player*, 2 Shaw. 286.

10. SAME—PRIVATE PURPOSE OR INTEREST, must be executed by all.—*McCoy vs. Curtice*, 9 Wend. (N. Y.) 17, 24 Am. Dec. 113.

11. All must be present and participate in proceedings although majority may determine.—See *Ala. Tuscarora Bridge Co. vs. Jamison*, 33 Ala. 476; *McCrary vs. Harrison*, 36 Ala. 577. Ill. *Smith vs. Smith*, 28 Ill. 56. Ky. *Henderson vs. Bulkley*, 14 B. Mon. 236. N. J. *Moore vs. Ewing*, 1 N. J. L. (Coxe) 114, 1 Am. Dec. 195. N. Y. *Green vs. Miller*, 6 John. 39, 5 Am. Dec. 184; *McInroy vs. Benedict*, 11 John. 402. Vt. *Blin vs. Hay*, 2 Tyl. 304, 4 Am. Dec. 738. Eng. *Little vs. Newton*, 9 Dowd. 437, 2 Man. & Gr. 351, 4 Eng. C. L. 407; *In re Plews*, 51 Eng. C. L. 845, 6 Q. B. (6 Ad. & E. N. S.) 845.

§ 13. WORDS AND PHRASES, HOW CONSTRUED. Words and phrases are construed according to the context and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, or are defined in the succeeding section, are to be construed according to such peculiar and appropriate meaning or definition.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to.
- 2, 3. Words and phrases—Construction of—General rule.
- 4-11. Same—Same—Same—Illustrations.
- 12, 13. Same—Same—To what rule applies—To contracts.
- 14-18. Same—Same—Same—To the constitution.
- 19-21. Same—Same—Same—To statutes.
22. Same—Same—Same—To wills.
- 23, 24. Same—Same—Technical words.
25. Same—Same—Technical as well as popular meaning.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Sharon vs. Sharon*, 75 Cal. 1, 73, 16 Pac. Rep. 345 (applied); *Estate of Smith*, 131 Cal. 433, 435, 65 Pac. Rep. 729 (referred to in discussion); *Richards vs. Fraser*, 136 Cal. 460, 464, 69 Pac. Rep. 83 (applied); *City Street Impr. Co. vs. Taylor*, 138 Cal. 364, 366, 71 Pac. Rep. 446 (applied).

2. WORDS AND PHRASES—CONSTRUCTION OF.—General rule is that words and

phrases are to be construed according to context and approved usage of language, in all those cases where they have not a well-defined technical meaning, and have not acquired any peculiar significance in law.—*Houghton's Appeal*, 42 Cal. 35, 52; *People vs. Eddy*, 43 Cal. 331, 336; *Central Pac. R. Co. vs. Beal*, 47 Cal. 151, 153; *Weill vs. Kenfield*, 54 Cal. 111, 113; *Sharon vs. Sharon*, 75 Cal. 1, 73, 16 Pac. Rep. 345; *Estate of Smith*, 131 Cal. 434, 435, 63 Pac. Rep. 729; *Richards vs. Fraser*, 136 Cal. 460, 464, 69 Pac. Rep. 83. See *Quigley vs. Gorham*, 5 Cal. 418, 63 Am. Dec. 139; *Sprague vs. Norway*, 31 Cal. 173. Ala. *Mayor etc. vs. Winter*, 29 Ala. 651. Miss. *Green vs. Weller*, 32 Miss. 650. N. Y. *Smith vs. Ferris*, 6 Hun 554; *Burkitt vs. Harper*, 14 Hun 564; *People vs. Todd*, 51 Hun 446, 451, 4 N. Y. Supp. 25; *Waller vs. Harris*, 20 Wend. 555, 32 Am. Dec. 590. Pa. *Philadelphia R. Co. vs. Catawissa R. Co.*, 53 Pa. St. 20. Fed. *Martin vs. Hunter*, 14 U. S. (1 Wheat.) 304, 326, bk. 4 L. ed. 97; *Georgia vs. Atkins*, 1 Abb. (U. S.) 22, 26, 10 Fed. Cas. 241;

Schriefer vs. Wood, 5 Blatchf. C. C. 215, 218, 21 Fed. Cas. 737; Parton vs. Frang, 3 Cliff. C. C. 537, 546, 18 Fed. Cas. 1273; Blue Bird Min. Co. vs. Largey, 49 Fed. Rep. 289, 290; In re McDonough, 49 Fed. Rep. 360.

3. "Words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged."—Story, J., in *Martin vs. Hunter*, 14 U. S. (1 Wheat.) 304, 326, bk. 4 L. ed. 97. See *Georgia vs. Atkins*, 1 Abb. (U. S.) 22, 26, 10 Fed. Cas. 241; *Schriefer vs. Wood*, 5 Blatchf. C. C. 215, 218, 21 Fed. Cas. 737; *Parton vs. Frang*, 3 Cliff. C. C. 537, 546, 18 Fed. Cas. 1273; *Blue Bird Min. Co. vs. Largey*, 49 Fed. Rep. 289, 290; In re *McDonough*, 49 Fed. Rep. 360.

General words controlled by specific exceptions.—*Lucas vs. Payne*, 7 Cal. 92; *United States vs. Weise*, 2 Wall. Jr., C. C. 72, 28 Fed. Cas. 518.

4. Illustrations—"Assume" or "assumption" is not convey same idea, but totally different meaning from, "denial" or "repudiation."—*Sharon vs. Sharon*, 75 Cal. 1, 73, 16 Pac. Rep. 345.

5. "Brothers and sisters" include those of half as well as whole blood.—*Estate of Smith*, 131 Cal. 433, 435, 63 Pac. Rep. 729. See *Rowley vs. Stray*, 32 Mich. 70, 75.

6. "Equally" or "as equal partners," being both used, are held to be synonymous, and latter expression is to be understood, not in its technical, but in its popular sense.—*Richards vs. Fraser*, 136 Cal. 460, 464, 69 Pac. Rep. 33.

7. "Gutterways" not "macadam," where to be constructed of different material from macadam, or to be laid in different manner at greater cost, are not same as macadamized streets.—*Partridge vs. Lucas*, 99 Cal. 519, 521, 33 Pac. Rep. 1082.

See post § 19 note par. 101.

8. "Macadamizing" does not include "curbing," where they are mentioned in statute as different and distinct kinds of street work.—*Beaudry vs. Valdez*, 32 Cal. 269, 276; *City Street Impr. Co. vs. Taylor*, 138 Cal. 364, 366, 71 Pac. Rep. 446.

9. "The case of *Burk vs. Altschul*, 66 Cal. 533, 6 Pac. Rep. 393, does not decide that rock gutterways are included within general definition of the word 'macadamize.'"—*Partridge vs. Lucas*, 99 Cal. 519, 521, 33 Pac. Rep. 1082.

10. "Unless" means same as "except," and signifies merely an exception to clause preceding the one in which it is used.—*Estate of Smith*, 131 Cal. 433, 434, 63 Pac. Rep. 729. See *Mich. Ryan vs. Andrews*, 21 Mich. 229, 234-235. *Wis. Estate of Kirkendall*, 43 Wis. 167, 173-175, 177. *Eng. Smith vs. Wilson*, 3 Burr. 1556.

11. "The last clause can, therefore, only apply to the class described in the first; or, in other words, to the class from which it constitutes an exception."—*Estate of Smith*, 131 Cal. 433, 434, 63 Pac. Rep. 729.

12. SAME—SAME—TO WHAT RULE APPLIES.—This rule applies alike to the construction of all written or printed instruments coming before the court for adjudication and determination.—See Code Civ. Proc. § 16 and note.

13. Contracts, as to, see post §§ 1644, 1645 and notes; Code Civ. Proc. § 1861 and note.

14. TO THE CONSTITUTION.—"Disqualified," as used in article XX, § 18 of the constitution, is used in the popular sense.—*Matter of Maguire*, 57 Cal. 604, 605, 40 Am. Rep. 127.

15. "Law," as used in constitution, article IV, § 32, is given its ordinary meaning, in *Miller vs. Dunn*, 72 Cal. 462, 1 Am. St. Rep. 69, 14 Pac. Rep. 27 (Temple, J., dissenting).

16. "Shall be entered in their journal," in article VII, § 1, of constitution, are used in their ordinary signification.—*Oakland Pav. Co. vs. Hilton*, 69 Cal. 479, 491, 11 Pac. Rep. 3.

17. "Property," as used in constitution (Const. 1849), is to be construed in its ordinary and popular sense, and comprises all tangible and visible property and choses in action.—*People vs. Eddy*, 43 Cal. 331, 336, 13 Am. Rep. 143; *City San Francisco vs. Flood*, 64 Cal. 504, 507, 2 Pac. Rep. 264; *Cottle vs. Spitzer*, 65 Cal. 456, 4 Pac. Rep. 435.

18. "Vacancy," in the office of governor, as used in constitution (of New Hampshire), given its ordinary meaning, in *Attorney-General vs. Taggart*, 66 N. H. 362, 364, 29 Atl. Rep. 1027, 25 L. R. A. 613.

19. TO STATUTES.—In construing statutes, words are to be taken in their usual and popular sense, unless they have a well-understood technical meaning, and, if practical, effect shall be given to all words and provisions of the statute.—*Houghton's Appeal*, 42 Cal. 35, 52; *People vs. Eddy*, 43 Cal. 331, 336-337, 13 Am. Rep. 143; *Langenour vs. French*, 34 Cal. 92.

Certainly to every distinct provision thereof.—*Langenour vs. French*, supra.

20. Where language of an act does not indicate any intention to alter received or proper meaning of word used.—*City Street Impr. Co. vs. Taylor*, 138 Cal. 364, 366, 71 Pac. Rep. 446.

21. A word repeatedly used in a statute, will bear same meaning throughout, unless it is manifest from context that another meaning was intended by the legislature.—*Miller vs. Dunn*, 72 Cal. 462, 466, 1 Am. St. Rep. 67, 70, 14 Pac. Rep. 27 (Temple, J., dissenting).

22. TO WILLS.—"Pro rata," in residuary clause of will, held to be intended for pro rata; the expression is of such frequent use in daily intercourse among all classes of men that it may almost be said to have become part of the vernacular.—*Rosenberg vs. Frank*, 58 Cal. 387, 405 (head note erroneously says: "pro rata was evidently intended to be pro rata.").

23. Technical words, used in technical sense, will be given technical meaning, although they may also have a popular meaning, which is different from the technical one.—*Central Pac. R. Co. vs. Beal*, 47 Cal. 151, 153. See *Clark vs. City of Utica*, 18 Barb. (N. Y.) 151; *Robinson vs. Varnell*, 16 Tex. 232.

24. "Where it is apparent that the party has used a technical word to express an idea different from its technical signification, a court will construe it accordingly."—*Central Pac. R. Co. vs. Beal*, 47 Cal. 151, 153. See *Bean vs. Kenmuir*, 26 Mo. 672.

25. Technical as well as popular meaning.—Preference to popular.—In those cases where

a word used in constitution or statute (or other written instrument) is sometimes employed in a sense especially appropriate to science, art, or business, and the meaning of which, when so used, differs from its popular or ordinary significance, courts will accord to it its popular meaning, unless the very nature of subject indicates, or context suggests, that it is employed in its technical sense.—Weill vs.

Kenfield, 54 Cal. 111, 113; In matter of Maguire, 57 Cal. 604, 605, 40 Am. Rep. 127; Oakland Pav. Co. vs. Hilton, 69 Cal. 479, 491, 11 Pac. Rep. 3; Miller vs. Dunn, 72 Cal. 462, 465, 1 Am. St. Rep. 69, 14 Pac. Rep. 27; Farrell vs. Board of Trustees Sacramento, 85 Cal. 408, 414, 24 Pac. Rep. 868; Barnard, Attorney-General, vs. Taggart, 66 N. H. 362, 364, 39 Atl. Rep. 1027, 25 L. R. A. 613.

§ 14. CERTAIN TERMS DEFINED. Words used in this code in the present tense include the future as well as the present; words used in the masculine gender include the feminine and neuter; the singular number includes the plural, and the plural the singular; the word **person** includes a corporation as well as a natural person; **county** includes city and county; **writing** includes printing and typewriting; **oath** includes affirmation or declaration; and [“testify”] every mode of oral statement, under oath or affirmation, is embraced by the term “testify,” and [“depose”] every written one in the term “depose”; **signature** or **subscription** includes mark, when the person cannot write, [1] his name being written near it, [2] by a person who writes his own name as a witness; provided, that when a signature is by mark it must, in order that the same may be acknowledged or may serve as the signature to any sworn statement, [1] be witnessed by two persons, [2] who must subscribe their own names as witnesses thereto. The following words have in this code the signification attached to them in this section, unless otherwise apparent from the context:

1. The word “property” includes property, real and personal;
2. The words “real property” are coextensive with lands, tenements, and hereditaments;
3. The words “personal property” include money, goods, chattels, things in action, and evidences of debt;
4. The word “month” means a calendar month, unless otherwise expressed;
5. The word “will” includes codicil;
6. The word “section,” wherever hereinafter employed, refers to a section of this code, unless some other code or statute is expressly mentioned.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 181; Code Commission amendment, Act March 19, 1901, Stats. and Amdts. 1900-1, p. 332; unconstitutional, see history, § 4, ante; amended March 25, 1903, Stats. and Amdts. 1903, p. 407.

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| 1. Applied, cited, construed, referred to, etc. | 26. Masculine gender includes feminine. |
| 2. Chattel—Included in “personal property.” | 27, 28. Same—“Horse” includes “mare” and “gelding.” |
| 3. Construction—Corporation—A “person.” | 29. “Month”—Means calendar month. |
| 4. Same—Freehold estate and estate for years—Common-law distinction. | 30. Note—Personal property. |
| 5. Same—“Person” includes corporation. | 31. “Person”—A generic term. |
| 6. Same—“Personal property”—Embraces what. | 32. Same—Artificial persons. |
| 7. Same—“Value” and “valuable consideration.” | 33. Same—Includes a corporation. |
| 8. Same—Witness of “mark”—What is. | 34. Same—Same—Provision of Fourteenth Amendment. |
| 9-11. Consideration—Valuable—Pre-existing debt. | 35-40. “Personal property”—Includes what. |
| 12-15. Same—Same—Collateral security. | 41, 42. “Property”—In constitution. |
| 16. Corporation—Included in “person.” | 43-45. Same—General rule for interpretation. |
| 17. Estate for years—Personal property. | 46-52. Same—Includes what. |
| 18. “Land”—Embraces what. | 53, 54. “Real property”—Includes what. |
| 19, 20. “Mark”—Party’s name, when. | 55. Right of possession—Thing in action, when. |
| 21, 22. Same—Witnessing signature. | 56, 57. “Signature” or “subscription”—Includes mark. |
| 23-25. Same—Same—Word “witness” not essential. | 58-64. Same—What is a signing or signature. |
| | 65. Thing in action—Personal property. |

66. Valuable consideration—Pre-existing debt is.
 67-69. Will—Mark of testator is his signature.
 70-75. Same—Witness signing by mark.
 76, 77. Same—Witness signing wrong name.
 78. Words used in boundaries.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Sackett vs. Johnson, 54 Cal. 107, 109 (construction of subd. 28 of section as originally passed,—repealed by amendments 1873-4); Fish vs. Fowle, 58 Cal. 373, 375 (construction of subd. 5 as originally enacted: substantially same as present provision); St. Helena Water Co. vs. Forbes, 62 Cal. 182, 184 (applied); Pacific Trust Co. vs. Dorsey, 72 Cal. 55, 12 Pac. Rep. 49 (applied); McClain vs. Buck, 73 Cal. 320, 322, 14 Pac. Rep. 376 (applied); City of Pasadena vs. Stimson, 91 Cal. 238, 248, 27 Pac. Rep. 604 (construed and applied); In re Guilfoyle, 96 Cal. 598, 600, 21 Pac. Rep. 553, 22 L. R. A. 370 (applied); In re Walker, 110 Cal. 387, 396, 52 Am. St. Rep. 104, 42 Pac. Rep. 815, 30 L. R. A. 460 (construed); Jeffers vs. Easton, 113 Cal. 345, 358, 45 Pac. Rep. 680 (construed and applied); Scoville vs. Anderson, 131 Cal. 590, 591, 594, 62 Pac. Rep. 1013 (construed and applied); Hansen vs. Wagner, 133 Cal. 69, 71, 65 Pac. Rep. 143 (cited with other sections); Farmers & Merchants' Bank vs. Copsey, 134 Cal. 287, 289, 46 Pac. Rep. 324 (referred to); City Sav. Bank vs. Enos, 135 Cal. 167, 172, 67 Pac. Rep. 52 (referred to); Langenbeck vs. Louis, 140 Cal. 406, 409, 72 Pac. Rep. 1086 (applied); People vs. McDaniels, 141 Cal. 118, 119, 74 Pac. Rep. 778 (construed and applied); Summerville vs. Stockton Milling Co., 142 Cal. 529, 76 Pac. Rep. 243 (applied).

Boundaries—Words used in,—as to see Pol. Code §§ 2902-2907 and notes.

2. "CHATTEL" is included in "personal property."—See para. 23-24 this note.

3. CONSTRUCTION—Corporation—A "person."—A corporation, either public or private, is a "person" within meaning of this section.—City of Pasadena vs. Stimson, 91 Cal. 238, 248, 27 Pac. Rep. 604; City Sav. Bank vs. Enos, 135 Cal. 167, 172, 67 Pac. Rep. 52.

See par. 31 this note; also post § 283 note par. 2.

4. Freehold estate and estate for years—Common-law distinction between, is not changed by this section, or other sections of this code.—Jeffers vs. Easton, 113 Cal. 345, 353, 45 Pac. Rep. 680.

5. "Person" includes a corporation, whether public or private.—See par. 3 this note.

6. "Real property."—Words "real property" are co-extensive with lands, tenements, and hereditaments.—Fish vs. Fowle, 58 Cal. 373, 375 (construction of subd. 5 of this section as originally enacted, which is substantially reenacted in subd. 2 as section now stands),

See para. 27, 28 this note.

7. "Value" and "valuable consideration."—Common-law rule which had previously prevailed upon question was not changed by subdivision 28 of this section, as originally passed, providing as follows: "The word 'value' or the phrase 'valuable consideration' means a

thing of value parted with, or a new obligation assumed, at the time of obtaining a thing which is a substantial compensation for that which is obtained thereby" (repealed by amds. 1873-4).—Sackett vs. Johnston, 54 Cal. 107, 109.

8. "Witness" to mark, as to what constitutes witnessing of signature, see para. 21-25 this note.

9. CONSIDERATION—VALUABLE.—Pre-existing indebtedness of an indorser to an indorsee constitutes valuable consideration; and same is true in relation to all transactions with respect to all negotiable commercial paper, bills, notes, mortgages, bills of lading, warehouse receipts, etc.—Payne vs. Bensley, 8 Cal. 260, 266, 68 Am. Dec. 318 (distinguished Price vs. The Elmbank (The Elmbank), 72 Fed. Rep. 610, 618); Robinson vs. Smith, 14 Cal. 94, 98; Naglee vs. Lyman, 14 Cal. 451, 454; Himmelmann vs. Hotelling, 40 Cal. 111; Frey vs. Clifford, 44 Cal. 335, 342; Connecticut Life Ins. Co. vs. McCormick, 45 Cal. 580, 583; Davis vs. Russell, 52 Cal. 611, 616, 28 Am. Rep. 647; Sackett vs. Johnson, 54 Cal. 107, 109; Russ Lumber & Mill Co. vs. Muscupiabe Land & Water Co., 120 Cal. 521, 532, 65 Am. St. Rep. 196, 52 Pac. Rep. 995 (but where taken with notice of equities, held subject to defenses). See Comm. McCasky vs. Sherman, 24 Conn. 605. Ill. Manning vs. McClure (dictum), 36 Ill. 495. Ind. Straughan vs. Fairchilds, 80 Ind. 600. Md. Maitland vs. Citizens' Nat. Bank, 40 Md. 564, 17 Am. Rep. 628. Mass. Blanchard vs. Stevens, 57 Mass. (3 Cush.) 162, 50 Am. Dec. 723. Nev. Fair vs. Howard, 6 Nev. 210. N. Y. Youngs vs. Lee, 12 N. Y. 551, 555 (surrender of debtor's own note not due, and acceptance of note of third person, makes creditor holder for value; distinguished on this point in Phoenix Ins. Co. vs. Church, 81 N. Y. 218, 37 Am. Rep. 494); Marble Iron Works vs. Smith, 4 Duer 376; Gould vs. Segee, 5 Duer 260; Mohawk Bank vs. Carey, 1 Hall 518; Stalker vs. McDonald, 6 Hill 93, 40 Am. Dec. 389 (followed in Youngs vs. Lee, 12 N. Y. 551); Bank of Salina vs. Babcock, 21 Wend. 499; Bank of Sandusky vs. Scoville, 24 Wend. 115; White vs. Springfield Bank, 3 Sandf. 222. Ohio. Roxborough vs. Messick, 6 Ohio St. 448, 452, 67 Am. Dec. 346. Wis. Fisher vs. Otis, 3 Chand. 83; Everts vs. Agnes, 4 Wis. 343, 6 Id. 453; Croft vs. Bunster, 9 Wis. 503; Bond vs. Wiltse, 12 Wis. 611; Shufeldt vs. Pease, 16 Wis. 659, 660 (distinguishing between a case where there is a surrender of a former security, and one in which there is merely an acceptance of payment without parting with anything); Andrews vs. Hart, 17 Wis. 247; Rice vs. Cutler, 17 Wis. 351, 84 Am. Dec. 747; Bowman vs. Van Kuren, 29 Wis. 209, 9 Am. Rep. 554. See para. 14, 15 this note.

10. Subdivision 28 of the above section (see para. 7, 9 this note), as originally enacted, did not change rule which had previously prevailed in this regard (repealed by Amdt. 1873-4, Code Amdts. 1873-4, p. 181).—Sackett vs. Johnson, 54 Cal. 107, 109.

11. Rule not applicable to non-negotiable paper,—so held in Price vs. The Elmbank (The Elmbank), 72 Fed. Rep. 610, 618.

Distinction between negotiable and non-

negotiable paper is important one, fully explained in *Brooklyn & N. R. Co. vs. National Bank of Republic*, 102 U. S. 14, bk. 26 L. ed. 61.

12. **SAME—SAME—COLLATERAL SECURITY** to guarantee payment of pre-existing debt,—as to, see post § 2968 and note.

13. **Assignment to secure pre-existing debt**, does not give the assignee equities of purchaser or encumbrancer for value.—*Lockwood vs. Bates*, 1 Del. Ch. 435, 12 Am. Dec. 131.

14. **Purchaser of a legal title who receives his conveyance merely in consideration of a prior indebtedness**, is not entitled to protection, because he has lost nothing by the purchase. This is the general rule.—*Bay vs. Coddington*, 5 John. Ch. (N. Y.) 54, 9 Am. Dec. 268. See *Ala. Bank of Mobile vs. Hall*, 6 Ala. 644, 41 Am. Dec. 73; *Fenouille vs. Hamilton*, 35 Ala. 322. *Ark. Bertrand vs. Barkman*, 13 Ark. 150. *Conn. Bush vs. Scribner*, 11 Conn. 388. *Ky. Lee vs. Smead*, 1 Met. 628. *Me. Bramball vs. Beckett*, 31 Me. 205. *Md. Maitland vs. Citizens' Nat. Bank*, 40 Md. 564. *Mass. Chicopee Bank vs. Chapin*, 49 Mass. (8 Met.) 40. *Miss. Isom vs. First Nat. Bank*, 52 Miss. 917; *Bank vs. Dorsey*, 1 Freem. Ch. 338; *Brooks vs. Whitson*, 7 Smed. & M. 513. *N. H. Jenness vs. Bean*, 10 N. H. 266; *Williams vs. Little*, 11 N. H. 66. *N. Y. Lawrence vs. Clark*, 36 N. Y. 129; *Weaver vs. Barden*, 49 N. Y. 286, 294; *Moore vs. Ryder*, 65 N. Y. 439, 441; *Comstock vs. Hier*, 73 N. Y. 271, 275, 29 Am. Rep. 146; *Farwell vs. Importers & Traders' Nat. Bank*, 90 N. Y. 484, 491; *Goldsmid vs. Lewis Co. Bank*, 12 Barb. 410; *Farrington vs. Frankfort Bank*, 31 Barb. 187, 24 Id. 561; *Fulton Bank vs. Phoenix Bank*, 1 Hall 571; *Stalker vs. McDonald*, 6 Hill 93; *Coddington vs. Bay*, 20 John. 637, 11 Am. Dec. 342; *Philbrick vs. Dallett*, 2 Jones & S. 387; *Covell vs. Tradesmen's Bank*, 1 Paige Ch. 131, 134; *Dickerson vs. Tillinghast*, 4 Paige Ch. 215, 25 Am. Dec. 528; *Padgett vs. Lawrence*, 10 Paige Ch. 170, 180, 11 Am. Dec. 232; *Root vs. French*, 13 Wend. 570, 28 Am. Dec. 482. *Ohio. Roxborough vs. Messick*, 6 Ohio St. 448, 67 Am. Dec. 346; *Bailey vs. Smith*, 14 Ohio St. 396, 34 Am. Dec. 385. *Pa. Kilpatrick vs. Muirhead*, 16 Pa. St. 117; *Girard vs. Pittsburg etc. R. Co.*, 29 Pa. St. 154; *Royer vs. Keystone Nat. Bank*, 83 Pa. St. 248; *Cummings vs. Boyd*, 83 Pa. St. 372; *Petrie vs. Clark*, 11 Serg. & R. 377. *Tenn. Napier vs. Elam*, 5 Yerg. 108; *Kimbro vs. Lytle*, 10 Yerg. 417, 428. *Va. Prentice vs. Zane*, 2 Gratt. 262. *Wis. Bowman vs. Van Kuren*, 29 Wis. 209, 9 Am. Rep. 554. *Fed. Smith vs. Babcock*, 2 Wood & M. C. C. 246, 288, 22 Fed. Cas. 432.

See par. 9 this note.

15. **Better doctrine**, and the one growing in favor, is that pre-existing indebtedness is sufficient consideration to entitle holder to equities of a purchaser.—See *Naglee vs. Lyman*, 14 Cal. 451. *Ala. Barney vs. Earle*, 13 Ala. 106. *Conn. Roberts vs. Hall*, 37 Conn. 211. *Del. Bush vs. Peckard*, 3 Harr. 385. *Ill. Mix vs. National Bank*, 91 Ill. 20. *Ind. Valette vs. Mason*, 1 Smith 39. *Ky. May vs. Quimby*, 3 Bush 96. *La. Citizens' Bank vs. Gilman*, 18 La. Ann. 222. *Me. Norton vs. Waite*, 20 Me. 175. *Mass. Blanchard vs. Stevens*, 57 Mass. (8 Cush.) 163; *Woodruff vs. Hill*, 116 Mass. 810. *Mich. Outhwaite vs. Porter*, 13 Mich. 533.

Minn. Stevenson vs. Heylend, 11 Minn. 198. *Mo. Knox vs. Hunt*, 13 Mo. 174; *Boatman's Sav. Inst. vs. Holland*, 38 Mo. 39. *N. C. Reddick vs. Jones*, 6 Ired. L. 107. *R. I. Cobb vs. Doyle*, 7 R. I. 550. *S. C. Bank of Charleston vs. Chambers*, 11 Rich L. 657. *Vt. Atkinson vs. Brooks*, 26 Vt. 574; *Russel vs. Splater*, 27 Vt. 273. *Wis. Knox vs. Clifford*, 38 Wis. 651; *Heath vs. Silverthorn L. M. Co.*, 39 Wis. 146. *Fed. Swift vs. Tyson*, 41 U. S. (16 Pet.) 1, bk. 10 L. ed. 865; *Bank of Metropolis vs. New England Bank*, 42 U. S. (1 How.) 234, bk. 11 L. ed. 115; *Goodman vs. Simonds*, 61 U. S. (20 How.) 843, bk. 15 L. ed. 934; *McCarty vs. Roots*, 62 U. S. (21 How.) 432, bk. 16 L. ed. 164; *Oates vs. First Nat. Bank*, 100 U. S. 239 bk. 25 L. ed. 580; *Brooklyn City & N. R. Co. vs. National Bank*, 102 U. S. 14, 25, bk. 26 L. ed. 61.

Discussion of this question in notes to 12 Am. Dec. 137; 67 Am. Dec. 352; 68 Am. Dec. 321; 69 Am. Dec. 387; 6 Am. & Eng. Encyc. of L. 703-750.

16. **"CORPORATION" INCLUDED IN "PERSON."**—See par. 3 this note.

17. **ESTATES FOR YEARS** declared chattels real, and therefore personal property.—*Jeffers vs. Easton*, 113 Cal. 345, 353, 45 Pac. Rep. 680; *Summerville vs. Stockton Mill Co.*, 142 Cal. 529, 539, 76 Pac. Rep. 243. See *Mayor etc. vs. Mable*, 13 N. Y. 151, 64 Am. Dec. 538.

18. **"LAND"—EMBRACES ALL TITLES**, legal or equitable, perfect or imperfect, including such rights as lie in contact; those which are executed as well as those which are executory.—*Fish vs. Fowle*, 58 Cal. 373, 375. See *Leese vs. Clark*, 20 Cal. 383, 421; *Soulard vs. United States*, 29 U. S. (4 Pet.) 511, bk. 7 L. ed. 938.

See pars. 37, 38, 45 this note.

19. **"MARK"**—Party's name, when.—Mark properly witnessed is a party's name.—In re *Walker*, 110 Cal. 387, 396, 52 Am. St. Rep. 104. 42 Pac. Rep. 315, 30 L. R. A. 460.

See pars. 31, 56 this note; also note 53 Am. Rep. 493-495.

As to witnessing will by mark, and as to sufficiency of signature,—see pars. 47, 53 this note.

20. **Name signed to will by mark simply**, by testator, is sufficient where will is otherwise valid and sufficient.—In re *Guilfoyle*, 96 Cal. 598, 600, 31 Pac. Rep. 553, 22 L. R. A. 370; In re *Mullin*, 110 Cal. 252, 259, 42 Pac. Rep. 645. See *Ark. Guthrie vs. Price*, 23 Ark. 396. *Mo. Stephens vs. Stephens*, 129 Mo. 422, 427, 50 Am. St. Rep. 454, 31 S. W. Rep. 792. *N. Y. Chaffee vs. Baptist Missionary Conv.*, 10 Paige Ch. 85, 40 Am. Dec. 225; also *Lewis vs. Lewis*, 11 N. Y. 225; *Willis vs. Mott*, 36 N. Y. 486; *Larabee vs. Ballard*, 1 Dem. 497; *Proteus vs. Holm*, 4 Dem. 18; *Buckhout vs. Fisher*, 4 Dem. 283; In re *Shaffer*, 2 How. Pr. N. S. 496; *Simpson's Will*, 2 Redf. 32. *Eng. Baker vs. Denning*, 8 Ad. & E. 94, 35 Eng. C. L. 335.

21. **Witnessing signature by mark** is provided for by this section of civil code, requiring person so witnessing to write name of the party so signing by mark near the mark of the party.—In re *Guilfoyle*, 96 Cal. 598, 600, 31 Pac. Rep. 553, 22 L. R. A. 370. See *Iowa. Meehan vs. Rourke*, 2 Bradf. 385. *Ky. Up-*

church vs. Upchurch, 16 B. Mon. 102. Mass. Chase vs. Kittredge, 93 Mass (11 Allen) 49, 37 Am. Dec. 637. N. H. Lord vs. Lord, 53 N. H. 7, 42 Am. Rep. 565. N. Y. Morris vs. Kniffin, 37 Barb. 336. Va. Jesse vs. Parker, 6 Gratt. 57, 53 Am. Dec. 102. Eng. Harrison vs. Harrison, 8 Ves. 185.

See 1 Redf. Wills, §19, p. 229 and cases; 1 Jarm. Wills (4th Am. ed.) p. 73 and Am. note.

"The only conceivable object of requiring the name to be written 'near' the mark is to show what name the mark is intended to represent."—In re Guilfoyle, supra (holding that name of party written in body of will, which was signed by testator by making his mark, was sufficiently near the mark to satisfy the requirements of the above section of civil code).

22. Mark is not sufficient signature where person writing grantor's name to deed fails to sign his own.—Watson vs. Billings, 38 Ark. 278.

23. Same.—Word "witnessed" is not essential, any equivalent expression will serve as well.—People vs. McDaniels, 141 Cal. 113, 115, 74 Pac. Rep. 773.

24. Signature to jurat, by justice of peace, sufficient attestation of signature by mark.—Ibid.

25. An officer taking an affidavit can also witness mark of affiant, without writing his name twice.—People vs. McDaniels, supra.

26. MASCULINE GENDER INCLUDES THE FEMININE.—Words used in masculine gender comprehend as well the feminine gender.—Folts vs. Hoge, 54 Cal. 28, 35.

See Pol. Code §17 and note.

27. "Horse" includes "mare."—"At common-law the word 'horse' was used in its generic sense, and was held to include all animals of the horse species, whether male or female; we are of opinion that the legislature of this state, in using the word 'mare' did not intend to modify or change the common-law rule, but inserted the word, possibly, for more definiteness."—People vs. Pico, 62 Cal. 50, 52. See People vs. Monteith, 73 Cal. 7, 9, 14 Pac. Rep. 273; State vs. Gooch, 60 Ark. 218, 220, 29 S. W. Rep. 640.

See Pen. Code §487 and note.

28. "Gelding" is included in term "horse."—People vs. Monteith, 73 Cal. 7, 9, 14 Pac. Rep. 273; State vs. Devine, 2 Ohio Dec. Rep. 80.

Compare: Hooker vs. State, 4 Ohio 348; Denbow vs. State, 18 Ohio 11.

29. MONTH means calendar month, unless otherwise expressed.—Scoville vs. Anderson, 121 Cal. 590, 594, 63 Pac. Rep. 1018.

See ante §10 and note para. 28, 29.

30. NOTE—A PROMISSORY NOTE is a thing in action, or evidence of debt, and therefore personal property.—Pacific Trust Co. vs. Dorsey, 72 Cal. 55, 57, 12 Pac. Rep. 49.

See par. 39; also post §663 and note.

31. "PERSON"—A generic term.—The word "person," in its legal signification, is a generic term, and was intended to include artificial as well as natural persons.—Douglass vs. Pacific Mail S. S. Co., 4 Cal. 304, 306; Spring Valley Water Works vs. Schottler, 63 Cal. 69. C. C.—2

See Ala. Planters' etc. Bank vs. Andrews, 3 Port. 404. Ind. Billings vs. State, 107 Ind. 54, 57 Am. Rep. 77, 6 N. E. Rep. 914, 7 Id. 763. Fed. San Mateo Co. vs. Southern Pac. R. Co. (Railroad Tax Cases), 13 Fed. Rep. 722, 760, 8 Sawy. C. C. 285.

See para. 3, 33 this note.

32. Artificial persons include, (1) a collection or succession of persons, forming a corporation; and (2) a collection of property to which the law attributes capacity of having rights and duties,—as the estate of a bankrupt, or a decedent.—Elliot, J., in Billings vs. State, 107 Ind. 54, 57 Am. Rep. 77, 6 N. E. Rep. 914, 7 Id. 763.

See full discussion of subject in 22 Am. & Eng. Encyc. of L. (2d ed.) 740-745.

33. Includes a corporation, either public or private.—Douglass vs. Pacific Mail S. S. Co., 4 Cal. 304, 306; City of Pasadena vs. Stimson, 91 Cal. 238, 248, 27 Pac. Rep. 604; City Sav. Bank vs. Enos, 135 Cal. 167, 172, 67 Pac. Rep. 52.

34. Provision Fourteenth Amendment to Constitution of United States, providing that no state shall "deny to any person within its jurisdiction the equal protection of the laws," applies to natural persons only, and does not apply to corporations or artificial persons.—Central Pac. R. Co. vs. State Board Equalization, 60 Cal. 35, 60, disapproved in San Mateo Co. vs. Southern Pac. R. Co. (Railroad Tax Cases), 13 Fed. Rep. 722, 760, 8 Sawy. C. C. 285.

35. "PERSONAL PROPERTY" includes things in action the evidences of debt.—Pacific Trust Co. vs. Dorsey, 72 Cal. 55, 57, 12 Pac. Rep. 49; McClain vs. Buck, 73 Cal. 320, 322, 14 Pac. Rep. 876.

See post §§657, 663 and notes.

36. Chattels, among other things, are included in phrase "personal property."—Jeffers vs. Easton, 113 Cal. 345, 353, 45 Pac. Rep. 680; Summerville vs. Stockton Mill Co., 142 Cal. 529, 539, 76 Pac. Rep. 243.

37. Estate for years is a chattel.—See par. 17 this note.

38. Things real, and an interest or estate in things real, are widely different interests.—Jeffers vs. Easton, 113 Cal. 345, 353, 45 Pac. Rep. 680.

See para. 18, 45 this note.

39. Note is a thing in action, or evidence of debt, and personal property.—Pacific Trust Co. vs. Dorsey, 72 Cal. 55, 57, 12 Pac. Rep. 49.

Premissory note—Personal property.—See para. 30, 39 this note.

40. Right of possession of personal property is a thing in action, and therefore personal property.—See par. 35 this note.

41. "PROPERTY"—In constitution article XI, §13 (Const. 1849), is used in its ordinary and popular sense, and includes not only real estate, and other visible and tangible property, but choses in action, and the like.—People vs. Eddy, 43 Cal. 231, 236, 13 Am. Rep. 143.

42. "With this general proposition I fully agree, but I am not prepared to admit that, in its vulgar sense, the word 'property' includes

all choses in action."—McKinstry, J., in *People vs. Hibernia Sav. & Loan Soc.*, 51 Cal. 243, 248.

43. **SAME—GENERAL RULE FOR INTERPRETATION** of words in constitutions and statutes is that they are to be given their ordinary and popular signification, unless context shows they were intended to have some technical, or some abstruse meaning.—*People vs. Eddy*, 43 Cal. 331, 336, 13 Am. Rep. 143; *Cottle vs. Spitzer*, 65 Cal. 456, 461, 52 Am. Rep. 305, 4 Pac. Rep. 435.

44. **"Property" includes all property, personal and real.**—*People vs. Eddy*, 43 Cal. 331, 336, 13 Am. Rep. 143; *Pacific Trust Co. vs. Dorsey*, 72 Cal. 55, 57, 12 Pac. Rep. 49.

See pars. 29-34, 35-38 this note.

45. **"Property" as applied to lands, embraces all titles, legal or equitable, perfect or imperfect, inchoate or complete.** "It is supposed to embrace the rights which are executory, as well as those which are executed."—*Leese vs. Clark*, 20 Cal. 388, 421; *Fish vs. Fowle*, 58 Cal. 373, 375; *Soulard vs. United States*, 29 U. S. (4 Pet.) 511, bk. 7 L. ed. 938.

See par. 18 this note.

46. **Bonds, of railroad, owned by resident of this state, although their payment is secured by lien on property lying without this state, are within provisions of the constitution, and taxable.**—*Mackay vs. San Francisco*, 113 Cal. 392, 399, 45 Pac. Rep. 696.

47. **"Credits"—Under former constitution.**—"Credits" are not "property," in sense in which the word is used in article XI, § 13, of the constitution of 1849, and solvent debts cannot be assessed for taxation, even though secured by mortgage.—*People vs. Hibernia Sav. & Loan Soc.*, 51 Cal. 243, 248, 21 Am. Rep. 704. See *Bank of Mendocino vs. Chalfant*, 51 Cal. 369, 370.

48. **Distinguished:** *City San Francisco vs. Flood*, 64 Cal. 504, 507, 2 Pac. Rep. 264; *Mackay vs. San Francisco*, 113 Cal. 392, 399, 45 Pac. Rep. 696.

49. **Denied:** *Lamar vs. Palmer*, 18 Fla. 149, 153 (declared opposed to earlier California cases); *State vs. Rand*, 39 Minn. 502, 508, 40 N. W. Rep. 835 (declared to be notable and much criticized exception); *City New Orleans vs. Mechanics & Traders' Ins. Co.*, 30 La. Ann. 876, 877, 31 Am. Rep. 232, 233; *State vs. Carson City Sav. Bank*, 17 Nev. 146, 154, 163, 30 Pac. Rep. 703.

50. **Under present constitution—"Credits" are declared to be property, within the meaning of the word "property," as therein used.**—*Miller vs. Heilborn*, 58 Cal. 133, 138.

51. **Mining stock is "property," within the meaning of that word, as used in the present constitution.**—*San Francisco vs. Flood*, 64 Cal. 504, 507, 2 Pac. Rep. 264.

52. **Right to take and prosecute an appeal, assumed but not decided, to be "property," within the meaning of the Penal Code § 519.**—*People vs. Cadman*, 57 Cal. 562, 564.

53. **"REAL PROPERTY" IS COEXTENSIVE WITH LANDS, tenements, and hereditaments.**—*Fish vs. Fowle*, 58 Cal. 373, 375. See *St. Helena Water Co. vs. Forbes*, 62 Cal. 182, 184. See par. 36 this note.

54. **Water flowing through land, in its natural course, is part and parcel of the land, as it is inseparably annexed to the soil, and passes with it as "real property."**—*St. Helena Water Co. vs. Forbes*, 62 Cal. 182, 184. See *Gould vs. Stafford*, 91 Cal. 146, 155, 27 Pac. Rep. 543; *Johnson vs. Jordan*, 43 Mass. (2 Met.) 234, 37 Am. Dec. 85; *Brace vs. Yale*, 92 Mass. (10 Allen) 441, 443.

55. **RIGHT TO POSSESSION** of personal property is a thing in action, and is, therefore, personal property under above section.—*McClain vs. Buck*, 73 Cal. 320, 322, 14 Pac. Rep. 876.

56. **"SIGNATURE" OR "SUBSCRIPTION" INCLUDES A MARK**, when a person cannot write, his name being written near it, and written by the person who writes his own name as witness.—*In re Guilfoyle*, 96 Cal. 598, 600, 31 Pac. Rep. 553, 22 L. R. A. 370; *In re Estate of Walker*, 110 Cal. 387, 52 Am. St. Rep. 104, 42 Pac. Rep. 815, 30 L. R. A. 460; *Farmers & Merchants' Bank vs. Copsey*, 134 Cal. 287, 289, 66 Pac. Rep. 324; *Langenbeck vs. Louis*, 140 Cal. 406, 409, 73 Pac. Rep. 1086; *People vs. McDaniels*, 141 Cal. 113, 115, 74 Pac. Rep. 773.

See pars. 19, 21 this note; also note 53 Am. Rep. 493-495.

57. **Physical weakness, preventing the party from writing his name, comes within provision of this section.**—*In re Guilfoyle*, 96 Cal. 598, 600, 31 Pac. Rep. 553, 22 L. R. A. 370.

58. **What is a signature within the meaning of this section.**—As to, see pars. 19 et seq. this note.

59. **Attorney's name printed at bottom of complaint is sufficient signing within provisions of code requiring a complaint to be signed.**—*Hancock vs. Bowman*, 49 Cal. 413. See *Williams vs. McDonald*, 58 Cal. 527, 529; *Ligare vs. California S. R. Co.*, 76 Cal. 610, 611, 13 Pac. Rep. 777. See *Ind. Hamilton vs. State*, 103 Ind. 96, 53 Am. Rep. 491. *Md. Drury vs. Young*, 53 Md. 546, 42 Am. Rep. 343. *N. Y. Barnard vs. Heydrick*, 49 Barb. (N. Y.) 612, 3 Abb. Pr. N. S. (N. Y.) 47.

See Code Civ. Proc. 446 and note.

60. **Cutting signature from another document, of a person, and pasting, does not constitute a signature of, or signing by, such other person, within the requirements of the Political Code, § 3976 et seq.**—*Fox vs. Board Supervisors San Mateo Co.*, 49 Cal. 563, 565.

61. **Facsimile of autograph of person, printed and used as a signature, is the signature of such person within this section; and bonds or coupons may be thus signed, although the statute does not specifically so authorize.**—*Pennington vs. Baehr*, 48 Cal. 565; *McKee vs. Vernon Co.*, 3 Dill. C. C. 210, 16 Fed. Cas. 138. See *Hamilton vs. State*, 13 Ind. 96, 53 Am. Rep. 491, and note 493-495.

62. **Lithograph signature, is a signing within this section.**—See par. 61 this note.

63. **Printed signature, adopted and used as a signature, is a sufficient signing, and a "signature," within requirements of the code.**—*Williams vs. McDonald*, 58 Cal. 527, 529; *Ligare vs. California S. R. Co.*, 76 Cal. 610, 611,

18 Pac. Rep. 777. See *Hamilton vs. State*, 18 Ind. 96, 53 Am. Rep. 491 and note 493-495.

64. **Same—Adopting—Affixing seal of court,** is a sufficient adopting of a printed signature of clerk.—*Ligare vs. California S. R. Co.*, supra.

65. **THING IN ACTION**, is personal property under this section.—See par. 32 this note.

66. **VALUABLE CONSIDERATION—PRE-EXISTING DEBT IS**,—as to, see pars. 9-15 this note.

67. **WILL—MARK OF TESTATOR IS HIS SIGNATURE** to will and not the name written near it.—*Jackson vs. Jackson*, 39 N. Y. 153, distinguished in *Williamson vs. Williamson*, 3 Redf. (N. Y.) 449; *Pool vs. Buffum*, 3 Oreg. 458. See par. 21 this note.

68. **Name of testator written in body of will** is near enough to his mark to satisfy requirements of this section.—In re *Gulfoyle*, 96 Cal. 598, 600, 31 Pac. Rep. 553, 22 L. R. A. 370.

See par. 21 this note.

69. **Mark is signature** to a will when properly attested without testator's name being written near it.—In re *Will of Cornelius*, 15 Ark. 675.

See pars. 19, 20, 67 this note.

70. **Same—Witness signing by mark**, or by touching his hand to the penholder while his name is being written by another at his request, and in the presence of and at the request of the testator, is not a sufficient attestation (dictum).—In re *Estate of Walker*, 110 Cal. 387, 396, 52 Am. St. Rep. 104, 42 Pac. Rep. 815, 30 L. R. A. 460. See *Tenn. Simmons vs. Leonard*, 91 Tenn. 183, 39 Am. St. Rep. 875, 18 S. W. Rep. 280; *McFarland vs. Bush*, 94 Tenn. 538, 45 Am. St. Rep. 760, 39 S. W. Rep. 899, sub nom. *Bush vs. McFarland*, 27 L. R. A. 662.

71. **Contra:** *Ala. Garrett vs. Hafin*, 98 Ala. 615, 39 Am. St. Rep. 89, 13 So. Rep. 326. *Ky. Montgomery vs. Perkins*, 2 Met. 448. 74 Am. Dec. 419. *N. H. Lord vs. Lord*, 58 N. H. 7, 42 Am. Rep. 565. *S. C. Smythe vs. Irick*, 46 S. C.

299, 57 Am. St. Rep. 684, 24 S. E. Rep. 69, 32 L. R. A. 77. *Va. Jesse vs. Parker*, 6 Gratt. 57, 52 Am. Dec. 102. *Eng. Harrison vs. Harrison*, 8 Ves. 185; *Addy vs. Grix*, 8 Ves. 504; *Harrison vs. Elvin*, 3 Ad. & E. N. S. 117, 43 Eng. C. L. 658.

72. The court say: "As our law has seen fit to prescribe that the testator shall subscribe his will at the end thereof, so it has seen fit to require attesting witnesses shall sign, and shall sign only in one way, that is to say, by affixing their names."—In re *Estate of Walker*, 110 Cal. 387, 396, 52 Am. St. Rep. 104, 42 Pac. Rep. 815, 30 L. R. A. 460 (*McFarland, Garoutte, and Van Fleet, JJ.*, vigorously dissenting).

73. **Mark of witness to will**, is sufficient attestation to a will where the testator writes his name.—*Garrett vs. Hafin*, 98 Ala. 615, 39 Am. St. Rep. 89, 13 So. Rep. 326.

74. **Otherwise when the testator or grantor cannot write his name**.—*Garrett vs. Hafin*, supra.

75. **Name of witness**, where he cannot write, unless his mark is affixed to the instrument, is not his signature.—*Simmons vs. Leonard*, 91 Tenn. 183, 39 Am. St. Rep. 875, 18 S. W. Rep. 280.

76. **Same—Witness signing wrong name**, as where the lawyer drawing the will witnesses it by giving his own initials and the name of the testator, held not to be a compliance with the statute.—In re *Estate of Walker*, 110 Cal. 387, 396, 52 Am. St. Rep. 104, 42 Pac. Rep. 815, 30 L. R. A. 460 (*McFarland, Garoutte, and Van Fleet, JJ.*, dissenting).

77. "It is clearly settled that a witness may effectually subscribe his name by a mark, or by initials or by a fictitious name, if used without the purpose of personating another."—*Lord vs. Lord*, 58 N. H. 7, 42 Am. Rep. 565.

See 1 Redf. Wills § 19, p. 229, and cases cited; 1 *Jarm. Wills* (4th Am. ed.) 73 and Am. note.

78. **WORDS USED IN BOUNDARIES**,—as to see *Pol. Code* §§ 2903-2907 and notes.

§ 15. GOOD FAITH, WHAT CONSTITUTES (repealed).

History: Enacted March 21, 1872; repealed March 30, 1874, Code Amdts. 1873-4, p. 182.

1. **ORIGINAL SECTION** read as follows: "Good faith consists in an intention to abstain from taking any unconscientious advantage of another, even though the forms or technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious."

2. **CODE COMMISSIONERS' CITATIONS** *Starin vs. Genoa*, 23 N. Y. 439; *Clafin vs. Farmers and Citizens' Bank*, 25 N. Y. 293, 298, *Dunham vs. Dey*, 15 John. (N. Y.) 554, 569, 8 Am. Dec. 282; *Sanger vs. Eastwood*, 19 Wend. (N. Y.) 514; *Gregory vs. Thomas*, 20 Wend. (N. Y.) 17.

§ 16. DEGREES OF CARE AND NEGLIGENCE (repealed).

History: Enacted March 21, 1872; repealed March 30, 1874, Code Amdts. 1873-4, p. 182.

1. **ORIGINAL SECTION READ AS FOLLOWS:** "There are three degrees of care and diligence:

"1. **Slight**—which is such as persons of ordinary prudence usually exercise about their own affairs of slight importance;

"2. **Ordinary**—which is such as persons of ordinary prudence usually exercise about their own affairs of ordinary importance;

"3. **Great**—which is such as persons of ordi-

nary prudence usually exercise about their own affairs of great importance."

2. **CODE COMMISSIONERS' CITATIONS:** *Edwards on Ballm.* 44; *Jones on Ballm.* 118; 2 *Parsons on Contr.* 87.

3. **FOR CRITICISMS UPON THE DEFINITIONS AND CLASSIFICATIONS OF "NEGLIGENCE,"** see *Steamer New World vs. King*, 16 How. Pr. (N. Y.) 469; *Blythe vs. Waterworks*, 36 Eng. L. & Eq. 506.

§ 17. DEGREES OF NEGLIGENCE (repealed).

History: Enacted March 21, 1872; repealed March 30, 1874, Code Amdts. 1873-4, p. 182.

1. **ORIGINAL SECTION READ AS FOLLOWS:** "There are three degrees of negligence:

"1. **Slight**—which consists in the want of great care and diligence;

"2. **Ordinary**—which consists in the want of ordinary care and diligence;

"3. **Gross**—which consists in the want of slight care and diligence."

2. **GROSS NEGLIGENCE.**—No legislative attempt has been made to establish degrees in negligence since the repeal of this section of the civil code. Gross negligence may be considered as equivalent to the absence of such care and diligence as the situation demands (dis. op.).—Hart vs. Western Union Tel. Co., 66 Cal. 579, 590, 56 Am. Rep. 119, 6 Pac. Rep. 637.

§ 18. NOTICE, ACTUAL AND CONSTRUCTIVE. Notice is:

1. **Actual**—which consists in express information of a fact; or,
2. **Constructive**—which is imputed by law.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Actual and constructive notice.
3. Same—Refusal to instruct as to.
4. Actual notice—Definition.
5. Same—As to nature and contents.
6. Same—Same—Written notice—Language not understood.
7. Same—Sufficiency.
8. Same—Possession is actual notice.
- 9-11. Constructive notice—Defined—Effect.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO,** etc., in: Riley vs. Martinelli, 97 Cal. 575, 584, 33 Am. St. Rep. 209, 32 Pac. Rep. 579, 21 L. R. A. 33 (referred to); Prouty vs. Devin, 118 Cal. 258, 260, 50 Pac. Rep. 380 (applied); Tynan vs. Kerns, 119 Cal. 447, 451, 51 Pac. Rep. 693 (applied); Merrill vs. Pacific Transf. Co., 131 Cal. 582, 587, 589, 63 Pac. Rep. 915 (applied).

2. **ACTUAL AND CONSTRUCTIVE NOTICE,** spoken of in the code, means no more than that, under the indicated circumstances, a man is legally chargeable with knowledge.—Merrill vs. Pacific Transf. Co., 131 Cal. 582, 587, 589, 63 Pac. Rep. 915.

3. **Refusal to instruct as to actual and constructive notice,** as defined in this and succeeding section, in an equity case, court adopting verdict of jury, where findings cover all issues, is not ground for reversal.—Riley vs. Martinelli, 97 Cal. 575, 584-585, 33 Am. St. Rep. 209, 32 Pac. Rep. 579, 21 L. R. A. 33. See Hewlett vs. Pilcher, 85 Cal. 542, 545, 24 Pac. Rep. 781; Lawlor vs. Kemper, 20 Mont. 18, 19, 49 Pac. Rep. 398.

See Code Civ. Proc. §§ 608, 609 and notes.

4. **ACTUAL NOTICE** is that which consists

in the express information of the fact.—Prouty vs. Devin, 118 Cal. 258, 260, 50 Pac. Rep. 380; Merrill vs. Pacific Transf. Co., 131 Cal. 582, 587, 589, 63 Pac. Rep. 915.

5. **As to nature and contents.**—Notice given, in order to be effectual, should be sufficient, precise, and complete enough to put defendant fully on his guard as to the fact, and he should have understood it.—Renton vs. Monnier, 77 Cal. 449, 455-456, 19 Pac. Rep. 820.

6. **Same—Written in language party neither reads nor understands perfectly,** is not sufficient notice under this section.—Renton vs. Monnier, 77 Cal. 449, 455-456, 19 Pac. Rep. 820, distinguishing Perkins vs. Eckert, 55 Cal. 40v, 404.

7. **Sufficiency to put prudent man on inquiry, question for the jury.**—Renton vs. Monnier, 77 Cal. 449, 456, 19 Pac. Rep. 820.

8. **Possession is actual notice to subsequent purchaser of existence of unrecorded lease.**—See post § 19 note par. 53 et seq.

9. **CONSTRUCTIVE NOTICE** is that which is imputed by law.—Dreyfus vs. Hirt, 82 Cal. 621, 626, 28 Pac. Rep. 193; Prouty vs. Devin, 118 Cal. 258, 260, 50 Pac. Rep. 380; Tynan vs. Kerns, 119 Cal. 447, 451, 51 Pac. Rep. 693; Merrill vs. Pacific Transf. Co., 131 Cal. 582, 587, 589, 63 Pac. Rep. 915.

See post § 19 note par. 9 et seq.

10. **As to which court can judge, notwithstanding the notice is denied.**—Tynan vs. Kerns, 119 Cal. 447, 451, 51 Pac. Rep. 693.

11. **Effect of constructive notice can be determined by court.**—Ibid.

See post § 19 and note.

§ 19. **CONSTRUCTIVE NOTICE, [WHEN DEEMED].** Every person who has had actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 182.

I. Preliminary.

1. Original section.

2. Code Commissioners' note.

II. In General.

3. Applied, cited, construed, referred to, etc.

4. Findings as to—Absence of—Grounds for reversal when.

5. Instructions as to—Refusal to give—Not error when.

6, 7. Jury to determine as to constructive notice.

- 8. Possession of land as notice.
- 9. Recording instrument—Notice by.

III. Constructive Notice.

- 10-15. Definition.
- 16, 17. Actual notice of circumstances—Effect.
- 18, 19. Same—As to what is sufficient notice.
- 20-22. Same—Duty to inquire.
- 23. Same—Extent of inquiry.
- 24. Same—True grounds of determining notice.
- 25. Assessment—Notice as to description of property.
- 26, 27. Agent—Notice to—When sufficient.
- 28. Conduct—Knowledge imputed by.
- 29. Corporation—Not chargeable with notice, when.
- 30-32. Deed—Facts appearing in face—Notice.
- 33-36. Same—Recitals and references—Notice to parties.
- 37, 38. Same—Same—Government bound by.
- 39. Same—Husband and wife joining in—Unrecorded deed to wife.
- 40, 41. Same—Recording—Notice by.
- 42. Same—Unrecorded deed—Notice as to.
- 43. Filing and recording—Notice by.
- 44. Lack of possession—Notice of chargeable, when.
- 45, 46. Lease—Effect of—When notice imputable—Under lease.
- 47, 48. Lessee's improvements—Imputed notice—Construction with lessor's knowledge.
- 49-51. Same—Same—Participation in benefits.
- 52. Pendency of suit to set aside deed—Notice of.
- 53-55. Possession of land—As notice.
- 56. Same—As notice of an unrecorded instrument.
- 57. Same—Apparent ownership.
- 58-61. Same—By grantor.
- 62. Same—Same—Recorded title by vendor in possession.
- 63-66. Same—By other than grantor.
- 67. Same—By one purchasing in bad faith—Knowledge not imputable.
- 68. Same—By mortgager—Notice to mortgagee's grantor.
- 69. Same—Same—By tenant of mortgager.
- 70. Same—By mortgagee—Notice to purchasers on execution.
- 71-76. Same—By tenant—Notice of landlord's interests.
- 77-79. Same—Same—Notice of tenant's interests.
- 80, 81. Same—Under contract of purchase.
- 82-86. Same—Under deed and claim of title.
- 87-89. Same—Same—Under unrecorded deed.
- 90-92. Same—Under lease.
- 93-96. Purchaser—Constructive notice to—What is.
- 97. Receipt—Presumption of notice from.
- 98, 99. Recital—In title papers—Notice.
- 100. Recording deed—Notice by.
- 101. Resolution to macadamize—No notice of guttering.
- 102, 103. Shipping receipt—Transfer of—Constructive notice.
- 104. Unrecorded deed—Facts sufficient to put party on inquiry, when.

I. PRELIMINARY.

1. **ORIGINAL SECTION** read as follows: "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, has constructive notice of the fact itself."

2. **CODE COMMISSIONERS' NOTE** appended to this section cites *Call vs. Hastings*, 3 Cal. 179, and adds: "If the party who receives information of circumstances suggesting an inquiry for the principal fact, makes the inquiry with due diligence, the result must be either that he will ascertain the fact, or that he will be prevented from doing so by causes for which he is not to blame, and from which he ought not to suffer. If he ascertain it, he then has actual notice, and the doctrine of constructive notice does not apply. If, notwithstanding due diligence, he fails to ascertain it, notice ought not to be imputed to him. The commissioners, therefore, as respects circumstances putting a person upon inquiry, have limited the doctrine of constructive notice to cases in which there is a failure to make diligent inquiry (see *Foster vs. Beals*, 21 N. Y. 247; *Williamson vs. Brown*, 15 N. Y. 354; *Fassett vs. Smith*, 23 N. Y. 252). The decision in *Kellogg vs. Smith*, 26 N. Y. 18, is put upon the ground that there was a duty of inquiry, both for the bond and the mortgage; but the inquiry made was only as to the mortgage."

II. IN GENERAL.

3. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Renton vs. Monnier*, 77 Cal. 449, 456, 19 Pac. Rep. 820 (applied); *Dreyfus vs. Hirt*, 82 Cal. 621, 626, 23 Pac. Rep. 193 (applied); *Riley vs. Martinelli*, 97 Cal. 575, 583, 33 Am. St. Rep. 209, 32 Pac. Rep. 579, 21 L. R. A. 33 (referred to); *Prouty vs. Devin*, 119 Cal. 258, 260, 50 Pac. Rep. 380 (applied); *Tynan vs. Kerns*, 119 Cal. 447, 451, 51 Pac. Rep. 693 (applied); *Evans vs. Judson*, 120 Cal. 282, 284, 52 Pac. Rep. 585 (applied); *Hines vs. Miller*, 123 Cal. 517, 521, 55 Pac. Rep. 401 (applied); *San Diego L. & T. Co. vs. La Presa School Dist.*, 122 Cal. 98, 101, 54 Pac. Rep. 528 (applied); *Tarke vs. Bingham*, 123 Cal. 163, 166, 55 Pac. Rep. 759 (applied); *Wilkerson vs. Thorp*, 128 Cal. 221, 224, 60 Pac. Rep. 679 (applied); *Merrill vs. Pacific Transf. Co.*, 131 Cal. 582, 587, 63 Pac. Rep. 915 (applied); *McDonald vs. Randall* (dis. op. of Beatty, C. J.), 139 Cal. 246, 257, 72 Pac. Rep. 997 (applied); *Kenriff vs. Caulfield*, 140 Cal. 34, 46, 73 Pac. Rep. 803 (applied).

4. **FINDING**—Absence of by court with reference to constructive notice, is ground for reversal.—*Prouty vs. Devin*, 118 Cal. 253, 260, 50 Pac. Rep. 380.

5. **INSTRUCTION**—Refusal to give in reference to actual or constructive notice, as defined in §§ 18 and 19 of Civil Code, in equity case.—See ante § 18 note par. 3.

6. **JURY ARE TO DETERMINE** whether, under all circumstances, party had constructive notice or knowledge, as contemplated by law.—*Merrill vs. Pacific Transf. Co.*, 131 Cal. 582, 587, 589, 63 Pac. Rep. 915.

See post § 2176 and note.

7. Whether notice was sufficient to put prudent man upon inquiry.—*Renton vs. Monnier*, 77 Cal. 449, 456, 19 Pac. Rep. 820.

8. POSSESSION OF LAND AS NOTICE.—See par. 53 et seq. this note; also post §1217 and note.

9. RECORDING INSTRUMENT, — as to notice by, see post §1158 and note.

III. CONSTRUCTIVE NOTICE.

10. CONSTRUCTIVE NOTICE is notice of circumstances sufficient to put prudent man upon inquiry.—See ante §18 note par. 9 et seq.

11. Law imputes knowledge to one who has means of knowledge.—*San Diego L. & T. Co. vs. La Presa School Dist.*, 122 Cal. 98, 101, 54 Pac. Rep. 528.

12. Means legal instrumentality by which knowledge is conveyed or by which one is charged with knowledge.—*Merrill vs. Pacific Transf. Co.*, 131 Cal. 582, 587, 589, 63 Pac. Rep. 915.

13. Constructive notice is a knowledge of such facts that party possessing such knowledge is conclusively presumed to know other things besides facts which have been proven to come to his knowledge.—*Wilkerson vs. Thorp*, 128 Cal. 221, 224, 60 Pac. Rep. 679.

See par. 16 this note.

14. Knowledge of facts possessed by party must be such that he is conclusively presumed to have notice of the main fact to which constructive notice is invoked.—*Ibid.*

15. Means of knowledge equivalent to knowledge, and party who has the opportunity of knowing facts constituting the fraud of which he complains cannot afterwards allege want of knowledge.—*Shain vs. Sresovich*, 104 Cal. 402, 38 Pac. Rep. 51; *Tynan vs. Kerns*, 119 Cal. 447, 451, 51 Pac. Rep. 693.

16. ACTUAL NOTICE OF CIRCUMSTANCES sufficient to put prudent man upon inquiry as to particular fact, is constructive notice of fact itself in all cases in which, by prosecuting such inquiry, such fact might have been learned.—*Prouty vs. Devin*, 118 Cal. 258, 260, 50 Pac. Rep. 380; *Tynan vs. Kerns*, 119 Cal. 447, 451, 51 Pac. Rep. 693; *San Diego L. & T. Co. vs. La Presa School Dist.*, 122 Cal. 98, 101, 54 Pac. Rep. 528; *Hines vs. Miller*, 122 Cal. 517, 521, 55 Pac. Rep. 401; *Tarke vs. Bingham*, 123 Cal. 163, 166, 55 Pac. Rep. 759; *Wilkerson vs. Thorp*, 128 Cal. 221, 224, 60 Pac. Rep. 679; *Merrill vs. Pacific Transf. Co.*, 131 Cal. 582, 587, 589, 63 Pac. Rep. 915; *McDonald vs. Randall* (dis. op. of Beatty, C. J.), 139 Cal. 246, 257, 72 Pac. Rep. 997; *Kenniff vs. Caulfield*, 140 Cal. 34, 46, 73 Pac. Rep. 803. See III. Coari vs. Olsen, 91 Ill. 280. *Ky. Buck vs. Holloway*, 2 J. J. Marsh. 180; *Brown vs. Anderson*, 1 T. B. Mon. 201. *Mich. Converse vs. Blumrich*, 14 Mich. 109, 120, 90 Am. Dec. 230; *Haines vs. Haines*, 69 Mich. 587, 37 N. W. Rep. 653. *Neb. Filley vs. Duncan*, 1 Neb. 134, 93 Am. Dec. 337. *N. J. Diehl vs. Page*, 3 N. J. Eq. (2 Gr.) 143, 154; *Holmes vs. Stout*, 10 N. J. Eq. (2 Stock.) 419, 426. *N. Y. Cook vs. Travis*, 20 N. Y. 400; *Brown vs. Volkening*, 64 N. Y. 83; *Webster vs. Van Steenberg*, 46 Barb. 212; *De Ruyter vs. St. Peter's Church*, 2 Barb. Ch. 558; *Chester-*

man vs. Gardner, 5 John. Ch. 29, 33, 9 Am. Dec. 265; *Gouverneur vs. Lynch*, 2 Paige Ch. 300; *Grimstone vs. Carter*, 3 Paige Ch. 421, 436, 24 Am. Dec. 230; *Tuttle vs. Jackson ex dem. Hills*, 6 Wend. 213, 226, 21 Am. Dec. 306; *Parke vs. Jackson*, 11 Wend. 447, 25 Am. Dec. 653. *Fed. Flagg vs. Mann*, 2 Sumn. C. C. 486, 554, 9 Fed. Cas. 202, 227. *Eng. Wigge vs. Wigge*, 1 Atk. 384, 1 West. 680; *Eyre vs. Dolphin*, 2 Ball & B. 290, 301, 12 Rev. Rep. 94; *Powell vs. Dillon*, 2 Ball & B. 416, 421; *Taylor vs. Barker*, Dan. Ch. 80, note a; *Moore vs. Mayhew*, Freem. Ch. 175; *Allen vs. Anthony*, 1 Mer. 282, 15 Rev. Rep. 113; *Crofton vs. Ormsby*, 2 Sch. & Lef. 595, 9 Rev. Rep. 107; *Meux vs. Maltby*, 2 Swanst. 277, 281; *Taylor vs. Stibbert*, 2 Ves. Jr. 437, 440, 2 Rev. Rep. 273; *Hall vs. Smith*, 14 Ves. 426, 9 Rev. Rep. 313; *Daniels vs. Davison*, 16 Ves. 249, 17 Ves. 433, 10 Rev. Rep. 171; *Tourville vs. Nash*, 3 Pr. Wms. 307.

See general discussion of question, 21 Am. & Eng. Encyc. of L. (2d ed.) 584; 23 Id. 494.

17. This is within the familiar rule, "id certum est, certum reddi potest."—*Kenniff vs. Caulfield*, 140 Cal. 34, 46, 73 Pac. Rep. 803.

18. SAME—AS TO WHAT IS SUFFICIENT NOTICE to put prudent man upon inquiry, see *Lumbard vs. Abbey*, 73 Ill. 178; *City of Chicago vs. Witt*, 75 Ill. 214.

19. Circumstances must be such that inquiry becomes a duty, and the failure to make it negligent omission.—*Bank of Mendocino vs. Baker*, 82 Cal. 114, 22 Pac. Rep. 1037; *Prouty vs. Devin*, 118 Cal. 258, 50 Pac. Rep. 380; *Tarke vs. Bingham*, 123 Cal. 163, 166, 55 Pac. Rep. 759.

20. Duty to inquire.—Provided inquiry becomes a duty, and, if followed, would lead to knowledge of fact by exercise of ordinary diligence and understanding.—*Bank of Mendocino vs. Baker*, 82 Cal. 114, 22 Pac. Rep. 1037; *Prouty vs. Devin*, 118 Cal. 258, 260, 50 Pac. Rep. 380; *Wilkerson vs. Thorp*, 128 Cal. 221, 224, 60 Pac. Rep. 679; *Lodge vs. Simonton*, 3 Pen. & W. (Pa.) 439, 23 Am. Dec. 38.

See par. 19 this note.

21. A man is not deemed to have notice, in law, of anything that his inquiries will not lead him to discover. It is only such facts as he could have learned, that the law will presume him to have notice of.—See *Williamson vs. Brown*, 15 N. Y. 354, 362; *Ware vs. Egmont*, 4 DeG. M. & G. 461, 31 Eng. L. & E. 89.

22. No duty is imposed by law upon person to make inquiry, where the circumstances are such that a prudent man would not be put upon inquiry; and the fact that means of knowledge are open to the plaintiff, and he has not availed himself of them, does not debar him from relief when thereafter he shall make actual discovery.—*Tarke vs. Bingham*, 123 Cal. 163, 166, 55 Pac. Rep. 759.

23. SAME—EXTENT OF INQUIRY.—Person put upon inquiry not bound to inquire of any person other than the one in possession or interest for information.—*Converse vs. Blumrich*, 14 Mich. 109, 120, 90 Am. Dec. 230; *Flagg vs. Mann*, 2 Sumn. C. C. 486, 554, 9 Fed. Cas. 202, 227.

Unless answer which he receives corroborates prior statements, or reveals the existence of other sources of information.—*Converse vs.*

Blumrich, *supra* p. 120. See *Holmes vs. Stout*, 10 N. J. Eq. (2 Gr.) 419; *Williamson vs. Brown*, 15 N. Y. 354, 358; *Acer vs. Westcott*, 46 N. Y. 384, 7 Am. Rep. 355; *Bennett vs. Buchanan*, 76 N. Y. 386; *Ellis vs. Horrman*, 90 N. Y. 466; *Mack vs. Phelan*, 92 N. Y. 20.

Location of land being such as to render it practical to make personal application to, and inquiry of, the occupant, it is the duty of a prospective purchaser to make such application and inquiry.—See *Cal. Hunter vs. Watson*, 12 Cal. 363, 73 Am. Dec. 543; *Lestrade vs. Barth*, 19 Cal. 675; *Dutton vs. Warschauer*, 21 Cal. 609, 82 Am. Dec. 765; *Landers vs. Bolton*, 26 Cal. 393; *Fair vs. Stevenot*, 29 Cal. 486; *Kelley vs. Wilson*, 33 Cal. 693; *Pehl vs. McElroy*, 36 Cal. 272. *Ky. Hopkins vs. Garrard*, 7 B. Mon. 312; *Barbour vs. Whitlock*, 4 T. B. Mon. 196. *N. H. Colby vs. Kenniston*, 4 N. H. 266; *Pritchard vs. Brown*, 4 N. H. 397, 404-405, 17 Am. Dec. 431. *N. Y. Williamson vs. Brown*, 15 N. Y. 355; *Chesterman vs. Gardner*, 5 John. Ch. 29, 9 Am. Dec. 265. *Pa. Woods vs. Farmers*, 7 Watts 372, 386, 23 Am. Dec. 772.

24. "The true ground in all cases for determining the question of notice is that in itself it is a species of fraud; takes away the bona fides of the purchaser and puts him in mala fides."—*Wilkerson vs. Thorp*, 128 Cal. 221, 225, 60 Pac. Rep. 679, following *Peebles vs. Reeding*, 3 Serg. & R. (Pa.) 496.

25. Assessment.—Notice as to description of property.—In the application of the general rule to specific instances we have several illustrations. Thus an assessment is notice as to description of the property.—*San Diego L. & T. Co. vs. La Presa School Dist.*, 122 Cal. 98, 101, 54 Pac. Rep. 528.

26. AGENT—NOTICE TO.—In line of duty.—Notice to an agent of facts arising from or connected with subject-matter of agency, is constructive notice to principal, when notice comes to agent while he is concerned for principal, and in course of very transaction.—See authorities next note.

27. Not in line of duty.—Notice to agent of facts not arising from or connected with subject-matter of agency, is not notice to principal, unless actually communicated to him.—*Bierce vs. Red Bluff Hotel Co.*, 31 Cal. 160, 165; *Renton vs. Monnier*, 77 Cal. 449, 456, 19 Pac. Rep. 820.

28. CONDUCT.—Knowledge itself may be imputed from.—*Merrill vs. Pacific Transf. Co.*, 131 Cal. 582, 587, 589, 63 Pac. Rep. 915.

See par. 16 et seq. this note.

29. CORPORATION—THE OFFICERS OR AGENTS.—Acting in their own behalf, and not for the corporation, constructive notice is not chargeable to the corporation.—*McDonald vs. Randall*, 139 Cal. 247, 250, 72 Pac. Rep. 997. See *Wickersham vs. Chicago Zinc Co.*, 18 Kan. 481, 26 Am. Rep. 784; *Barns vs. Trenton Gas Light Co.*, 27 N. J. Eq. (12 C. E. Gr.) 33; *Commercial Bank vs. Burgwyn*, 110 N. C. 267, 14 S. E. Rep. 623, 17 L. R. A. 326.

30. DEED.—Facts appearing in face of, chargeable to a purchaser derailing title through it.—*Childs vs. Clark*, 3 Barb. Ch. (N. Y.) 52, 49 Am. Dec. 164. See *Ala. Corbett vs. Glenn*, 52 Ala. 480. *Ill. Stumpf vs. Osterhage*,

94 Ill. 115. *Ky. Honore vs. Bakewell*, 6 B. Mon. 67, 43 Am. Dec. 147. *La. Boatner vs. Ventress*, 8 Mart. N. S. 644, 20 Am. Dec. 266. *Mass. George vs. Kent*, 89 Mass. (7 Allen) 16, 18; *White vs. Foster*, 102 Mass. 375. *Mich. Fitzhugh vs. Barnard*, 12 Mich. 104, 111; *Farmers & M. Bank vs. Bronson*, 14 Mich. 361; *Woods vs. Monroe*, 17 Mich. 238; *Case vs. Erwin*, 18 Mich. 434; *Baker vs. Mather*, 25 Mich. 51; *Hosley vs. Holmes*, 27 Mich. 416; *Shotwell vs. Harrison*, 30 Mich. 179; *Kitchell vs. Mudgett*, 37 Mich. 81; *Mason vs. Payne*, Walk. Ch. 459. *N. Y. Gilbert vs. Peteler*, 38 N. Y. 165. *Ohio. Reeder vs. Barr*, 4 Ohio 446, 22 Am. Dec. 762. *Pa. Burkart vs. Bucher*, 2 Binn. 455, 4 Am. Dec. 457. *Tenn. Payne vs. Abercrombie*, 10 Heisk. 161. *Tex. Robertson vs. Guerin*, 50 Tex. 317. *Va. Graff vs. Castleman*, 5 Rand. 195, 16 Am. Dec. 741. *Fed. Carver vs. Astor*, 29 U. S. (4 Pet.) 1, 79, bk. 7 L. ed. 761. *Eng. Ford vs. Grey*, 1 Salk. 285; *Taylor vs. Stibbert*, 2 Ves. Jr. 437, 2 Rev. Rep. 273; *Marchioness of Anandale*, 2 Pr. Wms. 432.

See note 20 Am. Dec. 276.

31. Grantee of land is chargeable with notice of facts contained in the record of the title.—*American Emigrant Co. vs. Call*, 22 Fed. Rep. 765, 768; *Hardy vs. Harbin*, 4 Sawy. C. C. 536, 545, 11 Fed. Cas. 510.

32. Purchaser by patent from state or commonwealth is bound to take notice of prior title to which reference made in patent.—*Burkart vs. Bucher*, 2 Binn. (Pa.) 455, 4 Am. Dec. 457; *Brush vs. Ware*, 40 U. S. (15 Pet.) 93, bk. 10 L. ed. 672.

33. SAME—RECITALS IN.—Notice to parties.—See post § 1217 and note.

34. Recital or reference in deeds or title-papers, is notice to the parties taking thereunder, of the facts or equities alluded to therein.—See *Ky. Honore vs. Bakewell*, 6 B. Mon. 67, 43 Am. Dec. 147. *N. Y. Acer vs. Westcott*, 46 N. Y. 384, 392; *Campbell vs. Vedder*, 1 Abb. App. Dec. 301, 3 Keyes (N. Y.) 178; *Childs vs. Clark*, 3 Barb. Ch. 52, 49 Am. Dec. 164. *Ohio. Reeder vs. Barr*, 4 Ohio 446, 22 Am. Dec. 762. *Pa. Burkart vs. Bucher*, 2 Binn. 455, 4 Am. Dec. 457. *Va. Graff vs. Castleman*, 5 Rand. 195, 16 Am. Dec. 741.

See par. 30 this note; also post § 1217 and note.

35. Recitals in patents issued by government are evidence against person in possession without title.—*Boatner vs. Ventress*, 8 Mart. N. S. (La.) 644, 20 Am. Dec. 266.

36. Recital of existence of lease, is notice of covenants therein.—See *Wilkerson vs. Thorp*, 128 Cal. 221, 224, 60 Pac. Rep. 679; *Wade's Law of Notice*, 321.

See pars. 45, 46 this note.

37. Government bound by recitals or references in deed same as private parties; it is presumed to have full knowledge of all facts recited in its conveyances, the same as are individuals.—*Nieto vs. Carpenter*, 7 Cal. 527. *Ala. Magee vs. Hallet*, 22 Ala. 699. *Mass. Commonwealth vs. Andre*, 20 Mass. (3 Pick.) 224. *Mo. Opinion as to Governor*, 49 Mo. 216. *Pa. Penrose vs. Griffith*, 5 Binn. 321. *Fed. Carver vs. Astor*, 29 U. S. (4 Pet.) 1, 87, bk. 7 L. ed.

761; *Branson vs. Wirth*, 84 U. S. (17 Wall.) 32, 42, bk. 21 L. ed. 566.

38. Compare: *Farish vs. Coon*, 40 Cal. 33, 111. *People vs. Brown*, 66 Ill. 435. *La. State vs. Graham*, 23 La. Ann. 402. *Mich. Crane vs. Reader*, 26 Mich. 303. *N. O. Den vs. Sunsford*, 4 Dev. & B. L. 407; *Doe vs. Shifford*, 4 Hawks L. 116; *Wallace vs. Maxwell*, 10 Ired. L. 110.

39. Husband and wife joining in deed of land is not constructive notice to creditor that wife held prior unrecorded deed. "Purchasers may, as a general rule, rely with safety upon the legal presumptions arising from the apparent facts relating to the title, without going in search of possible facts, to test or overthrow the presumptions."—*Vassault vs. Austin*, 36 Cal. 691. See *Wilkerson vs. Thorp*, 128 Cal. 221, 224, 60 Pac. Rep. 679.

40. SAME—RECORDATION—Notice by,—as to, see post §§ 1158, 1213 and notes.

41. Filing and recording certificate of sale imparts constructive notice to all the world, and rights acquired thereunder prior and paramount to title under prior unrecorded deed, of which subsequent purchaser had no notice at date of recordation.—*Riley vs. Martinelli*, 97 Cal. 575, 583, 33 Am. St. Rep. 209, 32 Pac. Rep. 679, 21 L. R. A. 33; *Foorman vs. Wallace*, 75 Cal. 552, 17 Pac. Rep. 680.

See post § 1213 and note par. 8 et seq.

42. Unrecorded deed—Notice of facts held sufficient to put defendant upon inquiry as to an unrecorded deed held by plaintiff.—*Prouty vs. Devin*, 118 Cal. 261, 50 Pac. Rep. 380; *Kenniff vs. Caulfield*, 140 Cal. 34, 46, 73 Pac. Rep. 803. See *Hains vs. Hains*, 69 Mich. 587, 37 N. W. Rep. 563.

See pars. 16-22 this note.

43. FILING AND RECORDING CERTIFICATE OF SALE—NOTICE.—See pars. 40, 41 this note.

44. LACK OF POSSESSION by defendant, notice of is chargeable to purchaser of land under execution sale.—*Tutterlilly vs. Montgomery*, 73 Ala. 263.

45. LEASE—EFFECT OF.—Where notice is imputed by law, is confined to the ordinary covenants therein.—See *Wilkerson vs. Thorp*, 128 Cal. 221, 224, 60 Pac. Rep. 679; *Wade's Law of Notice* 321.

See pars. 34, 36 this note.

46. Under-lease, agreement for, constructive notice of all usual covenants in original lease.—*Flight vs. Berton*, 3 Myl. & K. 282.

47. LESSEE'S IMPROVEMENT—Imputed notice.—Construction with lessor's knowledge, or permission given, on failure to give notice required by § 1192 of the Code of Civil Procedure, renders his interest in the land subject to the mechanic's lien.—See *Fuquay vs. Stickney*, 41 Cal. 583; *Moore vs. Jackson*, 49 Cal. 109, 111; *Phelps vs. Maxwell's Creek Gold Min. Co.*, 49 Cal. 336, 338, 339; *West Coast Lumber Co. vs. Newkirk*, 80 Cal. 275, 279, 22 Pac. Rep. 231; *Santa Monica Lumber & Mill Co. vs. Hege* (Cal. March 10, 1897), 48 Pac. Rep. 69; *Evans vs. Judson*, 120 Cal. 282, 284, 52 Pac. Rep. 585. See *Nev. Rosina vs. Trowbridge*, 20 Nev. 105, 120, 17 Pac. Rep. 751. N. M. Post

vs. Miles (dis. op.), 7 N. M. 317, 335, 34 Pac. Rep. 586.

48. Notice on part of lessor or landlord that such improvements are to be made by lessee, being necessary in order to render his interest in the property liable, it becomes an important question as to what is sufficient notice to landlord.—See pars. 16-24 this note.

49. Lease providing for participation, contingent, by landlord in benefit of improvement, and term being brief, landlord is presumed to know that such improvements must, if made at all, be made speedily, and that they might be of permanent character; and being party mutually interested, had notice "of circumstances sufficient to put a prudent man upon inquiry as to a particular fact,"—namely, the actual improvement which followed shortly,—and was chargeable with knowledge thereto, because by prosecuting inquiry he might have learned such fact.—See *Moore vs. Jackson*, 49 Cal. 109, 111; *Santa Monica Lumber & Mill Co. vs. Hege*, 119 Cal. 376, 379, 51 Pac. Rep. 555; 48 Id. 69; *Evans vs. Judson*, 120 Cal. 282, 284, 52 Pac. Rep. 585; *Hines vs. Miller*, 122 Cal. 517, 521, 55 Pac. Rep. 401; *Gould vs. Wise*, 18 Nev. 253, 259, 3 Pac. Rep. 30.

50. Lessor being entitled under lease to benefit of the improvements in a contingency, and being a party thus interested, was held to have notice of circumstances sufficient to put prudent man on inquiry, and mechanic's lien against landlord-lessor upheld.—*Hines vs. Miller*, 122 Cal. 517, 521, 55 Pac. Rep. 401.

51. Lease of mine—Granting right to run tunnels in working and developing mine, under which lease lessor was to receive a percentage of output, the latter was held to have sufficient interest to make him chargeable with constructive notice of improvements made in the mine under the lease.—*Hines vs. Miller*, supra.

52. PENDENCY OF SUIT TO SET ASIDE DEED under which mortgager claims title,—notice of is chargeable to purchaser at foreclosure sale.—*Randall vs. Duff*, 79 Cal. 123, 21 Pac. Rep. 610, 3 L. R. A. 754.

53. POSSESSION OF LAND—As notice.—See post § 1217 and note.

54. Open and notorious possession of real estate is sufficient to put purchaser upon inquiry as to interest of the occupant, legal or equitable.—*Hunter vs. Watson*, 12 Cal. 363, 73 Am. Dec. 543; *Eldridge vs. See Yup Co.*, 17 Cal. 44, 56; *Woodson vs. McCune*, 17 Cal. 298, 304; *Havens vs. Dale*, 18 Cal. 359, 367 (is mere evidence of notice; this rule not to be extended); *Lestrade vs. Barth*, 19 Cal. 660, 669, 676; *Dutton vs. Warschauer*, 21 Cal. 609, 627-628, 82 Am. Dec. 765; *Daubenspeck vs. Platt*, 22 Cal. 331, 335; *Landers vs. Bolton*, 26 Cal. 393, 419, 27 Id. 104; *Fair vs. Stevenot*, 29 Cal. 486, 490 (not notice per se; possession is merely evidence of notice); *Smith vs. Yule*, 31 Cal. 180, 184, 89 Am. Dec. 170; *Pell vs. McElroy*, 36 Cal. 268, 271; *O'Rourke vs. O'Connor*, 39 Cal. 442, 447; *Hellman vs. Levy*, 55 Cal. 117, 119; *Bank of Mendocino vs. Baker*, 82 Cal. 114, 118, 22 Pac. Rep. 1037; *Scheerer vs. Cuddy*, 85 Cal. 270, 272, 24 Pac. Rep. 713 (possession under unrecorded lease); *Brophy Min. Co. vs.*

Brophy & Dale G. & S. Min. Co., 15 Nev. 101, 114.

55. Open and visible possession of land is notice to all the world of claim of interest therein, and whoever purchases during continuance of such possession takes the land subject to such interest.—*Riley vs. Quigley*, 50 Ill. 304, 39 Am. Dec. 516; *Flint vs. Lewis*, 61 Ill. 306.

56. SAME—AS NOTICE OF UNRECORDED INSTRUMENT, or claim to interest.—*Bryan vs. Ramirez*, 8 Cal. 461, 68 Am. Dec. 340; *Hunter vs. Watson*, 12 Cal. 363, 73 Am. Dec. 543; *Woodson vs. McCune*, 17 Cal. 298, 304 (not confined to case of unrecorded deeds, but applies as well to any other title consistent with possession); *Dutton vs. Warschauer*, 21 Cal. 609, 82 Am. Dec. 765. See *Ga. Wyatt vs. Elam*, 23 Ga. 201, 68 Am. Dec. 518. Ill. *Morrison vs. Kelley*, 22 Ill. 610, 74 Am. Dec. 169; *Riley vs. Quigley*, 50 Ill. 304, 39 Am. Dec. 516; *Lumbard vs. Abbey*, 73 Ill. 178. Iowa. *Moore vs. Pierson*, 6 Iowa 279, 71 Am. Dec. 409. Md. *General Ins. Co. vs. United States Ins. Co.*, 10 Md. 517, 69 Am. Dec. 174. Mich. *Bloomer vs. Henderson*, 8 Mich. 395, 404, 77 Am. Dec. 453 (distinguished in *Bennett vs. Robinson*, 27 Mich. 26, in a case where the grantor retains possession long after his deed has been recorded); *Wood vs. Clark*, 15 Mich. 104; *Dawson vs. Danbury Bank*, 15 Mich. 489; *Bower vs. Earl*, 18 Mich. 367; *Humphrey vs. Hurd*, 29 Mich. 44. Mo. *Beatie vs. Butler*, 21 Mo. 313, 64 Am. Dec. 234; *Vaughn vs. Tracy*, 25 Mo. 318, 69 Am. Dec. 471. Pa. *Wilson vs. McCullough*, 23 Pa. St. 440, 62 Am. Dec. 347. Tex. *Blankenship vs. Douglas*, 26 Tex. 225, 82 Am. Dec. 608. Va. *Rorer Iron Co. vs. Trout*, 33 Va. 397, 5 Am. St. Rep. 285, 2 S. E. Rep. 713. Wis. *Parker vs. Kane*, 4 Wis. 1, 65 Am. Dec. 283; *Denton vs. White*, 26 Wis. 679; *Quinn vs. Quinn*, 27 Wis. 163.

57. Apparent ownership, evidence of knowledge that it is brought home to second purchaser should go to the jury, and ought to be deemed sufficient information that possessor was owner in fee, under title delivered from former owner.—*Vaughn vs. Tracy*, 22 Mo. 215. See *Maupin vs. Emmons*, 47 Mo. 307; *Masterson vs. West End Narrow Gauge R. Co.*, 5 Mo. App. 70.

58. SAME—BY GRANTOR, is constructive notice to subsequent grantee.—*Daubenspeck vs. Platt*, 22 Cal. 330, 335. See *Turman vs. Bell*, 54 Ark. 278, 280, 26 Am. St. Rep. 40, 15 S. W. Rep. 886; *Bennett vs. Robinson*, 27 Mich. 26.

59. Denied: *Brophy Min. Co. vs. Brophy & Dale G. & S. Min. Co.*, 15 Nev. 101-114.

60. "The continued exclusive possession of vendor, after his former conveyance of the legal title, is a fact in conflict with legal effect of his deed, and is presumptive evidence that he still retains an interest in the premises, and is sufficient to put purchaser upon inquiry, and subject him to the general rule, in case of the party in possession being a stranger to the title as of record."—*Pell vs. McElroy*, 36 Cal. 271. See *Bennett vs. Robinson*, *supra*.

61. By grantor after full conveyance made, is chargeable to purchaser under an execution against him.—*May vs. Sturdivant*, 75 Iowa 116, 39 N. W. Rep. 221.

62. Recorded title by vendor in possession, there is no presumption of title out of vendor, and no inquiry need be made of another person as to his right and title.—*Jeffersonville etc. R. Co. vs. Oyler*, 82 Ind. 405.

63. SAME—BY OTHER THAN GRANTOR, grantee is put on inquiry as to equities of the occupant.—*Peasley vs. McFadden*, 68 Cal. 611, 615, 10 Pac. Rep. 179. See *Gale vs. Shillock*, 4 Dak. 182, 196, 29 N. W. Rep. 661.

64. "Vendee's duty to know who was in possession of the property before making the purchase, and his purchase without ascertaining the fact, must be regarded as the strongest evidence of bad faith on his part. The burden of making the proper inquiry was cast upon him by the mere fact of actual possession on the part of the appellant. If it were allowed that, by failing to acquaint himself with the fact of possession on the part of another other than the vendor, the vendee could avoid the effect of the rule above stated, he could purposely avoid any inquiry on the subject, and thereby evade the rule and its consequences entirely."—*Scheerer vs. Cuddy*, 85 Cal. 270, 272, 24 Pac. Rep. 713.

65. Mortgagee not put upon inquiry where land conveyed is in possession of another than mortgager, possession not being so open and notorious as to come within the rule.—*Hellman vs. Levy*, 55 Cal. 117, 119.

66. However, mortgagee of land, part of which is occupied by a schoolhouse, takes subject to all equities of the school.—*School Dist. vs. Taylor*, 19 Kan. 292.

67. SAME—BY ONE PURCHASING IN BAD FAITH with knowledge of judgment, such knowledge will not be charged to purchaser of the land at judicial sale, where notice of pending suit is imperfect.—*Patterson vs. Brown*, 32 N. Y. 81.

68. SAME—BY MORTGAGER where mortgage a deed absolute with defeasance, constructive notice to purchaser from mortgagee.—*Daubenspeck vs. Platt*, 22 Cal. 331, 335.

69. By tenant of mortgager, is not notice to purchaser of unrecorded agreement between mortgager and mortgagee postponing the sale under the mortgage, even though possession is notice to all.—*Beatie vs. Butler*, 21 Mo. 313, 64 Am. Dec. 234.

70. SAME—BY MORTGAGEE of land, is constructive notice to purchaser at execution sale.—*Hubbel vs. Vaughan*, 42 Mo. 148.

71. SAME—BY TENANT—NOTICE OF LANDLORD'S INTERESTS.—It was formerly held in this state that possession of tenant is not notice of the landlord's title.—*Smith vs. Dall*, 13 Cal. 510, 512, relying on *Hunter vs. Watson*, 12 Cal. 363, 73 Am. Dec. 543.

72. Denied: *Havens vs. Dale*, 18 Cal. 359, 367.

73. Overruled: *Dutton vs. Warschauer*, 21 Cal. 609, 628, 82 Am. Dec. 765.

74. Disapproved: *Conlee vs. McDowell*, 15 Neb. 184, 189, 18 N. W. Rep. 60.

75. Present doctrine is that such possession is notice of the title of the landlord.—*Dutton vs. Warschauer*, 21 Cal. 609, 628, 82 Am. Dec. 765 (overruling *Smith vs. Dall*, 13 Cal.

510, 511); *Landers vs. Bolton*, 26 Cal. 393; *Thompson vs. Ploche*, 44 Cal. 508, 516; *Peasley vs. McFadden*, 68 Cal. 611, 615, 10 Pac. Rep. 179; *Emerio vs. Alvarado*, 90 Cal. 444, 472, 27 Pac. Rep. 356 (as against subsequent purchasers). See *Conlee vs. McDowell*, 15 Neb. 184, 189, 13 N. W. Rep. 60.

76. Such possession by tenant has also been held to be notice to subsequent purchaser, of landlord's unrecorded deed.—See *Morrison vs. Kelly*, 22 Ill. 610, 74 Am. Dec. 169; *Levy vs. Holberg*, 67 Miss. 526, 7 So. Rep. 431.

77. SAME—SAME—NOTICE OF TENANT'S INTERESTS.—Possession of tenant is constructive notice of title in occupant's land.—*Wilkins vs. Bevier*, 43 Minn. 213, 19 Am. St. Rep. 238, 45 N. W. Rep. 157.

78. Is notice of unrecorded lease.—*Dreyfus vs. Hirt*, 82 Cal. 621, 625, 23 Pac. Rep. 193; *Scheerer vs. Cuddy*, 85 Cal. 270, 272, 24 Pac. Rep. 713.

79. "Such possession would, if proven, establish the fact that appellant had actual notice of resident's leasehold interest in the premises, unless appellant pursues with proper diligence, and without obtaining knowledge of such interest, the inquiry such a possession would impose upon him."—*Dreyfus vs. Hirt*, supra. See *Fair vs. Stevenot*, 29 Cal. 486; *Smith vs. Yule*, 31 Cal. 180, 89 Am. Dec. 167; *Thompson vs. Ploche*, 44 Cal. 508; *Palmtag vs. Doutrick*, 59 Cal. 154, 43 Am. Rep. 245.

80. Under contract of purchase, of farming lands, by a person in possession thereunder, is notice to all persons who subsequently become interested in premises, of all rights of such vendee under his contract.—*Moyer vs. Hinman*, 13 N. Y. 180; *Brown vs. Volkening*, 64 N. Y. 76, 83.

81. Lien of judgment subsequently procured against the vendor, upon the lands, is subject to the rights of purchaser in possession; docketing of the judgment is not notice to him, and payments thereafter made by him to judgment debtor, according to the contract, without actual notice of the judgment, are valid as against its lien.—*Moyer vs. Hinman*, supra.

82. SAME—UNDER DEED AND CLAIM OF TITLE.—Constitutes adverse possession, and is notice to all the world of the title claimed. As to the elements of adverse possession and effect, see Code Civ. Proc. §§ 320-326 and notes.

83. Possession of land under deed to entire tract, held by such purchaser from tenant in common in possession, is adverse to rightful owner, though such grantor be tenant in common with such rightful owner.—*Unger vs. Mooney*, 63 Cal. 586, 594, 49 Am. Rep. 100, 105, following *Culler vs. Motzer*, 13 Serg. & R. (Pa.) 356, 15 Am. Dec. 604. See *Ga. Horne vs. Howell*, 46 Ga. 9; *Cain vs. Furlow*, 47 Ga. 674. *Ill. Goewey vs. Urig*, 15 Ill. 242; *Hinkley vs. Green*, 52 Ill. 230-233. *Iowa. Kinney vs. Slotterly*, 51 Iowa 353, 1 N. W. Rep. 626. *Ky. Gill vs. Fontleroy*, 8 B. Mon. 186. *Mass. Bigelow vs. Jones*, 27 Mass. (10 Pick.) 162; *Parker vs. The Proprietors of Locks & Canals*, 44 Mass. (3 Met.) 91, 101, 37 Am. Dec. 121. *Mo. Warfield vs. Lindell*, 30 Mo. 272, 282, 77 Am. Dec. 614, 38 Id. 561, 577, 90 Am. Dec. 443; *Lapeyre vs.*

Paul, 47 Mo. 590; *Long vs. Stapp*, 49 Mo. 508. *Nev. Abernathie vs. Consolidated Va. Min. Co.*, 16 Nev. 260, 267. *N. Y. Bogardus vs. Trinity Church*, 4 Paige Ch. 178. *N. C. Thomas vs. Garvan*, 4 Dev. L. 223, 25 Am. Dec. 708; *Cloud vs. Webb*, 4 Dev. L. 290, 25 Am. Dec. 711. *S. C. Gray vs. Bates*, 3 Strob. L. 500. *Tenn. Welsinger vs. Murphy*, 2 Head 674; *Hubbard vs. Wood*, 1 Sneed 286. *Va. Caperton vs. Gregory*, 11 Gratt. 505. *Eng. Doe ex dem. Reed vs. Taylor*, 5 Barn. & Ad. 575, 2 N. & M. 508, 8 L. J. N. S. K. B. 67, 27 Eng. C. L. 136; *Townsend's Case*, 4 Leon. 32.

84. In case where one in possession, purchasing from tenant in common, occupies property openly and notoriously, makes improvements and lets the property to several tenants, and the tenants occupy the property during the whole period; the purchaser collecting rents, paying taxes and assessments, never accounting to any one; the deed under which he occupies having been duly recorded soon after it was made, the occupation and improvement being unequivocal and open to observation of all; and the alleged tenant in common lives near the property and has full opportunity of observing the conditions, change of possession, occupation by tenants, and of ascertaining all the above mentioned facts, which facts a man ordinarily regardful of his interests would have made himself acquainted with,—is enough to put him on inquiry, according to rule in *Fair vs. Stevenot*, 29 Cal. 486; and if he had inquired he would have discovered the hostile character of the possession. This means of notice constituted notice within the rule in *Smith vs. Yule*, 31 Cal. 180, 184, 89 Am. Dec. 167; and *Pell vs. McElroy*, 36 Cal. 271, 272.—*Unger vs. Mooney*, 63 Cal. 586, 596, 49 Am. Rep. 100.

85. Tenant in common of lands entering upon and exercising acts of ownership over them, the law presumes that he intends nothing beyond an assertion of his rights, and in order to constitute an ouster by him of his cotenants, there must be such acts of exclusive ownership of an unequivocal character, overt and notorious, and of such a nature as, of their own import, to impart information and give notice to his cotenants that he asserts adverse possession, and of disseizin intended against them.—*Bath vs. Valdez*, 70 Cal. 350, 11 Pac. Rep. 724.

86. Where such party in possession gives deed which purports to convey whole of the property thus held, the grantee entering into open and notorious possession of whole without notice of cotenancy in the property, the entry has been held to be in the assertion of an exclusive right in severalty, and equivalent to an express declaration on part of the grantee that he enters claiming whole for himself, and the act constitutes such disseizin as sets statute of limitation in motion in his favor.—*Bath vs. Valdez*, 70 Cal. 350, 11 Pac. Rep. 724.

See Code Civ. Proc. § 313 and note para. 206-210.

87. SAME—SAME—UNDER UNRECORDED DEED IS CONSTRUCTIVE NOTICE to subsequent purchasers from same grantor.—*Hunter vs. Watson*, 12 Cal. 363, 374, 73 Am. Dec. 534;

Woodson vs. McCune, 17 Cal. 333, 304 (br any title); *Havens vs. Dale*, 18 Cal. 359, 367, 368 (bona fide possession with actual inclosure is requisite); *Lestrade vs. Barth*, 19 Cal. 660, 676 (second grantee taking from grantor's heirs); *Landers vs. Bolton*, 26 Cal. 393, 419; *Pell vs. McElroy*, 36 Cal. 268, 271.

See Code Civ. Proc. § 323 and note.

88. *Contra*: *Smith vs. Yule*, 31 Cal. 180, 184, 89 Am. Dec. 167.

89. "Regret has often been expressed that the plain rule of the statute was ever departed from, or that if any exception was made, it had not been confined to cases of actual notice brought directly home to the persons to be charged; but as it has been made to include notices implied from the possession of the prior purchasers, the remedy, if any is needed, is with the legislature; but the court will confine the exception to cases of open, notorious, and exclusive possession—to the exclusion, at least, of the grantor."—*Smith vs. Yule*, 31 Cal. 180, 184, 89 Am. Dec. 167.

90. *Same*—Under lease, open and notorious possession of one half of a tract of land purchased, constructive notice is chargeable to purchaser of whole tract, and the tenant in possession cannot be ejected from his half until his lease has expired.—*Dreyfus vs. Hirt*, 82 Cal. 621, 626, 23 Pac. Rep. 194. See *Scheerer vs. Cuddy*, 85 Cal. 270, 272, 24 Pac. Rep. 713.

91. Constructive notice chargeable to purchaser under foreclosure sale, where lease is set out in notice of sale.—*Riggs vs. Pursell*, 66 N. Y. 193.

92. "Purchasers supposed to have examined lease, and made their bids in view of its provisions; and they are also chargeable with knowledge of what was apparent and obvious upon the premises."—*Riggs vs. Pursell*, *supra*. See *Ky. Craddock vs. Thurlay*, 3 A. K. Marsh. 288. *N. Y. Tompkins vs. Hyatt*, 28 N. Y. 347; *White vs. Seaver*, 25 Barb. 235; *King vs. Bardeau*, 6 John. Ch. 33, 10 Am. Dec. 312; *Winne vs. Reynolds*, 6 Paige Ch. 407. *Eng. Taylor vs. Stibbert*, 2 Ves. Jr. 437, 2 Rev. Rep. 278; *Hale vs. Smith*, 14 Ves. 426.

93. **PURCHASERS — CONSTRUCTIVE NOTICE**—Whatever will put upon inquiry and lead to knowledge is to be regarded as notice to purchaser. Wherever prudent man would be led to make any inquiry, he is required to do so, and is presumed to have knowledge of all that due inquiry would have revealed to him.—*Galland vs. Jackman*, 26 Cal. 79, 85 Am. Dec. 172. See *Ala. Chapman vs. Glassell*, 18 Ala. 50, 48 Am. Dec. 41. *Conn. Booth vs. Barnum*, 9 Conn. 236, 23 Am. Dec. 339; *Litchfield's Appeals*, 28 Conn. 127, 73 Am. Dec. 662. *Ill. McConnell vs. Reed*, 5 Ill. (4 Scam.) 117, 38 Am. Dec. 124; *Morrison vs. Kelly*, 22 Ill. 610, 74 Am. Dec. 169; *Chicago etc. R. Co. vs. Kennedy*, 70 Ill. 362. *Md. Price vs. McDonald*, 1 Md. 403, 54 Am. Dec. 657; *Baxter vs. Sewell*, 3 Md. 341; *Mills vs. Matthews*, 7 Md. 325; *Green vs. Early*, 29 Md. 229; *Abrams vs. Sheehand*, 40 Md. 457. *N. Y. Tuttle vs. Jackson*, 6 Wend. 213, 21 Am. Dec. 306. *Pa. Hood vs. Fahnestock*, 1 Pa. St.

479, 44 Am. Dec. 147; *Wilson vs. McCullough*, 23 Pa. St. 440, 62 Am. Dec. 347; *Gibson vs. Winslow*, 46 Pa. St. 380, 84 Am. Dec. 552; *Lodge vs. Simonon*, 2 Pen. & W. 439, 23 Am. Dec. 36. *S. C. Farr vs. Sims*, 1 Rich. Eq. 123, 24 Am. Dec. 396.

See para. 16-23 this note.

94. Plaintiff who purchases land at execution sale, and credits the purchase money on his execution, is not an innocent purchaser as against party in possession claiming the land under parol contract.—*Barnett vs. Vincent*, 69 Tex. 685, 5 Am. St. Rep. 98, 7 S. W. Rep. 525.

95. Legal presumptions arising from apparent facts relating to a title may be relied upon by the purchaser without going in search of possible facts to test or overthrow the presumption.—*Vassault vs. Austin*, 36 Cal. 691; *Wilkerson vs. Thorp*, 128 Cal. 221, 224, 60 Pac. Rep. 679.

96. Purchase will be with notice where party acts in bad faith, and wilfully or negligently fails to act upon such knowledge or information as he has, which would lead to knowledge of facts affecting the subject of his purchase.—*Chicago etc. R. Co. vs. Kennedy*, 70 Ill. 362.

97. **RECEIPT—PRESUMPTION OF NOTICE FROM**—Receipt printed in large type, and easily read; received in the daytime, or when there was sufficient light to enable the traveler to read it, and he was acquainted with the methods of the business,—is conclusive evidence of the fact that the plaintiff, when he accepted the receipt knew of its limitations.—*Merrill vs. Pacific Transf. Co.*, 131 Cal. 582, 589, 63 Pac. Rep. 915. See *Madan vs. Sherard*, 73 N. Y. 329, 29 Am. Rep. 153.

98. Recital in deed to mortgager, constructive notice of, is chargeable to mortgagee who purchases the land at foreclosure sale.—*Singer vs. Scheible*, 109 Ind. 575, 10 N. E. Rep. 616.

99. Recital in patent, notice of, is chargeable to purchaser.—*Gingrich vs. Foltz*, 19 Pa. St. 38, 57 Am. Dec. 621.

100. **RECORDING DEED—NOTICE BY**—See para. 39, 40 this note.

101. **RESOLUTION TO MACADAMIZE** street, notice of, is not notice of intention to construct gutterways of different material.—*Partridge vs. Lucas*, 99 Cal. 519, 521, 33 Pac. Rep. 1082.

See ante § 13 note par. 7.

102. **SHIPPING RECEIPT**—Constructive notice of contents of receipt from express company is chargeable to party making the shipment.—*Kirkland vs. Dinsmore*, 62 N. Y. 171, 20 Am. Rep. 475.

103. In absence of fraud or imposition, the receipt constitutes contract controlling rights of the parties.—*Kirkland vs. Dinsmore*, *supra*. See *Collender vs. Dinsmore*, 55 N. Y. 200, 14 Am. Rep. 224; *Magnin vs. Dinsmore*, 56 N. Y. 153; *Hinckley vs. New York Cent. R. Co.*, 56 N. Y. 429.

104. **UNRECORDED DEED**—Facts sufficient to put party on inquiry, when.—See par. 42 this note.

§ 20. **EFFECT OF REPEAL.** No statute, law, or rule is continued in force because it is consistent with the provisions of this code on the same subject; but in all cases provided for by this code, all statutes, laws, and rules heretofore in force in this state, whether consistent or not with the provisions of this code, unless expressly continued in force by it, are repealed or abrogated.

This repeal or abrogation does not revive any former law heretofore repealed, nor does it affect any right already existing or accrued, or any action or proceeding already taken, except as in this code provided.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 333, held unconstitutional; see history, § 4, ante.

1. Applied, cited, construed, referred to, etc.
- 2, 3. Construed — Common law — Municipal ordinance.
4. Law not continued in force because consistent.
5. Municipal ordinance or order—Application of section to.
6. Same—Construction of—Rule for.
- 7-10. Repeals existing statutes, when.
- 11, 12. Repeal by implication—Not favored by law.
13. Same—Same—Special and local laws.
14. Same—Construction giving both effect.
15. Same—Exception to a general law.
- 16, 17. Same—Plain positive repugnance.
18. Same—Special act irreconcilably conflicting.
19. Repeal of repealing act—Revivor of original act.
20. Rule not continued because consistent.
21. Statute, etc., not continued because consistent.
22. Subsequent statutes repugnant—Repealing clause not necessary.
- 23-25. Subsequent statute not repugnant—Revision and substitution—Repealing effect.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in:** In matter of Yick Wo, 68 Cal. 294, 298, 303, 58 Am. Rep. 12, 9 Pac. Rep. 139 (construed and commented on); Churchill vs. Pacific Impr. Co., 96 Cal. 490, 492, 31 Pac. Rep. 560 (not applicable); Market St. R. Co. vs. Hellman, 109 Cal. 571, 580, 42 Pac. Rep. 225 (applied); Carpenter vs. Jones, 121 Cal. 362, 364, 53 Pac. Rep. 842 (construed and applied).

2. **CONSTRUED.**—This section applies to common-law rules declared by the codes.—Churchill vs. Pacific Impr. Co., 96 Cal. 490, 493, 31 Pac. Rep. 560.

3. **This section does not apply to an ordinance or order of a municipal corporation, except in so far as its rules enunciate general principles applicable to all statutory matters, general and local.**—In Matter of Yick Wo, 68 Cal. 294, 298, 303, 58 Am. Rep. 12, 9 Pac. Rep. 139.

4. **LAW NOT CONTINUED IN FORCE** simply because consistent with provisions of the code.—See par. 21 this note.

5. **MUNICIPAL ORDINANCE OR ORDER, section applies to when.**—See par. 3 this note.

6. **Construction of.—Rule for same as for construction of statutes.**—In Matter Yick Wo, 68 Cal. 294, 303, 58 Am. Rep. 12, 9 Pac. Rep.

139, sub nom. Yick Wo vs. Hopkins, 118 U. S. 356, bk. 30 L. ed. 220, 6 Sup. Ct. Rep. 1064. See Ill. Stanton vs. Chicago, 154 Ill. 23, 26, 39 N. E. Rep. 987; Illinois Cent. R. Co. vs. Chicago, 169 Ill. 329, 333, 48 N. E. Rep. 492. Wis. Ashland Water Co. vs. Ashland Co., 87 Wis. 209, 211, 58 N. W. Rep. 235.

7. **REPEALS EXISTING STATUTES, WHEN.**—This section repeals existing statutes only as provided for by the code.—Carpenter vs. Jones, 121 Cal. 362, 364, 53 Pac. Rep. 842.

8. **Act on subject not embraced by the code, is not repealed by this section.**—Ibid.

9. **Act 1871-2 not repealed, and a court may refuse to try a civil cause until the jury fees are paid.**—Ibid.

10. **Repealing effect and saving clause of § 288 post, discussed in Market St. R. Co. vs. Hellman, 109 Cal. 571, 580, 42 Pac. Rep. 225.**

11. **REPEAL BY IMPLICATION—Not favored by the law, and where there are two statutes upon the same subject, apparently in conflict, they are to be construed so as to maintain both, if possible to do so without destroying the intent of the latter; if this cannot be done, the latter must prevail.**—Merrill vs. Gorham, 6 Cal. 41, 42; Scofield vs. White, 7 Cal. 400; People vs. San Francisco & S. J. R. Co., 28 Cal. 254, 257; Nicolson Pav. Co. vs. Painter (dis. op.), 35 Cal. 699, 708; In matter of Yick Wo, 68 Cal. 294, 298, 304, 58 Am. Rep. 12, 9 Pac. Rep. 139. See Ala. Norton vs. Mobile, 43 Ala. 598. Colo. County of Saguache vs. Decker, 10 Colo. 149, 153, 14 Pac. Rep. 123. Ind. Water Works Co. vs. Burkhardt, 41 Ind. 364. Mich. Gordon vs. People, 44 Mich. 485, 7 N. W. Rep. 69. Minn. Kerlinger vs. Barnes, 14 Minn. 526. Mo. State vs. Severance, 55 Mo. 378. Neb. People vs. Webster, 3 Neb. 323. N. Y. People ex rel. Kingsland vs. Palmer, 52 N. Y. 83; People vs. Quigg, 59 N. Y. 83, 85. Ohio. Buckingham vs. Steubenville R. Co., 10 Ohio St. 25. Tex. Gill vs. State, 30 Tex. 514. Va. Hogan vs. Guilgon, 29 Gratt. 709. Wis. Goodrich vs. Milwaukee, 24 Wis. 422.

12. **"A statute may be repealed by implication, as well as in direct terms; and it is well settled, that where a subsequent act is repugnant to a prior one, the last operates, without any repealing clause, as a repeal of the first; and where two acts, passed at different times, are not in terms repugnant, yet if it is clearly evident that the last was intended as**

a revision or substitute of the first, it will repeal the first to the extent to which its provisions are revised or substituted."—*Pierpont vs. Crouch*, 10 Cal. 315, 316; *State vs. Conkling*, 19 Cal. 501, 513; *People vs. Burt*, 43 Cal. 560, 563; *In matter Yick Wo*, 68 Cal. 294, 304, 58 Am. Rep. 12, 9 Pac. Rep. 139; *Swinnerton vs. Monterey Co.*, 76 Cal. 113, 116, 18 Pac. Rep. 135. See *Ala. Reynolds vs. McAfee*, 44 Ala. 240. *Cole. Keesa vs. Denver*, 10 Colo. 112, 122, 15 Pac. Rep. 825. *D. C. Jackson vs. Davies*, 4 Mackey, 211. *Fla. Jernigan vs. Holden*, 34 Fla. 530, 538, 16 So. Rep. 413. *Ga. Harrison vs. Walker*, 1 Kelly, 32. *Ill. Sullivan vs. People*, 15 Ill. 233. *Kam. State ex rel. vs. Studdt*, 31 Kan. 245, 246, 1 Pac. Rep. 635. *Mass. Commonwealth vs. Kimball*, 38 Mass. (21 Pick.) 376. *Mich. People vs. Bussell*, 59 Mich. 104, 112, 26 N. W. Rep. 306. *Neb. Johnson vs. Lahn*, 4 Neb. 31; *Brome vs. Cuming Co.*, 31 Neb. 362, 367, 47 N. W. Rep. 1050. *N. H. Lighton vs. Walker*, 9 N. H. 59. *N. Y. Dexter & L. Plank Road vs. Allen*, 16 Barb. 18. *Oreg. State vs. Chadwick*, 10 Oreg. 465, 473; *Little vs. Cogswell*, 20 Oreg. 345, 347, 348, 25 Pac. Rep. 727. *Tex. Rogers vs. Watrous*, 8 Tex. 62, 58 Am. Dec. 100. *Wash. State vs. Carbon Hill Co.*, 4 Wash. 422, 423, 30 Pac. Rep. 728. *Fed. Davless vs. Fairbairn*, 44 U. S. (3 How.) 436, bk. 11 L. ed. 760; *United States vs. Henderson*, 78 U. S. (11 Wall.) 657, bk. 20 L. ed. 237; *State vs. Stoll*, 84 U. S. (17 Wall.) 425, 431, bk. 21 L. ed. 650, 654; *United States vs. Tynen*, 78 U. S. (11 Wall.) 88, bk. 20 L. ed. 153; *Murdock vs. Memphis*, 37 U. S. (20 Wall.) 590, 617, bk. 22 L. ed. 438; *Arthur vs. Homer*, 96 U. S. 137, 140, bk. 24 L. ed. 812; *King vs. Cornell*, 106 U. S. 295, bk. 27 L. ed. 60, 1 Sup. Ct. Rep. 312; *Red Rock vs. Henry*, 106 U. S. 596, 601, bk. 27 L. ed. 253, 1 Sup. Ct. Rep. 434; *Cook Co. Nat. Bank vs. United States*, 107 U. S. 445, 451, bk. 27 L. ed. 537, 539, 2 Sup. Ct. Rep. 561; *Pana vs. Bowler*, 107 U. S. 529, 538, bk. 27 L. ed. 428, 2 Sup. Ct. Rep. 704; *United States vs. Fisher*, 109 U. S. 143, 145, bk. 27 L. ed. 886, 3 Sup. Ct. Rep. 154; *Fussell vs. Gregg*, 113 U. S. 550, 560, bk. 28 L. ed. 993, 5 Sup. Ct. Rep. 631; *United States vs. Bennett*, 12 Blatchf. C. C. 345, 348-349, 24 Fed. Cas. 1090; 65 Terra Cotta Vases, 10 Fed. Rep. 880, 883; *United States vs. Auffmordt*, 19 Fed. Rep. 893, 897, 902; *The Aurania*, 29 Fed. Rep. 98, 103; *Woods vs. Jackson Iron Mfg. Co.*, 1 Holmes C. C. 379, 384, 30 Fed. Cas. 533; *Patterson vs. Tatum*, 3 Sawy. C. C. 164, 169, 18 Fed. Cas. 1331; *United States vs. Cheeseman*, 3 Sawy. C. C. 424, 429, 25 Fed. Cas. 415; *United States vs. Barr*, 4 Sawy. C. C. 254, 256, 24 Fed. Cas. 1016; *Stubblefield vs. Mensies*, 11 Fed. Rep. 268, 275, 8 Sawy. C. C. 49.

12. Special and local laws are not deemed repealed by general legislation, except upon clearest manifestation of an intent by the legislature to effect such repeal, and ordinarily an express repeal of same, with intelligent references to the special act, is necessary to accomplish that end.—*People vs. Quigg*, 59 N. Y. 83, 88; *People vs. Coffee*, 62 How. Pr. (N. Y.) 449.

14. SAME — CONSTRUCTION ENABLING BOTH TO HAVE EFFECT will be given, whenever it can consistently be done.—*Crosby*

vs. Patch, 18 Cal. 438; *Pond vs. Maddox*, 38 Cal. 572, 574; *Home of Inebriates vs. Reis*, 95 Cal. 142, 148, 30 Pac. Rep. 205. *Ala. Iverson vs. State*, 52 Ala. 170. *Ill. Fowler vs. Perkins*, 77 Ill. 271. *Mont. Jobb vs. Meagher Co.*, 20 Mont. 424, 434, 51 Pac. Rep. 1034. *Neb. State ex rel. Cutting vs. LaGrave*, 23 Nev. 88, 42 Pac. Rep. 797.

15. SAME—EXCEPTION TO A GENERAL LAW, existence of which is recognized by an act, is not repugnant to the general law; or if it be, it is only to extent of the exception.—*Ex parte Smith*, 40 Cal. 419, 420; *Capron vs. Hitchcock*, 98 Cal. 427, 432, 33 Pac. Rep. 431.

16. SAME — PLAIN POSITIVE REPUGNANCE existing between two statutes, the latter must prevail.—*Estate of Wixom*, 35 Cal. 320; *Ex parte Smith*, 40 Cal. 419; *People vs. Burt*, 43 Cal. 560, 561; *People vs. Sargent*, 44 Cal. 430; *Ex parte Henshaw (dis. op.)*, 73 Cal. 486, 506, 15 Pac. Rep. 110. See *Ill. Covington vs. East St. Louis*, 78 Ill. 518. *Ind. Water Works Co. vs. Burkhardt*, 41 Ind. 364. *Mo. Pacific R. Co. vs. Cass Co.*, 53 Mo. 17. *Mont. Barden vs. Wells*, 14 Mont. 462, 464, 36 Pac. Rep. 1076 (distinguished). *N. J. Golding vs. College of Chambersburg*, 37 N. J. L. (8 Vr.) 258. *Oreg. Grant Co. vs. Sels*, 5 Oreg. 243; *Hurst vs. Hawn*, 5 Oreg. 275. *S. D. Busby vs. Riley*, 6 S. D. 401, 405, 61 N. W. Rep. 164. *W. Va. Forqueron vs. Donally*, 7 W. Va. 114. See par. 22 this note.

17. Positive repugnance necessary between old and new act must be of such character that they cannot be reconciled, or stand together.—*Wood vs. The United States*, 41 U. S. (16 Pet.) 342, bk. 10 L. ed. 987; *McCool vs. Smith*, 66 U. S. (1 Bl.) 459, bk. 17 L. ed. 213; *Clay Co. vs. Society for Savings*, 104 U. S. 579, bk. 26 L. ed. 856. See *Galena vs. Ex rel. Army*, 72 U. S. (5 Wall.) 705, 709, bk. 18 L. ed. 560, 562; *Western Union Tel. Co. vs. Eyser*, 86 U. S. (19 Wall.) 419, 432, bk. 22 L. ed. 43, 46; *Arthur vs. Homer*, 96 U. S. 137, 140, bk. 24 L. ed. 811, 812; *United States vs. Taylor*, 104 U. S. 216, 218, bk. 26 L. ed. 721, 722; *Red Rock vs. Henry*, 106 U. S. 596, 601, bk. 27 L. ed. 251, 253, 1 Sup. Ct. Rep. 434; *United States vs. Fisher*, 109 U. S. 143, 145, bk. 27 L. ed. 885, 886, 3 Sup. Ct. Rep. 154; *Fussell vs. Gregg*, 113 U. S. 550, 560, bk. 28 L. ed. 993, 997, 5 Sup. Ct. Rep. 631; *In re McConnell*, 9 Bankr. Reg. 287, 294, 15 Fed. Cas. 1297; *United States vs. Cook Co. Nat. Bank*, 9 Biss. C. C. 55, 60, 25 Fed. Cas. 608; *Winchester vs. United States*, 14 Ct. Cl. 41; *Metropolitan Trust Co. vs. Pennsylvania, S. & N. E. R. Co.*, 25 Fed. Rep. 762; *United States vs. Cuba*, 2 Hughes C. C. 489, 491, 25 Fed. Cas. 716; *Dennis vs. Alachua Co.*, 3 Woods C. C. 683, 685, 7 Fed. Cas. 467.

As to repealing clause, see par. 21 this note.

As to subsequent statute not repugnant, see par. 22 this note.

18. SAME — SPECIAL ACT IRRECONCILABLY IN CONFLICT with prior special act repeals former act by implication.—*People vs. Sargent*, 44 Cal. 430, 432, approved in *matter of Yick Wo*, 68 Cal. 294, 304, 58 Am. Rep. 12, 9 Pac. Rep. 139.

19. REPEAL OF REPEALING ACT—RE-

VIVOR OF ORIGINAL ACT.—The repeal of a repealing act does not revive the law repealed by such original repealing act.—*People vs. Hunt*, 41 Cal. 435. See *City of Sacramento vs. Bird*, 15 Cal. 294, 295; *Sullivan vs. People*, 15 Ill. 233; *Tallaman vs. Cardenas*, 14 La. Ann. 109; *Witkouski vs. Witkouski*, 16 La. Ann. 232; *Smith vs. Hoyt*, 14 Wis. 252, 256; *Milne vs. Huber*, 3 McL. C. C. 212, 17 Fed. Cas. 403; *Sedgw. on Stat. & Const.* 124.

See ante § 6 and note; Pol. Code § 388 and note.

20. RULE NOT CONTINUED in force simply because consistent with provisions of the code.—See par. 21 this note.

21. STATUTE, LAW, OR RULE NOT CONTINUED IN FORCE because consistent with provisions of this code on same subject, unless expressly continued in force by it, but is repealed or abrogated.—In matter *Yick Wo*, 68 Cal. 294, 304, 58 Am. Rep. 12, 9 Pac. Rep. 139, sub nom. *Yick Wo vs. Hopkins*, 113 U. S. 356, bk. 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Churchill vs. Pacific Impr. Co.*, 96 Cal. 490, 492, 31 Pac. Rep. 560; *Capron vs. Hitchcock*, 98 Cal. 427, 432, 33 Pac. Rep. 431; *Market St. R. Co. vs. Hellman*, 109 Cal. 571, 580, 42 Pac. Rep. 225; *Carpenter vs. Jones*, 121 Cal. 362, 364, 53 Pac. Rep. 842.

As to statutes continued in force, see Pol. Code § 19 and note.

22. SUBSEQUENT STATUTES REPUGNANT to existing statute repeals it without any repealing clause.—*Pierpont vs. Crouch*, 10 Cal. 315, 316; In matter *Yick Wo*, 68 Cal. 294, 304, 58 Am. Rep. 112, 9 Pac. Rep. 139.

23. SUBSEQUENT STATUTE NOT REPUGNANT—REVISION AND SUBSTITUTION—Repeals, when.—A subsequent statute, which is not repugnant to former one, but it appears from last act that it was intended to take place of, or be a revision of, or substitution

for, the former statute, and the two are so inconsistent that effect cannot be given to both, latter will repeal former so far as revised or substituted.—*Pierpont vs. Crouch*, 10 Cal. 315; *Ex parte Smith*, 40 Cal. 419, 420; *Treadwell vs. Yolo Co.*, 62 Cal. 562; In matter *Yick Wo*, 68 Cal. 294, 304, 58 Am. Rep. 12, 9 Pac. Rep. 139; *Cerf vs. Riechert*, 73 Cal. 360, 363, 15 Pac. Rep. 10; *Ex parte Henshaw* (dis. op.), 73 Cal. 486, 506, 15 Pac. Rep. 110. See *Comm. Cullen vs. State*, 42 Conn. 55. *Dak. Campbell vs. Case*, 1 Dak. 17, 46 N. W. Rep. 504. *Ga. Erwin vs. Moore*, 15 Ga. 361. *Ind. Longlouis vs. Longlouis*, 48 Ind. 60; *Hayes vs. State*, 55 Ind. 99; *Doddell vs. State*, 50 Ind. 333. *Md. Strauss vs. Heis*, 48 Md. 292. *Mass. Commonwealth vs. Kimball*, 38 Mass. (21 Pick.) 376. *Miss. Swann vs. Buck*, 40 Miss. 268. *Nev. State ex rel. Flack vs. Rogers*, 10 Nev. 319, 322, 323. *N. H. Leighton vs. Walker*, 9 N. H. 59. *Tex. Stirman vs. State*, 21 Tex. 734. *W. Va. Coneley vs. Calhoun*, 2 W. Va. 416. *Fed. Norris vs. Crocker*, 54 U. S. (13 How.) 429, bk. 14 L. ed. 210; *United States vs. Tynen*, 78 U. S. (11 Wall.) 88, 95, bk. 20 L. ed. 153; *Murdock vs. Memphis*, 37 U. S. (20 Wall.) 590, bk. 22 L. ed. 429; *United States vs. Barr*, 4 Sawy. C. C. 254, 256, 24 Fed. Cas. 1016.

24. Subsequent act, in order to repeal former one, should appear to have been intended to take the place of or repeal same, or that the two are so inconsistent force and effect cannot be given to both.—*Estate of Wixom*, 35 Cal. 320; *Ex parte Smith*, 40 Cal. 419; *People vs. Burt*, 43 Cal. 560; *People vs. Sargent*, 44 Cal. 430; In matter *Yick Wo*, 68 Cal. 294, 298, 304, 54 Am. Rep. 12, 9 Pac. Rep. 139.

25. Where the statute is of narrower scope, but not repugnant to, it does not repeal former law.—See *Davies vs. Fairbairn*, 44 U. S. (3 How.) 636, bk. 11 L. ed. 760; 65 *Terra Cotta Vases*, 10 Fed. Rep. 880, 883.

§ 21. THIS ACT, HOW CITED. This act, whenever cited, enumerated, referred to, or amended, may be designated simply as "The Civil Code," adding, when necessary, the number of the section.

History: Enacted March 21, 1872.

DIVISION FIRST.

PART I. PERSONS, §§ 25-42.

II. PERSONAL RIGHTS, §§ 43-50.

III. PERSONAL RELATIONS, §§ 55-276.

IV. CORPORATIONS, §§ 283-653.

PART I.

PERSONS.

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| § 25. Minors, who are. | § 34. Contracts of minors made; disaffirmance. |
| § 26. Periods of minority, how calculated. | § 35. When minor may disaffirm. |
| § 27. Adults, who are. | § 36. Cannot disaffirm contract for necessities. |
| § 28. Status of minors, how changed (repealed). | § 37. Nor certain obligations. |
| § 29. Unborn child. | § 38. Contracts of persons without understanding. |
| § 30. Persons made adults by other states, considered as such in this state, when domiciled herein (repealed). | § 39. Contracts of other insane persons. |
| § 31. Minors by the law of other state or country, how considered in this state (repealed). | § 40. Power of persons whose incapacity has been adjudged. |
| § 32. Custody of minors. | § 41. Minors liable for wrongs, but not liable for exemplary damages. |
| § 33. Minors cannot give a delegation of power. | § 42. Minors may enforce their rights. |

§ 25. MINORS, WHO ARE. Minors are:

1. Males under twenty-one years of age;
2. Females under eighteen years of age.

History: Enacted March 21, 1872.

1. General rule—At common law.
2. Girls attain majority when.
3. Same—Contract to restore eighteen-year-old girl—Invalid.

1. GENERAL RULE—At common law is found in 1 Lewis' Bl. Com. 463 and note, 1 Am. & Eng. Encyc. of L. (2d ed.) 927.

2. GIRLS ATTAIN THEIR MAJORITY AT EIGHTEEN years of age, when parent's right of custody ceases.—Dittrich vs. Gobey, 119 Cal. 599, 601, 51 Pac. Rep. 962.

3. Contract to restore an eighteen-year-old daughter to custody of mother, is a contract infringing the personal liberty of the daughter, and void.—See post § 48 note par. 5.

§ 26. PERIODS OF MINORITY, HOW CALCULATED. The periods specified in the preceding section must be calculated from the first minute of the day on which persons are born to the same minute of the corresponding day completing the period of minority.

History: Enacted March 21, 1872; amended Code Commission, Act March 8, 1901, Stats. and Amdts. 1900-1, p. 333, held unconstitutional; see history, § 4, ante.

1. Computation of time—At common law—Precise period of majority.
2. Same—Same—Criticism of rule by Professor Minor.
3. Same—American rule.
4. Same—California rule.
5. Same—In criminal cases.
- 6, 7. Same—In limitation of actions.

1. COMPUTATION OF TIME—AT COMMON LAW—Precise period at which a person attains majority, is first moment of day preceding one on which anniversary of twenty-first birthday

falls.—See Hurburt vs. Torball, 1 Keb. 589, 989, 1 Sid. 162; Fitzhugh vs. Dennington, 6 Mod. 259, 2 Ld. Raym. 1094; Howard's Case, 1 Ld. Raym. 480, 2 Salk. 625; Grant vs. Grant, 4 Younge & C. 256; Roe vs. Hersey, 3 Wills. 274; 7 Bacon's Abr., Tit. "Wills," B; Bing. on Infancy, 2; 1 Lewis' Bl. Com. 463 and note; 1 Chit. Gen. Pr. 766; 1 Jarm. on Wills, 39; 2 Kent Com. 233; Metcalf on Contr. 38; Vin. Abr., Div. G, pl. 20.

2. Criticism of rule by Professor Minor and his annotator, Professor Lile (Notes on Minor's

Inst. p. 103), who strongly urge, in an academical way, that the precise moment of time when a person attains majority, is the first hour of the twenty-first anniversary of the natal day (see 1 Minor's Inst. 514). This is not the only point on which Professor Minor has found it necessary to differ from the common law, or from the savants expounding it. Lord Holt declares the common-law rule "presents an unbroken array of authority which will not be liable to be shaken by any dissent from us."—*Fitz-Hugh vs. Dennington*, 6 Mod. 259.

3. American rule is the same as that of the common law, in the majority, if not all, the states of the union.—See *Del. State vs. Clarke*, 3 Harr. 557. *Ind. Wells vs. Wells*, 6 Ind. 447. *Ky. Hamlin vs. Stevenson*, 4 Dana, 597. *Mass. Bardwell vs. Purrington*, 107 Mass. 425. *N. Y. Phelan vs. Douglass*, 11 How. Pr. 193. *Tex. Ross vs. Morrow*, 85 Tex. 172, 19 S. W. Rep. 1090, 16 L. R. A. 542; *Linhart vs. State*, 33 Tex. Cr. Rep. 504, 27 S. W. Rep. 260. *Fed. In re Richardson*, 2 Story C. C. 571, 20 Fed. Cas. 699.

See par. 5 this note; also 7 Wait Act. & Def. 129.

4. California rule is the same as that at

common law; that is, that a person attains majority first moment of day preceding "majority" anniversary day of natal day.—*Ganahl vs. Soher* (Cal. Dec. 9, 1884), 5 Pac. Rep. 80.

5. In criminal law—Age of responsibility being thirteen, the evidence showing that the person was born between 12 and 2 o'clock a. m. on the night of October 27, 1880, and that crime charged was committed by him at 10 o'clock p. m. of the night of October 26, 1893, he was held to have committed the act (burglary) after he attained the age of thirteen years.—*Linhart vs. State*, 33 Tex. Cr. Rep. 504, 27 S. W. Rep. 260.

6. In limitation of actions against a minor, the statute does not begin to run until he has attained his majority.—*Ganahl vs. Soher*, 68 Cal. 95, 97. 8 Pac. Rep. 650; *Gage vs. Downey*, 94 Cal. 241, 250, 29 Pac. Rep. 635.

See Code Civ. Proc. §§ 328, 352 and notes.

7. But the statute does not commence to run the first moment of the day preceding the "majority" anniversary of the natal day; having the whole of that day in which to bring suit, the statute does not commence to run until the day following.—*Ganahl vs. Soher* (Cal. Dec. 9, 1894), 5 Pac. Rep. 80.

§ 27. ADULTS, WHO ARE. All other persons are adults.

History: Enacted March 21, 1872.

§ 28. STATUS OF MINORS, HOW CHANGED (repealed).

History: Enacted March 21, 1872; repealed March 30, 1874, Code Amends. 1873-4, p. 182.

1. Statutes 1858 (p. 108) embraced only females; the original section extended the privilege to males.

§ 29. UNBORN CHILD. A child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth.

History: Enacted March 21, 1872.

I. In General.

1. Applied, cited, construed, referred to, etc.
2. Bastard child—When in esse.
- 3-5. Born dead—Cæsarean delivery.
6. Charge of portion—Unborn infant takes under.
- 7, 8. "Child"—"Children"—Include what.
9. Executor—Unborn child may be.
10. Guardian—Unborn child may have.
11. Injunction—In favor of unborn child.
12. "Person"—Unborn child not when.
13. "Pregnant" and "quick"—Distinction between.
14. Still-born child—As to effect.
15. Writ de ventre inspiciendo.

II. Action by Unborn Infant.

- 16, 17. To recover for injuries while in womb.
- 18, 19. Same—By administrator.
- 20-24. Same—No precedent for action.
25. Same—Negligence and duty relative.
- 26, 27. Same—Analogy to criminal law—Action does not lie in.
- 28, 29. Same—At common law.

30. Same—Same—A pertinent inquiry.

31, 32. Same—Same—Is infant part of mother or separate life.

33-35. Same—Same—Distinction of cases.

36. Same—Mother having settled or recovered damages.

37, 38. To recover damages for injuries to parent.

39-41. Same—But one action.

42, 43. Same—Statute of limitations.

44-47. Same—Prior recovery by another—California rule.

III. Taking by Present Conveyance.

48, 49. Direct conveyance—Common-law rule—Unborn child.

50-54. Same—Same—Conveyances immediately to grantee—Copyhold lands.

55, 56. Same—Conveyance by husband to wife and children.

57, 58. Same—Deed of gift to donor's grandchildren.

59-61. Conveyance to uses, trusts, and remainders.

62, 63. Same—Provision for after-born children.

- 64-66. Remainder after life-estate—Exercise of power.
- IV. Taking by Descent, Devise, Distribution, etc.
- 67-69. Deed in trust for woman and her children.
- 70, 71. Same—Born when—Caesarean delivery.
72. Charge of portions—Taking by.
- 73, 74. "Children"—What included.
- 75-81. Computation of time—In esse from when.
- 82, 83. Same—Time from when capable of living.
- 84-85. Descent, devise, etc.—Taking by—English doctrine.
- 86-91. Same—Same—American doctrine.
92. Same—Same—Suspension of power of alienation.
- 93-96. Same—Devise "to all," or to a class.
97. Estate in remainder—Unborn child will take.
- 98, 99. Existence of unborn child—Fiction of law.
100. Grandchild—Includes unborn child.
101. Half-blood brother—Unborn—Takes by distribution.
- 102-109. In esse—When child is—Imputed existence.
110. Same—Same—Bastard child.
111. Same—Same—Unborn child not, when.
- 112-114. Lands of unborn infant—Chancery jurisdiction over.
- 115, 116. Same—Held by trustee.
117. Legacy to a class.
118. Limitation to "children," "heirs," or "issue."
119. Partition—Unborn child not in esse to confer jurisdiction.
120. "Persons living at the death"—Includes unborn child.
- 121, 122. Premature birth—Effect of.
- 123-125. Remainders and reversions—Right to take under—Limitation in tail.
- 126, 127. Statute of distribution—Posthumous infant.
128. Statute of succession—Unborn child.
129. Posthumous child—Rights of.
130. Swinburne's rule.
- 131-133. Unborn child—Rights of.
134. Vouched in recovery—Unborn infant may be.

I. IN GENERAL.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Lehmann vs. Schmidt*, 37 Cal. 15, 21, 25 Pac. Rep. 161 (erroneously cited for § 2913); *Estate of Fair*, 132 Cal. 523, 580, 60 Pac. Rep. 442, 64 Id. 1000 (applied); *Daubert vs. Western Meat Co.*, 139 Cal. 480, 483, 96 Am. St. Rep. 154, 69 Pac. Rep. 297, 73 Id. 244 (unborn child not protected by this section where mother, etc., has brought suit and there has been a compromise or recovery without its existence having been known to defendant).

2. BASTARD CHILD NOT IN ESSE while en ventre sa mere.—See par. 110 this note.

3. BORN.—When child considered born in mother's womb.—See para. 102-109 this note.

4. "Children born dead, or at such an early stage of pregnancy as to be incapable of liv-

ing, although they be not actually dead at the time of birth, are considered as if they had never been conceived or born."—*Marsellis vs. Thalheimer*, 3 Paige Ch. (N. Y.) 35, 31 Am. Dec. 66.

See para. 121, 122 this note.

5. Caesarean process,—as to delivery by. see par. 71 this note.

6. CHARGE OF PORTION—INFANT EN VENTRE SA MERE, being born alive, may take under.—*Thellusson vs. Woodford*, 2 Ves. Jr. 319, 4 Ves. Jr. 227, 11 Rev. Rep. 112; 1 Bos. & P. N. R. 357, 4 Rev. Rep. 205, 3 Rev. Rep. 104.

7. "CHILD" includes fœtus.—*R. vs. Berri-man*, 6 Cox C. C. 338.

8. "Child" or "children"—In devise includes a child en ventre sa mere.—See para. 97-100 this note.

9. EXECUTOR—Unborn infant may be.—*Thellusson vs. Woodford*, 2 Ves. Jr. 319. See para. 131-133 this note.

10. GUARDIAN—Unborn child may have.—*Thellusson vs. Woodford*, 2 Ves. Jr. 319.

11. INJUNCTION—Unborn child, may be granted in favor of, to stay waste.—*Wallis vs. Hodson*, 2 Atk. 115; *Thellusson vs. Woodford*, 2 Ves. Jr. 319.

12. PERSON—Child en ventre sa mere is not, within the meaning of a statute giving a cause of action for injuries causing death, to the administrator of the decedent.—*Dietrich vs. Northampton*, 138 Mass. 14, 52 Am. Rep. 242. See par. 16 et seq. this note.

13. "PREGNANT" AND "QUICK" WITH CHILD.—Distinction between is applicable mainly, if not exclusively, in criminal cases, and has no application to cases involving descents, demises, and other gifts.—*Hall vs. Hancock*, 32 Mass. (15 Pick.) 255, 26 Am. Dec. 598.

14. STILL-BORN CHILDREN are not counted in the number of children who succeed and transmit property.—See para. 4, 82, 83, 121, 122 this note.

15. WRIT DE VENTRE INSPICIENDO lay at the ancient law (see Co. Lit. 86) in favor of the heir, or of a devisee; and if the wife was found to be with child, or suspect, she must be removed to a castle, and there safely kept until her delivery.—See *Ex parte Wallop*, 4 Bro. C. C. 90; *Ex parte Bellett*, 1 Cox C. C. 297; *Theaker's Case*, Cro. Jac. 686; *Dursley vs. Berkeley*, 6 Ves. 251, 5 Rev. Rep. 285.

II. ACTION BY UNBORN INFANT.

16. TO RECOVER FOR INJURIES WHILE IN WOMB.—An infant, after birth, cannot maintain an action to recover for injuries to its person, sustained while en ventre sa mere.—*Allaire vs. St. Luke's Hospital* (1900), 184 Ill. 359, 75 Am. St. Rep. 176, 56 N. E. Rep. 638, 48 L. R. A. 225 (vigorous dissent by Mr. Justice Boggs), relying on *Dietrich vs. Northampton* (1884), 138 Mass. 14, 52 Am. Rep. 242, and *Walker vs. Great N. Ry. Co.* (1891), L. R. 28 Ir. 69. See *Gorman vs. Budlong* (1901), 23 R. I. 169, 91 Am. St. Rep. 629, 49 Atl. Rep. 704, 55 L. R. A. 118.

17. In case of *Walker vs. Great Northern Railway Company*, supra, the child's mother was a passenger on defendant's railroad and suffered injuries while on trip, being in advanced state of pregnancy, for which she recovered damages. The infant plaintiff, shortly after its birth, brought suit to recover damages for injuries sustained by it in its own person at time the mother was injured. The declaration was defective and did not disclose the disregard of a duty by the defendant, which it owed to infant plaintiff (see par. 35 this note). The judges were unanimously of the opinion that action could not be maintained. Whether such action could be maintained, under any circumstances, by an infant who was en ventre sa mere at time of alleged injury, was not involved in the issue and not properly before the court, although elaborately and learnedly discussed by some of the judges; and while the case is of interest, although opinions expressed are purely obiter dictum, the judges (except Mr. Chief Justice O'Brien, who expressly declined to commit himself on question) came to the conclusion announced in above paragraph.

18. SAME—BY THE ADMINISTRATOR.—An action by an administrator of a child receiving injuries en ventre sa mere, from effects of which it died shortly after birth, is not maintainable under statute providing that "whenever death of a person shall be caused by wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although death shall have been caused under such circumstances as amount in law to a felony. Every such action shall be brought by and in the name of the executor or administrator of such deceased person." The reason assigned being because the unborn infant, had it survived the injury, would not have had right of action to recover damages,—not being recognized by law as a person capable of having a standing in court.—*Gorman vs. Budlong* (1901), 23 R. I. 169, 91 Am. St. Rep. 629, 49 Atl. Rep. 704, 55 L. R. A. 118, relying on *Walker vs. Great N. Ry. Co.* (1891), L. R. 28 Ir. 69; *Dietrich vs. Northampton* (1884), 138 Mass. 14, 52 Am. Rep. 242; and *Allaire vs. St. Luke's Hospital* (1900), 184 Ill. 359, 75 Am. St. Rep. 176, 56 N. E. Rep. 638, 48 L. R. A. 225.

19. Child en ventre sa mere not a person within the meaning of statute giving cause of action for injuries causing death, to administrator of decedent.—*Dietrich vs. Northampton* (1884), 138 Mass. 14, 52 Am. Rep. 242.

20. Same—No precedent for action.—"No case, so far as we know, has ever decided that, if the infant survived, it could maintain an action for injuries received by it while in its mother's womb."—*Dietrich vs. Northampton*, supra.

21. "This is not conclusive that action may

not be maintained; yet, in view of fact that, as said by Mr. Justice O'Brien (in *Walker vs. Great N. Ry. Co.*, supra), similar circumstances must have before occurred, it is entitled to great weight, especially where right to maintain the action is doubtful."—*Allaire vs. St. Luke's Hospital* (1900), 184 Ill. 359, 75 Am. St. Rep. 176, 56 N. E. Rep. 638, 48 L. R. A. 225.

22. Lord Mansfield declared: "The law would be an absurd science were it founded upon precedents only. Precedents are to illustrate principles, and to give them a fixed authority."—See 1 Kent Com. 477.

23. Mr. Judge Cooley, treating of precedents, among other things says: "New and peculiar cases must also arise from time to time for which the court must find the governing principle, and this may either be referred to some principle previously declared, or to some one which now, for the first time, there is occasion to apply."—Cooley on Torts, pp. 13-15.

24. Same—Same—Nonsequitur.—The reasons given why the action is not maintainable are various, among them the fact that there is no precedent for maintaining such an action, and another one given in the per curiam opinion of Illinois supreme court, that "if the action can be maintained, it necessarily follows that a infant may maintain an action against its own mother for injuries occasioned by the negligence of the mother while pregnant with it"—*Allaire vs. St. Luke's Hospital* (1900), 184 Ill. 359, 75 Am. St. Rep. 176, 56 N. E. Rep. 638, L. R. A. 225.

25. Same—Negligence and duty relative.—Negligence and duty are respectively relative, not absolute, terms. There is no case in which duty to an unborn child can arise out of contract; it must arise, if at all, from relative circumstances and situations of defendant to the infant plaintiff at time of occurrence of wrongful act or negligence complained of. But at that time the infant plaintiff had actual existence, was not a human being, pars viscerum matris, and there is no authority or principle of law to show that a duty arose towards that which was not in fact, and has only a fictitious existence in law, so as to render a negligent act a breach of duty (dictum).—*Walker vs. Great N. Co.* (1891), L. R. 28 Ir. 69.

26. Same—Analogy to criminal law.—A does not lie in, under which law if a born alive afterwards dies of injuries received while in utero, this is murder in the eye of the law who inflicted them (1 Russell on Crime ed. 646, note e). But there is no true analogy between such crime and such a tort. There are offenses against the public; they are offenses which tend to prejudice the whole community, and, as a general rule, criminal intent and act charged to be committed must concur to constitute a crime. On the other hand, is private wrong sustained by some person or body of persons. The result of one is punishment; the result of the other is compensation (dictum).—*Walker vs. Great N. Ry. Co.* (1891), L. R. 28 Ir. 69.

27. Another view, and in direct opposition to the one above announced, is found in dissenting opinion of *Boggs, J.*, in *A*

St. Luke's Hospital (1900), 184 Ill. 359, 75 Am. St. Rep. 176, 56 N. E. Rep. 638, 48 L. R. A. 225.

28. **SAME—AT COMMON LAW** actions were maintainable to recover damages occasioned by injuries to person of the plaintiff, whether inflicted intentionally or through negligence of defendant. The governing principle illustrated by such cases is that the common law, by way of damages, gave redress for personal injuries inflicted by the wrong or negligence of another.—Boggs, J., in *Allaire vs. St. Luke's Hospital*, supra.

29. The case of an infant in womb of its mother, injured by wrongful act or negligence of another, is thought to be clearly within this principle of the common law, unless "the fact that plaintiff was unborn when the alleged injuries were inflicted would have operated to deny a right of action. The argument is that at the common law an unborn child was but a part of the mother, and had no existence or being which could be subject-matter of injury distinct from the mother, and that an injury to it was but an injury to the mother; that in such case there was but one person,—one life,—that of the mother."—See *dis. op.* of Boggs, J., in *Allaire vs. St. Luke's Hospital*, supra.

30. **A pertinent inquiry.**—"If, in contemplation of the common law, life begins as soon as the infant is able to stir in the mother's womb, and that an injury inflicted upon an infant while in womb of the mother shall be deemed murder if the infant survive the wound during prenatal life, but succumbs to it, and dies from it after being born, and if every legitimate infant *en ventre sa mere* is to be deemed as born for all purposes beneficial to the child, why should it be supposed the common law would have denied to an infant, born alive, the right to recover damages for injury inflicted upon it while in womb of the mother? Had such injury, though inflicted on the child while in the mother's womb, been sufficient to cause the death of the infant after it had been born alive, the common law would have regarded the injury as having been inflicted upon a human being, and punished the perpetrator accordingly; and, that being true, why should the infant which survives be denied the right to recover damages occasioned by the same injury?"—Boggs, J., in *Allaire vs. St. Luke's Hospital* (1900), 184 Ill. 359, 75 Am. St. Rep. 176, 56 N. E. Rep. 638, 48 L. R. A. 225, citing, in the discussion, Co. Lit. 36; 3 Co. Inst. 50; 1 Pr. Wms. 343; 10 Am. & Eng. Encyc. of L. (1st ed.) 624.

31. **Is infant part of mother, or separate life?**—"A fetus in the womb of mother may well be regarded as but a part of the bowels of the mother during a portion of the period of gestation; but if, while in the womb, it reaches that prenatal age of viability when the destruction of the life of the mother does not necessarily end its existence also, and when, if separated prematurely, and by artificial means, from the mother, it would be so far a matured human being as that it would live and grow, mentally and physically, as other children generally, it is but to deny a palpable fact to argue there is but one life, and that

the life of the mother. Medical science and skill and experience have demonstrated that at a period of gestation in advance of the period of parturition the fetus is capable of independent and separate life, and that, though within the body of the mother, it is not merely a part of her body, for her body may die in all of its parts and the child remain alive, and capable of maintaining life, when separated from the dead body of the mother."—See Boggs, J., in *Allaire vs. St. Luke's Hospital*, supra.

32. The better opinion and sounder principle is thought to be, that if an infant *en ventre sa mere* is injured in its own proper person by wrongful act or negligence of another, at a period in its fetal existence at which it is capable of independent and separate life, and capable of maintaining that life after separation from body of mother, and is afterwards born into the world suffering from the effects of such injury, an action for damages therefor should be permitted to be maintained in same manner as though the child had been born at time of the injury.—See Boggs, J., in *Allaire vs. St. Luke's Hospital*, supra.

33. **Distinction of cases.**—In the case of *Dietrich vs. Northampton* (1884), 138 Mass. 14, 52 Am. Rep. 224, a woman four or five months advanced in pregnancy slipped and fell by reason of a defect in the highway, in consequence of which there was a miscarriage. The child was alive when delivered, but was not sufficiently advanced in fetal life to survive its premature birth, and died before it was severed from its mother. The person of the infant was not directly injured otherwise than by a communication of the shock received by the mother; and it was held an action to recover damages did not accrue to an administrator of the child.

34. This case can have little if any force or application in a cause where unborn child was injured in its proper person after such a period of gestation as to be capable of life separate and apart from the mother.—See pars. 17, 18 this note.

35. In the case of *Walker vs. Great Northern Railway Company* (1891), L. R. 23 Ir. 69, where a woman, far advanced in pregnancy, took passage on defendant's railway, and there was an accident to train whereby mother was injured, and the child was also injured in its proper person, and thereafter born a permanent cripple, action by the child for damages could have been sustained only on the ground that defendant railway had failed to observe some duty it owed the unborn child, arising generally by reason of defendant's position as common carrier; and the declaration was so defectively drawn that it failed to disclose that the railway company had knowledge, or in exercise of required care and prudence should have had knowledge, of condition of mother and existence of the unborn child, and, for that reason, the case is not regarded as settling, or properly passing upon, the question as to right of an unborn infant, under any circumstances, to maintain an action for injuries sustained while *en ventre sa mere*.

36. SAME—MOTHER HAVING SETTLED OR RECOVERED DAMAGES for injuries to her occasioned by tortious act or negligence, the child, after birth, cannot also maintain an action for injuries sustained by it, while en ventre sa mere, by reason of such tortious act or negligence.—*Daubert vs. Western Meat Co.* (1903), 139 Cal. 480, 96 Am. St. Rep. 154, 69 Pac. Rep. 297, 73 Id. 244; *Walker vs. Great N. Ry. Co.* (1891), L. R. 28 Ir. 69.

37. TO RECOVER DAMAGES FOR INJURIES TO PARENT, resulting in death, while en ventre sa mere, action may be maintained by an infant after his birth.—*Missouri Pac. R. Co. vs. Lehmborg*, 75 Tex. 61, 12 S. W. Rep. 838; *Nelson vs. Galveston, H. & S. A. R. Co.*, 78 Tex. 621, 22 Am. St. Rep. 81, 14 S. W. Rep. 1021, 11 L. R. A. 391.

See post § 3333 and note; also Code Civ. Proc. § 377 and note.

38. The right to recover is wholly statutory. It did not exist at common law; right of action died with the person. Such was the law in England until the passage of Lord Campbell's Act, in 1846. A statute similar to that one is in force in nearly all the states.—*Louisville & N. R. Co. vs. Sanders*, 86 Ky. 259, 5 S. W. Rep. 563; *Nelson vs. Galveston, H. & S. A. R. Co.*, 78 Tex. 621, 22 Am. St. Rep. 81, 14 S. W. Rep. 1021, 11 L. R. A. 391.

39. SAME—BUT ONE ACTION TO BE BROUGHT, contemplated by the statute, means one such action brought by all the beneficiaries, or an action to which they are all made parties.—*Galveston, H. & S. A. R. Co. vs. Kutac*, 72 Tex. 643, 647, 11 S. W. Rep. 127; *Nelson vs. Galveston, H. & S. A. R. Co.*, 78 Tex. 621, 22 Am. St. Rep. 81, 14 S. W. Rep. 1021, 11 L. R. A. 391.

40. Compare: *Daubert vs. Western Meat Co.*, 139 Cal. 480, 96 Am. St. Rep. 154, 69 Pac. Rep. 297, 73 Id. 244.

41. In forceful dissenting opinion in the last case, Mr. Chief Justice Beatty, among other things, says: "If, therefore, an action is brought by some of the heirs without joining others, that is not the action which the statute provides for, and it would be dismissed upon demurrer or plea, unless proper parties were brought in. But if defendant failed to make objection, in either mode, that there was a non-joinder of necessary parties plaintiff, and suffered recovery by part of those entitled to sue, he could not resist a recovery in a subsequent action by the other heirs of their share of the damages, unless he could show that plaintiffs in second action were estopped by some fraud or laches on their part. In this case the present plaintiff cannot possibly have been guilty of fraud or laches in connection with the former suit, for she was not born when the judgment was given, and if there was any fault it was the fault of the defendant in failing to make the issue, and exact proof that the mother was sole heir."

42. SAME—STATUTE OF LIMITATION against an action by posthumous child, to recover damages for death of its parent, resulting from injuries inflicted by tortious act or negligence of defendant, while infant plaintiff was en ventre sa mere, does not commence

to run against him from date on which cause of action occurred, merely because his mother was capable of commencing suit at that time.—*Nelson vs. Galveston, H. & S. A. R. Co.*, 78 Tex. 621, 22 Am. St. Rep. 81, 14 S. W. Rep. 1021, 11 L. R. A. 391.

43. Compare: *Louisville & N. R. Co. vs. Sanders*, 86 Ky. 259, 5 S. W. Rep. 563, in which it was held that "as the statute giving right of action was punitive, there could be but one recovery. And as there is but one cause of action, and right to sue upon it is given to either of three persons, and there is one in esse who can sue, and fails to do so within one year from the accrual of cause of action, all are barred, although others may be under disability of minority."

44. SAME—PRIOR RECOVERY BY ANOTHER—California rule.—Where child is unborn, and its existence is unknown to defendant at time that judgment in favor of widow, or other heirs, is given for damages for negligent act resulting in the death of father, an action cannot be maintained by the child after its birth, notwithstanding provisions of above section of this code.—*Daubert vs. Western Meat Co.*, 139 Cal. 480, 483, 96 Am. St. Rep. 154, 69 Pac. Rep. 297, 73 Id. 244 (vigorous dissent by Beatty, C. J.).

45. Compare: *Nelson vs. Galveston, H. & S. A. R. Co.*, 78 Tex. 621, 22 Am. St. Rep. 81, 14 S. W. Rep. 1021, 11 L. R. A. 391.

46. "Whether same rule would apply in case where other heir was in being, or whether the existence of an unborn child was known to the defendant, at the time of previous action and trial, are questions which are not intended to be here decided."—*Daubert vs. Western Meat Co.*, 139 Cal. 480, 483, 96 Am. St. Rep. 154, 69 Pac. Rep. 297, 73 Id. 244.

47. The vigorous dissent of Mr. Chief Justice Beatty, in the above case, shows that the unborn infant is entitled to as full protection under above section of the code, and its rights should receive as much consideration from the court, as the rights of tortious or negligent defendant under § 377 of the Code of Civil Procedure. He says, in part: "The appellant, to sustain her appeal, must establish two propositions: 1. If a man's death is caused by wrongful act or neglect of another, and he leaves surviving him a wife and living child, and the wife sues alone for the damages recoverable under § 377 of Code of Civil Procedure, a recovery by her in that action is not a bar to another action by the child; and 2. A child conceived, but not yet born at the time of the father's death, or at the time of the judgment in favor of the mother, has in this respect the same rights as a child living at the time of the father's death."

See also par. 41 this note.

III. TAKING BY PRESENT CONVEYANCE.

48. DIRECT CONVEYANCE—COMMON-LAW DOCTRINE.—Unborn child taking property by direct conveyance or deed of gift, while consistent with refinements of the civil law, and those doctrines of our law borrowed from the civil law, is wholly at variance with the principles, precepts, and maxims of the

common law—See Co. Inst. 50; Co. Lit. 2, 3; Perkins §43; Touch. a. 9, no. 4; Shep. Touch. 325.

49. In North Carolina the common-law rule is modified by statute, and on deed to a woman and her children, a child en ventre sa mere will take thereunder.—Heath vs. Heath, 114 N. C. 547, 19 S. E. Rep. 155.

50. In conveyances immediately and directly to grantee the common-law rule, requiring grantee in being to take title, has been generally, if not universally, adopted in this country.—See 9 Am. & Eng. Encyc. of L. (2d ed.) 131.

51. By the common law, to constitute valid conveyance, there must be (1) a grantor, (2) a grantee, (3) a thing to be granted, and (4) there must be an actual delivery. Hence a conveyance or deed of gift to an unborn child could not be made.—See Dupree vs. Dupree, 1 Busb. (N. C.) Eq. 164, 59 Am. Dec. 590.

52. Unborn child cannot take present grant of lands by deed, because it has no such existence as enables it to do so, although en ventre sa mere when instrument was executed.—Morris vs. Caudle, 178 Ill. 1, 9, 69 Am. St. Rep. 282, 52 N. E. Rep. 1036, 44 L. R. A. 489; Faloon vs. Simshauser, 130 Ill. 649, 22 N. E. Rep. 835. See Grimes vs. Orrand, 2 Heisk. (Tenn.) 298.

53. Same principle in Newsom vs. Thompson, 2 Ired. (N. C.) L. 277; Lillard vs. Ruckers, 9 Yerg. (Tenn.) 64.

54. Copyhold lands may be surrendered immediately to use of an infant en ventre sa mere, because such surrender is merely executory, and nothing vests until admittance; title of surrenderer vests in third person until birth of infant and its capacity to take the estate.—Dupree vs. Dupree, Busb. (N. C.) Eq. 164, 59 Am. Dec. 590.

55. SAME—CONVEYANCE BY HUSBAND TO WIFE AND CHILD OR CHILDREN "BEGOTTEN" OF HIM, child being afterwards born, eo instanti becomes a joint-tenant with the mother in the land, by legal effect of the deed to it, as prospective co-purchaser.—Powell vs. Powell, 5 Bush (Ky.) 619, 96 Am. Dec. 372.

56. Denied: In Davis vs. Hardin, 80 Ky. 672, in which case the court holds that the mother takes an estate for life, with remainder in fee to the children.

57. Deed of gift to donor's grandchildren—Conceived child, afterwards born alive, takes no part thereunder.—Dupree vs. Dupree, Busb. (N. C.) Eq. 164, 59 Am. Dec. 590.

58. The court say: "He claims by purchase, as distinguished from descent, succession or distribution. . . . His claim is put upon the ground that he was en ventre sa mere at date of the deed, and was in contemplation of law in esse, and capable of acquiring a right of property. For, according to the calculation by ordinary course of nature, he was conceived six days before date of deed, and the question is, can an atom, a thing in its mother's womb, six days old, acquire right of property by common-law conveyance,"—and answered as in the above paragraph.

59. CONVEYANCE TO USES, TRUSTS, REMAINDERS, ETC.—An unborn child will take in those cases where there is a conveyance to uses, trusts, or remainders, and there is no intervening life-estate.—See post §§ 778 et seq., 847 and notes.

60. Conveyance to uses, rule is otherwise than in direct conveyance to a person, because, legal estate vesting in trustee, requirements of common law are satisfied, and the use is allowed to shift so as to include a child en ventre sa mere.—Gay vs. Baker, 5 Jones (N. C.) Eq. 344, 78 Am. Dec. 229 (the court saying that Dupree vs. Dupree,—see pars. 57, 58 this note,—"is not opposed to the rule of construction here laid down, but will be found, upon examination, to be in accordance with it").—See Hurst vs. Satterwhite, 85 N. C. 75.

61. "This was, as I understand it, an indirect adoption of the more humane and practical rule of the Civil Code, which regarded the child in the womb as already born for all beneficial purposes."—Gay vs. Baker, 5 Jones (N. C.) Eq. 344, 78 Am. Dec. 229.

62. Same—Provision after-born children shall share equally, contained in deed of gift of land to children by name, is more in nature of a direction or command to children named than an attempt to convey to unborn children, and vests entire estate in children named.—Hall vs. Thomas, 3 Strobb. (S. C.) L. 101.

63. Same—Same—Might create trust in equity in such living children to share with such as should be afterwards born.—Ibid.

64. Same—Remainder after life-estate, in favor of unborn child, vests title to such remainder in child en ventre sa mere.—See vs. Derr, 57 Mich. 369, 24 N. W. Rep. 108 (under Michigan Statute).

65. Same—Same—Deed to man and wife for life, or life of survivor, and after their decease to their children begotten by each other, and their heirs, vests in children then living the estate in remainder, subsequently to be opened to let in subsequently-born children.—Graham vs. Houghtalin, 30 N. J. L. (1 Vr.) 552 (nothing in case to show whether any child en ventre sa mere at time deed was executed).

66. But where donor of power to create fund for benefit of her issue to be born before the appointment, appointed the fund to her daughter for life, and after such daughter's death, to the latter's children in equal shares on their attaining twenty-one years of age, and in case any should die before attaining that age leaving issue, the share to go to such issue, and vest on attaining twenty-one years of age, the daughter having at date of deed had two children born, with one en ventre sa mere, and three others afterwards born,—the court held that children born and en ventre sa mere were the only children who could share in the fund.—In re Francombe, L. R. 9, Ch. Div. 652, 47 L. J. Ch. N. S. 328.

IV. TAKING BY DESCENT, DEVISE, AND DISTRIBUTION.

67. A DEED IN TRUST FOR WOMAN AND HER CHILDREN, she having children at the time, will include child en ventre sa mere,—nothing appearing on face of deed to show a

contrary intention,—and vest title in them as tenants in common; but does not include children afterwards begotten.—*Gay vs. Baker*, 5 Jones (N. C.) Eq. 344, 78 Am. Dec. 229, the court refers to *Dupree vs. Dupree*, Busb. (N. C.) Eq. 164, 59 Am. Dec. 590, pars. 57, 58 this note,—and declares it "is not opposed to the rule of construction here set down."

68. **Distinguishing:** *Ponton vs. McLennon*, 2 Dev. & B. (N. C.) Eq. 416; *Chestnut vs. Mearse*, 3 Jones (N. C.) Eq. 416, and *Coakley vs. Daniel*, 4 Jones (N. C.) Eq.

69. **BASTARD CHILD CONCEIVED** in esse, when.—See par. 110 this note.

70. **BORN—Child in mother's womb** is for all purposes for its own benefit.—*Lancashire vs. Lancashire*, 5 Durnf. & E. (5 T. R.) 49, 2 Rev. Rep. 535.

See pars. 102-109 this note.

71. **Cæsarean process—Delivery of child** by from dead body of its mother, the child, if it live, is entitled to all rights same as though naturally delivered, so far as its rights and interests are concerned; but it does not serve the interests of another, where interests of such other are dependent upon the mother's dying leaving issue. Thus, rights of husband as tenant by the courtesy, depending upon issue being born before death of wife, will not be conserved by such delivery; because at instant of death of wife there was no "issue," although the child was alive and hearty within its mother's dead body; and for that reason there will be no right to an estate by courtesy. But entire estate descends to infant while yet in mere uterus.—*Marsellis vs. Thalhimer*, 2 Paige Ch. (N. Y.) 35, 21 Am. Dec. 66; In matter of *Winnie*, 1 Lans. (N. Y.) 513.

72. **CHARGE OF PORTIONS**, infant en ventre sa mere may take under.—*Thellusson vs. Woodford*, 4 Ves. Jr. 227, 11 Id. 112, 1 Bos. & P. (N. R.) 357, 4 Rev. Rep. 205, 3 Rev. Rep. 104.

73. **"CHILDREN"** includes child en ventre sa mere.—*Heath vs. Heath*, 114 N. C. 547, 19 S. E. Rep. 155.

74. **Devise to children** does not comprehend posthumous child, so as to prevent it from claiming under act of assembly as permitted by the will.—*Armistead vs. Dangerfield*, 3 Munf. (Va.) 20, 5 Am. Dec. 501.

See pars. 91, 111 this note, and post §1403 and note.

75. **COMPUTATION OF TIME**—"Child" includes a fetus.—*R. vs. Berriman*, 6 Cox C. C. 338.

76. **Distinction between "pregnant" and "quick with child"** is not applicable in cases involving descent, devise, etc.—See par. 13 this note.

77. **From conception child is in esse**.—*Hall vs. Hancock*, 32 Mass. (15 Pick.) 255, 26 Am. Dec. 598; *Marsellis vs. Thalhimer*, 2 Paige Ch. (N. Y.) 35, 21 Am. Dec. 66; *Hone vs. Van Schaick*, 3 Barb. Ch. (N. Y.) 488; *Harper vs. Archer*, 4 Smed. & M. (Miss.) 99, 43 Am. Dec. 472. See *R. vs. Berriman*, 6 Cox C. C. 338 (a fetus).

See pars. 102-109.

78. **If subsequently born alive**, at a stage of development capable of living.—*Hone vs. Van Schaick*, supra; *Harper vs. Archer*, supra.

79. **If for benefit of child that it should be so considered**.—*Marsellis vs. Thalhimer*, 2 Paige Ch. (N. Y.) 35, 21 Am. Dec. 66. See *Gillespie vs. Nabors*, 59 Ala. 441, 443, 31 Am. Rep. 21; *Harper vs. Archer*, 4 Smed. & M. (Miss.) 99, 43 Am. Dec. 472; *Hone vs. Van Schaick*, 3 Barb. Ch. (N. Y.) 488, 509; *Swift vs. Duffield*, 5 Serg. & R. (Pa.) 38.

80. **"From conception, infant is in esse** for purpose of taking any estate which is for his benefit, whether by descent, devise, or under statute of distribution; provided, however, that the infant be born alive, and after such period of fetal existence that its continuance in life might reasonably be expected."—*Harper vs. Archer*, 4 Smed. & M. (Miss.) 99, 109, 43 Am. Dec. 472, 4 Am. & Eng. Encyc. of L. (2d ed.) 719.

See par. 99 this note.

81. **Same—Conception presumed to have taken place** at period nine months prior to birth; in absence of evidence rebutting this presumption it is conclusive.—*Hall vs. Hancock*, 32 Mass. (15 Pick.) 255, 26 Am. Dec. 598.

82. **Born within six months after conception child is considered**, by the civil law, incapable of living, and unless it actually survive sufficient time to rebut this presumption, can neither inherit nor transmit property.—*Marsellis vs. Thalhimer*, 2 Paige Ch. (N. Y.) 35, 21 Am. Dec. 66.

83. **"Nine months is usual period of gestation, and we think it right to place the commencement of fetal existence to that period before birth.** It was formerly a question at what time the embryo might be said to be alive, and quickening was selected as surest test of life, and earliest point of time at which it would be deemed to be in existence. But it is now settled, both in England and in this country, that from time of conception the infant is in esse, for purpose of taking any estate which is for his benefit, whether by descent, devise, or under statute of distribution; provided, however, that the infant be born alive, and after such period of fetal existence that its continuance in life might be reasonably expected."—*Harper vs. Archer*, 4 Smed. & M. (Miss.) 99, 43 Am. Dec. 472.

84. **DESCENT, DEVISE, DISTRIBUTION—TAKING BY**.—**Early English Doctrine**.—Unborn child not regarded in esse, unless it appeared from words of will itself to have been so intended.—*Bennett vs. Honeywood*, Amb. 708; *Pierion vs. Garnett*, 2 Bro. C. C. 38; *Cooper vs. Forbes*, 2 Bro. C. C. 63; *Freemantle vs. Freemantle*, 1 Cond. Ch. Cas. 248; *Musgrove vs. Parry*, 2 Vern. 710; *Ellison vs. Airey*, 1 Ves. Sr. 111.

85. **Later English doctrine holds that**, for purposes of inheritance, or where its benefit is to be furthered, a child en ventre sa mere is regarded as in esse.—*Wallis vs. Hodson*, 2 Atk. 115, Doe ex dem. *Clarke vs. Clarke*, 2 H. Bl. 399, 3 Rev. Rep. 430; *Clarke vs. Blake*, 2 Bro. C. C. 320, 2 Ves. Jr. 673; *Rawlins vs. Rawlins*, 3 Cox Ch. 425; *Scatterwood vs. Edge*, 1 Salk. 229; *Snow vs. Tucker*, 1 Sid. 163; *Troves*

vs. Butts, 1 Sim. & S. 181; Long vs. Blackall, 1 Durnl. & E. (7 T. R.) 100, 3 Ves. Jr. 486, 4 Rev. Rep. 73; Miller vs. Turner, 1 Ves. Sr. 85; Burnt vs. Mann, 1 Ves. Sr. 156; Thellusson vs. Woodruff, 4 Ves. 227, 11 Id. 112, 1 Bos. & P. (N. R.) 357, 4 Rev. Rep. 205, 8 Rev. Rep. 104; Beale vs. Beale, 1 Pr. Wms. 244; Northey vs. Strange, 1 Pr. Wms. 340; Burdet vs. Hopegood, 1 Pr. Wms. 486; Crook vs. Hill, L. R. 3 Ch. Div. 773; Pearce vs. Carrington, L. R. 8 Ch. App. 969.

86. American doctrine—Unborn child, from time of its conception, is to be considered in esse,—although in utero matris and not in rerum natura,—for purpose of taking by descent, devise, or under statute of distribution.—Harper vs. Archer, 4 Smed. & M. (Miss.) 99, 43 Am. Dec. 472. See Ga. Grace vs. Rittenberry, 14 Ga. 232. Md. Chrisfield vs. Storr, 36 Md. 129. Mass. Hall vs. Hancock, 32 Mass. (15 Pick.) 255. N. Y. Mason vs. Jones, 2 Barb. 229; Hone vs. Van Schaick, 3 Barb. Ch. 488; Steadfast vs. Nicoll, 3 John. Cas. 18; Marsellis vs. Thalheimer, 2 Paige Ch. 35, 21 Am. Dec. 66; Jenkins vs. Freyer, 4 Paige Ch. 47. N. C. Petway vs. Powell, 2 Dev. & B. Eq. 304, 308, approved Nelson vs. Nelson, 6 Ired. Eq. 409; Haley vs. Haley, Phil. Eq. 180; distinguished Hinton vs. Lewis, 7 Ired. Eq. 184; Robinson vs. McDiarmid, 87 N. C. 455. Ohio. Starling vs. Price, 16 Ohio St. 29. Pa. Baker vs. Pearce, 30 Pa. St. 173; Land's Appeal, 85 Pa. St. 339; Swift vs. Duffield, 5 Serg. & R. 38. Tenn. Smart vs. King, Meigs (Tenn.) 149, 33 Am. Dec. 137.

87. SAME—DEVISE TO "CHILDREN."—General rule.—"An immediate gift to children (i. e. immediate in point of enjoyment), whether of person living or dead; and whether it be to children simply, or to all children; and whether there be gift over or not, comprehends children living at testator's death (if any), and those only; notwithstanding some early cases, which make time of making of will period of ascertaining the objects."—Powell on Devise, 302; Redf. Wills, Pt. 2, p. 330; 1 Roper on Legacies 48-49.

88. American and English cases support this rule.—See Benson vs. Wright, 4 Md. Ch. Dec. 278; Shotts vs. Poe, 47 Md. 513, 28 Am. Rep. 485; Viner vs. Francis, 3 Cox Ch. 190, 2 Rev. Rep. 29; Mann vs. Thompson, Kay 638; DeWitte vs. DeWitte, 11 Sim. 41; Radcliffe vs. Buckley, 10 Ves. 195, 7 Rev. Rep. 383; Davidson vs. Dallas, 14 Ves. 576, 9 Rev. Rep. 350.

89. "Child" includes a child en ventre sa mere.—Petway vs. Powell, 2 Dev. & B. (N. C.) Eq. 308; Crook vs. Hill, L. R. 3 Ch. Div. 773.

90. Child en ventre sa mere will take under devise to "children."—Ala. Nelson vs. Iverson, 24 Ala. 9, 60 Am. Dec. 442. Ark. Barton vs. Barton, 23 Ark. 580. Ind. Biggs vs. McCarty, 36 Ind. 352, 44 Am. Rep. 320. Ky. Haskins vs. Spiller, 1 Dana 172. La. Milne vs. Milne, 17 La. 46; Seveer vs. Douglas, 44 La. Ann. 609. Mass. Hall vs. Hancock, 32 Mass. (15 Pick.) 255, 26 Am. Dec. 598. Mich. Chambers vs. Shaw, 52 Mich. 18, 17 N. W. Rep. 223. Miss. Harper vs. Archer, 2 Smed. & M. (Miss.) 99, 108, 43 Am. Dec. 472. N. J. Randolph vs. Randolph, 40 N. J. Eq. (13 Stew.) 73. N. Y. Byrnes vs. Stilwell, 103 N. Y. 453, 57 Am. Rep. 760, 9 N. E. Rep.

241; Hone vs. Van Schaick, 3 Barb. Ch. 488; Steadfast vs. Nicoll, 3 John. Cas. 18; Marsellis vs. Thalheimer, 2 Paige Ch. 35, 21 Am. Dec. 66; Jenkins vs. Freyer, 4 Paige Ch. 47, 52. N. C. Petway vs. Powell, 2 Dev. & B. Eq. 308. Pa. Barker vs. Pearce, 30 Pa. St. 173, 72 Am. Dec. 691; Pemberton vs. Parke, 5 Binn. 601, 6 Am. Dec. 432; Swift vs. Duffield, 5 Serg. & R. 39; McKnight vs. Read, 1 Whart. 220. Tenn. Smart vs. King, Meigs 149, 33 Am. Dec. 137. Eng. Wallis vs. Hodson, 2 Atk. 115; Doe ex dem. Clarke vs. Clarke, 2 H. Bl. 399, 3 Rev. Rep. 430; Reeve vs. Long, 1 Salk. 227; Tower vs. Batts, 1 Sim. & S. 181; Clarke vs. Blake, 3 Bro. C. C. 320, 2 Ves. Jr. 673; Burdett vs. Hopegood, 1 Pr. Wms. 486; In re Burrows (1895), 2 Ch. 497; Crook vs. Hill, L. R. 3 Ch. Div. 773, 778, 18 Moak's Eng. Rep. 815.

Illegitimate child en ventre sa mere not included in a gift to "children," in the absence of provisions in will showing an unmistakable intention on part of testator to include them.—Hill vs. Crook, L. R. 6 H. L. Cas. 265, 276-277, affg. L. R. 6 Ch. 311, 7 Moak's Eng. Rep. 1. See Beachcroft vs. Beachcroft, 1 Madd. 430, 16 Rev. Rep. 242; In matter Overhill's Trust, 4 Sm. & G. 362; Fraser vs. Pigott, Young Excheq. Rep. 354, 34 Rev. Rep. 290.

91. DEVISE IN GENERAL TERMS TO TESTATOR'S CHILDREN, will not include a child en ventre sa mere so as to prevent it from taking under the statute.—Armistead vs. Dangerfield, 3 Munf. (Va.) 20, 5 Am. Dec. 501. See Shelby vs. Shelby, 1 B. Mon. (Ky.) 268; Hansford vs. Elliott, 9 Leigh (Va.) 99.

See pars. 74, 100, 111 this note.

92. Same—Suspension of power of alienation.—"The fact that child of either of testator's daughters, or of either of his brothers or sisters, may be en ventre sa mere at death of his last surviving child, will not suspend power of alienation for larger period than during lives of persons in being at death of testator. Such fact cannot be invoked to impair validity of a trust. It is only power of alienation which the statute forbids to be suspended, and this power is not suspended by reason of any difficulty or inconvenience that may attend its exercise. The suspension of alienation, which is aimed at by the statute, is such as is caused by instrument creating the estate, and not such as arises from some disability on part of person in whom estate is vested, such as infancy or other incapacity; or from any other cause outside the instrument."—Estate of Fair, 132 Cal. 523, 580, 60 Pac. Rep. 442, 64 Id. 1000. See Toland vs. Toland, 123 Cal. 140, 55 Pac. Rep. 681; Moore vs. Littell, 41 N. Y. 66; Beardsley vs. Hotchkiss, 96 N. Y. 201, 214.

93. Devise "to all and every such child or children of A as shall be living at time of my death," includes child en ventre sa mere.—Doe ex dem. Clarke vs. Clarke, 2 H. Bl. 399, 3 Rev. Rep. 480.

See par. 90 this note.

94. Devise to any son of A begotten and born at time of A's attaining majority, held to include one born three months thereafter.—Whitelock vs. Heddon, 1 Bos. & P. 243; Tower vs. Butts, 1 Sim. & S. 181, 1 L. J. Ch. 115, 24

Rev. Rep. 164. See *Pearce vs. Carrington*, L. R. 8 Ch. 969, 42 L. J. Ch. 518.

95. Devise to brothers and sisters alike—Shares to vest when they respectively attained twenty-one years of age, held that child en ventre sa mere when the oldest attained the age of twenty-one years, was excluded; that none other than those born at that time were included.—In re *Gardner's Estate*, L. R. 20 Eq. 647, relying on *Gimblett vs. Parton*, L. R. 12 Eq. 431 (both of these cases are out of harmony with other English cases and doctrine of American cases).

See pars. 85-88 this note.

96. Devise to "grandchildren" includes grandchild en ventre sa mere.—*Smart vs. King*, Meigs (Tenn.) 149, 33 Am. Dec. 137.

97. ESTATE IN REMAINDER—Child en ventre sa mere will take same as child born in lifetime of testator.—*Steadfast vs. Nicoll*, 3 John. Cas. (N. Y.) 18; *Barker vs. Pearce*, 30 Pa. St. 178, 72 Am. Dec. 691.

98. EXISTENCE OF CHILD BEFORE BIRTH—A fiction of law derived from the civil law for purpose of providing for and protecting the child, in hope and expectation that it will be born alive, and be capable of enjoying those rights which are thus preserved.—*Marsellis vs. Thalheimer*, 2 Paige Ch. (N. Y.) 35, 21 Am. Dec. 66. See *Ala. Gillespie vs. Nabors*, 59 Ala. 441, 31 Am. Rep. 20. *Mass. Hall vs. Hancock*, 32 Mass. (15 Pick.) 255, 26 Am. Dec. 598. *N. Y. Mason vs. Jones*, 2 Barb. 227; *Hone vs. Van Schaick*, 3 Barb. Ch. 488, 489; *Bowman vs. Tallman*, 27 How. Pr. 212; *Jenkins vs. Freyer*, 4 Paige Ch. 47. *Pa. McKnight vs. Read*, 1 Whart. 213. *Va. Armistead vs. Dangerfield*, 3 Munf. 20, 5 Am. Dec. 501. *Eng. Blossom vs. Blossom*, 2 De G. J. & S. 665.

99. Existence inchoate and conditional upon being born alive after such period of fetal existence that its continuance in life may reasonably be expected.—*Gillespie vs. Nabors*, 59 Ala. 441, 31 Am. Rep. 20; *Harper vs. Archer*, 4 Smed. & M. (Miss.) 99, 43 Am. Dec. 472; *Hone vs. Van Schaick*, 3 Barb. Ch. (N. Y.) 488, 489.

See par. 80 this note.

100. GRANDCHILD includes child en ventre sa mere.—See par. 96 this note.

101. HALF-BLOOD brother en ventre sa mere will take by statute of distribution.—See par. 126 this note.

102. IN ESSE—Child en ventre sa mere is, when.—See pars. 75-83 this note.

103. At death of testator, when.—See post § 1403 and note.

104. Not in esse to confer jurisdiction on court in partition.—See par. 119 this note.

105. In esse if afterwards born alive.—*Harper vs. Archer*, 4 Smed. & M. (Miss.) 99, 109, 43 Am. Dec. 472; *Mason vs. Jones*, 2 Barb. (N. Y.) 229, 252; *Hone vs. Van Schaick*, 3 Barb. Ch. (N. Y.) 488, 508; *Jenkins vs. Freyer*, 4 Paige Ch. (N. Y.) 47, 53; *Hawley vs. James*, 5 Paige Ch. (N. Y.) 318, 465.

106. "Although filius in utero matris est pails viscerum, yet the law in many cases hath consideration of him in respect of the apparent expectation of his birth."—*Earl of Bedford's Case*, 7 Co. Rep. 8b.

107. "This imputed existence in esse to an unborn child is a fiction of the civil law, which regards an unborn child as born for some (not all) purposes connected with acquisition and preservation of real or personal property" (in discussion).—*Walker vs. Great N. Ry. Co.* (1891), L. R. 28 Ir. 69.

108. "According to this fiction an unborn child may, in civil law, at same moment be regarded as in esse and not in esse; for its own benefit in esse, to its prejudice not in esse, and unless for benefit of itself not in esse."—*Walker vs. Great N. Ry. Co.* (1891), L. R. 28 Ir. 69.

109. English decisions holding an unborn child is for its own benefit regarded as born, is found in the ecclesiastical, admiralty, and chancery courts, in which civil law prevailed, and seldom recognized in common law courts.—*Walker vs. Great N. Ry. Co.* (1891), L. R. 28 Ir. 69.

110. Same—Bastard child while en ventre sa mere not regarded as in esse, because such a child could not take at common law until he got a reputation of being such a one's child, and such a reputation could not be gained before the child was born.—*Metham vs. Duke of Devon*, 1 Pr. Wms. 529.

111. Same—Unborn child held not in esse at time of his father's death, as he would take larger sum if testator was regarded as dying intestate as to him (applying *Swinburne's rule*).—*McKinglet vs. Read*, 1 Whart. (Pa.) 213.

See pars. 74, 130 this note.

112. LANDS OF UNBORN INFANTS—Court of chancery cannot sell or otherwise interfere with.—*Dowin vs. Sprecher*, 35 Md. 474. See *Baker vs. Lorillard*, 4 N. Y. 257, 266; *Wood vs. Mather*, 38 Barb. (N. Y.) 486.

See par. 115 this note.

113. Thus, where testator devised "use and improvements" of certain real estate to his grandson, with power of disposition, and in case of failure of issue, estate to descend to testator's son and his heirs. After birth of five children to the grandson, subsequent to death of testator, and during life of such grandson, sale was sought on behalf of the children to be made so as to bind all interests of children born or thereafter to be born, as well as of contingent interest of testator's son,—court held this could not be done.—*Baker vs. Lorillard*, 4 N. Y. 257, 266.

114. "Unborn infants are not seized; hence courts cannot sell their interests, because such interests does not exist."—*Bowman vs. Tallman*, 27 How. Pr. (N. Y.) 212, 272.

115. Same—Land held by a trustee for benefit of certain person and her children, born and to be born, court of competent jurisdiction, in suit to which trustee and all the living beneficiaries are made parties, may make decree which will bind after-born child or children, beneficiaries under the trust.—*Franklin Sav. Bank vs. Taylor*, 53 Fed. Rep. 854.

See pars. 112, 113 this note.

116. This is on the principle that trustee represents all beneficiaries.—See *Code Civ. Proc.* § 369 and note.

117. LEGACY TO A CLASS of individuals in general terms, as "to children of A," and no period fixed for distribution of legacy, it is due at death of testator and includes child en ventre sa mere, where it is subsequently born alive.—*Jenkins vs. Freyer*, 4 Paige Ch. (N. Y.) 52.

See par. 90 et seq. this note.

118. LIMITATION TO "CHILDREN," "HEIRS," OR "ISSUE."—Limitation of future estate to children, heirs, or issue, will include child en ventre sa mere, should it afterwards be born alive; it is considered in existence and capable of taking vested interest, in same manner as if born and living at testator's death.—*Gillespie vs. Nabors*, 59 Ala. 441, 444, 21 Am. Rep. 20, 22; *Marsellis vs. Thalhimier*, 2 Paige Ch. (N. Y.) 35, 21 Am. Dec. 66; *Jenkins vs. Freyer*, 4 Paige Ch. (N. Y.) 47; *Hawley vs. James*, 5 Paige Ch. (N. Y.) 464.

119. PARTITION—Unborn child not in esse in such sense as to give court jurisdiction to partition estate between living child and such child en ventre sa mere.—*Gillespie vs. Nabors*, 59 Ala. 441, 31 Am. Rep. 20.

120. "PERSONS LIVING AT DEATH" OF DESIGNATED PERSON will include child en ventre sa mere.—*Grace vs. Rittenberry*, 14 Ga. 232; *Baker vs. Pearce*, 30 Pa. St. 173; *Rawlins vs. Rawlins*, 2 Cox Ch. 425; *Burdet vs. Hopegood*, 1 Pr. Wms. 486.

121. PREMATURE BIRTH not regarded as of character to give completeness to inchoate right.—*Harper vs. Archer*, 4 Smed. & M. (Miss.) 99, 43 Am. Dec. 472. See *Marsellis vs. Thalhimier*, 2 Paige Ch. (N. Y.) 35, 21 Am. Dec. 66; *Swift vs. Duffield*, 5 Serg. & R. (Pa.) 33; *Wallis vs. Hodson*, 2 Atk. 115, 117. See 4 Kent Com. 248.

122. "No infant can be born viable, or capable of living, until one hundred and fifty days, or five months, after conception. . . . Between five and seven months there have been instances of infants living, though most rare; and even at seven, chances of surviving six hours after birth is much against the child."—1 Beck Med. Jurisp. (12th ed.) 407. See *Chitty Med. Jur.* 406.

123. REMAINDERS AND REVERSIONS—Limitation of right to take under is to persons in esse and capable of taking as purchasers.—*N. H. Dennett vs. Dennett*, 40 N. H. 503; *N. Y. Jackson vs. Brown*, 13 Wend. 437. *Eng. Chalmey's case*, 2 Co. Rep. 51b; *Money-penny vs. Dering*, 2 De G. M. & G. 145, 16 Mees. & W. 428; *Hay vs. Coventry*, 3 Durnf. & E. (3 T. R.) 86, 11 Rev. Rep. 652; *Burdenell vs. Elwes*, 1 East 452; *Conden vs. Clerke*, Hob. 33; *Cole vs. Sewell*, 2 H. L. Cas. 136, 4 Dr. & War. 27; *Reeve vs. Long*, 1 Salk. 277.

124. Limitation in tail to A for life, and then to his son, A dying leaving wife eniente, who is afterwards delivered of son, such son cannot take under the limitation, because not in esse at time of determination of particular estate.—*Reeve vs. Long*, 1 Salk. 227.

125. Remainder not preceded by gift of life estate will be good, and unborn child will take thereunder.—*Jackson vs. Brown*, 13 Wend. (N. Y.) 437; *Burdenell vs. Elwes*, 1 East 453.

126. STATUTE OF DISTRIBUTION, child en ventre sa mere may take or inherit under (dictum).—*Morris vs. Caudle*, 178 Ill. 9, 69 Am. St. Rep. 282, 52 N. E. Rep. 1036, 44 L. R. A. 489. See *N. C. Hill vs. Moore*, 1 Murph. (N. C.) 233. *S. C. Pearson vs. Carlton*, 18 S. C. 47. *Eng. Wallis vs. Hodson*, 2 Atk. 115; *Thellusson vs. Woodford*, 2 Ves. Jr. 319, 4 Id. 227, 11 Id. 112, 1 Bos. & P. (N. R.) 357, 4 Rev. Rep. 205, 8 Rev. Rep. 104.

127. Posthumous brother of half-blood.—*Burnet vs. Mann*, 1 Myl. & K. 672 note, 1 Ver. 186.

128. STATUTE OF SUCCESSION, child en ventre sa mere will take under in same manner as though born in lifetime of parent and were a surviving heir; the child in its mother's womb being considered born for purposes of its own interests.—*Ala. Scott vs. Hampton*, 11 Ala. 254. *Ga. Morrow vs. Scott*, 7 Ga. 535. *Ill. Detrick vs. Migatt*, 19 Ill. 146, 68 Am. Dec. 584; *Botsford vs. O'Connor*, 57 Ill. 72. *Mich. Catholic Mut. Ben. Assoc. vs. Firname*, 5 Mich. 82. *Miss. Harper vs. Archer*, 4 Smed. & M. (Miss.) 99, 43 Am. Dec. 473. *N. C. Watkins vs. Flora*, 8 Ired. (N. C.) L. 374; *Hill vs. Moore*, 1 Murph. (N. C.) 233. *Pa. Laird's Appeal*, 85 Pa. St. 339. *S. C. Pearson vs. Carlton*, 18 S. C. 47. *Eng. Wallis vs. Hodson*, 2 Atk. 115; *Doe vs. Lancashire*, 5 Durnf. & E. (5 T. R.) 49, 2 Rev. Rep. 535.

See par. 77 et seq. this note.

129. "POSTHUMOUS CHILD did not possess, until born, any estate in real property of which his father died seized which could affect power of the court to convert the property into personal fund, if the interest of children then in being, or enjoyment of dower right of widow, required such conversion. Whatever estate devolved upon him at his birth was an estate in property in its then condition. That property had ceased to be realty; it had become, by sale, converted into personalty. All that was then required for protection of his interest in it was appointment of guardian to take possession of his proportion."—*Knotts vs. Stearns*, 91 U. S. 638, bk. 23 L. ed. 252.

130. SWINBURNE'S RULE is: "We must consider whether it be for the benefit of the child that the father should be accounted to have died without issue or not; for howsoever the rule be, that he is not said to die without issue whose wife is with child at his death, yet that rule ought to take place when it tendeth to the benefit of the child, not where it tendeth to the prejudice of the child, or only benefit another."—*Swinb. on Wills* 562.

131. UNBORN CHILD—May be appointed executor, and if mother be delivered of two children, they both may be appointed executors.—*Thellusson vs. Woodford*, 2 Ves. Jr. 319, 4 Id. 227, 11 Id. 104, 1 Bos. & P. (N. R.) 357, 4 Rev. Rep. 205, 8 Rev. Rep. 104; *Bacon's Abrit. Infancy, C.*, and *tit. Executors, a. 7*; *Tyler on Inf. & Covet.* § 154.

132. May have a guardian.—See par. 10 this note.

133. May have injunction to stay waste.—See par. 11 this note.

134. **VOUCHED IN A RECOVERY**, unborn infant may be, though it is for purpose of making him answer over in value.—Thellus-

son vs. Woodford, 2 Ves. Jr. 319, 4 Id. 227, 11 Id. 104, 1 Bos. & P. (N. R.) 357, 4 Rev. Rep. 205, 3 Rev. Rep. 104.

§ 30. PERSONS MADE ADULTS BY OTHER STATES, CONSIDERED AS SUCH IN THIS STATE, WHEN DOMICILED HEREIN (repealed).

History: Enacted March 21, 1872; repealed March 30, 1874, Code Amdts. 1873-4, p. 182.

§ 31. MINORS BY THE LAWS OF OTHER STATE OR COUNTRY, HOW CONSIDERED IN THIS STATE (repealed).

History: Enacted March 21, 1872; repealed March 30, 1874, Code Amdts. 1873-4, p. 182.

§ 32. CUSTODY OF MINORS. The custody of minors and persons of unsound mind is regulated by Part III of this division.

History: Enacted March 21, 1872.

§ 33. MINORS CANNOT GIVE A DELEGATION OF POWER. A minor cannot [1] give a delegation of power, nor under the age of eighteen, [2] make a contract relating to [a] real property, or [b] any interest therein, or [c] relating to any personal property not in his immediate possession or control.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 182.

1. Applied, cited, construed, referred to, etc.
2. Original section.
3. Code Commissioners' note.
4. Proceedings commenced by minor.
5. Submission to jurisdiction.
- 6, 7. Relinquishment of control over child—Contract for wages.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: In re Cahill, 74 Cal. 52, 56, 15 Pac. Rep. 364 (discussed; not applicable); Taylor vs. Hill, 115 Cal. 143, 151, 44 Pac. Rep. 336, 46 Id. 922 (construed).

2. **ORIGINAL SECTION READ:** "A minor cannot give a delegation of power."

3. **CODE COMMISSIONERS' NOTE** appended as follows: "Bennett vs. Davis, 6 Cow. (N. Y.) 393; Thomas vs. Roberts, 16 Mees. & W. 778. Such a delegation is absolutely void.—

Bool vs. Mix, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; Lawrence vs. McArter, 10 Ohio 37; Pyle vs. Cravens, 4 Litt. (Ky.) 17."

4. **PROCEEDINGS COMMENCED BY A MINOR** in propria persona do not fall within meaning of section.—In re Cahill, 74 Cal. 52, 56, 15 Pac. Rep. 364.

See Code Civ. Proc. §§ 372, 373 and notes.

5. **SUBMISSION TO JURISDICTION** of court by minor is not without effect, in other words, is not absolutely void.—In re Cahill, supra.

See Code Civ. Proc. §§ 372, 373 and notes.

6. **RELINQUISHMENT OF CONTROL OVER SON** gives the son control of debt due him for his services.—Taylor vs. Hill, 115 Cal. 143, 151, 44 Pac. Rep. 336, 46 Id. 922.

7. Such debt is under the minor's control within the meaning of above section.—Ibid.

§ 34. CONTRACTS BY MINORS MADE; DISAFFIRMANCE. A minor may make any other contract than as above specified, in the same manner as an adult, subject only [1] to his power of disaffirmance under the provisions of this title, and subject [2] to the provisions of the titles on [a] marriage, and on [b] master and servant.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 183; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 333, unconstitutional; see history, § 4, ante.

1. Original section.
2. Code Commissioners' note.

1. **ORIGINAL SECTION.**—"A minor may make a conveyance or other contract in the same manner as any other person, subject only to his power of disaffirmance under the provisions of this title, and to the provisions of the title on marriage."

2. **CODE COMMISSIONERS' NOTE** to origi-

nal section is as follows: "Magee vs. Welsh, 18 Cal. 155. A minor may make a promissory note, and as to him the note will not be void, but merely voidable at his election.—Hasting vs. Dollarhide, 24 Cal. 195; Palmer vs. Miller, 25 Barb. (N. Y.) 399; Slocum vs. Hooker, 13 Barb. (N. Y.) 536; Bool vs. Mix, 17 Wend. (N. Y.) 119, 31 Am. Dec. 285; Gillett vs. Stanley, 1 Hill (N. Y.) 121; Van Nostrand vs. Wright, Hill & D. Supp. (N. Y.) 260; Clark vs. Levi, 10

N. Y. Leg. Obs. 184. It has been doubted whether a minor who has a guardian can make a contract.—*Stafford vs. Roof*, 9 Cow. (N. Y.) 626, 630; *Kline vs. L'Amoureux*, 2 Paige Ch. (N. Y.) 419, 22 Am. Dec. 652; but it seems now to be settled that he can.—*Bartholomew vs. Finnemore*, 17 Barb. (N. Y.) 428. A confession of judgment by an infant is void.—*Saunderson vs. Marr*, 1 H. Bl. 75; *Bennett vs. Davis*, 6 Cow. (N. Y.) 394; *Waples vs. Hastings*, 3 Harr. (Del.) 403; *Knox vs. Flack*, 22 Pa. St. 337. So too is his cognovit for the same purpose, although the action was wholly for necessities.—*Oliver vs. Woodruffe*, 4 Mees.

& W. 650; or his bond with a penalty, or for the payment of interest.—*Baylis vs. Dinely*, 3 M. & Sel. 477; *Hunter vs. Agnew*, 1 Fox & S. 15; *Colcock vs. Ferguson*, 3 Desau. (S. C.) 482; or a release by a female infant to a guardian.—*Fridge vs. State*, 3 Gill & J. (Md.) 103, 104, 20 Am. Dec. 463; or an infant's contract of suretyship.—*Wheaton vs. East*, 5 Yerg. (Tenn.) 41-61, 26 Am. Dec. 251. *Per contra*, *Hinley vs. Margaritz*, 3 Burr. 428; or his release of a legacy or distributive share in an estate.—*Langford vs. Fry*, 3 Humph. (Tenn.) 442."

§ 35. **WHEN MINORS MAY DISAFFIRM.** In all cases other than those specified in sections thirty-six and thirty-seven, the contract of a minor, if made whilst he is under the age of eighteen, may be disaffirmed [1] by the minor himself, either before his majority or within a reasonable time afterwards; or, in case of his death within that period, [2] by his heirs or personal representatives; and if the contract be made by the minor whilst he is over the age of eighteen, it may be disaffirmed in like manner upon restoring the consideration to the party from whom it was received, or paying its equivalent.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 183.

1. Applied, cited, construed, referred to, etc.
2. Code Commissioners' note.
- 3-6. Advantage of infancy—Who may take.
7. Same—Guardian or stranger cannot.
8. Same—Party to contract cannot.
- 9, 10. Construction—Quere as to contracts made while under eighteen.
11. Deed of infant—Not void.
- 12, 13. Same—Ratification—Subsequent disaffirmance.
- 14-18. Disaffirmances—Cannot be subsequently avoided.
- 19, 20. Same—Not necessary, when.
- 21-25. Ratification—Executed and executory contracts—Distinction.
26. Same—Acknowledgment of making contract.
- 27, 28. Same—Acquiescence as ratification.
- 29-31. Same—Affirmative acts of ownership.
- 32, 33. Same—Declaration to third party—Agent of agent.
- 34-37. Same—Direct promise.
- 38-40. Same—Knowledge that not bound—Essentiality.
41. Same—Offer to arbitrate.
42. Same—Slight declarations.
43. Reasonable time—Question for jury.
- 44-48. Restoration of consideration—Or pay equivalent.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Pico vs. Sepulveda*, 66 Cal. 326, 327, 5 Pac. Rep. 515 (erroneously cited by counsel); *Combs vs. Hawes* (Cal. Nov. 19, 1885), 8 Pac. Rep. 597 (construed); *Butler vs. Hyland*, 89 Cal. 576, 581, 26 Pac. Rep. 1108 (disaffirmance under this section not necessary where relation of trust and confidence is shown and conveyance rests on implied trust); *Whyte vs. Rosencrantz*, 123 Cal. 634, 640, 69 Am. St. Rep. 90, 97, 56 Pac. Rep. 436 (construed and applied).

2. **CODE COMMISSIONERS' NOTE**, appended to this section, is as follows: "*Merriam vs. Cunningham*, 65 Mass. (11 Cush.) 40; *Conroe vs. Birdsall*, 1 Johns. Cas. (N. Y.) 127, 1 Am. Dec. 105; *Brown vs. McCune*, 5 Sandf. (N. Y.) 224; *Bartholomew vs. Finnemore*, 17 Barb. (N. Y.) 428; *Taft vs. Sergeant*, 18 Barb. (N. Y.) 320; *Bac. Abr. tit. Infant*, I, 6; 3 Co. Rep. 42b. An infant grantor can neither affirm nor disaffirm conveyance of land made during nonage until he attains the age of legal majority.—*Hastings vs. Dollarhide*, 24 Cal. 195. What amounts to a disaffirmance.—*Id.* Conveyance, once ratified, cannot be disaffirmed.—*Id.* Ratification may be express or by implication.—*Id.* The doctrine of estoppel has no application to infants.—*Mahoney vs. Van Winkle*, 21 Cal. 552; *Lackman vs. Wood*, 25 Cal. 147. Judgments against minors.—*Joyce vs. Joyce*, 5 Cal. 161; *Regia vs. Martin*, 19 Cal. 463; *Joyce vs. McAvoy*, 31 Cal. 273, 89 Am. Dec. 172.

3. **ADVANTAGE OF INFANCY—Who may take.**—The infant, his heirs or representatives alone can take advantage of his infancy at time when the contract was executed.—*Hastings vs. Dollarhide*, 24 Cal. 195, 207.

4. This provision of the code, limiting the right to disaffirm contract of an infant to himself, his heirs and personal representatives, in case of his death, simply affirms general rule that before prevailed.—See *Ala. Shropshire vs. Burns*, 46 Ala. 180. *Ind. Frazier vs. Massey*, 14 Ind. 382; *Schrock vs. Crowl*, 83 Ind. 243. *Ky. Cannon vs. Alsbury*, 1 A. K. Marsh. 76, 10 Am. Dec. 709; *Beeler vs. Bullitt*, 3 A. K. Marsh. 280, 13 Am. Dec. 161. *Me. Hardy vs. Waters*, 38 Me. 450. *Mass. Oliver vs. Houdlet*, 13 Mass. 237, 239, 7 Am. Dec. 134; *Nightingale vs. Withington*, 15 Mass. 272, 8 Am. Dec. 101; *Hill vs. Keyes*, 92 Mass. (10 Allen) 258, 260. *Mich. Monaghan vs. Agricul-*

tural Fire Ins. Co., 53 Mich. 238, 18 N. W. Rep. 797. N. J. Voorhees vs. Wait, 15 N. J. L. (3 Gr.) 343; Patterson vs. Lippincott, 47 N. J. L. (18 Vr.) 457, 54 Am. Rep. 178, 1 Atl. Rep. 506; Inhabitants Bordentown Tp. vs. Wallace, 50 N. J. L. (21 Vr.) 13, 11 Atl. Rep. 267. N. Y. Beardsley vs. Hotchkiss, 96 N. Y. 201; Slocum vs. Hooker, 13 Barb. 536; Jones vs. Butler, 30 Barb. 641; Parker vs. Barker, 1 Clarke Ch. 136. Van Bramer vs. Cooper, 2 John. 279; Mason vs. Denison, 15 Wend. 64, 66. Pa. Kun vs. Young, 34 Pa. St. 60; Hesser vs. Steiner, 5 Watts & S. 476; Magill vs. Woodward, 3 Brev. 401. Tenn. White vs. Flora, 2 Overt. 426, 431. Tex. Harris vs. Musgrove, 59 Tex. 401; Simkins vs. Searcy, 10 Tex. Civ. App. 406, 412, 32 S. W. Rep. 849. Va. Warmisley vs. Lendenberger, 2 Rand. 478. Eng. Grey vs. Cooper, 3 Doug. 65, 1 Selw. N. P. 287, 26 Eng. C. L. 54; also Drayton vs. Dale, 2 Barn. & C. 229, 26 Rev. Rep. 360; Taylor vs. Croker, 2 Esp. N. P. C. 187; Jones vs. Darch, 4 Price 300, 18 Rev. Rep. 720.

5. Heirs may disaffirm.—See Ark. Bozeman vs. Browning, 31 Ark. 364. Ky. Breckenridge's Heirs vs. Ormsby, 1 J. J. Marsh. 236, 19 Am. Dec. 71. Ill. Illinois L. & L. Co. vs. Bonner, 75 Ill. 315, 322. Me. Hardy vs. Waters, 38 Me. 450. Md. Levering vs. Helghs, 2 Md. Ch. 81, 3 Id. 365. Mass. Austin vs. Charlestown Female Seminary, 49 Mass. (8 Met.) 196, 203, 41 Am. Dec. 497; Hill vs. Keyes, 92 Mass. (10 Allen) 258, 260. N. Y. Dominick vs. Michael, 4 Sandf. 374, 418. Tenn. White vs. Flora, 2 Overt. 426, 431. Tex. Veal vs. Fortson, 57 Tex. 482. Eng. Whittingham's Case, 8 Co. Rep. 42b.

6. Personal representatives may disaffirm.—Hastings vs. Dollarhide, 24 Cal. 195. See Ala. Jefford's Admr. vs. Ringgold, 6 Ala. 544; Shropshire vs. Burns, 46 Ala. 103. Ark. Vaughan vs. Parr, 20 Ark. 600; Bozeman vs. Browning, 31 Ark. 364. Ky. Breckenridge's Heirs vs. Ormsby, 1 J. J. Marsh. 236, 19 Am. Dec. 71. Mass. Hussey vs. Jewett, 9 Mass. 100; Hill vs. Keyes, 92 Mass. (10 Allen) 258, 260. Mo. Parsons vs. Hill, 8 Mo. 135; Ferguson vs. Bell's Admr., 17 Mo. 347, 351; Hardy vs. Waters, 38 Mo. 450. R. I. Tillinghast vs. Holbrook, 7 R. I. 230, 243. S. C. Counts vs. Bates, Harper L. 464.

7. Guardian or stranger cannot avail of.—Stranger to contract cannot avoid it on ground of infancy of a contracting party, and guardian cannot avoid contract made by his infant ward; it is a personal privilege resting with infant himself, "and in case of his death with his heirs and personal representatives," under our statute.—See Ind. Babcock vs. Doe ex dem. Bowman, 8 Ind. 110; Trustees LaGrange Collegiate Inst. vs. Anderson, 63 Ind. 367, 30 Am. Rep. 224. Md. Ridgeley vs. Crandall, 4 Md. 435, 441. Mass. Oliver vs. Houdlet, 13 Mass. 237, 7 Am. Dec. 134; Thompson vs. Hamilton, 29 Mass. (12 Pick.) 425, 23 Am. Dec. 619; Kendall vs. Lawrence, 39 Mass. (22 Pick.) 540; McCarty vs. Murray, 69 Mass. (3 Gray) 578; Kingman vs. Perkins, 105 Mass. 111; Mansfield vs. Gordon, 144 Mass. 168, 10 N. E. Rep. 773. Mich. Soper vs. Frye, 31 Mich. 236; Holmes vs. Rice, 45 Mich. 142, 7 N. W. Rep. 772. Mo. Griffith vs. Schwendesman, 27 Mo. 412. N. H. Roberts vs. Wigglin, 7 N. H. 78, 8 Am. Dec. 38. N. Y. Dominick vs. Michael, 4

Sandf. 374, 418. S. C. Rose vs. Daniel, 1 Brev. 438; Lester vs. Fraser, 2 Hill Eq. 529, Riley Eq. 76. Fed. Baldwin vs. Rosier, 48 Fed. Rep. 810, 1 McC. C. C. 384. Eng. Keane vs. Boycott, 2 H. Bl. 511, 515, 3 Rev. Rep. 494; Douglas vs. Watson, 17 C. B. 685, 34 Eng. C. L. 685.

8. Party to contract cannot avoid it on the ground that other contracting party is an infant.—See Ill. Chicago etc. R. Co. vs. Lamert, 19 Ill. App. 135, 140. Ind. Johnson vs. Rockwell, 12 Ind. 76; Beeson vs. Carleton, 13 Ind. 354. Ky. Cannon vs. Alsbury, 1 A. K. Marsh. 76, 10 Am. Dec. 709. La. Arnous vs. Lesassier, 10 La. 592, 29 Am. Dec. 470. Mass. Oliver vs. Houdlet, 13 Mass. 237, 239, 7 Am. Dec. 134; Boyden vs. Boyden, 50 Mass. (9 Met.) 514, 521; Stiff vs. Keith, 143 Mass. 224, 9 N. E. Rep. 577. Mich. Monaghan vs. Agricultural Fire Ins. Co., 53 Mich. 238, 18 N. W. Rep. 797. N. J. Voorhees vs. Wait, 15 N. J. L. (3 Gr.) 343. N. Y. Yates vs. Lyon, 61 N. Y. 344, overruling Fox vs. Heath, 21 How. Pr. 384; Hunt vs. Peake, 5 Cow. 475, 15 Am. Dec. 475; Willard vs. Stone, 7 Cow. 22, 17 Am. Dec. 496. S. C. Crymes vs. Day, 1 Ball. L. 320. Tex. Harris vs. Musgrove, 59 Tex. 401. Eng. Gable vs. Forrester, 1 Keb. 1, sub nom. Forrester's Companies, 1 Sid. 41; Smith vs. Brown, 1 Mod. 25; Holt vs. Ward Clarenceux, 2 Str. 937; Warwick vs. Bruce, 6 Taunt. 118, affg. 3 Maule & S. 205, 14 Rev. Rep. 634, 1 Eng. C. L. 535.

9. CONSTRUCTION.—"The provision of the section which requires restoration of consideration to party from whom it was received as condition precedent to disaffirmance of contract made by an infant over the age of eighteen, applies as well to the contract to refund to plaintiff the money advanced by him in taking up note as to the original contract evidenced by promissory note."—Combs vs. Hawes (Cal. Nov. 19, 1885), 8 Pac. Rep. 597.

10. Quære.—Whether, under the wording of the above statute, requirement to refund embraces those contracts made by an infant who is at time under the age of eighteen years.

11. DEED OF INFANT.—Not void where executed after age of eighteen years, but voidable.—Hastings vs. Dollarhide, 24 Cal. 195, 211. See Dak. Taylor vs. Brown, 5 Dak. 335, 345, 40 N. W. Rep. 525. Mich. Haynes vs. Bennett, 53 Mich. 15, 18, 13 N. W. Rep. 539. Minn. Dixon vs. Merritt, 21 Minn. 200. Mo. Craig vs. Van Bebber, 100 Mo. 584, 18 Am. St. Rep. 569, 13 S. W. Rep. 906.

See exhaustive monographic note 18 Am. St. Rep. 573-724.

12. Ratified (1) expressly by words and declarations, or by acts; or (2) indirectly by failure to disaffirm within reasonable time.—Hastings vs. Dollarhide, 24 Cal. 195, 215-217. See Colo. Kendrick vs. Neiss, 17 Colo. 506, 30 Pac. Rep. 245. Dak. Taylor vs. Brown, 5 Dak. 345, 40 N. W. Rep. 525. Minn. Goodnow vs. Empire Lumber Co., 31 Minn. 468, 47 Am. Rep. 798, 13 N. W. Rep. 233, 23 Am. L. Reg. (N. S.) 329 and note.

See also notes in 4 Am. Dec. 184; 45 Am. Dec. 571, and exhaustive monographic note 18 Am. St. Rep. 573-724. See also 16 Am. & Eng. Encyc. of L. (2 ed.) 301 et seq.

12. **Infant's deed once ratified cannot be afterwards disaffirmed.**—*Hastings vs. Dollarhide*, 24 Cal. 195, 211. See *Ill. Curry vs. St. John Plow Co.*, 55 Ill. App. 32. *Mich. Minock vs. Shortridge*, 21 Mich. 304; *Haynes vs. Bennett*, 53 Mich. 15, 18, 18 N. W. Rep. 539. *N. Y. Palmer vs. Miller*, 25 Barb. 399.

14. **DISAFFIRMANCE OF CONTRACT** by minor over eighteen years of age may be made either before or after attaining majority, upon restoring consideration received, "or paying its equivalent."—*Combs vs. Hawes* (Cal. Nov. 19, 1885), 8 Pac. Rep. 597; *Whyte vs. Rosencrantz*, 123 Cal. 634, 639, 641, 69 Am. St. Rep. 90, 56 Pac. Rep. 436.

See 16 Am. & Eng. Encyc. of L. (2 ed.) 287 et seq.

15. **Infant disaffirming contract before coming of age cannot after attaining his majority avoid such disaffirmance.**—*Edgerton vs. Wolf*, 72 Mass. (6 Gray) 453.

16. **Compare:** *Newry etc. Ry. vs. Coombe*, 3 Ex. 565; *Northwestern Ry. vs. McMichael*, 5 Ex. 114, 127.

17. **Rights of others intervening, an infant cannot avoid disaffirmance which takes place after his majority.**—*Derrick vs. Kennedy*, 4 Port. (Ala.) 41; *McCarthy vs. Nicrosi*, 72 Ala. 332, 47 Am. St. Rep. 418; *White vs. Flora*, 2 Overt. (Tenn.) 426, 432.

18. **As to incomplete disaffirmance,**—see *Best vs. Givens*, 3 B. Mon. (Ky.) 72, 74.

19. **Disaffirmance not necessary in action to enforce execution of constructive trust in real estate, arising under deed of gift executed by plaintiff while minor.**—*Butler vs. Hyland*, 89 Cal. 575, 581, 26 Pac. Rep. 1108.

20. **"Minority material only as tending to establish fact that relation between plaintiff and her aunt was confidential."**—*Ibid.*

21. **RATIFICATION OF INFANT'S CONTRACTS—Executory and executed contracts.**—There is distinction taken between executed and executory contracts in matter of ratification. "When contract remains in part unexecuted, mere acknowledgment of the debt, or payment of interest or part of principal, by infant, after becoming of age, is not binding legal affirmation. No new consideration is required, but where language is relied on to show ratification, while it may be either oral or written, and while it need follow no particular form, it must be voluntarily and understandingly used, and must indicate an intention to pay the debt."—*Hastings vs. Dollarhide*, 24 Cal. 195, 212. *Colo. Kendrick vs. Neiss*, 17 Colo. 506, 508, 30 Pac. Rep. 245. See *Conn. Catlin vs. Haddox*, 49 Conn. 492, 44 Am. Rep. 249. *Ind. Fetrow vs. Thompson*, 40 Ind. 143. *Mass. Whitney vs. Dutch*, 14 Mass. 457, 7 Am. Dec. 229; *Thompson vs. Lay*, 21 Mass. (4 Pick.) 47, 16 Am. Dec. 325.

See 16 Am. & Eng. Encyc. of L. (2d ed.) 301 et seq.

22. **"Its sufficiency frequently depends upon character of original transaction, as well as upon particular words employed."**—*Kendrick vs. Neiss*, 17 Colo. 506, 508, 30 Pac. Rep. 245.

23. **"The promise should either be absolute, or, if conditional, performance or happening of**

the condition should be proved affirmatively by plaintiff."—*Everson vs. Carpenter*, 17 Wend. (N. Y.) 419, 422.

24. **"An engagement or promise to pay when able, is conditional promise, and plaintiff, to avail himself of it, must give in evidence ability of defendant to pay."**—*Thompson vs. Lay*, 21 Mass. (4 Pick.) 47, 48, 16 Am. Dec. 325; *Chandler vs. Glover*, 32 Pa. St. 509; *Cole vs. Saxby*, 3 Esp. 159.

25. **"Ratification may be shown either (1) by proof of an express promise to pay the debt, made by infant after he becomes of age, or (2) by proof of such acts of infant, after he becomes of age, as fairly and justly lead to inference that he intended to ratify contract and pay the debt."**—*Tobey vs. Wood*, 123 Mass. 88, 25 Am. Rep. 27. See *Boody vs. McKenney*, 23 Me. 517; *Thompson vs. Lay*, 21 Mass. (4 Pick.) 48, 16 Am. Dec. 325; *Peirce vs. Tobey*, 46 Mass. (5 Met.) 168; *Proctor vs. Sears*, 86 Mass. (4 Allen) 95; *Dublin & W. Ry. vs. Black*, 8 Exch. 181, 16 Eng. L. & Eq. 556.

26. **Acknowledgment that he made note, and that it is due, is not an affirmation of the contract.**—*Benham vs. Bishop*, 9 Conn. 330, 23 Am. Dec. 358.

27. **Acquiescence as ratification.**—A majority of the cases are to effect that mere acquiescence, or silence, after attaining majority, where there are no circumstances other than silence, will not amount to ratification and bar infant to disavow the contract.—*Goodnow vs. Empire Lumber Co.*, 31 Minn. 463, 47 Am. Rep. 798, 18 N. W. Rep. 283, 23 Am. L. Reg. (N. S.) 329 and note. See *Ark. Vaughan vs. Parr*, 20 Ark. 600. *Ind. Doe vs. Abernethy*, 7 Blackf. 442; *Stringer vs. Northwestern Mut. L. Ins. Co.*, 82 Ind. 100; *Sims vs. Bardoner*, 86 Ind. 87, 44 Am. Rep. 263; *Richardson vs. Pate*, 93 Ind. 423, 47 Am. Rep. 374. *Me. Boody vs. McKenney*, 23 Me. 517; *Davis vs. Dudley*, 70 Me. 236, 35 Am. Rep. 313. *Mich. Prout vs. Wiley*, 28 Mich. 164. *Mo. Youse vs. Norcoms*, 12 Mo. 549, 51 Am. Dec. 175; *Norcum vs. Gaty*, 19 Mo. 65; *Peterson vs. Laik*, 24 Mo. 541, 69 Am. Dec. 441; *Baker vs. Kennett*, 50 Mo. 82. *N. H. Hale vs. Gerrish*, 8 N. H. 374. *N. Y. McMurray vs. McMurray*, 66 N. Y. 175; *Voorhies vs. Voorhies*, 24 Barb. 150; *Jackson vs. Carpenter*, 11 John. 539. *Ohio. Lessee of Drake vs. Ramsay*, 5 Ohio 252; *Cresinger vs. Welsh*, 15 Ohio 156, 45 Am. Dec. 565. *S. C. Ordinary vs. Wherry*, 1 Ball. 28. *W. Va. Gillespie vs. Bailey*, 12 W. Va. 70, 29 Am. Rep. 445. *Fed. Irvine vs. Irvine*, 76 U. S. (9 Wall.) 617, bk. 19 L. ed. 800; *Sims vs. Everhardt*, 102 U. S. 300, 312, bk. 26 L. ed. 87, 89; *Wells vs. Seixas*, 23 Blatchf. C. C. 243, 24 Fed. Rep. 32.

28. **On the other hand a great many cases hold that mere acquiescence beyond a reasonable time after attaining majority amounts to an affirmation of contract, and bars right to disaffirm.**—*Hastings vs. Dollarhide*, 24 Cal. 195. See *Ala. Tomasson vs. Boyd*, 13 Ala. 419. *Conn. Kline vs. Beebe*, 6 Conn. 494. *Del. Wallace vs. Lewis*, 4 Harr. (Del.) 75, 80. *Ga. Harris vs. Cannon*, 6 Ga. 382. *Ill. Cole vs. Pennoyer*, 14 Ill. 158; *Black vs. Hills*, 36 Ill. 376, 37 Am. Dec. 224; *Kell vs. Healey*, 84 Ill. 104, 25 Am. Rep. 434. *Ind. Hartman vs. Ken-*

dall, 4 Ind. 403. *Me. Robinson vs. Weeks*, 56 Me. 102. *N. Y. Bostwick vs. Atkins*, 3 N. Y. 53; *Chapin vs. Shafer*, 49 N. Y. 407; *Green vs. Green*, 69 N. Y. 553, 25 Am. Rep. 233; *Jones vs. Butler*, 30 Barb. 641; *Delano vs. Blake*, 11 Wend. 85, 25 Am. Dec. 617. *S. C. Little vs. Duncan*, 9 Rich. L. 55, 64 Am. Dec. 760. *Tenn. Scott vs. Buchanan*, 11 Humph. 467. *Tex. Bingham vs. Barley*, 55 Tex. 281, 40 Am. Rep. 801. *Vt. Bigelow vs. Kinney*, 3 Vt. 353, 21 Am. Dec. 589; *Richardson vs. Boright*, 9 Vt. 368. *Eng. Dublin & W. Ry. vs. Black*, 8 Exch. 181, 16 Eng. L. & Eq. 556; *Holmes vs. Blogg*, 3 Taunt. 3., 508, 1 Moore 466, 2 id. 552, 4 Eng. C. L. 29, 252, 19 Rev. Rep. 445.

29. Affirmative acts of ownership and enjoyment of property, without express promise to pay, after attaining majority, with knowledge of circumstances, or recognizing contract as binding, without acts or words showing disaffirmance of contract, is sufficient to show ratification.—See *Me. Lawson vs. Lovejoy*, 8 Me. 405, 23 Am. Dec. 526; *Boody vs. McKenney*, 23 Mo. 517. *Mass. Boyden vs. Boyden*, 50 Mass. (9 Met.) 519. *N. H. Robbins vs. Eaton*, 10 N. H. 561. *N. Y. Chapin vs. Shafer*, 49 N. Y. 407.

30. Mere passive conduct, or indecisive conduct, will not have that effect.—*Benham vs. Bishop*, 9 Conn. 330, 23 Am. Dec. 358 (merely retaining the contract money).

31. Unless it is such as amounts to an estoppel.—See *Del. Wallace vs. Lewis*, 4 Harr. 75. *Me. Higley vs. Barrow*, 49 Me. 103. *Miss. Allsworth vs. Cardtz*, 31 Miss. 32; *Thompson vs. Strickland*, 52 Miss. 574. *N. H. Emmons vs. Murray*, 16 N. H. 335. *N. Y. Jones vs. Phoenix Bank*, 8 N. Y. 228, 235. *Ohio. Cresinger vs. Welch*, 15 Ohio 156, 45 Am. Dec. 565. *S. C. Belton vs. Briggs*, 4 Desau. 465; *Hall vs. Simmons*, 2 Rich. L. 120. *Tenn. Wheaton vs. East*, 5 Yerg. 41, 26 Am. Dec. 251.

32. SAME—DECLARATION TO THIRD PERSON by party of intention to perform contract entered into during his infancy, such third person being in no way interested, is not evidence of such a ratification of contract as will bind party; to have binding effect, the declaration must be made to party himself, or to his agent.—*Miss. Mayer vs. McLure*, 36 Miss. 389, 72 Am. Dec. 190. *N. H. Holt vs. Underhill*, 9 N. H. 436, 32 Am. Dec. 380; *Bernham vs. Porter*, 24 N. H. 580. *N. Y. Bigelow vs. Grannis*, 2 Hill 120; *Goodsell vs. Myers*, 3 Wend. 479. *Pa. Chandler vs. Glover*, 32 Pa. St. 509.

See par. 42 this note.

33. Promise to agent of agent in whose hands claim is for collection is sufficient to bind.—*Mayer vs. McLure*, 36 Miss. 389, 72 Am. Dec. 190.

34. SAME—DIRECT PROMISE TO PAY, large majority of cases agree, constitutes ratification, but in determination of what constitutes direct promise, there is much hair-splitting in the decisions. The volume of decision is to effect that where infant, on attaining majority, says or acknowledges that he owes the debt, has not money to pay it, but will pay it when able, or as soon as he can, or using words to like effect, this merely

constitutes an acknowledgment and does not constitute direct promise or new promise to pay.—*Conn. Wilcox vs. Roath*, 12 Conn. 550. *Ga. Martin vs. Byrom*, Dud. 203. *Ind. Conklin vs. Ogborn*, 7 Ind. 553. *Mass. Ford vs. Phillips*, 18 Mass. (1 Pick.) 202; *Thompson vs. Lay*, 21 Mass. (4 Pick.) 48, 16 Am. Dec. 325; *Proctor vs. Sears*, 36 Mass. (4 Allen) 95. *N. H. Hale vs. Gerrish*, 8 N. H. 374. *N. Y. Bank of Silver Creek vs. Browning*, 16 Abb. Pr. 272; *Goodsell vs. Myers*, 3 Wend. 479. *N. C. Dunlap vs. Hales*, 2 Jones L. 381. *Pa. Chandler vs. Glover*, 32 Pa. St. 509.

35. "It has long been settled that a direct promise, when of age, is necessary to establish a direct contract made during minority, and that a mere acknowledgment will not have that effect."—*Proctor vs. Sears*, 36 Mass. (4 Allen) 95.

36. "The course of decision in this state authorizes us to assume that the narrow and stringent rule, formerly enunciated, that to establish the contract, when made in infancy, there must be a precise and positive promise to pay the particular debt, after attaining majority, is not sustained by the more modern decisions" (dictum).—*Henry vs. Root*, 33 N. Y. 526, 545, 546.

37. This decision of Judge Davies is regarded as dictum pure and simple, the question before the court being whether, where an infant has purchased real estate and continues in possession after majority, exercising acts of ownership, he will be deemed to have ratified the purchase; and the declaration has never received sanction in New York. The "course of decision" in New York, up to the time of this declaration (1865), not only did not "authorize the assumption," but is thought to have been exactly the opposite.

38. Knowledge not legally bound is thought not to be necessary to full ratification by infant on attaining majority; were it otherwise the rule would violate maxim that "ignorance of the law excuses no one." There are cases pro and con; but those holding knowledge necessary are traceable back for foundation to a dictum in case of *Harmer vs. Killing*, 5 Esp. 102.

39. Among the cases holding knowledge necessary are: *Ky. Petty vs. Roberts*, 7 Bush 410. *Me. Thing vs. Libbey*, 16 Me. 57. *Mass. Owen vs. Long*, 112 Mass. 403. *Mo. Parker vs. Kennett*, 54 Mo. 82. *Pa. Hinely vs. Margaritz*, 3 Pa. St. 428; *Curtin vs. Patton*, 11 Serg. & R. 305. *S. C. Chambers vs. Wherry*, 1 Bail. 28; *Norris vs. Vance*, 3 Rich. L. 164. *Tenn. Reed vs. Boshears*, 4 Sneed 118. *Canada. Davis vs. Kerr*, 17 Can. Sup. Ct. 235.

40. Among the cases holding such knowledge not essential are: *Ala. American Mortgage Co. of Scotland vs. Wright*, 101 Ala. 658, 14 So. Rep. 399. *Conn. Bestor vs. Hickey*, 71 Conn. 181, 41 Atl. Rep. 555. *Ind. Clark vs. Van Court*, 100 Ind. 113, 50 Am. Rep. 774. *Mass. Morse vs. Wheeler*, 36 Mass. (4 Allen) 570. *Mo. Ring vs. Jamison*, 2 Mo. App. 584, affirmed 66 Mo. 424. *N. Y. Taft vs. Sergeant*, 18 Barb. 320. *Ohio. Anderson vs. Soward*, 40 Ohio St. 325, 48 Am. Rep. 637.

41. Offer to arbitrate question of liability

is not ratification by infant.—*Benham vs. Bishop*, 9 Conn. 330, 23 Am. Dec. 353.

42. Slight declarations indicating recognition of contract are held sufficient in some cases.—See *Whitney vs. Dutch*, 14 Mass. 457, 7 Am. Dec. 229, *Ewell's Lead. Cas. on Inf.* 38 (in this case a note was made by partner of infant for firm debt; infant acknowledged money was due, when called upon to pay it, and promised that he would endeavor to procure the money, on his return home and send it to plaintiff); *Bay vs. Gunn*, 1 Den. (N. Y.) 108; *Cheshire vs. Barrett*, 4 McC. (S. C.) L. 241, 17 Am. Dec. 735; *Bigelow vs. Kinney*, 3 Vt. 252, 21 Am. Dec. 589.

See Par. 32 this note.

43. REASONABLE TIME.—Question for the jury.—What is reasonable time within which to disaffirm contract, is question of fact for the jury.—*Johnson vs. Storie*, 32 Neb. 610, 49 N. W. Rep. 371; *Dolph vs. Hand*, 156 Pa. St. 91, 36 Am. St. Rep. 25, 27 Atl. Rep. 114; *Searcy vs. Hunter*, 81 Tex. 644, 26 Am. St. Rep. 337, 17 S. W. Rep. 372.

44. RESTORATION OF CONSIDERATION.—Where money is loaned to an infant over eighteen years of age, upon specified conditions, which are disaffirmed when he attains majority, the money loaned must be restored; but it is not essential that he should be able to restore identical money received, in order that an action on the contract may be maintained against him.—*Whyte vs. Rosencrantz*, 123 Cal. 634, 641, 69 Am. St. Rep. 90, 56 Pac. Rep. 436.

45. It would be inequitable to allow him to disaffirm the contract without returning the consideration.—*Whyte vs. Rosencrantz*, supra. See *Green vs. Green*, 69 N. Y. 553, 25 Am. Rep.

233; *Bingham vs. Barley*, 55 Tex. 281, 40 Am. Rep. 801.

46. "Or pay its equivalent" requires that where a minor wishes to disaffirm contract made while he was in minority, but above the age of eighteen, he must pay its equivalent, if he cannot restore identical consideration.—*Whyte vs. Rosencrantz*, 123 Cal. 634, 641, 69 Am. St. Rep. 90, 56 Pac. Rep. 436.

47. In the above case counsel relied upon *Craig vs. Van Bebber*, 100 Mo. 584, 18 Am. St. Rep. 569, 13 S. W. Rep. 906, and the exhaustive monographic note in 18 Am. St. Rep. 573, 721. The court say: "Whatever may be the law under other statutes, we think our code is too plain to admit of any such interpretation, and was so made to obviate perplexities existing where the statutes had not made the law clear [see Code Commissioners' note par. 2 this note]. The consideration here was the five thousand dollars received by defendant. Conceding, but by no means admitting, that the duty of the minor only goes to the extent of returning the identical money received, if he have it, as seems to be held under some statutes, our code adds the words 'or paying its equivalent,' which clearly implies that if he cannot restore the identical consideration received he must pay its equivalent. In this case defendant received money, and that of other money is its only equivalent," citing *Combs vs. Hawes* (Cal. Nov. 19, 1885), 3 Pac. Rep. 597.

48. Whether the rule that party wishing to disaffirm a contract made during infancy must restore the consideration or pay its equivalent, applies in the case of a contract made by an infant under the age of eighteen years, quare.—See par. 10 this note.

§ 36. CANNOT DISAFFIRM CONTRACT FOR NECESSARIES. A minor cannot disaffirm a contract, otherwise valid, to pay the reasonable value of things necessary [1] for his support, or [2] that of his family, entered into by him when not under the care of a parent or guardian able to provide for him or them.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 183.

1. Applied, cited, construed, referred to, etc.
- 2, 3. Minor cannot disaffirm certain contracts.
- 4-8. Necessaries—Credit personally—Reasonable value.
- 9, 10. Same—Infant under care of parent or guardian.
- 11-14. Same—Note—Price unreasonable—Interest.
- 15-18. Same—What are necessities.
- 19-79. Same—Same—Illustrations.
80. Necessaries a question of law, when.
- 81-83. Necessaries a question of fact, when.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc. in: *Whyte vs. Rosencrantz*, 123 Cal. 634, 640, 69 Am. St. Rep. 90, 56 Pac. Rep. 436 (referred to by court in discussion, but class of contract not involved in case).

2. MINOR CANNOT DISAFFIRM CERTAIN CONTRACTS, otherwise valid, named in this and succeeding section of this code (dictum).

—*Whyte vs. Rosencrantz*, 123 Cal. 634, 640, 69 Am. St. Rep. 90, 56 Pac. Rep. 436.

3. Contract therefor by him binds his estate.—*Conn. Shelton vs. Pendleton*, 18 Conn. 417; *Strong vs. Foote*, 42 Conn. 203. *Ga. Oliver vs. McDuffie*, 28 Ga. 522. *Ill. Hunt vs. Thompson*, 4 Ill. (3 Scam.) 179, 36 Am. Dec. 538. *Ind. Fruchey vs. Eagleson*, 15 Ind. App. 88; *Price vs. Sanders*, 60 Ind. 312. *Me. Lawson vs. Lovejoy*, 8 Me. 405, 23 Am. Dec. 526. *Md. Fridge vs. State*, 3 Gill & J. 103, 20 Am. Dec. 463. *Mass. Stone vs. Dennison*, 30 Mass. (13 Pick.) 1, 23 Am. Dec. 654; *Breed vs. Judd*, 67 Mass. (1 Gray) 455; *McCarty vs. Murray*, 69 Mass. (3 Gray) 578; *Trainer vs. Trumbull*, 141 Mass. 527, 6 N. E. Rep. 761. *Mich. Squier vs. Hydliff*, 9 Mich. 274. *Miss. Epperson vs. Nugent*, 57 Miss. 45, 34 Am. Rep. 434; *Decell vs. Lewenthal*, 57 Miss 331, 34 Am. Rep. 449. *N. H. Kelly vs. Davis*, 49 N. H. 176, 6 Am. Rep. 499. *N. Y. Shaw vs. Bryant*, 65 Hun 57, 19

N. Y. Sup. 618; *Kline vs. L'Amoureux*, 2 Paige Ch. 419, 22 Am. Dec. 652; *Gay vs. Ballou*, 4 Wend. 403, 21 Am. Dec. 153. N. C. *Smith vs. Young*, 2 Dev. & B. L. 26; *Hyman vs. Cain*, 3 Jones L. 111; *Rainwater vs. Durham*, 2 Nott & McC. 524, 10 Am. Dec. 637. Tenn. *Grace vs. Hale*, 2 Humpu. 27; *Wheaton vs. East*, 5 Yerg. 41, 26 Am. Dec. 251. Tex. *Parsons vs. Keys*, 43 Tex. 557. Vt. *Bent vs. Manning*, 10 Vt. 225; *Gordon vs. Porter*, 17 Vt. 348; *Scofield vs. White*, 29 Vt. 330. Eng. *Ford vs. Fothergill*, 1 Esp. 211, 1 Peake 301, 3 Rev. Rep. 695.

4. **NECESSARIES FOR SUPPORT.**—Among contracts infant cannot disaffirm, is an express or implied contract to pay reasonable value of things necessary for his support (dictum).—*Whyte vs. Rosencrantz*, 123 Cal. 634, 640, 69 Am. St. Rep. 90, 56 Pac. Rep. 436.

5. **Articles other than necessary, furnished at same time with articles that are necessary, latter can be recovered for, but former cannot.**—*Johnson vs. Lines*, 6 Watts. & S. (Pa.) 80, 40 Am. Dec. 542; *Bent vs. Manning*, 10 Vt. 235; *Tuberville vs. Whitehouse*, 12 Price 692, 1 Car. & P. 94, 11 Eng. C. L. 326.

6. **Credit must be given to infant personally, and articles must be necessary for his support according to his condition and station in life, or he will not be chargeable therewith, notwithstanding fact he personally received them.**—*Ala. Simms vs. Norris*, 5 Ala. 42. Ga. *Nicholson vs. Wilborn*, 13 Ga. 467. Ill. *Sinklear vs. Emert*, 18 Ill. 63. N. Y. *Walling vs. Toll*, 9 John. 141 (physician's bill). Pa. *Rundell vs. Keeler*, 7 Watts 237. Vt. *Varney vs. Young*, 11 Vt. 258.

7. **Reasonable value only of articles furnished infant, and which are necessary for his support, can be recovered.**—*Price vs. Sanders*, 60 Ind. 310; *Earle vs. Reed*, 51 Mass. (10 Met.) 387; *Locke vs. Smith*, 41 N. H. 346.

8. **Reasonable value of the articles a question of fact.**—See authorities above, also Ky. *Beeler vs. Young*, 1 Bibb 519. Mass. *Swift vs. Bennett*, 64 Mass. (10 Cush.) 436. Pa. *Johnson vs. Lines*, 6 Watts & S. (Pa.) 80, 40 Am. Dec. 542. S. C. *Duboise vs. Wheddon*, 4 McC. L. 221.

9. **SAME—INFANT UNDER CARE AND PROTECTION OF PARENT OR GUARDIAN able and willing to furnish him with actual necessities cannot make binding contract therefor without consent of such parent or guardian.**—Mass. *Angel vs. McLellan*, 16 Mass. 28, 8 Am. Dec. 118. N. Y. *Ryan vs. Boltz*, 48 N. Y. Sup. 153; *Wilcox vs. Smith*, 26 Barb. 341; *Atchison vs. Gruff*, 50 Barb. 384; *Kline vs. L'Amoureux*, 2 Paige Ch. 419, 22 Am. Dec. 652; *L'Amoureux vs. Crosby*, 2 Paige Ch. 422, 425; *Walling vs. Toll*, 9 John. 141. S. C. *Assignees of Hull vs. Connolly*, 3 McC. L. 6, 15 Am. Dec. 612. Tenn. *Elwood vs. Myers*, 2 Head 33.

10. **Persons, selling infant must know at their peril whether he lives with and is supported by his parents.**—*Perrin vs. Wilson*, 10 Miss. 451; *Story vs. Perry*, 4 Carr. & P. 526, 19 Eng. C. L. 508; see also authorities above.

11. **SAME—NOTE EXECUTED BY INFANT IN PAYMENT FOR NECESSARIES furnished, may be recovered on by payee.**—*Morton vs. Steward*, 5 Ill. App. 533; *McCrillis vs. Howe*, 3 N. H. 343. See *Parsons vs. Keys*, 43 Tex.

557, in which it is said, in effect, that an infant is not liable in a bill or note given for necessities, but the point was not involved in that case; *Askey vs. Williams*, 74 Tex. 294, 11 S. W. Rep. 1101.

12. **Or subsequent holder of the note.**—*Earle vs. Reed*, 51 Mass. (10 Met.) 387; *Bradley vs. Pratt*, 23 Vt. 323.

"It is sometimes said that if an infant gave his negotiable promissory note or his bond under seal, even for necessities, the express contract so made is void. The reason for the doctrine is that no inquiry can be made into the consideration of such an instrument. . . . We apprehend, however, the better doctrine to be that an infant may make an express written contract for necessities, upon which he may be sued."—*Askey vs. Williams*, 74 Tex. 294, 11 S. W. Rep. 1101.

13. **Price charged unreasonable, amount recovered upon note given by infant in payment of necessities may be reduced.**—*Askey vs. Williams*, 74 Tex. 294, 11 S. W. Rep. 1101.

14. **Interest, agreement to pay, contained in an express contract made by infant for necessities, is binding upon him.**—*Bradley vs. Pratt*, 23 Vt. 323.

15. **What are necessities cannot be determined by any arbitrary and inflexible rule.**—*Epperson vs. Nugent*, 57 Miss. 45, 34 Am. Rep. 434.

16. **It depends upon the circumstances, and each case must be governed by its own.**—*Epperson vs. Nugent*, supra. See *Searcy vs. Hunter*, 31 Tex. 644, 26 Am. St. Rep. 337, 17 S. W. Rep. 372.

17. **They include whatever are suitable, proper and requisite, according to the circumstances and situation of the infant, for the maintenance, comfort, and development of his body or mind: such as food, clothing, appropriate amount, lodging, education, and the like, and nothing else.**—*Comm. Strong vs. Foote*, 42 Conn. 203. Ga. *Nicholson vs. Spencer*, 11 Ga. 607. Mass. *Tupper vs. Cadwell*, 53 Mass. (12 Met.) 559, 561, 46 Am. Dec. 704. N. C. *Jordan vs. Coffield*, 70 N. C. 110.

See 16 Am. & Eng. Encyc. of L. (2d ed.) 276 et seq.

18. **Necessaries have reference to the person, not the estate of an infant, such as new building erected upon his lands, or repairs to those already erected.**—*Decell vs. Lewenthal*, 57 Miss. 331, 34 Am. Rep. 449; *New Hampshire Ins. Co. vs. Norwich*, 32 N. H. 345.

See pars. 34, 75, 76 this note.

19. **SAME—ILLUSTRATIONS.**—**Apprenticeship, money advanced to place an infant at, is held not to be a necessary in** *Smith vs. Gibson*, 2 Peake Ad. Cas. 52, 4 Rev. Rep. 383.

As to apprenticeship, generally, see post § 264 et seq. and notes.

20. **Attorney's fee for beneficial services rendered an infant comes within the definition of a necessary.**—*Epperson vs. Nugent*, 57 Miss. 45, 34 Am. Rep. 434; *Searcy vs. Hunter*, 31 Tex. 644, 26 Am. St. Rep. 337, 17 S. W. Rep. 372.

21. **"There are cases which recognize that fees of attorneys for services rendered infants**

may, under some circumstances, be treated as necessities, for the payment of which the law will imply a contract: *Epperson vs. Nugent*, 57 Miss. 45, 34 Am. Rep. 434; *Thrall vs. Wright*, 38 Vt. 494; and see, for a general discussion, *Hall vs. Butterfield*, 59 N. H. 354, 47 Am. Rep. 209.—*Searcy vs. Hunter*, supra.

22. And the estate of the infant will be liable therefor.—*Munson vs. Washband*, 31 Conn. 303, 83 Am. Dec. 151.

23. Whether an attorney's fee is necessary is a question of whether services are beneficial to infant or not.—*Searcy vs. Hunter*, 81 Tex. 644, 26 Am. St. Rep. 837, 17 S. W. Rep. 372; *Epperson vs. Nugent*, 57 Miss. 45, 34 Am. Rep. 434.

24. Fees of an attorney who recovers property for an infant without guardian, is chargeable to infant's estate.—*Epperson vs. Nugent*, 57 Miss. 45, 34 Am. Rep. 434.

25. Attorney's fee for defense in a bastardy proceedings is a necessary for which an infant is liable.—*Baker vs. Hibbard*, 58 N. H. 539, 20 Am. Rep. 160.

26. Reasonable attorney's fees for services rendered an infant in defending him in a criminal trial comes within definition of necessities.—*Askey vs. Williams*, 74 Tex. 294, 11 S. W. Rep. 1101.

27. Reasonable attorney's fees for beneficial services rendered an infant in recovering property is a valuable consideration for deed by an infant, and is binding upon him.—*Searcy vs. Hunter*, 81 Tex. 644, 26 Am. St. Rep. 837, 17 S. W. Rep. 372.

28. Board and education.—Executed agreement for board, education, and clothing in return for services rendered by an infant, is binding upon the infant, in so far as it is executed.—*Stone vs. Dennison*, 30 Mass. (13 Pick.) 1, 23 Am. Dec. 654; *Squier vs. Hydliff*, 9 Mich. 274; *Mountain vs. Fisher*, 22 Wis. 93.

29. Infant cannot repudiate his executed agreement for board, clothing, and necessities, where parties are not aware of his infancy, and no advantage has been taken of him.—*Spicer vs. Earl*, 41 Mich. 191, 32 Am. Rep. 152, 1 N. W. Rep. 923.

30. Board and feed for horse, as to being a necessary, see pars. 62, 65 this note.

31. Same.—Agreement by another to pay infant's board removes the implied obligation by law that infant shall pay for same.—See *Simms vs. Norris*, 5 Ala. 42; *Wallis vs. Bardwell*, 126 Mass. 366; *Phelps vs. Worcester*, 11 N. H. 51; *Duncumb vs. Tickridge*, Aleyn 94.

32. Barber chair, and other articles and furnishings to be used in fitting up barber shop, are not necessities.—*Ryan vs. Smith*, 165 Mass. 303, 43 N. E. Rep. 109.

33. Bastardy proceedings.—Attorney's fee is a necessary.—See par. 25 this note.

34. Buildings erected upon infant's land for infant, are not necessities for which he is liable as such.—See Ill. *McCarty vs. Carter*, 49 Ill. 53, 95 Am. Dec. 572. Ind. *Price vs. Sanders*, 60 Ind. 310, 314; *Price vs. Jennings*, 62 Ind. 111. Mass. *Tupper vs. Cadwell*, 53 Mass. (12 Met.) 559, 46 Am. Dec. 704. N. Y.

Allen vs. Lardner, 78 Hun 603, 29 N. Y. Sup. 213. N. C. *Freeman vs. Bridger*, 4 Jones L. 1, 67 Am. Dec. 258.

35. Repairs to buildings,—as to whether necessities, see par. 75 this note.

36. Business.—Things purchased and used in conducting any kind of business, and proper and necessary thereto, are not necessities.—*Tupper vs. Cadwell*, 53 Mass. (12 Met.) 559, 560, 46 Am. Dec. 704.

See pars. 32, 62-64, 70, 73, 76, 78 this note.

37. The law does not contemplate that an infant shall open an office or shop, or engage in any business which involves making of variety of contracts.—*Tupper vs. Cadwell*, supra; *Mason vs. Wright*, 54 Mass. (13 Met.) 306; *Merriam vs. Cunningham*, 65 Mass. (11 Cush.) 40; *Wallis vs. Bardwell*, 126 Mass. 366; *McCarthy vs. Henderson*, 138 Mass. 310; *Pyne vs. Wood*, 145 Mass. 558, 14 N. E. Rep. 775; *Ryan vs. Smith*, 165 Mass. 303, 43 N. E. Rep. 109.

38. Bicycle is not necessary even where infant is employed at considerable distance from his father's house, and it is impracticable for him to take his dinner at home unless he uses a bicycle; and infant can recover instalments paid thereon.—*Pyne vs. Wood*, 145 Mass. 558, 14 N. E. Rep. 775; following *McCarthy vs. Henderson*, 138 Mass. 310; *Leonard vs. Stott*, 108 Mass. 46; and *Merriam vs. Cunningham*, 65 Mass. (11 Cush.) 40.

39. Clothing, of suitable quality and quantity, adapted to infant's condition and station in life, is necessary.—*Price vs. Sanders*, 60 Ind. 310, 314; *Saunders vs. Ott*, 1 McC. (S. C.) L. 572; *Rivers vs. Gregg*, 5 Rich. (S. C.) Eq. 274, 278.

40. Same.—Racing-jacket is necessary for jockey, but for none other.—*Burghart vs. Angerstein*, 6 Car. & P. 690, 698, 25 Eng. C. L. 600.

41. Same.—Uniform and regimentals furnished to infant, member of volunteer corps during war times or times of threatened trouble, is held necessary in *Coates vs. Wilson*, 5 Esp. 152, 8 Rev. Rep. 841. See *Hands vs. Slaney*, 8 Durnf. & E. (8 T. R.) 578.

42. Same.—Wedding outfit,—as to whether necessary, see par. 79 this note.

43. College education is not necessary for which infant can bind himself.—*Middlebury College vs. Chandler*, 16 Vt. 683, 43 Am. Dec. 537.

44. But it is otherwise as to common-school education.—See par. 48 this note.

45. Crime.—Infant charged with, attorney's fee for services in defending him is a necessary.—See pars. 25, 26 this note.

46. Dental services rendered an infant come within the meaning of necessities.—*Strong vs. Foot*, 42 Conn. 203.

47. Desirable or beneficial articles, furnished to an infant, are not always necessities.—*Decell vs. Lewenthal*, 57 Miss. 381, 34 Am. Rep. 449; *New Hampshire Ins. Co. vs. Norwich*, 32 N. H. 345.

48. Education.—Necessary education is confined to the common school; college or profes-

sional education does not come within the definition of necessities.—*Grace vs. Hale*, 2 *Humph.* (Tenn.) 27, 36 *Am. Dec.* 296; *Middlebury College vs. Chandler*, 16 *Vt.* 683, 686, 42 *Am. Dec.* 537.

See par. 71 this note.

49. Entertainment furnished by hotel-keeper held a necessary.—See par. 53 this note.

50. Fire insurance policy, procured on infant's property, securing against loss by fire, is not a necessary.—*New Hampshire Fire Ins. Co. vs. Noyes*, 32 *N. H.* 345.

51. As to insurance by infants,—see 13 *Am. & Eng. Encyc. of L.* (3d ed.) 135.

52. Food, proper in kind and quantity, is a necessary.—*Conn. Barnes vs. Barnes*, 50 *Conn.* 572. *Ind. Price vs. Saunders*, 60 *Ind.* 310, 314. *S. C. Saunders vs. Ott*, 1 *McC. L.* 572; *Rivers vs. Gregg*, 5 *Rich. Eq.* 274, 278.

53. Entertainment furnished by hotel-keeper is classed as "necessaries" in *Watson vs. Cross*, 2 *Duv. (Ky.)* 147.

54. Goods and clothing may be purchased on credit by infant, although having income sufficient to pay for necessities suitable to his condition and station in life, and they can be recovered for as necessities.—*Burghart vs. Hale*, 4 *Mees. & W.* 727.

55. Compare: *Nicholson vs. Wilborn*, 13 *Ga.* 467; *Rivers vs. Gregg*, 5 *Rich. (S. C.) Eq.* 274.

56. Goods furnished or clothing supplied an infant already sufficiently supplied, cannot be recovered for as necessities.—See *Ga. Nicholson vs. Spencer*, 11 *Ga.* 607; *Nicholson vs. Wilborn*, 13 *Ga.* 467. *Ill. McKanna vs. Merry*, 61 *Ill.* 177, 180. *Mass. Angel vs. McLellan*, 15 *Mass.* 28, 31, 8 *Am. Dec.* 118; *Swift vs. Bennett*, 64 *Mass.* (10 *Cush.*) 426; *Davis vs. Caldwell*, 66 *Mass.* (12 *Cush.*) 512; *Hoyt vs. Casey*, 114 *Mass.* 397, 19 *Am. Rep.* 371; *Trainer vs. Trumbull*, 141 *Mass.* 527, 530. *Miss. Decell vs. Lewenthal*, 57 *Miss.* 331, 34 *Am. Rep.* 449. *Mo. Perrin vs. Wilson*, 10 *Mo.* 451. *N. Y. Walling vs. Toll*, 9 *John.* 141; *Kline vs. L'Amoureux*, 2 *Paige Ch.* 419, 22 *Am. Dec.* 52. *N. C. Hussey vs. Roundtree*, *Busb. L.* 110; *Smith vs. Young*, 2 *Dev. & B. L.* 26. *Pa. Guthrie vs. Murphy*, 4 *Watts* 80, 28 *Am. Dec.* 681; *Johnson vs. Lines*, 6 *Watts & S.* 80, 40 *Am. Dec.* 542. *S. C. Edwards vs. Higgins*, 2 *McC. Eq.* 16; *Hull vs. Connolly*, 3 *McC. L.* 6, 15 *Am. Dec.* 612; *Kroker vs. Bynum*, 13 *Rich. L.* 163. *Tenn. Elrod vs. Myers*, 2 *Head* 33; *Nichol vs. Steger*, 2 *Tenn. Ch.* 328, 6 *Lea* 393. *Eng. Brayshaw vs. Eaton*, 5 *Bing. N. C.* 231, 7 *Scott* 183, 35 *Eng. C. L.* 99; *Bainbridge vs. Pickering*, 2 *W. Bl.* 1325; *Steedman vs. Rose*, 1 *Car. & M.* 422, 41 *Eng. C. L.* 232; *Cook vs. Deaton*, 3 *Car. & P.* 114, 14 *Eng. C. L.* 232; *Story vs. Pery*, 4 *Car. & P.* 526, 19 *Eng. C. L.* 508; *Burghart vs. Angerstein*, 6 *Car. & P.* 690, 25 *Eng. C. L.* 600; *Ford vs. Fothergill*, 1 *Esp.* 211, 1 *Peake N. P.* 229, 3 *Rev. Rep.* 695; *Mortara vs. Hall*, 6 *Sim.* 465; 3 *L. J. N. S. Ch.* 150, 4 *L. J. N. S. Ch.* 53; *Foster vs. Redgrave*, *L. R.* 4 *Ex.* 35 note; *Foster vs. Toye*, *L. R.* 13 *Q. B. Div.* 410; *Johnstone vs. Marks*, *L. R.* 19, *Q. B. Div.* 509.

57. Merchants supply such at their peril; if he is already sufficiently supplied they cannot recover, although articles and goods are other-

wise appropriate and would be necessities.—*Ga. Nicholson vs. Spencer*, 11 *Ga.* 607. *Mo. Perrin vs. Wilson*, 10 *Mo.* 451. *N. Y. Kline vs. L'Amoureux*, 2 *Paige Ch.* 419, 22 *Am. Dec.* 52. *Pa. Johnson vs. Lines*, 6 *Watts* 80, 40 *Am. Dec.* 542. *Eng. Steedman vs. Rose*, *Car. & M.* 422, 41 *Eng. C. L.* 232; *Cook vs. Deaton*, 3 *Car. & P.* 114, 14 *Eng. C. L.* 232; *Story vs. Pery*, 4 *Car. & P.* 526, 19 *Eng. C. L.* 508; *Burghart vs. Angerstein*, 6 *Car. & P.* 690, 25 *Eng. C. L.* 600; *Ford vs. Fothergill*, 1 *Esp.* 211, 1 *Peake N. R.* 229, 3 *Rev. Rep.* 695; *Mortara vs. Hall*, 6 *Sim.* 465, 3 *L. J. N. S. Ch.* 150, 4 *L. J. N. S. Ch.* 53; *Barnes vs. Toye*, *L. R.* 13 *Q. B. Div.* 410.

58. Same—Necessity of making inquiry, it has been held, may be dispensed with by conduct and appearance of infant, and circumstances of case; e. g., where the infant lived with her mother at fashionable hotel, and drove to tradesman's shop in carriage with her mother, who waited in carriage while daughter purchased the goods, some of which were taken away in the carriage, and others sent to hotel, jury might fairly assume that goods were subjected to mother's inspection, and that there was no necessity of making inquiry as to whether they were necessary or not.—*Dalton vs. Gib*, 5 *Bing. N. C.* 198, 7 *Scott* 117, 35 *Eng. C. L.* 83.

59. Where infant had before been taken to dentist for work, and bills paid without protest, and infant went alone third time, the former acts on part of his guardian rendered it unnecessary that dentist should have instituted an inquiry as to guardianship over defendant, before performing these last services, as prerequisite for recovery, the work being necessary to meet an unsupplied want.—*Strong vs. Foot*, 42 *Conn.* 203.

60. Inquiry will not protect tradesman furnishing articles not needed by infant, because already sufficiently supplied, notwithstanding his diligence and care in the transaction.—*Trainer vs. Trumbull*, 141 *Mass.* 527, 530; *Nichol vs. Steger*, 2 *Tenn. Ch.* 328, 6 *Lea* (Tenn.) 393; *Brayshaw vs. Eaton*, 5 *Bing. N. C.* 231, 7 *Scott* 183, 35 *Eng. C. L.* 99; *Ryder vs. Wombwell*, *L. R.* 4 *Ex.* 32; *Foster vs. Redgrave*, 4 *Ex.* 35.

61. Same—Unreasonable quantity of clothing furnished infant is not a necessary, and cannot be recovered for as such.—*Johnson vs. Lines*, 6 *Watts* (Pa.) 80, 40 *Am. Dec.* 542.

62. Horse purchased by an infant, for business or pleasure, is not a necessary.—*Ind. House vs. Alexander*, 105 *Ind.* 109, 55 *Am. Rep.* 189. *Ky. Beeler vs. Young*, 1 *Bib.* 519; *Smith-peters vs. Griffin*, 10 *B. Mon.* 259. *Mich. Wood vs. Long*, 50 *Mich.* 475, 15 *N. W. Rep.* 557. *S. C. Rainwater vs. Durham*, 2 *Nott. & McC.* 524, 10 *Am. Dec.* 637. *Tenn. Grace vs. Hale*, 2 *Humph.* 27, 36 *Am. Dec.* 269. *Eng. Skrine vs. Gordon*, 9 *Ir. Rep. C. L.* 479.

63. Compare: *Moheny vs. Evans*, 51 *Pa. St.* 30 (this case seems to be out of harmony with all the other cases).

64. Otherwise where physician has advised exercise on horseback, for the benefit of health.—*Aaron vs. Harley*, 6 *Rich. (S. C.) L.* 26; *Hart vs. Porter*, 1 *Jur.* 623; *Clowes vs. Brooke*, 2 *Str.* 1101.

65. Same—Board or feed of horses, used

by an infant in his business as hackman or as teamster and common carrier, is not a necessary.—*Merriam vs. Cunningham*, 65 Mass. (11 Cush.) 40; *Mason vs. Wright*, 54 Mass. (13 Met.) 305.

66. House rented by infant in which he lives and runs barber shop, question of its being necessary is one for the jury.—*Lowe vs. Griffith*, 1 Scott 458.

See par. 63 this note.

67. Repairs to dwelling house,—as to whether necessary, see par. 75 this note.

68. Lodgings, proper, are among the necessities of an infant.—*Price vs. Saunders*, 60 Ind. 310, 314; *Rivers vs. Gregg*, 5 Rich. (S. C.) L. 274, 278.

See par. 66 this note.

69. Medical services, medicines, and articles purchased for health of infant, are necessities.—*Price vs. Saunders*, 60 Ind. 310, 314; *Saunders vs. Ott*, 1 McC. (S. C.) L. 692.

70. Money advanced to pay off mortgage on land of infant, although made at request of guardian or infant, is not in category of necessities, and cannot be recovered as such.—*Magee vs. Welsh*, 18 Cal. 155; *Bicknell vs. Bicknell*, 111 Mass. 265; *West vs. Gregg*, 1 Grant Cas. (Pa.) 53.

71. Professional education does not fall within "necessaries."—*Turner vs. Gaither*, 33 N. C. 357, 35 Am. Rep. 574; *Banchell vs. Clary*, 3 Brev. (S. C.) 194; *Grace vs. Hale*, 2 Humph. (Tenn.) 27, 36 Am. Dec. 296.

See par. 48 this note.

72. Racing-jacket,—as to when a necessary, see par. 40 this note.

73. Ranch—Supplies and money for carrying on, not necessities; and where infant boards with his father, he is not liable for provisions used in carrying on ranch.—*Decell vs. Lewenthal*, 57 Miss. 331, 34 Am. Rep. 449; *State vs. Howard*, 88 N. C. 650.

74. Regimentals,—as to whether necessities, see par. 42 this note.

75. Repairs to his dwelling house, although absolutely necessary to prevent injury, are not necessities, and party cannot recover for material furnished and work done, as such.—See III. *Mathers vs. Doleschuetz*, 72 Ill. 438. Ind. *Price vs. Saunders*, 60 Ind. 310. Mass. *Tupper vs. Cadwell*, 53 Mass. (12 Met.) 559, 561, 46 Am. Dec. 704; *Wallis vs. Bardwell*, 126 Mass. 366. Mo. *Hostmeyer vs. Connors*, 86

Mo. App. 115. N. C. *Freeman vs. Bridger*, 4 Jones L. 1, 67 Am. Dec. 258. Pa. *West vs. Gregg*, 1 Grant Cas. 53. R. I. *Phillips vs. Lloyd*, 18 R. I. 99, 25 Atl. Rep. 909.

76. Supplies for business, needed and used therein, are not necessities within the meaning of above section; it comprehends only what are personal to infant.—See *Decell vs. Lewenthal*, 57 Miss. 331, 34 Am. Rep. 449; *Grace vs. Hale*, 2 Humph. (Tenn.) 27, 36 Am. Dec. 296; *Turberville vs. Whitehouse*, 1 Car. & P. 94, 11, Eng. C. L. 326.

See pars. 35, 36 this note.

77. Uniform and regimentals, as to whether necessities, see par. 42 this note.

78. Wagon for use in his farm work by infant, is not a necessary.—*Paul vs. Smith*, 41 Mo. App. 275.

79. Wedding outfit furnished to infant is regarded as a necessary, and recoverable for as such.—*Garr vs. Haskett*, 86 Ind. 373; *Sams vs. Stockton*, 14 B. Mon. (Ky.) 187; *Gordon vs. Coffield*, 70 N. C. 110, 113.

80. NECESSARIES A QUESTION OF LAW, WHEN.—It is a matter of law that necessities for which infant may bind himself by contract consist of food, clothing, washing, mending, lodging, schooling, medical services, medicine, and nursing.—*Grace vs. Hale*, 2 Humph. (Tenn.) 27, 36 Am. Dec. 296.

81. NECESSARIES QUESTION OF FACT WHEN.—Whether within limitation or definition given by law, certain articles are in fact necessities, becomes question of relative fact to be determined from circumstances and fortune of the infant.—*Grace vs. Hale*, supra. See *Epperson vs. Nugent*, 57 Miss. 45, 34 Am. Rep. 434; *Ford vs. Fothergill*, 1 Esp. 211, 1 Peake N. P. 306, 3 Rev. Rep. 695; *Hands vs. Slaney*, 3 Durnf. & E. (8 T. R.) 578.

82. What are necessities is question mixed of fact and law.—*Decell vs. Lewenthal*, 57 Miss. 331, 34 Am. Rep. 449; *Johnson vs. Lines*, 6 Watts & S. (Pa.) 80, 40 Am. Dec. 542.

83. "Whether articles are of those classes for which infant shall be bound to pay is matter of law to be judged of by the court; if they fall under those general descriptions, then, whether they were actually necessary and suitable to the condition and estate of the infant, and of reasonable prices, must regularly be left to jury as matter of fact."—*Beeler vs. Young*, 1 Bibb (Ky.) 519.

§ 37. NO CERTAIN OBLIGATIONS. A minor cannot disaffirm an obligation, otherwise valid, entered into by him under the express authority or direction of a statute.

History: Enacted March 21, 1872.

1. MINOR CANNOT DISAFFIRM OBLIGATION OTHERWISE VALID, entered into by him under express authority or direction of

statute (dictum).—*Whyte vs. Rosencrantz*, 123 Cal. 634, 640, 69 Am. St. Rep. 90, 97, 56 Pac. Rep. 436.

§ 38. CONTRACTS OF PERSONS WITHOUT UNDERSTANDING. A person entirely without understanding has no power to make a contract of any kind, but he is liable for the reasonable value of things furnished to him necessary for [1] his support or [2] the support of his family.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 183.

1. Applied, cited, construed, referred to, etc.
- 2-4. Construction of section.
5. Entirely without understanding—Person cannot contract.
- 6-8. Same—Meaning of "understanding."
- 9, 10. Same—Non compos mentis—Generic term.
- 11-15. Same—Same—Idiots.
16. Same—Same—Persons of unsound mind.
- 17-20. Same—Same—Same—Imbecility.
21. Same—Same—Same—Moral insanity.
22. Same—Same—Persons of unsound memory.
- 23, 24. Pleading and practice—Complaint—Sufficiency of—Demurrer.
25. Same—Burden of proof.
- 26, 27. Same—Presumption of sanity.
- 28, 29. Same—Same—In case of wills.
- 30, 31. Responsibilities for necessities—Reasonable value.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *More vs. Calkins*, 85 Cal. 177, 190, 29 Am. St. Rep. 128, 24 Pac. Rep. 729 (construed and applied); *Castro vs. Gell*, 110 Cal. 292, 296, 52 Am. St. Rep. 84, 42 Pac. Rep. 804 (construed and applied); *Estate of Yturburru*, 134 Cal. 567, 568, 66 Pac. Rep. 729 (construed and applied); *Jacks vs. Estee*, 139 Cal. 507, 511, 73 Pac. Rep. 247 (construed and applied).

2. **CONSTRUCTION OF SECTION**.—This section is to be regarded as an expression of previously existing law and hence it is not limited to its literal expression.—*Harris vs. Harris*, 59 Cal. 620, 621; *More vs. Calkins*, 85 Cal. 177, 182, 190, 29 Am. St. Rep. 128, 24 Pac. Rep. 729; *Castro vs. Gell*, 110 Cal. 292, 294, 296, 52 Am. St. Rep. 84, 87, 42 Pac. Rep. 804; *Jacks vs. Estee*, 139 Cal. 507, 511, 73 Pac. Rep. 247.

3. This view of meaning of section seems to be supported, in some degree, by what is said of code in *Harris vs. Harris*, 59 Cal. 621; nor is it in conflict with the decision in *More vs. Calkins*, 85 Cal. 177, 182, 190, 29 Am. St. Rep. 128, 24 Pac. Rep. 729; *Castro vs. Gell*, 110 Cal. 294, 296, 52 Am. St. Rep. 84, 87, 42 Pac. Rep. 804.

4. **INCAPACITY TO UNDERSTAND**,—as to construction or interpretation of term, see par. 6-8 this note.

As to liability for necessities, see construction of section in par. 31 this note.

5. **ENTIRELY WITHOUT UNDERSTANDING**—A person being, has no power to make a contract.—*Jacks vs. Estee*, 139 Cal. 507, 511, 73 Pac. Rep. 247.

6. Understanding denotes, not the act of understanding, but the capacity or faculty of doing so, and the expression refers to person with such capacity.—*Jacks vs. Estee*, 139 Cal. 507, 511, 73 Pac. Rep. 247.

7. Term restricted to contracts executed, hence, applies to all persons without capacity of understanding and comprehending such transactions.—*Jacks vs. Estee*, 139 Cal. 507, 511, 73 Pac. Rep. 247.

8. Incapacity to understand particular trans-

action in question, implies incapacity to understand such transactions in general, and finding that party was not insane at time of transaction is controlled by specific fact, consistent therewith, that party was incapacitated to contract.—*Shultz vs. McLean*, 93 Cal. 329, 28 Pac. Rep. 1053; *Hidden vs. Jordan*, 28 Cal. 301; *Warder vs. Enslin*, 13 Cal. 291, 14 Pac. Rep. 374.

Drunkenness—Complete drunkenness as a defense,—see post § 39 note pars. 18-23.

9. **SAME—NON COMPOS MENTIS** is a generic term which comprehends all defects of mind of which law takes cognizance, and embraces all persons deemed legally incompetent to transact business. It includes three separate classes of ailments and incompetents, to wit:

1. Idiots.
2. Persons of unsound mind.
3. Persons of unsound memory.

Each of these classes are entirely distinct from the others. The mingling of these classes, each with its distinctive features, as is frequently done, tends inevitably to confusion.—*DeLafield vs. Parish*, 25 N. Y. 9, 103. See *Ala. Dearman vs. Dearman*, 5 Ala. 203. *Ga. Potts vs. House*, 6 Ga. 324; *Cason vs. Owens*, 10 Ga. 145; *Maddox vs. Simmons*, 31 Ga. 512. *Ind. Somers vs. Pumphrey*, 24 Ind. 244; *Blough vs. Parry*, 144 Ind. 463, 40 N. E. Rep. 70, 43 Id. 560. *Me. Hovey vs. Chase*, 52 Me. 304, 83 Am. Dec. 514. *Neb. Mulloy vs. Ingalls*, 4 Neb. 117. *N. Y. Jackson ex dem. Caldwell vs. King*, 4 Cow. 207, 217, 15 Am. Dec. 354; *Blanchard vs. Nestle*, 3 Den. 37; *Barker's Case*, 2 John. Ch. 233; *Stewart vs. Lisenard*, 28 Wend. 255, 301. *Pa. Matter of Beaumont*, 1 Whart. 52, 29 Am. Dec. 33. *W. Va. Hiett vs. Shull*, 36 W. Va. 563, 15 S. E. Rep. 146. *Eng. Ex parte Barnsley*, 3 Atk. 168, 171.

10. One non compos mentis is one who has never had any mind, or, having had a mind, has wholly lost it. It includes idiots and lunatics.—*Jackson ex dem. Caldwell vs. King*, 4 Cow. (N. Y.) 207, 217; *Beverley's Case*, 4 Co. Rep. 128.

11. **Idiots**.—"Idiocy is that condition in which the human creature has never had, from birth, any, the least glimmering of reason, and is utterly destitute of all those intellectual faculties by which man, in general, is so eminently and peculiarly distinguished. It is not the condition of a deranged mind, but that of a total absence of all mind."—*Owing's Case*, 1 Bland Ch. (Md.) 362, 17 Am. Dec. 311. See *Donegal's Case*, 2 Ves. Sr. 408.

12. The term "Idiot" is generally applied to one who has been without understanding from his nativity,—to congenital dementia.—See *Ga. Battle vs. State*, 105 Ga. 703, 708, 32 S. E. Rep. 160. *Ind. Somers vs. Pumphrey*, 24 Ind. 244. *Md. Owing's Case*, 1 Bland Ch. (Md.) 370, 17 Am. Dec. 311. *N. Y. Blanchard vs. Nestle*, 3 Den. 37; *Odell vs. Buck*, 21 Wend. 143. *W. Va. Hiett vs. Shull*, 36 W. Va. 365. *Eng. Beverley's Case*, 4 Co. Rep. 124; 1 *Lewis' Bl. Com.* 303 and notes; 1 *Russ on Crimes* (9th Am. ed.) 11.

13. But this is incorrect, in that it is too restricted. Idiots embrace not only congenital idiots, or idiots from birth, but also such as

have subsequently become mentally imbecile, from sickness or other cause.—Shelden, C. J., in *Delafield vs. Parish*, 25 N. Y. 9, 103.

14. Complete idiocy is total fatuity from birth.—*Browning vs. Reane*, 2 Phil. Ecc. 69.

15. Idiots and madmen distinguished in this, the former are bereft of or have but few ideas, and reason not at all, while madmen put wrong ideas together and make wrong propositions, although they may argue and reason rightly from them.—*Commonwealth vs. Harkell*, 2 Brewst. (Pa.) 497.

16. SAME—SAME—PERSONS OF UNSOUND MIND comprise all who suffer from alienation of mind, whether they are (1) lunatics, (2) monomaniacs, or (3) generally deranged.—Shelden, C. J., in *Delafield vs. Parish*, 25 N. Y. 9, 103.

17. Imbecility, however great, in the absence of fraud, will not avoid contract. There must be absolute want of intelligence.—*Jackson ex dem. Caldwell vs. King*, 4 Cow. (N. Y.) 207, 15 Am. Dec. 354; *Blanchard vs. Nestle*, 3 Den. (N. Y.) 37; *Odell vs. Buck*, 21 Wend. (N. Y.) 142; *Petrie vs. Shoemaker*, 24 Wend. (N. Y.) 85.

18. In the unofficially reported case of *Osterhout vs. Shoemaker* (N. Y.), decided in 1846, the general enunciation of which was affirmed at the same term in *Blanchard vs. Nestle*, 3 Den. (N. Y.) 37, and has never been overruled, disapproved, or questioned in that state, carried the doctrine to an extreme and dangerous limit. In that case an inquest of lunacy, held immediately after conveyance of lands, found plaintiff to be of unsound and imbecile mind from his nativity; and yet the deed was upheld.

19. "Our law does not distinguish between different degrees of intelligence. It does not deny to a man of very feeble mind the right to make contracts and manage his own affairs. . . . There must be actual want of understanding."—*Osterhout vs. Shoemaker*, 3 Den. (N. Y.) 37 note.

20. "Weakness of understanding is not, of itself, any objection in law to validity of a contract. If a man be legally compos mentis, he is the disposer of his own property."—*Jackson ex dem. Caldwell vs. King*, 4 Cow. (N. Y.) 207, 218, 15 Am. Dec. 354.

21. Moral insanity, unaccompanied by mental delusion and legal incompetency, will not invalidate or render voidable a contract.—*Ala. Florey vs. Florey*, 24 Ala. 241. *Ga. Lucas vs. Parsons*, 24 Ga. 640, 641, 71 Am. Dec. 147. *Ky. St. Louis Mut. L. Ins. Co. vs. Graves*, 6 Bush. 263. *Miss. Mullins vs. Cottrell*, 41 Miss. 291. *N. H. Boardman vs. Woodman*, 47 N. H. 120. *N. Y. Staton vs. Weatherwax*, 16 Barb. 269; *Matter of Forman*, 54 Barb. 274. *N. C. Mayo vs. Jones*, 78 N. C. 402. *R. I. Jencks vs. Probate Court*, 2 R. I. 255. *Eng. Frere vs. Peacock*, 1 Rob. Ecc. 442; *White vs. Wilson*, 13 Ves. 87, 14 Ves. 151. See *Banks vs. Goodfellow*, L. R. 5 Q. B. 549.

22. SAME—SAME—PERSONS OF UNSOUND MEMORY is confined to particular class of individuals, composed mostly of persons whose memory is impaired by age; such persons are said to be afflicted with senile dementia.—Shelden, C. J., in *Delafield vs. Parish*, 25 N. Y. 9,

23. PLEADING AND PRACTICE—Complaint—Sufficiency.—Complaint failing to allege, directly or indirectly, definitely or indefinitely, that plaintiff was entirely without understanding, presents no cause of action under this section.—*More vs. Calkins*, 85 Cal. 177, 190, 29 Am. St. Rep. 128, 24 Pac. Rep. 729. See *Castro vs. Geil*, 110 Cal. 292, 296, 52 Am. St. Rep. 84, 42 Pac. Rep. 804.

24. Demurrer to complaint based upon §§ 38 and 39 this code properly sustained where complaint failed to allege plaintiff was "entirely without understanding."—*More vs. Calkins*, 85 Cal. 177, 190, 29 Am. St. Rep. 128, 24 Pac. Rep. 729.

25. Same—Burden of proof of want of understanding is on him who alleges it.—*Jackson ex dem. Caldwell vs. King*, 4 Cow. (N. Y.) 207, 15 Am. Dec. 354.

26. Presumption of sanity, or soundness of mind. The common-law rule is that a man is presumed to be of sound mind until the contrary appears.—See *Hawkins vs. Grimes*, 13 B. Mon. (Ky.) 257, 270; *Brooks vs. Barrett*, 24 Mass. (7 Pick.) 94; *McMechen vs. McMechen*, 17 W. Va. 633.

27. Presumption of sanity makes out a prima facie case, but does not shift the burden of proof.—*Elliott vs. Wellby*, 13 Mo. App. 19.

28. In case of wills rule is otherwise ever since statute of 34 and 35 Henry VIII., c. 5, § 14 was passed.—*Conn. Comstock vs. Hallyme*, 8 Conn. 254. *Ga. Potts vs. House*, 6 Ga. 324, 50 Am. Dec. 329; *Evans vs. Arnold*, 62 Ga. 169. *Ill. Riggs vs. Wilton*, 13 Ill. 15. *Ky. Hawkins vs. Grimes*, 13 B. Mon. 257. *Me. Garrish vs. Nasson*, 22 Me. 438, 441; *Chilley vs. Chilley*, 34 Me. 162; *Robinson vs. Adams*, 62 Me. 369, 16 Am. Rep. 473. *Mass. Crowinshield vs. Crowinshield*, 68 Mass. (2 Gray) 524, 527. *Mich. Taff vs. Hosmer*, 14 Mich. 309; *McGinnis vs. Kempsey*, 27 Mich. 363. *N. H. Boardman vs. Woodman*, 47 N. H. 120, 130. *N. Y. Delafield vs. Parish*, 25 N. Y. 9. *Vt. Williams vs. Robinson*, 42 Vt. 658, 1 Am. Rep. 359. *W. Va. McMechen vs. McMechen*, 17 W. Va. 633; *Nicholas vs. Kerchiner*, 20 W. Va. 261. *Eng. Wellis vs. Hodgson*, 2 Atk. 56; *Barry vs. Buthin*, 1 Cart. 672, 2 Moo. P. C. 480; *Sutton vs. Sadler*, 3 C. B. N. S. 87, 91 Eng. C. L. 86; *Baker vs. Batt*, 2 Moo. P. C. 317; *Symes vs. Green*, 1 Swab. & T. 401; *Harris vs. Ingleton*, 3 Pr. Wms. 91.

29. Compare (but local statute of wills should always be consulted): *Ark. Rogers vs. Diamond*, 13 Ark. 479; *McDaniel vs. Crosley*, 19 Ark. 533; *Tobin vs. Jenkins*, 29 Ark. 151; *Jenkins vs. Tobin*, 31 Ark. 309; *McCulloch vs. Campbell*, 49 Ark. 367, 5 S. W. Rep. 590, 36 Alb. L. J. 434. *Del. Jamison vs. Will*, 3 Houst. 108. *Ind. Blough vs. Parry*, 144 Ind. 463, 40 N. E. Rep. 70, 43 Id. 560, overruling *Kenworthy vs. Williams*, 5 Ind. 375, and disapproving *Durham vs. Smith*, 120 Ind. 463, 22 N. E. Rep. 333. *Md. Tyson vs. Tyson*, 37 Md. 567. *N. H. Perkins vs. Perkins*, 39 N. H. 163. *N. J. Don vs. Gibbons*, 22 N. J. L. (3 Zab.) 117; *Sloan vs. Maxwell*, 3 N. J. Eq. (2 Gr.) 563. *Pa. Egbert vs. Egbert*, 78 Pa. St. 326. *Vt. Dean vs. Dean*, 27 Vt. 726.

30. RESPONSIBILITY FOR NECESSARIES.

—Insane person is liable for reasonable value of things furnished to him, necessary for his support.—Estate of Yturburru, 134 Cal. 567, 568, 66 Pac. Rep. 729. See Ala. Ex parte Northington, 37 Ala. 496. Ark. Henry vs. Fine, 23 Ark. 417. Ill. McCormick vs. Little, 85 Ill. 62. Me. Sawyer vs. Lufkin, 56 Me. 808. Mass. Hallett vs. Oakes, 55 Mass. (1 Cush.) 296; Kendall vs. May, 59 Mass. (10 Allen) 59. Mo. Darby vs. Cabanne, 1 Mo. App. 127. N. J. Van Hoon vs. Hann, 39 N. J. L. (10 Vr.) 207. N. C.

Surles vs. Pipkins, 69 N. C. 513; Tolly vs. Tolly, 2 Dev. & B. Eq. 385; Richardson vs. Strong, 13 Ired. L. 106. Pa. LaRue vs. Gilkyson, 4 Pa. St. 375, 45 Am. Dec. 700; Lancaster etc. Bank vs. Moore, 78 Pa. St. 407. Eng. Baxter vs. Earl of Portsmouth, 5 Barn. & C. 170, 11 Eng. C. L. 190; Nelson vs. Dunscombe, 9 Beav. 211; In re Persse, 3 Mal. 94.

31. Section applies to the care and support of ward obtained at State Asylum for Insane.—Estate of Yturburru, 134 Cal. 567, 568, 66 Pac. Rep. 729.

§ 39. BY PERSONS OF UNSOUND MIND. A conveyance or other contract of person of unsound mind but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission, as provided in the chapter on rescission of this code.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 184.

1. Applied, cited, construed, referred to, etc.
2. Construction.
- 3, 4. Contract of persons of unsound mind.
- 5-9. Same—Voidable.
- 10, 11. Same—Same—Fraud, when.
- 12-16. Same—General rule.
17. Same—Same—Deed of deaf muta.
- 18-23. Same—Same—Drunkenness.
24. Same—Executed contract.
- 25, 26. Same—Inquest of lunacy—Necessity for.
- 27, 28. Same—Same—Effect of finding.
29. Same—Same—Provisions of statute must be followed.
- 30, 31. Same—Same—Return—What must show.
32. Same—Office found—Contract after.
- 33, 34. Conveyance by person of unsound mind.
35. Same—"Void" and "voidable"—Confusion of.
- 36, 37. Same—Vests title—How divested.
- 39-44. Judgments against lunatics—Not void.
- 45-47. Liability—For breach of contract—Personal services.
48. Same—For necessities.
- 49, 50. Same—For negligence and tort.
51. Same—Same—Intent being essential.
- 52, 53. Same—Same—Slander and libel.
54. Same—Same—Exemplary damages.
- 55-58. Rescission of contract—Restoration of consideration.
- 59, 60. Pleading—Complaint—Demurrer.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO,** etc., in: More vs. Calkins, 85 Cal. 177, 190, 29 Am. St. Rep. 128, 24 Pac. Rep. 729 (applied); Castro vs. Geil, 110 Cal. 292, 296, 52 Am. St. Rep. 84, 42 Pac. Rep. 804 (explained and applied); Murphy vs. Crowley, 140 Cal. 141, 152, 73 Pac. Rep. 820 (applied).

2. **CONSTRUCTION.**—This and preceding section are to effect that deed of person non compos mentis, who is not under guardianship, transfers seizin, and is merely voidable.—Castro vs. Geil, 110 Cal. 292, 295-296, 52 Am. St. Rep. 84, 42 Pac. Rep. 804.

3. **CONTRACT OF PERSON OF UNSOUND MIND,** who is not under care of guardian, is not void.—Castro vs. Geil, 110 Cal. 292, 296, 52 Am. St. Rep. 84, 42 Pac. Rep. 804.

4. Instrument executed by party held not to be void under section.—More vs. Calkins,

85 Cal. 177, 190, 29 Am. St. Rep. 128, 132, 24 Pac. Rep. 729.

5. **Contract voidable until after office found:** Incapacity of party not having been officially judged and determined, his contracts are on same footing as those of infants. D. C. Sullivan vs. Flynn, 20 D. C. 401. Ind. Crouse vs. Holeman, 19 Ind. 30; Somers vs. Pumphrey, 24 Ind. 231; Nichol vs. Thomas, 53 Ind. 42. Iowa. Allen vs. Berryhill, 27 Iowa, 534. Kan. Gribben vs. Maxwell, 34 Kan. 812, 7 Pac. Rep. 584. Ky. Breckinridge vs. Ormsby, 1 J. J. Marsh. 236, 19 Am. Dec. 71. Md. Key vs. Donis, 1 Md. 82; Chew vs. Bank, 14 Md. 299; Riley vs. Carter, 76 Md. 581, 594, 25 Atl. 667; Flach vs. Gottschalk Co., 38 Md. 363, 71 Am. St. Rep. 413, 41 Atl. Rep. 908, 42 L. R. A. 745. Me. Hovey vs. Hobson, 53 Me. 451, 453, 89 Am. Dec. 705. Mass. Wait vs. Maxwell, 22 Mass. (5 Pick.) 217, 16 Am. Dec. 391; Allis vs. Billings, 47 Mass. (6 Met.) 415, 39 Am. Dec. 744; Hallett vs. Oakes, 55 Mass. (1 Cush.) 296; Arnold vs. Richmond Iron Works, 67 Mass. (1 Gray) 434; Gibson vs. Soper, 72 Mass. (6 Gray) 279, 66 Am. Dec. 414; Carrier vs. Sears, 86 Mass. (4 Allen) 336, 81 Am. Dec. 707; Bond vs. Bond, 89 Mass. (7 Allen) 1. Mich. Moran vs. Moran, 106 Mich. 8, 58 Am. St. Rep. 462, 63 N. W. Rep. 989. Miss. Fitzgerald vs. Reed, 9 Smed. & M. 94. N. H. Burke vs. Allen, 29 N. H. 106, 61 Am. Dec. 642; Ewele's Lead. Cas. 576 and note. N. J. Eaton vs. Eaton, 37 N. J. L. (8 Vr.) 108, 18 Am. Rep. 716. N. Y. Ingraham vs. Baldwin, 9 N. Y. 46; Bool vs. Mix, 17 Wend. 120, 124, 31 Am. Dec. 285. Pa. Lancaster Co. Bank vs. Moore, 78 Pa. St. 407, 21 Am. Rep. 24. Tenn. Bank vs. Sneed, 97 Tenn. 120, 56 Am. St. Rep. 788, 36 S. W. Rep. 716. Tex. Elston vs. Jasper, 45 Tex. 409.

6. There is some opposition to this doctrine in those cases which follow the English rule, that deed of lunatic is absolutely void. The argument of this class of cases is very forcibly put by Mr. Justice Story, in *Dexter vs. Hall*, 82 U. S. (15 Wall.) 9, 19, bk. 21 L. ed. 73, and in the dissenting opinion in *Allen vs. Berryhill*, 27 Iowa 534, 540, 1 Am. Rep. 309. See also *Ga. American Trust & Banking Co. vs. Boone*, 102 Ga. 202, 66 Am. St. Rep. 167, 29 S. E. Rep. 182, 40 L. R. A. 250. Ill. *Helbreg vs.*

Schumann, 150 Ill. 12, 41 Am. St. Rep. 339, 37 N. E. Rep. 99. *N. Y. Van Deusen vs. Sweet*, 51 N. Y. 378. *Ohio. Hosler vs. Beard*, 54 Ohio St. 393, 56 Am. St. Rep. 720, 43 N. E. Rep. 1040. *Pa. Desilver's Estate*, 5 Rawle 111, 28 Am. Dec. 645. *Fed. Parkhurst vs. Hosford*, 21 Fed. Rep. 327, 10 Sawy. C. C. 410; *Anglo-Calif. Bank vs. Ames*, 27 Fed. Rep. 727, 728; *Edwards vs. Davenport*, 20 Fed. Rep. 756, 758, 4 McC. C. C. 34, 35.

7. Judge Story says, in part: "Looking at the subject in the light of reason, it is difficult to perceive how one incapable of understanding or acting in the ordinary affairs of life can make an instrument the efficacy of which consists in the fact that it expresses his intention, or, more properly, his mental conclusions. The fundamental idea of a contract is that it requires the assent of two minds, but a lunatic, or a person non compos mentis, has nothing which the law recognizes as a mind, and it would seem, therefore, on principle, that he cannot make a contract which may have any efficacy as such."—*Dexter vs. Hall*, 32 U. S. (15 Wall.) 9, 19, bk. 21 L. ed. 73.

8. In *Van Deusen vs. Sweet*, 51 N. Y. 378, the deed of a grantor non compos mentis (see ante §38, pars. 9, 10) was held absolutely void. This case has been followed in *Banker vs. Banker*, 63 N. Y. 409, 413; *Valentine vs. Lunt*, 51 Hun (N. Y.) 544, 548, sub nom. *Valentine vs. Richardt*, 3 N. Y. Supp. 906; *Dominick vs. Dominick*, 10 N. Y. St. Rep. 33; *Wagner vs. Harriott*, 10 N. Y. St. Rep. 709; *Goodyear vs. Adams*, 24 N. Y. St. Rep. 31, 34, 5 N. Y. Supp. 275; *Farley vs. Parker*, 6 Oreg. 105, 25 Am. Rep. 504.

9. In the recent case of *American Trust & B. Co. vs. Boone*, 102 Ga. 202, 66 Am. St. Rep. 167, 29 S. E. Rep. 132, 40 L. R. A. 250, it was held that contract entered into by insane person, whether it be executory or executed, is void, even though there has been no judicial determination that he is insane.

10. Same—It is fraud where party trading with lunatic knew of his condition.—*Price vs. Berrington*, 7 Hare 402. See *Lincoln vs. Buckmaster*, 32 Vt. 632.

11. Or had information which would lead prudent man to such knowledge; the contract will not be held valid.—*Atk. Henry vs. Fine*, 23 Ark. 417. *N. J. Matthiessen etc. Co. vs. McMahon*, 38 N. J. L. (9 Vr.) 536. *Pa. Lancaster Co. Bank vs. Moore*, 78 Pa. St. 407, 21 Am. Rep. 24. *Vt. Lincoln vs. Buckmaster*, 32 Vt. 652. *Eng. Beaveen vs. McDonnell*, 10 Exch. 184, 24 Eng. L. & Eq. 484; *Moss vs. Tube*, 3 Fost. & F. 297.

12. The general rule is that "contracts with lunatics and insane persons are invalid, subject to qualification that contract made in good faith with lunatic, for full consideration, which has been executed without knowledge of insanity, or such information as would lead prudent person to belief of incapacity, will be sustained."—*Matthiessen vs. McMahon*, 38 N. J. L. (9 Vr.) 536; *Lancaster Co. Bank vs. Moore*, 78 Pa. St. 407, 21 Am. Rep. 24.

13. "Knowledge or information, such as would lead prudent person to belief of inca-

pacity, is such evidence of bad faith as will avoid contract."—*Lincoln vs. Buckmaster*, 32 Vt. 632.

14. "If proof be clear that executory contract to purchase was made in good faith, and for full, fair price, when lunacy of vendor was neither known nor suspected, and that contract was executed on part of purchaser without knowledge or belief of existence of incapacity of grantor, the contract will be upheld."—*Yauger vs. Skinner*, 14 N. J. Eq. (1 McC.) 389.

15. "Dealings of sale and purchase by person apparently sane, will not be set aside against those who have dealt with him on faith of his being person of competent understanding."—*Lancaster Co. Bank vs. Moore*, 78 Pa. St. 407, 21 Am. Rep. 24.

16. "We are not so disposed to lay down so general a proposition as that all executed contracts bona fide entered into must be taken as valid, though one of parties be of unsound mind; we think, however, that we may safely conclude that when person of apparently sound mind, and not known to be otherwise, enters into contract for purchase of property, which is fair and bona fide, and which is executed and completed, and the property, the subject-matter of the contract, has been paid for and fully enjoyed, and cannot be restored so as to put parties in statu quo, such contract cannot afterwards be set aside by alleged lunatic or those who represent him."—*Pollock, C. B.*, in *Molton vs. Camroux*, 2 Exch. 502. See *Ill. Scanlan vs. Cobb*, 85 Ill. 296. *Ind. Wilder vs. Weakley*, 34 Ind. 134. *Iowa. Behrens vs. McKenzie*, 23 Iowa 333, 343, 92 Am. Dec. 423. *N. H. Young vs. Stevens*, 48 N. H. 133, 2 Am. Rep. 202. *N. J. Eaton vs. Eaton*, 37 N. J. L. (8 Vr.) 108, 13 Am. Rep. 716; *Matthiessen W. F. Co. vs. McMahon*, 38 N. J. L. (9 Vr.) 536. *N. Y. Loomis vs. Spencer*, 2 Paige Ch. 153; *Sprague vs. Duel*, 11 Paige Ch. 480. *Pa. Beals vs. See*, 10 Pa. St. 56, 49 Am. Dec. 573; *Lancaster Co. Bank vs. Moore*, 78 Pa. St. 407, 414, 21 Am. Rep. 24. *Vt. Lincoln vs. Buckmaster*, 32 Vt. 653. *Eng. Dane vs. Kirkwall*, 8 Car. & P. 679, 34 Eng. C. L. 581; *Price vs. Berrington*, 15 Jur. 999, 7 Eng. L. & Eq. 354.

17. SAME—SAME—DEED BY DEAF AND DUMB PERSON is not void but voidable.—*Brown vs. Brown*, 3 Conn. 298, 3 Am. Dec. 187.

18. SAME — SAME — DRUNKENNESS. — "Complete drunkenness" being shown "complete incapacity" will be presumed, and will be good defense by maker of note (arguendo).—*Caulkins vs. Fry*, 35 Conn. 170 (good as against a bona fide purchaser).

19. No defense in absence of fraud, or proof of absolute incapacity.—*Miller vs. Finley*, 26 Mich. 249, 12 Am. Rep. 306.

20. No defense in hands of an innocent holder. Indorsee will be deemed innocent holder, unless he took the note mala fides, and with notice of condition of maker.—*State Bank vs. McCoy*, 69 Pa. St. 204, 3 Am. Rep. 246.

21. "There is nothing on the paper to cast suspicion upon its character, and it can only be impeached, in hands of holder for value, by evidence that he took it under circumstances which rendered him guilty of bad faith."—*Mill-*

ler vs. Finley, 26 Mich. 349, 12 Am. Rep. 306. See Goodman vs. Simonds, 61 U. S. (20 How.) 343, bk. 15 L. ed. 943; Murray vs. Lardner, 69 U. S. (2 Wall.) 110, bk. 17 L. ed. 857; Goodman vs. Harvey, 4 Ad. & E. 870, 31 Eng. C. L. 212; Uther vs. Rich, 10 Ad. & E. 784, 37 Eng. C. L. 232.

22. "After one has by inquisition been found an habitual drunkard, he cannot, until it is vacated or a commission thereon superseded, even in his sober intervals, make a contract to bind himself or property."—See Leonard vs. Leonard, 31 Mass. (14 Pick.) 280; Wadsworth vs. Sharpsteen, 8 N. Y. 388, 59 Am. Dec. 499; Lancaster Co. Bank vs. Moore, 78 Pa. St. 407, 21 Am. Rep. 24.

23. Settlement of cause when intoxicated, held not binding, in Murray vs. Carlin, 67 Ill. 286.

24. SAME—EXECUTED CONTRACT cannot be avoided on the ground of insanity at time of purchase, unless fraud was committed upon the insane person, or party dealing with him had notice of his condition.—LaRue vs. Gilkyson, 4 Pa. St. 375, 45 Am. Dec. 700; Beals vs. See, 10 Pa. St. 56, 49 Am. Dec. 573; Noce vs. Boyer, 30 Pa. St. 99; State Bank vs. McCoy, 69 Pa. St. 204, 8 Am. Rep. 246; Lancaster Co. Bank vs. Moore, 78 Pa. St. 407, 21 Am. Rep. 24.

25. SAME—INQUEST OF LUNACY—Necessity for.—Contract by insane person is not void, unless he has been adjudged insane, and it may become valid by ratification.—Ind. Nichols vs. Thomas, 53 Ind. 53. Mass. Carrier vs. Sears, 86 Mass. (4 Allen) 336, 327, 81 Am. Dec. 707; Howe vs. Howe, 99 Mass. 88; Wright vs. Reeves, 107 Mass. 327, 328. N. J. Blakely vs. Blakely, 33 N. J. Eq. (6 Stew.) 508. Wis. Mohr vs. Tulip, 40 Wis. 66, 82.

26. Conveyance or other contract made by person of unsound mind, but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission as provided for in chapter on "rescission" in this code.—Murphy vs. Crowley, 140 Cal. 141, 152, 73 Pac. Rep. 320.

See post §§1688-1691 and notes.

27. Effect of finding.—"As to acts done by lunatic or drunkard, before issuing of commission, and which are overreached by retrospective finding of jury, the inquisition is only presumptive, but not conclusive, evidence of incapacity. But all gifts of goods and chattels of an idiot, lunatic, or drunkard, and all bonds or other contracts made by him after actual finding of inquisition declaring his incompetency, and until he is permitted to assume control of his property by the court, are utterly void."—L'Amoreux vs. Crosby, 2 Paige Ch. (N. Y.) 422, 22 Am. Dec. 655. See Osterhout vs. Shoemaker, 3 Hill (N. Y.) 513, 516; Demelt vs. Leonard, 19 How. (N. Y.) 141; Hoyt vs. Adea, 3 Lans. (N. Y.) 173; Goodell vs. Harrington, 3 Thomp. & C. (N. Y.) 345; Hart vs. Deamer, 6 Wend. (N. Y.) 497; Lancaster Co. Bank vs. Moore, 78 Pa. St. 407, 21 Am. Rep. 24.

28. Such inquisitions are admissible in evidence, but they are not conclusive, except against parties or their privies.—Hoyt vs. Adea, 3 Lans. (N. Y.) 173; Goodell vs. Har-

ington, 3 Thomp. & C. (N. Y.) 345. See Lancaster Co. Bank vs. Moore, 78 Pa. St. 407, 21 Am. Rep. 24.

29. Provisions of statute must be followed regulating inquest of lunacy.—See Ark. Cox vs. Gress, 51 Ark. 224, 11 S. W. Rep. 416. Pa. In re Weaver, 116 Pa. St. 225, 9 Atl. Rep. 323; Meurer Appeal, 119 Pa. St. 115, 12 Atl. Rep. 368. Tenn. Davis vs. Norvell, 37 Tenn. 36, sub nom. Davis vs. Norrill, 9 S. W. Rep. 193.

30. Return of inquiry of lunacy should show whether party is so bereft of his reason as to warrant his being deprived of power over his property and control of his affairs; and if return does not so show he should not be placed under guardianship.—In matter of Lindsley, 44 N. J. Eq. (17 Stew.) 564, 6 Am. St. Rep. 913, 15 Atl. Rep. 1. See Dutcher vs. Hill, 29 Mo. 271, 77 Am. Dec. 572; Kimball vs. Fisk, 39 N. H. 110; Beaumont's Case, 1 Whart. (Pa.) 52, 29 Am. Dec. 33.

31. For a person may be of weak mind and yet not of unsound mind.—Anderson vs. State, 25 Neb. 550, 41 N. W. Rep. 397 (so as to excuse for crime).

32. Office found.—Contract after, and appointment of guardian, is void under our statute.—See also Wait vs. Maxwell, 22 Mass. (5 Pick.) 217, 16 Am. Dec. 391.

33. CONVEYANCE BY PERSON OF UNSOUND MIND, but not entirely without understanding, is not void.—Castro vs. Gell, 110 Cal. 292, 296, 52 Am. St. Rep. 84, 87, 42 Pac. Rep. 804. See Me. Hovey vs. Chase, 52 Me. 304, 83 Am. Dec. 514; Hovey vs. Hobson, 53 Me. 451, 39 Am. Dec. 705. Mass. Wait vs. Maxwell, 22 Mass. (5 Pick.) 217, 16 Am. Dec. 391; Allis vs. Billings, 47 Mass. (6 Met.) 415, 39 Am. Dec. 744, 749. Mich. Moran vs. Moran, 106 Mich. 8, 58 Am. St. Rep. 462, 63 N. W. Rep. 989. N. Y. Williams vs. Hays, 143 N. Y. 442, 42 Am. St. Rep. 743, 38 N. E. Rep. 449, 26 L. R. A. 153; Eaton vs. Eaton, 37 N. J. L. (8 Vr.) 108, 18 Am. Rep. 716. N. C. Riggan vs. Green, 80 N. C. 236, 30 Am. Rep. 77. Tex. Pearson vs. Cox, 71 Tex. 246, 10 Am. St. Rep. 740, 9 S. W. Rep. 124.

34. Lunatic not under care of guardian cannot avoid his deed as against an innocent purchaser.—Odom vs. Riddick, 104 N. C. 515, 17 Am. St. Rep. 686, 10 S. E. Rep. 609, 7 L. R. A. 118.

35. "Void" and "voidable"—Confusion of.—"The term 'void,' as applicable to conveyances, or other agreements, has not at all times been used with technical precision, nor restricted to its peculiar and limited sense as contradistinguished from 'voidable'; it being frequently introduced, even by legal writers and jurists, where the purpose is nothing further than to indicate that a contract was invalid, and not binding in law. But the distinction between the terms 'void' and 'voidable' in their applications to contracts, is often one of great practical importance; and whenever entire technical accuracy is required, the term 'void' can only be properly applied to those contracts that are of no effect whatsoever; such as are a mere nullity, and incapable of confirmation or ratification."—Allis vs. Billings, 47 Mass. (6

Met.) 415, 39 Am. Dec. 744, 749. See *Van Shaack vs. Robbins*, 36 Iowa 204; *Terrill vs. Auchauer*, 14 Ohio St. 85.

36. **Vests title—How divested.**—A deed executed and delivered by party of unsound mind, who is not entirely without understanding, vests title in grantee; he can be divested only by judicial action or voluntary conveyance.—*Castro vs. Gell*, 110 Cal. 292, 296, 52 Am. St. Rep. 84, 42 Pac. Rep. 804.

37. **EFFECT OF DEED OF INSANE PERSON**, under this section of the code, is to give legal title to premises, subject to rescission on grounds of fraud or undue influence.—*Murphy vs. Crowley* (dis. op.), 140 Cal. 141, 152, 73 Pac. Rep. 320; *Castro vs. Gell*, 110 Cal. 296, 52 Am. St. Rep. 84, 42 Pac. Rep. 804.

See Code Civ. Proc. § 1338 subd. 4 and note.

38. **Deed jointly executed by insane man and his wife** is not void where wife and children have received benefits of the sale.—*Pearson vs. Cox*, 71 Tex. 246, 10 Am. St. Rep. 740, 9 S. W. Rep. 124.

39. **JUDGMENTS AGAINST LUNATIC**—Not void or voidable. Until office found suit may be commenced against a lunatic same as against person in full possession of all his faculties. It is not the duty of plaintiff to ascertain mental capacity and conditions of prospective defendant, and have guardian appointed before commencing suit against him. Ill. *Maloney vs. Dewey*, 127 Ill. 395, 11 Am. St. Rep. 131, 19 N. E. Rep. 848. Ind. *Woods vs. Brown*, 93 Ind. 164, 169, 47 Am. Rep. 369, 373. Ky. *Allison vs. Taylor*, 6 Dana 87, 32 Am. Dec. 68. Md. *Stigers vs. Brent*, 50 Md. 215, 33 Am. Rep. 317. Me. *King vs. Robinson*, 33 Me. 114, 54 Am. Dec. 614. Tex. *Ewing vs. Wilson*, 63 Tex. 90.

40. **Personal service upon person not judicially declared to be insane**, gives court jurisdiction of the parties.—*Sacramento Sav. Bank vs. Spencer*, 53 Cal. 737, 740. See *Speck vs. Pullman Palace Car Co.*, 121 Ill. 32, 51, 12 N. E. Rep. 213 (where judgment was held not voidable because plaintiff a lunatic).

41. "The mere fact that party defendant is non compos mentis during any of the preliminary proceedings, or when judgment is rendered, constitutes no ground of defense, for both at law and in equity a contract and liability assumed by him while of sound mind may be enforced against him when he is of unsound mind."—*King vs. Robinson*, 33 Me. 114, 54 Am. Dec. 614. See *Mass. Hathaway vs. Clark*, 22 Mass. (5 Pick.) 490. N. Y. *Clarke vs. Dunham*, 4 Den. 262; *Robertson vs. Lain*, 19 Wend. 649. Eng. *Steel vs. Alan*, 2 Bos. & P. 427, 5 Rev. Rep. 647; *Pillop vs. Sexton*, 3 Bos. & P. 550; *Baxter vs. Portsmouth*, 2 Car. & P. 178, 12 Eng. C. L. 79; *Kernot vs. Norman*, 2 Durnf. & E. (3 T. R.) 390; *Nutt vs. Verney*, 4 Durnf. & E. (4 T. R.) 121; *Ibbotson vs. Galway*, 6 Durnf. & E. (6 T. R.) 133; *Yates vs. Boen*, 2 Str. 1104; *Owen vs. Davies*, 1 Ves. Sr. 82; *Niell vs. Morley*, 9 Ves. 478; *Anonymous*, 13 Ves. 590; *In re Lee* (1883), 23 Ch. Div. 216; *In re Farnham* (1895), 2 Ch. 799, 64 L. J. Ch. 717.

See par. 45 et seq. this note.

42. **Where an insane person has been prop-**

erly brought before the court, "acts done by a matter of record, as fines, recoveries, judgments, statutes, recognizances, etc., shall bind as well the idiot as he who becomes non compos mentis."—*Maloney vs. Dewey*, 127 Ill. 395, 11 Am. St. Rep. 131, 19 N. E. Rep. 848. See *King vs. Robinson*, 33 Me. 114, 123, 54 Am. Dec. 614; *Beverley's Case*, 4 Co. Rep. 123; *Mansfield's Case*, 12 Co. Rep. 124.

43. Unless set aside on an appropriate proceedings in court in which rendered, or in court of equity, such judgment is valid.—*Sacramento Sav. Bank vs. Spencer*, 53 Cal. 737. Ga. *Foster vs. Jones*, 23 Ga. 168. Ill. *Wrenson vs. Harroun*, 34 Ill. 422, 85 Am. Dec. 316; *Mall vs. Manvell*, 107 Ill. 554; *Maloney vs. Dewey*, 127 Ill. 395, 11 Am. St. Rep. 131, 19 N. E. Rep. 848. Md. *Stigers vs. Brent*, 50 Md. 214, 33 Am. Rep. 317. N. H. *Lamphrey vs. Nudd*, 29 N. H. 299. Ohio. *Johnson vs. Pomeroy*, 31 Ohio St. 247. Pa. *Wood vs. Bayard*, 69 Pa. St. 320. Fed. *Krippendorf vs. Hyde*, 110 U. S. 276, bk. 28 L. ed. 145, 4 Sup. Ct. Rep. 27; *Pacific R. of Mo. vs. Mo. Pac. R. Co.*, 111 U. S. 505, bk. 28 L. ed. 498, 4 Sup. Ct. Rep. 533.

44. "If any attempt were made to vacate or enjoin such judgment in chancery, doubtless the mere insanity of judgment defendant would not be sure guaranty of success. It would require aid of other facts, from which conclusion must follow that judgment is inequitable, and cannot be executed without injustice."—*Maloney vs. Dewey*, 127 Ill. 395, 11 Am. St. Rep. 131, 19 N. E. Rep. 848. See *Allison vs. Taylor*, 6 Dana (Ky.) 87, 32 Am. Dec. 68 and note.

45. **LIABILITY**—For breach of contract.—A lunatic may be held liable for breach of contract, where he was sane when he entered into it.—*Williams vs. Hays*, 143 N. Y. 442, 42 Am. St. Rep. 742, 38 N. E. Rep. 449, 26 L. R. A. 153.

See par. 41 et seq. this note.

46. **Breach of contract for personal services** is not within above rule, because all "contracts for personal services are subject to this implied condition, that the person shall be able, at time appointed, to perform them; and if he dies, or, without fault on part of covenantor, becomes disabled, the obligation to perform becomes extinguished."—*Spalding vs. Rosa*, 71 N. Y. 40, 27 Am. Rep. 7.

47. The same principle is sustained by the following cases.—Conn. *Ryan vs. Dayton*, 20 Conn. 188, 65 Am. Dec. 560. Ga. *Griggs vs. Swift*, 82 Ga. 392, 14 Am. St. Rep. 176, 9 S. E. Rep. 1062, 5 L. R. A. 405. Me. *Knight vs. Bean*, 22 Me. 531; *Lakeman vs. Pollard*, 43 Me. 463, 69 Am. Dec. 77. Mass. *Fuller vs. Brown*, 52 Mass. (4 Met.) 440; *Harrington vs. Fall River etc.*, 119 Mass. 32. N. Y. *Jones vs. Judd*, 4 N. Y. 411; *Wolfe vs. Howes*, 20 N. Y. 197, affg. 34 Barb. 174, 666, 75 Am. Dec. 388; *Clark vs. Gilbert*, 26 N. Y. 279; *Devlin vs. Mayor etc.* 68 N. Y. 14; *Faby vs. North*, 19 Barb. 341; *Clark vs. Gilbert*, 33 Barb. 576; *People vs. Manning*, 8 Cow. 297, 18 Am. Dec. 451; *Seymour vs. Cogger*, 18 Hun 29; *Gray vs. Murray*, 3 John. Ch. 167. Wis. *Green vs. Gilbert*, 21 Wis. 395, 400; *Jennings vs. Lyons*, 39 Wis. 553, 557, 20 Am. Rep. 57. Eng. *Boast vs. Firth*, L. R. 4

C. P. 1; *Robinson vs. Davison*, L. R. 6 Exch. 269.

48. For necessities,—as to, see ante § 33 note para. 30 and 31.

49. For negligence and tort.—A lunatic is liable for consequence of his torts, whether they consist in mere negligence or overt act of trespass.—*Williams vs. Hays*, 143 N. Y. 442, 42 Am. St. Rep. 743, 38 N. E. Rep. 449, 26 L. R. A. 153.

50. The same principle is sustained by numerous cases.—See *Comm. Neal vs. Gillett*, 23 Conn. 437. Ill. *McIntyre vs. Sholty*, 121 Ill. 660, affg. 24 Ill. App. 605, 2 Am. St. Rep. 140, 13 N. E. Rep. 239. Iowa. *Behrens vs. McKenzie*, 23 Iowa 333, 92 Am. Dec. 428. Md. *Cross vs. Kent*, 32 Md. 581. Mass. *Brown vs. Howe*, 75 Mass. (9 Gray) 84, 69 Am. Dec. 276; *Morain vs. Devlin*, 132 Mass. 87, 42 Am. Rep. 423. N. H. *Jewell vs. Colby*, 66 N. H. 399, 24 Atl. Rep. 902. N. Y. *Krom vs. Schoonmaker*, 3 Barb. 647; *Conklin vs. Thompson*, 29 Barb. 218; *Bullock vs. Babcock*, 3 Wend. 391; *Hartfield vs. Roper*, 21 Wend. 615, 34 Am. Dec. 273. Pa. *Beals vs. See*, 10 Pa. St. 56, 49 Am. Dec. 573; *Lancaster Co. Bank vs. Moore*, 78 Pa. St. 407, 21 Am. Rep. 24. Tenn. *Ward vs. Conatser*, 4 Baxt. 64. Vt. *Humphrey vs. Douglass*, 10 Vt. 71, 33 Am. Dec. 177; *Morse vs. Crawford*, 17 Vt. 499, 44 Am. Dec. 349. Wis. *Huching vs. Engel*, 17 Wis. 230, 84 Am. Dec. 741; *Karow vs. New York Cont. Ins. Co.*, 57 Wis. 56, 46 Am. Rep. 17, 15 N. W. Rep. 27. Canada. *Taggard vs. Innes*, 12 Up. Can. C. P. 77. Eng. *Cross vs. Andrews*, Cro. Eliz. 622; *Jennings vs. Rundall*, 8 Durnf. & E. (8 T. R.) 336, 4 Rev. Rep. 680.

51. Same—Intent to do the wrong being essential if mental state of lunatic is such that he cannot justly be charged with forming or acting upon such intent, there is not absolute liability.—See Mass. *Ex parte Leighton*, 14 Mass. 207. N. Y. *Krom vs. Schoonmaker*, 3 Barb. 647. Pa. *Beals vs. See*, 10 Pa. St. 56, 61, 49 Am. Dec. 573; *Lancaster Co. Bank vs. Moore*, 78 Pa. St. 407, 21 Am. Rep. 24. Tenn. *Ward vs. Conatser*, 4 Baxt. 64. Vt. *Morse vs. Crawford*, 17 Vt. 499, 44 Am. Dec. 349.

52. Same—Slander and libel.—A lunatic has been said to be liable for slander (dictum).—*Mordaunt vs. Mordaunt*, 39 L. J. Prob. & M. 59 (divorce case).

53. Insanity may be shown in prosecution for slander and libel, not as constituting complete defense, but (1) in rebuttal of the pre-

sumption of malice, (2) in mitigation of damages, and (3) to disprove all damage by reason of fact of defendant's well-known insanity.—See Ind. *Gates vs. Meredith*, 7 Ind. 440; *Yeates vs. Reed*, 4 Blackf. 463, 32 Am. Dec. 43. Mass. *Dickinson vs. Barber*, 9 Mass. 225, 6 Am. Dec. 58. Tenn. *Bryant vs. Jackson*, 6 Humph. 199. Va. *Homer vs. Marshall*, 5 Munf. 466. See post § 48 note para. 3-17.

54. Same—Exemplary damages for any act of omission or commission may be defeated by proving insanity of defendant.—Ill. *McIntyre vs. Sholty*, 121 Ill. 660, affg. 24 Ill. App. 605, 2 Am. St. Rep. 140, 13 N. E. Rep. 239. N. Y. *Krom vs. Schoonmaker*, 3 Barb. (N. Y.) 647. Tenn. *Ward vs. Conatser*, 4 Baxt. 64.

55. RESCISSION OF CONTRACTS,—as to, see post §§ 1688-1691, 3406-3408 and notes.

56. Restoration of consideration.—Contract or conveyance by person of unsound mind, but not entirely without understanding, and not office found, cannot be rescinded without an offer to restore money paid on the contract.—More vs. Calkins, 85 Cal. 177, 190, 29 Am. St. Rep. 123, 132, 24 Pac. Rep. 729; *Castro vs. Geil*, 110 Cal. 292, 296, 52 Am. St. Rep. 84, 37, 42 Pac. Rep. 804; *Murphy vs. Crowley*, 140 Cal. 141, 152, 73 Pac. Rep. 820.

57. Grantee not being aware of grantor's insanity.—*Gribben vs. Maxwell*, 34 Kan. 8, 7 Pac. Rep. 684.

58. Where grantee knew grantor to be insane at time of conveyance, which conveyance is not ratified by such insane grantor during sane periods, he may avoid the sale without refunding the money, or offering to do so.—*Crawford vs. Scovell*, 94 Pa. St. 48, 39 Am. Rep. 766. See *Gibson vs. Scoper*, 72 Mass. (6 Gray) 279, 66 Am. Dec. 414.

See para. 10, 11 this note.

59. PLEADING — Complaint. — Complaint failing to allege, directly or indirectly, definitely or indefinitely, that plaintiff was entirely without understanding, presents no cause of action under section.—More vs. Calkins, 85 Cal. 177, 190, 29 Am. St. Rep. 123, 132, 24 Pac. Rep. 729.

60. Demurrer to cause of action in complaint based upon §§ 38 and 39 of this code in such case, properly sustained.—More vs. Calkins, 85 Cal. 177, 190, 29 Am. St. Rep. 123, 132, 24 Pac. Rep. 729; *Castro vs. Geil*, 110 Cal. 292, 296, 52 Am. St. Rep. 84, 37, 42 Pac. Rep. 804.

§ 40. POWERS OF PERSONS WHOSE INCAPACITY HAS BEEN ADJUDGED. After his incapacity has been judicially determined, a person of insane mind can make no conveyance or other contract, nor delegate any power or waive any right, until his restoration to capacity. But a certificate from the medical superintendent or resident physician of the insane asylum to which such person may have been committed, showing that such person had been discharged therefrom, cured and restored to reason, shall establish the presumption of legal capacity in such person from the time of such discharge.

History: Enacted March 21, 1872; amended March 30, 1878, Code Amdts. 1877-8, p. 75; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, pp. 333-334, held unconstitutional; see history, § 4 ante.

1. Applied, cited, construed, referred to, etc.
2. Adjudication of incompetency.
3. Conveyance by insane person.
4. Discharge from asylum.
5. Same—Improperly committed.
6. Same—No guardian having been appointed.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc.**, in: *Estate of Johnson*, 57 Cal. 529, 531 (section as amended 1878 not applicable); *Kellogg vs. Cochran*, 87 Cal. 192, 198, 25 Pac. Rep. 677, 12 L. R. A. 104 (construed and applied); *Castro vs. Gell*, 100 Cal. 292, 296, 52 Am. St. Rep. 84, 36, 42 Pac. Rep. 804 (applied).

2. **ADJUDICATION OF INCOMPETENCY**, under this section, as it read in 1877, as to lack of testamentary capacity, is *prima facie* evidence only, and court may hear evidence as to whether ward, at time of execution of will, was actually restored to capacity.—*Estate of Johnson*, 57 Cal. 529, 531.

§ 41. MINORS LIABLE FOR WRONGS, BUT NOT LIABLE FOR EXEMPLARY DAMAGES. A minor, or person of unsound mind, of whatever degree, is civilly liable for a wrong done by him, but is not liable in exemplary damages unless at the time of the act he was capable of knowing that it was wrongful.

History: Enacted March 21, 1872.

§ 42. MINORS MAY ENFORCE THEIR RIGHTS. A minor may enforce his rights by civil action, or other legal proceedings, in the same manner as a person of full age, except that a guardian must conduct the same.

History: Enacted March 21, 1872.

1. Minor can enforce rights by civil action.
- 2, 3. Same—Action for seduction.
- 4-6. Same—Appointment of guardian ad litem.
- 7, 8. Same—Proceedings commenced by infant.
- 9, 10. Submission of jurisdiction.

1. **MINOR CAN ENFORCE RIGHTS** (1) by civil action, or (2) other legal proceedings, in the same manner as persons of full age, except that guardian must conduct the action or proceedings.—*In re Cahill*, 74 Cal. 52, 55, 15 Pac. Rep. 364.

See Code Civ. Proc. §§ 372, 373, 343 and notes.

2. **Action for seduction may be maintained by a minor in her own name.**—See Code Civ. Proc. § 374 and note.

3. **Question raised, but not passed upon, because of insufficiency of language of demurrer to raise an issue of law, in *Morrell vs. Morgan*, 65 Cal. 575, 576, 4 Pac. Rep. 580.**

4. **Appointment of guardian ad litem remains as it did at common law.**—*Crawford vs. Neal*, 56 Cal. 321; *In re Cahill*, 74 Cal. 52, 55, 15 Pac. Rep. 364.

See Code Civ. Proc. §§ 372, 373 and notes.

5. **Appointment of guardian ad litem should be alleged in complaint.**—*Crawford vs. Neal*, 56 Cal. 321; *In re Cahill*, 74 Cal. 52, 55, 15 Pac. Rep. 364. See *Kid vs. Mitchell*, 1 Nott & McC. (S. C.) L. 384, 9 Am. Dec. 702.

6. **Objection as to the time of appointment of guardian ad litem is question of practice, not of jurisdiction, and may be waived.**—*In re Cahill*, 74 Cal. 52, 57-58, 15 Pac. Rep. 364. See *Mass. Blood vs. Harrington*, 25 Mass. (8 Pick.)

2. **CONVEYANCE BY INSANE PERSON**, not under care of guardian, vests title, which can only be divested by judicial action, or voluntary conveyance by grantee.—*Castro vs. Gell*, 110 Cal. 292, 296, 52 Am. St. Rep. 84, 42 Pac. Rep. 804.

4. **DISCHARGE FROM ASYLUM** is adjudication by competent authority that person had recovered from insanity, and such person is in same status as to capacity that he was before he was committed.—*Kellogg vs. Cochran*, 87 Cal. 192, 198, 25 Pac. Rep. 677, 12 L. R. A. 104.

5. **Improperly committed.**—Discharge from asylum because improperly committed, restores a person to his former status.—*Kellogg vs. Cochran*, 87 Cal. 192, 198, 25 Pac. Rep. 677, 12 L. R. A. 104.

6. **No guardian having been appointed, discharge from asylum restores person to legal capacity.**—*Kellogg vs. Cochran*, supra.

552, 554. *N. H. Young vs. Young*, 3 N. H. 345. *N. Y. Schemerhorn vs. Jenkins*, 7 John. 373; *Smart vs. Haring*, 14 Hun 278; *Sims vs. New York College*, 35 Hun 344; *Fellows vs. Niver*, 18 Wend. 563, 565. *S. C. Kid vs. Mitchell*, 1 Nott & McC. L. 344, 9 Am. Dec. 702. *Tex. Brooke vs. Clarke*, 57 Tex. 112. *Wis. Hepp vs. Huefner*, 61 Wis. 150, 20 N. W. Rep. 923.

See Code Civ. Proc. §§ 372, 373 and notes.

7. **Proceedings commenced by infant, during which guardian ad litem is not appointed, are not void.**—*In re Cahill*, 74 Cal. 52, 55, 15 Pac. Rep. 364. See *Ga. Bartlett vs. Batts*, 14 Ga. 541. *Mass. Blood vs. Harrington*, 25 Mass. (8 Pick.) 552, 554. *N. H. Young vs. Young*, 3 N. H. 345. *N. Y. Schemerhorn vs. Jenkins*, 7 John. 373; *Smart vs. Haring*, 14 Hun 276; *Sims vs. New York College*, 35 Hun 344. *S. C. Kid vs. Mitchell*, 1 Nott & McC. L. 334. *Tex. Brooke vs. Clarke*, 57 Tex. 140. *Wis. Sabine vs. Fisher*, 37 Wis. 376; *Hepp vs. Huefner*, 61 Wis. 150, 20 N. W. Rep. 923.

8. **The court say in *In re Cahill*, supra, the case of *Townsend vs. Tallant*, 33 Cal. 52, 91 Am. Dec. 617, is not regarded as inconsistent with this conclusion.**

9. **Submission to jurisdiction of court by minor, is not without effect, nor absolutely void.**—*In re Cahill*, 71 Cal. 52, 55, 15 Pac. Rep. 364.

10. **But a summons must previously have been served upon him.**—See *McCloskey vs. Sweeney*, 66 Cal. 53, 4 Pac. Rep. 942.

See Code Civ. Proc. § 372 and note.

PART II.

PERSONAL RIGHTS.

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| <p>§ 43. General personal rights.</p> <p>§ 44. Defamation, what is.</p> <p>§ 45. Libel, what is.</p> <p>§ 46. Slander, what is.</p> <p>§ 47. What communications are privileged.</p> <p>§ 48. Malice not inferred.</p> <p>§ 49. Protection to personal relations.</p> <p>§ 50. Right to use force.</p> | <p>§ 51. Rights of citizens in places of public accommodation and amusement.</p> <p>§ 52. Damages recoverable for violation of preceding section.</p> <p>§ 53. Wrongful refusal to admit persons to places of public amusement.</p> <p>§ 54. Damages recoverable for such refusal.</p> |
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§ 43. **GENERAL PERSONAL RIGHTS.** Besides the personal rights mentioned or recognized in the Political Code, every person has, subject to the qualifications and restrictions provided by law, the right of protection [1] from bodily restraint or harm, [2] from personal insult, [3] from defamation, and [4] from injury to his personal relations.

History: Enacted March 21, 1872.

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| <p>I. In General.</p> <p>1. Applied, cited, construed, referred to, etc.</p> <p>2. Construction—Distinguished from other provisions of code.</p> <p>3, 4. General provisions—Particulars of protection provided.</p> <p>II. Protection From Bodily Restraint.</p> <p>5. Contract to restore daughter—In agreement of divorced parties.</p> <p>III. Protection From Bodily Harm.</p> <p>6. Bodily injury while in prison—As to liability for.</p> <p>7. Causa proxima, et non remota, spectatur.</p> <p>8. Defective articles of manufacture—Delivery without notice.</p> <p>9. Same—Liability to third persons.</p> <p>10. Same—Same—Known defect not disclosed.</p> <p>11, 12. Same—Same—Defective machinery furnished servant—Liability of manufacturer, when.</p> <p>13-18. Same—Same—Some instances.</p> <p>19. Dangerous articles, etc.—Dangerous explosives.</p> <p>20. Same—Horse sold as gentle, kind, and good family horse.</p> <p>21, 22. Same—Horse astray—Injury by kicking.</p> <p>23. Same—Negligence—In management of ferry, causing death.</p> <p>24. Same—Same—Negligence of switch tender causing injury.</p> <p>25. Same—Same—Driving sleigh against carriage—Damages in runaway.</p> <p>26, 27. Same—Same—Setting fire to own building—Spreading to that of another.</p> <p>28. Same—Same—Small-pox patient having died—Whitewashing room.</p> <p>29, 30. Same—Same—Steam boiler—Defective manufacture and poor materials.</p> | <p>31. Same—Same—Truck left standing in street.</p> <p>32, 33. Drugs and poisons—Liability of druggist.</p> <p>34-36. Same—Warning of danger and direction for use.</p> <p>37. Same—No warning being given—Responsibility for injury.</p> <p>38, 39. Same—Accident will excuse.</p> <p>40. Same—Contributory negligence will relieve.</p> <p>41-43. Same—Delivering wrong medicine—Liability.</p> <p>44-50. Same—Same—Instances.</p> <p>51. Same—Failure to exercise due care and skill.</p> <p>52. Same—Hair-wash—Injury.</p> <p>53. Ignorance does not excuse.</p> <p>54-56. Same—Mistake of druggists.</p> <p>57, 58. Negligence.</p> <p>59-62. Same—Poisons labeled as harmless medicines.</p> <p>63. Same—Representatives may sue.</p> <p>64, 65. Unwholesome foods—Generally.</p> <p>66-71. Same—Provisions sold for domestic use—Implied warranty.</p> <p>72-75. Same—Action for relief—Ex contractu or ex delicto.</p> <p>76. Same—Animals sold by one dealer to another.</p> <p>77. Same—Butcher selling unwholesome meat.</p> <p>78, 79. Same—Caterer—Public—Liability.</p> <p>80, 81. Same—Cow diseased.</p> <p>82. Same—Hog diseased—Killed and sold by farmer.</p> <p>83. Same—Molasses—No warranty for use, when.</p> <p>84. Same—Provisions sold by private person.</p> <p>85. Same—Provisions sold in course of trade.</p> <p>86. Same—Unwholesome water—Infected with typhoid—Liability.</p> |
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IV. Protection from Personal Insult.

87. Code Commissioners' note.

V. Protection from Defamation.

88. Slander and libel.

VI. Protection from Injury to Personal Relations.

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168. Same—Same—Question of fact.

169. Same—Action on advice.

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173. Same—Knowledge derived from adverse counsel.

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187. Right of action for false imprisonment—Does not survive.

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205, 206. Same—"Unlawful," "wrongful," etc allegation of.

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208. Same—Official capacity of defendant.

209. Civil arrest—Sufficiency of evidence.

I. IN GENERAL.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Lewis vs. Terry*, 111 Cal. 39, 45, 52 Am. St. Rep. 146, 43 Pac. Rep. 392, 31 L. R. A. 320 (cited in discussion); *Dittich vs. Gobey*, 119 Cal. 599, 601, 51 Pac. Rep. 962 (applied to contract in restraint of personal liberty of daughter); *Humphrey vs. Pope*, 122 Cal. 253, 256, 54 Pac. Rep. 847 (construed; provisions distinguished from those in § 49 post); *Swan vs. Thompson*, 124 Cal. 193, 199, 56 Pac. Rep. 878 (cited by error for § 46 post).

2. **CONSTRUCTION**—Bodily restraint, bodily harm, defamation, etc., enumerated in the above section, are entirely separate and distinct from injury to personal relations, defined in § 49 post.—*Humphrey vs. Pope*, 122 Cal. 253, 255, 54 Pac. Rep. 847.

3. **GENERAL PERSONAL RIGHTS**,—as to, see Pol. Code §§ 37, 50-60 and notes; also Penal Code §§ 346-349 and notes.

4. This section provides for protection in five particulars, to wit:

1. Protection from bodily restraint.
2. Protection from bodily harm or injury.
3. Protection from personal insults.
4. Protection from defamation.
5. Protection from injury to personal relations.

II. PROTECTION FROM BODILY RESTRAINT.

5. **CONTRACT TO "RESTORE" DAUGHTER.** *NOLENS VOLENS*, when she should be eighteen years of age, in agreement between divorced parents, is unlawful, as infringement on daughter's personal rights; she at age of

eighteen attaining her right of freedom from personal restraint.—*Dittrich vs. Gobey*, 119 Cal. 599, 601, 51 Pac. Rep. 962.

III. PROTECTION FROM BODILY HARM.

6. **BODILY INJURY SUSTAINED WHILE CONFINED IN PRISON** under conviction of, and as punishment for, infraction of the laws, which injury is caused by defect in construction of prison or negligence of prison official, state nor municipality is not liable in damages.—See Pol. Code § 37 note.

7. **"CAUSA PROXIMA, ET NON REMOTA, SPECTATUR**; the loss must be connected with the supposed cause of it, and in relation of cause and effect, speaking according to common parlance."—*McDonald vs. Snelling*, 96 Mass. (14 Allen) 290, 92 Am. Dec. 768. See *Marsden vs. City and County Ass. Co.*, L. R. 1 C. P. 232, and *Ironsides vs. Universal Ins. Co.*, 8 L. T., N. S. 705.

8. **DEFECTIVE ARTICLE OF MANUFACTURE—Delivery without notice.**—Protection from bodily injury or harm through defective article delivered without notice, is furnished by above section; it being a well-established rule that a man "who delivers an article, which he knows to be dangerous or noxious, to another person, without notice of its nature and qualities, is liable for injury which may be reasonably contemplated as likely to result, and which does in fact result therefrom, to that person or any other who is not himself in fault."—*Lewis vs. Terry*, 111 Cal. 39, 44, 45, 52 Am. St. Rep. 146, 43 Pac. Rep. 398, 31 L. R. A. 220. See *Mass. Wellington vs. Downer Kerosene Oil Co.*, 104 Mass. 64, 65. *Minn. Schubert vs. Clark Co.*, 49 Minn. 331, 335, 51 N. W. Rep. 1103, 32 Am. St. Rep. 559, 15 L. R. A. 813. *Mo. Helzer vs. Kingsland & Douglass Mfg. Co.*, 110 Mo. 605, 33 Am. St. Rep. 482, 19 S. W. Rep. 630, 15 L. R. A. 821. *Pa. Elkins vs. McKean*, 79 Pa. St. 493. *Eng. Longmeid vs. Holliday*, 6 Ex. 765.

See par. 64 this note.

As to implied warranty by manufacturers, see post § 1769 and note.

9. **Liability to third person.**—The manufacturer of machinery is not liable to person, other than vendee, for injury caused by breakage, in those cases where it is not inherently of dangerous character, and he failed to make known its true nature.—*Helzer vs. Kingsland & Douglass Mfg. Co.*, 110 Mo. 605, 19 S. W. Rep. 630, 33 Am. St. Rep. 482, 15 L. R. A. 821. See *Mich. Necker vs. Harvey*, 49 Mich. 517, 14 N. W. Rep. 503. *Mo. Roddy vs. Missouri Pac. R. Co.*, 104 Mo. 234, 24 Am. St. Rep. 333, 15 S. W. Rep. 1112, 12 L. R. A. 746; *Cordon vs. Livingston*, 12 Mo. App. 267. *N. J. Kahl vs. Love*, 37 N. J. L. (8 Vr.) 15; *Marvin Safe Co. vs. Ward*, 46 N. J. L. (17 Vr.) 19. *N. Y. Loop vs. Litchfield*, 42 N. Y. 351, 1 Am. Rep. 543; *Loosee vs. Clute*, 51 N. Y. 494, 10 Am. Rep. 638. *Pa. Curtin vs. Somerset*, 140 Pa. St. 70, 23 Am. St. Rep. 220, 21 Atl. Rep. 244, 12 L. R. A. 322. *Fed. National Sav. Bank vs. Ward*, 100 U. S. 195, bk. 25 L. ed. 625. *Eng. Winterbottom vs. Wright*, 10 Mees. & W. 109.

10. **Known defect not being disclosed**, the rule will be otherwise.—*Helzer vs. Kingsland*

& Douglass Mfg. Co., 110 Mo. 605, 33 Am. St. Rep. 482, 15 L. R. A. 821, 19 S. W. Rep. 630.

11. **DEFECTIVE MACHINERY OR IMPLEMENTS FURNISHED BY MASTER TO HIS SERVANT**, the master having no knowledge of the defects, manufacturer of article will be liable for any personal injuries sustained by reason of such defects, although the master is not.—*Devlin vs. Smith*, 89 N. Y. 470, 42 Am. Rep. 311 and note; *Coughtry vs. Globe Woolen Co.*, 56 N. Y. 124, 128, 15 Am. Rep. 387.

See par. 13 this note. But see par. 9 this note.

12. The reason for exemption of employer from liability is the fact that he does not "undertake absolutely with his employees for sufficiency or safety of implements and facilities furnished for their work, but only for the exercise of reasonable care in that respect, and where injury to employee results from defect in implements furnished, knowledge of defect must be brought home to employer, or proof given that he omitted the exercise of proper care to discover it. Personal negligence is gist of the action."—*Devlin vs. Smith*, 89 N. Y. 470, 42 Am. Rep. 311. See *Wright vs. New York Cent. R. Co.*, 25 N. Y. 562, 566; *Warner vs. Erie R. Co.*, 39 N. Y. 468, 475; *Fuller vs. Jewett*, 80 N. Y. 46, 36 Am. Rep. 575; *Wilson vs. Merry*, L. R. 1 Sc. & Div. App. 326.

13. **Balance-wheel manufactured and sold for use in certain wood-sawing machine**, with defect in it, which was pointed out to purchaser, burst after five years' use, by reason of defect in manufacture, and killed person who was using it with owner's consent. The manufacturer was held not liable in damages (1) because the balance-wheel was not in itself a dangerous instrument, and (2) because the injury was not a natural consequence of its use.—*Loop vs. Litchfield*, 42 N. Y. 351, 357, 1 Am. Rep. 543 (commenting on and distinguishing *Thomas vs. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455, par. 30 this note).

14. **Derrick rope having broken**, by reason of defect therein, and injured employee of lessee of the derrick, while he was using derrick, owner was held not liable in damages.—*Burke vs. De Castro*, 11 Hun (N. Y.) 354, 357.

15. **Elevator falling, through defect of construction**, injuring an employee of contractor to whom it had been let, owners were held not liable for damages thus sustained.—*Barrett vs. Singer Mfg. Co.*, 1 Sweeny (N. Y.) 545, 548.

16. **Folding bed being defective**, sold under representation that it was safe for use, when vendor knew it to be dangerous, he is liable for personal injuries caused by reason of such known defect, to any person who used bed, notwithstanding fact that there was no privity of contract between them.—*Lewis vs. Terry*, 111 Cal. 39, 52 Am. St. Rep. 146, 43 Pac. Rep. 398, 31 L. R. A. 220.

17. **Manufacturer of oils**, for illuminating purposes, using naphtha, knowing it to be explosive and dangerous, who sells his product to retailer of illuminating oils, without disclosing to him its dangerous character, who, in ignorance of its true character, sells it to a customer equally ignorant, and explosion fol-

lows from use of the oil in lamp; manufacturer will be liable in damages to such purchaser and seller for injury caused.—*Wellington vs. Downer Kerosene Oil Co.*, 104 Mass. 64.

18. Scaffolding of dock, leased with dock for repair of vessels, having fallen, by reason of defects therein, and injured an employee of lessee, owners were held liable in damages.—*Cook vs. New York Floating Dry Dock Co.*, 1 Hill (N. Y.) 437. See *Coughtry vs. Globe Woolen Co.*, 56 N. Y. 124, 128, 15 Am. Rep. 387, *Devlin vs. Smith*, 89 N. Y. 470, 42 Am. Rep. 311.

19. DANGEROUS ARTICLES, ETC.—Explosive, e. g. nitro-glycerine, shipped without giving notice of dangerous character of article, shipper will be liable in damages for any injuries.—*Barney vs. Burstenbinder*, 7 Lans. (N. Y.) 213, 64 Barb. (N. Y.) 213.

20. Horse sold as gentle and kind and good family horse; eighteen days thereafter he ran away and injured plaintiff, who was riding with her husband. It appearing that defendant understood horse was to be used by husband in his business, and not knowing it was being purchased for plaintiff or for her use, it was held that he was not liable to plaintiff for his false representations to her husband.—*Carter vs. Harden*, 78 Me. 528, 7 Atl. Rep. 392.

21. Horse astray on highway viciously kicked child; in absence of proof that owner knew the animal was in habit of kicking, he was held not to be liable, because act was not one in ordinary course of nature for horse of common temper and disposition to do.—*Cox vs. Burbidge*, 32 L. J., N. S., C. P. 39. See *Cooke vs. Waring*, 32 L. J., N. S., Ex. 262.

22. Otherwise where owner failed to repair gate he was bound to, and his horse strayed into adjoining field where he kicked another horse; because this was the natural consequence of the two horses meeting under such circumstances, and the proximate cause of such injury was deemed to be defendant's negligence.—*Lee vs. Riley*, 34 L. J., N. S., C. P. 212. See *Reed vs. Edwards*, 34 L. J., N. S., C. P. 212.

23. Negligent management of ferry caused drowning of passenger; held that party from whom negligent lessee held ferry was not liable (1) because there was no privity, and (2) because injury was not necessary or natural consequence of leasing.—*Blakewell vs. Wiswall*, 34 Barb. (N. Y.) 361, 11 How. Pr. (N. Y.) 264; *Norton vs. Wiswall*, 26 Barb. (N. Y.) 627.

24. Negligence of switch-tender injuring engineer of another road, which has permission to run trains over tracks, such negligence being in connection with management of switch, his company was held liable in damages, because the act causing the injury was imminently dangerous to life, and privity of contract not required to establish right to recover.—*Smith vs. New York & H. R. Co.*, 19 N. Y. 127.

25. Servant negligently driving sleigh against carriage, causing team attached thereto to run away, running over and injuring third person, master is liable to injured

person in damages for injury sustained because the negligent act was breach of duty towards persons in highway, and injury to property or person of others was reasonably likely to ensue therefrom.—*McDonald vs. Snelling*, 96 Mass. (14 Allen) 290, 295, 92 Am. Dec. 768.

26. Setting fire to own buildings negligently by sparks from locomotive, the fire spreading to plaintiff's house and destroying it, railroad company was held not to be liable, because the damages were too remote.—*Ryan vs. New York Cent. R. Co.*, 35 N. Y. 210 (*distinguishing Thomas vs. Winchester*, par. 30 this note).

27. But true rule in such cases is thought to be announced, under exactly the same circumstances, in *Delaware L. & W. R. Co. vs. Salmon*, 39 N. J. L. (10 Vr.) 299, 310, 23 Am. Rep. 214, *disapproving Ryan vs. New York Cent. R. Co.*, *supra*, and *approving Thomas vs. Winchester*, par. 30 this note.

28. Smallpox patient having died in house, attending physician employed person to white-wash it, assuring him that house had been disinfected and that he would be safe; person having caught the disease the physician was held liable for damages if he had not acted towards the party injured with due care, and party had not been guilty of rashness.—*Span vs. Ely*, 3 Hun (N. Y.) 258.

29. Steam-boller manufacturer for particular purpose, knowing it is to be used in immediate vicinity of and adjacent to dwelling-houses and stores in village, so that, in case of explosion while in use, it would be likely to be destructive of life and adjacent property, negligently constructed such boiler improperly and of poor iron; which being tested to their satisfaction by parties for whom made, was accepted, and thereafter used for about three months for purpose for which manufactured, when an explosion took place causing damages complained of. Held, that manufacturer was liable only to employer, and that injured party could not recover.—*Loosee vs. Clute*, 51 N. Y. 494, 10 Am. Rep. 638.

30. This is thought to be neither good morals nor good law, and is grossly violative of the established doctrine "causa proxima non remota spectatur; the loss must be connected with the supposed cause of it, and in the relation of cause and effect, speaking according to common parlance" (see par. 7 this note). The direct and proximate cause of injury and damages complained of was negligence in improperly constructing boiler and criminal dishonesty in using poor iron, which amounted to fraud upon rights of the public. A steam boiler thus manufactured is of necessity a dangerous instrument, perilous to life and property, and manufacturer should be held to strict accountability, and principle laid down in *Thomas vs. Winchester* (6 N. Y. 397, 57 Am. Dec. 455) should be applied and govern. Independent of the obligation created by contract for manufacture of the boiler, it was duty of manufacturer to avoid danger of explosion of boiler by exercise of proper care in selection of material of good quality and sufficient strength for uses to which it was known the boiler was to be put, in the situation in

which it was known to manufacturer it was to be placed.—See *Thomas vs. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455; *Coughtry vs. Globe Woolen Co.*, 56 N. Y. 124, 128, 15 Am. Rep. 387; *Devlin vs. Smith*, 89 N. Y. 470, 42 Am. Rep. 311; *Cook vs. New York Floating Dry Dock Co.*, 1 Hilt. (N. Y.) 436; *Heizer vs. Kingsland & Douglass Mfg. Co.*, 110 Mo. 605, 33 Am. St. Rep. 482, 19 S. W. Rep. 630; *Godley vs. Hagerty*, 20 Pa. St. 387, 59 Am. Dec. 731.

31. Truck left standing beside sidewalk in public street by defendant's servant, with shafts shored up by plank, in usual way. Another truckman temporarily left his truck directly on opposite side of street. Afterwards third truckman came along and attempted to drive his truck between two others, using due care; but hit defendant's truck in such manner as to whirl its shafts around on sidewalk so that they struck plaintiff, who was walking by, and broke her leg. The careless position in which truck was left was held to be sole cause of breaking of plaintiff's leg, and, in legal contemplation, sufficiently proximate to render defendant responsible.—*Powell vs. Deveney*, 57 Mass. (3 Cush.) 300, 50 Am. Dec. 738. See *N. Y. Vandenburg vs. Truax*, 4 Den. 464, 47 Am. Dec. 268. *Pa. Morrison vs. Davis*, 20 Pa. St. 171, 175, 57 Am. Dec. 695. *Eng. Rigby vs. Hewett*, 5 Ex. 240; *Greenland vs. Chaplin*, 5 Ex. 245; *Powell vs. Salisbury*, 2 Younge & J. 391, 31 Rev. Rep. 607; *Lynch vs. Nurdin*, 1 Q. B. (1 Ad. & E. N. S.) 29, 41 Eng. C. L. 422.

32. DRUGS AND POISONS—Liability of druggist.—Druggist held to special degree of responsibility.—*Walton vs. Booth*, 34 La. Ann. 913.

33. Duty to know properties of drugs sold; ignorance will not excuse.—*Fleet vs. Hollenkemp*, 13 B. Mon. (Ky.) 219, 56 Am. Dec. 562.

34. Warning given as to nature and direction as to use.—Where druggist informs purchaser of deadly character of drug purchased, and warns him against improper use of it, telling him what is safe dose, there will be no liability in damages for death of purchaser caused by over-dose of the drug, although he did not label it poison, in conformity to requirement of statute.—*Wohlfahrt vs. Beckert*, 92 N. Y. 490, 44 Am. Rep. 406, citing *Pakalinsky vs. New York Cent. & H. Riv. R. Co.* 82 N. Y. 424; *Connelly vs. New York Cent. & H. Riv. R. Co.*, 83 N. Y. 346.

35. In such case the warning having been testified to by clerk who put up the medicine, he being interested to establish truth of what he swears to, having violated the law by omitting to put on prescribed label, question whether warning was given is one of fact for jury, and it will be error to direct verdict for defendant.—*Wohlfahrt vs. Beckert*, 92 N. Y. 490, 44 Am. Rep. 406. See *Rollwagen vs. Rollwagen*, 63 N. Y. 504, affg. 5 *Thomp. & C. (N. Y.)* 426; *Kearny vs. Mayor etc. New York City*, 92 N. Y. 617; *Sipple vs. State*, 99 N. Y. 284, 290, 1 N. E. Rep. 892, 3 Id. 657; *Sheridan vs. Mayor etc.*, 8 Hun (N. Y.) 424; *Keller vs. West Bradley etc. Mfg. Co.*, 39 Hun (N. Y.) 355; *Corn vs. Rosenthal*, 1 Misc. (N. Y.) 168, 20 N. Y. Supp. 632; *Rumsey vs. Boutwell*, 15 N. Y. Supp. 765; *Vandercock vs. City of Cohoes*, 12

Week. Dig. (N. Y.) 84; *Williams vs. Burton*, 19 *Week. Dig. (N. Y.)* 399; *McElwain vs. Erie R. Co.*, 21 *Week. Dig. (N. Y.)* 21; *Chesebro vs. Tilden*, 21 *Week. Dig. (N. Y.)* 467; *Sheridan vs. Farnham*, 21 *Week. Dig. (N. Y.)* 470; *Richardson vs. English*, 22 *Week. Dig. (N. Y.)* 432; *Laidlow vs. Slayback*, 23 *Week. Dig. (N. Y.)* 259.

36. The reason for this is rule that uncontradicted evidence of party or interested witness, though not improbable and not impeached, is not necessarily conclusive either upon court or jury.—*Sheridan vs. Mayor etc.*, 8 Hun. (N. Y.) 424; *Metropolitan El. R. Co. vs. Manhattan El. R. Co.*, 14 Abb. N. C. (N. Y.) 296; *Taylor vs. Ballard*, 1 N. Y. Supp. 884, 17 N. Y. St. Rep. 598; *Richards vs. Derrick*, 2 N. Y. Supp. 31, 17 N. Y. St. Rep. 963; *Gildersleeve vs. Landon*, 73 N. Y. 611; *Koehler vs. Adler*, 78 N. Y. 287, 291; *Carbon Works vs. Scad*, 38 Hun (N. Y.) 71; *Kinney vs. Pudney*, 46 How. Pr. (N. Y.) 258; *Brooklyn Crosstown R. Co. vs. Strong*, 73 N. Y. 591; *Munzo vs. Wilson*, 111 N. Y. 295, 330, 18 N. E. Rep. 855.

37. No warning having been given, its omission is negligence, for results of which druggist will be liable both at common law and by force of the statute.—*Wohlfahrt vs. Beckert*, 92 N. Y. 490, 44 Am. Rep. 406, citing *Thomas vs. Winchester*, par. 59 this note; *Loop vs. Litchfield*, 42 N. Y. 351, 353, 1 Am. Rep. 543, and *Wellington vs. Downer Kerosene Oil Co.*, 104 Mass. 64.

38. Accident will excuse druggist.—*Brown vs. Marshall*, 47 Mich. 576, 41 Am. Rep. 728, 11 N. W. Rep. 392.

39. The court say: "It may seem a hard rule which throws upon the purchaser consequences of mistake by another, but it is the same rule which in other cases leaves consequences of inevitable accident where they have chanced to fall."—See *Ark. Bizzell vs. Booker*, 16 Ark. 308. *Conn. Morris vs. Platt*, 32 Conn. 75. *La. Burton vs. Davis*, 15 La. Ann. 448. *Md. Gault vs. Humes*, 20 Md. 297. *N. Y. Losee vs. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623. *Eng. Weaver vs. Ward*, Hob. 134.

40. Contributory negligence on part of person injured defeats his right of recovery; as where he helped himself to what he supposed was extract of dandelion, but which proved to be belladonna.—*Gwynn vs. Duffield*, 66 Iowa 708, 55 Am. Rep. 286, 61 Iowa 64, 47 Am. Rep. 802.

41. Delivering wrong kind of medicine negligently, druggist is liable in damages for the evil consequences.—*Brown vs. Marshall*, 47 Mich. 576, 41 Am. Rep. 728, 11 N. W. Rep. 392.

42. Held absolutely liable, regardless of degree of care used, for injuries resulting from mixture of poisons with ordinary drugs, in Kentucky.—See *Fleet vs. Hollenkemp*, 13 B. Mon. (Ky.) 219, 56 Am. Dec. 563.

43. In the last case druggist, in compounding medicines, ground different ingredients in mill which had been used for poisonous drugs, and did not first properly clean it. They claimed to go to jury on question of due care, and under instructions that if they used due care, or at least if they used extraordinary

and unusual care, they were not liable in civil action. The court of appeals justly say: "It is absurd to speak of degrees of diligence and of negligence as excusing or not excusing, or as settling question of liability, in a case where vendor of drugs, being required to compound innocent medicines, runs them through a mill in which he knew a poisonous drug had shortly before been ground."—*Fleet vs. Hollenkemp*, 13 B. Mon. (Ky.) 219, 56 Am. Dec. 563.

44. SAME—INSTANCES.—*Belladonna* labeled as dandelion, and sold as such, by wholesale druggist, he is liable to the party injured, although the drug, thus labeled, has passed through several hands.—*Thomas vs. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455 (the leading case on the subject). See para. 30 this note.

45. Laudanum for tincture of rhubarb negligently furnished, druggist liable to representatives of party who died from effects.—*Norton vs. Sewall*, 106 Mass. 143, 8 Am. Rep. 298.

46. Strychnine instead of camphor, called for in prescription, being used, prima facie establishes negligence and renders liable in damages, unless exculpating explanation is given.—See *Minner vs. Scherphoh*, 5 N. Y. St. Rep. 351.

47. Sulphate of zinc for epsom salts.—*Walton vs. Booth*, 34 La. Ann. 913.

48. Sulphide of antimony as and for black oxide of magnesia, which it closely resembles, and which is not injurious, except when compounded with another chemical agent, negligently sold to retailer, who in turn sold to customers, who, supposing it was what it purported to be, used it in combination, one of the ingredients of which was chlorate of potassa. An explosion having resulted in which purchaser was injured, it was held injured party could not recover against wholesaler, because article was not, in itself, necessarily dangerous, and he had no knowledge it was intended to be used in combination in which it would be dangerous.—*Davidson vs. Nichols*, 93 Mass. (11 Allen) 514, 519 (distinguishing *Thomas vs. Winchester*, para. 30, 59 this note).

49. It is thought distinction is not well founded, and that doctrine in above paragraph is unsound.

50. Zinc for epsom salts, negligently furnished, druggist liable.—*Brown vs. Marshall*, 47 Mich. 576, 41 Am. Rep. 728, 11 N. W. Rep. 392.

51. Same—Failure to exercise due care and skill, on part of druggist's clerk, in compounding medicine, must be established to render druggist liable in damages for evil consequences arising from use of wrong drug.—*Beckwith vs. Oatman*, 43 Hun (N. Y.) 265.

See para. 54-56 this note.

52. Same—*Hair-wash*, compounded by druggist on his own prescription, purchaser injured by use thereof may recover damages.—*George vs. Skivington*, L. R. 5 Ex. 17.

53. IGNORANCE, liability for injurious results.—*Fleet vs. Hollenkemp*, 13 B. Mon. (Ky.) 219, 56 Am. Dec. 563.

54. SAME—MISTAKE BY CLERK, druggist is liable for, although clerk employed by another,

in charge of business, during druggist's absence from city.—*McCubbin vs. Hastings*, 27 La. Ann. 713.

55. Mistake of clerk in putting up prescription, druggist not liable, unless negligence or want of skill is shown.—*Beckwith vs. Oatman*, 43 Hun (N. Y.) 265; *Brown vs. Marshall*, 47 Mich. 576, 41 Am. Rep. 728, 11 N. W. Rep. 392.

56. The question of should be submitted to jury as matter of evidence on issue of negligence.—*Brown vs. Marshall*, 47 Mich. 576, 41 Am. Rep. 728, 11 N. W. Rep. 392.

57. NEGLIGENCE in allowing poisonous drugs to become mixed with prescription filled. Liability for injurious consequences.—*Fleet vs. Hollenkemp*, 13 B. Mon. (Ky.) 219, 56 Am. Dec. 563.

58. Negligence necessary element to recovery for consequences of mistake in using the wrong drug.—*Beckwith vs. Oatman*, 43 Hun (N. Y.) 265.

See para. 54-56 this note.

59. Poison labeled as harmless medicine negligently, and sold accordingly, druggist is liable for evil consequences arising therefrom.—*Thomas vs. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455 (the leading case on the subject).

60. Followed.—*Norton vs. Sewall*, 106 Mass. 143, 8 Am. Rep. 298.

61. Approved.—*Davidson vs. Nichols*, 93 Mass. (11 Allen) 514, 519; *McDonald vs. Snelling*, 96 Mass. (14 Allen) 290, 295, 92 Am. Dec. 768; *Wellington vs. Downer Kerosene Oil Co.*, 104 Mass. 64; *Delaware L. & W. R. Co. vs. Salmon*, 39 N. J. L. (10 Vr.) 299, 310, 23 Am. Rep. 214.

62. Explained and distinguished.—*Ryan vs. New York Cent. R. Co.*, 35 N. Y. 210; *Loop vs. Litchfield*, 42 N. Y. 351, 357, 1 Am. Rep. 543; *Davidson vs. Nichols*, 93 Mass. (11 Allen) 514, 519.

63. Representative of party injured may maintain action for damages in thus causing his death.—*Norton vs. Sewall*, 106 Mass. 143, 8 Am. Rep. 298.

64. UNWHOLESOME FOODS.—General rule is that an article made or manufactured, or furnished, for a special purpose, on order, and supplied and sold for that purpose, there is an implied warranty that it is reasonably fit for such purpose.—See *Ala. Perry vs. Johnson*, 59 Ala. 648; *Herring vs. Skaggs*, 62 Ala. 180, 34 Am. Rep. 4; *Pacific Guano Co. vs. Mullen*, 66 Ala. 582; *Farrow vs. Andrew*, 69 Ala. 96; *Snow vs. Schomacker Mfg. Co.*, 69 Ala. 111, 44 Am. Rep. 509; *Kennebrew vs. Southern Autom. Elec. Shock Mach. Co.*, 106 Ala. 377, 17 So. Rep. 545; *Troy Grocery Co. vs. Potter*, 139 Ala. 359, 36 So. Rep. 12. Ark. *Curtis etc. Mfg. Co. vs. Williams*, 48 Ark. 325, 3 S. W. Rep. 517. Ga. *Williams vs. Wylly*, 45 Ga. 580; *Radcliff vs. Gunby*, 46 Ga. 464; *Simms vs. Howells*, 49 Ga. 620; *Gammell vs. Gunby*, 52 Ga. 504; *Barry vs. Ury*, 70 Ga. 711; *Smith vs. Hightower*, 76 Ga. 629; *Wells vs. Gress*, 113 Ga. 566, 45 S. E. Rep. 418. Ill. *Misner vs. Granger*, 9 Ill. 69; *Beers vs. Williams*, 16 Ill. 69; *Archdale vs. Moore*, 19 Ill. 565; *Kohl vs. Lindley*, 39 Ill. 195, 39 Am. Dec. 394; *Union H. & L. Co. vs.*

Reissig, 48 Ill. 75; Chicago Pkg. & Prov. Co. vs. Tilton, 27 Ill. 547; Lanz vs. Wachs, 50 Ill. App. 262; Murray Iron Works Co. vs. Dekalb Elec. Co., 103 Ill. App. 78; Telluride Power Trans. Co. vs. Crane Co., 103 Ill. App. 647. Ind. Brenton vs. Davis, 3 Blackf. 317, 44 Am. Dec. 769; Page vs. Ford, 12 Ind. 46; Street vs. Chapman, 29 Ind. 142; Robinson Mach. Works vs. Chandler, 56 Ind. 575; Poland vs. Miller, 95 Ind. 387, 48 Am. Rep. 730; McCamrock vs. Flint, 101 Ind. 278; Conant vs. National St. Bank, 121 Ind. 323, 22 N. E. Rep. 250; Merchants & Mechanics' Sav. Bank vs. Frazee, 9 Ind. App. 161, 53 Am. St. Rep. 341, 36 N. E. Rep. 378; Zimmerman vs. Druecker, 15 Ind. App. 512, 44 N. E. Rep. 557; Crane vs. Lord, Wils. 263. Iowa. Rose vs. Meeks, 91 Iowa 715, 59 N. W. Rep. 30; Parson's Band-Cutter & S. F. Co. vs. Mallinger, 122 Iowa 703, 98 N. W. Rep. 680. Kan. Field vs. Kinnear, 4 Kan. 476; Show vs. Smith, 45 Kan. 334, 25 Pac. Rep. 886, 11 L. R. A. Ky. Miller vs. Gaither, 3 Bush 152. Me. Downing vs. Dearborn, 77 Me. 457, 1 Atl. Rep. 407. Mass. Whitmore vs. South Boston L. Co., 84 Mass. (2 Allen) 58; Dickinson vs. Gay, 39 Mass. (7 Allen) 29, 31, 83 Am. Dec. 656; French vs. Vining, 102 Mass. 132, 3 Am. Rep. 440; Swett vs. Shumway, 102 Mass. 365, 3 Am. Rep. 471; Howard vs. Emerson, 110 Mass. 320, 14 Am. Rep. 608; Taylor vs. Cole, 111 Mass. 363; Hight vs. Bacon, 126 Mass. 10, 30 Am. Rep. 639. Mich. Kimball & A. Mfg. Co. vs. Vroman, 35 Mich. 310, 24 Am. Rep. 553. Minn. Cosgrove vs. Bennett, 32 Minn. 371, 20 N. W. Rep. 359; Shatto vs. Abernathy, 35 Minn. 535, 29 N. W. Rep. 325; Breen vs. Moran, 51 Minn. 525, 53 N. W. Rep. 755. Miss. Brown vs. Murphee, 31 Miss. 91. Mo. Johnson vs. Sproull, 50 Mo. App. 121; Skinner vs. Kerwin Ornam. Glass Co., 103 Mo. App. 650, 77 S. W. Rep. 1011; Creasy vs. Gray, 83 Mo. App. 454. Neb. Omaha C. C. & L. Co. vs. Fay, 37 Neb. 63, 55 N. W. Rep. 211. N. H. Denning vs. Foster, 42 N. H. 165. N. J. Walcott vs. Mount, 36 N. J. L. (7 Vr.) 262, 13 Am. Rep. 438. N. Y. Hargous vs. Stone, 5 N. Y. 86; Maurer vs. Bliss, 6 N. Y. St. Rep. 224; Hoe vs. Sanborn, 21 N. Y. 552, 78 Am. Dec. 163; Dounce vs. Dow, 64 N. Y. 411; Van Pub. Co. vs. Westinghouse, Church, Kerr & Co., 72 App. Div. 121, 76 N. Y. Supp. 340; Bell vs. Mills, 78 App. Div. 42, 80 N. Y. Supp. 34; Freeman vs. Clute, 3 Barb. 424; Charlotte C. & A. R. Co. vs. Jesup, 44 How. Pr. 447; William Anson Wood M. R. Co. vs. Thayer, 50 Hun 516, 3 N. Y. Supp. 465; Waring vs. Mason, 18 Wend. 425, 439; Howard vs. Hoey, 23 Wend. 350, 35 Am. Dec. 572. N. C. Dickson vs. Jordan, 33 N. C. 166, 53 Am. Dec. 413; Thomas vs. Simpson, 80 N. C. 4. Ohio. Rodgers vs. Niles, 11 Ohio St. 48, 78 Am. Dec. 290; Byers vs. Chapin, 23 Ohio St. 300; Dayton vs. Hoagland, 39 Ohio St. 671; Hauser vs. Curran (Cent. Super. Ct.) 25 Week. L. Bull. 52. Oreg. Case Thrash. Mach. Co. vs. Smith, 16 Oreg. 381, 13 Pac. Rep. 641. Pa. Eagan vs. Call, 34 Pa. St. 236, 75 Am. Dec. 653; Port Carbon Iron Co. vs. Groves, 68 Pa. St. 149; McCormick Harv. Mach. Co. vs. Nicholson, 17 Pa. Super. Ct. 138; Wilson vs. Belles, 22 Pa. Super. Ct. 477; Ulrich vs. Stohrer, 13 Phila. 199. S. C. Robson vs. Miller, 12 S. C. 586, 30 Am. Rep. 518. Tenn. Overton vs. Ph. 445; Donelson vs. Young, 1

Meigs 155; Southern Brass & I. Co. vs. Exeter Mach. Works, 109 Tenn. 67, 70 S. W. Rep. 614. Vt. Beals vs. Olmstead, 24 Vt. 114, 53 Am. Dec. 150; Pease vs. Sabin, 38 Vt. 432, 91 Am. Dec. 364; Gibson vs. Bingham, 43 Vt. 410, 5 Am. Rep. 289; Harris vs. Waite, 51 Vt. 481, 31 Am. Rep. 694. Va. Mason vs. Chappell, 15 Gratt. 572; Gerst vs. Jones, 32 Gratt. 518, 24 Am. Rep. 773. W. Va. Hood vs. Bloch, 29 W. Va. 244, 11 S. E. Rep. 910. Wis. Getty vs. Rountree, 2 Pinn. 379, 2 Chand. 28, 54 Am. Dec. 138; Walton vs. Cordy, 1 Wis. 420; Williams vs. Slaughter, 3 Wis. 347; Bird vs. Mayer, 3 Wis. 362; Ketchum vs. Wells, 9 Wis. 26; Flisk vs. Tank, 12 Wis. 376, 78 Am. Dec. 737; Ketchum vs. Wells, 19 Wis. 25; Woodie vs. Whitney, 23 Wis. 55, 99 Am. Dec. 102; Leopold vs. Van Kirk, 27 Wis. 152. Fed. Kellogg Bridge Co. vs. Hamilton, 110 U. S. 108, bk. 28 L. ed. 86, 3 Sup. Ct. Rep. 537; Dawes vs. Peebles, 6 Fed. Rep. 856; Bagley vs. Cleveland Roll. Mill Co., 21 Fed. Rep. 159; Ottawa Bottle S. F. G. Co. vs. Gunther, 31 Fed. Rep. 203; Cunningham vs. Hall, 18 Spr. C. C. 404, 21 Law Rep. 18, 6 Fed. Cas. 972, reversed on another point, 1 Cliff. C. C. 43, 6 Fed. Cas. 967. Eng. Jones vs. Bright, 5 Bing. 533, 3 Moo. & P. 155, 7 L. J. C. P. 213, Dan. & L. 304, 30 Rev. Rep. 728; Parsons vs. Sexton, 4 C. B. (4 Man. Gr. & S.) 899, 56 Eng. C. L. 397; Mallan vs. Radloff, 17 C. B. N. S. 583, 112 Eng. C. L. 537.

See exhaustive monographic note by Ernest Watts, 23 L. R. A. 187-198.

As to implied warranty by maker or manufacturer, and extent of that warranty, see post § 1769 and note.

Unwholesome food for stock, as to liability for furnishing, see post § 1708 and note.

63. Vendor not manufacturer of article sold, but merely dealer or merchant, is not held to impliedly warrant its fitness or soundness.—See Dounce vs. Dow, 64 N. Y. 411; Bartlett vs. Hoppock, 34 N. Y. 118, 33 Am. Dec. 428; Wright vs. Hart, 13 Wend. (N. Y.) 449; Bragg vs. Morrill, 49 Vt. 45, 24 Am. Rep. 102; Tiltonca vs. Tisdale, 43 Vt. 33.

64. SAME—PROVISIONS SOLD FOR DOMESTIC USE fall under general rule (par. 64 this note), and there is an implied warranty that they are sound and wholesome.—Moore vs. McKinlay, 5 Cal. 471 (where contract to sell or of sale no implied warranty.—Harley vs. Golden State & M. L. W., 66 Cal. 238, 5 Pac. Rep. 160). See Ind. Humphreys vs. Comline, 3 Blackf. 516. Kan. Lukens vs. Frelund, 27 Kan. 664, 41 Am. Rep. 429. Ky. Jones vs. Murrav, 3 T. B. Mon. 83. Md. Osgood vs. Lewis, 2 Harr. & G. 490, 18 Am. Dec. 317. Mass. Emerson vs. Brigham, 10 Mass. 197, 6 Am. Dec. 109; Winsor vs. Lombard, 35 Mass. 13 (Pick.) 57, 61; French vs. Vining, 102 Mass. 132, 3 Am. Rep. 440; Howard vs. Emerson, 110 Mass. 320, 14 Am. Rep. 608. Mich. Hoover vs. Peters, 18 Mich. 51; Sinclair vs. Hathaway, 57 Mich. 60, 58 Am. Rep. 327, 23 N. W. Rep. 459; Copas vs. Anglo-Am. Prov. Co., 73 Mich. 541, 41 N. W. Rep. 690. Minn. Ryder vs. Nietzer, 21 Minn. 70. N. Y. Hoe vs. Sanborn, 21 N. Y. 552, 78 Am. Dec. 163; Divine vs. McCormick, 50 Barb. 116; Moses vs. Mead, 1 Den. 373, 48 Am. Dec. 673; Burch vs. Spencer, 15 Hun 504; Fairbank Can Co. vs. Metzger, 43 Hun 71; Van Brack-

Iln vs. Fonda, 12 John. 468, 7 Am. Dec. 339; *Hyland vs. Sherman*, 2 E. D. Smith 234; *Hart vs. Wright*, 17 Wend. 267, 272. Pa. *McNaughton vs. Joy*, 1 Week. Notes Cas. 470. Tenn. *Good vs. Johnson*, 6 Heisk. 340. Tex. *Houston Cotton Oil Co. vs. Trammell* (Tex. Civ. App.), 73 S. W. Rep. 244 (but see 74 S. W. Rep. 899). Wis. *Getty vs. Rountree*, 2 Pinn. 379, 2 Chand. 68, 54 Am. Dec. 138; *Williams vs. Slaughter*, 8 Wis. 347.

See exhaustive monographic note, by Ernest Watts, 22 L. R. A. 187-198.

67. "In sale of provisions for domestic use, vendor is bound to know that they are sound and wholesome, at his peril."—*Van Bracklin vs. Fonda*, 12 John. (N. Y.) 468, 7 Am. Dec. 339.

68. "The furnishing of provisions which endanger human life or health stands clearly upon same ground as administering of improper medicines, from which liability springs irrespective of any question of privity of contract between the parties."—*Bishop vs. Weber*, 139 Mass. 411, 52 Am. Rep. 715. See *Norton vs. Sewall*, 106 Mass. 143, 8 Am. Rep. 298; *Longmead vs. Holliday*, 6 Exch. 761; *Pippin vs. Sheppard*, 11 Price 400, 410, 35 Rev. Rep. 746.

69. "In case of provisions it will be readily presumed that vendor intended to represent them as sound and wholesome, because offer of articles of food for sale implies this, and may readily be presumed that a common vendor of articles of food, from nature of his calling, knows whether they are unwholesome and unsound or not. From the fact of their being bad, therefore, false and fraudulent representation may be presumed. But these reasons do not apply to the case of provisions packed, inspected and prepared for exportation in large quantities as merchandise. The vendee does not rely upon the supposed skill or actual knowledge of the vendor."—*Winsor vs. Lombard*, 35 Mass. (18 Pick.) 61.

70. "Dealer who sells food for consumption impliedly warrants that it is fit for purpose for which it is sold."—*Craft vs. Parker W. & Co.*, 96 Mich. 245, 55 N. W. Rep. 812, 21 L. R. A. 139. See *Bishop vs. Weber*, 139 Mass. 411, 52 Am. Rep. 715.

See also par. 64 this note.

71. There is no implied warranty unless such vendor is a dealer in such provisions, and they are bought for immediate family consumption.—See Ill. *Morris vs. Thompson*, 35 Ill. 16. Md. *Hyatt vs. Boyle*, 5 Gill & J. 119, 25 Am. Dec. 276. Mass. *Miper vs. Coburn*, 53 Mass. (11 Met.) 559, 45 Am. Dec. 230. Minn. *Ryder vs. Nietzer*, 21 Minn. 70. N. Y. *Renschler vs. Jelliffe*, 9 Daly 469; *Wright vs. Hart*, 13 Wend. 449. S. D. *McCormick Harvest Mach. Co. vs. Watson*, 5 S. D. 9, 57 N. W. Rep. 945. Eng. *Bigge vs. Parkinson*, 7 Hurl. & N. 954; *Burnby vs. Ballette*, 16 Mees. & W. 644.

See par. 35 this note.

72. Action for relief—*Ex contractu* or *ex delicto*.—A person who has suffered damages by reason of defect in quality of provision sold may seek redress either in an action *ex contractu* for recovery of the price paid, or *ex delicto* to recover for damages suffered.

73. "If man sells victuals which are corrupt, without warranty, an action lies, because it is

against the commonwealth."—*Roswell vs. Vaughan*, Cro. Jac. 196.

Unwholesome meat sold as and for good meat and wholesome, declaration on the case was sustained, although it did not allege plaintiff had paid for the meat, was a consumer, or was injured thereby.—*Peckham vs. Holman*, 28 Mass. (11 Pick.) 484.

74. Action for deceit in sale of provisions unwholesome and unfit for food can only be maintained where wilful false representations or affirmations are shown to have been made, and from situation of parties.—*Emerson vs. Brigham*, 10 Mass. 197, 6 Am. Dec. 109.

75. Same—*Simplex commendatio non obligat*.—But mere expression of opinion as to character or quality of goods sold does not amount to warranty; the seller being permitted to puff, exaggerate, or enhance articles as much as he pleases, as long as he confines it to mere "bar-gaining talk." Ill. *Adams vs. Johnson*, 15 Ill. 436; *Reed vs. Hastings*, 61 Ill. 266. Md. *Rice vs. Forsyth*, 41 Md. 389; *Hyatt vs. Boyle*, 5 Gill & J. 110, 119, 25 Am. Dec. 276; *Johnston vs. Cope*, 3 Har. & J. 89, 5 Am. Dec. 423. Mass. *Conner vs. Henderson*, 15 Mass. 312, 8 Am. Dec. 103; *Lamb vs. Crafts*, 53 Mass. (12 Met.) 353; *Sweat vs. Shumway*, 102 Mass. 365, 3 Am. Rep. 471; *Howard vs. Emerson*, 110 Mass. 320, 14 Am. Rep. 608. N. Y. *Sands vs. Taylor*, 5 John. 395, 4 Am. Dec. 374; *Hart vs. Wright*, 17 Wend. 267; *Salisbury vs. Stainer*, 19 Wend. 159, 32 Am. Dec. 437. Pa. *Fraley vs. Bispham*, 10 Pa. St. 320, 51 Am. Dec. 486; *Carson vs. Baillie*, 19 Pa. St. 375, 57 Am. Dec. 659; *Wetherill vs. Neilson*, 20 Pa. St. 448, 59 Am. Dec. 741; *Eagan vs. Call*, 34 Pa. St. 236, 75 Am. Dec. 653; *McFarland vs. Newman*, 9 Watts 55, 34 Am. Dec. 497; *Matthews vs. Harston*, 3 Pittsb. 86.

76. Same—Animal sold by one dealer to another with knowledge latter intends to convert it into meat for domestic use, there is no implied warranty animal is fit for that purpose.—*Howard vs. Emerson*, 110 Mass. 320, 14 Am. Rep. 608; *Giroux vs. Stedman*, 145 Mass. 439, 1 Am. St. Rep. 472, 14 N. E. Rep. 538; *Burnby vs. Bollett*, 16 Mees. & W. 645.

Provisions sold in course of commercial transaction,—as to, see par. 35 this note.

77. Same—Butcher selling unwholesome meat, negligently, that is dangerous to those who eat it, and by reason whereof they are made sick, is liable for consequences.—*Craft vs. Parker*, 96 Mich. 245, 55 N. W. Rep. 812, 21 L. R. A. 139.

78. Caterer, a public, employed as such to furnish refreshments at a public hall, by those who arrange for entertainment, is liable in action of tort for injury suffered by one at tending and partaking of foods he provides, by reason of unwholesomeness of provisions furnished by him.—*Bishop vs. Weber*, 139 Mass. 411, 52 Am. Rep. 715, 1 Lewis' Bl. Com. 430, Rolle Abr. 95.

"The liability does not rest so much upon implied contract as upon violated or neglected duty voluntarily assumed. Indeed where guests are entertained without pay it would be hard to establish implied contract with each individual. The duty however arises from relation of caterer to guests. The latter have

a right to assume that he will furnish for their consumption provisions which are not unwholesome and injurious through any neglect on his part."—*Ibid.*

Compare: *Sheffer vs. Willoughby*, 163 Ill. 518, 54 Am. St. Rep. 483, 45 N. E. Rep. 253, 84 L. R. A. 464 (holding him liable for want of ordinary care only, and putting burden of showing want of such care on plaintiff).

79. Guest may maintain action against caterer (public) for injuries sustained from eating unwholesome food provided by the caterer, notwithstanding absence of privity of contract.—See par. 78 this note.

80. Cow diseased (foundered on green peas, etc.), butchered and sold for domestic consumption, vendor is liable in damages for sickness caused by eating the meat.—*Van Bracklin vs. Fonda*, 12 John. (N. Y.) 468, 7 Am. Dec. 339.

81. Cow sold by farmer to retail butcher, there is no implied warranty that animal is fit for food, although farmer knows butcher buys her for purposes of converting her into beef for immediate use.—*Howard vs. Emerson*, 110 Mass. 320, 14 Am. Rep. 608. See *Mass. Emerson vs. Brigham*, 10 Mass. 197, 6 Am. Dec. 109; *Winsor vs. Lombard*, 35 Mass. (18 Pick.) 57; *Mixer vs. Coburn*, 52 Mass. (11 Met.) 559, 45 Am. Dec. 230; *French vs. Vining*, 102 Mass. 132, 3 Am. Rep. 440. N. Y. *Moses vs. Mead*, 1 Den. 378, 43 Am. Dec. 676; *Hart vs. Wright*, 17 Wend. 267; *Wright vs. Hart*, 18 Wend. 449. Eng. *Burnby vs. Bollett*, 16 Mees. & W. 644.

See par. 85 this note.

Farmer, liability for selling diseased meat,—as to, see pars. 71, 82, 84 this note.

82. Hogs killed and sold for provisions by farmer, who makes no representations, he does not impliedly warrant that hogs are fit for use, and will not be liable in damages for sickness produced by eating the meat,—even though some of his other hogs are diseased with hog-cholera.—*Giroux vs. Stedman*, 145 Mass. 439, 1 Am. St. Rep. 472, 14 N. E. Rep. 583, distinguishing *Van Bracklin vs. Fonda*, 12 John. (N. Y.) 468, 7 Am. Dec. 339 (see par. 81 this note).

See also par. 85 this note.

83. Molasses in barrels sold at market price to grocer to retail, barrels being present at sale, but quality of the molasses not examined, there is no implied warranty that the molasses is fit for purpose for which it is purchased.—*Humphreys vs. Comline*, 8 Blackf. (Ind.) 516.

84. Provisions sold by private person, he is not amenable to law applicable to victualers and other common dealers, providing criminal and civil responsibility.—*Burnby vs. Bollett*, 16 Mees. & W. 644.

See par. 85 this note.

85. Provisions sold in course of commercial transactions, there is no implied warranty of quality.—*Giroux vs. Stedman*, 145 Mass. 439, 1 Am. St. Rep. 472, 14 N. E. Rep. 583; *Howard vs. Emerson*, 110 Mass. 320, 14 Am. Rep. 603; *Burnby vs. Bollett*, 16 Mees. & W. 645.

As between one dealer and another dealer, general rule is, that when food or provisions are sold as merchandise, in absence of fraud,

there is no implied warranty of fitness.—*Ind. Humphreys vs. Comline*, 8 Blackf. 516. Ky. *Jones vs. Murray*, 3 T. B. Mon. 83. Mass. *Emerson vs. Brigham*, 10 Mass. 197, 6 Am. Dec. 109; *Winsor vs. Lombard*, 35 Mass. (18 Pick.) 57; *Mattoon vs. Rice*, 102 Mass. 236; *Howard vs. Emerson*, 110 Mass. 320, 14 Am. Rep. 608; *Giroux vs. Stedman*, 145 Mass. 439, 1 Am. St. Rep. 472, 14 N. E. Rep. 583. Minn. *Ryder vs. Nietzer*, 21 Minn. 70. N. Y. *Miller vs. Scherder*, 2 N. Y. 262; *Rinschler vs. Jelliffe*, 9 Daly 469; *Moses vs. Mead*, 1 Den. 378, 43 Am. Dec. 673; *Fairbank Can. Co. vs. Metzger*, 43 Hun 71; *Hyland vs. Sherman*, 2 E. D. Smith 234; *Goldrich vs. Ryan*, 3 E. D. Smith 324; *Hart vs. Wright*, 17 Wend. 267; *Wright vs. Hart*, 18 Wend. 449. Tenn. *Good vs. Johnson*, 6 Heisk. 340. Wis. *McQuaid vs. Ross*, 35 Wis. 492, 39 Am. St. Rep. 864, 55 N. W. Rep. 705, 22 L. R. A. 187. Eng. *Burnby vs. Rollett*, 16 Mees. & W. 644.

See monographic note by Ernest Watts, 22 L. R. A. 187-198.

86. UNWHOLESOME WATER,—contaminated and infected in its course with typhoid fever in passing through town located upon its banks,—furnished by water company for domestic use, will not be liable in damages for death caused by using such water, where company was ignorant of existence of such disease in said town, and had banks of river duly and regularly inspected.—*Buckingham vs. Plymouth Water Co.*, 142 Pa. St. 221, 21 Atl. Rep. 824.

IV. PROTECTION FROM PERSONAL INSULTS.

87. CODE COMMISSIONERS' NOTE.—In note appended to this section the Code Commissioners say: "There is no doubt that persistent public insults, e. g. continually shouting at a person in the street, or even silently dogging him, are personal injuries, against which he ought to be protected. Why is not an act which the law admits almost to justify, certainly to mitigate, the crime of assault and battery, sufficient foundation for a civil action? Compare *Adams vs. Rivers*, 11 Barb. (N. Y.) 290, where an action for the use of insulting words, by one standing in the highway in front of plaintiff's land, was sustained on the ground of the trespass involved in standing in the highway after being ordered to depart, for the malicious purpose evinced."

V. PROTECTION FROM DEFAMATION.

88. LIBEL AND SLANDER,—as to, see post §§ 44-43 and notes.

VI. PROTECTION FROM INJURY TO PERSONAL RELATIONS.

89. CONSTRUCTION—Domestic relations.—We have already seen that provisions of this section are distinguished from those of § 43 post.—See par. 2 this note.

90. "Personal relations" in last clause of section are thought to refer to and to be confined to domestic relations, injuries to which are carefully defined in § 49 post.—See *Humphrey vs. Pope*, 123 Cal. 253, 256, 54 Pac. Rep. 847.

See post § 49 and note.

VII. MALICIOUS PROSECUTION.

91. "ACTIONS FOR MALICIOUS PROSECUTION HAVE NEVER BEEN FAVORED IN LAW, although they have always been readily upheld when proper elements therefor have been presented. They have been sustained, however, only when it is shown that prosecution was in fact actuated by malice, and that party instigating it had no reasonable ground for causing the prosecution."—*Lacey vs. Porter*, 103 Cal. 597, 605, 37 Pac. Rep. 635, quoting from *Ball vs. Rawles*, 93 Cal. 222, 228, 27 Am. St. Rep. 174, 38 Pac. Rep. 937. See *Kolka vs. Jones*, 6 N. D. 461, 471, 66 Am. St. Rep. 615, 622, 71 N. W. Rep. 558.

92. CAUSE OF ACTION FOR MALICIOUS PROSECUTION IS NOT ASSIGNABLE after verdict and before judgment entered thereon.—*Lawrence vs. Martin*, 23 Cal. 174, 178. See *Berson vs. Ewing*, 84 Cal. 89, 94, 23 Pac. Rep. 1113 (surviving partner may prosecute claim for).

93. As to right of surviving partner to recover damages for the malicious prosecution of a civil action against the firm, see post § 3461 and note.

94. LIMITATION OF ACTION—MALICIOUS PROSECUTION OF CIVIL ACTION.—Where gist of action is malicious prosecution of civil action upon unfounded claim, in which writ of attachment issued, termination of principal action, and not date of issuance of writ of attachment, is the time from which statute of limitations begins to run against an action for damages.—*Berson vs. Ewing*, 84 Cal. 89, 93, 23 Pac. Rep. 1113.

See Code Civ. Proc. § 339 and note.

95. Malicious attachment, statute begins to run from date of levy of writ.—*McCusker vs. Walker*, 77 Cal. 208, 212, 19 Pac. Rep. 382. See *Sharp vs. Miller*, 57 Cal. 431.

Distinguished: *Berson vs. Ewing*, 84 Cal. 89, 94, 23 Pac. Rep. 1112.

96. WHO MAY BE LIABLE—Partner not liable for malicious prosecution instituted by partner, unless participated in or advised by him; mere knowledge and consent not enough.—*Gilbert vs. Emmons*, 42 Ill. 143, 89 Am. Dec. 412.

97. Corporation.—Action against, for malicious prosecution, maintainable.—*Goodspeed vs. East Haddam Bank*, 22 Conn. 530, 58 Am. Dec. 439; *Hussey vs. Norfolk So. R. Co.*, 98 N. C. 34, 38, 2 Am. St. Rep. 312, sub nom. *Hussey vs. King*, 3 S. E. Rep. 923.

See note 26 Am. Rep. 131.

98. Executor or administrator.—Where suit is instituted by administrator in good faith, without malice, and with probable cause, for protection of succession interest, and he fails, no damages can be claimed from succession by defendant for expenses incurred in defending the suit.—*Louque vs. Succession of Saloy*, 45 La. Ann. 1886, 14 So. Rep. 255.

99. Several defendants.—An action for malicious prosecution will lie against several defendants.—*Dreux vs. Domec*, 18 Cal. 83, 83.

100. Same—Assignee of cause of action.—One who makes business of lending his name for hire to others to use in prosecuting suits,

which real parties in interest are ashamed, or, for more substantial reasons, decline to prosecute in their own names; who gives his confederate carte blanche to use his name as he sees fit, without informing as to circumstances or facts, and shares compensation, cannot afterward shield himself from consequences on plea of ignorance, or on pretense that he might possibly have supposed there was good cause of action.—*Kinsey vs. Wallace*, 36 Cal. 462, 478.

101. THE PROSECUTION—CRIMINAL OFFENSES—Generally.—One who, under belief that another has committed public offense, arrests such other under that belief, cannot be said to have acted unlawfully.—*Lyon vs. Hancock*, 35 Cal. 372, 376. See *Lamb vs. Galland*, 44 Cal. 609, 612.

102. "It is not necessary that a man who makes complaint charging another with forgery should suppose that he, the party making the complaint, is responsible upon the forged instrument in order to constitute good faith in making the complaint."—*Hahn vs. Schmidt*, 64 Cal. 284, 287, 30 Pac. Rep. 818.

103. Facts not constituting crime.—One who makes, before committing magistrate, an affidavit stating facts conceded to be true, which magistrate erroneously supposes constitute crime, and proceeds accordingly, is not liable in damages to person whom magistrate causes to be arrested upon such affidavit.—*Hahn vs. Schmidt*, 64 Cal. 284, 286, 30 Pac. Rep. 818.

Distinguished: *Krause vs. Spiegel*, 94 Cal. 370, 374, 28 Am. St. Rep. 137, 29 Pac. Rep. 707.

104. In order to constitute defense to action for malicious prosecution facts stated in the complaint, if they do not constitute crime, must nevertheless be true.—*Hahn vs. Schmidt*, 64 Cal. 284, 286, 30 Pac. Rep. 818.

105. Arrest and imprisonment on charge of slander, which does not constitute crime, will not support action for malicious prosecution.—*Krause vs. Spiegel*, 94 Cal. 370, 372, 28 Am. St. Rep. 137, 29 Pac. Rep. 707.

106. Compare: *Minneapolis Thresh. Mach. Co. vs. Regier*, 51 Neb. 402, 406, 70 N. W. Rep. 934 (insufficiency of criminal complaint no defense).

See note 58 Am. St. Rep. 289.

107. Proof that complaint was filed.—That defendants did file complaint with justice of peace charging plaintiff with criminal offense, is not admitted by averment in his separate answer that "he was credibly informed . . . that complaint was made and sworn to [by his co-defendant], and was filed by said justice, charging plaintiff with said offense"; and it is error to charge jury that such fact is admitted.—*Seabridge vs. McAdam*, 119 Cal. 460, 51 Pac. Rep. 691.

108. Charge of insanity.—Action of malicious prosecution on charge of insanity resulting in order committing person who is not insane, can be maintained.—*Kellogg vs. Cochran*, 87 Cal. 192, 199, 25 Pac. Rep. 677, 12 L. R. A. 104.

109. SAME—CIVIL ACTION—Generally.—An action can be maintained for malicious prosecution of civil action in which no process,

other than the summons, was issued.—*Eastin vs. Bank of Stockton*, 66 Cal. 123, 126, 56 Am. Rep. 77, 4 Pac. Rep. 1106. See *Smith vs. George*, 5 Cal. 341, 344; *Kolka vs. Jones*, 6 N. D. 461, 66 Am. St. Rep. 615, 71 N. W. Rep. 558.

See note 81 Am. Dec. 477.

110. Refusal to charge jury that "if defendants instituted suit in justice's court against plaintiffs in good faith, without malice, and with no other motive than to recover debt which they honestly believed was due by plaintiffs, then plaintiffs cannot recover in this action, and your verdict must be for defendants," held error.—*Gonzales vs. Coblner*, 63 Cal. 151, 154, 3 Pac. Rep. 697.

111. Suing for more than due.—One who, having good cause of action against another, wilfully sues for much greater amount than is due, and attaches property of such other, and puts him to charges, is liable in action for malicious prosecution.—*Clark vs. Nordholt*, 121 Cal. 26, 28, 53 Pac. Rep. 400. See *Weaver vs. Page*, 6 Cal. 681, 685.

112. Suborning witness to swear falsely in criminal prosecution against plaintiff, does not constitute cause of action for damages; gravamen of action is alleged malicious prosecution.—*Taylor vs. Bidwell*, 65 Cal. 489, 4 Pac. Rep. 491.

113. TERMINATION OF PROSECUTION—Generally.—It is essential to maintenance of action for malicious prosecution that proceeding complained of should have been finally terminated in favor of plaintiff.—*Holliday vs. Holliday*, 123 Cal. 26, 35, 55 Pac. Rep. 703; *Grant vs. Moore*, 29 Cal. 644, 657.

114. In action for malicious prosecution on criminal charge, plaintiff must prove that prosecution alleged to have been malicious was terminated by acquittal.—*Hibbing vs. Hyde*, 50 Cal. 206.

115. Burden is on plaintiff in action for malicious prosecution to show that proceeding, which is made basis of the action, has been finally determined in his favor.—*Holliday vs. Holliday*, 123 Cal. 26, 31, 55 Pac. Rep. 703.

116. But it is not incumbent upon plaintiff to aver and show means by which final determination of first proceeding in his favor was accomplished.—*Holliday vs. Holliday*, supra.

117. Discharge upon writ of habeas corpus, duly issued and returned, and prosecution wholly ended, is sufficient.—*Holliday vs. Holliday*, supra.

118. Dismissal of charge at procurement of accused is not such final determination in plaintiff's favor as will support action of malicious prosecution.—*Holliday vs. Holliday*, 123 Cal. 26, 35, 55 Pac. Rep. 703 (holding, however, that dismissal under circumstances of that case was not such dismissal). See *Langford vs. Boston & A. R. Co.*, 144 Mass. 431, 11 N. E. Rep. 697; *McCormick vs. Sisson*, 7 Cow. (N. Y.) 715. See *Craig vs. Ginn* (Del. Jan. 16, 1901), 48 Atl. Rep. 192, 53 L. R. A. 715.

119. MALICE AND WANT OF PROBABLE CAUSE—Necessity for.—In order to sustain action for malicious prosecution, malice and want probable cause must concur.—*Anderson*

vs. Coleman, 53 Cal. 188; *Jones vs. Jones*, 71 Cal. 89, 91, 11 Pac. Rep. 817; *Smith vs. Liverpool, L. & G. Ins. Co.*, 107 Cal. 432, 438, 40 Pac. Rep. 540. See *Coleman vs. Allen*, 79 Ga. 637, 11 Am. St. Rep. 449, 5 S. E. Rep. 204.

120. One who causes another to be prosecuted for crime is not liable in damages therefor, unless he acts through malice and without probable cause; and it is policy of the law that whenever citizen shall have reasonable cause to believe that a crime has been committed, he shall be protected in his efforts to secure punishment of offender.—*Dunlap vs. New Zealand F. & M. Ins. Co.*, 109 Cal. 365, 369, 42 Pac. Rep. 29.

121. "The gravamen of action for malicious prosecution is that defendant instituted proceedings without probable cause; that is, without having at time such knowledge or information of circumstances as would superinduce in mind of ingenuous and unprejudiced person of ordinary capacity reasonable belief that plaintiff was guilty of the charge."—*Harkrader vs. Moore*, 44 Cal. 144, 149. See *Dawson vs. Schloss*, 93 Cal. 194, 202, 29 Pac. Rep. 31; *Ball vs. Rawles*, 93 Cal. 222, 233, 27 Am. St. Rep. 174, 28 Pac. Rep. 937; *People vs. Kilvington*, 104 Cal. 86, 43 Am. St. Rep. 73, 37 Pac. Rep. 799; *Sandell vs. Sherman*, 107 Cal. 391, 394, 40 Pac. Rep. 493.

122. "The defense to action for malicious prosecution must be that defendant did believe and had reasonable grounds to believe at the time that accusation made, it was well founded."—*Harkrader vs. Moore*, 44 Cal. 144, 149.

123. It is not sufficient as defense that at time of alleged prosecution that facts of which defendant then had knowledge were sufficient to warrant reasonable man in belief that alleged charge was true; it must also appear that defendant believed charge to be true.—*Harkrader vs. Moore*, supra.

124. Prosecution for indecent exposure—Case made for jury in action for malicious prosecution, where plaintiff testifies that he did not know that he was in sight of any person whatever, or at point where any one was likely to see him, and in effect also that there was in fact no improper exposure of his person. He further testified that at time he supposed the place was one frequently used for purposes for which he was using it, and did not know that prosecuting witness or his family were likely to see him, or be offended by the act. If such were the case, mere fact that plaintiff was seen would not constitute violation of law.—*Simmons vs. Brinkmeyer*, 78 Cal. 486, 14 Pac. Rep. 101.

125. Prosecution based upon statements of child eleven years old, who claimed to have seen plaintiff commit offense with which he was subsequently charged, there appearing no reason to doubt truth of her statement,—held not without probable cause.—*Dwain vs. Denalso*, 66 Cal. 415, 5 Pac. Rep. 903.

126. SAME—PROBABLE CAUSE DEFINED.—Probable cause for criminal prosecution is equivalent to reasonable cause, and consists of facts in mind of prosecutor sufficient to lead person of ordinary caution to believe that

party to be prosecuted is guilty.—*Johnston vs. Meagher*, 14 Utah 426, 441, 47 Pac. Rep. 861.

127. "Probable cause does not depend on actual state of the case, in point of fact, but upon honest and reasonable belief of party prosecuting. It must appear that defendant knew of existence of those facts which tended to show reasonable cause, because without knowing them he could not act upon them; and also that he believed facts amounted to offense which he charged, because otherwise he will have made them pretext for prosecution without even entertaining opinion that he had right to prosecute."—*Harkrader vs. Moore*, 44 Cal. 144, 149.

128. The question of probable cause must be determined from facts as they existed and appeared to defendant at time he made the complaint. He had a right to act upon facts as they were apparent by acts of plaintiff, independent of any secret intention on part of latter which was not and could not be known to him.—*Jones vs. Jones*, 71 Cal. 89, 92, 11 Pac. Rep. 817.

129. Questions of law and fact.—"Probable cause is mixed question of law and fact. Whether alleged circumstances existed or not, is simply question of fact; and, conceding their existence, whether or not they constitute probable cause, is question of law. Where circumstances are admitted, or clearly proved by uncontradicted testimony, it is province of court to determine question of probable cause, and court may order nonsuit."—*Smith vs. Liverpool, L. & G. Ins. Co.*, 107 Cal. 432, 437, 40 Pac. Rep. 540, quoting from *Potter vs. Seale*, 8 Cal. 217, 220.

130. What facts and circumstances amount to probable cause is pure question of law. Whether they exist or not in any particular case is pure question of fact. The former is exclusively for court; the latter for jury.—*Sandell vs. Sherman*, 107 Cal. 391, 394, 40 Pac. Rep. 498. See *Potter vs. Seale*, 8 Cal. 217, 220; *Lacey vs. Porter*, 108 Cal. 597, 605, 37 Pac. Rep. 635.

131. What constitutes probable cause is matter of law for court.—*Holliday vs. Holliday*, 123 Cal. 26, 31, 55 Pac. Rep. 703.

132. Whether or not facts constitute probable cause is for determination of court, and not the jury.—*Eastin vs. Bank of Stockton*, 66 Cal. 123, 56 Am. Rep. 77, 4 Pac. Rep. 1106.

133. "It is not error for trial court to instruct jury in an action for malicious prosecution, that, if certain facts are proved, there was or was not probable cause for prosecution alleged to have been malicious. On the contrary, such instruction is eminently proper, and it is error to leave it to the jury to determine whether facts and circumstances proved do or do not establish want of reasonable cause. Where there is no dispute about facts proved by plaintiff, and it clearly appears to the judge that facts fail to establish want of probable cause, he may grant nonsuit, or direct verdict in favor of defendant."—*Emerson vs. Skaggs*, 52 Cal. 246.

134. Want of probable cause is mixed question of law and fact, and it is error to leave it to jury to decide whether or not facts

found amount to want of probable cause.—*Grant vs. Moore*, 29 Cal. 644, 648.

135. Probable cause, or reasonable ground for suspicion, whether it arises in action for malicious prosecution or false imprisonment, is one of law, unless evidence out of which it arises is conflicting, in which event it is duty of court to instruct jury what facts, if established, will constitute probable cause, and submit to them only the question as to such facts.—*People vs. Kilvington*, 104 Cal. 86, 90, 43 Am. St. Rep. 73, 37 Pac. Rep. 799. See *Harkrader vs. Moore*, 44 Cal. 144, 152; *Seabridge vs. McAdam*, 108 Cal. 345, 350, 41 Pac. Rep. 409.

136. Charge that jury "in action for malicious prosecution are not to determine facts amounting to probable cause; it is province of court to determine that question. I have determined that question, gentlemen, when I tell you that the very fact that this man was arrested and liberated in police court, gave him right of action," is erroneous, in that the court determined that facts mentioned established conclusively want of probable cause.—*Rogers vs. Mahoney*, 62 Cal. 611.

137. "When facts in reference to alleged probable cause are admitted, or established beyond controversy, then determination of their legal effect is absolute, and the jury are to be told there was or was not probable cause, as case may be. When, however, facts are controverted and evidence is conflicting, then determination of their legal effect is necessarily hypothetical, and jury are to be told that if they find facts in designated way, such facts, when so found, do or do not amount to probable cause. But in neither case are the jury to determine whether or not established facts do or do not amount to probable cause."—*Fulton vs. Onesti*, 66 Cal. 575, 6 Pac. Rep. 491.

138. Charge to jury, that "when plaintiff first rested his case, it appeared to me that action complained of was, in fact, commenced; that the time of payment of indebtedness sued upon had, for valuable consideration, been extended until April next; that there was no indebtedness due upon contract, express or implied; that payment of alleged indebtedness was originally secured, in whole or in part, by mortgage upon real property, and that such security had not been rendered nugatory by any act of plaintiff. I decided, as matter of law, that there was want of probable cause for commencement and prosecution of the action; and issuance and execution of writ of attachment" (p. 465).—held proper "because testimony of defendants did not obviate or avoid, or in any degree tend to obviate or avoid, case of want of probable cause made by pleadings and testimony of plaintiff, but, on contrary, it went to show still more forcibly and conclusively, that suit was brought and attachment issued without probable cause."—*Kinsey vs. Wallace*, 36 Cal. 462, 477.

139. Sufficiency of exception to charge.—Exception to "that part of charge about probable cause," reciting first sentence employed by court on that subject, is sufficiently specific.—*Rogers vs. Mahoney*, 62 Cal. 611, 613.

See Code Civ. Proc. § 648 and note.

140. SAME—BURDEN OF PROOF.—In an action for malicious prosecution burden is

upon plaintiff to show affirmatively that there was want of probable cause.—*Grant vs. Moore*, 29 Cal. 644, 648; *Ganea vs. Southern Pac. R. Co.*, 51 Cal. 140; *Emerson vs. Skaggs*, 52 Cal. 146; *Dwain vs. Descalso*, 66 Cal. 415, 5 Pac. Rep. 903; *Lacey vs. Porter*, 103 Cal. 597, 605, 17 Pac. Rep. 635.

141. Upon such prima facie evidence, it is incumbent upon defendant to disprove facts sought to be established by plaintiff, or to prove other facts which establish probable cause.—*Emerson vs. Skaggs*, 52 Cal. 246.

142. To maintain an action for malicious prosecution plaintiff must allege and prove malice and want of probable cause on part of defendant in instituting proceeding which is made basis of the action.—*Holliday vs. Holliday*, 123 Cal. 26, 31, 55 Pac. Rep. 703.

143. Malice, actual, must be proved by plaintiff, and is a fact to be found by jury, in action for malicious prosecution. Want of probable cause does not raise legal presumption of malice, but it may be inferred from other circumstances.—*Levy vs. Brannan*, 39 Cal. 485, 488.

144. Malice in fact must be shown. It does not follow that wrongful accusation made, and without reasonable or probable cause, is malicious in fact by necessary conclusions; and while jury may find the fact from circumstances of want of probable cause, or from other circumstances established, they are not to be told that wrongful charge made without probable cause is per se malicious in fact.—*Harkrader vs. Moore*, 44 Cal. 144, 153.

145. To maintain an action for malicious prosecution first question to be considered is want of probable cause for prosecution complained of. From want of probable cause malice may be inferred, but from most express malice want of probable cause cannot be implied.—*Grant vs. Moore*, 29 Cal. 644, 648. See *Potter vs. Seale*, 8 Cal. 220; *Pangburn vs. Bull*, 1 Wend. (N. Y.) 345, 352; *Stockley vs. Hornidge*, 8 Car. & P. 11, 18, 34 Eng. C. L. 272.

146. SAME—EVIDENCE OF—Order holding accused to answer.—Where court has not full jurisdiction to try matter and to render judgment upon merits, e. g. where justice sits as committing magistrate with power merely to discharge defendant or to hold him to answer for trial before higher tribunal, the order made by the magistrate in such cases, lacking essentials of final judgment, is not held conclusive upon question of probable cause. At most it is but prima facie evidence.—*Holliday vs. Holliday*, 123 Cal. 26, 32, 55 Pac. Rep. 703.

147. Proof that plaintiff was held to answer by examining magistrate establishes prima facie existence of probable cause, and subsequent ignoring of charge by grand jury did not have effect of overcoming such prima facie case.—*Ganea vs. Southern Pac. R. Co.*, 51 Cal. 140.

148. Order by committing magistrate holding plaintiff to answer does not establish conclusively want of malice and that there was probable cause.—*Diemer vs. Herber*, 75 Cal. 287, 290, 17 Pac. Rep. 205.

149. Discharge by grand jury.—Where deliberations of grand jury are not mere exami-

nation of case of prosecution, but in fact constitute preliminary trial in which accused may appear by his witnesses, make his defense, and testify in his own behalf, the favorable result of such trial certainly affords no evidence of want of probable cause.—*Ganea vs. Southern Pac. R. Co.*, 51 Cal. 140.

150. Acquittal.—“The interests of public justice require that parties who, in good faith, and upon grounds believed at time to be sufficient, attempt to bring supposed offenders to just accountability, should not be mulcted in damages merely because accused party has ultimately succeeded in obtaining acquittal of the charge.”—*Ganea vs. Southern Pac. R. Co.*, supra.

151. Ordering defendants to give bonds to keep peace.—Order of justice of peace requiring plaintiff in malicious prosecution action to give bonds to keep peace is conclusive determination that there was probable cause for instituting proceeding, though plaintiff is afterwards discharged from imprisonment under writ of habeas corpus.—*Holliday vs. Holliday*, 123 Cal. 26, 31, 55 Pac. Rep. 703.

152. SAME—SAME—CIVIL ACTION.—Existence of cause of action in proceedings alleged to have been maliciously prosecuted, although for considerable less amount, shows probable cause, and entitles defendant to verdict.—*Grant vs. Moore*, 29 Cal. 644, 648. See *Bulkeley vs. Smith*, 2 Duer (N. Y.) 274.

153. Commitment for insanity.—Action for malicious prosecution based on charge of insanity—order of commitment is not final or conclusive against plaintiff of his insanity at any time, or of probable cause for prosecution.—*Kellogg vs. Cochran*, 87 Cal. 192, 199, 25 Pac. Rep. 677, 12 L. R. A. 104.

154. The proceedings of justice's court, and evidence of what defendants did and swore to in that court, are admissible to show malice.—*Dreux vs. Domec*, 18 Cal. 83, 88.

155. Copies of complaint, warrant of arrest, proceedings, and docket entries in criminal action tried before justice of peace, certified by latter, are properly received in evidence as against objection to them as a whole, where some of them are admissible, and defendant fails to specify any particular portion to which he addresses his objection.—*Shatto vs. Crocker*, 87 Cal. 629, 25 Pac. Rep. 921.

156. Malice may be proved by acts or declarations of defendant, in prosecuting action, in respect to the prosecution, or matter which was made subject of criminal charge against plaintiff.—*Levy vs. Brannan*, 39 Cal. 485, 488.

157. Scope of inquiry.—In action for malicious prosecution, where plaintiff claims punitive damages, motives of defendant become a most material subject of inquiry. To such inquiry, from necessity of case, a wide range should be allowed to both sides. Malice, like fraud, is generally to be inferred from facts and circumstances. Hence, plaintiff is entitled to prove any facts or circumstances which tend, even in slightest degree, to show malice on part of defendant. For same reason, defendant is entitled to prove any facts and circumstances which tend, in slightest degree,

to show contrary motive. No fact or circumstance can, therefore, be properly excluded from the jury, unless court is satisfied to a moral certainty that the jury can draw no rational presumption from it.—*Lyon vs. Hancock*, 35 Cal. 372, 376.

153. Arrest of wife—Evidence of threat and ill-will upon part of her husband against defendant, admissible as tending to establish probability of wife having committed offense charged.—*Lyon vs. Hancock*, 35 Cal. 372, 376.

159. Circumstances under which arrest was caused may be shown in rebuttal of malice and want of proper cause. If the defendant had received information from apparently reliable source, of character to induce prudent, cautious man to believe that plaintiff had been guilty of offense for which he was arrested, he should have been allowed to state what the information was; not for purpose of proving that plaintiff was, in fact, guilty of offense imputed to him, but that defendant, when he caused the arrest, had good reason to believe he was guilty.—*Lamb vs. Galland*, 44 Cal. 609, 611.

160. Where issue is as to whether or not plaintiff used pistol in assault upon defendant, for which plaintiff was prosecuted maliciously, as he alleges, and parties directly contradict each other as to the fact, there being no other witnesses, plaintiff cannot show his innocent possession of the pistol by showing circumstances under which weapon came into his hands.—*Swan vs. Thompson*, 124 Cal. 193, 197, 56 Pac. Rep. 873.

161. **ADVICE OF COUNSEL**—Generally.—Where party has communicated to his counsel all facts bearing upon the case of which he has knowledge, or could have ascertained by reasonable diligence and inquiry, and has acted upon advice received, honestly and in good faith, absence of malice is established, want of probable cause is negatived.—*Potter vs. Seale*, 8 Cal. 217, 225; *Sandell vs. Sherman*, 107 Cal. 391, 396, 40 Pac. Rep. 493. See *Levy vs. Brannan*, 39 Cal. 485, 488; *Wild vs. Odell*, 56 Cal. 136, 138 (recognizing this rule, but holding that defense in that case was entirely overcome by evidence defendant had not stated the fact of his case to counsel); *Jones vs. Jones*, 71 Cal. 89, 92, 11 Pac. Rep. 817; *Stone vs. Swift*, 21 Mass. (4 Pick.) 339, 16 Am. Dec. 349.

162. In order to avail himself of the defense (advice of counsel), it devolved upon defendant to prove that before receiving the advice he had fairly and fully communicated to his counsel, or at least that his counsel knew, all facts within defendant's knowledge tending to prove or to disprove probable cause for prosecution; and that at time of commencing prosecution defendant believed plaintiff to be guilty as charged.—*Dawson vs. Schloss*, 93 Cal. 194, 202, 29 Pac. Rep. 31.

163. Defense of advice of counsel is not available where, in view of the testimony, jury might well conclude that defendant did not believe plaintiff was guilty of crime with which he was charged.—*Vann vs. McCreary*, 77 Cal. 434, 19 Pac. Rep. 826.

164. As to pleading statements of facts to counsel, see par. 176 this note.

165. Prosecuting attorney.—If person whose advice he seeks is officer selected by people to prosecute offenders against the laws, and he gives to that officer all information he possesses, and is then advised by him that crime has been committed, and prosecution is made upon complaint prepared by that officer, his good faith is established.—*Dunlap vs. New Zealand F. & M. Ins. Co.*, 109 Cal. 365, 369, 42 Pac. Rep. 29.

166. Full statement of facts to counsel must be made in order to make out defense of advice of counsel available.—*Wild vs. Odell*, 56 Cal. 136, 138. See *Bliss vs. Wyman*, 7 Cal. 257.

167. "If there are any circumstances within his knowledge, or which he is chargeable with knowing, which would destroy apparent effect of facts stated by him, or if, after obtaining advice of counsel, and before acting upon it, other facts should come to his knowledge, which he did not submit, his good faith in seeking advice or in acting thereon would be impeached, and defense dependent upon such good faith would fail. So, too, if he should suppress some material fact upon mistaken belief that it was immaterial, advice of counsel would be unavailing, for reason that he had not laid before him all facts within his knowledge."—*Dunlap vs. New Zealand F. & M. Ins. Co.*, 109 Cal. 365, 370, 42 Pac. Rep. 29.

168. Question of fact.—Whether defendants in malicious prosecution action had made fair and full statement of all facts to counsel which were known to them, is question of fact to be determined by jury, and not by court.—*Seabridge vs. McAdam*, 108 Cal. 345, 349, 41 Pac. Rep. 409.

169. SAME—ACTION ON ADVICE.—Whether party acted bona fide on advice given him by his professional adviser, is question of intention to be determined by jury, in all cases where there is any legitimate evidence to show want of good faith in following professional advice.—*Potter vs. Seale*, 8 Cal. 217, 225. See *Hall vs. Suydam*, 6 Barb. (N. Y.) 83.

170. "Diligent inquiry" by prosecutor not necessary.—It is not necessary that he shall institute investigation of the crime itself, or seek to ascertain whether there are other facts relating to the offense, or try to find out whether accused has any defense to the charge. He is not required to exhaust all sources of information bearing upon facts which have come to his knowledge, for that would be to require him to perform office of committing magistrate, and thus thwart the very purpose of the law in inducing him to seek its immediate vindication for crimes committed against it.—*Dunlap vs. New Zealand F. & M. Ins. Co.*, 109 Cal. 365, 371, 42 Pac. Rep. 29.

171. Instruction that when, in an action for malicious prosecution, defendant relies upon advice of counsel as defense for instituting proceedings complained of, he must, in order to avail himself of that defense, prove to satisfaction of jury that before instituting proceeding he made full, fair, and honest statement to his counsel of all material facts bearing upon

the charge of which he had knowledge, or 'which he could have ascertained by reasonable diligence,' is erroneous.—*Holliday vs. Holliday*, 123 Cal. 26, 36, 55 Pac. Rep. 703, following *Dunlap vs. New Zealand F. & M. Ins. Co.*, 109 Cal. 365, 371, 42 Pac. Rep. 29.

172. The question of good faith of counsel in giving advice is not an element in the problem.—*Sandell vs. Sherman*, 107 Cal. 397, 40 Pac. Rep. 493, quoted with approval in *Seabridge vs. McAdam*, 119 Cal. 460, 462, 51 Pac. Rep. 691 (where it was held error to charge jury that such advice must be sought and given in good faith and with honest purpose).

173. Knowledge derived from adverse counsel.—Where it is claimed that advice as to probable cause is grounded in part on knowledge derived from others than defendant, attorney cannot, as witness for defendant, be asked to state what plaintiff's counsel had said while representing him on trial of action out of which prosecution grew, without showing that plaintiff was present or in any way assented to what his counsel said.—*Dawson vs. Schloss*, 93 Cal. 194, 203, 29 Pac. Rep. 31.

174. PLEADING—GENERALLY.—In action for malicious prosecution it is not necessary to set out in complaint evidence of facts, but only the substantial matter which constitutes the action.—*Dreux vs. Domec*, 18 Cal. 83, 88.

175. Joint defendants.—Averment that defendants, contriving and maliciously intending to injure plaintiff, etc., procured him to be indicted, sufficiently avers the joint agency on part of defendants in instituting prosecution.—*Dreux vs. Domec*, 18 Cal. 83, 88.

176. That facts were stated to counsel is not new matter within contemplation of code, and it is not necessary that it be specially pleaded.—*Levy vs. Brannan*, 39 Cal. 485, 489. See *Sparling vs. Conway*, 6 Mo. App. 286.

177. DAMAGES—Question for jury.—Rule well settled that where trespass is committed from wanton or malicious motives, or reckless disregard of rights of others, or under circumstances of great hardship or oppression, the measure and amount of damages are matters for jury alone. In such cases courts will not disturb verdict, on the ground that damages are excessive, unless amount of damages is so disproportionate to injury proved as to make it clear that jury, in rendering verdict, must have acted under influence of passion or prejudice.—*Russell vs. Dennison*, 45 Cal. 337, 342.

178. In malicious prosecution case jury are not confined to actual loss sustained by plaintiff, but may take into consideration character and position of parties and of circumstances that transpired.—*Weaver vs. Page*, 6 Cal. 681, 685.

179. Only actual damage sustained by arrest should be awarded at most when person arrested and claiming damage for malicious prosecution was morally guilty of crime charged, although he evaded penalty of law.—*Sears vs. Hathaway*, 12 Cal. 277.

180. General damages.—"Bodily pain and suffering come under head of general damages, because they result naturally and directly from bodily harm, and injuries to feel-

ings flow as naturally and as directly from treatment like that complained of herein."—*Shatto vs. Crocker*, 87 Cal. 629, 25 Pac. Rep. 921.

181. Injury to feeling, caused by arrest, may be testified to by plaintiff under his general allegation of damages.—*Shatto vs. Crocker*, supra.

182. Expenses incurred.—An action instituted and prosecuted maliciously and without reasonable or probable cause, party aggrieved may have his action for damages, and recover expense incurred by him, beyond taxable costs (dictum).—*Reay vs. Butler*, 69 Cal. 572, 585, 11 Pac. Rep. 463.

183. Error to prevent jury to allow plaintiff all that he paid out and expended in defense of former suit, "both counsel fees and all other expenses paid out by him," without reference to whether such fees and expenses were or were not reasonable and proper.—*Eastin vs. Bank of Stockton*, 66 Cal. 123, 125, 56 Am. Rep. 77, 4 Pac. Rep. 1106.

184. Excessive damages.—Verdict for \$4,000 held excessive, where plaintiff was accused of no moral turpitude, was subjected to no physical suffering, received no large damage to his business or property, and reasonable man should not have experienced any very poignant and overwhelming sorrow and laceration of feeling at an arrest on mere charge of simple assault, where party making charge did not appear to press it, and officer of law dismissed it in reasonable time, and plaintiff's friends met him with merely a smile or word of gentle pleasantries.—*Phelps vs. Cogswell*, 70 Cal. 201, 203, 11 Pac. Rep. 628.

185. Damages will not be considered excessive, where, all circumstances considered, they are not so excessive as to warrant inference that they are result of passion or prejudice, and are not so excessive as to warrant court in disturbing verdict.—*Stuart vs. Hoffman*, 68 Cal. 381, 9 Pac. Rep. 451.

VIII. FALSE IMPRISONMENT.

186. "PERSONAL LIBERTY" consists of right of locomotion,—to go where one pleases, and when, and to do that which may lead to one's business or pleasure, only so far restrained as rights of others may make it necessary for welfare of all other citizens. One may travel along public highways, or in public places; and while conducting himself in decent and orderly manner, disturbing no other, and interfering with rights of no citizens, will be protected under the law, not only in person, but in safe conduct. Constitution and laws are framed for public good, and protection of all citizens, from highest to lowest; and no one may be restrained of his liberty, unless he has transgressed some law. Any law which would place conduct and safekeeping of another in hands of even the conservator of peace, unless for some breach of peace committed in his presence, or upon suspicion of felony, would be most oppressive and unjust, and destroy all rights which our constitution guarantees.—*Pinkerton vs. Verberg*, 78 Mich. 573, 18 Am. St. Rep. 473, 44 N. W. Rep. 579, 7 L. R. A. 507.

187. RIGHT OF ACTION FOR FALSE IMPRISONMENT.—DIES with the death of the wrong-doer.—*Harker vs. Clark*, 57 Cal. 245.

189. Not assignable, even after verdict, but before judgment; it is a mere personal right, and not subject of sale and transfer.—*Hunt vs. Conrad*, 47 Minn. 561, 50 N. W. Rep. 614.

190. VENUE OF ACTION—CHANGE TO DEFENDANT'S RESIDENCE—Error to refuse motion for in action for false imprisonment.—*Ah Fong vs. Sternes*, 79 Cal. 30, 21 Pac. Rep. 381.

See Code Civ. Proc. §§ 392-400 and notes.

191. WHO MAY BE LIABLE—Judicial officers.—Inferior tribunals, invested with special jurisdiction only, and persons clothed with limited authority, e. g. justices of the peace, must, at their peril, keep within their prescribed jurisdiction; and if they transcend limits of their authority, they are answerable to any one whose rights are thereby invaded. And honesty of purpose in such case, while it may mitigate damages, cannot justify clear usurpation of power.—*De Courcey vs. Cox*, 94 Cal. 665, 669, 30 Pac. Rep. 95.

191. "If magistrate acts beyond limit of his jurisdiction, his proceedings are deemed to be coram non iudice, and void; if he attempts to enforce any process founded on any judgment, sentence, or conviction in such case, he thereby becomes a trespasser."—*De Courcey vs. Cox*, supra.

192. Judicial officer is not liable for acts done in his official capacity and within his jurisdiction.—*Going vs. Dinwiddie*, 86 Cal. 633, 637, 25 Pac. Rep. 129. See *Pratt vs. Gardner*, 56 Mass. (2 Cush.) 63, 68, 48 Am. Dec. 652.

Acts in excess of jurisdiction, even, not liable.—*Sharp vs. Blankenship*, 59 Cal. 288, 293.

See note 90 Am. Dec. 727; 12 Am. St. Rep. 919.

193. Peace Officer.—Where an officer receives information from which he believes felony has been committed, it is his duty to make arrest with or without warrant; but if upon arriving at plaintiff's residence he finds information to be erroneous, he must proceed no further.—*Fulton vs. Staats*, 41 N. Y. 498.

See par. 200 this note.

194. Grand juror is not answerable civilly for damages for an act done by him as such grand juror, even though he acts upon insufficient evidence, and with a desire maliciously to injure person against whom indictment is found.—*Turpen vs. Booth*, 56 Cal. 65, 67, 33 Am. Rep. 48.

See Penal Code, § 927 and note.

195. WHAT CONSTITUTES FALSE IMPRISONMENT.—Evidence tending to show that plaintiff was restrained of his liberty at defendant's instance, by reason of process which magistrate had no authority to issue in premises, is sufficient to sustain count for false imprisonment. Neither malice nor want of probable cause need be proved to support such action.—*Boeger vs. Langenberg*, 97 Mo. 390, 10 Am. St. Rep. 322, 11 S. W. Rep. 223.

196. Justification—Lawfulness of imprisonment.—Burden of proof on defendant to establish.—*Ah Fong vs. Sternes*, 79 Cal. 30, 32, 21 Pac. Rep. 381.

See exhaustive monographic note by Irvine Taylor, 51 L. R. A. 193.

197. Process regularly issued on judgment

of justice of peace in action within his jurisdiction, upon which plaintiff was imprisoned, is protection, in action for false imprisonment, to officer executing it, and to parties at whose instance it was issued and served.—*Hallock vs. Dominy*, 69 N. Y. 238. See *Brown vs. Crowl*, 5 Wend. (N. Y.) 298; *Chapman vs. Dyett*, 11 Wend. (N. Y.) 31, 25 Am. Dec. 598; *Doswell vs. Impey*, 1 Barn. & C. 163, 4 Dowl. & Ry. 350, 1 L. J. K. B. 99, 3 Eng. C. L. 70; *Ackerley vs. Parkinson*, 3 Maule & S. 411, 16 Rev. Rep. 317.

198. "Same principle which gives protection to ministerial officer should protect him when he executed process of court of limited jurisdiction, if subject-matter of suit is within that jurisdiction, and nothing appears on face of process to show that person was not also within it."—*Savacool vs. Boughton*, 5 Wend. (N. Y.) 170, 21 Am. Dec. 181.

199. Process from court without jurisdiction.—"Where it appears on face of process that court or magistrate issuing it had not jurisdiction of subject-matter of suit, or of person of party against whom it is directed, it is void, not only as respects court or magistrate and party at whose instance it is sued out, but it affords no protection to officer who has acted under it."—*Savacool vs. Boughton*, 5 Wend. (N. Y.) 170, 21 Am. Dec. 181.

200. Statute authorizing arrest without warrant.—Where an officer seeks to justify arrest without warrant under statute authorizing such arrest where public offense is committed in his presence, or where he has reasonable ground to believe that person arrested has committed felony, and act for which arrest was made was not committed in his presence, he must show that he acted on information such as would justify reasonable man in believing that particular person arrested was guilty of felony. Where he has no such information, but nevertheless makes an arrest, he acts entirely outside of line of his duty and authority; as much so as an officer who arrests without warrant where there is no law permitting an arrest without process.—*Chandler vs. Rutherford*, 101 Fed. Rep. 774, 778.

201. PLEADINGS—Generally.—Allegation that plaintiff was "confined and restrained of his liberty by defendant" is an allegation of physical and bodily restraint, which would serve as foundation for old action of trespass vi et armis.—*Ah Fong vs. Sternes*, 79 Cal. 30, 32, 21 Pac. Rep. 381.

202. Complaint for false imprisonment which shows that no warrant could legally be issued on complaint made against plaintiff; that he was not convicted or adjudged guilty of any crime; that he was charged with commission of act which did not constitute a crime; was arrested and imprisoned, sufficiently states cause of action.—*De Courcey vs. Cox*, 94 Cal. 665, 669, 30 Pac. Rep. 95.

203. Complaint averring that defendants, sitting as court, knowing that he had not committed contempt, and not having acquired jurisdiction over his person, falsely, wilfully, and maliciously adjudged plaintiff guilty of contempt, and ordered his imprisonment, shows upon its face that plaintiff has no cause of action against the defendants.—*Pickett vs.*

Wallace, 57 Cal. 555, 557. (This case is notable as a flagrant violation of the wholesome maxim of the law, "nemo potest esse simul actor et judex,"—no man can be at the same time judge and suitor.)

204. Malice and want of probable cause.—In false imprisonment it is not necessary to aver that the imprisonment was malicious or without probable cause.—*Ah Fong vs. Sternes*, 79 Cal. 30, 32, 21 Pac. Rep. 381. See *Aikin vs. Newell*, 32 Ark. 605; *Colter vs. Lower*, 35 Ind. 285, 286, 9 Am. Rep. 735; *Carey vs. Sheets*, 60 Ind. 20, 21.

205. "Unlawful," "Wrongful," etc.—It is not even necessary to allege that imprisonment was unlawful. If matter of justification exists, it must be pleaded by defendant.—*Ah Fong vs. Sternes*, 79 Cal. 30, 32, 21 Pac. Rep. 381.

206. Averment that defendant "wrongfully" caused plaintiff to be arrested and "unlawfully" did certain other things, accompanying arrest, is statement of mere conclusions of law, and tenders no issue, in absence of further averment showing acts complained to be unlawful or wrongful.—*Going vs. Dinwiddie*, 86 Cal. 633, 638, 25 Pac. Rep. 129.

207. Nature of jurisdiction of court.—Plaintiff, in attempting to state his cause of action against justice of peace, for alleged false imprisonment for contempt of court, cannot presume that justice acted outside of his jurisdiction; but he must aver that said acts were without or in excess of his jurisdiction, or aver facts from which such want of jurisdiction appears.—*Going vs. Dinwiddie*, supra.

208. Official capacity of defendant.—In an action for false imprisonment against marshal or sheriff, it is not necessary to declare against him in his official capacity, or where acts complained of were done by deputy, to allege that they were so done.—*Hirsch vs. Rand*, 39 Cal. 315, 318; *Drake vs. Paulhamus*, 66 Fed. Rep. 895, 897.

209. CIVIL ARREST.—If judge to whom application was made had jurisdiction to pass upon sufficiency of evidence disclosed by affidavit to procure order of arrest, party applying for it cannot be held responsible as for false imprisonment, unless there was an entire lack of evidence of some essential fact which law requires to be shown.—*Dusy vs. Helm*, 59 Cal. 183, 189.

§ 44. DEFAMATION, WHAT. Defamation is effected by;

1. Libel;
2. Slander.

History: Enacted March 21, 1872.

SLANDER OF TITLE.—"Considering the law as laid down in sections 44-48 of the Civil Code inclusive, and the facts of this case as disclosed by the record, we can perceive no good reason why the defendant should have been precluded from asserting orally or

by publication that which he had a right to do, and is in good faith continuing to do, . . . which had for its object the determination of the question of title to the ore-roasting furnace."—*Thompson vs. White*, 70 Cal. 135, 136, 11 Pac. Rep. 564.

§ 45. LIBEL, WHAT. Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.

History: Enacted March 21, 1872.

LIBEL AND SLANDER.

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 163, 164. Special damages—What are.
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I. IN GENERAL.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc.,** in: *Dixon vs. Allen*, 69 Cal. 527, 528, 529, 11 Pac. Rep. 179 (construed and applied); *Bettner vs. Holt*, 70 Cal. 270, 274, 275, 11 Pac. Rep. 713 (construed and applied); *Tonini vs. Cevasco*, 114 Cal. 266, 271, 272, 46 Pac. Rep. 1031 (construed and applied); *Schomberg vs. Walker*, 132 Cal. 224, 227, 228, 229, 230, 64 Pac. Rep. 290 (construed and applied).

II. DEFINITIONS AND DISTINCTIONS.

2. **DEFINITION OF LIBEL.**—Libel has been defined as malicious publication, by means of printing, writing, effigies, pictures, or signs, tending either (1) to injure the reputation of a living person, or to blacken the memory of one deceased, and (2) exposing to public contempt, hatred, obloquy, or ridicule, or (3) hindering virtuous men from associating with him.—See *Comm. Donaghue vs. Gaffy*, 54 Conn. 268, 7 Atl. Rep. 552. *Mo. Nelson vs. Musgrave*, 10 Mo. 648; *Price vs. Whitely*, 50 Mo. 439; *Legg vs. Dunleavy*, 80 Mo. 558, 563, 50 Am. Rep. 512; *Herman vs. Bradstreet Co.*, 19 Mo. App. 227. *N. Y. People vs. Crowell*, 3 John. Cas. 337, 354; *Steele vs. Southwick*, 9 John. 214, 216. *Fed. White vs. Nicholls*, 44 U. S. (3 How.) 267, 285, bk. 11 L. ed. 591.

"Under the earlier decisions, in actions of slander, words were held not to be actionable per se unless they imputed crime involving moral turpitude; although, even in actions of slander, the rule was afterward greatly relaxed. But there was always a distinction running through the cases between actions of slander and action of libel,—between words spoken and words written or printed; and in actions of libel words were held actionable per se which would not have been so held in actions of slander. Some few judges thought this distinction not sound, but they admitted that it was well established by the authorities."—*Tonini vs. Cevasco*, 114 Cal. 266, 270, 46 Pac. Rep. 103.

3. **Libel is publication without justification or lawful excuse, calculated to injure reputation or standing of a person** (1) in the community, (2) in his profession or calling, (3) cause him to be shunned by his fellows, or (4) deprive him of public confidence, by exposing him to contempt, hatred, obloquy, or ridicule.—See *Sealer vs. Montgomery*, 78 Cal. 486, 12 Am. St. Rep. 76, 21 Pac. Rep. 185, 3 L. R. A. 553; *People vs. Stephens*, 79 Cal. 428, 21 Pac. Rep. 856, 4 L. R. A. 845. *Comm. Hillhouse vs. Dunning*, 6 Conn. 391, 407. *Ill. Herrick vs. Tribune Co.*, 108 Ill. App. 244. *Iowa. Quinn vs. Prudential Ins. Co.*, 116 Iowa, 522, 90 N. W. Rep. 349. *Mass. Commonwealth vs. Clap*, 4 Mass.

163, 3 Am. Dec. 212; *Clark vs. Binney*, 19 Mass. (2 Pick.) 113. Mich. *Park vs. Detroit Free Press Co.*, 72 Mich. 560, 16 Am. St. Rep. 544, 40 N. W. Rep. 731, 1 L. R. A. 599; *Smith vs. Smith*, 73 Mich. 445, 16 Am. St. Rep. 594, 41 N. W. Rep. 499, 3 L. R. A. 52. Minn. *Allen vs. Pioneer Press Co.*, 40 Minn. 117, 12 Am. St. Rep. 707, 41 N. W. Rep. 936, 3 L. R. A. 532. N. Y. *Cooper vs. Greeley*, 1 Den. 347; *Steele vs. Southwick*, 9 John. 214; *Byam vs. Collins*, 111 N. Y. 143, 7 Am. St. Rep. 726, 19 N. E. Rep. 75, 2 L. R. A. 129; *Morey vs. Morning Journal Assoc.*, 123 N. Y. 207, 20 Am. St. Rep. 730, 25 N. E. Rep. 161, 9 L. R. A. 621. N. C. *Nissen vs. Cramer*, 104 N. C. 574, 10 S. E. Rep. 676, 6 L. R. A. 780. Ohio. *Murray vs. Murray*, 1 Cin. Rep. 290; *Newbraugh vs. Curry*, *Wright 47. Pa. Hayes vs. Press Co.*, 127 Pa. St. 642, 14 Am. St. Rep. 874, 18 Atl. Rep. 331, 5 L. R. A. 643. S. C. *State vs. Farley*, 4 McC. L. 317. Vt. *Halton vs. Muzzy*, 30 Vt. 365. Va. *Moss vs. Harwood*, 102 Va. 386, 46 S. E. Rep. 385. Fed. *White vs. Nicholls*, 44 U. S. (3 How.) 267, bk. 11 L. ed. 591; *Whitney vs. Janesville Gazette*, 5 Bliss. C. C. 330, 5 Chicago Leg. N. 469, 29 Fed. Cas. 1091; *Broughton vs. McGrew*, 39 Fed. Rep. 672, 5 L. R. A. 406; *Palmer vs. Mahin*, 120 Fed. Rep. 737, 57 C. C. A. 41; *Dexter vs. Spear*, 4 Mas. C. C. 115, 7 Fed. Cas. 624. Eng. *Gathercole vs. Miall*, 15 Mees. & W. 319, 344; *O'Brien vs. Clement*, 15 Mees. & W. 435.

See 18 Am. & Eng. Encyc. of L. (2 ed.) 861; 3 Columbia L. Rev. 546, 4 Id. 33.

"Libel is a false and unprivileged publication which exposes any person to hatred, contempt, ridicule or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his business."—*Taylor vs. Hearst*, 107 Cal. 262, 269, 40 Pac. Rep. 392.

See par. 3 this note.

4. According to the old definition, a libel may be justified by proving its truth, or that it is privileged. Under the code definition the publication, if it can thus be justified, is not a libel.—*Schomberg vs. Walker*, 132 Cal. 224, 227, 64 Pac. Rep. 290.

5. Same.—Definition of libel in the code is very broad and includes almost any words, which, upon their face, have natural tendency to injure a man's reputation, either generally or with respect to his occupation.—*Tonini vs. Cevasco*, 114 Cal. 266, 272, 46 Pac. Rep. 103.

6. *Ex malitia* imports false publication.—See par. 13 this note.

7. "LANGUAGE USED"—Whether libelous.—The courts frequently refer to the "language used," but it is thought it is more exact to say "the words used"; "language" is more general, —is the generic term,—"words" more specific. The matter is herein so treated.—See par. 8 this note.

III. WHO MAY BE HELD LIABLE.

8. PROPRIETOR OF NEWSPAPER, in which a libel is published, is answerable in an action, though he has no concern in conducting it, and publication was without his privity.—*Taylor vs. Hearst*, 107 Cal. 262, 269, 40 Pac. Rep. 392. See *Andres vs. Wells*, 7 John. (N. Y.) 260, 5 Am. Dec. 267; *Bruce vs. Reed*, 104 Pa. St. 408, 49 Am. Rep. 586.

9. COPARTNER, engaged in publishing newspaper, liable for publication of libel—the malice of one partner being imputable to the other—notwithstanding statute requires that actual malicious intention in making publication shall be found, if matter published be true, statute does not change general rule of law.—*Lothrop vs. Adams*, 133 Mass. 471, 481, 48 Am. Rep. 528.

10. CORPORATION AGGREGATE may compose and publish libel, and by reason thereof become liable to action for damages by person of and concerning whom words were composed and published.—*Maynard vs. Fireman's Fund Ins. Co.*, 34 Cal. 48, 52, 91 Am. Dec. 672; *Fogg vs. Boston & L. R. Corp.*, 148 Mass. 513, 12 Am. St. Rep. 583, 20 N. E. Rep. 109; *Philadelphia W. & B. R. Co. vs. Quigley*, 62 U. S. (21 How.) 202, 204, bk. 16 L. ed. 73.

See note 12 Am. St. Rep. 586.

IV. WHAT WORDS ARE ACTIONABLE.

11. GENERALLY—Words libelous *per se* which are fairly included in statutory definition of libel.—*Tonini vs. Cevasco*, 114 Cal. 266, 271, 46 Pac. Rep. 103; *Schomberg vs. Walker*, 132 Cal. 224, 227, 64 Pac. Rep. 290.

12. To constitute libel it is not necessary that there be direct and specific allegation of improper conduct. The charge may be either expressly stated or implied; in latter case implication may be very apparent, or words used have such character as to require a statement and proof of extrinsic facts (inducement, colloquium, and innuendo) to show their meaning. In last case, proper allegations and proof of facts necessary to make meaning of the words apparent will be required.—*Schomberg vs. Walker*, 132 Cal. 224, 228, 64 Pac. Rep. 290.

13. *Ex malitia*.—Legal significance of *ex malitia* imports a false publication, or one which is made without legal excuse.—*Dixon vs. Allen*, 69 Cal. 527, 529, 11 Pac. Rep. 179.

14. False complaint made to body having power to redress wrong complained of may be subject of action for libel, where made with express malice, and without probable excuse.—*Bodwell vs. Osgood*, 20 Mass. (3 Pick.) 379, 15 Am. Dec. 228.

15. "Discharged for reprehensible conduct," publication alleging, libelous.—See par. 33 this note.

16. As to slander of public officer—see para. 19-22 this note.

17. Article calculated to expose to obloquy is libelous *per se*.—See para. 30 et seq. this note.

18. WORDS IN FOREIGN LANGUAGE.—As instances of slander alleged to have been spoken in the French language, see *Grand vs. Dreyfus*, 122 Cal. 53, 64 Pac. Rep. 389; *Kimm vs. Steketee* (Mich. April 25, 1882), 12 N. W. Rep. 177.

19. COMMENTS ON PUBLIC OFFICERS.—Right of comment.—The right of citizen to comment on matters of public interest and general concern, is recognized by court.—*Schomberg vs. Walker*, 132 Cal. 224, 229, 64 Pac. Rep. 290.

See post § 47 and note para. 41-53.

29. Limited to true criticism.—The right of citizen to comment on proceedings of public officers is limited by condition that he does so fairly and with honest purpose, and that line be observed where true criticism ends and defamation commences. — *Schomberg vs. Walker*, 132 Cal. 224, 230, 64 Pac. Rep. 290.

31. Of public officer in regard to fitness for office, to be actionable, must tend directly to injure plaintiff in respect to that office, by imputing to him general disqualification to perform duties of office in those respects which it peculiarly requires.—*Rea vs. Wood*, 105 Cal. 314, 320, 33 Pac. Rep. 899.

32. Words imputing want of integrity in any one holding office of confidence or trust, whether office of profit or not, are held, as a generally accepted rule of law, to be actionable per se.—*Jarman vs. Rea*, 137 Cal. 339, 343, 70 Pac. Rep. 216.

33. Words affecting occupation, trade, or profession.—Every publication in writing, or in print, which charges or imputes to merchant or business man insolvency or bankruptcy, or conduct which would prejudice him in his business or trade, or be injurious to his standing and credit as a merchant or business man, is libelous.—*Erber vs. Dun*, 12 Fed. Rep. 526, 531.

Imputing insolvency or want of credit,—see note 5 L. R. A. 643.

34. PUBLICATION OF PROFESSIONAL MAN that "he has removed his office to his house to save expense," affords no ground for legal inference that he has been degraded or injured thereby, and is not libelous per se.—*Stewart vs. Minnesota Tribune Co.*, 40 Minn. 101, 12 Am. St. Rep. 696, 41 N. W. Rep. 457.

35. General incompetency.—Statements made in respect to practising physician imputing, not lack of skill in particular case, but general ignorance of medical science, incompetency to treat diseases, and general want of professional skill, are slanderous, and actionable without proof of special damage.—*Cruikshank vs. Gordon*, 118 N. Y. 178, 23 N. E. Rep. 457.

36. Stating that physician "is no good"; that he is only a butcher; that "I wouldn't have him to treat a dog," and the like, is slanderous per se.—*Cruikshank vs. Gordon*, 118 N. Y. 178, 23 N. E. Rep. 457.

37. Charging lawyer with "betraying and selling innocence in a court of justice," while conducting defense in criminal prosecution, held actionable.—*Ludwig vs. Cramer*, 53 Wis. 193, 10 N. W. Rep. 81.

38. Calling lawyer a "shyster," held libelous in *Gribble vs. Pioneer Press Co.*, 34 Minn. 342, 25 N. W. Rep. 710. See *Bailey vs. Kalamazoo Pub. Co.*, 40 Mich. 251, 256 (pettifoggish shyster).

39. Charging minister with drunkenness, actionable per se.—*Chaddock vs. Briggs*, 13 Mass. 248, 7 Am. Dec. 187; *Hayner vs. Cowden*, 27 Ohio St. 292, 22 Am. Rep. 303.

See note 5 L. R. A. 406.

40. WORDS NOT IMPUTING COMMISSION OF CRIME.—A publication tending to reflect shame upon person and hold him up to the people as object of ridicule, is libelous.—*Lick*

vs. Owen, 47 Cal. 252, 257; *Tonini vs. Cevasco*, 114 Cal. 266, 273, 46 Pac. Rep. 103.

31. Article being calculated to expose plaintiff to obloquy, censure, and reproach, if false, its publication is libelous per se.—*Bettner vs. Holt*, 70 Cal. 270, 275, 11 Pac. Rep. 713.

32. Publication imputing grave offenses and dishonest practices, which, if established, would justly bring person named into general contempt and disgrace, is actionable on its face.—*Wilson vs. Fitch*, 41 Cal. 363, 378.

33. "Discharged for reprehensible conduct," publication that plaintiff was, is libelous per se.—*Tonini vs. Cevasco*, 114 Cal. 266, 268, 46 Pac. Rep. 103.

Statements as to unfitness, in entry in book, made at time of discharge.—As to see 4 L. R. A. 280 and note. See also post § 47 note par. 20.

34. SAME—BREACH OF PROMISE.—Publication that person named was threatened with breach of promise suit; that he and his friends are moving to effect reconciliation, but the lady insists on his marrying her,—tends to disgrace him and bring him into ridicule and contempt, and is libelous per se.—*Morey vs. Morning Journal Assoc.*, 123 N. Y. 207, 20 Am. St. Rep. 730, 25 N. E. Rep. 161, 9 L. R. A. 621.

35. SAME—CORRUPTION.—Statement that certain persons "will put a large sum of money into the fight to-day to corrupt voters; that there are scores of voters in every community that money can buy. . . . It is also reported that [a person named] is to have charge of the sack," signifies a fund in hand to be used for purposes of corruption, and that person named is to disburse the fund for such purposes, and is libelous per se.—*Edwards vs. San Jose Print. & Pub. Co.*, 99 Cal. 431, 435, 37 Am. St. Rep. 70, 34 Pac. Rep. 128.

36. Charging publisher with being party to secret conclave, in which he sold the support and advocacy of his newspaper to certain corporations for large sum of money, tends to expose him to hatred, contempt, ridicule, and the like, and is actionable.—*Fitch vs. De Young*, 66 Cal. 339, 5 Pac. Rep. 364.

37. SAME—CONTAGIOUS OR LOATHSOME DISEASE—GONORRHEA.—Charging a person with having is actionable per se.—*Watson vs. McCarthy*, 2 Ga. 57, 46 Am. Dec. 380. See *Sterling vs. Adams*, 3 Day (Conn.) 411; *Kaucher vs. Blinn*, 29 Ohio St. 62, 23 Am. Rep. 727.

38. "Without citing the disgusting string of cases upon this subject with which the older reports abound, it may be deemed sufficient to observe, that whenever it can be collected from the circumstances that the speaker intended the hearers to understand that the person spoken of was, at the time of speaking, afflicted with either of the disorders above mentioned, an action may be maintained."—*Watson vs. McCarthy*, supra.

39. Infectious disease, words charging are actionable per se.—*Watson vs. McCarthy*, 2 Ga. 57, 46 Am. Dec. 380; *Castlebury vs. Kelly*, 26 Ga. 608.

40. WORDS IMPUTING COMMISSION OF CRIME held actionable per se.—*Ala. Coburn vs. Harwood*, 1 Minor 93, 12 Am. Dec. 37; *Commons vs. Walters*, 1 Port. 377, 27 Am. Dec. 635; *Waters vs. Jones*, 3 Port. 442, 29 Am. Dec. 26'.

Ga. *Little vs. Barlow*, 26 Ga. 423, 71 Am. Dec. 219. Ind. *Hoskins vs. Tarrence*, 5 Blackf. 417, 35 Am. Dec. 129. Iowa. *Abrams vs. Foshee*, 3 Iowa 274, 66 Am. Dec. 77. Ky. *Brite vs. Gill*, 2 T. B. Mon. 65, 15 Am. Dec. 122. Md. *Arnold vs. Cost*, 3 Gill & J. 219, 22 Am. Dec. 302. Mass. *Goodrich vs. Hooper*, 97 Mass. 1, 93 Am. Dec. 49. Mich. *McAllister vs. Detroit Free Press Co.*, 76 Mich. 333, 15 Am. St. Rep. 318, 43 N. W. Rep. 431. Minn. *St. Martin vs. Desnoyer*, 1 Minn. 156, 61 Am. Dec. 494. N. Y. *Klink vs. Colby*, 46 N. Y. 427, 7 Am. Rep. 360; *Brooker vs. Coffin*, 5 John. 188, 191, 4 Am. Dec. 337; *Gilman vs. Lowell*, 8 Wend. 573, 24 Am. Dec. 96. N. C. *Shipp vs. McCraw*, 3 Murph. 463, 9 Am. Dec. 611. Pa. *Thompson vs. Lusk*, 2 Watts 17, 26 Am. Dec. 91. Utah. *Lowe vs. Herald Co.*, 6 Utah 175, 21 Pac. Rep. 991.

See notes 9 Am. Dec. 611; 61 Am. Dec. 498; monographic notes 66 Am. Dec. 82-91; 15 Am. St. Rep. 333-369.

41. Publication imputing or implying commission of crime, not openly charged, is actionable per se.—*Mallory vs. Pioneer Press Co.*, 34 Minn. 521, 26 N. W. Rep. 904; *Bradley vs. Cramer*, 59 Wis. 309, 48 Am. Rep. 511, 18 N. W. Rep. 268.

42. "To render words actionable per se, on ground that they impute criminality to plaintiff, they must, first, be such as charge him with indictable offense; and, second, offense charged must involve high degree of moral turpitude, or subject offender to infamous punishment."—*Hollingsworth vs. Snaw*, 19 Ohio St. 430, 2 Am. Rep. 411 (where plaintiff has been charged with being a deserter).

43. Question—Imputing felony by, as well as by direct allegation, if it was so meant; and whether so meant, is question of construction.—*Sawyer vs. Elfert*, 2 Nott. & McC. (S. C.) L. 611, 10 Am. Dec. 633.

44. To charge that person committed adultery and that, from current report of the affair, it is deemed to be premeditated case of beastly rape, is libelous.—*Lowe vs. Herald Co.*, 6 Utah 175, 21 Pac. Rep. 991 (holding, also, that "on trial of action for such libel, defendant having proved that the woman on whom alleged rape was committed made complaint of plaintiff's act, it is not error to exclude details of her complaint").

Bastardy—As to charging married man with, see 1 L. R. A. 599 and note.

45. Fornication—Charging a woman with having committed, is slanderous per se.—*Kedroviansky vs. Niebaum*, 70 Cal. 216, 219, 11 Pac. Rep. 461.

46. Charging arson, is actionable per se.—*Clugston vs. Garretson*, 103 Cal. 441, 37 Pac. Rep. 469.

See par. 40 this note.

47. "I believe he burnt said barn," or "I have every reason to believe he burnt said barn," actionable per se.—*Logan vs. Steele*, 1 Bibb (Ky.) 593, 4 Am. Dec. 659.

48. Charging attempted arson is slanderous.—*Chamberlin vs. Vance*, 51 Cal. 75, 83.

49. Embellishment.—Publication charging trusted employee with having collected bill due to his employer, which he secreted until discovered by fellow employee; with having

borrowed money; leaving board bill unpaid, and catching many friends who had confidence in him,—plainly imports offense of embezzlement, and imputes fraud and dishonesty in other respects.—*Iron Age Pub. Co. vs. Crudup*, 85 Ala. 519, 5 So. Rep. 332.

50. Charging person with larceny in handbills, is actionable.—*Call vs. Larabee Co.*, 60 Iowa 212, 14 N. W. Rep. 237.

51. "Thieving puppy," to say that person is, is actionable per se.—*Little vs. Barlow*, 26 Ga. 423, 71 Am. Dec. 219.

52. Stating of a person: "You are a thief; you make your money by stealing," is actionable per se.—*Rhodes vs. Naglee*, 66 Cal. 677, 6 Pac. Rep. 863.

53. "He is a thief" imputes crime, and is actionable per se.—*Smullen vs. Phillips*, 92 Cal. 408, 28 Pac. Rep. 442.

54. "He stole the corn," is actionable per se.—*Hume vs. Arrasmith*, 1 Bibb (Ky.) 165, 4 Am. Dec. 626.

55. "Antrobus is a thief, he stole corn to feed two horses out of my crib," is actionable per se.—*Estes vs. Antrobus*, 1 Mo. 197, 13 Am. Dec. 496.

56. "She is a damned thief" are held to be words libelous in themselves, and are presumed to have been understood by hearers to be libelous.—*Harris vs. Zanone*, 93 Cal. 59, 66, 28 Pac. Rep. 845.

57. "You are a damned thief, and a damned whore," are actionable per se.—*Pink vs. Catnach*, 51 Cal. 420.

58. Charging, in effect, that plaintiff was a swindler, forger, and double thief of large sum without attempting to verify before publication, is libelous per se.—*Graybill vs. De Young*, 140 Cal. 323, 73 Pac. Rep. 1067.

59. Charging theft of that which cannot be stolen is not slander per se; e. g. "you are a thief, for you stole my trees"; or, "you are a thief, for you stole my marl," and the like.—*Ogden vs. Riley*, 14 N. J. L. (2 Gr.) 186, 25 Am. Dec. 513.

60. Charging woman with "slow-poisoning" her husband, actionable per se.—*Campbell vs. Campbell*, 54 Wis. 90, 11 N. W. Rep. 456.

61. Charging witness with perjury in swearing to promise within statute of frauds; and though his testimony was not competent, as against proper objection, he was not thereby absolved, in conscience or in law, from his obligation to speak the truth.—*Howard vs. Sexton*, 4 N. Y. 157, 159.

62. "You swore false," "you took a false oath," "he swore false before Esquire Andrews," "he swore a lie," and other similar expressions, will not sustain an action, unless declaration contains a colloquium showing that words referred to a trial, or other legal proceeding.—*Grand vs. Dreyfus*, 122 Cal. 58, 63, 54 Pac. Rep. 389.

63. Words not importing perjury, in the legal sense, but which hold plaintiff up to contempt and ridicule, are actionable; because a writing published maliciously, with view to expose person to contempt or ridicule, is un-

doubtedly actionable.—Schomberg vs. Walker, 132 Cal. 224, 228, 64 Pac. Rep. 290.

64. WORDS WHICH IMPUTE A WANT OF CHASTITY IN A WOMAN, are actionable per se.—Kedroviansky vs. Niebaum, 70 Cal. 216, 218, 11 Pac. Rep. 461; Hitchcock vs. Caruthers, 82 Cal. 523, 526, 23 Pac. Rep. 48; Preston vs. Frey, 91 Cal. 107, 111, 27 Pac. Rep. 533. Ala. Sedegreaves vs. Myatt, 22 Ala. 617. Conn. Frisbie vs. Fowler, 2 Conn. 707. Ill. Spencer vs. McMasters, 16 Ill. 405. Ind. Shields vs. Cunningham, 1 Blackf. 86; Worth vs. Butler, 7 Blackf. 251; Rodebaugh vs. Hollingsworth, 6 Ind. 339; Rodgers vs. Lacey, 23 Ind. 507; Linck vs. Kelley, 25 Ind. 278, 87 Am. Dec. 362; Blickensraff vs. Perrin, 27 Ind. 527; Waugh vs. Waugh, 47 Ind. 580. Iowa. Cox vs. Bunker, Mor. 269; Dailey vs. Reynolds, 4 G. Gr. 454; Smith vs. Silence, 4 Iowa 321, 66 Am. Dec. 137; Truman vs. Taylor, 4 Iowa 424; Wilson vs. Beighler, 4 Iowa 427; Beardsley vs. Bridgman, 17 Iowa 290; Cleveland vs. Detweiler, 18 Iowa 299. Ky. McGee vs. Wilson, Litt. Sel. Cas. 187; Smalley vs. Anderson, 2 T. B. Mon. 56. 15 Am. Dec. 121. Md. Terry vs. Bright, 4 Md. 430. N. C. Watts vs. Greenle, 2 Dev. L. 115; McBroyer vs. Hill, 4 Ired. L. 346; Snow vs. Witcher, 9 Ired. L. 346. Ohio. Malone vs. Stewart, 15 Ohio 319, 45 Am. Dec. 577; Wilson vs. Robbins. Wright 40; Sexton vs. Todd, Wright 317; Wilson vs. Runyon, Wright 651.

65. At common law the rule was otherwise; plaintiff had to allege and prove special damages.—Ala. Berry vs. Carter, 4 Stew. & P. 387, 24 Am. Dec. 762. Ind. Rodgers vs. Lacey, 23 Ind. 507. Ky. Elliot vs. Allsberry, 2 Bibb 473, 5 Am. Dec. 631. Md. Griffin vs. Moore, 43 Md. 426. N. Y. Pettibone vs. Simpson, 66 Barb. 492; Brooker vs. Coffin, 5 John. 183, 4 Am. Dec. 337. N. C. Lucas vs. Nichols, 7 Jones L. 32. S. C. Boyd vs. Brent, 3 Brev. L. 241. Tex. Linney vs. Maton, 13 Tex. 449; McQueen vs. Fulgham, 27 Tex. 463. Vt. Underhill vs. Welton, 32 Vt. 40. Wis. Ranger vs. Goodrich, 17 Wis. 78. Eng. Roberts vs. Roberts, 5 Best & S. 384, 33 L. J. Q. B. 249, 10 Jur. N. S. 1027, 12 W. R. 900, 10 L. T. N. S. 602, 117 Eng. C. L. 384; Wilby vs. Elston, 8 C. B. 142, 7 D. & L. 143, 13 Jur. 706, 18 L. J. C. P. 320, 65 Eng. C. L. 141; Falckner vs. Cooper, Carth. 55; Calabyn vs. Viner, W. Jones 356; Byron vs. Elmer, 2 Salk. 693; Robertson vs. Powell, 2 Selw. N. P. 1224.

66. Charging woman with being prostitute is libelous.—Diston vs. Rose, 62 N. Y. 122.

67. "Baden saw, or told him he saw, on Sunday, at the camp-meeting, he either scared or drove Jane Owens, and a man supposed to be Jo. Dearmond, up from behind a log; he and others supposed it to be Jo. Dearmond; that they broke and ran, and that he (Baden) got her parasol and handkerchief, and if anybody did not believe him, he could come and see them," actionable per se.—Proctor vs. Owens, 18 Ind. 21, 81 Am. Dec. 341.

68. "Screwed" does not of itself import sexual intercourse, but it may, in certain localities, involve charge of whoredom; in such case complaint must affirmatively allege its import at time and place used.—Miles vs. Vanhorn, 17 Ind. 245, 79 Am. Dec. 477.

C. C.—6

69. Self-pollution, words charging a woman with, are not actionable per se.—Anonymous, 60 N. Y. 262, 19 Am. Rep. 174.

70. "To make them such it is not enough that the charge thereby imputed was one involving turpitude in a moral sense, but it must constitute an indictable offense, upon conviction of which punishment may be inflicted. Young vs. Miller, 3 Hill (N. Y.) 21; Crawford vs. Wilson, 4 Barb. (N. Y.) 504."—Ibid.

71. Intercourse with beast, words charging a woman with, are actionable per se.—Haynes vs. Ritchey, 30 Iowa 76, 6 Am. Rep. 642.

72. Adultery need not be directly charged.—Proctor vs. Owens, 18 Ind. 21, 81 Am. Dec. 341. See Shields vs. Cunningham, 1 Blackf. (Ind.) 86 (charging that plaintiff made an appointment with a woman, scaled wall, and went to bed with her); Drummond vs. Leslie, 5 Blackf. (Ind.) 453 (words calculated to induce hearers to believe plaintiff guilty of offense); Guard vs. Risk, 11 Ind. 156 (charging plaintiff with having slept with designated man).

73. Words calculated to induce hearers to suspect plaintiff guilty of adultery, are actionable per se.—Roe vs. Chutevood, 36 Ark. 44; Proctor vs. Owens, 18 Ind. 21, 81 Am. Dec. 341; Waugh vs. Waugh, 47 Ind. 584; Walton vs. Singleton, 7 Serg. & R. (Pa.) 451, 10 Am. Dec. 472.

74. "With child," charging an unmarried female with being, actionable per se.—Miles vs. Vanhorn, 17 Ind. 245, 79 Am. Dec. 477.

75. "Loose woman," to say that woman is, or to charge her with open and gross lewdness, and similar charges; or to say of unmarried woman she "is with child"; or of married woman, "she slept with a man not her husband,"—is libelous per se.—Ala. Downing vs. Wilson, 36 Ala. 717. Ga. Richardson vs. Roberts, 23 Ga. 215. Ind. Guard vs. Risk, 11 Ind. 156; Miles vs. Vanhorn, 17 Ind. 245, 79 Am. Dec. 477; Proctor vs. Owens, 18 Ind. 21, 81 Am. Dec. 341. Iowa. Beardsley vs. Bridgeman, 17 Iowa 290. N. H. Symonds vs. Carter, 32 N. H. 458. N. J. Smith vs. Minor, 1 N. J. L. (Coxe) 18. N. C. Adrock vs. Marsh, 8 Ired. L. 360. Vt. Underhill vs. Welton, 32 Vt. 49.

As to requiring to submit person to expert examination,—see par. 307 this note.

76. Words charging woman with being "in habit of entertaining gentlemen callers at all hours of night," do not necessarily, and as matter of law, charge unchastity.—Hemmens vs. Nelson, 138 N. Y. 517, 34 N. E. Rep. 342, 20 L. R. A. 440.

77. Paramour—Charging married woman with being, of man other than her husband, alleges in her want of chastity, and, allegation being false, is slanderous per se.—McKinney vs. Roberts, 68 Cal. 192, 193, 8 Pac. Rep. 857.

78. Special damages—see pars. 64, 65, 163, et seq. this note.

79. SAME — OF MAN — FORNICATION—Charging person with having committed, is actionable per se.—Walton vs. Singleton, 7 Serg. & R. (Pa.) 451, 10 Am. Dec. 472.

As to charging married man with bastardy,—see 1 L. R. A. 599 and note.

80. "You got to bed with Sarah M." is actionable.—Walton vs. Singleton, 7 Serg. & R. (Pa.) 451, 10 Am. Dec. 472.

81. "He is such a whoring fellow that it is with difficulty he can keep a girl about the house, being continually a-riding them," are words actionable per se.—Walton vs. Singleton, 7 Serg. & R. (Pa.) 451, 10 Am. Dec. 472.

82. QUESTION OF LAW AND FACT.—Whether words are actionable is within power of court to determine, either on demurrer, on motion, or in arrest of judgment.—Hume vs. Arrasmith, 1 Bibb (Ky.) 165, 4 Am. Dec. 626. See also post § 47, note pars. 61-63.

V. PUBLICATION.

83. TALKING ALOUD TO ONE'S SELF, man cannot commit slander.—Sesler vs. Montgomery, 78 Cal. 486, 487, 12 Am. St. Rep. 76, 21 Pac. Rep. 185, 3 L. R. A. 653.

84. HUSBAND AND WIFE TALKING TO EACH OTHER ALONE differ in conversation but little from process of talking to one's self. Under common rule of law that husband and wife are one, their conversation, not in presence of third person, does not constitute a publication, within the meaning of law of slander.—Sesler vs. Montgomery, 78 Cal. 486, 488, 12 Am. St. Rep. 76, 21 Pac. Rep. 185, 3 L. R. A. 653.

85. Compare: State vs. Shoemaker, 101 N. C. 690, 8 S. E. Rep. 332 (where it is held that calling a woman a "whore" in the hearing alone of wife of speaker constituted charge of incontinence within meaning of North Carolina statute).

86. MERE DELIVERY OF PRIVATE LETTER to plaintiff, is not publication of libel which will support civil action; although upon criminal prosecution of libel it amounts to a publication.—Warnock vs. Mitchell, 43 Fed. Rep. 428. See Wennhawk vs. Morgan, L. R. 20 Q. B. 635 (where it is held that writing on the "letter of character" of a servant, the words: "the plaintiff had been dismissed for staying out all night without leave," and delivering it to wife of writer, who afterwards delivered the letter, thus indorsed, to servant, did not constitute libel).

87. ARTICLE PRINTED IN NEWSPAPER IN STATE AND COUNTY ADJOINING county of domicile, at request of defendant, and circulated in county of domicile,—held sufficient publication in county of domicile.—Commonwealth vs. Blanding, 20 Mass. (3 Pick.) 304, 15 Am. Dec. 214.

See note 52 Am. Dec. 770.

VI. COLLOQUIUM.

88. COLLOQUIUM AND INNUENDO must appear where publication not libelous per se.—Edwards vs. San Jose Print. & Pub. Soc., 99 Cal. 431, 435, 37 Am. St. Rep. 70, 34 Pac. Rep. 128; People vs. Collins, 102 Cal. 345, 346, 36 Pac. Rep. 669; Hearne vs. De Young, 119 Cal. 670, 680, 52 Pac. Rep. 150, 499; Chiatovich vs. Hanchett, 88 Fed. Rep. 273, 876.

89. Proof of the colloquium is not necessary in order to make out prima facie case for plaintiff. If libel is actionable per se.—Wilson vs. Hitch, 41 Cal. 363, 378; Rhodes vs. Naglee, 66

Cal. 677, 6 Pac. Rep. 863; Blumhardt vs. Rohr, 70 Md. 328, 17 Atl. Rep. 266.

90. "When slander or libel is couched in language having a covert meaning, not apparent upon its face, or in words or phrases not used otherwise than as slang, or cant terms, it is necessary for a plaintiff not only to allege and prove the slanderous or libelous sense in which words were used by defendant, but also that they were understood in same sense by those to whom they were addressed."—Edwards vs. San Jose Print. & Pub. Co., 99 Cal. 431, 435, 37 Am. St. Rep. 70, 34 Pac. Rep. 128. See Maynard vs. Fireman's Fund Ins. Co., 34 Cal. 48, 91 Am. Dec. 672; Andrews vs. Woodmansee, 15 Wend. (N. Y.) 232.

91. When article is libelous upon its face, and person libeled is found upon face of article, there is no room for introduction of evidence of witnesses as to their understanding of its meaning.—Hearne vs. De Young, 119 Cal. 670, 679, 52 Pac. Rep. 150, 499.

92. AMBIGUOUS WORDS—Generally.—"Where the publication is not a libel on its face, but it is claimed that the words used have covert meaning, it is necessary not only to allege and prove slanderous or libelous sense in which they were used by defendant, but also that they were understood in same sense by those to whom they were addressed."—People vs. Collins, 102 Cal. 345, 346, 36 Pac. Rep. 669.

See note 4 Am. Dec. 348.

93. "I will send him where he was before," can by no possibility be held to mean, "I will send him to state's prison," except it be aided by allegation of some extrinsic facts or circumstances.—Grand vs. Dreyfus, 122 Cal. 58, 63, 54 Pac. Rep. 389.

94. Ambiguous words used, susceptible of different meanings, must be submitted to jury.—Tonini vs. Cevalasco, 114 Cal. 266, 268, 46 Pac. Rep. 103.

95. Extraneous facts—Proof and rebuttal.—Where words used have slanderous meaning, not by their own intrinsic force, but by reason of existence of some extraneous facts, plaintiff must undertake to prove that fact, and defendant must be at liberty to disprove it.—Nidever vs. Hall, 67 Cal. 79, 83, 7 Pac. Rep. 136; Edwards vs. San Jose Print. & Pub. Co., 99 Cal. 431, 435, 37 Am. St. Rep. 70, 34 Pac. Rep. 128; People vs. Collins, 102 Cal. 345, 347, 36 Pac. Rep. 669; Ingraham vs. Lyon, 105 Cal. 254, 257, 38 Pac. Rep. 892; Tonini vs. Cevalasco, 114 Cal. 266, 273, 46 Pac. Rep. 103.

96. Hearers may testify as to their understanding of words as used.—Nidever vs. Hall, 67 Cal. 79, 83, 7 Pac. Rep. 136; Lewis vs. Humphries, 64 Mo. App. 471.

See pars. 110, 113, 114 this note.

97. Impressions of witnesses, as to admissibility in evidence, see cases pro and con in note to 4 Am. Dec. 352-354; see also par. 113 this note.

98. "Sell," regarded in its ordinary meaning, does not mean "steal," and can be availed of as defamatory only by proper colloquium.—Grand vs. Dreyfus, 122 Cal. 58, 61, 54 Pac. Rep. 389.

99. Same.—Where article does not name plaintiff, testimony of witnesses who knew

parties and circumstances, and who can state their judgment and opinion as to defendant's intention and application of the libel to plaintiff, is competent.—*Russel vs. Kelly*, 44 Cal. 641, 642, 13 Am. Rep. 169. See *Nidever vs. Hall*, 67 Cal. 79, 83, 7 Pac. Rep. 136; *Harris vs. Zanone*, 93 Cal. 59, 66, 28 Pac. Rep. 845. *Mich. Finnegan vs. Detroit Free Press Co.*, 78 Mich. 659, 680, 44 N. W. Rep. 585. *Oreg. State vs. Mason*, 26 Oreg. 273, 275, 46 Am. St. Rep. 629, 630, 38 Pac. Rep. 130. *Utah. People vs. Ritchie*, 12 Utah 180, 189, 42 Pac. Rep. 209.

100. Subsequent publication in which his name is inserted, admissible to show that first publication applied to plaintiff.—*Russel vs. Kelly*, 44 Cal. 641, 642, 13 Am. Rep. 169.

101. SAME—CONSTRUCTION of alleged libelous publication which it behooves court to make, is to be derived as well from expressions used as from whole scope and apparent object of the writer.—*Schomberg vs. Walker*, 132 Cal. 224, 228, 64 Pac. Rep. 290.

102. "In interpretation to be placed upon language charging publication of libel, court is to put such construction upon words which it contains, as may be derived as well from expressions used as from whole scope and apparent object of the writer."—*Bettner vs. Holt*, 70 Cal. 270, 274, 11 Pac. Rep. 713. See *McGinnis vs. Knapp*, 109 Mo. 131, 146, 18 S. W. Rep. 1134; *Chlatovich vs. Hanchett*, 88 Fed. Rep. 873, 876.

103. Not only is language employed to be regarded with reference to actual words used, but according to sense and meaning under all circumstances attending publication, which such language may fairly be presumed to have conveyed to those to whom it was published.—*Bettner vs. Holt*, 70 Cal. 270, 274, 11 Pac. Rep. 713.

104. In passing upon sufficiency of alleged libelous words used, as constituting cause of action, court is to place itself in situation of hearer or reader, and determine sense or meaning of such words, according to their generally accepted significance.—*Bettner vs. Holt*, 70 Cal. 270, 275, 11 Pac. Rep. 713.

105. "In ascertaining meaning of a particular sentence, it must of course be construed in connection with remainder of publication of which it forms part. An isolated phrase, if standing alone, or used in different connection, may be capable of meaning of which it is not susceptible in connection in which it is used."—*Van Vactor vs. Walkup*, 46 Cal. 124, 133.

106. Words are to be construed or interpreted, in action of libel and slander, according to their obvious meaning, and are to be taken in the sense in which hearers understood them.—*Ala. Stallings vs. Newman*, 26 Ala. 300, 62 Am. Dec. 723. *Conn. Beers vs. Strong*, 1 Kirby 12, 1 Am. Dec. 10. *Ga. Watson vs. McCarthy*, 2 Ga. 57, 46 Am. Dec. 380; *Hawks vs. Patton*, 18 Ga. 52, 63 Am. Dec. 266. *Ky. Logan vs. Steele*, 1 Bibb 593, 4 Am. Dec. 659; *McGowan vs. Manifee*, 7 T. B. Mon. 314, 18 Am. Dec. 178. *N. J. Ogden vs. Riley*, 14 N. J. L. (2 Gr.) 186, 25 Am. Dec. 513. *N. C. Hamilton vs. Dent*, 1 Hayw. 117, 1 Am. Dec. 552. *Pa. Andres vs. Koppenhefer*, 3 Serg. & R. 255, 3 Am. Dec. 647; *Bricker vs. Potts*, 12 Pa. St. 206. *S. C. Sawyer vs. Eifert*, 2 Nott & McC. L. 511, 10 Am. Dec.

638. *Fed. Rue vs. Mitchell*, 2 U. S. (2 Dal.) 58, bk. 1 L. ed. 288, 1 Am. Dec. 258.

107. Words spoken in disparagement of person's character, are to be interpreted in sense in which person of ordinary capacity would understand them.—*Little vs. Barlow*, 26 Ga. 423, 71 Am. Dec. 219.

108. Old rule exploded which required that when susceptible of two constructions, words were to be understood in milder sense.—*Little vs. Barlow*, 26 Ga. 423, 71 Am. Dec. 219.

109. "Doctrine that slander must be direct so as to exclude every intendment, and that words in all cases must be taken in mitiori sense, has been exploded for more than a century."—*Ala. Stallings vs. Newman*, 26 Ala. 300, 62 Am. Dec. 723. *N. J. Ogden vs. Riley*, 14 N. J. L. (2 Gr.) 186, 25 Am. Dec. 513. *Pa. Brown vs. Lamberton*, 2 Binn. 34. *Fed. Republica vs. Keating*, 1 U. S. (1 Dal.) 110, bk. 1 L. ed. 59; *Rue vs. Mitchell*, 2 U. S. (2 Dal.) 58; bk. 1 L. ed. 288, 1 Am. Dec. 258. *Eng. Roberts vs. Camden*, 9 East 93, 9 Rev. Rep. 513.

110. SAME—EVIDENCE AS TO UNDERSTANDING OF MEANING.—"Where words are ambiguous and application is doubtful, it must be shown by plaintiff: 1. That words were actually used in their actionable sense, and were applied to plaintiff; 2. That hearers so understood them. . . . Had it appeared, then, . . . that the meaning was ambiguous and application doubtful, and that witness was one to whom libel complained of was published, his understanding of it would be admissible, especially if it appeared that he was acquainted with circumstances to which it related. Great care, however, should be taken that, under pretense of showing how hearers understood ambiguous expression, the mere opinion of witness as to interpretation of the language should not be received."—*Smart vs. Blanchard*, 42 N. H. 137; quoted with approval in *Hearne vs. De Young*, 119 Cal. 670, 679, 52 Pac. Rep. 150, 499.

See pars. 96, 97 this note; also note 53 Am. St. Rep. 693.

111. It is admissible in actions of slander and libel to aver and prove that words which have covert meaning were intended to defame, and were understood in particular sense by those who heard or read them.—*Chamberlin vs. Vance*, 51 Cal. 75, 84.

112. "It is admissible in actions of slander and libel to aver and prove that words alleged to be defamatory, and which have covert or ambiguous meaning, were intended and used in a particular defamatory sense by those who heard or read them."—*Maynard vs. Fireman's Fund Ins. Co.*, 34 Cal. 48, 59, 91 Am. Dec. 672.

113. Conclusions of witnesses who have read alleged libelous article,—and who know nothing of parties or circumstances save what they gathered from the publication,—as to their understanding of its meaning, are inadmissible, as being an invasion of the province of the jury.—*Hearne vs. De Young*, 119 Cal. 670, 678, 52 Pac. Rep. 150, 499.

Impressions of witnesses, as to admissibility, see pars. 96, 97 this note.

114. After having testified specifically as to words used, witness cannot state what mean-

ing he understood defendant intended to convey thereby.—*Watson vs. McCarthy*, 2 Ga. 57, 46 Am. Dec. 380; *Maynard vs. Beardsley*, 7 Wend. (N. Y.) 560, 22 Am. Dec. 595.

115. **Question for jury.**—"When language is capable of two meanings, one of which is harmless and other libelous, it is undoubtedly province of jury to determine whether, on its face, alleged libel is capable of double meaning."—*Van Vactor vs. Walkup*, 46 Cal. 124, 133; *Tonini vs. Cevasco*, 114 Cal. 266, 273, 46 Pac. Rep. 103. See *State vs. Gould*, 62 Me. 509; *Shattuck vs. Allen*, 70 Mass. (4 Gray) 540.

116. **Compare:** *Donaghue vs. Gaffy*, 54 Conn. 357, 266, 7 Atl. Rep. 552; *Pugle vs. McCarty*, 44 Ga. 383; *Gabe vs. McGinnis*, 68 Ind. 538; *Hunt vs. Bennett*, 19 N. Y. 173; *Pittock vs. O'Neill*, 53 Pa. St. 253, 3 Am. Rep. 544; *Gregory vs. Atkins*, 42 Vt. 237; *Gottbehuet vs. Hubachek*, 36 Wis. 515.

VII JUSTIFICATION.

117. **GENERALLY.**—Every word of alleged defamatory matter need not be justified; it is sufficient if the substance, the gist, the sting of the libelous charge be justified.—*Hearne vs. De Young*, 119 Cal. 670, 673, 52 Pac. Rep. 150, 199. See *Snow vs. Utcher*, 9 Ired. (N. C.) L. 146.

118. **Selling diseased meat.**—Proof that meat sold by plaintiff was obtained from Chinese, and that Chinese often sold diseased meat, does not justify statement in circular charging retail butcher with selling Chinese meat which contained the seeds of disease and spread pestilence and death; defendant must also prove that the meat which plaintiff sold was diseased, or would spread seeds of disease or death.—*Mowry vs. Raabe*, 89 Cal. 606, 27 Pac. Rep. 157.

119. **BELIEF OF TRUTH BY AUTHOR.**—In order to justify publication purporting to be made on belief of author that alleged fact was true, defendant must prove truth of allegation, and not merely belief of its truthfulness.—*Wilson vs. Fitch*, 41 Cal. 363, 378 (wherein article charged that owners of mine believed they had been swindled by plaintiff, and it was held proper to exclude testimony of such owners as to their belief at time of publication of article referred to).

120. **OTHER SIMILAR OFFENSES.**—When alleged slander consists in falsely charging plaintiff with being interested with another in larceny, and receiving stolen property, evidence of efforts of plaintiff to get such other person to commit other similar larcenies, as part of general understanding between them, is admissible to show relations and transactions between them, to sustain plea of justification.—*Barkly vs. Copeland*, 74 Cal. 1, 6, 5 Am. St. Rep. 413, 15 Pac. Rep. 307.

121. **ILLEGAL BUSINESS.**—Where alleged libels are only in respect to an unlawful business carried on by plaintiff, it results that the action cannot be maintained, "for I think," said Best, C. J., "that where a man complains of a libel written respecting an illegal transaction in which he is engaged, the illegality of that transaction is an answer to his complaint."—*Johnson vs. Simonton*, 43 Cal. 242, 249.

As to insanity as a defense, see post § 39 note para. 52, 53.

VIII DAMAGES.

122. **GENERALLY.**—The law implies that every libelous publication causes some damage to injured party, and it is peculiar province of jury to estimate the amount.—*Wilson vs. Fitch*, 41 Cal. 363, 386 (upholding verdict for \$7,500 damages).

123. **Standard by which determined,** there is none, and "jury must, necessarily, be left to exercise of wide discretion; to be restricted by the court only when sum awarded is so large that verdict shocks the moral sense, and raises presumption that it must have proceeded from passion or prejudice."—*Wilson vs. Fitch*, supra. See *Rhodes vs. Naglee* (dis. op. of Sharpstein), 66 Cal. 677, 682, 6 Pac. Rep. 363 (majority holding \$3,000 damages excessive); *Harris vs. Zanone*, 93 Cal. 59, 72, 28 Pac. Rep. 845 (holding \$5,000 damages not excessive); *Gilman vs. McClatchy*, 111 Cal. 606, 611, 618, 44 Pac. Rep. 241 (upholding verdict for \$5,000); *Taylor vs. Hearst*, 118 Cal. 366, 368, 50 Pac. Rep. 541 (upholding verdict for \$5,000).

See para. 125-128 this note.

124. **CLASSIFIED—General and special.**—"Two classes of damages may be recovered in actions of libel, to-wit: Actual or compensatory damages, and exemplary damages. Special damages, as branch of actual damages, may be recovered when actual pecuniary loss has been sustained, and such loss is specially pleaded. The remaining branch of actual damages embraces recovery for loss of reputation, shame, mortification, injury to feelings, etc., and, while special damages must be alleged and proven, general damages, for outrage to feelings and loss of reputation, need not be alleged in detail, and may be recovered in absence of actual proof; and to amount that jury estimates will fairly compensate plaintiff for injury done."—*Childers vs. San Jose Mercury Print & Pub. Co.*, 105 Cal. 284, 45 Am. St. Rep. 40, 38 Pac. Rep. 903.

125. **ELEMENTS — Lawyer.**—Publication libelous per se, and affecting his professional standing, in estimating general damages to which plaintiff is entitled, it is proper for jury to know his position and standing in society, and nature and extent of his professional practice.—*Turner vs. Hearst*, 115 Cal. 394, 399, 47 Pac. Rep. 129.

See par. 123 this note.

126. **Mental suffering element of general damages** in an action for libel, but such must be suffering which plaintiff naturally experiences as direct, immediate, proximate effect of the libel upon his mind and feelings; and plaintiff should not be permitted to give evidence of what others have said to him about the publication, and what persons upon the street said about him.—*Turner vs. Hearst*, 115 Cal. 394, 399, 47 Pac. Rep. 129.

127. In considering amount of actual damages to be awarded, jury may consider injury to plaintiff's feelings. It is not necessary that damages resulting from injury to feelings be specially pleaded, or that proof of such injury be specially given.—*Taylor vs. Hearst*, 107 Cal. 262, 271, 40 Pac. Rep. 392.

128. **Previous character.**—In fixing amount of damages, jury may consider previous character

of plaintiff, as they may believe it to be from the evidence; but they are not, even if they find his character to be bad, to be restricted to nominal damages in their verdict, unless they believe that such damages will fully compensate plaintiff for wrong suffered by the publication, and that exemplary damages shall not be given.—*Edwards vs. San Jose Print. & Pub. Soc.*, 99 Cal. 431, 439, 37 Am. St. Rep. 70, 34 Pac. Rep. 128.

129. Defendant's wealth, evidence of, is admissible in actions for libel and slander.—*Barkly vs. Copeland*, 74 Cal. 1, 7, 5 Am. St. Rep. 413, 15 Pac. Rep. 807. See *Comm. Bennett vs. Hyde*, 6 Conn. 24. Ill. *Hosley vs. Brooks*, 20 Ill. 115, 71 Am. Dec. 252; *White vs. Murland*, 71 Ill. 250, 22 Am. Rep. 100. Ind. *Adcock vs. Marsh*, 8 Ind. 360. Iowa. *Karney vs. Paisley*, 13 Iowa 89. Me. *Humphries vs. Parker*, 52 Me. 502. Md. *Wilms vs. White*, 26 Md. 380, 90 Am. Dec. 113; *Sloan vs. Edwards*, 61 Md. 101. Mass. *Larned vs. Buffinton*, 3 Mass. 546; *Shute vs. Barrett*, 24 Mass. (7 Pick.) 82. Mich. *Brown vs. Barnes*, 39 Mich. 211, 33 Am. Rep. 375. Minn. *McCarthy vs. Niskern*, 22 Minn. 90. Miss. *Bell vs. Morrison*, 27 Miss. 68. Mo. *Buckley vs. Knapp*, 48 Mo. 152. N. H. *Belknap vs. Boston & M. R. Co.*, 49 N. H. 358, 373-374. N. Y. *Bump vs. Betts*, 23 Wend. 85 (in passing upon question of excessiveness of damages awarded, points out wealth of defendant, and that plaintiff is a poor man, in justification of verdict). N. C. *Reeves vs. Winn*, 97 N. C. 246, 2 Am. St. Rep. 287, 1 S. E. Rep. 448; *McAulay vs. Birkhead*, 13 Ired. L. 28, 55 Am. Dec. 427. Ohio. *Hayner vs. Cowden*, 27 Ohio St. 292, 22 Am. Rep. 303. S. C. *Rowe vs. Moses*, 9 Rich. L. 423, 67 Am. Dec. 560. Va. *Clem vs. Holmes*, 33 Gratt. 722, 36 Am. Rep. 793. Wis. *Birchard vs. Booth*, 4 Wis. 67; *Brown vs. Swineford*, 44 Wis. 282, 291-294, 28 Am. Rep. 582. Fed. *Brown vs. Evans*, 17 Fed. Rep. 912, 8 Savvy. C. C. 491.

See note 67 Am. Dec. 562-568.

130. Admissible to show extent of injury and not to show defendant's ability to pay; or for purpose of enabling jury to inflict punishment upon defendant by way of punitive damages.—*Dain vs. Wyckoff*, 7 N. Y. 191; *Lewis vs. Chapman*, 19 Barb. (N. Y.) 252. See *Bennett vs. Hyde*, 6 Conn. 24; *Shute vs. Barrett*, 24 Mass. (7 Pick.) 86; *Palmer vs. Haskins*, 28 Barb. (N. Y.) 90.

131. Not admissible for any purpose in some states. Supreme court of Alabama say, in *Ware vs. Cartledge*, 34 Ala. 622, 60 Am. Dec. 483, that "the mere ownership of \$20,000 worth of property is not legal evidence of owner's rank and influence in society. Greenleaf and Starkie agree that defendant's ability is not legitimate inquiry in an action of slander, and the courts of New Jersey agree with them; the conclusion is fortified by the general principles regulating assessment of damages. *Greenl. Ev.*, § 269; *Stark. on Sland. & L.* 402; *Coxe* 79, 80; *Seay vs. Greenwood*, 21 Ala. 495; *Jones vs. Donnell*, 18 Ala. 490, 48 Am. Dec. 59. Opposed to this array of principles and authorities, one or two states have, without reason, and contrary to principle, adopted a different rule. *Case vs. Marks*, 20 Conn. 248, shakes the force of *Bennett vs. Hyde*, 6 Conn. 24, and in *Morris vs. Barker*, 4 Har. (Del.) 520, it was expressly held that defendant's circumstances

cannot be given in evidence in an action of slander."

132. PUNITIVE DAMAGES should not be allowed in libel action where there is not only no proof of express malice, but it is clearly shown that defendants had no malice or ill-will towards plaintiff, and made the publication in course of their business as public journalists, believing the matter to be one of special interest to public at that time.—*Wilson vs. Fitch*, 41 Cal. 363, 378; *Clugston vs. Garretson*, 103 Cal. 441, 446, 37 Pac. Rep. 469; *Taylor vs. Hearst*, 107 Cal. 262, 271, 40 Pac. Rep. 392.

133. PROOF—Married man with family.—In libel and slander plaintiff may prove, in aggravation of damages, that he is a married man and has a family.—*Rhodes vs. Naglee*, 66 Cal. 677, 680, 6 Pac. Rep. 863.

134. Publisher's care and regard for rights of others in employment of reporter who wrote article in question, being shown, evidence of his discharge from employment subsequent to libelous publication is not admissible.—*Turner vs. Hearst*, 115 Cal. 394, 399, 47 Pac. Rep. 129.

135. "Good faith and reasonable care are pertinent inquiry, where question of punitive damages is involved; not when, the matter being libelous per se, and its publication admitted, recovery is expressly limited to compensatory damages. For plaintiff, under such facts is entitled to compensatory damages, without regard to good faith or caution which attended publication."—*Taylor vs. Hearst*, 118 Cal. 866, 50 Pac. Rep. 541.

136. "The law gives to defendant right in his answer to allege truth of matter charged as defamatory. If he exercises this right in good faith, under honest belief in truth of his allegation, he is not to suffer penalty of exemplary damages; but if jury find it was averred of record with intent to injure plaintiff, they may rightfully consider it as an aggravation of the injury."—*Lowe vs. Herald Co.*, 6 Utah 175, 21 Pac. Rep. 991.

137. Pleading truth in justification, without an attempt, on trial, to introduce any evidence in support of plea, or evidence offered being wholly inadequate to make out defense, jury may take these facts into consideration, and if they believed defense to be unproved, and that it was inserted maliciously, and without probable cause, they may consider it an aggravation of damages.—*Cruikshank vs. Gordon*, 118 N. Y. 178, 23 N. E. Rep. 457, affg. 1 N. Y. Supp. 443; *Distin vs. Rose*, 69 N. Y. 122; *Bush vs. Prosser*, 11 N. Y. 347; *Fero vs. Ruscoe*, 4 N. Y. 162; *Bennett vs. Mathews*, 64 Barb. (N. Y.) 410; *Doe vs. Roe*, 32 Hun (N. Y.) 628; *King vs. Root*, 4 Wend. (N. Y.) 113, 139, 21 Am. Dec. 102.

138. This rule does not apply where publication was privileged, although defendant fails to sustain his plea of truth in justification.—*Klinck vs. Colby*, 46 N. Y. 427, 7 Am. Rep. 360.

139. Result of carelessness, etc.—Whether publication, which charges plaintiff with offense, did so by design, or was result of carelessness in setting type, is immaterial, so far as question of actual damages is involved.—*Taylor vs. Hearst*, 107 Cal. 262, 271, 40 Pac. Rep. 392.

140. "One who has published a libel on another cannot successfully resist latter's act for redress by showing he did not intend to publish it, and that its publication was due to carelessness, inadvertence, or mistake. Hence, it is not sufficient defense that publication of a libel resulted from error in setting type."—Taylor vs. Hearst, 107 Cal. 262, 270, 40 Pac. Rep. 392.

141. Libel recklessly or carelessly published, as well as one induced by personal ill-will, will support award of punitive damages.—Warner vs. Press Pub. Co., 132 N. Y. 181, 30 N. E. Rep. 393.

142. Repetition of slanderous charges made by defendant—Proof of is always competent in action for defamation, for purpose of showing malice, and it is not necessary to plead repetition of slanderous words themselves.—Preston vs. Frey, 91 Cal. 107, 111, 27 Pac. Rep. 532.

143. Evidence of other utterances than those alleged in complaint, of different nature and at different times is not competent for any purpose.—Stern vs. Loewenthal, 77 Cal. 340, 342, 19 Pac. Rep. 579; Howard vs. Sexton, 4 N. Y. 157.

144. Distinguishing: Hearne vs. De Young, 119 Cal. 670, 677, 52 Pac. Rep. 150, 499.

145. Proof in mitigation that defendant did not originate, but merely repeated the slander or libel, is admissible; such evidence is not admissible in justification.—Comm. Lelfter vs. Smith, 2 Root 24; Case vs. Marks, 20 Conn. 243. Ind. Hellman vs. Shanklin, 60 Ind. 425. Iowa. Hinkle vs. Davenport, 38 Iowa 355; Barr vs. Hack, 46 Iowa 308. Ky. Williams vs. Greenwade, 3 Dana 432; Calloway vs. Middleton, 2 A. K. Marsh. 372, 12 Am. Dec. 409; Evans vs. Smith, 5 T. B. Mon. 363, 17 Am. Dec. 74. Md. Shilling vs. Carson, 27 Md. 175, 92 Am. Dec. 632. Mich. Moyer vs. Pine, 4 Mich. 409; Farr vs. Rasco, 9 Mich. 353, 80 Am. Dec. 83; Brewer vs. Chase, 121 Mich. 526, 80 Am. St. Rep. 527, 80 N. W. Rep. 575, 46 L. R. A. 397. Minn. Hewitt vs. Pioneer Press Co., 23 Minn. 178, 23 Am. Rep. 680. Mo. Fish vs. St. Louis Co. Print. & Pub. Co., 103 Mo. App. 6, 74 S. W. Rep. 641; Hess vs. Ganzs, 90 Mo. App. 439. N. H. Wetherbee vs. Marsh, 20 N. H. 561, 51 Am. Dec. 244. N. J. Cook vs. Barkley, 2 N. J. L. (1 Penn.) 169, 2 Am. Dec. 343; Stuart vs. News Pub. Co., 67 N. J. L. (38 Vr.) 317, 51 Atl. Rep. 709. N. Y. Skinner vs. Powers, 1 Wend. 451; Dinkelspiel vs. N. Y. Evening Journal Pub. Co., 42 Misc. Rep. 74, 85 N. Y. Supp. 570. N. C. Nelson vs. Evans, 1 Dev. L. 9. Ohio. Van Derveer vs. Sutphin, 5 Ohio St. 293, 24 Am. Dec. 281; Young vs. Shevons, Wright 124. Oreg. Upton vs. Hume, 24 Oreg. 420, 41 Am. St. Rep. 863, 33 Pac. Rep. 810, 21 L. R. A. 493. Pa. Kennedy vs. Gregory, 1 Binn. 85; Stepp vs. Croft, 18 Pa. Super. Ct. 101. S. C. Galloway vs. Courtney, 10 Rich. L. 414. Tenn. Hancock vs. Stephens, 11 Humph. 507. Vt. Bowen vs. Hall, 20 Vt. 232; Bridgman vs. Hopkins, 34 Vt. 532. Wis. Haskins vs. Lumsden, 10 Wis. 359. Fed. McDonald vs. Woodruff, 2 Dill. C. C. 244, 16 Fed. Cas. 49; Edwards vs. Kansas City Times, 32 Fed. Rep. 813; Romaine vs. Duane, 3 Wash. C. C. 246, 20 Fed. Cas. 1140.

See note 40 C. C. A. 163.

146. Compare: Edwards vs. San Jose Print. & Pub. Soc., 99 Cal. 431, 37 Am. St. Rep. 70, 34 Pac. Rep. 123. Ala. Bradley vs. Gibson, 9

Ala. 406; Scott vs. McKinnish, 15 Ala. 662 Colo. Republican Pub. Co. vs. Mosman, 15 Colo. 399, 24 Pac. Rep. 1051. Conn. Treat vs. Brown- ing, 4 Conn. 408, 10 Am. Dec. 156. Ill. Young vs. Bennett, 5 Ill. (4 Scam.) 43. Ind. Sanders vs. Johnson, 6 Blackf. 50, 36 Am. Dec. 564; Hell- man vs. Shanklin, 60 Ind. 425. Iowa. Beardsley vs. Bridgman, 17 Iowa 290; Wallace vs. Home- stead Co., 117 Iowa 348, 90 N. W. Rep. 835. Mass. Wolcott vs. Hall, 6 Mass. 514, 4 Am. Dec. 173; Alderman vs. French, 18 Mass. (1 Pick.) 1, 11 Am. Dec. 114; Peterson vs. Morgan, 116 Mass. 350. Mich. Bronson vs. Bruce, 59 Mich. 467, 475, 60 Am. Rep. 807, 26 N. W. Rep. 671. Minn. Larrabee vs. Minnesota Tribune Co., 36 Minn. 141, 30 N. W. Rep. 462. Mo. Anthony vs. Stephens, 1 Mo. 254, 13 Am. Dec. 497; Baldwin vs. Boulware, 79 Mo. App. 5, 2 Mo. App. Rep'r. 359. N. Y. Inman vs. Foster, 8 Wend. 602; Morey vs. Morning Journal Assoc., 123 N. Y. 207, 20 Am. St. Rep. 730, 25 N. E. Rep. 161, 9 L. R. A. 621. Pa. Pease vs. Shippen, 80 Pa. St. 513, 21 Am. Rep. 116. S. C. Poppenheim vs. Wilkes, 1 Strob. 275. Vt. Smith vs. Moore, 74 Vt. 81, 52 Atl. Rep. 320.

Articles in other papers regarding same mat- ter or transaction in connection with which alleged libelous article is published, not admis- sible in evidence in mitigation of damages.— See Wilson vs. Fitch, 41 Cal. 363, 332; Hearne vs. De Young, 132 Cal. 357, 64 Pac. Rep. 576. Ill. Sheahan vs. Collins, 20 Ill. 325, 71 Am. Dec. 271. Mich. McDuff vs. Journal Co., 34 Mich. 1, 22 Am. St. Rep. 673, 47 N. W. Rep. 671. Minn. Simmons vs. Holster, 13 Minn. 249 (Gil. 332). N. Y. Hatfield vs. Lasher, 81 N. Y. 246; Mattice vs. Wilcox, 147 N. Y. 624, 42 N. E. Rep. 270; Palmer vs. Matthews, 162 N. Y. 100, 56 N. E. Rep. 501, revis'g 29 App. Div. 149, 51 N. Y. Supp. 839; Palmer vs. Publishing Co., 31 App. Div. 210, 52 N. Y. Supp. 539; Read vs. Sweetzer, 6 Abb. Pr. N. S. 9; Gray vs. Brooklyn Union Pub. Co., 35 App. Div. 236, 55 N. Y. Supp. 85; Tillotson vs. Cheetham, 3 John. 56, 3 Am. Dec. 459; Morrison vs. Publishing Co., 14 N. Y. Supp. 131. Pa. Clark vs. North Am. Co., 203 Pa. St. 346, 53 Atl. Rep. 237. R. I. Folwell vs. Providence Journal Co., 19 R. I. 551, 37 Atl. Rep. 6. Fed. Smith vs. Sun Print. & Pub. Assoc., 55 Fed. Rep. 240, 245, 5 C. C. A. 91, 95; Enquirer Co. vs. Johnston, 72 Fed. Rep. 443, 18 C. C. A. 628.

147. In recent case of Hoboken Print. & Pub. Co. vs. Kahn, 53 N. J. L. (29 Vr.) 359, 55 Am. St. Rep. 609, 33 Atl. Rep. 382, 1060 (Garrison, J., dissenting), the case was this: Defendant was the proprietor and publisher of a newspaper whose editorial agent, McCawley, accepted the story about plaintiff from Collins, a local re- porter. Collins had gotten the story from one Woods. At trial, defendant was permitted to put McCawley on stand to testify to what Col- lins told him; then Collins was allowed to tell what he said to McCawley, and that his in- formant was one Woods. Woods was then sworn, and asked to give conversation between Collins and himself about plaintiff. This was objected to, and ruling of court sustaining objection to this line of proof constituted sole bill of exceptions.

148. Same—Knowledge of publisher.—It is not incumbent on plaintiff in libel action to show that republication in defendant's news-

payer was made with their knowledge. Its publication in their paper is presumptive evidence of that fact, burden of overcoming which rests with them.—*Westerfield vs. Scripps*, 119 Cal. 607, 612, 51 Pac. Rep. 958.

149. Republication of libel in plea of justification, and answer asserting truth, which is not proved at trial, and not expected to be proved, aggravates damages.—*Westerfield vs. Scripps*, 119 Cal. 607, 612, 51 Pac. Rep. 958.

150. Same—Original answer of defendant in slander action, which has been superseded by amended answer, is not admissible against defendant.—*Stern vs. Loewenthal*, 77 Cal. 340, 343, 19 Pac. Rep. 579.

151. Pleas of justification which have been withdrawn cannot be read in evidence against defendant.—*Gillmore vs. Borders*, 2 How. (Miss.) 824.

152. MITIGATION—Publication not actuated by ill-will.—“Defendant may, however, show, if he can, in mitigation, that he was not actuated by ill-will or feeling of personal spite, and his own testimony directly to point is competent evidence, tending to establish that fact. But no amount of testimony of this character can disprove that malice which constitutes necessary ingredient of cause of action.”—*Mowry vs. Raabe*, 89 Cal. 606, 609, 27 Pac. Rep. 157.

See para. 145, 146 this note; also post § 48 and note.

153. Correction or retraction is properly pleaded and given in evidence in mitigation of damages, but not as full defense.—*Taylor vs. Hearst*, 107 Cal. 262, 270, 40 Pac. Rep. 392.

154. Full, prompt, and adequate apology undoubtedly tends to decrease amount of damages which, without it, plaintiff would have sustained, and must have afforded evidence upon question of express presence of what alone justifies punitive damages.—*Turner vs. Hearst*, 115 Cal. 394, 399, 47 Pac. Rep. 129.

155. Apology or retraction not made at earliest opportunity after commencement of action may nevertheless be given in evidence in mitigation of damages.—*Turner vs. Hearst*, supra.

156. Tardy or reluctant or half-hearted apology, or one which seems to have been made rather to escape liability than to repair the wrong, will avail but little.—*Turner vs. Hearst*, supra.

157. Sufficiency or insufficiency of apology or retraction is peculiarly question of fact to be determined by jury.—*Turner vs. Hearst*, supra.

158. Retraction to be available in mitigation of damages must appear to have been fully, fairly, and promptly made, and such as an impartial person would consider reasonable and satisfactory, under the circumstances of the case.—*Turner vs. Hearst*, supra.

159. GENERAL REPORT AND SUSPICION.—Damages cannot be mitigated by evidence that prior and up to time of publication plaintiff had been generally reported and suspected to have been guilty of acts imputed to him in libel.—*Wilson vs. Fitch*, 41 Cal. 363, 384; *Jick vs. Owen*, 47 Cal. 252, 258; *Chamberlin vs. Vance*, 51 Cal. 75, 85; *Preston vs. Frey*, 91

Cal. 107, 110, 27 Pac. Rep. 533; *Taylor vs. Hearst*, 107 Cal. 262, 269-270, 40 Pac. Rep. 392.

See para. 145, 146 this note; also notes 11 Am. Dec. 120; 13 Am. Dec. 499.

160. Previous publication of slanderous words by others,—proof of cannot be admitted in mitigation of damages. Fact that others, besides defendant have defamed plaintiff, is wholly irrelevant matter.—*Preston vs. Frey*, 91 Cal. 107, 110, 27 Pac. Rep. 533.

See authorities par. 146 this note.

161. Other distinct libelous articles on plaintiff, by another person, published prior to libel in question, cannot be introduced in extenuation of such libel.—*Wilson vs. Fitch*, 41 Cal. 363, 378.

162. Particular acts of plaintiff in relation to other like offenses, prior to publication of libel in question, cannot be shown where it is not also shown that defendants had knowledge of them when they made publication sued on.—*Edwards vs. San Jose Print. & Pub. Soc.*, 99 Cal. 431, 439, 37 Am. St. Rep. 70, 34 Pac. Rep. 128.

163. SPECIAL DAMAGES—What are.—At common law, or under statute, loss of friends, home, hospitality, marriage, means of support, or of any substantial benefit, constitutes special damages in action by either man or woman.—See III. *Spencer vs. McMasters*, 16 Ill. 405. Ind. *Linck vs. Kelley*, 25 Ind. 278, 87 Am. Dec. 362. Iowa. *Cleveland vs. Detweiler*, 18 Iowa 299. N. Y. *Pettibone vs. Lempson*, 66 Barb. 492. Ohio. *Malone vs. Stewart*, 15 Ohio 319, 45 Am. Dec. 577. Vt. *Underhill vs. Welton*, 32 Vt. 140. Eng. *Davis vs. Gordon*, 4 Co. Rep. 16; *Reston vs. Pamfreight*, Cro. Eliz. 639; *Mathews vs. Cross*, Cro. Jac. 323; *Davies vs. Solomon*, 41 L. J. Q. B. 100; *Moore vs. Meagher*, 1 Taunt. 39, 9 Rev. Rep. 702.

164. Allegation and proof of necessary.—See par. 186 et seq. this note.

165. Illness from over-excitement produced by slander, of married woman, and inability, by reason thereof, to attend to her domestic duties, not such special damages as will enable her to sustain, at common law, action for the slander.—*Allsop vs. Allsop*, 5 Hurl. & N. 534.

166. Otherwise as to an unmarried woman dependent upon her labor for her livelihood.—*Fuller vs. Fenner*, 16 Barb. (N. Y.) 338.

IX. PLEADING AND PRACTICE.

167. GENERALLY—Definition of libel in the code does not affect mode of pleading in actions of this character.—*Dixon vs. Allen*, 69 Cal. 527, 528, 11 Pac. Rep. 179.

As to pleading generally in actions of libel and slander, see Code Civ. Proc. § 461 and note.

168. COMPLAINT—Generally.—Words defamatory, spoken of another, are slanderous in and of themselves, or by reason of insinuated meaning conveyed. Where words are not in and of themselves actionable, they may be made so by proper averments.—*Jarman vs. Rea*, 137 Cal. 339, 345, 70 Pac. Rep. 216.

169. Allegation of language charging libel.—as to, see Code Civ. Proc. § 460 and note.

170. Allegation of falsity—Sufficiency of.—Averment that defendant spoke “the false and scandalous words following,” held sufficient

allegation of their falsity to pass general demurrer.—*Haskins vs. Jordan*, 123 Cal. 157, 159, 55 Pac. Rep. 786.

171. **Same—Repetition of slanderous words** in pleading is not necessary in order to be able to show such repetition.—See par. 142 this note.

172. **Alleging extrinsic facts.**—When plaintiff does not consider words alleged in his complaint slanderous in themselves, he is privileged to connect them, by proper averments, with extrinsic facts and circumstances in which they were published, in order to show slanderous meaning expressed by them.—*Nidever vs. Hall*, 67 Cal. 79, 80, 7 Pac. Rep. 136.

173. **Allegation of information and belief—Sufficiency.**—Allegation of plaintiff that "plaintiff is informed and believes defendant spoke certain words in presence of certain good and worthy persons," is held to be sufficient, although it should be more definite and certain.—*McKinney vs. Roberts*, 68 Cal. 192, 8 Pac. Rep. 857. See *Warburton vs. Ralph*, 9 Wash. 537, 550, 38 Pac. Rep. 140.

174. **Averment and proof.**—Words used being of such character as to contain covert slander, their meaning must be set out by statement and proof of such extrinsic facts as are necessary to make meaning of the words appear.—*Schomberg vs. Walker*, 132 Cal. 224, 228, 64 Pac. Rep. 290. See *Edwards vs. San Jose Print. & Pub. Soc.*, 99 Cal. 431, 435, 37 Am. St. Rep. 70, 34 Pac. Rep. 128; *Maynard vs. Fireman's Fund Ins. Co.*, 34 Cal. 48, 91 Am. Dec. 672; *Andrews vs. Woodmansee*, 15 Wend. (N. Y.) 232.

See par. 181 this note.

175. **Slander by insinuation—Averments of innuendo.**—"Words which do not expressly charge, but insinuate, fornication, are always understood as an assault upon bright central virtue of woman's character, and are almost always made in covert way,—such is the normal loquendi,—and meaning of such expressions may be properly averred in innuendo."—*Kedroviansky vs. Niebaum*, 70 Cal. 216, 219, 11 Pac. Rep. 641. See *Vanderlip vs. Roe*, 23 Pa. St. 84.

176. **WORDS NOT ACTIONABLE** in themselves, complaint must allege they were used in criminal sense; want of such averment cannot be supplied by innuendo.—*Miles vs. Vanhorn*, 17 Ind. 245, 79 Am. Dec. 477. See *Rice vs. Simmons*, 2 Harr. (Del.) 417, 31 Am. Dec. 766; *Little vs. Barlow*, 26 Ga. 423, 71 Am. Dec. 219. See Code Civ. Proc. §§ 460, 461 and notes.

177. **Inducement or colloquium, office of** is to set forth extrinsic circumstances which, coupled with words spoken, affect their construction or interpretation, and make them actionable, where standing alone they would appear not to injuriously affect plaintiff.—*Grand vs. Dreyfus*, 122 Cal. 58, 62, 54 Pac. Rep. 389.

See Code Civ. Proc. § 461 and note.

178. "Inducement is the statement of facts out of which charge arises, or which is necessary or useful to make charge intelligible."—*Taverner vs. Little*, 5 Bing. N. C. 678, 35 Eng. C. L. 269.

179. **Ironical language** must be alleged as such in inducement.—*Commonwealth vs. Kneeland*, 37 Mass. (20 Pick.) 206.

180. **Immaterial in what part of complaint matters of inducement appear**, whether before or after alleged slanderous words; but logically it should precede the words spoken.—*Grand vs. Dreyfus*, 122 Cal. 58, 62, 54 Pac. Rep. 389.

181. **WORDS HAVING COVERT MEANING** intended to defame, it is admissible to allege and prove that fact, and that they were so understood by those who heard them.—*Chamberlin vs. Vance*, 51 Cal. 75, 83. See *Maynard vs. Fireman's Fund Ins. Co.*, 34 Cal. 48, 59, 91 Am. Dec. 672; *Peake vs. Oldham*, 1 Cow. (N. Y.) 275; *Goodrich vs. Wolcott*, 3 Cow. (N. Y.) 231, 239; *Gibson vs. Williams*, 4 Wend. (N. Y.) 320; *Andrews vs. Woodmansee*, 15 Wend. (N. Y.) 230, 234; *Woolnor vs. Meadows*, 5 East 463, 2 Smith 28, 7 Rev. Rep. 742.

See par. 174 this note.

182. **COLLOQUIUM AND INNUENDO—DISPENSED WITH BY STATUTE** (see Code Civ. Proc. § 460) "only so far as they show that defamatory words applied to plaintiff, and goes no further. Averments necessary in common-law pleading to show meaning of the words must still be made."—*Harris vs. Zanone*, 93 Cal. 59, 23 Pac. Rep. 845; *Grand vs. Dreyfus*, 122 Cal. 58, 61, 54 Pac. Rep. 389.

183. **Innuendo** can be employed only to interpret the meaning of words used, when words spoken are not actionable per se; if natural import of words used is not slanderous, party cannot so broaden meaning by innuendo to make them actionable, except by connecting them, by proper inducement or colloquium, with extrinsic circumstances which, in connection with the words spoken, make them actionable.—*Grand vs. Dreyfus*, 122 Cal. 58, 62, 54 Pac. Rep. 389. See *Weil vs. Schmidt*, 28 Wis. 137; *Langton vs. Hagerty*, 35 Wis. 150, 158.

184. **Office of innuendo** "is merely to interpret meaning of language used; indeed, the word 'meaning' is the synonym of the word 'innuendo'; and so is the phrase 'that is to say'; and hence it is held that, where the words spoken are actionable, an innuendo undertaking to state same in other words is superfluous; if not actionable or libelous per se, innuendo cannot introduce meaning broader than words naturally bear, unless connected with proper introductory averments."—*Grand vs. Dreyfus*, 122 Cal. 58, 61, 54 Pac. Rep. 389. See *Young vs. Cook*, 124 Mass. 41; *Van Vechten vs. Hopkins*, 5 John. (N. Y.) 211, 220, 4 Am. Dec. 339; *Pollard vs. Lyon*, 91 U. S. 225, bk. 23 L. ed. 308.

185. **Same—Portion of publication not libelous per se**, should be distinguished from that part which is libelous per se.—*Fleming vs. Albeck*, 67 Cal. 226, 7 Pac. Rep. 659.

186. **SAME—ALLEGING SPECIAL DAMAGES.**—In complaint for slander, which contains allegations adequately showing that words are actionable per se, it is not incumbent upon plaintiff to allege special damages.—*Frolich vs. McKiernan*, 84 Cal. 177, 180, 24 Pac. Rep. 114.

187. Where words are charged to have been spoken of and concerning defendant as clerk or tradesman, which, it is alleged in substance, was his profession, rule is well established that

It is unnecessary to allege special damages.—*Butler vs. Howes*, 7 Cal. 87, 89; *Frollich vs. McKiernan*, 84 Cal. 177, 180, 24 Pac. Rep. 114.

188. **Averment and proof of special damage** is required only when libelous meaning of publication is covert.—*Tonini vs. Cevasco*, 114 Cal. 266, 271, 46 Pac. Rep. 103.

189. No averment and proof of special damages required in those cases where words are fairly included in the definition of the code and libelous per se.—*Schomberg vs. Walker*, 132 Cal. 224, 227, 64 Pac. Rep. 290.

190. **Same**—As to amending complaint to conform to facts proved, see Code Civ. Proc. § 340 and note.

191. **ANSWER—GENERAL ISSUE** being pleaded by defendant is not entitled to show privilege.—See post § 47 note par. 66.

192. To constitute justification, answer should aver truth of defamatory matter charged. It is not sufficient to set up facts which only tend to establish truth of such matter.—*Thrall vs. Smiley*, 9 Cal. 529, 536. See *Fenstermaker vs. Tribune Pub. Co.*, 13 Utah 439, 463, 43 Pac. Rep. 112.

193. **DEMURRER—General**, to complaint will be overruled where any part of such complaint states good cause of action.—*Fleming vs. Albeck*, 67 Cal. 226, 227, 7 Pac. Rep. 569. See *Hulsman vs. Todd*, 96 Cal. 228, 230, 31 Pac. Rep. 39; *Clugston vs. Garretson*, 103 Cal. 441, 445, 37 Pac. Rep. 469; *Stafford vs. Western U. Tel. Co.*, 73 Fed. Rep. 273.

194. **EVIDENCE—Burden on plaintiff.**—Words charged not being slanderous per se, plaintiff must prove they are actually slanderous as used, and were so understood by the hearers.—*Nidever vs. Hall*, 67 Cal. 79, 83, 7 Pac. Rep. 136. See *Lewis vs. Humphries*, 64 Mo. App. 471.

195. **Variance**—It is not necessary that slanderous words be shown to have been spoken on precise day alleged in complaint. It is sufficient that they were spoken within so recent a period as to avoid bar of statute of limitations, even though statute be relied on as a defense.—*Norris vs. Elliott*, 39 Cal. 72, 74 (where statute was not pleaded, answer merely denying that words were spoken at time and place alleged, or at any other time or place; and it was held proper to permit proof of speaking of words at any time before the action commenced).

196. **PROOF OF WORDS AS LAID** not required; proof of substance of what is charged will be sufficient.—*Hume vs. Arrasmith*, 1 Bibb (Ky.) 165, 4 Am. Dec. 626; *Estes vs. Antrobus*, 1 Mo. 197, 13 Am. Dec. 496; *Cooper vs. Marlow*, 3 Mo. 189 (134).

197. But some of words charged must be proved.—*Wheeler vs. Robb*, 1 Blackf. (Ind.) 330, 12 Am. Dec. 245; *Watson vs. Musick*, 3 Mo. 29.

See note to 12 Am. Dec. 246-248.

198. **VARIANCE BETWEEN DATE OF LIBEL ALLEGED** and date of libel proved, is immaterial.—*Thrall vs. Smiley*, 9 Cal. 529, 536.

199. Proof of words in addition to words alleged does not constitute material variance, unless additional words take away, detract

from, or modify legal effect of words alleged.—*Robnett vs. McDonald*, 65 Cal. 611, 612, 4 Pac. Rep. 651.

200. As to falsifying admission of crime charged in alleged libel, see Code Civ. Proc. § 1962 and note.

201. **SAME—SAME—BURDEN ON DEFENDANT.**—Burden of proving truth of libel, or privilege claimed, lies on defendant.—*Schomberg vs. Walker*, 132 Cal. 224, 226, 64 Pac. Rep. 290.

202. "Defendant having admitted speaking of words, law presumes that words were both false and malicious. Therefore burden of proving truth of words, or of any facts tending to mitigate the damages, was on defendant."—*Clugston vs. Garretson*, 103 Cal. 441, 446, 37 Pac. Rep. 469.

203. Where answer admits falsity of words spoken, it is error to impose burden of proving falsity on plaintiff.—*Burke vs. Mascarich*, 81 Cal. 302, 22 Pac. Rep. 673.

204. **Degree of proof requisite.**—To support special plea in justification where crime is imputed, same evidence must be adduced as would be necessary to convict plaintiff upon indictment for crime imputed to him; and it is conceived that he would be entitled to benefit of any reasonable doubts of his guilt, in minds of jury, in same manner as in criminal trial.—*Merk vs. Gelzhaeuser*, 50 Cal. 631, 633. See *Chaplin vs. Lee*, 18 Neb. 440, 442, 25 N. W. Rep. 609.

205. **Disapproved:** *Hearne vs. De Young*, 119 Cal. 670, 682, 52 Pac. Rep. 150, 499.

206. Charge that marking hogs alleged to have been stolen by plaintiff, was no proof of asportation, is erroneous. "For if the hogs were taken possession of by plaintiff unlawfully, with intent to mark them in his own mark, and he did so mark them in order to claim and use them as his own, knowing them to belong to defendant, this would seem to make the offense of larceny complete. Whether he did this it was for jury to determine from facts before them."—*Scott vs. Harbor*, 18 Cal. 704, 709.

207. **SAME—SUBMITTING PERSON TO EXAMINATION.**—Defendant is not entitled to an order directing plaintiff to submit her person to examination of medical experts for purpose of furnishing evidence to sustain plea of truth in justification, in action for slander, for saying and publishing of plaintiff, an unmarried woman, that she was unchaste, had become pregnant, and had procured an abortion.—*Kern vs. Birdwell*, 119 Ind. 226, 12 Am. St. Rep. 409, 21 N. E. Rep. 664.

208. **JURY**—To decide whether averments in innuendo are true.—*Kedrolivansky vs. Niebaum*, 70 Cal. 216, 219, 11 Pac. Rep. 641.

209. **Innuendo slander**—Averment in innuendo.—Jury to decide whether averment true.—*Kedrolivansky vs. Niebaum*, 70 Cal. 216, 219, 11 Pac. Rep. 641.

210. **Damages.**—Where there is no averment of special damages in complaint, it is for jury, and not for a witness, to say what damages have been sustained.—*Fleming vs. Albeck*, 67 Cal. 226, 7 Pac. Rep. 659.

§ 46. **SLANDER, WHAT.** Slander is a false and unprivileged publication other than libel, which:

1. Charges any person with crime, or with having been indicted, convicted, or punished for crime;
2. Imputes in him the present existence of an infectious, contagious, or loathsome disease;
3. Tends directly to injure him in respect to his office, profession, trade, or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profit;
4. Imputes to him impotence or a want of chastity; or,
5. Which, by natural consequence, causes actual damage.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Slander—Definition.
3. Slander of title—Definition.
4. Same—Action for—At common law.
5. Same—Same—Nature of action.
- 6, 7. Same—Same—Object of action.
8. Same—Essentials to maintain action.
9. Same—Title in dispute.
- 10, 11. Same—Same—Acts or declarations in right.
- 12-14. Same—Malice in defendant—Must be shown.
- 15, 16. Pleading—Joint defendants—Verbal slander.
17. Same—Allegations and proof.
18. Same—Same—Slandrous words.
19. Same—Same—Special damages.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc.,** in: *Nidever vs. Hall*, 67 Cal. 79, 80, 7 Pac. Rep. 136 (applied); *McKinney vs. Roberts*, 68 Cal. 192, 193, 8 Pac. Rep. 857 (applied); *Kedroviansky vs. Niebaum*, 70 Cal. 216, 218, 219, 11 Pac. Rep. 641 (applied); *Hitchcock vs. Caruthers*, 82 Cal. 523, 526, 23 Pac. Rep. 48 (applied); *Frolich vs. McKiernan*, 84 Cal. 177, 180, 24 Pac. Rep. 114 (applied); *Preston vs. Frey*, 91 Cal. 107, 110, 111, 112, 27 Pac. Rep. 333 (applied); *Rea vs. Wood*, 105 Cal. 314, 320, 38 Pac. Rep. 899 (cited); *Grand vs. Dreyfus*, 122 Cal. 58, 61, 54 Pac. Rep. 389 (applied); *Haskins vs. Jordan*, 123 Cal. 157, 159, 55 Pac. Rep. 786 (construed and applied); *Jarman vs. Rea*, 137 Cal. 339, 343, 70 Pac. Rep. 216 (construed and applied).

2. **SLANDER—Definition.**—Slander is false and malicious defamation by word of mouth, tending to injury or disgrace of a person living, or to the memory of a person deceased.—See 18 Am. & Eng. Encyc. of L. (2d ed.) 562 and authorities cited.

As to slander generally, see full annotation of subject ante § 45 and note.

3. **SLANDER OF TITLE—Definition.**—Slander of title is false and malicious statement, made either verbally or in writing, in disparagement of title or right or interest of another in and to real or personal property, to latter's injury or damage.—See 25 Am. & Eng. Encyc. of L. (2d ed.) 1074; also monographic note 87 Am. Dec. 562.

4. **Action for maintainable at common law.**—See *Meyrose vs. Adams*, 12 Mo. App. 332 (representations regarding letters patent); *Like vs. McKinstry*, 41 Barb. (N. Y.) 186; *Paull vs. Halferty*, 63 Pa. St. 46, 3 Am. Rep. 46; *Pater vs. Baker*, 3 Man. Gr. & S. 831, 54 Eng. C. L. 830; *Cro. Eliz.* 196, 427; *Cro. Jac.* 484; *Kel.* 153; *Styles Rep.* 169.

5. **Nature of the action.**—Slandering title is to speak or publish, not of the person, but of his right or title to something merely external to the person. One may speak or write whatever he pleases concerning a thing, and with any intention towards it, and for such speaking or writing no action can be maintained. The thing cannot complain; it has no rights to be invaded. But a person having a right to the thing spoken or written about,—the right of property,—will have an action for such speaking or writing, whenever his rights are invaded thereby. This action is known as an action for slander of title.—*Edwards vs. Burris*, 60 Cal. 157, 160-161. See *Meyrose vs. Adams*, 12 Mo. App. 339; *Hargrave vs. Le Breton*, 4 Burr. 2422; *Smith vs. Spooner*, 3 Taunt. 246, 12 Rev. Rep. 645.

6. **Object of action.**—"The principal object of such a suit, according to the Spanish law, from which we derive it, is to quiet titles, or to compel defendant either to waive all right, or to institute suit, and thereby enable plaintiff to make good his title. Whenever there is waiver of title, that object is accomplished."—*Walden vs. Peters*, 3 Rob. (La.) 331, 38 Am. Dec. 213.

7. "The object of the law was to protect possession; to give it the same advantages when disturbed by slander as by actual intrusion; to force defamer to bring suit, and throw burden on him of proving what he asserted."—*Livingston vs. Heerman*, 9 Mart. (La.) 714.

8. **Same—Essentials to maintenance of action.**—In order to maintain an action for slander of title plaintiff must show (1) he possesses an estate or interest in the property, (2) falsehood and malice in the utterance of slander concerning it, and (3) a pecuniary injury or damage to plaintiff.—*Edwards vs. Burris*, 60 Cal. 157, 161; *Burkett vs. Griffith*, 90 Cal. 532, 25 Am. St. Rep. 151, 27 Pac. Rep. 527, 13 L. R. A.

707; *Hargrave vs. Le Breton*, 4 Burr. 2422; *Smith vs. Spooner*, 3 Taunt. 246, 12 Rev. Rep. 646.

See notes 37 Am. Dec. 562; 35 Am. St. Rep. 153.

9. *Same*—Title in dispute.—Where the existence of the title itself, alleged to have been slandered, is yet in dispute between parties to original suit, brought for purpose of determining that very issue, defendant is entitled to nonsuit.—*Thompson vs. White*, 70 Cal. 135, 11 Pac. Rep. 564.

10. Acts or declarations in pursuance of claim of title on part of defendant, bona fide, and for purpose of protecting himself or his interest, he is not responsible in damages therefor.—See *Ala. Hill vs. Ward*, 13 Ala. 311. Ill. *Van Tuyle vs. Riner*, 3 Ill. App. (3 Bradw.) 556. La. *Walden vs. Peters*, 2 Rob. (La.) 331, 38 Am. Dec. 213. Mo. *Meyrose vs. Adams*, 12 Mo. App. 334. N. J. *Andrew vs. Deshler*, 45 N. J. L. (16 Vr.) 167. N. Y. *Bailey vs. Dean*, 5 Barb. 297.

11. Burden of proof shifts, in such case, to plaintiff.—See authorities last paragraph.

12. Malice in defendant must be shown by plaintiff in an action for slander of title; it is not presumed.—*Edwards vs. Burris*, 60 Cal. 157, 161. Ill. *Van Tuyle vs. Riner*, 3 Ill. App. (3 Bradw.) 556. Kan. *Stark vs. Chitwood*, 5 Kan. 141. Mich. *Walkley vs. Bostwick*, 49 Mich. 374, 13 N. W. Rep. 780. Mo. *Meyrose vs. Adams*, 12 Mo. App. 332. N. J. *Andrew vs. Deshler*, 45 N. J. L. (14 Vr.) 16, 45 Id. (16 Vr.) 167. N. Y. *Kendall vs. Stone*, 5 N. Y. 14; *Hovey vs. Rubber T. P. Co.*, 57 N. Y. 119, 5 Am. Rep. 470. Pa. *Paull vs. Halferty*, 63 Pa. St. 46, 49, 3 Am. Rep. 513.

See par. 14 this note.

13. "If it appeared that defendant had no color of title when he instituted his petitory action, malice might, perhaps, be inferred from that circumstance" (dictum).—*Walden vs. Peters*, 2 Rob. (La.) 331, 38 Am. Dec. 213.

14. It is error to charge jury upon trial of action for slander of title, that when person injuriously slanders title of another, malice is

presumed.—*McDaniel vs. Baca*, 3 Cal. 326, 339, 56 Am. Dec. 339.

As to malice generally, see post § 48 and note.

15. PLEADING—JOINT DEFENDANTS.—Verbal slander of title.—In case of verbal slander of title, joint action against two or more persons cannot be maintained.—*Webb vs. Cecil*, 9 B. Mon. (Ky.) 198, 48 Am. Dec. 423. See *Harris vs. Huntington*, 3 Tyl. (Vt.) 129, 4 Am. Dec. 728 (sustaining joint action for libel).

16. In such case words of one are not words of the other. The act of each constitutes an entire and distinct offense. And same words spoken by each defendant, spoken by one may create much greater injury than when spoken by another defendant. Each defendant should be responsible for injury inflicted by his own independent act.—*Webb vs. Cecil*, supra. See *Patten vs. Gurney*, 17 Mass. 182, 186, 9 Am. Dec. 141; *Thomas vs. Rumsey*, 6 John. (N. Y.) 32.

17. Allegation and proof.—The (1) falsity and (2) maliciousness and (3) the pecuniary injury or damage must be specially alleged in the complaint and proved on trial; malice being gist of action.—See *Edwards vs. Burris*, 60 Cal. 157, 161. Ill. *Van Tuyle vs. Riner*, 3 Ill. App. (3 Bradw.) 556. Kan. *Stark vs. Chitwood*, 5 Kan. 141. Mich. *Walkley vs. Bostwick*, 49 Mich. 374, 13 N. W. Rep. 780. Mo. *Meyrose vs. Adams*, 12 Mo. App. 332. N. J. *Andrew vs. Deshler*, 45 N. J. L. (14 Vr.) 16, 45 Id. (16 Vr.) 167. N. Y. *Kendall vs. Stone*, 5 N. Y. 14; *Hovey vs. Rubber T. P. Co.*, 57 N. Y. 119, 5 Am. Rep. 470. Pa. *Paull vs. Halferty*, 63 Pa. St. 46, 49, 3 Am. Rep. 513.

See par. 8 this note.

18. SLANDEROUS WORDS must be set out in the complaint.—*Hill vs. Ward*, 13 Ala. 310.

19. SPECIAL DAMAGES must be circumstantially alleged.—*Stark vs. Chitwood*, 5 Kan. 141.

§ 47. PRIVILEGED PUBLICATION, IS WHAT. A privileged publication is one made—

1. In the proper discharge of an official duty.

2. In any legislative or judicial proceeding, or in any other official proceeding authorized by law.

3. In a communication, without malice, to a person interested therein, [1] by one who is also interested, or [2] by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or [3] who is requested by the person interested to give the information.

4. By a fair and true report, without malice, in a public journal, of a judicial, legislative, or other public official proceeding, or of anything said in the course thereof, or of a verified charge or complaint made by any person to a public official, upon which complaint a warrant shall have been issued.

5. By a fair and true report, without malice, of the proceedings of a public meeting, if such meeting was lawfully convened for a lawful purpose and open to the public, or the publication of the matter complained of was for the public benefit.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 184; March 26, 1895, Stats. and Amdts. 1895, p. 167; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 334, held unconstitutional; see history, § 4 ante.

LIBEL AND SLANDER—PRIVILEGED COMMUNICATION.

I. In General.

1. Applied, cited, construed, referred to, etc.

II. Communications in Discharge of Public Duty, etc.

- 2, 3. Generally.
4. Complaint addressed to competent person.
- 5-11. Same—Illustrations—Church member's complaint.
12. Same—Same—Complaint to grand jury.
- 13-16. Same—Same—Complaint to lodges and societies.
- 17, 18. Same—Same—Complaint to postmaster-general.
19. Same—Same—Complaint to school committee.
20. Same—Same—Complaint to supreme court.
21. Same—Same—Petition to governing bodies of state.
- 22, 23. Same—Court or tribunal must be competent.
- 24, 25. Same—No probable cause—Malice.
26. Same—Same—Remedy.

III. Communications in Proceedings Authorized by Law.

- 27-30. Disclosures—In discharge of duty to others.
- 31-34. Same—In discharge of official duty.
35. Interstate commerce commission proceedings.
- 36-39. Judicial proceedings—General doctrine.
- 40-47. Same—Affidavits, etc.—In civil actions.
- 48-52. Same—Same—In criminal proceedings.
- 53-57. Same—Complaint and pleadings in civil action.
- 58-60. Same—Defamatory statements in course of proceedings.
- 61, 62. Same—Same—Words spoken by counsel.
63. Same—Same—Pleading signed by counsel.
64. Same—Same—Party acting as own counsel.
- 65-67. Same—Statements by parties to court.
68. Same—Statements in pleadings.
69. Same—Same—Complaint in criminal action.
70. Same—Statements in creditor's objection to discharge.
- 71-73. Same—Statement of witness in testifying.
74. Legislative proceedings—Words spoken by legislator.

IV. Communications between Interested Persons.

75. Generally—Privileged, when.
76. Information as to credit.
77. Same—Verbal statement of mercantile agency.
78. Same—Blacklisting delinquent debtors.
79. Blacklisting discharged employees.
80. Letter from son to mother.

V. Matters of General Interest.

81. Generally—Communication to governor.
82. Newspaper publication—Generally.

83. Same—Liberty of the press—Regulation.

84. Same—Mere belief of editor—Not justification.

- 85, 86. Same—Defamatory publication relating to public interest.

- 87, 88. Same—Same—Right to publish mere news.

89. Same—False statement regarding arrest of witness.

- 90-92. Criticism of public officer—Good faith and privilege.

- 93-95. Same—Same—Imputing crime.

- 96, 97. Same—Same—Trustee of private corporation not public officer.

- 98-100. Same—Criticism of candidate for public office.

- 101, 102. Same—Criticism of teacher's methods and ability.

VI. Reports of Official Proceedings.

103. Fair accounts and unbiased reports.

VII. Malice as Affecting Privileges Claimed.

- 104-106. Words spoken in malice—Not privileged.

107. Communication.

108. Same—Imputation of crime presumes malice.

109. Same—Mode of proof.

VIII. Questions of Law and Fact.

- 110-112. Whether privileged question for court.

113. Question of malice is for jury.

IX. Pleading.

114. As to pleading generally.

115. Privilege must be pleaded.

I. IN GENERAL.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO,** etc., in: *Dixon v. Allen*, 69 Cal. 527, 530, 11 Pac. Rep. 179 (applied in connection with § 46); *Hollis vs. Meux*, 69 Cal. 625, 627, 630, 58 Am. Rep. 574, 11 Pac. Rep. 248 (construed and applied); *Sesler vs. Montgomery* (Cal. Dec. 1883), 19 Pac. Rep. 686, 687 (applied); *Sesler vs. Montgomery*, 78 Cal. 486, 487, 488, 12 Am. St. Rep. 76, 21 Pac. Rep. 185, 3 L. R. A. 653 (applied); *Preston vs. Frey*, 91 Cal. 107, 112, 27 Pac. Rep. 533 (construed and applied); *Harris vs. Zanone*, 93 Cal. 59, 70, 23 Pac. Rep. 845 (applied); *Ball vs. Rawles*, 93 Cal. 222, 236, 27 Am. St. Rep. 174, 28 Pac. Rep. 937 (applied); *Gilman vs. McClatchy*, 111 Cal. 606, 611, 612, 44 Pac. Rep. 241 (applied); *Schromberg vs. Walker*, 132 Cal. 224, 229, 64 Pac. Rep. 290 (construed and applied); *Jarman vs. Rea*, 137 Cal. 339, 349, 70 Pac. Rep. 216 (applied).

II. COMMUNICATIONS IN DISCHARGE OF PUBLIC DUTY.

2. **GENERALLY.**—Evidence collected by school trustees as to conduct of principal, and sent to board of education, which alone had authority to discipline such principal, is privileged.—*Galligan vs. Kelly*, 31 N. Y. Supp. 561.

3. "Truth is privileged when published from good motives, and for justifiable ends. And that which is not true, but honestly believed to be true, and published in good faith, by one in performance of a public or official duty, in

certain cases, is also privileged. This is so in case of communications made to body or officer having power to redress grievance complained of, or having cognizance of subject-matter of communication, to some intent or purpose, and in cases where communication is made confidentially, or upon request, where party requiring information has an interest in knowing character of person inquired after. So may a person be justified where he is honestly endeavoring to vindicate his own interests, as in case of slander of title (see ante § 46 and note pars. 5-19), or guarding against any transaction which might operate to his own injury."—*McAllister vs. Detroit Free Press Co.*, 76 Mich. 338, 15 Am. St. Rep. 318, 43 N. W. Rep. 431.

4. COMPLAINT ADDRESSED TO PERSON OR TRIBUNAL COMPETENT TO REDRESS GRIEVANCE complained of, is privileged.—See *N. Y. Thorn vs. Blanchard*, 5 John. 508; *Howard vs. Thompson*, 21 Wend. 319, 34 Am. Dec. 238. *Pa. Gray vs. Pentland*, 2 Serg. & R. 23. *Vt. Harris vs. Huntington*, 2 Tyl. 129, 4 Am. Dec. 728. *Eng. Jeykll vs. Moore*, 2 Bos. & P. (N. R.) 341; *Aufeld vs. Feverhill*, 2 Bulst. 269; *Ashley vs. Young*, 2 Burr. 808, 810; *Cutler vs. Dixon*, 4 Co. Rep. 14b (scandalous matter in articles of the peace exhibited to a justice of the peace); *Beauchamp vs. Crofts*, *Dyer* 285; *Rex vs. Baillie*, 2 Esp. 91; *Lake vs. King*, 1 Saund. 131; *Boulton vs. Clapham*, *Sir W. Jones* 431.

See note 34 Am. Dec. 238.

5. Church member's complaint or communication to governing body regarding conduct of another member, or of presiding pastor, for purpose of an investigation by that body and subjecting person complained of to church discipline, is privileged, where there is probable cause for complaint or accusation.—See *Ga. Etchison vs. Pergerson*, 88 Ga. 620, 15 S. E. Rep. 680. *Ind. Kleizer vs. Symmes*, 40 Ind. 562; *Coombs vs. Rose*, 8 Blackf. 155. *Ky. Lucas vs. Case*, 9 Bush 297. *Mass. Remington vs. Congdon*, 19 Mass. (2 Pick.) 310, 314, 316, 13 Am. Dec. 431; *Bradley vs. Heath*, 29 Mass. (12 Pick.) 163, 22 Am. Dec. 418; *York vs. Pease*, 48 Mass. (2 Gray) 282. *Mo. Landis vs. Campbell*, 79 Mo. 433, 49 Am. Rep. 239. *Neb. Piper vs. Woolman*, 43 Neb. 280, 61 N. W. Rep. 588. *N. Y. Jarvis vs. Hatheway*, 3 John. 180, 3 Am. Dec. 473; *O'Donaghue vs. McGovern*, 23 Wend. 26. *N. C. Whitaker vs. Carter*, 26 N. C. 461. *Ohio. Dial vs. Holter*, 6 Ohio St. 228, 243. *S. C. Smith vs. Youmans*, 3 Hill (S. C.) 85. *Tenn. Dunn vs. Winters*, 2 Humph. 512. *Tex. Holt vs. Parsons*, 23 Tex. 9, 76 Am. Dec. 49. *Wis. Servatius vs. Pichel*, 34 Wis. 292. *Eng. The King vs. Hart*, 3 John. Ecc. 180; *Cockayne vs. Hodgkinson*, 5 Car. & P. 543, 24 Eng. C. L. 443; *Warr vs. Jolly*, 6 Car. & P. 497, 25 Eng. C. L. 508; *Woodward vs. Lander*, 6 Car. & P. 543, 25 Eng. C. L. 537.

As to complaint without probable cause,—see pars. 13-15 this note.

6. And this rule holds true where person not member of the church makes such complaint, bona fide, for a similar purpose.—See *Remington vs. Congdon*, 19 Mass. (2 Pick.) 310, 314, 13 Am. Dec. 431 (plaintiff had intimated a desire or willingness that inquiry should be

made by the church; defendant made complaint and the church body found it to be true).

As to where resorted to merely as pretense to cover malicious design, see par. 14 this note.

7. Entry in church book—Of resolution of excommunication, and exhibiting it to members of session for their signatures, is privileged and not a publication.—*Landis vs. Campbell*, 79 Mo. 433, 49 Am. Rep. 239.

See par. 12 this note.

8. Same—Without formal proceeding or hearing, is not privileged within rule; e. g. entry in record of current report derogatory of character of member of the church.—*Shelton vs. Nance*, 7 B. Mon. (Ky.) 128.

9. Entry in baptismal record of church of name of reputed father of bastard child, knowing that person has been acquitted of that charge, a minister is guilty of libel.—*Kubricht vs. State*, 44 Tex. Cr. Rep. 94, 100 Am. St. Rep. 842, 69 S. W. Rep. 157, 58 L. R. A. 959.

10. Statement regarding chastity made by one member of a church to another member regarding third, in absence of power to discipline in member to whom communication made, is not privileged.—*Hocks vs. Sprangers*, 113 Wis. 123, 87 N. W. Rep. 1101, 89 Id. 113.

11. Words spoken in church, by minister or priest, not in the discharge of his clerical and pastoral duties, but wantonly, maliciously, and without authority, with intent to injure, are not privileged.—*Servatius vs. Pichel*, 34 Wis. 292.

12. COMPLAINT TO GRAND JURY charging plaintiff with perjury, although exhibited to others before being presented to the jury, for purpose of signatures, is privileged.—*Kidder vs. Parkhurst*, 85 Mass. (3 Allen) 393.

See pars. 7, 15 this note.

13. COMPLAINTS TO LODGES and other social organizations for purpose of exercise of lodge discipline, stand on same footing as complaints and communications to governing bodies of churches.—See pars. 5-7 this note.

14. Communications or utterances in lodge room, not uttered in public debate or discharge of official duty, are not privileged.—*Miller vs. Roy*, 10 La. Ann. 231.

But where spoken for benefit of lodge, speaker believing them to be true, it is otherwise.—*Ostheimer vs. Blumert*, 1 City Ct. Rep. Supp. (N. Y.) 17.

15. Presenting written charges against member of society to others for signature is privileged.—*Streety vs. Wood*, 15 Barb. (N. Y.) 105.

See pars. 7, 12 this note.

16. Parties not being members of the lodge, communication not privileged.—*Nix vs. Caldwell*, 81 Ky. 293, 50 Am. Rep. 163.

17. COMPLAINT TO POSTMASTER-GENERAL, or to general post-office, regarding misconduct in a postmaster, made bona fide to obtain redress, is privileged.—*Woodward vs. Lander*, 6 Car. & P. 543, 25 Eng. C. L. 537.

18. Memorial to post-office department charging plaintiff with fraud and collusion with other bidders in securing contract authorized by law to be let by postmaster-general.—*Cook vs. Hill*, 3 Sandf. (N. Y.) 341, 350.

19. COMPLAINT TO SCHOOL COMMITTEE of district school regarding a teacher thereof, is privileged.—*Harwood vs. Keech*, 4 Hun (N. Y.) 389. See *Galligan vs. Kelly*, 81 N. Y. Supp. 561.

See par. 4 this note.

20. COMPLAINT TO SUPREME COURT, preferring charges against an applicant for admission to bar, received and acted on by the court, is privileged.—*Wilson vs. Whitacre*, 2 Ohio C. D. 392.

21. Petition to governing bodies of state; e. g. to governor for removal of sheriff, where petition is pertinent and relevant, is privileged.—*Larkin vs. Noonan*, 19 Wis. 82, 87. See *Ind. Hartssock vs. Reddick*, 6 Blackf. 255, 38 Am. Dec. 141. N. Y. *Garr vs. Seiden*, 4 N. Y. 91; *Gilbert vs. People*, 1 Den. 41, 43 Am. Dec. 646; *Hastings vs. Lusk*, 22 Wend. 410, 34 Am. Dec. 330; *O'Donaghue vs. McGovern*, 23 Wend. 26. Eng. *Lake vs. King*, 1 Saund. 131 (petition to committee of house of commons), cited and recognized as correct principle by Lord Mansfield in *Astley vs. Younge*, 2 Burr. 803, 810, 811.

22. SAME—COURT OR TRIBUNAL MUST BE COMPETENT TO DEAL WITH.—But the tribunal, individual, or body must be vested with authority in the premises.—*Hosmer vs. Loveland*, 19 Barb. (N. Y.) 111.

23. Court or tribunal not competent to try case, communication not privileged.—*Milam vs. Burnsides*, 1 Brev. (S. C.) 295; *Hawk P. C. c. 73*, § 8. But see *Buckley vs. Wood*, 4 Co. Rep. 14b; *Powell, J., in Gwynne vs. Poole*, 2 Lutw. 1571.

24. SAME—NO PROBABLE CAUSE—MALICE.—A false complaint made with express malice, without probable cause, to a governing body having power to redress the wrong complained of, is not privileged and subject of action for damages.—*Bodwell vs. Osgood*, 20 Mass. (3 Pick.) 379, 15 Am. Dec. 228.

25. Measure resorted to as a pretense and a cover to a malicious design to slander the good name of the plaintiff, the rule will be otherwise.—*Remington vs. Congdon*, 19 Mass. (2 Pick.) 810, 814, 13 Am. Dec. 431. See *Mass. Bodwell vs. Osgood*, 20 Mass. (3 Pick.) 379, 15 Am. Dec. 228; *Bradley vs. Heath*, 29 Mass. (12 Pick.) 163, 164, 22 Am. Dec. 418. Pa. *Gray vs. Pentland*, 4 Serg. & R. 423. S. C. *Milam vs. Burnsides*, 1 Nott & McB. 426n. Eng. *Bromage vs. Prosser*, 4 Barn. & C. 247, 6 Dowl. & Ry. 293, 3 L. J. K. B. 203, 1 Car. & P. 475, 10 Eng. C. L. 321, 28 Rev. Rep. 241; *Allen vs. Flood*, '98, A. C. 1, 171.

26. Same—Remedy is by an action for malicious prosecution.—See *Mass. Remington vs. Congdon*, 19 Mass. (2 Pick.) 810, 814, 13 Am. Dec. 431. N. Y. *Jarvis vs. Hatheway*, 3 John. 180, 3 Am. Dec. 473; *Thorn vs. Blanchard*, 5 John. 508. Pa. *Gray vs. Pentland*, 2 Serg. & R. 23. S. C. *Sanders vs. Rollins*, 2 Strobb. 447. Eng. *Rex vs. Baillie*, 2 Esp. 91; *Lake vs. King*, 1 Saund. 131.

III. COMMUNICATIONS IN PROCEEDINGS AUTHORIZED BY LAW.

27. DISCLOSURES.—In discharge of duties to others in relation to matters respecting

which they are entitled to inquire or to receive information, or which are for good of community, where honestly made with good motives.—*Ind. Wabash R. Co. vs. Young*, 162 Ind. 102, 69 N. E. Rep. 1003 (statement made in answer to inquiry that person is labor-agitator). Iowa. *Mott vs. Dawson*, 46 Iowa 533. Ky. *Harper vs. Harper*, 10 Bush 447; *Hart vs. Reed*, 1 B. Mon. 166, 35 Am. Dec. 179; *Nix vs. Caldwell*, 51 Ky. 293, 50 Am. Rep. 163. La. *McBride vs. Ledoux*, 111 La. 398, 35 So. Rep. 615 (statements regarding person engaged to member of family made to the family). Mass. *Squires vs. Wason Mfg. Co.*, 182 Mass. 137, 65 N. E. Rep. 32. Miss. *Hubbard vs. Rutledge*, 57 Miss. 7. N. Y. *Liddle vs. Hodges*, 2 Bosw. 537; *Washburn vs. Cooke*, 3 Den. 110; *Webber vs. Vincent*, 55 Hun 612, 9 N. Y. Supp. 101. N. C. *Adcock vs. Marsh*, 30 N. C. 360; *State vs. Hinson*, 103 N. C. 374, 376, 9 S. E. Rep. 552; *Harrison vs. Garrett*, 132 N. C. 172, 43 S. E. Rep. 594 (communication by employee to employer); *Hudnell vs. Eureka Lumber Co.*, 133 N. C. 169, 45 S. E. Rep. 532 (statements made to party in honest belief he was performing duty towards him). Va. *Strode vs. Clement*, 90 Va. 553, 19 S. E. Rep. 177; *Brown vs. Norfolk & W. R. Co.*, 100 Va. 619, 42 S. E. Rep. 664, 60 L. R. A. 472. Wis. *Noonan vs. Orton*, 32 Wis. 106; *Rude vs. Nass*, 79 Wis. 321, 24 Am. St. Rep. 717, 42 N. W. Rep. 555. Fed. *White vs. Nichols*, 44 U. S. (3 How.) 266, bk. 11 L. ed. 591; *Erber vs. Dun*, 12 Fed. Rep. 526, 4 McC. C. C. 160; *Locke vs. Bradstreet*, 22 Fed. Rep. 771. Can. *Gildner vs. Busse* (Div. Ct.) 3 Ont. L. R. 561 (accusing servant of theft in presence of other servants). Eng. *Sandgrove vs. Hole*, 70 L. J. K. B. 445, [1901] 2 K. B. 1, 84 L. T. 647, 49 Week. Rep. 473.

28. Letter to discharged employee, by manager of corporation, accusing him of theft in removal of certain property, and threatening prosecution in case it was not returned, is privileged as to the company, the manager of company, and stenographer to whom dictated.—*Puterbaugh vs. Gold Medal Co.*, 5 Ont. L. R. 680.

Publications of reasons for discharge of employee, by railroad.—60 L. R. A. 470.

Unjust derogatory statements as to character in answer to inquiries by interested party.—56 L. R. A. 296.

29. Where there is no duty imposed it is otherwise; e. g. physician volunteering statement to uninterested person, that plaintiff was fit subject for lunatic asylum.—*Perkins vs. Mitchell*, 31 Barb. (N. Y.) 461.

Or the matter is communicated in strict confidence to a friend.—*Branstetter vs. Dorough*, 81 Ind. 527; *Byam vs. Collins*, 111 N. Y. 143, 7 Am. St. Rep. 726, 19 N. E. Rep. 75, 2 L. R. A. 129; *Alpin vs. Morton*, 21 Ohio St. 536.

30. Repeating slanderous report to third person, not consulted as an attorney, for purpose of getting advice as to whether defamed person should be notified, not privileged.—*Branstetter vs. Dorough*, 31 Ind. 527.

31. SAME—IN DISCHARGE OF OFFICIAL DUTY, all official acts, reports, and records, done and made in good faith, are privileged.—*Conn. Haight vs. Cornell*, 15 Conn. 74. Ga. *Pearce vs. Bower*, 72 Ga. 243. La. *Fisk vs.*

Soniat, 33 La. Ann. 1400; Billett vs. Times-Democrat Pub. Co., 107 La. Ann. 751, 32 So. Rep. 17, 53 L. R. A. 62. Md. Maurice vs. Worden, 54 Md. 233, 39 Am. Rep. 384. Mass. Shattuck vs. Allen, 70 Mass. (4 Gray) 540; Howland vs. Flood, 160 Mass. 509, 36 N. E. Rep. 482. Me. Weber vs. Lane (Mo. App. 1903), 71 S. W. Rep. 1099. N. Y. Van Wyck vs. Aspinwall, 17 N. Y. 190; Ratzel vs. New York News Pub. Co. 67 App. Div. 598, 73 N. Y. Supp. 849 (reversing 71 N. Y. Supp. 1074); Van Wyck vs. Guthrie, 4 Duer 268. R. I. In re Investigation Com., 16 R. I. 751, 11 Atl. Rep. 429. Fed. Gardner vs. Anderson, 22 Int. Rev. Rep. 41, 9 Fed. Cas. 1153 (communication from one officer of government to another, in relation to their duty). Cam. Puterbaugh vs. Gold Medal Co. (Div. Co.), 5 Ont. L. R. 680.

School board, in requesting revocation of teacher's license.—52 L. R. A. 352.

32. Otherwise where the act is beyond their scope of duty.—Fawcett vs. Charles, 13 Wend. (N. Y.) 473.

33. For example, preamble by board of health alleging numerous deaths in village due to negligence of physician attending, not privileged.—Mauk vs. Brundage, 68 Ohio St. 89, 67 N. E. Rep. 152.

Chairman committee of political party, letter of attacking governor's appointment to particular office.—55 L. R. A. 732.

34. False statements not protected.—Campeau vs. Monetta (Rap. Jud. Queb.), 19 C. S. 429 (in regard to not letting contract to builder therefor).

35. INTERSTATE COMMERCE COMMISSION, although perhaps not court of civil jurisdiction, pleadings filed with such commission are nevertheless filed in "official proceeding authorized by law," within meaning of § 47; and statements made in pleadings filed before that commission are absolutely privileged within terms of section.—Duncan vs. Atchison, T. & S. F. R. Co., 72 Fed. Rep. 303, 312, 19 C. C. A. 202, 44 U. S. App. 427.

See pars. 22, 23, 26 this note.

36. JUDICIAL PROCEEDINGS — General doctrine that judges, counsel, parties, and witnesses are absolutely exempted from liability to action for defamatory words published in course of judicial proceedings, is recognized, with qualification, however, that as to parties, counsel and witnesses, that, in order to be privileged, their statements made in the course of an action must be pertinent and material to the case.—Hollis vs. Meux, 69 Cal. 625, 58 Am. Rep. 574, 11 Pac. Rep. 248. Ala. Lawson vs. Hicks, 38 Ala. 279, 81 Am. Dec. 49. Del. Goslin vs. Cannon, 1 Har. (Del.) 3 (but see Eccles vs. Shannon, 4 Har. 193). Ill. Strauss vs. Meyer, 43 Ill. 387. Ind. Hartsock vs. Reddick, 6 Blackf. 255, 38 Am. Dec. 141. Iowa. Rector vs. Smith, 11 Iowa 302; Smith vs. Howard, 28 Iowa 51. Ky. Bunton vs. Worley, 4 Bibb 38, 7 Am. Dec. 735; Hardin vs. Cumstock, 2 A. K. Marsh. 480, 12 Am. Dec. 427; Stewart vs. Hall, 83 Ky. 375. La. Terry vs. Fellows, 21 La. Ann. 375; Wamock vs. Kemp, 6 Mart. N. S. 477; Stackpole vs. Hennen, 6 Mart. N. S. 481, 17 Am. Dec. 187. Me. Barnes vs. McCarte, 32 Me. 442. Md. Hunckel vs.

Voneiff, 69 Md. 179, 9 Am. St. Rep. 413, 14 Atl. Rep. 500, 17 Id. 1056. Mass. Hoar vs. Wood, 44 Mass. (3 Met.) 193; Rice vs. Coolidge, 121 Mass. 393, 23 Am. Rep. 279. Miss. Sands vs. Robison, 12 Smed. & M. 704, 51 Am. Dec. 132; Verner vs. Verner, 64 Miss. 184, 1 So. Rep. 52. N. Y. Garr vs. Selden, 4 N. Y. 91; White vs. Carroll, 42 N. Y. 161, 1 Am. Rep. 503; Klinck vs. Colby, 46 N. Y. 427, 434, 7 Am. Rep. 360; Marsh vs. Ellsworth, 50 N. Y. 309, 312, affg. 36 How. Pr. 535, 1 Sweeny 56; Spooner vs. Keeler, 51 N. Y. 527; Newfield vs. Copperman, 15 Abb. Pr. N. S. 362, 47 How. Pr. 89; Streety vs. Woods, 15 Barb. 111; Hosmer vs. Loveland, 19 Barb. 116; Perkins vs. Mitchell, 31 Barb. 469; Ring vs. Wheeler, 7 Cow. 725; Gilbert vs. People, 1 Den. 41, 43, 43 Am. Dec. 646; Aylesworth vs. St. John, 25 Hun 156; Jarvis vs. Hatheway, 3 John. 180, 3 Am. Dec. 473; Suydam vs. Moffat, 1 Sandf. 459, 464; Warner vs. Paine, 2 Sandf. 195, 201; Cook vs. Hill, 3 Sandf. 341; Allen vs. Crofoot, 2 Wend. 615, 20 Am. Dec. 647; Howard vs. Thompson, 21 Wend. 319, 34 Am. Dec. 238; Hastings vs. Lusk, 22 Wend. 410, 34 Am. Dec. 330. N. C. Shelfer vs. Gooding, 2 Jones 175; Nissen vs. Cramer, 104 N. C. 574, 10 S. E. Rep. 676, 6 L. R. A. 780. Ohio. Liles vs. Gaster, 42 Ohio St. 631; Wilson vs. Whitacre, 2 Ohio C. D. 392. Pa. Press Co. vs. Stewart, 119 Pa. St. 584, 14 Atl. Rep. 51; McMillan vs. Birch, 1 Binn. 178, 2 Am. Dec. 426; Shock vs. McChesney, 4 Yeat. 507, 2 Am. Dec. 415. S. C. Vause vs. Lee, 1 Hill 197, 26 Am. Dec. 168. Tenn. Ruohs vs. Backer, 6 Heisk. 395, 19 Am. Rep. 598; Lea vs. White, 4 Sneed 111; Shodden vs. McElwee, 86 Tenn. 146, 6 Am. St. Rep. 821, 5 S. W. Rep. 602; Crockett vs. McLanahan, 109 Tenn. 517, 72 S. W. Rep. 950, 61 L. R. A. 914; Cooley vs. Calyon, 109 Tenn. 1, 97 Am. St. Rep. 823, 70 S. W. Rep. 607, 60 L. R. A. 139. Vt. Mower vs. Watson, 11 Vt. 536, 34 Am. Dec. 704; Dunham vs. Powers, 41 Vt. 1. W. Va. Johnson vs. Brown, 13 W. Va. 71. Wis. Jennings vs. Paine, 4 Wis. 358; Calkins vs. Sumner, 13 Wis. 193, 80 Am. Dec. 728. Fed. White vs. Nicholls, 44 U. S. (3 How.) 266, bk. 11 L. ed. 591; Randall vs. Brigham, 74 U. S. (7 Wall.) 523, bk. 19 L. ed. 285; Trussell vs. Scarlett, 18 Fed. Rep. 214, 216; McGehee vs. Insurance Co. of N. A., 112 Fed. Rep. 853, 50 C. C. A. 551; King vs. McKissick, 126 Fed. Rep. 215. Cam. Wilkins vs. Major (Rep. Jud. Queb.), 22 C. S. 264. Eng. Revis vs. Smith, 18 C. B. (9 J. Scott) 126, 86 Eng. C. L. 125; Dawkins vs. Rokeby, 4 Fost. & F. 806; Henderson vs. Broomhead, 4 Hurl. & N. 568; Kennedy vs. Hilliard, 10 J. R. C. L. 195; Seaman vs. Netherclift, 34 L. T. N. S. 878; King vs. Skinner, Loftt. 55; Scott vs. Stansfield, L. R. 3 Exch. 220; Dawkins vs. Rokeby, L. R. 3 Q. B. 255, 5 Moak Eng. Rep. 212 affirmed, L. R. 7 H. L. 744, 14 Moak Eng. Rep. 127; Munster vs. Lamb, L. R. 11 Q. B. Div. 588.

See 13 Am. & Eng. Encyc. of L. (2d ed.) 1023; also notes 2 Am. Dec. 431; 12 Am. Dec. 430; 17 Am. Dec. 194; 43 Am. Dec. 648; 6 Am. St. Rep. 825; 9 Am. St. Rep. 413; and briefs in 53 L. R. A. 447; 54 L. R. A. 931.

37. "To catalogue of absolutely privileged communications belong all words spoken or written by court, parties, or counsel, in due course of judicial proceedings, which may be

relevant. The relevancy, or pertinency, of calumnious matter is indispensable to perfect and absolute freedom from all actionable quality; and being relevant, it can give rise to no civil responsibility, no matter how great the malignity or malice from which it may have originated.—*Lawson vs. Hicks*, 38 Ala. 279, 81 Am. Dec. 49. To same effect, see *Hastings vs. Lusk*, 22 Wend. (N. Y.) 410, 34 Am. Dec. 330.

See note 34 Am. Dec. 340.

38. As to words immaterial or outside of issues, it is otherwise.—*Wyatt vs. Buell*, 47 Cal. 624, 625. See *Iowa. Smith vs. Howard*, 23 Iowa 51. *N. Y. White vs. Carroll*, 42 N. Y. 161, 1 Am. Rep. 503; *Gilbert vs. People*, 1 Den. 41, 43 Am. Dec. 646. *Pa. Kean vs. McLaughlin*, 2 Serg. & R. 469. *Tenn. Ruohs vs. Backer*, 6 Heisk. 395, 19 Am. Rep. 598. *Eng. Hooper vs. Truscott*, 2 Bing. N. C. 457, 29 Eng. C. L. 395; *Powell vs. Planket*, Cro. Car. 52.

As to defamatory statements in answer not constituting defense.—54 L. R. A. 930.

39. As to application for extension of time which goes outside of necessary representation and volunteers libelous matters,—see *Hollis vs. Meux*, 69 Cal. 625, 629, 58 Am. Rep. 574, 11 Pac. Rep. 248, and *Wheaton vs. Beecher*, 49 Mich. 348, 357, 13 N. W. Rep. 769.

See also par. 26 this note.

40. SAME—AFFIDAVITS, ETC.—In civil actions, where within restriction and pertinent to issue, are protected within this rule.—*Ill. Hibbard vs. Ryan*, 46 Ill. App. 313 (affidavit in attachment); *Roll vs. Donnelly*, 56 Ill. App. 425 (affidavit in opposition to application for alimony). *Iowa. Hawk vs. Evans*, 76 Iowa 593, 14 Am. St. Rep. 247, 41 N. W. Rep. 368 (affidavit on application for order in summary proceedings directing attorney to pay over moneys collected). *Mass. Hoar vs. Wood*, 44 Mass. (3 Met.) 193; *McLaughlin vs. Cowley*, 127 Mass. 316. *Mich. Hart vs. Baxter*, 47 Mich. 198, 10 N. W. Rep. 198 (affidavit in action to reform mortgage charging wilful and malicious falsity; indulging in improper motives does not affect privilege where pertinent). *N. Y. Warner vs. Paine*, 2 Sandf. 195 (fact that language coarser than consistent with good taste does not take affidavit out of privilege); *Garr vs. Selden*, 4 N. Y. 91; *Marsh vs. Ellsworth*, 50 N. Y. 309, 311 (improper choice of words and needless epithets do not affect privilege). *Ohio. Harris vs. Reams*, 3 Ohio Dec. 281 (affidavit in injunction). *Vt. Dunham vs. Powers*, 42 Vt. 1.

41. Agent of corporation in conducting suit entitled to same protection as a party.—*Nissen vs. Cramer*, 104 N. C. 574, 10 S. E. Rep. 676, 6 L. R. A. 780.

42. A next friend is entitled to same protection as a party.—*Ruohs vs. Backer*, 6 Heisk. (Tenn.) 395, 19 Am. Rep. 598.

43. Accusing witness of having committed perjury, etc., made in the proceeding, is not privileged.—*Eccles vs. Shannon*, 4 Har. (Del.) 193; *Cole vs. Grant*, 18 N. J. L. (3 Har.) 327. See *Ga. Jones vs. Forehand*, 89 Ga. 520, 32 Am. St. Rep. 81, 16 S. E. Rep. 262. *N. Y. Burlingame vs. Burlingame*, 8 Cow. 141; *Rosen-*

berg vs. Nesbitt, 14 N. Y. St. Rep. 248. *Vt. Clemmons vs. Danforth*, 67 Vt. 617, 48 Am. St. Rep. 336, 22 Atl. Rep. 626 (heir accusing physician of having fabricated claims against estate, and of having done same with other estates; though made for purpose of inducing other heirs to join in resisting claim).

44. "It's a lie," spoken by party during trial, of testimony being given by witness, is not privileged.—*Cole vs. Grant*, 18 N. J. L. (3 Har.) 327; *Mower vs. Watson*, 11 Vt. 536, 34 Am. Dec. 704.

Compare: *Nissen vs. Cramer*, 104 N. C. 574, 10 S. E. Rep. 676, 6 L. R. A. 780.

45. Aspersions not absolutely privileged.—*Kelly vs. Lafette*, 28 La. Ann. 435.

46. Matters in affidavit, filed in civil suit, which are not relevant and pertinent, are not privileged.—*Hyde vs. McCabe*, 100 Mo. 412, 13 S. W. Rep. 875.

47. Immaterial and irrelevant not within protection.—*King vs. McKissick*, 126 Fed. Rep. 215.

48. SAME—SAME—IN CRIMINAL PROCEEDINGS, affidavits, motions, etc., are privileged to same extent and on same conditions as in civil actions.—See *Hahn vs. Schmidt*, 64 Cal. 284, 286; *Ball vs. Rawles*, 93 Cal. 222, 27 Am. St. Rep. 174, 28 Pac. Rep. 937 (but may be indicted for perjury). *Ga. Reid vs. McLendon*, 44 Ga. 156; *Francis vs. Wood*, 75 Ga. 648 (where false and malicious, remedy by action for malicious prosecution—see par. 26 this note). *Ind. McNeely vs. Driskill*, 2 Blackf. 259; *Hartssock vs. Reddick*, 6 Blackf. 255, 38 Am. Dec. 141. *Iowa. Newman vs. Davis*, 59 Iowa 447; *Rainbow vs. Benson*, 71 Iowa 301, 32 N. W. Rep. 352. *Kan. Bailey vs. Dodge*, 28 Kan. 72. *Ky. Bunton vs. Worley*, 4 Bibb 38, 7 Am. Dec. 735. *La. Burke vs. Ryan*, 36 La. Ann. 951 (criminal charge in affidavit on motion for new trial, even where false and malicious). *Mass. Kldder vs. Parkhurst*, 85 Mass. (3 Allen) 393; *Morrow vs. Wheeler & W. Mfg. Co.*, 165 Mass. 349, 43 N. E. Rep. 105. *Mich. Graham vs. Cass Circ. Judge*, 108 Mich. 425, 66 N. W. Rep. 348. *N. Y. Bailey vs. Dear*, 5 Barb. 297; *Allen vs. Crofoot*, 2 Wend. 515, 20 Am. Dec. 647. *N. C. Briggs vs. Byrd*, 34 N. C. 377. *Pa. Warden vs. Whalen*, 8 Pa. Co. Ct. R. 660. *S. C. Vause vs. Lee*, 1 Hill 197, 26 Am. Dec. 168; *Sanders vs. Rollins*, 2 Strobb. 447. *W. Va. Lisk vs. Hurst*, 1 W. Va. 53. *Fed. Vogel vs. Gruaz*, 110 U. S. 311, bk. 28 L. ed. 158, 4 Sup. Ct. Rep. 12; *Teal vs. Fissel*, 28 Fed. Rep. 351. *Eng. Leigh vs. Webb* (Lord Eldon, J.), 3 Esp. 165; *Cohen vs. Morgan*, 6 Dowl. & R. 8; *Carratt vs. Morley* (Lord Denman, J.), 1 Gale & D. 275.

49. Otherwise where criminal proceedings are instituted, not with intention to prosecute, but as pretense to promulgate slander, or serve improper purpose; e. g. to enforce payment of debt.—*Hill vs. Miles*, 9 N. H. 9.

50. Statement made to justice of peace on application for warrant for felony, made in good faith to commence prosecution, is privileged.—*Bunton vs. Worley*, 4 Bibb 38, 7 Am. Dec. 735.

51. Otherwise where made to him as individ-

ual and not as an officer.—*Liske vs. Stevenson*, 50 Mo. App. 220.

52. Otherwise where made without probable cause.—*Pierce vs. Oard*, 23 Neb. 823, 37 N. W. Rep. 677.

See par. 46 this note.

53. **SAME—COMPLAINT AND PLEADING IN CIVIL ACTION**, within general restriction above laid down, being pertinent, privileged.—*Ga. Wilson vs. Sullivan*, 81 Ga. 238, 7 S. E. Rep. 274 (pertinent matter in bill for injunction). *Ill. Strauss vs. Meyer*, 48 Ill. 385 (charges against defendant's character for honesty, made in bill in chancery); *Ash vs. Zwietusch*, 159 Ill. 455, 42 N. E. Rep. 854, affg. 57 Ill. App. 151 (answer charging embezzlement; or petition of receiver against co-receiver charging embezzlement, *Bartlett vs. Christ-hilf*, 69 Md. 219, 14 Atl. Rep. 518). *Ind. Wilkins vs. Hyde*, 142 Ind. 260, 41 N. E. Rep. 536 (petition to obtain custody of children, charging mother with leading low and debauched life). *Ky. Hardin vs. Cumstock*, 2 A. K. Marsh. 480, 12 Am. Dec. 427; *Forbes vs. Johnson*, 11 B. Mon. 48 (charging fraudulent alteration of instrument). *La. Wallis vs. New Orleans C. R. Co.*, 29 La. Ann. 66 (assailing character of party in plea); *Vinas vs. Merchants' Mut. Ins. Co.*, 33 La. Ann. 1265 (accusing plaintiff of fraud). *Md. Bartlett vs. Christ-hilf*, 69 Md. 219, 14 Atl. Rep. 518 (charging embezzlement in petition). See *Ash vs. Zwietusch*, 159 Ill. 455, 42 N. E. Rep. 854 (affg. 57 Ill. App. 151). *N. Y. Doda vs. Pipe*, 41 Hun 254; *Perzel vs. Tousey*, 20 Jones & S. 79 (in bill of particulars demanded; otherwise where not demanded, and needlessly published, *Moore vs. Manufacturers' Nat. Bank*, 123 N. Y. 420, 25 N. E. Rep. 1048, 11 L. R. A. 753); *Prescott vs. Tousey*, 21 Jones & S. 56 (plea in mitigation and justification). *Ohio. Lanning vs. Christy*, 30 Ohio St. 115, 27 Am. Rep. 431. *Tenn. Cooley vs. Galyon*, 109 Tenn. 1, 97 Am. St. Rep. 823, 70 S. W. Rep. 607, 60 L. R. A. 139; *Crockett vs. McLanahan*, 109 Tenn. 517, 72 S. W. Rep. 950, 61 L. R. A. 914. *Fed. Duncan vs. Atchison, T. & S. F. R. Co.*, 72 Fed. Rep. 808, 812, 19 C. C. A. 202, 44 U. S. App. 427 (libelous statements in answer). *Can. Wilkins vs. Major* (Rap. Jud. Queb.), 22 C. S. 264.

54. **Charges against person not party to suit privileged**, where pertinent.—*Gardemal vs. McWilliams*, 43 La. Ann. 454, 26 Am. St. Rep. 195, 9 So. Rep. 106.

As in action for divorce on ground of adultery, charging adultery, with plaintiff in libel suit.—*Link vs. Moore*, 84 Hun 118, 32 N. Y. Supp. 461, 1 N. Y. Ann. Cas. 330.

Adultery charged in cross-bill for divorce.—53 L. R. A. 445.

55. Or in stockholder's suit charging fraudulent conduct of management by plaintiff detailing actions involving director not party to action.—*Runge vs. Franklin*, 72 Tex. 585, 13 Am. St. Rep. 833, 10 S. W. Rep. 721, 3 L. R. A. 417.

56. **Defamatory matters in pleading not absolutely privileged.**—*Randall vs. Hamilton*, 45 La. Ann. 1184, 14 So. Rep. 73, 22 L. R. A. 449; *Youree vs. Hamilton*, 45 La. Ann. 1191, 14 C. C.—7

So. Rep. 77. See Kelly vs. Lafitte, 23 La. Ann. 435.

57. **Statements outside of necessary and pertinent facts, not privileged.**—*Wyatt vs. Buell*, 47 Cal. 624 (application for extension of time to file transcript stating matter wholly foreign to application, and charging attorney with collusion); *Weil vs. Israel*, 42 La. Ann. 955, 8 So. Rep. 826 (non-pertinent attack on character of clerk in his suit to recover wages on quantum meruit); *Wimbish vs. Hamilton*, 47 La. Ann. 246, 16 So. Rep. 856; *McLaughlin vs. Cowley*, 127 Mass. 316, 131 Id. 70; *Sherwood vs. Powell*, 61 Minn. 479, 52 Am. St. Rep. 614, 63 N. W. Rep. 1103, 29 L. R. A. 153.

58. **SAME—DEFAMATORY STATEMENT MADE BY WRITING, OR IN WORDS**, in course of inquiry regarding administration of law, is privileged, whether it was or not made in bad faith, and was or not relevant to inquiry.—*Hollis vs. Meux*, 69 Cal. 625, 627, 58 Am. Rep. 574, 11 Pac. Rep. 248. See *La. Randall vs. Hamilton*, 45 La. Ann. 1184, 14 So. Rep. 73, 22 L. R. A. 449; *Grant vs. Haynes*, 105 La. Ann. 804, 29 So. Rep. 708, 54 L. R. A. 930. *Minn. Sherwood vs. Powell*, 61 Minn. 479, 52 Am. St. Rep. 614, 63 N. W. Rep. 1103, 29 L. R. A. 153. *Mo. Jones vs. Brownslee*, 161 Mo. 258, 61 S. W. Rep. 795, 53 L. R. A. 445.

See note 22 L. R. A. 649.

59. **Defamatory words spoken by witness of third person**, not party to the action, pertinent to issues and fairly responsive to questions put by counsel or court, are absolutely privileged, although malicious.—See *Cooper vs. Phipps*, 24 Oreg. 357, 33 Pac. Rep. 986, 22 L. R. A. 836; *Ruohs vs. Backer*, 6 Heisk. (Tenn.) 405, 19 Am. Rep. 598; *Lea vs. White*, 4 Sneed (Tenn.) 113, 115; *Cooley vs. Galyon*, 109 Tenn. 1, 97 Am. St. Rep. 823, 70 S. W. Rep. 607, 60 L. R. A. 139.

See pars. 71-73 this note; and also note 22 L. R. A. 836.

60. **Words written in course of plaintiff's proceedings in insolvency**, though they were such as imputed crimes to plaintiff, and if spoken elsewhere would import malice and be actionable, are not actionable under either an absolute or conditional law of privilege.—*Hollis vs. Meux*, 69 Cal. 625, 630, 58 Am. Rep. 574, 11 Pac. Rep. 248.

61. **SAME—AS TO WORDS SPOKEN BY COUNSEL IN CONDUCT OF CAUSE**, are privileged.—See *Hastings vs. Lusk*, 23 Wend. (N. Y.) 410, 34 Am. Dec. 330.

62. **Words spoken by counsel, to be privileged**, "must have been spoken in the course of discharge of his duty to his client, and must have been pertinent to matter in question."—*Mower vs. Watson*, 11 Vt. 536, 34 Am. Dec. 704.

63. **SAME—PLEADING DRAWN AND SIGNED BY COUNSEL**, presumption that it is privileged.—*Ruohs vs. Backer*, 6 Heisk. (Tenn.) 395, 19 Am. Rep. 598.

64. **Party acting as own counsel.**—Matter contained in sworn application to supreme court requesting extension of time to file transcript, which does not relate wholly to reasons for delay, but charges his attorney

with having entered into collusive agreement with adverse counsel, held not privileged.—*Wyatt vs. Buell*, 47 Cal. 624.

See par. 18 this note.

65. **SAME—STATEMENTS BY PARTIES TO COURT.**—"Prima facie, the party or his counsel is privileged for everything spoken in court. If any one considers himself aggrieved, in order to sustain an action for slander he must show that words spoken were not pertinent to matter then in progress, and that they were spoken maliciously, and with view to defame him. So that if words spoken were pertinent to matter in hand, party and counsel may claim full immunity from action of slander, however malicious might have been his motive in speaking them."—*Mower vs. Watson*, 11 Vt. 536, 34 Am. Dec. 704, 705.

66. "A party is neither absolutely not conditionally privileged to utter to his counsel, and to those jointly interested with him in defending particular matter, and to others not so interested, a false and actionable slander of the other party to the matter in controversy, not in any way pertinent or material to matter in controversy, to induce those jointly interested and his counsel to join him in defending matter in controversy. He has no interest or duty to make such charge. It will be wholly unavailing and injurious to himself and those jointly interested."—*Clemmons vs. Danforth*, 67 Vt. 617, 48 Am. St. Rep. 836, 32 Atl. Rep. 626.

67. That matter defamatory and libelous in its character was charged in petition does not of itself carry absolute exemption from liability for damages claimed by reason of such matter; other facts must concur to bring about that result.—*Randall vs. Hamilton*, 45 La. Ann. 1184, 14 So. Rep. 73, 22 L. R. A. 649.

See note 22 L. R. A. 649.

68. **SAME—STATEMENTS IN PLEADING.**—Rule of privilege applied to.—*Marsh vs. Ellsworth*, 50 N. Y. 309, 311. See *Aylesworth vs. St. John*, 25 Hun (N. Y.) 156; *Smith vs. Smith*, 26 Hun (N. Y.) 577; *Prezel vs. Tousey*, 52 N. Y. Super. Ct. 88.

69. Complainant in criminal action is not liable to person charged with commission of offense, for slander, if complainant in such proceeding makes false accusation. The remedy therefor is to procure an indictment for perjury; he cannot be made liable for damages in civil action.—*Ball vs. Rawles*, 93 Cal. 222, 236, 27 Am. St. Rep. 174, 28 Pac. Rep. 937.

See *Hartscock vs. Reddick*, 6 Blackf. (Ind.) 255, 38 Am. Dec. 141.

70. **STATEMENT IN CREDITOR'S OBJECTION TO BANKRUPT'S DISCHARGE**, charging him with having procured false testimony in support of his application, is privileged.—*Marsh vs. Ellsworth*, 50 N. Y. 309.

See note 2 Am. Dec. 431.

71. **SAME—STATEMENTS OF WITNESS IN GIVING TESTIMONY**, pertinent and relevant to inquiry, are absolutely privileged.—*Lanning vs. Christy*, 30 Ohio St. 115, 27 Am. Rep. 431.

See notes 22 L. R. A. 836, 6 Am. St. Rep. 825.

72. Words spoken by witness testifying in judicial proceeding, and relevant and pertinent

to subject of inquiry, or responsive to questions propounded by counsel, concerning strangers to action, are absolutely privileged.—*Cooley vs. Galyon*, 109 Tenn. 1, 97 Am. St. Rep. 823, 70 S. W. Rep. 607, 60 L. R. A. 139.

See par. 59 this note.

73. "Reasons why testimony of witnesses is privileged are that it is given upon compulsion and not voluntary, and that, in order to promote most thorough investigation in courts of justice, public policy requires that witnesses shall not be restrained by fear of being vexed by actions at instance of those who are dissatisfied with their testimony. But these reasons do not apply to stranger to suit, who procures and suborns false witnesses, and rule should not be extended beyond those cases which are within its reasons."—*Rice vs. Coolidge*, 121 Mass. 393, 23 Am. Rep. 279.

74. **LEGISLATIVE PROCEEDING.**—Words uttered by member of legislature, while in execution of his official duty, are privileged, though spoken with malice.—*Coffin vs. Coffin*, 4 Mass. 1, 3 Am. Dec. 189.

IV. COMMUNICATIONS BETWEEN INTERESTED PERSONS.

75. **GENERALLY.**—Slandorous communication is not privileged unless party making it has some interest in its subject-matter.—*Byam vs. Collins*, 111 N. Y. 143, 7 Am. St. Rep. 726, 19 N. E. Rep. 75.

76. **INFORMATION AS TO CREDIT.**—Where one person applies to another for credit, and latter seeks information as to trustworthiness of applicant, a privileged occasion arises for communications bearing on that subject.—*Fahr vs. Hayes*, 50 N. J. L. (21 Vr.) 275, 13 Atl. Rep. 261.

77. Verbal statements by mercantile agency made in relation to person's business credit and standing as a merchant, to subscribers who have an interest in knowing the facts, and in answer to inquiries, having been made in good faith and upon information on which agency relied, are privileged.—*Eerber vs. Dun*, 12 Fed. Rep. 526. See *Ormsby vs. Douglass*, 37 N. Y. 477; *King vs. Patterson*, 49 N. J. L. 417, 60 Am. Rep. 622; *Trussell vs. Scarlett*, 18 Fed. Rep. 214.

78. **Blacklisting delinquent debtors**, whose names are stricken off, and notice sent out, on their paying up, is not privileged when published not to protect subscribers from trusting such debtors, but to aid them in coercing payment.—*Muetze vs. Tuteur*, 77 Wis. 236, 20 Am. St. Rep. 115, 46 N. W. Rep. 123.

79. **Black-listing discharged employees.**—Publication by railroad corporation of its discharged employees placed in hands of agents of other railway companies, without malice, but for sole purpose of enabling such agents to avoid employment of unsuitable persons, whether so communicated by request or not, looking to public interests involved, is not actionable.—*Missouri Pac. R. Co. vs. Richmond*, 73 Tex. 568, 15 Am. St. Rep. 794, 11 S. W. Rep. 555, 4 L. R. A. 280.

See ante § 45 note par. 33.

80. **LETTER FROM SON TO MOTHER**, the only publication thereof being sending from

him to her by mail, although libelous, is conditionally privileged, requiring proof of malice.—*Kimble vs. Kimble*, 14 Wash. 369, 44 Pac. Rep. 866.

V. MATTERS OF GENERAL INTEREST.

81. GENERALLY.—Communication to governor.—“Whether public statutes of state shall be changed is matter of general interest, and of common concern, and information given to governor for purpose of influencing his action on bill which has passed the legislature, is *prima facie* privileged; but, if the communication contains defamatory matter, and is unnecessarily published to others, such publication is not privileged.”—*Woods vs. Wiman*, 122 N. Y. 445, 25 N. E. Rep. 919. See *Coffin vs. Coffin*, 4 Mass. 1, 3 Am. Dec. 189.

82. NEWSPAPER PUBLICATIONS—Generally.—“The liberty of the press, as law now stands, is only more extensive and improved use of the liberty of speech which prevailed before printing became general; and, independently of certain statutory provisions, the law recognizes no distinction in principle between a publication by the proprietor of a newspaper and a publication by any other person. A newspaper proprietor is not privileged, as such, in dissemination of news, but is liable for what he publishes in same manner as any other individual.”—*McAllister vs. Detroit Free Press Co.*, 76 Mich. 333, 15 Am. St. Rep. 318, 43 N. W. Rep. 431.

83. “The liberty of the press is not more under the protection of the constitution than liberty of speech, and publisher of newspaper can only defend action for libel, or mitigate damages to be recovered therefor, upon precisely same grounds as any other individual could defend action for slander in uttering the same words upon the street.”—*Edwards vs. San Jose Print. & Pub. Soc.*, 99 Cal. 431, 439, 37 Am. St. Rep. 70, 34 Pac. Rep. 123.

84. “Mere belief of editor of newspaper in justification of an attack which he makes upon private character of a citizen, is no defense to action brought by person assailed for damages sustained by such attack; nor can such belief be considered in mitigation of damages, unless it is shown to have been based upon information derived from reliable source. It must be shown that the charge was only made after due investigation of the matter to which it relates.”—*Edwards vs. San Jose Print. & Pub. Soc.*, *supra*.

85. Defamatory publication in journal cannot be held to be privileged simply because it relates to subject of public interest and was published in good faith and without malice and from laudable motives.—*Wilson vs. Fitch*, 41 Cal. 363, 378; *Edwards vs. San Jose Print. & Pub. Soc.*, 99 Cal. 431, 438, 37 Am. St. Rep. 70, 34 Pac. Rep. 123; *Gilman vs. McClatchy*, 111 Cal. 606, 614, 44 Pac. Rep. 241. See *Neb. Pokrok Zapadu Pub. Co. vs. Ziskovsky*, 42 Neb. 64, 77, 60 N. W. Rep. 353. *Utah. Fenstermaker vs. Tribune Pub. Co.*, 18 Utah 532, 536, 45 Pac. Rep. 1097, 35 L. R. A. 611. *Wis. Eviston vs. Cramer*, 54 Wis. 220, 226, 11 N. W. Rep. 556. *Fed. Post Pub. Co. vs. Hallam*, 59 Fed. Rep. 530, 542.

86. Publication by newspaper of false damaging report, although publication is made without express malice, is actionable and cannot be said to be privileged communication.—*Gilman vs. McClatchy*, 111 Cal. 606, 615, 44 Pac. Rep. 241.

87. Same.—“Editor or publisher of newspaper has right to publish fact that individual has been arrested, and upon what charge; but he has no right to assume that the person is guilty, or to hold him out to the world as such.”—*Lowe vs. Herald Co.*, 6 Utah 175, 21 Pac. Rep. 991. See *McAllister vs. Detroit Free Press Co.*, 76 Mich. 333, 15 Am. St. Rep. 318, 43 N. W. Rep. 431; *Usher vs. Severance*, 20 Me. 9, 37 Am. Dec. 33.

88. Same.—“The greater the circulation the greater the wrong, and the more reason why greater care should be exercised in publication of personal items. No newspaper has right to trifle with reputation of any citizen, or by carelessness or recklessness to injure his good name and fame or business. And reporter of newspaper has no more right to collect stories on street, or even to gather information from policemen or magistrates out of court, about a citizen, and to his detriment, and publish such stories and information as facts, in newspaper, than has a person not connected with a newspaper to whisper from ear to ear gossip and scandal of the street. If true, such publication, or such speaking, may be privileged, but if false, the newspaper as well as the citizen must be responsible to any one who is wronged and damaged thereby. It is indignity enough for an honest man to be arrested and put into prison for an offense of which he is innocent, and for which indignity oftentimes he has redress, without being further subjected to the wrong and outrage of a false publication of the circumstances of such arrest and imprisonment, looking towards his guilt, without remedy.”—*McAllister vs. Detroit Free Press Co.*, 76 Mich. 333, 15 Am. St. Rep. 318, 43 N. W. Rep. 431.

89. False statement that witness named, “whose idea of an oath appeared in yesterday’s Times, was arrested after his evidence was taken . . . on account of his criminal evidence . . . and in default of necessary bail was committed to jail,” is libelous, although it imputed no particular crime.—*Godshalk vs. Metzgar* (Pa. March 25, 1889), 17 Atl. Rep. 315.

As to law of newspaper libel, see full discussion in notes 15 Am. St. Rep. 333 and 16 Am. St. Rep. 544.

90. SAME—CRITICISM OF PUBLIC OFFICER.—In case of public officers, public policy demands that their official conduct should be open to unrestricted criticism in which no malice is implied by law, and which must express malice in order to render the author liable.—*Wilson vs. Fitch*, 41 Cal. 363, 378.

91. Question of good faith is for the jury.—*Hamilton vs. Eno*, 81 N. Y. 116; *Brooks vs. Harrison*, 91 N. Y. 84, 89; *Byam vs. Collins*, 111 N. Y. 143, 162, 7 Am. St. Rep. 726, 19 N. E. Rep. 75; *Holmes vs. Jones*, 121 N. Y. 461, 467, 24 N. E. Rep. 701; *Lally vs. Emery*, 59 Hun (N. Y.) 239, 12 N. Y. Supp. 785.

92. Question of privilege is for the court.—

Hamilton vs. Eno, 81 N. Y. 116; Byam vs. Collins, 111 N. Y. 143, 162, 7 Am. St. Rep. 726, 19 N. E. Rep. 75; Lovell vs. Houghton, 116 N. Y. 520, 525, 22 N. E. Rep. 1046, 6 L. R. A. 363.

See par. 98 et seq. this note.

93. SAME—SAME—IMPUTING CRIME.—Publication in newspaper concerning either public officer or candidate for elective office (see par. 98 this note), which falsely imputes to him a crime, is not privileged by the occasion, either absolutely or qualifiedly, but such publication is actionable per se; the law imputing malice to publisher or author.—Bronson vs. Bruce, 59 Mich. 467, 60 Am. Rep. 307, 26 N. W. Rep. 671.

94. Same—Same—Publication charging that report of public official recommending certain kind of street pavement was written under dictation of manufacturer of such pavement, and that he had been paid for his report, is not privileged.—Hamilton vs. Eno, 81 N. Y. 116.

95. Public rumors and general suspicions do not justify defamatory publication and cannot be proved in mitigation.—Wilson vs. Fitch, 41 Cal. 363, 384; Lick vs. Owen, 47 Cal. 252, 258; Chamberlin vs. Vance, 51 Cal. 75, 85; Preston vs. Frey, 91 Cal. 107, 110, 27 Pac. Rep. 533; Taylor vs. Hearst, 107 Cal. 262, 269, 270, 40 Pac. Rep. 392.

96. Same—Same—Trustee of a private corporation is not public officer in such sense that the criticism of him in a newspaper is privileged; and he is not, in an action for libel, required to prove express malice.—Wilson vs. Fitch, 41 Cal. 363, 382, 383.

97. "While communication from one voter to another concerning character of candidate for public office may be privileged, and consequently excusable, even though it turns out to have been untrue, yet the reckless repetition of a mere rumor, without any attempt at investigation of its truth or probability, is not within the protection of the rule."—Burke vs. Mascariich, 81 Cal. 302, 22 Pac. Rep. 673.

98. CRITICISM OF CANDIDATE FOR PUBLIC OFFICE, when shown to be just, proper, made in good faith, without malice, and for public good, for the purpose, as supposed by the person at the time, to prevent an incompetent and unfit and unsuitable person from receiving majority of votes of electors of the district, is prima facie privileged, and the law will require of party who complains of the article to show that same was published with bad motives, and not for good ends and purposes. . . . When that is shown that privilege vanishes, and it is no longer a protection to person apparently covered by it in the first instance.—Bronson vs. Bruce, 59 Mich. 467, 60 Am. Rep. 307, 26 N. W. Rep. 671.

99. "That electors should have right to assemble, and freely and openly examine fitness and qualifications of candidates for public offices, and communicate their opinions to others, is a position which I most cordially accede. But there is wide difference between this privilege and right irresponsibly to charge candidate with direct, specific, and unfounded crimes. It would, in my judgment, be a monstrous doctrine to establish, and when a man becomes a candidate for an elective office he

thereby gives to others a right to accuse him of any imaginable crime with impunity. Candidates have rights, as well as electors; and those rights and privileges must be so guarded and protected as to harmonize one with the other."—Lewis vs. Few, 5 John. (N. Y.) 1, 35.

100. "It is not only the privilege, but the duty, of the public press to discuss before electors the fitness and qualifications of candidates for public office conferred by election of the people; and when a man becomes such a candidate, he must be considered as putting his character in issue, so far as respects his fitness and qualification for the office, and that every person who engages in discussion, whether private conversation, public speech, or in the newspapers, may, while keeping in proper limits and acting in good faith, be regarded and protected as one engaged in the discharge of a duty. But it is not believed that this rule can be legitimately carried to the extent of justifying a publication which imputes to a candidate for office the commission of a crime, merely because he is seeking office."—Upton vs. Hume, 24 Oreg. 420, 428, 41 Am. St. Rep. 863, 866, 33 Pac. Rep. 810, 21 L. R. A. 493.

101. SAME—CRITICISM OF TEACHER'S METHODS AND ABILITY by superintendent of schools, published in newspaper interview during pendency of controversy between the two, held privileged and not libelous, in O'Connor vs. Sill, 60 Mich. 175, 27 N. W. Rep. 13.

102. Publication in newspaper by teacher in a school for the training of teachers that a pupil therein, by her conduct in class, by her behavior in and around the building, and by her spirit, as exhibited in numberless personal interviews, has shown herself tricky and unreliable, and almost destitute of those womanly and honorable characteristics that should be first requisites in a teacher,—is libelous per se.—Dixon vs. Allen, 69 Cal. 527, 11 Pac. Rep. 179.

VI. REPORTS OF OFFICIAL PROCEEDINGS.

103. FAIR ACCOUNT, AND UNBIASED REPORT OF—held privileged.—McBee vs. Fulton, 47 Md. 403, 28 Am. Rep. 465; Cincinnati Gazette Co. vs. Timberlake, 10 Ohio St. 548, 78 Am. Dec. 285.

VII. MALICE AS AFFECTING PRIVILEGE CLAIMED.

104. WORDS SPOKEN IN MALICE—Not privileged.—If there be malice, the communication cannot be privileged, and the question of the existence of malice is one for the jury.—Sealer vs. Montgomery (Cal. Dec. 3, 1888), 19 Pac. Rep. 686, 687.

105. Words spoken in malice cannot in any sense be considered privileged, and are actionable.—Preston vs. Frey, 91 Cal. 107, 112, 27 Pac. Rep. 533.

106. Privileged publication cannot be pleaded where there is ample and uncontradicted proof of express malice.—Schomberg vs. Walker, 132 Cal. 224, 230, 64 Pac. Rep. 290.

107. COMMUNICATION WHICH WOULD OTHERWISE BE PRIVILEGED, is not so if made with malice in fact,—that is, through hatred, ill-will, and malicious desire to injure;

and a statement privileged in the first instance may lose its privileged character by being repeated and persisted in after knowledge of its falsity has been brought home to its author.—*Erber vs. Dun*, 12 Fed. Rep. 526, 530.

108. Imputation of a crime presumes existence of malice and this presumption is not rebutted by an allegation or proof that the slanderous words were believed to be true, and cannot be pleaded to have been a privileged communication.—*Jarman vs. Rea*, 137 Cal. 339, 250, 70 Pac. Rep. 216.

109. Mode of proof.—See § 48 and note.

VIII. QUESTION OF LAW AND FACT.

110. WHETHER COMMUNICATION BE PRIVILEGED or not is question for the court, and not for the jury.—*Hamilton vs. Eno*, 81 N. Y. 116; *Briggs vs. Garrett*, 111 Pa. St. 404, 56 Am. Rep. 274.

See para. 91, 92 this note.

111. Ordinarily, whether publication is privileged is question of law, unless the facts

upon which defendant bases his claim of privilege are challenged by plaintiff, in which case it is for the jury to determine whether the facts upon which claim is sought to be founded exist.—*Warner vs. Press Pub. Co.*, 132 N. Y. 181, 30 N. E. Rep. 393.

112. It is sufficient to confer privilege that the matter is of public interest to the community.—*Briggs vs. Garrett*, 111 Pa. St. 404, 56 Am. Rep. 274 (fitness of candidate for judge).

113. Question of malice is for jury.—See para. 91 this note.

IX. PLEADING.

114. As to pleading generally.—See Code Civ. Proc., § 460 and note.

115. Privileged publication must be pleaded in an action for libel.—*Gilman vs. McClatchy*, 111 Cal. 606, 615, 44 Pac. Rep. 241. See *Goodwin vs. Daniels*, 39 Mass. (7 Allen) 61; *Langton vs. Hagerty*, 35 Miss. 150, 161; *Bell vs. Parke*, 11 J. R. C. L. 413.

§ 48. **MALICE NOT INFERRED.** In the cases provided for in subdivisions three, four, and five, of the preceding section, malice is not inferred from the communication or publication.

History: Enacted March 21, 1872; amended March 26, 1895, Stats. and Amdts. 1895, p. 168. In force March 26, 1895.

1. Applied, cited, construed, referred to, etc.
2. Malice classified and defined.
3. Presumption of malice from publication—When not actionable per se.
- 4-8. Same—When actionable per se.
9. Same—Legal—Not rebuttable.
10. Same—In fact—Rebuttable.
- 11-14. Same—Same—Surrounding circumstances.
- 15-17. Same—Same—Legal excuse for publication.
18. Repetitions—Generally.
- 19-22. Same—Similitude.
23. Same—Portion privileged.
24. Same—Taking depositions to prove truth.
25. Same—Asserting truth in answer.
26. Same—Previous publication.
- 27-30. Same—Subsequent to action begun.
31. Other different publications.
- 32, 33. Pleading—Alleging malice in complaint.
- 34-36. Question for jury.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Thompson vs. White*, 70 Cal. 135, 136, 11 Pac. Rep. 564 (referred to); *Harris vs. Zanone*, 93 Cal. 59, 70, 28 Pac. Rep. 845 (referred to in application of § 47); *Schomberg vs. Walker*, 132 Cal. 224, 229, 64 Pac. Rep. 290 (construed and applied).

2. **MALICE CLASSIFIED AND DEFINED**—Malice in law and in fact.—Malice, as pertaining to libel and slander, may be divided into two classes, to wit: malice in law and malice in fact. Malice in law is wrongful act done intentionally without just cause or excuse. Malice in fact is only material in libel and establishes right to recover exemplary damages or to defeat the defendant's plea that publication is privileged. Malice in fact is spiteful or rancorous disposition which causes act to be done for mischief.—*Childers vs. San*

Jose Mercury Print. & Pub. Co., 105 Cal. 284, 45 Am. St. Rep. 40, 38 Pac. Rep. 903.

See notes 2 L. R. A. 129, 6 L. R. A. 363, 7 Fed. Cas. 624.

As to insanity as a defense, see post § 39 note para. 52, 53.

3. **PRESUMPTION FROM PUBLICATION**—When not actionable per se.—Malice must be established by extrinsic proof and not inferred from communication or publication.—*Harris vs. Zanone*, 93 Cal. 59, 70, 28 Pac. Rep. 845.

4. **When actionable per se**.—Section 45 of the Civil Code does not enact new rule of evidence. When language is actionable, and it does not appear that it is privileged, it is presumed to be both false and malicious, and no evidence of falsehood or malice is necessary other than publication itself.—*Dixon vs. Allen*, 69 Cal. 527, 11 Pac. Rep. 179; *Childers vs. San Jose Mercury Print. & Pub. Co.*, 105 Cal. 284, 289, 45 Am. St. Rep. 40, 38 Pac. Rep. 903.

See notes 72 Am. Dec. 429; 45 Am. St. Rep. 43.

5. "To constitute libel there must be malice, actual or implied, on part of publisher. Actual malice exists when publication is made through motives of ill-will and with intent to injure or defame, and law presumes malice when article published is libelous per se. Such malice is called malice in law, and it signifies wrongful act intentionally done."—*Taylor vs. Hearst*, 107 Cal. 262, 269, 40 Pac. Rep. 392. See *Byam vs. Collins*, 111 N. Y. 143, 7 Am. St. Rep. 726, 19 N. E. Rep. 75.

6. **Deliberate publication of calumny**, when publisher knows it false, or has reason to believe it untrue, or without having reason to believe it true, is conclusive evidence of malice.—*Bodwell vs. Osgood*, 20 Mass. (3 Pick.) 379, 15 Am. Dec. 228.

7. Language being actionable, when it does not appear that it is privileged, it is presumed to be both false and malicious and no evidence of falsehood or malice is necessary other than the publication itself.—*Dixon vs. Allen*, 69 Cal. 527, 529, 11 Pac. Rep. 179. See *Mowry vs. Raabe*, 89 Cal. 606, 609, 27 Pac. Rep. 157; *Childers vs. San Jose Mercury Print. & Pub. Co.*, 105 Cal. 284, 289, 45 Am. St. Rep. 40, 38 Pac. Rep. 903; *Taylor vs. Hearst*, 107 Cal. 262, 276, 40 Pac. Rep. 392.

8. Nonsuit properly denied when evidence of plaintiff proves, *prima facie*, that publication was false and malicious.—*Dixon vs. Allen*, 69 Cal. 527, 529, 11 Pac. Rep. 179.

9. SAME—LEGAL—Not rebuttable.—“If publication be libelous, and not privileged, the law implies that it is malicious. This is not mere presumption, which may be wholly overcome by proof, but is a legal conclusion which cannot be rebutted. But whilst absence of actual malice cannot be shown as bar to action, defendant may plead and prove ‘any mitigating circumstance to reduce amount of damages.’”—*Lick vs. Owen*, 47 Cal. 252, 258; *Childers vs. San Jose Mercury Print. & Pub. Co.*, 105 Cal. 284, 288, 45 Am. St. Rep. 40, 38 Pac. Rep. 903. See *Taylor vs. Hearst*, 107 Cal. 262, 270, 272, 40 Pac. Rep. 392.

10. Presumption of malice in fact from libelous character of publication not conclusive but disputable, and may be rebutted by any proper evidence.—*Childers vs. San Jose Mercury Print. & Pub. Co.*, 105 Cal. 284, 45 Am. St. Rep. 40, 38 Pac. Rep. 903.

11. Surrounding circumstances.—Publisher of alleged libel which is not privileged should, in order to rebut presumption of malice, be given first opportunity to show circumstances under which publication made, the sources of information and motives which induced publication.—*Wilson vs. Fitch*, 41 Cal. 363, 378.

12. But to entitle such circumstances to be admissible in evidence, they must tend to rebut presumption of malice or reduce its degree.—*Wilson vs. Fitch*, *supra*. See *Lick vs. Owen*, 47 Cal. 252, 258; *Chamberlin vs. Vance*, 51 Cal. 75, 85; *Preston vs. Frey*, 91 Cal. 107, 110, 27 Pac. Rep. 533; *Taylor vs. Hearst*, 107 Cal. 262, 269-270; 40 Pac. Rep. 392; *Republican Pub. Co. vs. Miner*, 12 Colo. 1187-1188, 20 Pac. Rep. 345; *Thompson vs. Powning*, 15 Nev. 195; *People vs. Glassman*, 12 Utah 238, 247, 42 Pac. Rep. 956.

13. As to evidence of general reports in mitigation of damages, see note 13 Am. Dec. 499.

14. As going to question of malice it is a general rule that publication and all circumstances attending and surrounding it may be given in evidence; and evidence that defendant in publishing article in question relied entirely upon publication in another newspaper for his information, and did not verify that report, is competent upon the question of negligence or of careless disregard for rights of others, notwithstanding fact that article published in the other newspaper was correct.—*Turner vs. Hearst*, 115 Cal. 394, 399, 47 Pac. Rep. 129.

15. Malice presumed in false publication can in but one way be evaded, and that is by show-

ing legal excuse for act of publication, i. e., by showing that it was privileged.—*Dixon vs. Allen*, 69 Cal. 527, 529, 11 Pac. Rep. 179.

16. It is competent for defendant to show, under general issue, that alleged libel is privileged, or, as otherwise expressed, that it is published on some lawful occasion.—*Schomberg vs. Walker*, 132 Cal. 224, 229, 64 Pac. Rep. 290.

17. Where publication of libelous article is admitted, implication of malice which law makes can be rebutted in no way except by proof of truth of charge; and it is not error to refuse to permit defendant to testify that he had no malice at time of publication.—*Mowry vs. Raabe*, 89 Cal. 606, 609, 27 Pac. Rep. 157.

18. REPETITION—Generally.—Repetition of slander between date when cause of action arose and date when action was begun, other than those set out in complaint, may be shown on question of malice.—*Chamberlin vs. Vance*, 51 Cal. 75; *Westerfield vs. Scripps*, 119 Cal. 607, 611, 51 Pac. Rep. 958; *Cruikshank vs. Gordon*, 118 N. Y. 178, 23 N. E. Rep. 467. See *Bodwell vs. Swan*, 20 Mass. (3 Pick.) 378; *Kennedy vs. Gifford*, 19 Wend. (N. Y.) 296, 306.

19. Similitude—Such repetition, to be admissible, is not required to conform to any exact standard of similitude in terms with original words, so long as they are of similar import.—*Westerfield vs. Scripps*, 119 Cal. 607, 611, 51 Pac. Rep. 958.

20. Words substantially same as those declared on, spoken or published by defendant after commencement of action, are admissible on question of malice, but not in aggravation of damages.—*Chamberlin vs. Vance*, 51 Cal. 75; *Harris vs. Zanone*, 93 Cal. 59, 69, 28 Pac. Rep. 845; *Westerfield vs. Scripps*, 119 Cal. 607, 611, 51 Pac. Rep. 958; *Hearne vs. De Young*, 119 Cal. 670, 677, 52 Pac. Rep. 150, 499.

21. Second publication, although not *verbatim et literatim*, but which is substantial reiteration of former article, and which refers specifically to first article by date of publication, with statement of its subject-matter in terms clearly libelous in themselves, and with added vice of very clear implication of truth of original statement, is admissible on question of actual malice; and fact that it contains reference to commencement of the action which, standing alone, might be regarded as privileged, does not operate to exclude it so long as there were statements therein not covered by such privilege.—*Westerfield vs. Scripps*, 119 Cal. 607, 610, 51 Pac. Rep. 958. See also *Hearne vs. De Young*, 119 Cal. 670, 676, 52 Pac. Rep. 150, 499.

22. If words used relate to same subject-matter and are of a character from which a malicious purpose may be inferred, they are admissible.—*Westerfield vs. Scripps*, 119 Cal. 607, 611, 51 Pac. Rep. 958. See *Chamberlin vs. Vance*, 51 Cal. 75; *Harris vs. Zanone*, 93 Cal. 59, 68, 28 Pac. Rep. 845.

23. Part of second repetition or publication privileged will be justification for publication only so far as privileged, and balance of article will be admissible in evidence.—*Ibid*.

24. Taking depositions to prove truth of libel, and then abandoning defense at trial,

may be properly referred to jury on question of malice, but cannot be considered in aggravation of damages.—*Bodwell vs. Osgood*, 20 Mass. (3 Pick.) 379, 15 Am. Dec. 228.

25. Truth asserted in answer of statements of original publication without apparently any proper investigation to ascertain truth, and without any effort to establish it at trial, is circumstance to be considered by jury as tending to contradict defendant's evidence on question of malice.—*Westerfield vs. Scripps*, 119 Cal. 607, 611, 51 Pac. Rep. 958. See *Chamberlin vs. Vance*, 51 Cal. 75, 84; *Cruikshank vs. Gordon*, 118 N. Y. 178, 23 N. E. Rep. 457.

26. Previous publication of libel is properly admitted to show malice, although bar of statute against an action on such previous publication has intervened.—*Gribble vs. Pioneer Press Co.*, 34 Minn. 842, 25 N. W. Rep. 710; *Evening Journal Assoc. vs. McDermott*, 44 N. J. L. (15 Vr.) 430, 43 Am. Rep. 392; *Barrett vs. Long*, 3 H. L. Cas. 395.

27. Slandereous words repeated after action was begun competent to be shown on question of malice.—*Norris vs. Elliott*, 39 Cal. 72, 74; *Hearne vs. De Young*, 119 Cal. 670, 677, 52 Pac. Rep. 150, 499. See *Williams vs. Miner*, 18 Conn. 472; *Swift vs. Dickerman*, 31 Conn. 289; *Ward vs. Dick*, 47 Conn. 300, 36 Am. Rep. 75.

28. Repetition after commencement of action admissible on question of malice, but not as basis for recovery of additional damage.—*Chamberlin vs. Vance*, 51 Cal. 75, 85.

29. A contrary doctrine is held by New York Court of Appeals in *Frazier vs. McCloskey*, 60 N. Y. 337, 19 Am. Rep. 193, in which Mr. Justice Rapallo says: "It has been decided that repetition of words charged in complaint, or speaking of them at times other than those laid in complaint, may be shown; but in all these cases, the occasions on which slander was uttered were before the commencement of action. In *Root vs. Lowndes*, 6 Hill (N. Y.) 518, 519, 41 Am. Dec. 762, admissibility of the evidence was placed, by Bronson, J., upon ground that the judgment would be bar to another action. In *Titus vs. Sumner*, 44 N. Y. 366, evidence was admitted that same slanderous charge was made by defendant at times prior to those laid in complaint; but ruling was sustained by the Court of Appeals solely on ground that at time of trial an action for such prior slander was barred by statute of limitations. The same decision was made, and for same reason, in *Inman vs. Foster*, 8 Wend. (N. Y.) 602. The plaintiff should never be permitted to give in evidence words which might be subject of an-

other action. *Root vs. Lowndes*, 6 Hill (N. Y.) 518, per Bronson, J.; *De Fries vs. Davis*, 7 Car. & P. 112, 32 Eng. C. L. 460, per Tindal, Ch. J. The reason is obvious—defendant might be compelled to pay damages twice for same injury."

30. This case, though given a place in a selection of leading cases, is of very doubtful authority, both on principle and precedent in its own state. It is contrary to the ruling in *Johnson vs. Brown*, 57 Barb. (N. Y.) 126, and is distinguished in *Flanders vs. Goff*, 25 Hun (N. Y.) 553.

31. "EVIDENCE OF CHARGE OF DIFFERENT NATURE, and at different time from that alleged in declaration, is not admissible to prove malice, or for any purpose. This is in effect only another form of the rule that actionable words not counted upon cannot be given in evidence unless suit upon them is barred by statute of limitations, and their admission, where statute has run, is opposed to principle, as it, in effect, restores cause of action which has been taken away by the law."—*Root vs. Lowndes*, 6 Hill (N. Y.) 518, 41 Am. Dec. 762; quoted with approval in *Stern vs. Lowenthal*, 77 Cal. 340, 19 Pac. Rep. 579.

32. PLEADING—Complaint need not allege that publication was malicious.—*Dixon vs. Allen*, 69 Cal. 527, 528, 11 Pac. Rep. 179.

Pleading and proceeding in action for slander or libel.—See Code Civ. Proc. § 460 and note.

33. "Prior to codes, although courts held that malice, meaning bad intent, was necessary ingredient of libel, they also held that it was not absolutely necessary to allege malice in declaration, and the very common if not universal introduction of allegation of malice in declaration for libel, was rather to exclude the supposition that the publication had been made on some innocent occasion."—*Dixon vs. Allen*, supra.

34. MALICE IN PUBLICATION OF LIBEL. is question for the jury.—*Bodwell vs. Osgood*, 20 Mass. (3 Pick.) 379, 15 Am. Dec. 228.

35. Whether malice exists to warrant exemplary or punitive damages is ordinarily one of fact for the jury.—*Taylor vs. Hearst*, 107 Cal. 262, 271, 40 Pac. Rep. 392.

36. Positive testimony for defendants in libel action, although not directly contradicted, that original article was published without their knowledge and with no actual malice, is not conclusive upon question of malice in fact, where there are circumstances from which jury might find against such positive statements.—*Westerfield vs. Scripps*, 119 Cal. 607, 611, 51 Pac. Rep. 958.

§ 49. PROTECTION OF PERSONAL RELATIONS. The rights of personal relations forbid:

1. The abduction of a husband from his wife, or of a parent from his child.
2. The abduction or enticement of a wife from her husband, or a child from a parent, or from a guardian entitled to its custody.
3. The seduction of a wife, daughter, orphan sister, or servant.
4. Any injury to a servant which affects his ability to serve his master.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 334, held unconstitutional; see history, § 4 ante; amended March 7, 1905, Stats. and Amdts. 1905, c. LXX, p. 68.

1. Applied, cited, construed, referred to, etc.
2. No distinction as to means employed.
- 3-5. Enticing husband.
- 6, 7. Abduction, enticing or alienating wife.
8. Seduction—Of wife—What constitutes.
9. Same—Former action by infant.
10. Same—As criminal offense.
11. Same—Limitations of actions for.
12. Interference between master and servant—Relationship.
13. Same—Liability.
14. Same—Obligation to render service.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Boysen vs. Thorn*, 98 Cal. 578, 582, 33 Pac. Rep. 492, 21 L. R. A. 233 (applied); *Humphrey vs. Pope*, 122 Cal. 253, 256, 259, 54 Pac. Rep. 847 (construed and applied).

2. **NO DISTINCTION IS MADE BETWEEN DIFFERENT MEANS** which may be employed to disturb or destroy any of relationships mentioned in this section, for it is direct interference with relation which is forbidden, whether relation be founded in natural right, as parent and child, or created by law, as guardian and ward, or by personal contract, as between master and servant, and therefore does not depend upon mode or means in, or by which, relation may be created.—*Boysen vs. Thorn*, 98 Cal. 578, 582, 33 Pac. Rep. 492, 21 L. R. A. 233.

3. **ENTICING HUSBAND**.—Wife should be as much entitled to sue for violence of her personal right, where her husband has been taken away from her by enticement, as should husband when his wife has been enticed from him.—*Humphrey vs. Pope*, 122 Cal. 253, 256, 54 Pac. Rep. 847. See *Williams vs. Williams*, 20 Colo. 51, 37 Pac. Rep. 614; *Hodgkinson vs. Hodgkinson*, 43 Neb. 269, 47 Am. St. Rep. 759, 61 N. W. Rep. 577, 27 L. R. A. 120; *Bernett vs. Bennett*, 116 N. Y. 584, 23 N. E. Rep. 17.

See notes 6 L. R. A. 553; 46 Am. St. Rep. 470.

4. **Compare**: *Duffies vs. Duffies*, 76 Wis. 374, 20 Am. St. Rep. 79, 45 N. W. Rep. 522.

5. **Wife may maintain action for damages for alienation of her husband's affections**, under authority of this section and § 370 of Code of Civil Procedure. This right of the wife to sue in her own name cannot be affected by question of whether or not damages recovered in such action would be community property.—*Humphrey vs. Pope*, 122 Cal. 253, 256, 54 Pac. Rep. 847.

See Code Civ. Proc. § 370.

6. **ABDUCTION IS TAKING AWAY OF WIFE**, child, or ward, by fraud and persuasion or open violence. In private or civil law, it is act of taking away man's wife by violence or persuasion.—*Humphrey vs. Pope*, 122 Cal. 253, 256, 54 Pac. Rep. 847.

7. **Enticing or alienation of wife—Husband may maintain action to recover damages therefor**.—*Bigaouette vs. Paulet*, 134 Mass. 123, 45 Am. Rep. 307; *Rinehart vs. Bills*, 32 Mo. 534, 52

Am. Rep. 385; *Barbee vs. Armstead*, 10 Ired. (N. C.) L. 530, 51 Am. Dec. 404; *Preston vs. Bowers*, 13 Ohio St. 1, 82 Am. Dec. 430; *Fratini vs. Caslini*, 66 Vt. 273, 44 Am. St. Rep. 843, 29 Atl. Rep. 252.

8. **SEDUCTION—Of wife—What constitutes**.—A woman who engages in criminal indulgence with her male acquaintances as opportunities present themselves, and who will make opportunities for that purpose, cannot be said to have been seduced.—*Patterson vs. Hayden*, 17 Oreg. 238, 11 Am. St. Rep. 822, 21 Pac. Rep. 129.

See note 87 Am. Dec. 405.

9. **Of infant—Former action by infant for seduction**, in which fact of infancy was not averred, and demurrer was sustained on ground that right of action was barred, is no bar to action by her through her guardian, averring infancy.—*Morrell vs. Morgan*, 65 Cal. 575, 4 Pac. Rep. 580.

10. **As a criminal offense**, see Pen. Code, §§ 266, 268 and notes.

11. **Limitation of actions for**, see Code Civ. Proc. § 340 note par. 34 and § 352 and note.

12. **INTERFERENCE BETWEEN MASTER AND SERVANT—Relationship of master and servant**, though that relation is now created solely by contract, seems to stand upon different grounds from relationship existing under contract not creating the relationship of master and servant.—*Boysen vs. Thorn*, 98 Cal. 578, 582, 33 Pac. Rep. 492, 21 L. R. A. 233.

13. **Liability**.—"If one contracts upon consideration to render personal services for another, any third person who maliciously, that is, without lawful justification, induces party who contracted to render service, to refuse to do so, is liable to injured party in action for damages. It need scarcely be said that there is nothing in this principle inconsistent with personal freedom, else we should not find it in laws of the freest and most enlightened states in the world. It extends impartially to every grade of service, from most brilliant and best paid to the most homely, and it shelters nearest and tenderest domestic relations from interference of malicious intermeddlers. It is not derived from any idea of property by one party in other, but as an inference from obligation of contract freely made by competent persons."—*Haskins vs. Royster*, 70 N. C. 601, 16 Am. Rep. 780. See *Huff vs. Watkins*, 15 S. C. 82, 40 Am. Rep. 680; *Old Dominion S. S. Co. vs. McKenna*, 30 Fed. Rep. 48.

See notes 22 Am. Rep. 485; 11 Am. St. Rep. 474; 60 Am. St. Rep. 260.

14. **Obligation to render service—Necessary to be shown**.—"To constitute enticement of servant from his master's service, within the meaning of the law, inducements must be presented to him, while he is in the service, which cause him to leave it. After he has, of his own accord, left such service, and while he is out of it, he cannot be enticed from it."—*Caughey vs. Smith*, 47 N. Y. 244.

§ 50. **RIGHT TO USE FORCE**. Any necessary force may be used to protect from wrongful injury the person or property of oneself [one's self], or of a wife,

husband, child, parent, or other relative, or member of one's family, or of a ward, servant, master, or guest.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 184.

§ 51. RIGHTS OF CITIZENS IN PLACES OF PUBLIC ACCOMMODATION OR AMUSEMENT. All citizens within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities, and privileges of inns, restaurants, hotels, eating-houses, barber-shops, bath-houses, theaters, skating-rinks, and all other places of public accommodation or amusement, subject only to the conditions and limitations established by law and applicable alike to all citizens.

History: Added by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 334, held unconstitutional; see history, § 4 ante; re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXIII, p. 553.

§ 52. DAMAGES RECOVERABLE FOR VIOLATION OF PRECEDING SECTION. Whoever violates any of the provisions of the last preceding section, [1] by denying to any citizen, except for reasons applicable alike to every race or color, the full accommodations, advantages, facilities, and privileges in said section enumerated, or [2] by aiding or inciting such denial, or whoever [3] makes any discrimination, distinction, or restriction on account of color or race, or except for good cause, applicable alike to all citizens of every color or race whatever, in respect to the admission of any citizen to, or his treatment in, any inn, hotel, restaurant, eating-house, barber-shop, bath-house, theater, skating-rink, or other public place of amusement or accommodation, whether such place is licensed or not, or whoever aids or incites such discrimination, distinction, or restriction, for each and every such offense is liable in damages in an amount not less than fifty dollars, which may be recovered in an action at law brought for that purpose.

History: Added by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 334, held unconstitutional; see history, § 4 ante; re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXIII, pp. 553-554.

§ 53. WRONGFUL REFUSAL TO ADMIT PERSON TO PLACES OF PUBLIC AMUSEMENT. It is unlawful for any corporation, person, or association, or the proprietor, lessee, or the agents of either, of any opera house, theater, melodeon, museum, circus, caravan, race-course, fair, or other place of public amusement or entertainment, to refuse admittance to any person over the age of twenty-one years, who presents a ticket of admission acquired by purchase, or who tenders the price thereof for such ticket, and who demands admission to such place.

[Who may be excluded.] Any person under the influence of liquor, or who is guilty of boisterous conduct, or any person of lewd or immoral character, may be excluded from any such place of amusement.

History: Added by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 335, held unconstitutional; see history, § 4 ante; re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXIII, p. 554.

§ 54. DAMAGES RECOVERABLE FOR SUCH REFUSAL. Any person who is refused admission to any place of amusement contrary to the provisions of the last preceding section, is entitled to recover from the proprietor, lessee, or their agents, or from any such person, corporation, or association, or the directors thereof, his actual damages, and one hundred dollars in addition thereto.

History: Added by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 335, held unconstitutional; see history, § 4 ante; re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXIII, p. 554.

- 35. Solemnization—Necessity—Generally.
- 36. Same—Same—Marriage without consent followed by mutual assumption.
- 37. Same—Same—Particular form of ceremony.
- 38. Same—Same—Propriety of requiring public declaration.
- 39-41. Same—Same—Solemnization—Code requirements.
- 42, 43. Same—Form—Generally.
- 44. Same—Same—Marriage performed on high seas.
- 45-48. Same—Form of solemnization—Person officiating.
- 49-54. Completion, consummation, etc.—Generally.
- 55, 56. Same—Assumption of marital rights, duties and obligations.
- 57, 58. Same—Same—Marital rights and obligations defined.
- 59. Same—Same—"Duties" and "obligations" defined.
- 60. Same—Same—Agreement attempting to limit duration, etc.
- 61. Same—Same—Construction and criticism.
- 62, 63. Same—Same—Cohabitation.
- 64, 65. Same—Same—Same—Evidence of assumption of marital rights.
- 66, 67. Same—Same—Commencement of true and open matrimonial cohabitation.
- 68, 69. Same—Evidence of consent.
- 70. Same—Same—Registering as man and wife at hotel or on steamer.
- 71. Same—Same—Prosecution for bigamy.
- 72-76. Same—Same—Public assumption.
- 77. Marriage by laws of nature—Casual commerce between sexes.
- 78. Same—Cohabitation between Indian man and woman.

IV. Proof of Marriage.

- 79-82. Generally—Admission of marriage, etc.
- 83, 84. Promise of marriage for purpose of seduction—Boy under eighteen.

I. IN GENERAL.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Sharon vs. Sharon (dis. op.), 67 Cal. 185, 212, 7 Pac. Rep. 456, 635, 3 Id. 709 (construed and applied); Sharon vs. Sharon, 75 Cal. 1 (construed and applied on pp. 8, 12, 15, 16, 17, 50, 51) (construed on pp. 19, 21, 22, 23, 24, 25, 35) (in dis. op.) (construed and applied on pp. 57, 58, 59, 72, 73, 74, 76) (referred to p. 14), 16 Pac. Rep. 345; Sharon vs. Sharon, 79 Cal. 633, 634 (applied on pp. 634, 644, 661, 667, construed and applied on 669), 22 Pac. Rep. 26, 131; Wadsworth vs. Wadsworth, 81 Cal. 182, 189, 22 Pac. Rep. 648 (construed and applied); Mott vs. Mott, 82 Cal. 413, 416, 417, 22 Pac. Rep. 1140 (construed and applied); Kilburn vs. Kilburn, 89 Cal. 46, 50, 23 Am. St. Rep. 447, 26 Pac. Rep. 638 (construed and applied); People vs. Beevers, 99 Cal. 286, 288, 33 Pac. Rep. 344 (construed and applied); Toon vs. Huberty, 104 Cal. 260, 261, 37 Pac. Rep. 944 (applied); People vs. Lehmann, 104 Cal. 631, 633, 38 Pac. Rep. 422 (construed and applied); Norman vs. Norman, 121 Cal. 620, 624, 66 Am. St. Rep. 74, 54 Pac. Rep. 143, 42 L. R. A. 343 (applied,—by blunder of reporter cited in headlines as Norman vs. Thomson); Har-

ron vs. Harron, 128 Cal. 308, 310, 60 Pac. Rep. 932 (applied); Estate of Richards, 133 Cal. 524, 527, 65 Pac. Rep. 1034 (applied).

2. CONSTRUCTION—Generally.—Purpose of statute can only be derived from its words, read in the light of previous law, and if it is so confused and uncertain that it can be given no intelligent meaning, we must consider the common law unchanged by it.—Sharon vs. Sharon, 75 Cal. 1, 18, 16 Pac. Rep. 345.

3. Same—Public policy of the state can only be ascertained by reference to constitution and statutes. Courts cannot create a policy, and then declare, in support of policy so created, that legislature must have meant what it has not said.—Sharon vs. Sharon, 75 Cal. 1, 13, 16 Pac. Rep. 345.

4. Head-notes are entitled to more consideration than the title to an entire act, as they are parts of the statute limiting and defining the sections to which they refer.—Barnes vs. Jones, 51 Cal. 303; Ex parte Koser (dis. op.), 60 Cal. 177, 206; Williams vs. People, 45 Barb. (N. Y.) 201; People vs. Mollneux, 53 Barb. (N. Y.) 15, 40 N. Y. 119; Sharon vs. Sharon, 75 Cal. 1, 16, 16 Pac. Rep. 345. See Pol. Code §4482 note par. 6.

This doctrine should be limited to the codes, because head-notes to sections of statutes are not part of the enactment, but supplied by some hired clerk not a member of legislature, who gives to the acts passed their chapters and "head-notes" as "side-lines" in the official volume.

5. COMMON-LAW MARRIAGE VALID.—Marriages clearly proved under the common law are valid.—Sharon vs. Sharon, 75 Cal. 1, 13, 16 Pac. Rep. 345.

6. Common law underlies all our legislation, and furnishes rule of decision, except in so far as the statutes have changed the common law, and when common law is departed from by provision of code, effect is to be given to the provision to the extent—and only to the extent—of the departure. This is not saying that code must be strictly construed, as those terms were sometimes applied to classes of statutes prior to codes. Provisions of code expressed in intelligible language must be given full force and effect. But, under pretense of an interpretation,—or explanation in different language,—courts cannot add to significant terms of statute; nor, by resorting to conjecture, can they go beyond intent derivable from terms actually employed, considered with pre-existing law.—Sharon vs. Sharon, 75 Cal. 1, 28, 29, 16 Pac. Rep. 345.

II. AS A CONTRACTUAL RELATION OR STATUS.

7. IN GENERAL.—Marriage is personal relation arising out of civil contract, to which consent of parties capable of making it is necessary.—Mott vs. Mott, 82 Cal. 413, 415, 416, 22 Pac. Rep. 1140; Sharon vs. Sharon, 75 Cal. 1, 8, 16 Pac. Rep. 345.

8. Marriage as defined by section accords with that given by courts and law writers.—Sharon vs. Sharon, 75 Cal. 1, 8, 16 Pac. Rep. 345.

9. Marriage-state is a status, but it is one which results from contract.—Wadsworth vs. Wadsworth, 81 Cal. 182, 189, 15 Am. St. Rep. 38, 22 Pac. Rep. 648; Sharon vs. Sharon, 75 Cal. 1, 9, 16 Pac. Rep. 345.

10. Marriage must be viewed as act which determines character of new family group, and from which spring a number of relations, actual and possible, moral and legal; relations which, taken in their aggregate, constitute marriage as a status.—Sharon vs. Sharon (dis. op.), 67 Cal. 185, 212, 7 Pac. Rep. 456, 635, 3 Id. 709.

11. CONTRACT OUT OF WHICH MARRIAGE RELATION ARISES must be a contract then and there to become husband and wife.—Sharon vs. Sharon, 75 Cal. 1, 9, 16 Pac. Rep. 345; Sharon vs. Sharon, 79 Cal. 633, 669, 22 Pac. Rep. 131.

12. MARRIAGE CONTRACT is one by which a man and woman reciprocally engage to live with each other during their joint lives and to discharge towards each other the duties imposed by law upon husband and wife.—Mott vs. Mott, 82 Cal. 413, 415, 416, 22 Pac. Rep. 1140.

13. "Marriage is considered in every country as a contract, and may be defined to be a contract according to form prescribed by law, by which a man and woman capable of entering into such contract mutually engage with each other to live their whole lives together in state of union which ought to exist between a husband and his wife."—Sharon vs. Sharon, 75 Cal. 25, 16 Pac. Rep. 345; Kilburn vs. Kilburn, 89 Cal. 46, 50, 23 Am. St. Rep. 447, 26 Pac. Rep. 636.

14. Distinguished from present contract to marry, or act of becoming married, is the civil status of one man and one woman united in law for life, for the discharge to each other and to the community of the duties legally incumbent on those whose association is founded on the distinction of sex.—Sharon vs. Sharon, 75 Cal. 1, 9, 16 Pac. Rep. 345.

15. Marriage is regarded in law as more than mere contract; it is a status, a public institution.—Sharon vs. Sharon (dis. op.), 67 Cal. 185, 212, 7 Pac. Rep. 456, 635, 3 Id. 709; Sharon vs. Sharon, 75 Cal. 1, 8, 16 Pac. Rep. 345.

16. Personal relation created by contract is not merely a contract. The contract is the portal through which the parties enter into the relation of marriage, and they can enter into that relation in no other way.—Sharon vs. Sharon, 75 Cal. 1, 9, 16 Pac. Rep. 345.

17. ACTION FOR DIVORCE OR ANNULMENT OF MARRIAGE is at least in part for dissolution of a contract.—Wadsworth vs. Wadsworth, 81 Cal. 182, 189, 15 Am. St. Rep. 38, 22 Pac. Rep. 648.

18. ACTION FOR ANNULMENT OR DISSOLUTION OF MATRIMONIAL STATUS is not an action in equity, involving the personal and separate property of married women, the adjudication of antenuptial or postnuptial settlements and articles, or of marriage contracts absolutely void as against public policy or for fraud,—subjects of which chancery courts have jurisdiction; it is a statutory proceeding within a jurisdiction *sui generis*, which is

exercisable at discretion of court to which it has been confided; and judgments and orders rendered by court in exercise of its discretionary powers are not reviewable.—Sharon vs. Sharon (dis. op.), 67 Cal. 185, 212, 7 Pac. Rep. 456, 635, 3 Id. 709.

19. Cross-demand in a suit for divorce or annulment of marriage may be said to be one relating to contract upon which an action is brought, in the sense of this statute.—Lowell vs. Lowell, 55 Cal. 316; Coulthurst vs. Coulthurst, 58 Cal. 239; Wadsworth vs. Wadsworth, 81 Cal. 182, 189, 15 Am. St. Rep. 38, 22 Pac. Rep. 648; Mott vs. Mott, 82 Cal. 413, 416, 22 Pac. Rep. 1140; Wilson vs. Wilson, 40 Iowa 233.

20. Decree of divorce from bonds of matrimony is in effect an annulment of marriage contract.—Mott vs. Mott, 82 Cal. 413, 417, 22 Pac. Rep. 1140.

21. Contra: Statement to contrary in Haley vs. Haley, 74 Cal. 489, 491, 5 Am. St. Rep. 460, 16 Pac. Rep. 248, is but dictum, and therefore not applicable to the case.—Mott vs. Mott, 82 Cal. 413, 417, 22 Pac. Rep. 1140.

22. Dissolution of status does not leave marriage contract in force. Therefore if not left in force it must be dissolved by decree of divorce.—Wadsworth vs. Wadsworth, 81 Cal. 182, 189, 15 Am. St. Rep. 38, 22 Pac. Rep. 648.

23. CONTRACT BETWEEN MAN AND WOMAN TO LIVE AND COHABIT TOGETHER, or even to assume duties of husband and wife for limited period or so long as it may prove agreeable to both, has been held not to be an agreement to become husband and wife, out of which arises the relation of marriage.—Sharon vs. Sharon, 75 Cal. 1, 9, 16 Pac. Rep. 345.

24. An agreement to live with a man "as his true and lawful wife" is not contract of marriage.—Letters vs. Cady, 10 Cal. 533. See Kelly vs. Murphy, 70 Cal. 560, 564 (that offer to prove that two persons lived together as man and wife was not an offer to prove marriage).

25. Same—Stipulation for secrecy.—Promise of plaintiff not to make a marriage known for period of two years, except with consent of defendant, is a collateral agreement, and not a condition to marriage contract taking effect.—Sharon vs. Sharon, 75 Cal. 1, 10, 16 Pac. Rep. 345.

As to conditions precedent and subsequent, see post §§1436, 1438 and notes.

26. Does not invalidate marriage under the common law.—Sharon vs. Sharon, 75 Cal. 1, 11, 16 Pac. Rep. 345.

III. WHAT CONSTITUTES MARRIAGE.

27. CONSENT OF PARTIES—Necessity for.—To establish relation or status of marriage, consent of parties capable of making it is necessary.—Sharon vs. Sharon (dis. op.), 67 Cal. 185, 212, 7 Pac. Rep. 456, 635, 3 Id. 709; Sharon vs. Sharon, 75 Cal. 1, 8, 16 Pac. Rep. 345; Mott vs. Mott, 82 Cal. 413, 416, 22 Pac. Rep. 1140; Kilburn vs. Kilburn, 89 Cal. 46, 50, 23 Am. St. Rep. 447, 26 Pac. Rep. 636; People vs. Beevers, 99 Cal. 286, 23 Pac. Rep. 844; Toon vs. Huberty, 104 Cal. 360, 361, 37 Pac. Rep. 944.

22. "Consensus, non concubitus, facit matrimonium" is a maxim of ecclesiastical, common, and all other law governing the subject, and hence when parties capable of intermarrying agree to a present marriage, the relation is made thereby complete.—Sharon vs. Sharon, 75 Cal. 1, 17, 16 Pac. Rep. 345.

23. Mutual agreement of parties to live together in professed relation of husband and wife is essential to create contract of marriage.—People vs. Lehmann, 104 Cal. 631, 633, 38 Pac. Rep. 422.

30. Sufficiency—Generally.—Consent, although an essential element, is not of itself sufficient to constitute marriage.—Sharon vs. Sharon (dis. op.), 67 Cal. 185, 212, 7 Pac. Rep. 456, 635, 8 Id. 709; Sharon vs. Sharon, 75 Cal. 1, 8, 16 Pac. Rep. 345; Kilburn vs. Kilburn, 89 Cal. 46, 50, 23 Am. St. Rep. 447, 26 Pac. Rep. 636; People vs. Beevers, 99 Cal. 286, 33 Pac. Rep. 844; Toon vs. Huberty, 104 Cal. 260, 261, 37 Pac. Rep. 944; People vs. Lehmann, 104 Cal. 631, 38 Pac. Rep. 422.

31. Present consent alone does not constitute marriage; it must be followed by solemnization or by mutual assumption of marital rights and duties.—Sharon vs. Sharon, 75 Cal. 1, 13, 16 Pac. Rep. 345; Kilburn vs. Kilburn, 89 Cal. 46, 50, 23 Am. St. Rep. 447, 26 Pac. Rep. 636.

32. As to solemnization, see par. 35 et seq. this note.

33. As to assumption of marital rights, duties, and obligations, see para. 36, 39, 55 et seq. this note.

34. CONSENT OF STATE.—Marriage contract is one of so solemn and binding a nature, and so affects public weal, that consent of parties alone, even though they are capable of consent, will not constitute marriage or create relation of marriage; it is one to which consent of state is also required.—Mott vs. Mott, 82 Cal. 413, 416, 22 Pac. Rep. 1140; Dyer vs. Brannock, 66 Mo. 391, 27 Am. Rep. 359.

35. SOLEMNIZATION—NECESSITY—Generally.—Solemnization as condition to valid marriage was not necessary prior to amendment of 1895, provided mutual consent was followed by other condition named in last clause of section, as indicated by the Code Commissioners' note.—Sharon vs. Sharon, 75 Cal. 1, 19, 16 Pac. Rep. 345.

36. Marriage without consent of parties followed by mutual assumption of marital rights, duties, or obligations, or where there is no solemnization, fails to comply with the section as it stood before the amendment of 1895.—Sharon vs. Sharon (dis. op.), 75 Cal. 1, 59, 73, 16 Pac. Rep. 345; Sharon vs. Sharon, 79 Cal. 633, 663, 22 Pac. Rep. 26, 131; Mott vs. Mott, 82 Cal. 413, 417, 22 Pac. Rep. 1140; White vs. White, 82 Cal. 427, 23 Pac. Rep. 276; Kilburn vs. Kilburn, 89 Cal. 46, 23 Am. St. Rep. 447, 26 Pac. Rep. 636; People vs. Beevers, 99 Cal. 286, 33 Pac. Rep. 844; Toon vs. Huberty, 104 Cal. 260, 261, 37 Pac. Rep. 944; People vs. Lehmann, 104 Cal. 631, 38 Pac. Rep. 422; Hinckley vs. Ayres, 105 Cal. 357, 38 Pac. Rep. 735; Hite vs. Hite, 124 Cal. 389, 71 Am. St. Rep. 82, 57 Pac. Rep. 227, 45 L. R. A. 793; Harron vs. Harron, 128 Cal. 303, 310, 60 Pac.

Rep. 932; Dyer vs. Brannock, 66 Mo. 391, 27 Am. Rep. 359.

37. Particular form of ceremony of marriage not required, but mutual consent followed by consummation sufficient to constitute marriage.—Estate of McCausland, 52 Cal. 563; Sharon vs. Sharon, 75 Cal. 1, 9, 16 Pac. Rep. 345; White vs. White, 82 Cal. 427, 23 Pac. Rep. 276; Estate of Richards, 133 Cal. 524, 527, 66 Pac. Rep. 1034; Mathewson vs. Phoenix Iron Foundry, 20 Fed. Rep. 280, 284. See Ga. Ashew vs. Dupree, 30 Ga. 173. Ill. Port vs. Port, 70 Ill. 484; Hebblethwaite vs. Hepworth, 98 Ill. 126. Ky. Dumaresny vs. Fichley, 3 A. K. Marsh. (Ky.) 368. La. Patton vs. New Orleans, 1 La. Ann. 98. Mo. Dyer vs. Brannock, 66 Mo. 391, 27 Am. Rep. 359. N. H. Londonderry vs. Chester, 3 N. H. 268, 9 Am. Dec. 61. N. Y. Fenton vs. Reed, 4 John. (N. Y.) 52, 4 Am. Dec. 244. Pa. Nathan's Case, 2 Brewst. (Pa.) 149; Richard vs. Brehn, 73 Pa. St. 140, 13 Am. Rep. 733. R. I. Peck vs. Peck, 12 R. I. 485, 34 Am. Rep. 702. Vt. Newbury vs. Brunswick, 2 Vt. 151, 19 Am. Dec. 703.

Compare: Cheney vs. Arnold, 15 N. Y. 345, 69 Am. Dec. 609; Duncan vs. Duncan, 10 Ohio St. 181.

For further discussion of this rule see note 69 Am. Dec. 615.

38. Propriety of requiring public declaration to accompany unsolemnized marriages was directly called to attention of legislature of California, but that body refused to act upon the suggestion, and permitted § 55 to remain as it now is.—Sharon vs. Sharon, 75 Cal. 1, 17, 16 Pac. Rep. 345.

39. Solemnization completes marriage according to section, although not followed by mutual assumption of marital rights and duties; since such assumption is required only where there is no solemnization.—Sharon vs. Sharon, 75 Cal. 1, 13, 16 Pac. Rep. 345.

As to solemnization, see par. 55 et seq. this note.

40. Solemnization authorized by code as amended in 1895, must follow consent of parties in order to constitute valid marriage.—Norman vs. Norman, 121 Cal. 620, 628, 66 Am. St. Rep. 74, 54 Pac. Rep. 143, 42 L. R. A. 343 (by error of reporter Norman vs. Thomson).

41. Statute not retroactive.—Section as amended March, 1895, has no application to marriages consummated prior thereto.—Estate of Richards, 133 Cal. 524, 527, 66 Pac. Rep. 1034. See ante § 3 note 4.

42. SAME—FORM—Generally.—"Marriage is regarded as a civil contract, and no form is necessary for its solemnization. If it take place between parties able to contract, an open avowal of intention, and assumption of relative duties which it imposes on each other, is sufficient to render it valid and binding."—Graham vs. Bennet, 2 Cal. 503; Baker vs. Baker, 13 Cal. 87; Sharon vs. Sharon, 75 Cal. 1, 25, 16 Pac. Rep. 345.

43. Solemnization is given too narrow a meaning to confine it to a mere ceremony before officer or minister; but should be held to include issuance of license and record of certificate, together with publicity incidental

to license and record; purpose of the section must be to facilitate proof of marriages by requiring their existence to be made public.—*Sharon vs. Sharon*, 75 Cal. 1, 18, 16 Pac. Rep. 345.

44. Marriage performed on vessel upon high seas by the captain, and upon parties seeking that mode of ceremony in order to avoid the statutes, is void.—*Norman vs. Norman*, 121 Cal. 620, 624, 66 Am. St. Rep. 74, 54 Pac. Rep. 143, 43 L. R. A. 343 (by error of reporter headed *Norman vs. Thompson*).

45. As to form of solemnization, see post § 71 and note.

46. As to by whom solemnized,—see post § 70 and note.

47. As to requirements by person solemnizing marriage, see post § 72 and note.

48. Same—Declaration of marriage solemnization of which is not recorded.—See post § 76 and note.

49. COMPLETION, CONSUMMATION, ETC.—Generally.—Agreement to present marriage must be followed by consummation, which, however, might consist of any conduct which would show parties to have actually entered upon married state; this view was obviously the one intended to be adopted by legislature.—*Sharon vs. Sharon*, 75 Cal. 1, 51, 16 Pac. Rep. 345.

50. Consummation, if it does not constitute, is at least included in an assumption of marital rights and duties.—*Sharon vs. Sharon*, 75 Cal. 1, 15, 16 Pac. Rep. 345.

51. "Consummation" generally is the completion of the marriage relation, and not necessarily the act of sexual intercourse.—*Sharon vs. Sharon*, 79 Cal. 633, 670, 22 Pac. Rep. 26, 131. See *Ga. Clark vs. Cassidy*, 64 Ga. 662. *N. Y. Clayton vs. Wardell*, 4 N. Y. 238. *Tenn. Bashan vs. State*, 1 Yerg. 193. *Tex. Robertson vs. Cole*, 12 Tex. 363; *Lewis vs. Ames*, 44 Tex. 341. *Vt. Newbury vs. Brunswick*, 2 Vt. 151, 160, 19 Am. Dec. 708.

Distinguished: *Hulett vs. Carey*, 66 Minn. 227, 338, 61 Am. St. Rep. 419, 69 N. W. Rep. 31, 24 L. R. A. 384.

52. "Consummation" in section refers to the 'completion,' the 'perfection' provided in § 57 as an element to follow; that is, the 'assumption of marital rights, duties, or obligations.'—*Sharon vs. Sharon* (dis. op.), 75 Cal. 1, 76, 16 Pac. Rep. 345.

53. "Consummation" is 'the act of carrying to the utmost extent or degree; completion; termination; close; perfection.'—*Sharon vs. Sharon* (dis. op.), 75 Cal. 1, 76, 16 Pac. Rep. 345.

54. "Consummation" was avoided in § 55, because it has come to be euphemism for the more indelicate word "copula," and thereby has acquired a narrower meaning than was intended.—*Sharon vs. Sharon*, 75 Cal. 1, 51, 16 Pac. Rep. 345.

55. ASSUMPTION OF MARITAL RIGHTS, DUTIES, AND OBLIGATIONS.—"Agreement to marry not followed by solemnization is no assumption of marital rights, duties, or obligations, within the meaning of § 55 of the Civil Code, until commencement of cohabitation by

parties to agreement; and by cohabitation, is not meant simply gratification of sexual passion, but 'to live or dwell together, to have the same habitation, so that where one lives and dwells there does the other live and dwell also.' . . . Mere copulation without such cohabitation is insufficient."—*People vs. Lehmann*, 104 Cal. 631, 633, 38 Pac. Rep. 422. See *Sharon vs. Sharon*, 79 Cal. 633, 670, 22 Pac. Rep. 26, 131; *Kilburn vs. Kilburn*, 89 Cal. 46, 50, 23 Am. St. Rep. 447, 26 Pac. Rep. 636; *People vs. Beevers*, 99 Cal. 286, 287, 33 Pac. Rep. 844.

56. Assumption is that which is peculiar to and distinguishes it from all other relations, and is necessary in order to assume marriage relation.—*Sharon vs. Sharon* (dis. op.), 75 Cal. 1, 74, 16 Pac. Rep. 345; *Harron vs. Harron*, 128 Cal. 308, 60 Pac. Rep. 932.

57. Marital rights and obligations defined.—Civil contract of marriage is simply agreement to enter into certain status or relation. Rights and obligations of married status are fixed by society in accordance with principles of natural law, and are beyond and above the parties themselves. They cannot modify terms on which they live together, nor superadd to the relation a single condition.—*Sharon vs. Sharon*, 75 Cal. 1, 8, 16 Pac. Rep. 345.

58. "Marital" must, to give any effect to the sentence in which it is found, be treated as equivalent of "conjugal,"—to include rights and duties of wife as well as those of husband.—*Sharon vs. Sharon*, 75 Cal. 1, 10, 16 Pac. Rep. 345.

59. "Duties" and "obligations" are evidently used in the same sense in this section, and the duties to be assumed are the obligations which flow from the obligations of husband and wife.—*Sharon vs. Sharon*, 75 Cal. 1, 10, 16 Pac. Rep. 345.

60. Agreement which attempts to limit in extent or duration rights and duties uniformly annexed to the status of matrimony is not an agreement to become husband and wife, out of which arises the relation of marriage.—*Sharon vs. Sharon*, 75 Cal. 1, 9, 16 Pac. Rep. 345.

61. Construction and criticism.—"We may wonder at employment of terms so unlike the usual phraseology of statutes, and may regret that words more certain and definite in their meaning were not selected, and still, if we give any fair and reasonable construction to all the language, we can hardly escape the conclusion that 'a mutual assumption of marital rights, duties, or obligations' imports acts and conduct of the two parties toward each other, and rights and duties belonging to the married relation, which cannot possibly be embraced in the word 'copula' or the word 'consummation,' or even, perhaps, the word 'cohabitation.'"—*Sharon vs. Sharon*, 75 Cal. 1, 23, 16 Pac. Rep. 345.

62. Cohabitation. — "Assumption required must be proved by something more than copulation, and nothing less than cohabitation in the manner above stated will establish the necessary fact, where it depends for its proof upon acts and conduct of the parties towards each other and the public."—*Sharon vs. Sharon*,

79 Cal. 633, 670, 22 Pac. Rep. 26, 131. See *Hebblethwaite vs. Hepworth*, 98 Ill. 126.

62. "Where a marriage per verba de futuro cum copula is allowed, the marriage does not become consummated by copulation unless the parties so intend."—*Sharon vs. Sharon*, 79 Cal. 633, 670, 22 Pac. Rep. 26, 131. See *Hebblethwaite vs. Hepworth*, 98 Ill. 126; *Stoltz vs. Doering*, 112 Ill. 234; *Peck vs. Peck*, 12 R. I. 485, 488, 34 Am. Rep. 702.

64. Cohabitation, which is evidence of assumption of marital rights, duties, or obligations, must be a "living together as husband and wife."—*Sharon vs. Sharon*, 79 Cal. 633, 669, 22 Pac. Rep. 26, 131. See *Ala. Wall vs. Williams*, 11 Ala. 826, 8 Id. 48. *Ga. Clark vs. Cassidy*, 64 Ga. 662. *Ill. Port vs. Port*, 70 Ill. 488. *Me. Calef vs. Calef*, 54 Me. 365, 92 Am. Dec. 549. *Mo. Johnson vs. Johnson*, 30 Mo. 72, 77 Am. Dec. 595; *Boyer vs. Dively*, 58 Mo. 510; *La Riviere vs. La Riviere*, 77 Mo. 512. *Pa. Yardley's Estate*, 75 Pa. St. 211. *Tenn. Morgan vs. McGhee*, 5 Humph. (Tenn.) 14. *Fed. Cannon vs. United States*, 116 U. S. 55, bk. 29 L. ed. 561, 6 Sup. Ct. Rep. 278.

65. "Cohabitation does not simply mean gratification of sexual passion, but 'to live or dwell together, to have the same habitation, so that where one lives and dwells there does the other live and dwell also.'"—*Kilburn vs. Kilburn*, 89 Cal. 46, 50, 23 Am. St. Rep. 447, 26 Pac. Rep. 636.

66. Commencement of true and open matrimonial cohabitation under marriage agreement is mutual assumption of marital rights, duties, and obligations, while mere copulation, without such cohabitation, is insufficient.—*Sharon vs. Sharon*, 79 Cal. 633, 670, 22 Pac. Rep. 26, 131; *Kilburn vs. Kilburn*, 89 Cal. 46, 50, 23 Am. St. Rep. 447, 26 Pac. Rep. 636.

67. Agreement between parties to presently take each other for husband and wife, and from that time, living together professedly in that relation, sufficient to constitute marriage.—*Sharon vs. Sharon*, 79 Cal. 633, 669, 22 Pac. Rep. 26, 131.

68. EVIDENCE OF CONSENT.—Cohabitation as husband and wife is a manifestation that the parties have consented to contract such marriage inter se.—*Estate of Richards*, 133 Cal. 524, 527, 65 Pac. Rep. 1034.

69. Proof that a man and woman cohabited under his promise to marry her, but that she subsequently left him because he did not marry her as promised, and that she afterwards lived with another man, does not establish a marriage.—*Estate of Beverson*, 47 Cal. 621.

70. Registering as man and wife at hotel or on steamer on course of journey taken together, does not establish existence of marriage relation, although it may be received as evidence tending to show that such relation existed.—*People vs. Lehmann*, 104 Cal. 631, 634, 38 Pac. Rep. 423.

71. Prosecution for bigamy may be maintained against person although under the age of consent at the time of the marriage, where it is followed by cohabitation after arriving at the proper age.—*People vs. Beever*, 99 Cal.

286, 287, 33 Pac. Rep. 844; *Shafner vs. State*, 20 Ohio 1.

See Pen. Code §1106 and note.

72. Public assumption.—Mutual assumption of marital rights, duties, or obligations does not imply public assumption of relation.—*Sharon vs. Sharon*, 75 Cal. 1, 50, 16 Pac. Rep. 345.

73. Distinguished: *Hulett vs. Carey*, 66 Minn. 327, 338, 61 Am. St. Rep. 419, 69 N. W. Rep. 31, 34 L. R. A. 384.

74. Public mutual assumption of marital rights, duties, and obligations should not necessarily follow the present consent to marry, where marriage is not attended by solemnization, in order to be valid.—*Sharon vs. Sharon*, 79 Cal. 633, 684, 22 Pac. Rep. 26, 131.

75. "Mutual assumption of marital rights, duties, and obligations cannot be otherwise than open to view,—at least, open to view of mutual friends and associates of the parties. Mutual assumption need not be carefully and studiously made public, but persons must manifest such assumption by that open, visible, and undisguised living together, such as is usually practiced by persons holding towards each other the relation of husband and wife."—*Sharon vs. Sharon* (dis. op.), 75 Cal. 1, 62, 16 Pac. Rep. 345.

76. Mutual assumption may be given full effect by holding it to include not only consummation, directly proved as it rarely is or can be, but also the mutual taking on by man and woman of marital rights and duties, from which consummation may be inferred, and the "uncouth" phrase does not require that they shall hold themselves out to the world as husband and wife.—*Sharon vs. Sharon*, 75 Cal. 1, 28, 16 Pac. Rep. 345.

77. MARRIAGES BY LAWS OF NATURE.—"Mere casual commerce between the sexes, without the intention of cohabitation, does not constitute marriage, even by law of nature. But when two persons agree to have that commerce for procreation and bringing up of children, and for such lasting cohabitation, that, in state of nature, would be marriage, and in absence of all civil and religious institutes might safely be presumed to be, as it is popularly called, marriage in the sight of God. It has been made a question how long the cohabitation must continue by the law of nature—whether to end of life. Without pursuing that discussion, it is enough to say that it cannot be a mere casual and temporary commerce, but must be a contract at least extending to such purposes of more permanent nature, in the intention of the parties."—*Linds vs. Belissario*, 1 Hag. Const. 231.

78. Cohabitation between Indian man and woman, according to the custom of their tribe, which permitted the parties to dissolve the connection whenever they pleased, does not constitute marriage.—*State vs. Ta-Cha-na-tah*, 64 N. C. 614. See also *Roche vs. Washington*, 19 Ind. 53, 31 Am. Dec. 376.

IV. PROOF OF MARRIAGE.

79. GENERALLY.—Marriage is one thing; the evidence by which it may be established is

another.—*Sharon vs. Sharon*, 75 Cal. 1, 11, 16 Pac. Rep. 345.

See post § 57 and note.

50. ADMISSIONS OF MARRIAGE COUPLED WITH COHABITATION and repute, are sufficient to sustain finding of actual marriage.—*People vs. Beevers*, 99 Cal. 286, 289, 33 Pac. Rep. 844. *Ala. Williams vs. State*, 44 Ala. 24. *Ark. Scroggins vs. State*, 32 Ark. 205. *Kan. State vs. Hughes*, 35 Kan. 626, 57 Am. Rep. 195. *Mo. State vs. Gonce*, 79 Mo. 600. *S. C. State vs. Britton*, 4 McC. 256. *Va. O'Neale vs. Commonwealth*, 17 Gratt. 583.

51. Mode of proof.—See post § 57 and note.

52. Prosecutions for bigamy.—See Pen. Code § 1106 and note.

53. PROMISE OF MARRIAGE FOR PURPOSE OF SEDUCTION need not be such a legal promise as would support an action for its breach provided it be such a promise as will justify reliance upon it by the woman betrayed.—*People vs. Kehoe*, 123 Cal. 224, 227, 69 Am. St. Rep. 52, 55 Pac. Rep. 911; *Callahan vs. State*, 63 Ind. 198, 30 Am. Rep. 211; *Kenyon vs. People*, 26 N. Y. 203, 84 Am. Dec. 177.

54. Boy under age of eighteen is not incapable of making a promise of marriage which in good faith and good morals it was his bounden duty to perform.—*People vs. Kehoe*, 123 Cal. 224, 228, 69 Am. St. Rep. 52, 55 Pac. Rep. 911.

§ 56. MINORS CAPABLE OF CONTRACTING MARRIAGE. Any unmarried male of the age of eighteen years or upwards, and any unmarried female of the age of fifteen years or upwards, and not otherwise disqualified, are capable of consenting to and consummating marriage.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.

2. 3. Consummation defined.

4. Seduction by sixteen-year-old boy.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Sharon vs. Sharon*, 75 Cal. 1, 14 (cited), 16 (construed), 16 Pac. Rep. 345; *Sharon vs. Sharon*, 79 Cal. 633, 667, 22 Pac. Rep. 26, 131 (referred to); *People vs. Kehoe*, 123 Cal. 224, 226, 69 Am. St. Rep. 52, 55 Pac. Rep. 911 (construed and held not applicable).

2. CONSUMMATION in §§ 56, 57 is to be interpreted in broader sense of completion, and as by § 55 marriage is not complete until pub-

lic recognition of it by parties, consummation of, in §§ 56, 57, means completion of marriage as provided in § 55.—*Sharon vs. Sharon*, 75 Cal. 1, 16, 16 Pac. Rep. 345.

3. "It is said in the prevailing opinion on the former appeal that 'consummation,' as used in §§ 56, 57 of our code, means 'simply sexual intercourse,—copulation,—nothing more nor less.'"—*Sharon vs. Sharon*, 79 Cal. 633, 667, 22 Pac. Rep. 26, 131.

4. SEDUCTION BY SIXTEEN-YEAR-OLD BOY, on promise of marriage, may be committed, notwithstanding this section.—*People vs. Kehoe*, 123 Cal. 224, 226, 69 Am. St. Rep. 52, 55 Pac. Rep. 911.

§ 57. MARRIAGE, HOW MANIFESTED AND PROVED. Consent to marriage and solemnization thereof may be proved under the same general rules of evidence as facts are proved in other cases.

History: Enacted March 21, 1872; amended March 26, 1895, Stats. and Amdts. 1895, p. 121.

1. Applied, cited, construed, referred to, etc.

2. Construction—Particular meaning of phrase.

3-10. Same—Consummation synonymous with completion.

11. Same—Consummation as meaning copulation.

12-15. Same—Manifested—Manifesting defined.

16, 17. Same—Mutual assumption.

18. Same—Same—Cohabitation.

19. Statute not retroactive.

20-22. Presumptions—Intercourse matrimonial—Generally.

23. Same—Same—Clear proof required to rebut.

24. Same—Connection meretricious in inception.

25. Same—Same—Mere continuance of illicit cohabitation.

26. Same—Same—Presumption rebuttable.

27, 28. Same—Former marriage—Consent.

29. Direct testimony.

30. Marriage certificate.

31. Same—Not recorded as required by law.

C. C.—8

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Sharon vs. Sharon*, 75 Cal. 1, 15 (cited), 16 (construed), 51, 52, 63 (construed and applied), 67, 16 Pac. Rep. 345; *Sharon vs. Sharon*, 79 Cal. 633, 666 (construed), 636, 694 (construed and applied), 22 Pac. Rep. 26, 131; *In re Ruffino*, 116 Cal. 304, 313, 48 Pac. Rep. 127 (construed and applied); *Estate of Richards*, 133 Cal. 524, 527, 65 Pac. Rep. 1034 (applied).

2. CONSTRUCTION—Particular meaning of phrase when used in connection with other language must be gathered from context (dis. op.).—*Sharon vs. Sharon*, 75 Cal. 1, 76, 16 Pac. Rep. 345.

See ante § 13 note pars. 2, 3.

3. Consummation synonymous with completion.—Consummation of §§ 56 and 57 means completion of marriage as provided in § 55.—*Sharon vs. Sharon*, 75 Cal. 1, 16, 16 Pac. Rep. 345.

4. Consummation in §§ 56 and 57 is to be interpreted in broadest sense of copulation, as by § 55 marriage is not complete until after

public recognition of it by the parties.—Sharon vs. Sharon, 75 Cal. 1, 16, 16 Pac. Rep. 345.

5. Consummation, if it does not constitute, is at least included in, assumption of marital rights and duties.—Sharon vs. Sharon, *supra*.

6. "Consummation" in this section is substituted for the phrase "mutual assumption of marital rights, duties, or obligations" in § 55.—Sharon vs. Sharon, *supra*.

7. Consummation is in the nature of part performance of consent of marriage, but is not limited to the copula.—Sharon vs. Sharon, *supra*.

8. Consummation in this section refers to completion and perfection provided in § 55, which is the assumption of marital rights, duties, or obligations (*dis. op.*).—Sharon vs. Sharon, *supra*, p. 76.

9. Consummation is the act of carrying to utmost extent or degree, completion, termination, close, perfection (*dis. op.*).—Sharon vs. Sharon, *supra*, p. 76.

10. "'Consummation,' as used in §§ 56 and 57, means 'simply sexual intercourse,—copulation,—nothing more nor less.'"—Sharon vs. Sharon, 79 Cal. 633, 667, 22 Pac. Rep. 26, 131.

11. "'Consummation,' whenever used as something different from mere consent or formal solemnization of marriage, has always been held to mean 'simply sexual intercourse,—copulation,—nothing more nor less.'"—Sharon vs. Sharon, *supra*, p. 693.

12. Manifested, as used in this section, has reference to proof, and applies to mode of proving private marriage.—Sharon vs. Sharon, *supra*; also 75 Cal. 1, 52, 16 Pac. Rep. 345.

13. Manifestation in any form of consent, as well as subsequent consummation in any form, may mean by secret cohabitation, that husband claims the right, believing himself the husband, and wife submitting because she believes herself a wife.—Sharon vs. Sharon, *supra*.

14. It is circumstance of some significance that, when providing for mode of consent and subsequent consummation, nothing is said of manner of proving other rights and duties to be mutually assumed, if proof of others is contemplated by § 55.—Sharon vs. Sharon, *supra*, p. 15.

15. Manifestation of subsequent marriage in any form means that it must be done in form which manifests or shows such consummation,—that is, manifests assumption of marital rights, duties, and obligations; but conduct of parties and their relation with each other must be of a character which shows that they have mutually assumed the rights and duties of husband and wife (*dis. op.*).—Sharon vs. Sharon, 75 Cal. 1, 63, 16 Pac. Rep. 345.

16. Mutual assumption need not be carefully and studiously made public, but persons must manifest such assumption by that open, visible, and undisguised living together, such as is usually practised by persons holding toward each other relation of husband and wife (*dis. op.*).—Sharon vs. Sharon, *supra*, p. 62.

See § 55 and note.

17. Mutual assumption of marital rights, duties, and obligations cannot be otherwise

than open to views of mutual friends and associates of the parties (*dis. op.*).—Sharon vs. Sharon, *supra*.

18. Same—Cohabitation.—Cohabitation as husband and wife is manifestation of parties having consented to contract such marriage *inter se*.—Estate of Richards, 133 Cal. 524, 527, 65 Pac. Rep. 1034.

19. STATUTE NOT RETROACTIVE.—Where section was still in force when marriage of parties took effect, amendment has no application.—Estate of Richards, 133 Cal. 524, 527, 65 Pac. Rep. 1034.

See ante § 3 note 4.

20. PRESUMPTIONS—INTERCOURSE MATRIMONIAL.—Generally.—General rule is that marriage, and not merely meretricious relation, will be presumed.—Teter vs. Teter, 101 Ind. 129, 51 Am. Rep. 742; Wilkie vs. Collins, 48 Miss. 496.

21. "All intercourse in form matrimonial is presumed, until contrary is shown, to be matrimonial."—*In re Ruffino*, 116 Cal. 804, 313, 48 Pac. Rep. 127.

22. "The law presumes morality and not immorality; marriage and not concubinage; legitimacy and not bastardy."—Hynes vs. McDermott, 91 N. Y. 451, 459, 43 Am. Rep. 677; quoted with approval Teter vs. Teter, 101 Ind. 129, 51 Am. Rep. 742.

23. Clear proof required to rebut.—Presumption of marriage from cohabitation apparently matrimonial can be overthrown by only most cogent and satisfactory evidence.—Hynes vs. McDermott, 91 N. Y. 451, 459, 43 Am. Rep. 677. See Morris vs. Davies, 5 Cl. & Fin. 163.

24. SAME CONNECTION MERETRICIOUS IN INCEPTION.—Where connection is meretricious in its inception presumption is, in absence of evidence from which matrimonial relation may be inferred, that it continues so.—White vs. White, 82 Cal. 427, 433, 23 Pac. Rep. 276, 7 L. R. A. 799; Cartwright vs. McGown, 121 Ill. 383, 2 Am. St. Rep. 105, 12 N. E. Rep. 737; Clayton vs. Wardell, 4 N. Y. 230.

25. Mere continuance of illicit cohabitation does not raise presumption of marriage.—Harbeck vs. Harbeck, 102 N. Y. 714, 7 N. E. Rep. 408; Fagan vs. Fagan, 11 N. Y. Supp. 743, 32 N. Y. St. Rep. 994.

26. Presumption rebuttable.—But presumption that cohabitation illicit in its inception continues so is rebuttable one.—Hynes vs. McDermott, 91 N. Y. 451, 43 Am. Rep. 677; Caujolle vs. Ferrie, 23 N. Y. 90.

Whether it is a presumption of law or of fact.—White vs. White, 82 Cal. 427, 437, 23 Pac. Rep. 276, 7 L. R. A. 799.

27. Same—Formal marriage—Consent.—Formal ceremony of marriage, whether in due form or not, must be assumed to be by consent.—Hutchins vs. Kimmell, 31 Mich. 126, 18 Am. Rep. 164.

28. "Prima facie the fact of marriage celebrated according to forms of a religious denomination embraces requisite assent of married parties to take each other as husband and wife; and if the party whose interest it is to dispute the marriage is satisfied with a general statement of the ceremony, and will not

inquire more particularly as to what took place, he cannot be permitted to deny apparent effect of the evidence."—*Fleming vs. People*, 27 N. Y. 330, 333.

29. DIRECT TESTIMONY.—Marriage may be proved by testimony of person who was present at ceremony.—*State vs. Kean*, 10 N. H. 347, 34 Am. Dec. 162; *Wolverton vs. State*, 16 Ohio 173, 47 Am. Dec. 378.

30. MARRIAGE CERTIFICATE in form prescribed by statute is, in connection with direct proof of identity of parties, competent

evidence.—*State vs. Isenhardt*, 32 Oreg. 170, 52 Pac. Rep. 569. See *Hutchins vs. Kimmiell*, 31 Mich. 126, 18 Am. Rep. 164; *State vs. Abbey*, 29 Vt. 60, 67 Am. Dec. 754.

31. Not recorded as required by law.—Certificate of marriage, although proper in other respects, but not filed as required within time specified by law, is not admissible in absence of evidence authenticating it, or accounting for delay in filing.—*People vs. Etter*, 81 Mich. 570, 45 N. W. Rep. 1109.

See post § 74.

§ 58. VOIDABLE MARRIAGES (repealed).

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 185; repealed by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 335, held unconstitutional; see history, § 4 ante; re-repealed March 21, 1905, Stats. and Amdts. 1905, c. CDXIV, p. 554.

1. Applied, cited, construed, referred to, etc.
- 2, 3. Physical incapacity—Generally.
4. Same—Distinct from fraud.
5. Same—Impotency.
6. Same—Mere sterility or barrenness.
7. Same—Same—Must be incurable.
8. Same—Deformity—Physical examination.
9. Same—Pregnancy at time of marriage.
10. Fraud—Generally.
- 11-15. Same—Pregnancy by stranger—Generally.
16. Same—Same—Question for jury.
- 17, 18. Same—Same—Husband participating in incontinence.
19. Previous unchaste conduct.
20. Force or duress—Generally.
21. Same—Arrest for bastardy.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Franke vs. Franke* (Cal. Nov. 30, 1892), 31 Pac. Rep. 571, 573, 574 (construed and held not applicable); *Estate of McCauley*, 138 Cal. 546, 549, 71 Pac. Rep. 458 (erroneously cited for § 158).

2. PHYSICAL INCAPACITY—Generally.—Ground for annulment of marriage under this section consists solely of such physical defects or incurable disease existing at time of marriage as will prevent sexual coition.—*Franke vs. Franke* (Cal. Nov. 30, 1892), 31 Pac. Rep. 571, 574.

3. Meaning of words "physical incapacity," as here used, is substantially the same as that of the word "impotent," frequently met with in divorce proceedings. It means powerless, or wanting in physical power, to consummate marriage. Animal desire between the sexes is one of the incitements to matrimony, the lawful gratification of which is encouraged and protected alike by moral sentiment and municipal regulation. Copulation or coition—the act of gratifying sexual desire—is the consummation of marriage, inability to accomplish which, when it proceeds from incurable physical imperfection or malformation, is precisely what our statute means and expresses by the words "physically and incurably incapacitated." Barrenness, however, is in no sense the synonym of "impotency."—*Anonymous*, 39 Ala. 291, 18 Am. St. Rep. 116; 7 So. Rep. 100, 7 L. R. A. 425.

4. Distinct from fraud.—Physical incapacity, as expressed in § 58, is entirely distinct from fraud.—*Franke vs. Franke* (Cal. Nov. 30, 1892), 31 Pac. Rep. 571, 574.

5. Impotency "means want of potentia copulandi, and not merely incapacity for procreation. It is an incapacity that admits neither copulation nor procreation. And what the law refers to is capacity for copula vera, and not partial and imperfect or immature copulation."—*Payne vs. Payne*, 40 Minn. 467, 24 Am. St. Rep. 240, 49 N. W. Rep. 230.

6. Mere sterility or barrenness is not impotence.—*Devanbagh vs. Devanbagh*, 5 Paige Ch. (N. Y.) 554, 28 Am. Dec. 443.

7. Same—Incapacity must be incurable in order to come within the provisions of code.—*Payne vs. Payne*, 40 Minn. 467, 24 Am. St. Rep. 240, 49 N. W. Rep. 230; *Devanbagh vs. Devanbagh*, 5 Paige Ch. (N. Y.) 554, 28 Am. Dec. 443.

8. Deformity—Physical examination.—Where physical incapacity is said to be malformation or abnormal size of husband's private parts, proof should be very satisfactory, and most direct which nature of question is susceptible of. Wife must be required to submit her person to examination by physicians or matrons skilled in such matters appointed by court, proof of which, showing that the fault is not with her, must be made an indispensable condition of relief. Husband must also submit to like examination.—*Anonymous*, 39 Ala. 291, 18 Am. St. Rep. 116, 7 So. Rep. 100, 7 L. R. A. 425; *Devanbagh vs. Devanbagh*, 5 Paige Ch. (N. Y.) 554, 28 Am. Dec. 443.

See note 28 Am. Dec. 446-451.

9. Pregnancy at time of marriage is not such physical incapacity, within meaning of this section, as will entitle party to avoid marriage.—*Franke vs. Franke* (Cal. Nov. 30, 1892), 31 Pac. Rep. 571, 574.

10. FRAUD—Generally.—"If a marriage may be annulled for fraud, it must be such fraud as operates upon one or other of the immediate parties to contract, and has legal effect of vitiating contract between the parties ab initio. But as respects strangers, fraud cannot be predicated of contract which immediate parties thereto may lawfully enter into which no principle of municipal law forbids, or can restrain consummation of."—*McKinney vs. Clarke*, 2 Swan (Tenn.) 321, 58 Am. Dec. 59.

11. Pregnancy by another man than her husband at time of marriage, of which he is ignorant, is such fraud upon husband as will entitle him to have marriage annulled.—*Baker*

vs. Baker, 13 Cal. 87. See *Ga. Firth vs. Firth*, 18 Ga. 273. *Ind. Ritter vs. Ritter*, 5 Blackf. 81. *Mass. Crehore vs. Crehore*, 97 Mass. 330, 93 Am. Dec. 98; *Foss vs. Foss*, 94 Mass. (12 Allen) 26. *Mich. Sissung vs. Sissung*, 65 Mich. 171, 178, 31 N. W. Rep. 770; *Harrison vs. Harrison*, 94 Mich. 559, 561, 34 Am. St. Rep. 364, 54 N. W. Rep. 275. *N. J. Carris vs. Carris*, 24 N. J. Eq. (9 C. E. Gr.) 525. *N. Y. Scott vs. Shufeldt*, 5 Paige Ch. 43. *N. C. Moss vs. Moss*, 1 Ired. (N. C.) Eq. 55. *Ohio. Morris vs. Morris*, Wright (Ohio) 630. *Pa. Allen's Appeal*, 99 Pa. St. 201, 44 Am. Rep. 101, 104.

See post § 82 note para. 21-23.

12. So held even though she made no representations on the subject other than those implied from the contract of marriage.—*Baker vs. Baker*, 13 Cal. 87; *Donovan vs. Donovan*, 91 Mass. (9 Allen) 140.

13. "It is not going too far to say that woman who has not only submitted to embraces of another man, but who also bears in her womb fruit of such illicit intercourse, has, during period of gestation, incapacitated herself from making and executing valid contract of marriage with man who takes her as his wife in ignorance of her condition, and on faith of representations that she is chaste and virtuous. In such case the concealment and false statements go directly to the essentials of marriage contract, and operate as fraud of gravest character on him with whom she enters into that relation."—*Reynolds vs. Reynolds*, 85 Mass. (3 Allen) 605.

14. "A woman to be marriageable, it is said, must at time be able to bear children to her husband; as first purpose of matrimony, by laws of nature and society, is procreation. A woman who is pregnant at time of marriage by stranger is not in condition to bear children to her husband, and concealment of that fact, or misrepresentation, is gross fraud upon husband, and sufficient to avoid the marriage, if he was ignorant of her situation, and believed

her chaste and virtuous."—*Sissung vs. Sissung*, 65 Mich. 168, 31 N. W. Rep. 770.

15. Compare: *Long vs. Long*, 77 N. C. 304, 24 Am. Rep. 449 (in absence of statute on subject).

16. Question for jury.—Whether or not concealment of pregnancy by another man than her husband, at time of marriage, is such fraud as avoids the marriage is for determination of jury.—*Allen's Appeal*, 99 Pa. St. 196, 44 Am. Rep. 101.

17. Pregnancy.—Husband participating in incontinence.—Marriage is not voidable on ground of fraud because of pregnancy of spouse at time of marriage where complaining party participated in incontinence of wife before marriage, even though it is doubtful as to plaintiff being father of child.—*Franke vs. Franke* (Cal. Nov. 30, 1892), 31 Pac. Rep. 571, 573, 574.

18. Although husband knew of pregnancy at time of marriage, yet where wife had represented that he was father of child, when in fact another man was such father, the marriage will be avoided.—*Sissung vs. Sissung*, 65 Mich. 168, 31 N. W. Rep. 770.

19. PREVIOUS UNCHASTE CONDUCT, although concealed, does not invalidate marriage.—*Barnes vs. Barnes*, 110 Cal. 418, 421, 42 Pac. Rep. 904; *Varney vs. Varney*, 52 Wis. 120, 38 Am. Rep. 726, 8 N. W. Rep. 739.

20. FORCE OR DURESS.—Generally.—"Consent given under actual duress obtained by force is no consent; and although the form of marriage has been observed, essence of contract is wanting."—*Willard vs. Willard*, 6 Baxt. (Tenn.) 297, 32 Am. Rep. 529.

21. Arrest for bastardy.—Fact that man was in custody of officer in proceeding against him for bastardy will not warrant conclusion that his consent was result of duress.—*Jackson ex dem. Dies vs. Winne*, 7 Wend. (N. Y.) 47, 22 Am. Dec. 563.

§ 59. INCOMPETENCY OF PARTIES TO. Marriages between parents and children, ancestors and descendants of every degree, and between brothers and sisters of the half as well as the whole blood, and between uncles and nieces or aunts and nephews, are incestuous, and void from the beginning, whether the relationship is legitimate or illegitimate.

History: Enacted March 21, 1872.

§ 60. OF WHITES AND NEGROES OR MULATTOES, VOID. All marriages of white persons with negroes, mongolians, or mulattoes are illegal and void.

History: Enacted March 21, 1872; amended by Code Commission (by adding word "mongolian"), Act March 16, 1901, Stats. and Amdts. 1900-1, p. 335, held unconstitutional; see history, § 4 ante; amended March 21, 1905, c. CDXIV, p. 554.

1. Applied, cited, construed, referred to, etc.
2. Construction—Application of statute.
3. Constitutionality of statute.
4. Same—Fourteenth Federal amendment.
5. White person defined.
6. Mulatto defined.
- 7, 8. Action declaring nullity—Necessity.
- 9, 10. Validity of marriage contracted in other state—Generally.
11. Same—To avoid statute of domicile.
12. Marriage not presumed from cohabitation.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc. in: In re Estate of Wood, 137 Cal. 129, 135, 69 Pac. Rep. 900 (referred to).

2. CONSTRUCTION—Section refers to marriages contracted in this state.—Estate of Wood, 137 Cal. 129, 135, 69 Pac. Rep. 900.

See post § 63 note para. 3-14.

3. Constitutionality of statute.—Statute prohibiting white persons and negroes from intermarrying is constitutional.—*Green vs. State*,

58 Ala. 190, 29 Am. Rep. 739 (overruling *Burns vs. State*, 48 Ala. 195, 17 Am. Rep. 34); *State vs. Gibson*, 36 Ind. 389, 10 Am. Rep. 42; *Francois vs. State*, 9 Tex. App. 144.

4. **Fourteenth Federal amendment.**—Statute making it an offense for white persons and negroes to intermarry, and providing for punishment of each in case of conviction, does not discriminate against person of any particular color or race, and hence does not violate fourteenth Federal amendment.—*Pace vs. Alabama*, 106 U. S. 583, bk. 27 L. ed. 207, 1 Sup. Ct. Rep. 637.

5. **White person defined.**—Person having sixteenth part Indian blood is white person within the meaning of statute prohibiting marriage between white person and negro, mulatto, or Indian.—*Barley vs. Fiske*, 34 Me. 77.

6. **"Mulatto,"** under a statute prohibiting marriage between white person and mulatto, is a person begotten by a black and a white person, and issue of a mulatto and a white person is not a mulatto.—*Medway vs. Natick*, 7 Mass. 88.

7. **ACTION DECLARING NULLITY—Necessity.**—Marriage between free white person and free person of color in violation of Louisiana Civil Code, article 95, is an absolute nullity, and no action is needed to declare that fact; either party may disregard it, and neither can pretend to derive from it any of consequences of a lawful marriage.—*Succession of Minvielle*, 15 La. Ann. 342.

8. **Compare:** *Boyer vs. Tassin*, 9 La. Ann. 491.

9. **VALIDITY OF MARRIAGE CONTRACTED IN OTHER STATE—Generally.**—Marriage contracted between white persons and negroes or mulattoes, if valid under laws of state where marriage was performed, is valid in this state.—*Pearson vs. Pearson*, 46 Cal. 609, 51 Cal. 120; *Estate of Wood*, 137 Cal. 129, 136, 69 Pac. Rep. 900. See *Medway vs. Needham*, 16 Mass. 157, 8 Am. Dec. 131.

See post § 63 note para. 3-6.

10. **Contras:** *Dupree vs. Boulad*, 10 La. Ann. 411; *State vs. Ross*, 76 N. C. 242, 22 Am. Rep. 678; *State vs. Kennedy*, 76 N. C. 251, 22 Am. Rep. 683; *Kinney vs. Commonwealth*, 30 Gratt. (Va.) 858, 32 Am. Rep. 690.

11. **To avoid statute of domicile.**—Marriage between Indian and white person, when purposely contracted within the Indian reservations in order to avoid statutes of parties' domicile, is invalid.—In re *Wilbur's Estate*, 8 Wash. 35, 40 Am. St. Rep. 886; *Wilbur's Estate vs. Bingham*, 8 Wash. 35, 35 Pac. Rep. 407. See N. C. *State vs. Kennedy*, 76 N. C. 251, 22 Am. Rep. 693. Va. *Kinney vs. Commonwealth*, 30 Gratt. 858, 32 Am. Rep. 690. N. C. *State vs. Ross*, 76 N. C. 242, 22 Am. Rep. 678. Fed. *State vs. Tutty*, 41 Fed. Rep. 753.

12. **MARRIAGE IS NOT PRESUMED FROM FACT OF COHABITATION** between free white woman and negro.—*Armstrong vs. Hodges*, 3 B. Mon. (Ky.) 69.

§ 61. **SUBSEQUENT MARRIAGE, WHEN ILLEGAL AND VOID.** A subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any person other than such former husband or wife, is illegal and void from the beginning, unless:

1. The former marriage has been annulled or dissolved. In no case can a marriage of either of the parties during the life of the other, be valid in this state, if contracted within one year after the entry of an interlocutory decree in a proceeding for divorce.

2. Unless such former husband or wife is [1] absent, and not known to such person to be living for the space of five successive years immediately preceding such subsequent marriage, or [2] is generally reputed or believed by such person to be dead at the time such subsequent marriage was contracted. In either of which cases the subsequent marriage is valid until its nullity is adjudged by a competent tribunal.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 185; Feb. 25, 1897, Stats. and Amdts. 1897, p. 34; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 335, unconstitutional; see history, § 4 ante; amended March 16, 1903, Stats. and Amdts. 1903, p. 176.

I. In General.

1. Applied, cited, construed, referred to, etc.
2. Construction—Of subdivision one.
3. Same—Of subdivision two.

II. Marriage During Existence of Prior Marriage.

4. Generally.
- 5-7. Good faith in contracting second marriage.

III. Marriage by Divorced Persons.

8. Decree of separation.
- 9, 10. Marriage by guilty party—Generally.
11. Same—Good faith in contracting second marriage.
- 12-16. Same—Foreign marriage.
17. Marriage pending appeal—Generally.
- 18-21. Marriage before final decree—Construction of section—Generally.
- 22, 23. Same—Same—"Dissolved."

24-27. Same—Decree nisi or interlocutory decree dissolving marriages.

28-32. Same—Same—Decree rendered but not entered.

33. Same—Same—Agreement to marry before year.

34-41. Same—Decree nisi or interlocutory decree not dissolving marriage.

42. Same—Final decree defined.

43-46. Same—Foreign marriages—Marriage held valid.

47-52. Same—Same—Marriage held void.

53, 54. Absence or reputed death of spouse.

55. Same—Absent spouse.

56. Same—Separation by mutual consent.

57, 58. Same—Good faith.

59, 60. Same—Presumption of death by absence or silence.

61. Same—Same—Proof of reputed death.

62, 63. Same—Necessity of inquiry.

64-66. Same—Collateral attack of marriage.

I. IN GENERAL.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Jackson vs. Jackson, 94 Cal. 446, 459, 464, 29 Pac. Rep. 957 (construed and applied); In re Estate of Richards, 133 Cal. 524, 527, 65 Pac. Rep. 1034 (not applicable); In re Estate of Wood, 137 Cal. 129, 131, 132, 133, 134, 135, 137 (construed); 138 (amendment of 1897 to section not applicable); 139 (construed and applied), 144 (applied), 69 Pac. Rep. 900; Buelna vs. Ryan, 139 Cal. 630, 632, 73 Pac. Rep. 466 (construed and applied); In re Estate of Harrington, 140 Cal. 244, 247, 248 (construed and applied); 73 Pac. Rep. 1000; Deyoe vs. Superior Court of Mendocino County, 140 Cal. 476, 485 (construed), 488 (applied), 74 Pac. Rep. 28.

2. CONSTRUCTION—Of subdivision 1. As to, see par. 19 this note.

3. Of subdivision 2. As to, see par. 53 this note.

II. MARRIAGE DURING EXISTENCE OF PRIOR MARRIAGE.

4. GENERALLY.—A marriage contracted while a prior marriage relation exists is absolutely null and void.—Graham vs. Bennet, 2 Cal. 503. See Colo. Poole vs. People, 24 Colo. 510, 52 Pac. Rep. 1025. III. Cartwright vs. McGown, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. Rep. 737; Gordon vs. Gordon, 141 Ill. 160, 33 Am. St. Rep. 294, 30 N. E. Rep. 446, 21 L. R. A. 387. Mass. Adams vs. Adams, 154 Mass. 290, 28 N. E. Rep. 260, 13 L. R. A. 275. N. J. Applegate vs. Applegate, 45 N. J. Eq. (18 Stew.) 116, 17 Atl. Rep. 293. N. Y. Williamson vs. Parisien, 1 John. Ch. 52, 4 Am. Dec. 244; Fenton vs. Reed, 4 John. (N. Y.) 52, 4 Am. Dec. 244. N. C. Gathings vs. Williams, 5 Ired. 487, 44 Am. Dec. 49. Pa. Thomas vs. Thomas, 124 Pa. St. 646, 17 Atl. Rep. 132.

See note to 46 Am. Dec. 130.

5. GOOD FAITH IN CONTRACTING SECOND MARRIAGE.—Where marriage is void, fact that person entered into it in good faith and with belief that he had right to marry is immaterial on question of its invalidity.—Pratt vs. Pratt, 157 Mass. 503, 32 N. E. Rep. 747.

6. Second marriage during existence of prior marriage is void, notwithstanding party

had good reasons to believe, and did believe, that prior spouse was dead, if in truth and fact he or she was living.—Thomas vs. Thomas, 124 Pa. St. 646, 17 Atl. Rep. 132. See Kenley vs. Kenley, 2 Yeates (Pa.) 207; Heffner vs. Heffner, 23 Pa. St. 104.

7. As to good faith in contracting second marriage as defense to prosecution for bigamy, see Pen. Code §§ 281, 1106 and notes.

III. MARRIAGE BY DIVORCED PERSONS.

8. DECREE OF SEPARATION.—Second marriage after rendition of decree of separation, by either party thereto, is void.—Carmena vs. Blaney, 16 La. Ann. 245; Young vs. Naylor, 1 Hill (S. C.) Eq. 333.

9. MARRIAGE BY GUILTY PARTY.—Generally.—Marriage contracted by person from whom divorce had been granted for adultery is unlawful and void.—West Cambridge vs. Lexington, 18 Mass. (1 Pick.) 505, 11 Am. Dec. 231 (under Massachusetts statute, differing materially from ours).

10. Although statute may prohibit guilty party to divorce from remarrying, or marrying within certain time, or except under certain conditions, second marriage in violation thereof is not void, but merely voidable.—Park vs. Barron, 20 Ga. 702, 65 Am. Dec. 641.

11. Good faith in contracting second marriage.—Where guilty party to divorce is prohibited from marrying again without leave of court, second marriage without such leave is invalid, even though entered into in belief that right to do so existed.—White vs. White, 105 Mass. 325, 7 Am. Rep. 526.

12. Foreign marriage.—Statutes prohibiting guilty person from remarrying either during certain period or except with leave of court, have no extra-territorial effect, and second marriage by such person in another jurisdiction, where no such prohibition exists, is valid, even though both parties were residents of domicile of divorcee, and married in other jurisdiction for sole purpose of evading the prohibition.—Me. State vs. Weatherby, 43 Me. 258, 69 Am. Dec. 159. Mass. Commonwealth vs. Lane, 113 Mass. 453, 13 Am. Rep. 509. N. Y. Thorp vs. Thorp, 90 N. Y. 602. Tenn. Dickson vs. Dickson, 1 Yerg. (Tenn.) 110, 24 Am. Dec. 444. Vt. State vs. Shattuck, 69 Vt. 403, 60 Am. St. Rep. 936, 38 Atl. Rep. 81, 40 L. R. A. 423.

13. Prohibition to marry within a specified period after divorce is granted is in the nature of penalty and has no force as disability to marriage out of the state (dis. op.).—In re Estate of Wood, 137 Cal. 129, 147, 69 Pac. Rep. 900. Me. Inhabitants of Phillips vs. Inhabitants of Madrid, 83 Me. 205, 23 Am. St. Rep. 770, 22 Atl. Rep. 114, 12 L. R. A. 862. N. Y. Van Voorhis vs. Brintnall, 86 N. Y. 18, 40 Am. Rep. 505; Thorp vs. Thorp, 90 N. Y. 602, 43 Am. Rep. 189.

14. Statutes prohibitory of marriage after divorce are not extra-territorial, unless made so by express words or necessary implication.—In re Estate of Wood, 137 Cal. 129, 135, 69 Pac. Rep. 900. Ala. Fuller vs. Fuller, 40 Ala. 501; Wilson vs. Holt, 83 Ala. 523, 3 Am. St. Rep. 768, 3 So. Rep. 321. Vt. State vs. Shat-

tuck, 69 Vt. 403, 60 Am. St. Rep. 936, 38 Atl. Rep. 81, 40 L. R. A. 428.

15. Decree of divorce prohibiting subsequent remarriage to person against whom judgment was rendered in state of his domicile, does not preclude party from remarriage in another state.—*Reed vs. Hudson*, 13 Ala. 570; *Fuller vs. Fuller*, 40 Ala. 501; *Wilson vs. Holt*, 33 Ala. 523, 3 Am. St. Rep. 768.

16. *Contra*: "Believing as we do that statute in question which we are called upon to construe in case at bar is expressive of decided state policy not to permit sensibilities of innocent and injured husband or wife who has been driven by adultery of his or her consort to necessity of obtaining divorce to be wounded, nor public decency to be affronted by being forced to witness continued cohabitation of adulterous pair, even under guise of subsequent marriage performed in another state for the purpose of evading our statute, and believing that moral sense of community is shocked and outraged by such exhibition, we will not allow such parties to shield themselves behind general rule of law of marriage, wisdom and perpetuity of which depends as much upon judicious exceptions thereto as upon inherent rule itself."—*Pennegar vs. State*, 87 Tenn. 244, 10 Am. St. Rep. 648, 10 S. W. Rep. 505, 2 L. R. A. 703. See *In re Estate of Wood*, 137 Cal. 129, 143, 69 Pac. Rep. 900; *In re Estate of Stull*, 183 Pa. St. 625, 63 Am. St. Rep. 776, 39 Atl. Rep. 16, 39 L. R. A. 539.

17. **MARRIAGE PENDING APPEAL—Generally.**—Where statute renders either party to divorce proceedings incapable of contracting marriage with third person during time in which an appeal may be taken, or pending appeal, marriage contracted during such time is void.—*Wilhite vs. Wilhite*, 41 Kan. 154, 21 Pac. Rep. 173 (applying Oregon statutes); *McLennan vs. McLennan*, 31 Oreg. 480, 50 Pac. Rep. 802; *Smith vs. Eife*, 4 Wash. 702, 704, 30 Pac. Rep. 1059.

Contra: Where statute merely declares that it shall be unlawful for either party to so marry, and fixes penalty for its violation.—*Conn vs. Conn*, 2 Kan. App. 419, 42 Pac. Rep. 1006. See *State vs. Walker*, 36 Kan. 297, 303, 13 Pac. Rep. 279.

18. **MARRIAGE BEFORE FINAL DECREE—Construction of section—Generally.**—Provision in subd. 1 of § 61 contains restrictive legislation affecting unmarried persons alone; the parties may remarry.—*In re Estate of Wood*, 137 Cal. 129, 134, 69 Pac. Rep. 900.

19. Provision in § 91 that the effect of the judgment of divorce is to restore the parties to the estate of unmarried persons must be read in connection with § 61 (dis. op.).—*Estate of Wood*, 137 Cal. 129, 144, 69 Pac. Rep. 900.

20. Court say that they are fully persuaded that the marriage law requires amendment, and that supposed intention of amendment of 1897 to this section was a laudable one, but that intention should be made manifest in the terms of the law and not left to rest upon a doubtful construction.—*In re Estate of Wood*, 137 Cal. 129, 137, 69 Pac. Rep. 900.

21. Amendment of this section passed in

1897 is not regarded by the court as having any effect upon accepted construction of §§ 90 and 91, and this conclusion is fortified by consideration that any act involving consequences in their nature penal is to be strictly construed.—*In re Estate of Wood*, 137 Cal. 129, 138, 69 Pac. Rep. 900.

22. "Dissolved" is used in the same sense in §§ 61 and 69.—*In re Estate of Wood*, 137 Cal. 129, 134, 69 Pac. Rep. 900.

23. "DISSOLVED" WHEN USED AS RELATING TO THE FIRST MARRIAGE means, and can only mean, dissolution of marriage—a divorce.—*In re Estate of Wood*, 137 Cal. 129, 132, 69 Pac. Rep. 900.

24. **Decree nisi or interlocutory decree dissolving marriage.**—Decree for divorce rendered and made dissolves marriage.—*In re Estate of Wood*, 137 Cal. 129, 133, 69 Pac. Rep. 900.

25. When decree of divorce has been rendered and made, the marriage is dissolved, and section, by use of those words, thus declares it must have been dissolved one year before either party may marry again.—*In re Estate of Wood*, 137 Cal. 129, 133, 69 Pac. Rep. 900.

26. "If object of amendment was to postpone change of status resulting from divorce until, and to make it dependent upon, finality of decree, it was wholly inadequate to that purpose. It would not even have suspended effect of decree during time then allowed for taking an appeal from judgment, for year of suspension was to commence with rendition of judgment, while year limited for appealing only commenced to run from entry of judgment,—acts often separated by considerable lapse of time. Much less would it have suspended effect of decree pending decision of the appeal."—*In re Estate of Wood*, 137 Cal. 129, 137, 69 Pac. Rep. 900.

27. "Amendment to section was probably intended by its author to remedy anomalous condition of our marriage law resulting from construction theretofore placed upon § 91, under which husband or wife could be taken subject to contingency of being displaced by reversal of appealable, and possibly erroneous, decree."—*In re Estate of Wood*, 137 Cal. 129, 137, 69 Pac. Rep. 900.

28. **Decree rendered but not entered.**—Decree of judgment rendered has full force and effect.—*In re Estate of Wood*, 137 Cal. 129, 133, 69 Pac. Rep. 900.

29. Decree of divorce makes parties unmarried when rendered.—*In re Estate of Wood*, 137 Cal. 129, 138, 69 Pac. Rep. 900.

30. Decree has full force and effect regardless of mere ministerial act of entering it upon judgment-book.—*In re Estate of Wood*, 137 Cal. 129, 143, 69 Pac. Rep. 900.

31. **Judgment is not what is entered, but what is ordered and considered.**—*In re Estate of Wood*, 137 Cal. 129, 133, 69 Pac. Rep. 900.

32. Entry of judgment or decree does not go to its validity.—*In re Estate of Wood*, 137 Cal. 129, 133, 69 Pac. Rep. 900.

33. **Agreement to marry before lapse of one**

year after decree of divorce is rendered, is valid. Divorce being granted, parties are no longer married people, and have right to contract to marry and may marry after lapse of a year from rendering of decree.—*Buelna vs. Ryan*, 139 Cal. 630, 632, 73 Pac. Rep. 466.

34. SAME—DECREE NISI OR INTERLOCUTORY DECREE NOT DISSOLVING MARRIAGE.—A decree nisi rendered in divorce suit does not dissolve marriage relation, and second marriage entered into before entry of absolute or final decree, or within specified time after entry of interlocutory decree or decree nisi, is void.—*Cook vs. Cook*, 144 Mass. 163, 10 N. E. Rep. 749; *Googins vs. Googins*, 152 Mass. 533, 25 N. E. Rep. 833.

35. Until nisi judgment, decreeing divorce, is made absolute parties are husband and wife, and neither can marry again.—*Edgerly vs. Edgerly*, 112 Mass. 53; *Fox vs. Davis*, 113 Mass. 255; *Moore vs. Moore*, 121 Mass. 233; *Norman vs. Villars*, L. R. 2 Exch. Div. 359; *Noble vs. Noble*, L. R. 1 P. & D. 691. See *McLennan vs. McLennan*, 31 Oreg. 480, 65 Am. St. Rep. 835, 50 Pac. Rep. 802. See note 65 Am. Dec. 355.

36. Nisi decree of divorce is not judgment of divorce in full virtue until it is made absolute by final decree.—*Moore vs. Moore*, 121 Mass. 233; *Alexander vs. Alexander*, 2 L. J. Mat. Cas. 164; *Boulton vs. Boulton*, 31 L. J. Mat. Cas. 115; *Masters vs. Masters*, 34 L. J. Mat. Cas. 7; *Whitmore vs. Whitmore*, 35 L. J. Mat. Cas. 52; *Hulsey vs. Hulsey*, 41 L. J. Mat. Cas. 19; *Amsey vs. Amsey*, 45 L. J. Mat. Cas. 56.

37. Marriage illegal unless divorced one year (dis. op.).—In re Estate of Wood, 137 Cal. 129, 139, 69 Pac. Rep. 900.

38. The courts are inhibited from granting decree of divorce which will be immediately operative or which can be final or effective until after expiration of year from time of rendering decree of divorce.—In re Estate of Wood (dis. op.), 137 Cal. 129, 144, 69 Pac. Rep. 900.

39. Section is not to be construed as applying solely to marriages already dissolved, but as also declaring that until expiration of year from time of decree of divorce is rendered a marriage is not dissolved (dis. op.).—In re Estate of Wood, 137 Cal. 127, 144, 69 Pac. Rep. 900.

40. Amendment of 1897 to this section places limitation upon effect of decree of divorce in determining status of parties to the action, and suspends operation of decree for one year from time it was rendered (dis. op.).—In re Estate of Wood, 137 Cal. 129, 144, 69 Pac. Rep. 900.

41. Until one year from time decree is rendered, proceedings for divorce are inchoate and undetermined, and parties to action are still legally bound to each other as husband and wife, and their status or capacity for marriage is unchanged, whatever may be their social or individual relations to each other (dis. op.).—In re Estate of Wood, 137 Cal. 129, 144, 69 Pac. Rep. 900.

42. Final decree within meaning of statute prohibiting party against whom divorce is

granted from remarrying within two years from time of entry of final decree of divorce, means decree absolute and not decree nisi.—*Googins vs. Googins*, 152 Mass. 533, 25 N. E. Rep. 833.

43. SAME—FOREIGN MARRIAGES—Marriage held valid.—Section has no extra-territorial operation.—In re Estate of Wood, 137 Cal. 129, 135, 69 Pac. Rep. 900; *State vs. Shattuck*, 69 Vt. 403, 60 Am. St. Rep. 936, 38 Atl. Rep. 81, 40 L. R. A. 428.

44. Divorce being granted, parties are no longer married and may marry outside of state.—In re Estate of Wood, 137 Cal. 130, 69 Pac. Rep. 900.

45. "This amendment (i. e. the section as it now stands, and stood prior to 1903) was, however, found to be inadequate, for it was held that it could not affect marriage solemnized in foreign jurisdiction."—*Dictum in Deyoe vs. Superior Court of Mendocino County*, 140 Cal. 476, 485, 74 Pac. Rep. 28 (in construing and applying § 131).

46. Subsequent marriage abroad, before period required by law after divorce is granted has expired, is void in this state (dis. op.).—In re Estate of Wood, 137 Cal. 129, 145, 69 Pac. Rep. 900.

See post § 63 and note.

47. Same—Marriage held void.—Contract entered into in another state which is contrary to policy of laws of this state will not be enforced by courts of this state, irrespective of whether it is contrary to policy of laws of country where it was entered into (dis. op.).—In re Estate of Wood, 137 Cal. 129, 145, 69 Pac. Rep. 900.

48. Benefit of contract which is contrary to policy of laws of state, purposely made in another state with intent to disregard laws of this state, cannot be granted (dis. op.).—In re Estate of Wood, 137 Cal. 129, 146, 69 Pac. Rep. 900.

49. Marriage not dissolved by rendering decree of divorce, but parties remain married people until expiration of one year from rendering of decree of divorce (dis. op.).—In re Estate of Wood, 137 Cal. 129, 147, 69 Pac. Rep. 900.

50. Policy of laws of state is superior to any obligations of comity (dis. op.).—In re Estate of Wood, 137 Cal. 147, 69 Pac. Rep. 900.

51. Marriage purposely contracted in another state which is contrary to laws of parties' domicile is void (dis. op.).—In re Estate of Wood, 137 Cal. 129, 146, 147, 69 Pac. Rep. 900. *Pa.* In re Estate of Stull, 183 Pa. 625, 39 Atl. Rep. 16, 39 L. R. A. 539. *Tenn.* *Pennegar vs. State*, 87 Tenn. 244, 10 Am. St. Rep. 648, 10 S. W. Rep. 305, 2 L. R. A. 703. *Fed. State vs. Tutty*, 41 Fed. Rep. 753, 7 L. R. A. 50.

52. See further on this question, post § 63 and note.

53. ABSENCE OR REPUTED DEATH OF SPOUSE—Generally.—Subsequent marriage contracted by any person is not void where husband or wife of former marriage has been absent and not known for space of five years.—*Jackson vs. Jackson*, 94 Cal. 446, 459, 29 Pac. Rep. 957.

54. Subsequent marriage of spouse under second provision of section makes her wife of her second husband, and precludes her from claiming homestead right in estate of her first husband.—In re Estate of Harrington, 140 Cal. 244, 249, 73 Pac. Rep. 1000.

55. Absent spouse is a spouse who has left his or her home, residence, or domicile.—Jackson vs. Jackson, 94 Cal. 446, 459, 29 Pac. Rep. 957.

56. Separation by mutual consent does not constitute absence in sense used in subd. 2 of this section.—Jackson vs. Jackson, 94 Cal. 446, 464, 29 Pac. Rep. 957.

57. Good faith.—To be entitled to protection of statute, second marriage must have been contracted in good faith, and parties must have had good reason to believe that former spouse was dead.—Brown vs. Brown, 1 Abb. App. Dec. (N. Y.) 214; Oram vs. Oram, 3 Redf. (N. Y.) 300. See Cropsey vs. McKinney, 30 Barb. (N. Y.) 47.

58. Where husband left his wife of his own volition in another state and came to this state, presumption is that having married and left her in Missouri he did not believe her to be dead.—In re Estate of Richards, 133 Cal. 524, 528, 65 Pac. Rep. 1034.

59. Death of husband may be presumed from his silence for ten years prior to marriage by wife.—In re Estate of Harrington, 140 Cal. 244, 249, 73 Pac. Rep. 1000.

60. Presumption of death from absence.—See Code Civ. Proc. § 1963 and note.

61. Same—Proof of reputed death.—Presumption of death of spouse after an absence from home for period of five years will not be indulged in absence of any proof or repute of her death.—In re Estate of Richards, 133 Cal. 524, 528, 65 Pac. Rep. 1034.

62. Same—Necessity of inquiry.—“He cannot shut his eyes and ears, and justify a second marriage because for five years he did not hear of his wife. Did he try to hear of her? Did he honestly believe that she was dead? Did he make inquiry? Was he excused from making inquiry by false report of her death?”—Gall vs. Gall, 114 N. Y. 109, 21 N. E. Rep. 106.

63. Mere lapse of time is not enough.—“It should be shown where husband went to reside, or that diligent inquiry in that respect had proved unavailing; that he had abandoned his former resorts or occupation; if his residence was discovered, that he afterwards had abandoned such residence, without leaving trace of where he had gone.”—Tyler vs. Tyler, 80 Hun (N. Y.) 406, 30 N. Y. Supp. 330.

64. SAME—COLLATERAL ATTACK OF MARRIAGE.—Subsequent marriage contracted during life of spouse by former marriage where such spouse has been absent for period of five years is valid until annulled by proper proceedings.—Jackson vs. Jackson, 94 Cal. 446, 464, 29 Pac. Rep. 957.

65. Subsequent marriage by wife whose husband was absent and not known to her to be living, or so generally reputed and believed by her to be dead for space of five successive years, is valid until such second marriage is annulled by competent tribunal.—In re Estate of Harrington, 140 Cal. 244, 247, 73 Pac. Rep. 1000.

66. Second marriage contracted in good faith and under belief of death of former spouse cannot be attacked collaterally, but only by direct proceeding for that purpose instituted by one of the parties.—Charles vs. Charles, 41 Minn. 201, 42 N. W. Rep. 935; Cropsey vs. McKinney, 30 Barb. (N. Y.) 47; White vs. Lowe, 1 Redf. (N. Y.) 376.

§ 62. RELEASE FROM MARRIAGE CONTRACT, WHEN. Neither party to a contract to marry is bound by a promise made in ignorance of the other's want of personal chastity, and either is released therefrom by unchaste conduct on the part of the other, unless both parties participate therein.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 185.

1. Want of chastity known to defendant.
- 2-5. Want of chastity unknown to defendant.
6. Same—How far back evidence may go.
7. Same—Charge to the jury.
8. Same—Concealment of birth of bastard child.
9. Same—Cohabitation by plaintiff prior to promise.
10. Same—General reputation of bad character.
11. Same—Intimacy with other men.
12. Same—Damages—Charge not made in good faith.

1. WANT OF CHASTITY KNOWN TO DEFENDANT at time of promise is no defense to action to recover damages for breach of promise.—Johnson vs. Travis, 33 Minn. 231, 22 N. W. Rep. 624; Kelley vs. Highfield, 15 Oreg. 277, 14 Pac. Rep. 744. See Ala. Espy vs. Jones, 37 Ala. 379, 383-384. Ill. Sprague vs. Craig, 51 Ill. 282. Iowa. Denslow vs. Van Horn, 16

Iowa 476. Me. Snowman vs. Wardwell, 32 Me. 275; Berry vs. Bakemann, 44 Me. 164. Pa. Von Storch vs. Griffin, 77 Pa. St. 77; Johnson vs. Smith, 3 Pittsb. 184. Eng. Irving vs. Greenwood, 1 Car. & P. 350, 11 Eng. C. L. 412; Bench vs. Merrick, 1 Car. & K. 463, 47 Eng. C. L. 462. See par. 6 this note.

2. WANT OF CHASTITY UNKNOWN AT TIME OF PROMISE constitutes good defense on part of defendant to an action for breach of promise.—McKee vs. Nelson, 4 Cow. (N. Y.) 355, 15 Am. Dec. 384; Willard vs. Stone, 7 Cow. (N. Y.) 22, 17 Am. Dec. 496. See Ala. Espy vs. Jones, 37 Ala. 379, 383-384. Conn. Woodward vs. Bellamy, 2 Root 354. Ill. Doubet vs. Kirkman, 15 Brad. App. 622; Butler vs. Eschleman, 18 Ill. 44; Fidler vs. McKinley, 21 Ill. 308; Burnett vs. Simpkins, 24 Ill. 264. Ind. Hunter vs. Hatfield, 68 Ind. 419. Iowa. Denslow vs. Van Horn, 16 Iowa 476; Guptill vs. Verback, 58 Iowa 98. La. Morgan

vs. Yarborough, 5 La. Ann. 316. *Mo. Cole vs. Holliday*, 4 Mo. App. 94. *N. Y. Johnson vs. Caulkins*, 1 John. Cas. 116, 1 Am. Dec. 102. *Pa. Von Storch vs. Griffin*, 77 Pa. St. 504. *Tenn. Williams vs. Hollingsworth*, 6 Baxt. 12. *Eng. Irving vs. Greenwood*, 1 Car. & P. 350, 11 Eng. C. L. 412.

As to breach of promise, see monographic note 63 Am. Dec. 532-548.

3. The whole law in the matter has been summed up by Judge Sedgwick as follows: "1. That if the woman was of bad character at the time of the contract, and that was unknown to the defendant, the verdict ought to be in his favor; 2. That if the plaintiff, after the promise, had prostituted her person to any person other than the defendant, she thereby discharged the defendant; 3. That if her conduct was improperly indelicate, although not criminal, before the promise, and it was unknown to the defendant, it ought to be considered in mitigation of damages; 4. That if such was her conduct after the promise, it was proper in the same view for the consideration of the jury."—*Boynton vs. Kellogg*, 3 Mass. 189, 3 Am. Dec. 122. See to same effect *Butler vs. Eschleman*, 18 Ill. 44; *Palmer vs. Andrews*, 7 Wend. (N. Y.) 142.

See *Abbott's Trial Ev.*, ch. 44.

4. "A loose woman, a woman of loose character, is an unchaste woman in ordinary signification of those terms. By an unchaste woman is meant a sexually impure woman, ordinarily."—*Foster vs. Hanchett*, 63 Vt. 319, 54 Am. St. Rep. 886, 35 Atl. Rep. 316.

5. Defendant in breach of promise suit should be permitted to show licentious conduct in plaintiff, and her general character as to sobriety and virtue, without any limitation of time. Object of action is not merely compensation for immediate injury sustained, but damages for loss of reputation. This must necessarily depend on general conduct of party subsequent to as well as previous to injury complained of, and damages to be recovered, as in action of defamation, ought to be regulated by all circumstances of the case. Proof of reputation cannot depend on time; it is a question which is general in its nature, and inquiry respecting it, when material, must be general.—*Johnson vs. Caulkins*, 1 John. Cas. (N. Y.) 116, 1 Am. Dec. 102, approved in *Willard vs. Stone*, 7 Cow. (N. Y.) 22, 17 Am. Dec. 496; and *Palmer vs. Andrews*, 7 Wend. (N. Y.) 142.

6. How far back evidence may go has been discussed with variant results. Without any limitation as to time (*Johnson vs. Caulkins*, supra); twenty-five years too far back to go (*Tompkins vs. Woodley*, 3 Thomp. & C., N. Y. Supr. Ct. 429); permitting inquiry for eight or ten years back held error (*Thorn vs. Helmes*, 2 Keyes, N. Y. 27); inquiry for five years back was allowed in *Rothburn vs. Ross*, 46 Barb. (N. Y.) 133.

7. Charge to jury in breach of promise suit to effect that "if you find from evidence that, at time of alleged promise by defendant, plaintiff had been guilty of criminal intercourse with other men, or was of immoral, lewd, lascivious, or unchaste character, then such conduct or character afforded just cause for defendant to refuse to marry her, and should be considered by you in mitigation of damages, and may, in your discretion, forbid plaintiff from recovering any amount whatever. The amount you give should only be commensurate with the damage done. So, too, if plaintiff seriously and in earnest declared to others that she did not care for defendant, but it was his money she was after, this was just cause for defendant's refusing to marry her, and should in like manner be permitted to reduce amount of her recovery, or, in your discretion, entirely forbid recovery, if contract was understood on his part to be one of and for love and affection," is contradictory to itself and clearly misleading.—*Guptill vs. Verback*, 58 Iowa 98, 12 N. W. Rep. 125.

8. Concealment of birth of bastard child.—Fact that plaintiff, in breach of promise suit, fraudulently concealed from defendant, at time of promise, fact that she had prior thereto been delivered of bastard child, constitutes good defense.—*Bell vs. Eaton*, 28 Ind. 468, 92 Am. Dec. 329.

9. Cohabitation by plaintiff prior to promise constitutes no defense, where promise was made with knowledge of the fact.—*Rich vs. Mayer*, 7 N. Y. Supp. 69.

See par. 1 this note.

10. General reputation of bad character in respect to chastity is no bar to action for breach of marriage promise. Actual unchastity must be shown, as well as ignorance of such unchastity at time of promise.—*Foster vs. Hanchett*, 63 Vt. 319, 54 Am. St. Rep. 886, 35 Atl. Rep. 316. See *Boynton vs. Kellogg*, 3 Mass. 189, 3 Am. Dec. 122.

11. Intimacy with other men.—Evidence that the woman "had an intimacy with several different men," not accompanied with an offer of proof of any criminality, is properly excluded, as "intimacy" means nothing more than close and familiar acquaintance.—*McCarty vs. Coffin*, 157 Mass. 478, 32 N. E. Rep. 649. See *Parkhurst vs. Ketchum*, 83 Mass. (6 Allen) 406.

12. DAMAGE—Charge not made in good faith.—Where charge of misconduct with other men is made, and jury should be satisfied from whole evidence that the evidence offered on that point was offered in bad faith, they may consider that fact in enhancement of damages, both as tending to show animus of defendant and as being an injury to feelings and wounded pride of plaintiff.—*Reed vs. Clark*, 47 Cal. 194, 208. See *Haymond vs. Saucer*, 84 Ind. 10; *Kelley vs. Highfield*, 15 Oreg. 277, 14 Pac. Rep. 744.

§ 63. MARRIAGES CONTRACTED WITHOUT THE STATE. All marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, are valid in this state.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Marriage contract not contemplated by prohibition against impairment.
- 3-5. Validity—Governed by *lex loci contractus*—Generally.
6. Same—Exception to rule.
7. Same—Same—Statute expressing decides state policy.
- 8-10. Same—Foreign marriage to evade law of domicile.
11. Same—Same—Motive of parties.
12. Same—Same—Statute silent.
- 13, 14. Same—Same—Marriage on high seas.
15. Capacity of parties.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Norman vs. Norman* (by error of reporter cited in headlines of official volume *Norman vs. Thomson*), 121 Cal. 620, 624, 66 Am. St. Rep. 74, 54 Pac. Rep. 143, 42 L. R. A. 343 (construed and held not applicable); *In re Estate of Wood*, 137 Cal. 129, 135, 136, 137, 138, 139 (applied), 145 (comment), 147 (held not applicable), 69 Pac. Rep. 900.

2. **MARRIAGE CONTRACT NOT CONTEMPLATED BY PROHIBITION AGAINST IMPAIRMENT**.—Marriage contracts are not contemplated by provision of constitution of United States against impairment of obligations of contracts by state legislation.—*Ky. Maguire vs. Maguire*, 7 Dana (Ky.) 181, 183. *Me. Adams vs. Palmer*, 51 Me. 481. *R. L. Ditson vs. Ditson*, 4 R. L. 87. *Fed. State vs. Tutty*, 41 Fed. Rep. 753, 7 L. R. A. 50. See *Dartmouth College vs. Woodward*, 17 U. S. (4 Wheat.) 518, bk. 4 L. ed. 629; *Maynard vs. Hill*, 125 U. S. 190, bk. 31 L. ed. 654; *Hunt vs. Hunt*, 97 U. S. 565, bk. 24 L. ed. 1109.

3. **VALIDITY—GOVERNED BY LEX LOCI CONTRACTUS**—Generally.—Validity of marriage is to be tested by law of place where it is celebrated. If valid there, it is valid everywhere. It has a legal ubiquity of obligation. If invalid there, it is equally invalid everywhere.—*O'Farrel vs. Harney*, 51 Cal. 125, 128; *Norman vs. Norman* (by error of reporter cited in headlines of official volume as *Norman vs. Thomson*), 121 Cal. 620, 624, 66 Am. St. Rep. 74, 54 Pac. Rep. 143, 42 L. R. A. 343; *Pearson vs. Pearson*, 51 Cal. 120; *In re Estate of Wood*, 137 Cal. 129, 135, 136, 69 Pac. Rep. 900. See *Ky. Sneed vs. Ewing*, 5 J. J. Marsh. 460, 22 Am. Dec. 41. *Me. Harding vs. Alden*, 9 Me. 140, 23 Am. Dec. 549. *Mo. Johnson vs. Johnson*, 30 Mo. 72, 77 Am. Dec. 598. *Neb. Gibson vs. Gibson*, 24 Neb. 394, 39 N. W. Rep. 450. *N. H. True vs. Ranney*, 21 N. H. 52, 53 Am. Dec. 164. *N. J. Harral vs. Harral*, 39 N. J. Eq. (12 Stew.) 379, 51 Am. Rep. 17. *N. Y. Moore vs. Hegeman*, 92 N. Y. 521, 44 Am. Rep. 408. *N. C. State vs. Ross*, 76 N. C. 242, 22 Am. Rep. 678; *State vs. Patterson*, 3 Ired. L. 346, 38 Am. Dec. 699. *Pa. Phillips vs. Gregg*, 10 Watts 158, 36 Am. Dec. 158.

See notes 5 Am. Dec. 736; 7 Am. Dec. 208; 8 Am. Dec. 478.

4. The proposition is established as general one, in private and international law, that actual marriage, valid in country where celebrated, will not, as upon a claim of right, but by courtesy, be given effect to in other states, though not celebrated by the forms nor evi-

denced in mode prescribed for marriages in such other states."—*Roche vs. Washington*, 19 Ind. 53, 81 Am. Dec. 376.

5. To rule that if invalid where celebrated, they are invalid everywhere, there are well-recognized exceptions, amongst which may be classed those marriages celebrated in foreign countries by citizens entitling themselves under certain circumstances to benefit of laws of their own country.—*Phillips vs. Gregg*, 10 Watts (Pa.) 158, 36 Am. Dec. 158.

6. Exceptions to rule declared by section are those marriages which, although valid in state where celebrated, will not be so recognized elsewhere because contrary to the laws of nature, as generally recognized in Christian countries (e. g. polygamous and incestuous), or because contrary to the policy of laws of domicile.—*Commonwealth vs. Lane*, 113 Mass. 458, 18 Am. Rep. 509; *State vs. Tutty*, 41 Fed. Rep. 753, 7 L. R. A. 50. See *Mass. Greenwood vs. Curtis*, 6 Mass. 358, 4 Am. Dec. 145, 149. *N. H. True vs. Ranney*, 21 N. H. 52, 53 Am. Dec. 164 (where one of the parties was an imbecile). *Pa. In re Estate Stull*, 133 Pa. St. 625, 63 Am. St. Rep. 776, 39 Atl. Rep. 16, 39 L. R. A. 539. *Tenn. Pennegar vs. State*, 37 Tenn. 244, 10 Am. St. Rep. 648, 10 S. W. Rep. 305, 2 L. R. A. 703. *Va. Kinney vs. Commonwealth*, 30 Gratt. 858, 32 Am. Rep. 690.

7. When statutory prohibition is expressive of decided state policy as matter of morals, marriage contracted in another state in contravention to laws of state in which parties reside, must be held to be void as contra bonos mores (dis. op.).—*In re Estate of Wood*, 137 Cal. 129, 141. *Tenn. State vs. Bell*, 7 Baxt. 12, 32 Am. Rep. 549. *Tex. Frasher vs. State*, 3 Tex. Ct. App. 263, 30 Am. Rep. 131 (quære). *Va. Kinney vs. Commonwealth*, 30 Gratt. 858, 32 Am. Rep. 690. *Wash. In re Wilbur's Estate*, 8 Wash. 35, 40 Am. St. Rep. 886, sub nom. *Wilbur's Estate vs. Bingham*, 35 Pac. Rep. 407. *Fed. State vs. Tutty*, 41 Fed. Rep. 753, 7 L. R. A. 50.

See ante §§ 60, 61 and notes.

8. **SAME — FOREIGN MARRIAGE TO EVADE LAW OF DOMICILE**.—Marriage contracted elsewhere, if valid where it is contracted, is held valid where parties reside, although parties intended to evade laws of their domicile, unless statutes declare such marriage void or the marriage is one being contrary to law of nature as generally recognized in Christian countries.—*Commonwealth vs. Lane*, 113 Mass. 458, 18 Am. Rep. 509; *Ross vs. Ross*, 129 Mass. 243; *Commonwealth vs. Graham*, 157 Mass. 73, 34 Am. St. Rep. 255, 31 N. E. Rep. 706, 16 L. R. A. 578; *State vs. Shattuck*, 69 Vt. 403, 60 Am. St. Rep. 936, 38 Atl. Rep. 81, 40 L. R. A. 428.

9. This principle is considered so essential that even when it appears that parties went into another state to evade laws of their own country, marriage in foreign state shall nevertheless be valid in country where parties live.—*Medway vs. Needham*, 16 Mass. 157, 3 Am. Dec. 131.

10. Persons who are citizens of this state and domiciled therein will not be permitted to go into another state for purpose of enter-

ing into a contract which is forbidden by laws of this state, and immediately return to this state and invoke aid of our courts for enforcement of that contract.—In re Estate of Wood (dis. op. of Temple, J.), 187 Cal. 129, 146, 69 Pac. Rep. 900.

11. Motive of parties in contracting marriage abroad will not change operation of rule that marriages valid under laws where contracted are valid in state of parties' domicile.—Norman vs. Norman (by error of reporter in headlines of official volume Norman vs. Thomson), 121 Cal. 620, 624, 66 Am. St. Rep. 74, 54 Pac. Rep. 143, 42 L. R. A. 343; Commonwealth vs. Lane, 113 Mass. 458, 18 Am. Rep. 509; State vs. Shattuck, 69 Vt. 403, 60 Am. St. Rep. 936, 38 Atl. Rep. 81, 40 L. R. A. 428 and note.

12. Statutes being silent as to effect of marriages purposely contracted in other states to avoid laws of parties' domicile, such marriage will be upheld where inhibition relates to form or ceremony.—State vs. Tutty, 41 Fed. Rep. 753, 7 L. R. A. 50. See Ward vs. Morrison, 25 Vt. 593; Ovitt vs. Smith, 68 Vt. 35, 33 Atl.

769; State vs. Shattuck, 69 Vt. 403, 60 Am. St. Rep. 936, 38 Atl. Rep. 81, 40 L. R. A. 428.

13. Marriages on high seas.—Marriages performed outside of parties' domicile in order to avoid laws thereof and at place not within jurisdiction of any country is governed by laws of parties' residence.—Norman vs. Norman (by error of reporter in headlines of official volume Norman vs. Thomson), 121 Cal. 620, 624, 625, 66 Am. St. Rep. 74, 54 Pac. Rep. 143, 42 L. R. A. 343; Holmes vs. Holmes, 1 Abb. (U. S.) 525, 546, 1 Sawy. C. C. 99, 117, 12 Fed. Cas. 405; Davis vs. Davis, 1 Abb. (N. Y.) 140.

14. MARRIAGE CEREMONY PERFORMED BY CAPTAIN OF VESSEL upon high seas in order to avoid law of domicile of parties is void.—Norman vs. Norman (by error of reporter in headlines of official volume Norman vs. Thomson), 121 Cal. 620, 624, 625, 66 Am. St. Rep. 74, 54 Pac. Rep. 143, 42 L. R. A. 343.

15. Capacity of parties controlled by law of domicile.—State vs. Kennedy, 76 N. C. 251, 22 Am. Rep. 683 (when one of the parties was a negro).

See ante § 60 and note.

ARTICLE II.

AUTHENTICATION OF MARRIAGE.

- § 68. Procedure required.
- § 69. Marriage license.
- § 70. By whom marriages may be celebrated.
- § 71. No particular form of solemnization.
- § 72. Requirements by persons solemnizing marriages.
- § 73. Certificate of marriage.
- § 74. Certificate of parties and recorder.

- § 75. Declaration where there is no record (repealed).
- § 76. Declaration to contain what.
- § 77. Declaration to be recorded.
- § 78. Either party may proceed to test validity of marriage.
- § 79. Marriage without license.
- § 79a. Recording declaration of marriage.

§ 68. **PROCEDURE REQUIRED.** Marriage must be licensed, solemnized, authenticated, and recorded as provided in this article; but non-compliance with its provisions by others than a party to a marriage does not invalidate it.

History: Enacted March 21, 1872; amended March 26, 1895, Stats. and Amdts. 1895, p. 121; March 21, 1905, Stats and Amdts. 1895, c. CDXIV, p. 554.

- 1. Applied, cited, construed, referred to, etc.
- 2. Annulment of marriage.
- 3. Construction—Not applicable, when.
- 4. Consent to present marriage.
- 5. Evidence—Burden of proof.
- §, 7. Non-compliance with section—Effect.
- 8. Non-assumption of marital rights.
- 9, 10. Requisites—License, etc.—Signing, etc.
- 11, 12. Marriage on high seas—Avoiding statute.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in:** Toon vs. Huberty, 104 Cal. 260, 261, 37 Pac. Rep. 944 (applied with other sections); In re Ruffino, 116 Cal. 304, 311, 48 Pac. Rep. 127 (cited with other sections); Norman vs. Norman (by error of reporter in headlines of official volume Norman vs. Thomson), 121 Cal. 620, 628, 66 Am. St. Rep. 74, 54 Pac. Rep. 143, 42 L. R. A. 343 (applied); Estate of Richards, 133 Cal. 524, 547, 65 Pac. Rep. 1034 (amendment of 1895 held not applicable).

2. **ANNULMENT OF MARRIAGE.**—Marriage not consummated under some recognized law

will be declared invalid by courts of this state.—Norman vs. Norman (by error of reporter in headlines of official volume Norman vs. Thomson), 121 Cal. 620, 628, 66 Am. St. Rep. 74, 54 Pac. Rep. 143, 42 L. R. A. 343.

3. **CONSTRUCTION.**—Section as amended in March, 1895, has no application to common-law marriages entered into before enactment of statute.—Estate of Richards, 133 Cal. 524, 527, 65 Pac. Rep. 1034.

4. **CONTRACT FOR PRESENT MARRIAGE** to be followed any length of time thereafter by assumption of marital rights and duties, both understanding and intending thereby to consummate a marriage contract, will be lawful marriage under statute.—In re Ruffino, 116 Cal. 304, 313, 48 Pac. Rep. 127.

5. **EVIDENCE.**—Burden of proof rests upon party seeking to establish validity of marriage, to show that it was consummated under some recognized law.—Norman vs. Norman (by error of reporter in headlines of official volume Norman vs. Thomson), 121 Cal. 620, 628, 66

Am. St. Rep. 74, 54 Pac. Rep. 143, 42 L. R. A. 343.

6. **NON-COMPLIANCE WITH SECTION** does not invalidate lawful marriage.—Toon vs. Huberty, 104 Cal. 260, 261, 37 Pac. Rep. 944; Estate of Richards, 133 Cal. 524, 527, 65 Pac. Rep. 1034.

7. Marriage not consummated under some recognized law will be declared invalid by courts of this state.—Norman vs. Norman (by error of reporter cited in headlines of official volume as Norman vs. Thomson), 121 Cal. 620, 628, 66 Am. St. Rep. 74, 54 Pac. Rep. 143, 42 L. R. A. 343 (decided on state of facts prior to stats. and amds. 1895 p. 121).

8. **Non-assumption of marital rights.**—Declaration conforming to § 75, with agreements prior to and at time of declaration, never to assume marital rights, duties, and obligations, but to live separate and apart, will not constitute marriage.—Toon vs. Huberty, 104 Cal. 260, 261, 37 Pac. Rep. 944 (§ 75 repealed, stats. and amds. 1895 p. 121).

9. **REQUISITES**—License, etc.—Marriage

must be licensed, solemnized, authenticated, and recorded as provided in this article.—Norman vs. Norman (by error of reporter in headlines of official volume Norman vs. Thomson), 121 Cal. 620, 628, 66 Am. St. Rep. 74, 54 Pac. Rep. 143, 42 L. R. A. 343.

See post § 69 note par. 3.

10. **Signing, acknowledging, and recording** of declaration of marriage is not solemnization.—Toon vs. Huberty, 104 Cal. 260, 261, 37 Pac. Rep. 944.

11. **MARRIAGE ON HIGH SEAS** between residents of this state is governed by laws of this state.—Norman vs. Norman (by error of reporter Norman vs. Thomson), 121 Cal. 620, 628, 66 Am. St. Rep. 74, 54 Pac. Rep. 143, 42 L. R. A. 343.

See post § 63 and note.

12. Marriage performed upon high seas between residents of this state, in order to avoid statutes, is void.—Norman vs. Norman (by error of reporter Norman vs. Thomson), 121 Cal. 620, 628, 66 Am. St. Rep. 74, 54 Pac. Rep. 143, 42 L. R. A. 343.

§ 69. **MARRIAGE LICENSE.** All persons about to be joined in marriage must first obtain a license therefor from the county clerk of the county in which the marriage is to be celebrated, and must upon oath qualify and show as follows:

1. The identity of the parties;
2. Their real and full names and places of residence;
3. Their ages;
4. No license must be granted when either of the parties applicants therefor is an imbecile or insane, or who at the time of making application for said license is under the influence of any intoxicating liquor, or narcotic drug;
5. No license must be issued authorizing the marriage of a white person with a negro, mulatto, or mongolian;
6. If the male is under the age of twenty-one, or the female under the age of eighteen years, the consent of the father, mother or guardian, if such consent is given; or that such non-age person has been previously, but is not at the time married.

If the male is under the age of twenty-one, or the female under the age of eighteen years, and such person has not been previously married, no license must be issued by the clerk, unless the consent in writing of the parents of the person under age, or one of such parents, or of his or her guardian is presented to him duly verified by such parents or parent or guardian; and such consent must be filed by the clerk and he must state such facts in the license. For the purpose of ascertaining all the facts mentioned and required in this section, the clerk must at the time the license is applied for examine the parties to whom the license is to be issued under oath and reduce such examination to writing to be by them subscribed.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 186; April 6, 1880, Code Amdts. 1880 (C. C. pt.), p. 3; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 336, held unconstitutional; see history, § 4 ante; amended March 18, 1905, Stats. and Amdts. 1905, c. CLXXXVI, p. 182.

1. Applied, cited, construed, referred to, etc.
2. Contract to present marriage.
3. License—Necessity for.
4. Perjury as to age.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: People vs. Kelly, 59 Cal. 372, 374 (referred to); In re Ruffino, 116 Cal. 304, 311, 48 Pac. Rep. 127 (cited with other

sections); *Norman vs. Norman* (by error *Norman vs. Thomson*), 121 Cal. 620, 629, 66 Am. St. Rep. 74, 54 Pac. Rep. 143, 42 L. R. A. 343 (applied); *People vs. Kehoe*, 123 Cal. 224, 226, 69 Am. St. Rep. 52, 55 Pac. Rep. 911 (not applicable).

2. CONTRACT FOR PRESENT MARRIAGE followed, at any length of time thereafter, by assumption of marital rights and duties, both parties understanding and intending thereby to consummate marriage contract, is lawful marriage under the statute.—*In re Ruffino*, 116 Cal. 304, 313, 48 Pac. Rep. 127.

Marriage by contract, see ante §§ 55, 63 and notes.

§ 70. BY WHOM MARRIAGES MAY BE CELEBRATED. Marriage may be solemnized by either a [1] justice of the supreme court, [2] judge of the superior court, [3] justice of the peace, [4] judge of any police court, [5] city recorder, [6] priest, or [7] minister of the gospel of any denomination.

History: Enacted March 21, 1872; amended April 6, 1880, Code Amdts. 1880 (C. C. pt.), p. 4; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 336, held unconstitutional; see history, § 4 ante; amended March 20, 1903, Stats. and Amdts. 1903, p. 255.

1. Applied, cited, construed, referred to, etc.
2. Authority to solemnize.
3. Duty to exercise authority.
4. Solemnization on high seas.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Sharon vs. Sharon*, 75 Cal. 1, 12, 16 Pac. Rep. 345 (applied); *In re Ruffino*, 116 Cal. 304, 311, 48 Pac. Rep. 127 (cited in connection with other sections); *Norman vs. Norman* (by error of reporter *Norman vs. Thomson*), 121 Cal. 620, 623, 629, 66 Am. St. Rep. 74, 54 Pac. Rep. 143, 42 L. R. A. 343 (applied); *Crocker vs. Conrey*, 140 Cal. 213, 221, 73 Pac. Rep. 1006 (referred to).

2. LICENSE—Necessity for.—Persons about to be joined in marriage must first obtain a license therefor from clerk of county in which marriage is to be celebrated, showing certain facts which must appear, such as names, identity, and ages of parties.—*Norman vs. Norman* (by error of reporter *Norman vs. Thomson*), 121 Cal. 620, 629, 66 Am. St. Rep. 74, 54 Pac. Rep. 143, 42 L. R. A. 343.

See ante § 68 note pars. 9, 10.

4. PERJURY AS TO AGE.—Prosecution for perjury is maintainable against one who obtains marriage certificate upon false oath as to his age.—See Pen. Code § 118 and note.

2. AUTHORITY TO SOLEMNIZE.—Solemnization can only be performed by persons mentioned in this section. No other persons are so authorized.—*Norman vs. Norman* (by error of reporter *Norman vs. Thomson*), 121 Cal. 620, 623, 66 Am. St. Rep. 74, 54 Pac. Rep. 143, 42 L. R. A. 343.

3. DUTY TO EXERCISE AUTHORITY.—Solemnization is purely exercise of ministerial powers which is optional with those authorized to exercise or not (dis. op.).—*Crocker vs. Conrey*, 140 Cal. 213, 221, 73 Pac. Rep. 1006.

4. Solemnization on high seas by captain of vessel,—as to validity, see ante § 68 note pars. 11, 12.

§ 71. NO PARTICULAR FORM OF SOLEMNIZATION. No particular form for the ceremony of marriage is required, but the parties must declare, in the presence of the person solemnizing the marriage, that they take each other as husband and wife.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Laws of other states—Presumption as to.
- 3, 4. Marriage—Solemnized, when.
5. Marriage abroad—Validity, how determined.
6. Same—Presumption as to laws of another state.
7. Same—Same—Statute as well as common law included.
8. Record—Not necessary to validity.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Sharon vs. Sharon* (dis. op.), 75 Cal. 1, 60, 77 (applied), 66 (referred to), 16 Pac. Rep. 345; *Sharon vs. Sharon*, 79 Cal. 633, 651, 22 Pac. Rep. 26, 131 (applied); *Toon vs. Huberty*, 104 Cal. 260, 261, 37 Pac. Rep. 944 (applied); *In re Ruffino*, 116 Cal. 304, 311, 48 Pac. Rep. 127 (cited with other sections); *Norman vs. Norman* (by error of reporter *Norman vs. Thomson*), 121 Cal. 620, 623, 66

Am. St. Rep. 74, 54 Pac. Rep. 143, 42 L. R. A. 343 (applied).

2. LAWS OF OTHER STATES PRESUMED TO BE SAME as in this state in absence of proof to contrary.—*Norris vs. Harris*, 15 Cal. 226; *Hickman vs. Alpaugh*, 21 Cal. 226; *Hill vs. Grigsby*, 32 Cal. 55, 60, 35 Id. 199; *Marsters vs. Lash*, 61 Cal. 622, 624; *Shumway vs. Leakey*, 67 Cal. 458, 460, 8 Pac. Rep. 12; *Mortimer vs. Marder*, 93 Cal. 172, 173, 28 Pac. Rep. 814; *Palmer vs. Atchison. T. & S. F. R. Co.*, 101 Cal. 187, 196, 35 Pac. Rep. 630; *Wickersham vs. Johnston*, 104 Cal. 407, 411, 43 Am. St. Rep. 113, 38 Pac. Rep. 89; *Cavallaro vs. Texas & Pac. R. Co.*, 110 Cal. 348, 357, 52 Am. St. Rep. 94, 42 Pac. Rep. 918; *Estate of Richards*, 133 Cal. 524, 526, 65 Pac. Rep. 1034.

3. MARRIAGE IS SOLEMNIZED, WHEN, in presence of judicial officer, priest, or minister, parties declare that they take each other as

husband and wife; and officer or minister who witnesses this ceremony is said to solemnize the marriage.—Sharon vs. Sharon, 75 Cal. 1, 12, 16 Pac. Rep. 345.

4. No particular form of ceremony of marriage is required, but parties must declare in presence of person solemnizing the marriage that they take each other as husband and wife.—In re Richards' Estate, 133 Cal. 524, 527, 65 Pac. Rep. 1034.

5. **MARRIAGE ABROAD**—Validity, how determined.—Question as to whether or not marriage contracted abroad is valid will have to be determined according to the laws of our own state, as without proof to contrary the laws of state where marriage is contracted is presumed to be same as in this state.—Marsters vs. Lash, 61 Cal. 622; Shumway vs. Leakey, 67 Cal. 458, 460, 8 Pac. Rep. 12; Estate of Richards, 133 Cal. 524, 526, 65 Pac. Rep. 1034.

See par. 2 this note.

6. **Presumption laws of another state** are same as those of our state, in absence of evidence to contrary.—Norris vs. Harris, 16 Cal. 226; Hickman vs. Alpaugh, 21 Cal. 225; Hill vs.

Grigsby, 22 Cal. 55; Taylor vs. Shew, 39 Cal. 536, 540, 2 Am. Rep. 478; Brown vs. San Francisco G. L. Co., 58 Cal. 426; Marsters vs. Lash, 61 Cal. 622, 624; Shumway vs. Leakey, 67 Cal. 458, 8 Pac. Rep. 12; Tolman vs. Smith, 85 Cal. 280, 24 Pac. Rep. 743; Ex parte Spears, 88 Cal. 640, 22 Am. St. Rep. 341, 26 Pac. Rep. 608; Mortimer vs. Marder, 93 Cal. 172, 28 Pac. Rep. 814; Palmer vs. Atchison, T. & S. F. R. Co., 101 Cal. 187, 35 Pac. Rep. 630; Cavallaro vs. Texas & Pac. R. Co., 110 Cal. 348, 357, 52 Am. St. Rep. 94, 42 Pac. Rep. 918.

7. **Statute as well as common law** included in this presumption.—Hickman vs. Alpaugh, 21 Cal. 225; Marsters vs. Lash, 61 Cal. 622, 624; Shumway vs. Leakey, 67 Cal. 458, 460, 8 Pac. Rep. 12; Mortimer vs. Marder, 93 Cal. 172, 28 Pac. Rep. 814; Cavallaro vs. Texas & Pac. R. Co., 110 Cal. 348, 357, 52 Am. St. Rep. 94, 42 Pac. Rep. 918.

8. **RECORD**—Not necessary to validity.—Solemnization between competent persons makes marriage complete though not succeeded by record.—Sharon vs. Sharon, 75 Cal. 1, 12, 16 Pac. Rep. 345.

See §§ 55, 57, 68, 69 and notes.

§ 72. REQUIREMENTS BY PERSONS SOLEMNIZING MARRIAGE. The person solemnizing a marriage must first require the presentation of the marriage license; and if he has any reason to doubt the correctness of its statement of facts, he must first satisfy himself of its correctness, and for that purpose he may administer oaths and examine the parties and witnesses in like manner as the county clerk does before issuing the license.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 186.

§ 73. CERTIFICATES OF MARRIAGE. The person solemnizing a marriage must make, sign, and indorse upon, or attach to, the license, a certificate, showing:

1. The fact, time, and place of solemnization; and,
2. The names and places of residence of one or more witnesses to the ceremony.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 187.

§ 74. CERTIFICATE TO PARTIES AND RECORDER. He must, at the request of, and for either party, make a certified copy of the license and certificate, and file the originals with the county recorder within thirty days after the marriage.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 336, held unconstitutional; see history, § 4 ante.

Recordation provided for in Pol. Code § 4235.

§ 75. DECLARATION OF MARRIAGE, HOW MADE (repealed).

History: Enacted March 21, 1872; repealed March 26, 1895, Stats. and Amdts. 1895, p. 121.

1. Applied, cited, construed, referred to, etc.
2. Agreement not to assume marital rights.
3. Contract of marriage—Followed by public assumption of rights.
4. Same—Agreement to keep contract secret.
5. Marriage by declaration.
6. Marriage without solemnization.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: Sharon vs. Sharon, 75 Cal. 1, 12, 16 Pac. Rep. 345 (applied), 60, 66 (referred to), (dis. op.); Norman vs. Norman (by error of reporter Norman vs. Thomson), 121 Cal. 620, 628, 66 Am. St. Rep. 74, 54 Pac. Rep. 143, 42 L. R. A. 343 (applied); Estate

of Richards, 133 Cal. 524, 526, 527, 65 Pac. Rep. 1084 (applied).

2. AGREEMENT NOT TO ASSUME MARITAL RIGHTS.—Declaration of marriage, though conforming to this section, does not constitute marriage where, at time of making said declaration, it was expressly agreed by parties that they should never assume marital rights, duties, or obligations, but should live separate and apart from each other.—Toon vs. Huberty, 104 Cal. 260, 261, 37 Pac. Rep. 944.

3. Contract of marriage followed by public assumption of rights, duties, and obligations of that relation, this section has no application to.—In re Ruffino, 116 Cal. 304, 314, 48 Pac. Rep. 127.

See §§ 55, 56 and notes.

4. Agreement to keep contract secret.—Con-

tract of marriage by which each party agrees to take the other as spouse, with provision on part of woman that she will not disclose contract for two years, is not compliance with the statute.—Sharon vs. Sharon, 79 Cal. 633, 651, 23 Pac. Rep. 26, 131.

5. MARRIAGE BY DECLARATION without solemnization, as required by § 71, was provided for by this section of the code prior to amendment of 1895, but act of March 26, 1895, swept away that easy process of marriage.—Norman vs. Norman (by blunder of reporter Norman vs. Thomson), 121 Cal. 620, 628, 66 Am. St. Rep. 74, 54 Pac. Rep. 143, 42 L. R. A. 343.

6. MARRIAGE WITHOUT SOLEMNIZATION provided for in § 70 must be declared in accordance with this section (dis. op.).—Sharon vs. Sharon, 75 Cal. 1, 77, 16 Pac. Rep. 345.

§ 76. DECLARATION WHERE THERE IS NO RECORD. If no record of the solemnization of a marriage heretofore contracted, be known to exist, the parties may join in a written declaration of such marriage, substantially showing:

1. The names, ages, and residences of the parties.

2. The fact of marriage.

3. That no record of such marriage is known to exist. Such declaration must be subscribed by the parties and attested by at least three witnesses.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 187.

1. Applied, cited, construed, referred to, etc.

2. Contract of marriage is not a declaration.

3. Declaration as substitute for record.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: In re Ruffino, 116 Cal. 304, 310, 311, (cited with other sections), 312 (held not applicable), 48 Pac. Rep. 127; Norman vs. Norman (by blunder of reporter Norman vs. Thomson), 121 Cal. 620, 629, 66 Am. St. Rep. 74, 54 Pac. Rep. 143, 42 L. R. A. 343 (applied).

2. CONTRACT OF MARRIAGE in writing is not formal written declaration of marriage as provided for in this section, and it not being

intended to comply with requirements of this section, followed by assumption of marital rights and duties, is not governed by this section.—In re Ruffino, 116 Cal. 304, 312, 48 Pac. Rep. 127.

3. DECLARATION AS SUBSTITUTE FOR RECORD.—Section now as heretofore makes provision for supplying evidence of marriage where no record of solemnization is known to exist and form of written declaration is prescribed.—Norman vs. Norman (by blunder of reporter Norman vs. Thomson), 121 Cal. 620, 629, 66 Am. St. Rep. 74, 54 Pac. Rep. 143, 42 L. R. A. 343.

§ 77. TO BE ACKNOWLEDGED AND RECORDED. Declarations of marriage must be acknowledged and recorded in like manner as grants of real property.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.

2. Contracts not intended as declarations.

3. Recorded in same manner as grants.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Sharon vs. Sharon, (dis. op.), 75 Cal. 1, 77, 16 Pac. Rep. 345 (applied); In re Ruffino, 116 Cal. 304, 311 (referred to), 314 (held not applicable), 48 Pac. Rep. 127; Norman vs. Norman (by error of reporter Norman vs. Thomson), 121 Cal. 620, 629, 66 Am. St. Rep. 74, 54 Pac. Rep. 143, 42 L. R. A. 343 (referred to).

2. CONTRACTS NOT INTENDED AS DECLARATIONS.—Section does not apply to contracts of marriage not intended to be declarations.—In re Ruffino, 116 Cal. 304, 316, 48 Pac. Rep. 127.

3. RECORDED IN SAME MANNER AS GRANTS.—Declaration of marriage must be acknowledged and recorded in like manner as grants of real property (dis. op.).—Sharon vs. Sharon, 75 Cal. 1, 77, 16 Pac. Rep. 345.

See Pol. Code § 4235 and note.

§ 78. EITHER PARTY MAY PROCEED TO TEST VALIDITY OF MARRIAGE. If either party to any marriage denies the same, or refuses to join in a

declaration thereof, the other may proceed, by action in the superior court, to have the validity of the marriage determined and declared.

History: Enacted March 21, 1872; amended to make it conform to new constitution, Feb. 15, 1883, Stats. and Amdts. 1883, p. 4.

1. Applied, cited, construed, referred to, etc.
2. Appeal will lie.
3. Equitable proceeding.
4. Refusal to join.

vs. Sharon, 67 Cal. 185, 195, 7 Pac. Rep. 456, 635, 8 Id. 709.

See post § 92 and note.

3. EQUITABLE PROCEEDING.—Action to have validity of disputed marriage determined and declared under this section is, in its nature, a suit in equity.—Sharon vs. Sharon, 67 Cal. 185, 195, 7 Pac. Rep. 456, 635, 8 Id. 709.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Sharon vs. Sharon, 67 Cal. 185, 194, 195, 7 Pac. Rep. 456, 635, 8 Id. 709 (applied); Sharon vs. Sharon, 75 Cal. 1, 12, 16 Pac. Rep. 345 (erroneously cited for § 68); Norman vs. Norman (by blunder of reporter Norman vs. Thomson), 121 Cal. 620, 623, 66 Am. St. Rep. 74, 75, 54 Pac. Rep. 143, 42 L. R. A. 343 (applied).

2. APPEAL WILL LIE from a decree determining validity of disputed marriage.—Sharon

4. REFUSAL TO JOIN.—Validity of marriage may be determined and declared if either party denies the same or refuses to join declaration thereof.—Sharon vs. Sharon, 67 Cal. 185, 194, 7 Pac. Rep. 456, 635, 8 Id. 709; Norman vs. Norman (by blunder of reporter Norman vs. Thomson), 121 Cal. 620, 623, 66 Am. St. Rep. 74, 54 Pac. Rep. 143, 42 L. R. A. 343.

§ 79. MARRIAGE WITHOUT LICENSE. When unmarried persons, not minors, have been living together as man and wife, they may, without a license, be married by any clergyman. A certificate of such marriage must, by the clergyman, be made and delivered to the parties, and recorded upon the records of the church of which the clergyman is a representative. No other record need be made.

History: Enacted Feb. 3, 1878, Code Amdts. 1877-8, p. 75-6.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Toon vs. Huberty, 104 Cal. 260, 261, 37 Pac. Rep. 944 (applied).

2. Signing and recording declaration as to

whether constitutes solemnization within the meaning of the statute.—See Toon vs. Huberty, 104 Cal. 260, 261, 37 Pac. Rep. 944.

See also ante § 68 and note.

§ 79a. RECORDING DECLARATION OF MARRIAGE. The provisions of this chapter, so far as they relate to the solemnizing of marriages, are not applicable to members of any particular religious denomination having, as such, any peculiar mode of entering the marriage relation; but such marriages must be declared, as provided in section seventy-six, and be acknowledged and recorded, as provided in section seventy-seven. Where a marriage is declared as provided in said section seventy-six, the husband must file said declaration with the county recorder within thirty days after such marriage, and upon receiving the same the county recorder must record the same; and if the husband fails to make such declaration and file the same for record, as herein provided, he is liable to the same penalties as any person authorized to solemnize marriages, who fails to make the return of such solemnization as provided by law.

History: Enacted March 27, 1897, Stats. and Amdts. 1897, p. 186; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 336, held unconstitutional: see history, § 4 ante; amended and renumbered 79a instead of 79½, March 21, 1905, Stats. and Amdts. 1905, c. CDXIV, p. 555.

MARRIAGE UPON HIGH SEAS by party licensed as captain of vessel, of parties not of age of consent is not valid marriage under statute; such marriage does not fall within exception provided for in this section. The court say: "In this case there was no license, there was no solemnization by any person author-

ized by law to perform the ceremony, there was no marriage under § 79½."—Norman vs. Norman (by blunder of reporter Norman vs. Thomson), 121 Cal. 620, 623, 66 Am. St. Rep. 74, 54 Pac. Rep. 143, 42 L. R. A. 343.

As to marriage on high seas,—see ante § 63 note para. 13, 14; § 63 note para. 11, 12.

ARTICLE III.

JUDICIAL DETERMINATION OF VOID MARRIAGE.

§ 80. Action to have marriage declared void.

§ 80. VOID MARRIAGES. Either party to an incestuous or void marriage may proceed, by action in the superior court, to have the same so declared.

History: Enacted March 15, 1876, Code Amdts. 1875-6, p. 69; amended (changing from former district to superior court) April 6, 1880, Code Amdts. (C. C. pt.), p. 4.

CHAPTER II.

DIVORCE.

- Article I. Nullity, §§ 82-86.
 II. Dissolution, §§ 90-107.
 III. Causes for Denying Divorce, §§ 111-132.
 IV. General Provisions, §§ 136-148.

ARTICLE I.

NULLITY.

- | | |
|---|--------------------------------------|
| § 82. Causes for annulling marriage. | § 85. Custody of children. |
| § 83. Actions therefor, when to be commenced. | § 86. Effect of judgment of nullity. |
| § 84. Children of annulled marriage. | |

§ 82. CAUSES FOR ANNULLING MARRIAGES. A marriage may be annulled for any of the following causes, existing at the time of the marriage:

1. That the party in whose behalf it is sought to have the marriage annulled was under the age of legal consent, and such marriage was contracted without the consent of his or her parents or guardian, or person having charge of him or her; unless, after attaining the age of consent, such party for any time freely cohabited with the other as husband or wife.

2. That the former husband or wife of either party was living, and the marriage with such former husband or wife was then in force.

3. That either party was of unsound mind, unless such party, after coming to reason, freely cohabit with the other as husband or wife.

4. That the consent of either party was obtained by fraud, unless such party afterwards, with full knowledge of the facts constituting the fraud, freely cohabited with the other as husband or wife.

5. That the consent of either party was obtained by force, unless such party afterwards freely cohabited with the other as husband or wife.

6. That either party was, at the time of marriage, physically incapable of entering into the marriage state, and such incapacity continues, and appears to be incurable.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, pp. 187-188.

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| 1. Applied, cited, construed, referred to, etc. | 5. Same—Same—Sufficiency of marriage, when. |
| 2. Consent—Obtained by force. | 6, 7. Construction—Voidable only. |
| 3, 4. Same—Below age of—Ceremony on high seas. | 8. Distinction between annulments. |

- 9-11. Former spouse living—Second marriage valid.
- 12, 13. Fraud, force, terror, etc.—Marriage procured by.
14. Same—Abduction—Marriage procured by.
15. Same—Ceremony in jest—Annulment.
- 16-20. Same—Constraint—Marriage under.
21. Same—Concealment of unchastity.
- 22-25. Same—Concealment of pregnancy by another.
26. Same—Same—No express representations.
27. Same—Same—Where husband might have known.
28. Same—Representation of pregnancy by plaintiff.
29. Same—Pregnancy as physical defect.
30. Same—Terror—Marriage procured by.
- 31, 32. Mental incapacity—Insanity.
33. Same—Delirium tremens—Marriage during.
34. Same—Idiots and lunatics.
- 35, 36. Same—Ratification during lucid intervals.
37. Proceeding and practice—Jurisdiction.
38. Same—Same—Annulment for fraud.
39. Same—Same—Annulment for insanity.
40. Same—Causes—Joinder of.
41. Same—Decree of nullity not divorce.
42. Same—Discretion to refuse decree—Court has none.
- 43, 44. Same—Evidence—Clear required.
45. Same—Same—Presumption of validity of second marriage.
46. Same—Same—Jury to determine whether concealment fraudulent.
47. Same—Fulltest opportunity to be heard given.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Hays vs. Gloster, 88 Cal. 557, 560, 564, 26 Pac. Rep. 366 (erroneously cited for § 2235); Jackson vs. Jackson, 94 Cal. 446, 464, 29 Pac. Rep. 957 (applied); Franke vs. Franke (Cal. Nov. 30, 1892), 81 Pac. Rep. 571, 573, 574, 575 (applied); People vs. Beevers, 99 Cal. 286, 287, 33 Pac. Rep. 844 (applied in construction relative to status of parties in voidable marriage); Linebaugh vs. Linebaugh, 137 Cal. 26, 27, 69 Pac. Rep. 616 (construed and applied).

2. CONSENT OBTAINED BY FORCE.—Marriage may be annulled when consent of either party was obtained by force, unless such party afterwards freely cohabits with the other as husband or wife.—Linebaugh vs. Linebaugh, 137 Cal. 26, 27, 69 Pac. Rep. 616.

See ante § 58 and note.

3. Below age of consent—Ceremony performed by ship's captain on high seas,—as to validity, see ante § 79½ and note.

4. Marriage can only be annulled under subd. 1 of this section by party who did not possess capacity to consent; but if, after attaining age of consent, such party freely cohabits with other as husband or wife, he is precluded.—People vs. Beevers, 99 Cal. 286, 287, 33 Pac. Rep. 844.

5. Same—Sufficiency of marriage where followed by cohabitation when of age, for prosecution for bigamy upon a second marriage.—People vs. Beevers, 99 Cal. 286, 288, 33 Pac. Rep. 844.

See ante § 55 and note; also Pen. Code § 281 et seq. and notes.

6. Construction.—This section assumes that marriage relation exists between parties to action.—Linebaugh vs. Linebaugh, 137 Cal. 26, 27, 69 Pac. Rep. 616.

7. Section clearly contemplates that such marriages as may be annulled are not absolutely void but only voidable at instance of aggrieved party, who may have it annulled by decree of court.—Linebaugh vs. Linebaugh, 137 Cal. 26, 27, 69 Pac. Rep. 616.

See post § 90 and note.

8. Distinction between annulment on grounds of fraud from annulment for physical defect.—Franke vs. Franke (Cal. Nov. 30, 1892), 81 Pac. Rep. 571, 573.

See ante § 58 and note.

9. Former spouse living at time marriage is contracted, and marriage with such former husband or wife being then in force, subsequent marriage may be annulled.—Jackson vs. Jackson, 94 Cal. 446, 464, 29 Pac. Rep. 957.

10. SAME—SECOND MARRIAGE VALID until its nullity is adjudged by competent tribunal.—Jackson vs. Jackson, supra; Estate of Harrington, 140 Cal. 244, 247, 73 Pac. Rep. 1000. See Gall vs. Gall, 114 N. Y. 109, 120, 21 N. E. Rep. 106; Griffin vs. Banks, 24 How. Pr. (N. Y.) 213; Valteau vs. Valteau, 6 Paige Ch. (N. Y.) 207, 209; White vs. Lowe, 1 Redf. (N. Y.) 379.

11. Distinguishing: In re Eichhoff, 101 Cal. 600, 36 Pac. Rep. 11; Estate of Newman, 124 Cal. 638, 57 Pac. Rep. 686, 45 L. R. A. 780; Estate of Richards, 133 Cal. 524, 65 Pac. Rep. 1034; Harris vs. Harris, 136 Cal. 379, 69 Pac. Rep. 23.

12. FRAUD, FORCE, TERROR, ETC.—Marriage procured by will be annulled.—McClurg vs. Terry, 21 N. J. Eq. (6 C. E. Gr.) 229; Ferlat vs. Gojon, 1 Hopk. Ch. (N. Y.) 478, 14 Am. Dec. 554; Wightman vs. Wightman, 4 John. Ch. (N. Y.) 343; Clark vs. Field, 13 Vt. 460.

13. Fraud which will lead court to annul a marriage must be such as shocks sense of fairness, and succeeded by reason of its audacity and baseness.—Scott vs. Shufeldt, 5 Paige Ch. (N. Y.) 43; Hides vs. Hides, 65 How. Pr. (N. Y.) 51. See Klein vs. Wolfsohn, 1 Abb. N. C. (N. Y.) 134; Clarke vs. Clarke, 11 Abb. Pr. (N. Y.) 228; Ferlat vs. Gojon, 1 Hopk. Ch. (N. Y.) 478, 14 Am. Dec. 554; Sloan vs. Kane, 10 How. Pr. (N. Y.) 66.

Fraud,—as to generally, see ante § 58 note pars. 11-18.

14. Abduction—Marriage procured by will be annulled.—Ferlat vs. Gojon, 1 Hopk. Ch. (N. Y.) 478, 14 Am. Dec. 554. See Fornshill vs. Murray, 1 Bland. Ch. (Md.) 479, 18 Am. Dec. 344.

15. Ceremony in jest, or where one or both of the parties are below the age of consent, the marriage will be annulled.—Aymar vs. Roff, 3 John. Ch. (N. Y.) 49; Carris vs. Carris, 24 N. J. Eq. (9 C. E. Gr.) 519.

16. CONSTRAINT—MARRIAGE UNDER.—Illicit intercourse between man and woman followed by constraint under against him for

bastardy, or under arrest in proceedings to recover damages for seduction, does not in and of itself constitute valid ground of annulment.—*Scott vs. Shufeldt*, 5 Paige Ch. (N. Y.) 43; *Jackson ex dem. Dies vs. Winne*, 7 Wend. (N. Y.) 47, 22 Am. Dec. 563. See *Sickles vs. Carson*, 26 N. J. Eq. (11 C. E. Gr.) 440; *Seyer vs. Seyer*, 37 N. J. Eq. (10 Stew.) 210.

17. "Most of the reported cases upon the subject hold that when husband has had intercourse with the wife before marriage, and knows that she is pregnant, but is falsely led to believe that the child is his, and its birth proves it not to be his, yet, nevertheless, he must submit to the bonds of matrimony, and the presumed paternity of the child."—*Sissung vs. Sissung*, 65 Mich. 168, 171, 31 N. W. Rep. 770, citing *Foss vs. Foss*, 94 Mass. (12 Allen) 26; *Crehore vs. Crehore*, 97 Mass. 330, and *Carriss vs. Carriss*, 24 N. J. Eq. (9 C. E. Gr.) 517.

18. Knowledge that he cannot be father.—And where, knowing he cannot be the father of bastard child, man is induced to marry mother to avoid prosecution, it is no ground for annulling marriage contract on ground of fraud, although he should afterwards be able to establish fact that child was not his.—*Scott vs. Shufeldt*, 5 Paige Ch. (N. Y.) 43.

19. Child a mulatto.—Even though in case where white woman so charges white man, who thereupon marries her, and child, upon birth, is a mulatto. The court say: "If he knew it could not be his child, there was no fraud as to him, although he afterwards ascertained that it was child of a negro, instead of its being child of some white person other than himself."—*Scott vs. Shufeldt*, supra.

20. But it will be otherwise in those cases where child had been born at time complaint was made, and mother at that time knew it was not child of the white man charged, but child of a negro to whose embraces she had submitted.—*Ibid*.

21. SAME—CONCEALMENT OF UNCHASTITY is not a ground for annulment, even where woman falsely represents herself as chaste, and by such false representation induces him to marry her.—*Barnes vs. Barnes*, 110 Cal. 418, 422, 42 Pac. Rep. 904; *Reynolds vs. Reynolds*, 85 Mass. (3 Allen) 605; *Long vs. Long*, 77 N. C. 304, 24 Am. Rep. 449; *Varney vs. Varney*, 52 Wis. 120, 38 Am. Rep. 726, 8 N. W. Rep. 739.

22. Concealment of pregnancy by another man will be ground for annulment of marriage where husband, having no knowledge of such condition, believed her to be chaste, and had not participated in her incontinence.—*Baker vs. Baker*, 13 Cal. 87, 103.

See ante § 53 note par. 11.

23. Compare: *Barnes vs. Barnes*, 110 Cal. 418, 422, 42 Pac. Rep. 904; *Long vs. Long*, 77 N. C. 304, 24 Am. Rep. 449; *Varney vs. Varney*, 52 Wis. 120, 38 Am. Rep. 726, 8 N. W. Rep. 739.

See par. 21 this note.

24. As to right of husband to annul marriage on ground of pregnancy of spouse when he participates in the incontinence of the wife before marriage.—*Franke vs. Franke* (Cal. Nov. 30, 1892), 31 Pac. Rep. 571, 573.

See ante § 53 and note.

25. Question for jury whether concealment of such condition is such fraud as will vitiate marriage.—*Allen's Appeal*, 99 Pa. St. 196, 44 Am. Rep. 101.

26. No express representations on part of woman are necessary to maintaining of action to annul for pregnancy.—*Donovan vs. Donovan*, 91 Mass. (9 Allen) 140.

As to pregnancy by another, see ante § 53 note pars. 11-16.

27. Where husband might have known wife pregnant before he was married to her, held he was not entitled to divorce, in *Scroggins vs. Scroggins*, 3 Dev. (N. C.) Eq. 535, and *Borden vs. Borden*, 3 Dev. (N. C.) Eq. 548.

28. Representation of pregnancy by plaintiff, who thereupon marries woman, who is delivered of child within nine months, no ground of annulment whether husband was or was not father of child.—*Hoffman vs. Hoffman*, 30 Pa. St. 417.

See para. 16-20 this note.

29. Pregnancy physical defect, as to whether is within meaning of this section.—See ante § 53 and note.

See also par. 22 et seq. this note.

30. SAME—TERROR—Marriage procured by will be annulled.—*Ferlat vs. Gojon*, 1 Hopk. Ch. (N. Y.) 478, 14 Am. Dec. 554. See *Fornhill vs. Murray*, 1 Bland. Ch. (Md.) 479, 18 Am. Dec. 347.

31. MENTAL CAPACITY TO CONSENT NECESSARY to valid marriage. If either of the parties to a marriage is non compos mentis at time of entering into marriage it is null and void.—*Ala. Rawdon vs. Rawdon*, 28 Ala. 565. *Ky. Jenkins vs. Jenkins*, 2 Dana (Ky.) 102, 103, 26 Am. Dec. 437. *Mass. Inhabitants of Middleborough vs. Inhabitants of Rochester*, 12 Mass. 363. *N. H. True vs. Ranney*, 21 N. H. 52, 53 Am. Dec. 164; *Keyes vs. Keyes*, 22 N. H. 553. *N. Y. Christy vs. Clarke*, 45 Barb. (N. Y.) 529; *Wightman vs. Wightman*, 4 John. Ch. (N. Y.) 343. *N. C. Reese vs. Kincaid*, 2 Ired. (N. C.) Eq. 470; *Crump vs. Morgan*, 3 Ired. (N. C.) Eq. 91, 40 Am. Dec. 447. *Ohio. Waymire vs. Jetmore*, 22 Ohio St. 271. *S. C. Clement vs. Mattison*, 3 Rich. L. 93; *Foster vs. Means*, 1 Spear Eq. 569, 42 Am. Dec. 332. *Tenn. Cole vs. Cole*, 5 Sneed 57, 70 Am. Dec. 275. *Eng. Portsmouth vs. Portsmouth*, 3 Eng. Ecc. 155, 1 Hag. Ecc. 155; *Brownling vs. Reane*, 2 Phillim. 69.

32. Mental incapacity of one of contracting parties is ground of annulment only on clear and definite evidence as to state of mind at time of marriage, by witnesses who saw and knew such condition at that time.—*Slais vs. Slais*, 9 Mo. App. 96.

33. Delirium tremens is a form of mental incapacity, or insanity, which renders void a marriage contracted while in that condition.—See *Clement vs. Mattison*, 3 Rich. (S. C.) L. 93.

34. Idiots and lunatics are incapable of entering into marriage contract, and such a marriage is void ab initio.—*Wightman vs. Wightman*, 4 John. Ch. (N. Y.) 343; *Beaumont's Case*, 1 Whart. (Pa.) 52, 56, 29 Am. Dec. 1, 32. See *Inhabitants of Middleborough vs. Inhabitants of Rochester*, 12 Mass. 363; *True vs. Ran-*

ney, 21 N. H. 52, 53 Am. Dec. 164; Doe vs. Roe, 1 Edm. Sel. Cas. (N. Y.) 344; Johnson vs. Kincaid, 3 Ired. (N. C.) Eq. 70; Gathings vs. Williams, 5 Ired. (N. C.) Eq. 487, 44 Am. Dec. 49, 57; Foster vs. Means, 1 Spear (S. C.) Eq. 569, 42 Am. Dec. 332; Cole vs. Cole, 5 Sneed (Tenn.) 57, 70 Am. Dec. 275; Osmond vs. Fitzroy, 3 Pr. Wms. 130, 131; Griffin vs. De Veuille, 3 Woodd. Lect. App. 334.

As to who are to be deemed non compos mentis,—see note 29 Am. Dec. 38, 44 Am. Dec. 55.

35. Same—Ratification during lucid interval of lunatic has been said to render marriage valid.—Cole vs. Cole, 5 Sneed (Tenn.) 57, 70 Am. Dec. 275; 1 Bish. on Mar. & Div. 139.

36. Contrary doctrine held in Crump vs. Morgan, 3 Ired. (N. C.) Eq. 91, 40 Am. Dec. 447, but holding was not necessary to decision, and must be regarded as dictum.

37. PROCEEDING AND PRACTICE—Jurisdiction—Validity of marriage contract may be inquired into and decided by courts.—Fornshill vs. Murray, 1 Bland. Ch. (Md.) 479, 18 Am. Dec. 347, 348; Ferlat vs. Gojon, 1 Hopk. Ch. (N. Y.) 478, 14 Am. Dec. 554.

38. Annulment of marriage contract for fraud rests in general power of court of equity.—See McClurg vs. Terry, 21 N. J. Eq. (6 C. E. Gr.) 229; Anonymous, 24 N. J. Eq. (9 C. E. Gr.) 21; Carris vs. Carris, 24 N. J. Eq. (9 C. E. Gr.) 519, 522; Ferlat vs. Gojon, 1 Hopk. Ch. (N. Y.) 478, 14 Am. Dec. 554; Aymar vs. Roff, 3 John. Ch. (N. Y.) 49; Clark vs. Field, 13 Vt. 460.

39. Annulment for insanity.—Jurisdiction to declare marriage a nullity entertained by court of equity on ground of insanity of one of the parties.—Wightman vs. Wightman, 4 John. Ch. (N. Y.) 343; Waymire vs. Jetmore, 22 Ohio St. 274. See McClurg vs. Terry, 21 N. J. Eq. (6 C. E. Gr.) 229; Griffin vs. Griffin, 47 N. Y. 134, 139; Erkenbrach vs. Erkenbrach, 96 N. Y. 456, 463; Ferlat vs. Gojon, 1 Hopk. Ch. (N. Y.) 478, 14 Am. Dec. 554; Aymar vs. Roff, 3 John. Ch. (N. Y.) 49; Perry vs. Perry, 2 John. Ch. (N. Y.) 505.

40. Cause of action to annul marriage cannot be joined with cause of action to quiet title to land.—Uhl vs. Uhl, 52 Cal. 250.

41. Decree of nullity not decree of divorce; it is a judicial declaration that no marriage exists; it does not make alleged marriage void, but declares it void ab initio.—Wightman vs. Wightman, 4 John. Ch. (N. Y.) 343. See Ala. Boykin vs. Rain, 28 Ala. 332, 35 Am. Dec. 349, 355; Rawdon vs. Rawdon, 28 Ala. 565. Ga. Brown vs. Westbrook, 27 Ga. 102. Ky. Powell vs. Powell, 18 Kan. 371, 26 Am. Rep. 774. La. Minvielle vs. Minvielle, 15 La. Ann. 342; Lincoln vs. Lincoln, 6 Robt. 525. Me. Chase vs. Chase, 55 Me. 21. N. C. Smith vs. Moorehead, 6 Jones Eq. 360.

42. Discretion to refuse decree—Court has not where, on hearing, party can legally demand it.—Crump vs. Morgan, 3 Ired. (N. C.) Eq. 91, 40 Am. Dec. 447.

43. Evidence—Must clearly establish former marriage in order to entitle party to decree of nullity; mere admissions of wife she knew such former husband was living when second marriage was contracted, in absence of evidence as to first husband's being alive at the time, is not sufficient to warrant a decree.—Le Bruen vs. Le Bruen, 55 Md. 496.

44. "Experience of the world plainly shows, that married persons are often too ready to seek release from the nuptial chain, and too little scrupulous of means of effecting it."—Searle vs. Price, 2 Hag. Con. 187, 4 Eng. Ecc. 524; Bayard vs. Morphew, 2 Phillim. 321.

45. Same—Presumption of validity of second marriage will prevail over presumption that first husband was still living and undivorced, where not heard from for four and half years, in absence of proof that first husband was then living.—Hunter vs. Hunter, 111 Cal. 261, 52 Am. St. Rep. 180, 43 Pac. Rep. 756, 31 L. R. A. 411.

46. Same—Jury to determine whether concealment so fraudulent as to make marriage void.—See par. 25 this note.

47. Fulltest opportunity to be heard will be accorded parties in an application for annulment of marriage.—Wadsworth vs. Wadsworth, 81 Cal. 132, 15 Am. St. Rep. 38, 22 Pac. Rep. 648. See Cohn vs. Cohn, 85 Cal. 108, 109, 24 Pac. Rep. 659; Barnes vs. Barnes (dis. op.), 95 Cal. 171, 182, 30 Pac. Rep. 293, 16 L. R. A. 660.

§ 83. ACTIONS THEREFOR, WHEN COMMENCED. An action to obtain a decree of nullity of marriage, for causes mentioned in the preceding section, must be commenced within the periods and by the parties, as follows:

1. For causes mentioned in subdivision one: by the party to the marriage who was married under the age of legal consent, within four years after arriving at the age of consent; or by a parent, guardian, or other person having charge of such nonaged male or female, at any time before such married minor has arrived at the age of legal consent.

2. For causes mentioned in subdivision two: by either party during the life of the other, or by such former husband or wife.

3. For causes mentioned in subdivision three: by the party injured, or relative or guardian of the party of unsound mind, at any time before the death of either party.

4. For causes mentioned in subdivision four: by the party injured, within four years after the discovery of the facts constituting the fraud.

5. For causes mentioned in subdivision five: by the injured party, within four years after the marriage.

6. For causes mentioned in subdivision six: by the injured party, within four years after the marriage.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, pp. 188-189.

§ 84. CHILDREN OF ANNULLED MARRIAGE. A judgment of nullity of marriage does not affect the legitimacy of children begotten before the judgment.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 337, held unconstitutional; see history, § 4 ante; amended March 21, 1905, c. CDXIV, p. 555.

1. Child born before marriage—Texas rule.
2. Construction—Massachusetts ruling on section.
3. Illegitimate child omitted from will—Inheritance by.

1. CHILD BORN BEFORE MARRIAGE—Texas rule.—The provisions of Revised Statutes of Texas, art. 1656, are the same as the provisions of the above section. In construing that statute it has been said that children born before marriage would be legitimated thereby so as to take as children under a Texas will (dictum).—*Carroll vs. Carroll*, 30 Tex. 731, 745, 746.

2. CONSTRUCTION—Massachusetts Supreme Judicial Court, in passing upon similar question, involving above section, says: "If we assume that section 84 applies where there has been no judgment annulling marriage, the

general words 'children begotten before the judgment' must be confined to children born after marriage, in view of § 1387. Neither § 84, nor § 1387, nor both together, can be taken to enlarge the meaning of § 215, discussed at the beginning of opinion, so that a void marriage shall legitimate children previously born. The view which we take seems to be that of the supreme court of California, so far as they have expressed an opinion: *Estate of Wardell*, 57 Cal. 484, 491. See, also, *Watts vs. Owens*, 62 Wis. 512, 517, 22 N. W. Rep. 720.—*Adams vs. Adams*, 154 Mass. 290, 28 N. E. Rep. 260, 13 L. R. A. 275.

See monographic note 13 L. R. A. 275-279.

3. Illegitimate child whose name was unintentionally left out of will of its mother entitled to share in estate.—In re *Estate of Wardell*, 57 Cal. 484, 491.

See post § 1387 and note.

§ 85. CUSTODY OF CHILDREN. The court must award the custody of the children of a marriage annulled on the ground of fraud or force to the innocent parent, and may also provide for their education and maintenance out of the property of the guilty party.

History: Enacted March 21, 1872.

§ 86. EFFECT OF JUDGMENT OF NULLITY. A judgment of nullity of marriage rendered is conclusive only as against the parties to the action and those claiming under them.

History: Enacted March 21, 1872.

ARTICLE II.

DISSOLUTION OF MARRIAGE.

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| § 90. Marriage, how dissolved. | § 99. Separation by consent not desertion. |
| § 91. Effect of divorce. | § 100. Absence becomes desertion, when. |
| § 92. Causes for divorce. | § 101. Consent to separate revocable. |
| § 93. Adultery defined. | § 102. Desertion, how cured. |
| § 94. Extreme cruelty, what. | § 103. Wife must abide by husband's selection of home, or it is desertion on her part. |
| § 95. Desertion, what. | § 104. If place is unfit, and wife refuses to conform, it is desertion by the husband. |
| § 96. Desertion, how manifested. | § 105. Wilful neglect, what. |
| § 97. In case of stratagem or fraud, who commits desertion. | § 106. Habitual intemperance, what. |
| § 98. In case of cruelty, where one party leaves the other, who commits desertion. | § 107. Habitual intemperance for one year. |

§ 90. MARRIAGE, HOW DISSOLVED. Marriage is dissolved only:

1. By death of one of the parties; or,
2. By the judgment of a court of competent jurisdiction decreeing a divorce of the parties.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 189.

1. Applied, cited, construed, referred to, etc.
2. "A marriage"—Definition of.
3. Construction—Amendments to section 69 not affected.
4. Same—Section 61 to be considered with this.
5. Same—Sense in which "dissolved" is used.
6. Divorce dissolves marriage.
7. Distinction between section 82 and 90.
8. Same—Annulment of valid and voidable marriages.
9. Effect of dissolution.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Linebaugh vs. Linebaugh*, 137 Cal. 26, 27, 69 Pac. Rep. 616 (referred to); *Estate of Wood*, 137 Cal. 129, 134, 137, 138, 139, 69 Pac. Rep. 900 (applied).

2. **"A MARRIAGE" DEFINED.**—Marriage means generally a certain existing relation, or status, and "a marriage" can mean nothing more than this same status as existing between two particular persons.—*Linebaugh vs. Linebaugh*, 137 Cal. 26, 27, 69 Pac. Rep. 616. See § 82.

3. **CONSTRUCTION**—Amendments to section 69—No effect on this section.—Amendments to § 69 have no effect upon accepted construction of this section, and this section is fortified by consideration that an act involving consequences in their nature penal is to be strictly construed.—*Estate of Wood*, 137 Cal. 129, 138, 69 Pac. Rep. 900.

4. **Section 61 to be considered with this.**—Provisions in section that marriage may be dissolved by judgment of court of competent jurisdiction decreeing divorce, must be read in connection with section 61 (dis. op.).—*Estate of Wood*, 137 Cal. 129, 144, 69 Pac. Rep. 900.

5. **The sense in which "dissolved" is used** showed to be ascertained by reference to § 61.—*Estate of Wood*, 137 Cal. 129, 134, 69 Pac. Rep. 900.

6. **DIVORCE DISSOLVES MARRIAGE.**—*Estate of Wood*, 137 Cal. 129, 137, 69 Pac. Rep. 900.

7. **DISTINCTION BETWEEN §§ 82 AND 90** is not founded upon a distinction between marriage and marriage ceremony.—*Linebaugh vs. Linebaugh*, 137 Cal. 26, 27, 69 Pac. Rep. 616. See ante § 82 and note.

8. **Annulment of valid and voidable marriages.**—This section and § 82 are two separate and distinct provisions; § 82 provides for annulment of voidable marriage, and in this section reference is to dissolution of valid and binding marriages.—*Linebaugh vs. Linebaugh*, 137 Cal. 26, 27, 69 Pac. Rep. 616.

See ante § 82 and note.

9. **Effect of dissolution of marriage**,—as to see in re *Estate of Wood*, 137 Cal. 129, 134, 69 Pac. Rep. 900.

See post § 81 and note.

§ 91. EFFECT OF DIVORCE. The effect of a judgment decreeing a divorce, is to restore the parties to the state of unmarried persons.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 189.

1. Applied, cited, construed, referred to, etc.
2. Construction—Reference to section 61.
3. Effect of judgment decreeing divorce.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: In re *Estate of Wood*, 137 Cal. 129, 134, 137, 138, 139, 144 (applied), 69 Pac. Rep. 900; *Deyoe vs. Superior Court of Mendocino County*, 140 Cal. 476, 488, 98 Am. St. Rep. 73, 74 Pac. Rep. 28 (referred to).

2. **CONSTRUCTION**—Reference to section 61.—Provision of section must be read in connection with § 61 (dis. op.).—*Estate of Wood*, 137 Cal. 129, 144, 69 Pac. Rep. 900.

3. **EFFECT OF JUDGMENT DECREEING DIVORCE** is to restore parties to state of unmarried persons.—*Estate of Wood*, 137 Cal. 129, 134, 137, 69 Pac. Rep. 900.

§ 92. CAUSES FOR DIVORCE. Divorces may be granted for any of the following causes:

1. Adultery.
2. Extreme cruelty.
3. Wilful desertion.
4. Wilful neglect.
5. Habitual intemperance.
6. Conviction of felony.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 189.

1. Applied, cited, construed, referred to, etc.
2. Alimony.
- 3, 4. Appeal—Jurisdiction on.
5. Same—Community property.
- 6, 7. Same—Effect of—From interlocutory order.
8. Same—Order—When not appealable.
9. As to whether action is on marriage contract.
10. Community property—Divided equally.
- 11-14. Same—Action for division—Disposition of.
15. Same—Homestead of set apart to wife.
16. Same—Stipulation as to division—Effect.
17. Counsel fees and costs.
- 18, 19. Cross-complaint—Necessary allegation—Effect on maintenance.
- 20-23. Same—Property rights determined on.
24. Default—Judgment on.
- 25-27. Demurrer—Necessity for.
28. Same—Sufficiency of.
29. Same—Order striking out.
30. Dismissal—Presumption of falsity from.
31. Evidence—Corroboration necessary.
32. Same—Presumption of falsity, when.
33. Effect on maintenance of cross-demand.
34. Findings—Generally.
35. Same—Failure to find—Recrimination.
36. Same—Unnecessary finding.
37. Guardian in divorce proceedings.
38. Injunction—Restraining alienation.
- 39, 40. Innocence of plaintiff—Requisite.
- 41, 42. Insanity—Adultery charged—As defense.
43. Same—Consent to action.
- 44, 45. Same—Guardian ad litem—For plaintiff.
46. Same—Same—For defendant.
- 47, 48. Same—Same—Complaint by.
- 49, 50. Jury trial—Special issues.
- 51, 52. Maintenance—Divorce not proper—Recrimination.
53. Marriage—Allegation of necessary.
54. Same—As to proof of.
55. Pleading and practice—Alleged marriage and residence.
56. Same—Complaint in two courts—Inducement.
- 57, 58. Same—Same—Pleading by reference.
59. Same—Same—Supplementary complaint.
60. Same—Answer denying material allegation.
61. Same—Referee finding facts—Judge to determine upon evidence.
62. Presumption of falsity, when.
- 63, 64. Property rights—Settled on cross-complaint.
65. Recrimination—Effect on maintenance.
- 66-69. Residence—Allegation and proof.
70. Stipulation—As to community property—Effect.
71. Summons—Service of.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Devos vs. Devos*, 51 Cal. 542, 544 (applied); *De Haley vs. Haley*, 74 Cal. 489, 492, 5 Am. St. Rep. 460, 16 Pac. Rep. 248 (applied); *Waldron vs. Waldron*, 85 Cal. 251, 255, 256, 24 Pac. Rep. 649, 9 L. R. A. 487 (construed and applied); *Sweasey vs. Sweasey*, 126 Cal. 123, 128, 58 Pac. Rep. 456 (referred to); *Harrigan vs. Harrigan*, 135 Cal. 397, 399, 87 Am. St. Rep. 113, 67 Pac. Rep. 506 (applied).

2. ALIMONY,—as to, see post §§ 136, 137 and notes.

3. APPEAL—Jurisdiction of supreme court to entertain, from decree rendered in suit for divorce.—*Conant vs. Conant*, 10 Cal. 249, 70 Am. Dec. 717; *Sharon vs. Sharon*, 67 Cal. 185, 187 (included in jurisdiction over cases "in equity"), 213, 214 (distinguished in dis. op. of McKee, J.), 7 Pac. Rep. 456, 635, 8 Id. 709; *Harron vs. Harron*, 123 Cal. 508, 509, 56 Pac. Rep. 334.

4. Applies only to property rights (dis. op.).—*Sharon vs. Sharon*, supra, 213.

5. Community property.—That portion of a decree in divorce which deals with community property may be reviewed on appeal, without disturbing other parts of decree, where findings clearly show what community property is.—*Reid vs. Reid*, 112 Cal. 274, 278, 44 Pac. Rep. 564. See post § 146 and note.

6. Effect of appeal from decree in divorce proceeding is "purely matter of statutory regulation, to be determined by construction of statute under which appeal is taken, and by terms of which, when clear and unambiguous, we are concluded."—*Ex parte Queirolo*, 119 Cal. 635, 637, 51 Pac. Rep. 47. See *Foster vs. Superior Court*, 115 Cal. 279, 47 Pac. Rep. 58.

7. From interlocutory order appointing receiver does not enlarge rights of plaintiff. Appeal and effect thereof is independent of appeal from judgment.—*Anderson vs. Anderson*, 123 Cal. 446, 446, 56 Pac. Rep. 61.

8. Order denying nonsuit is not appealable.—*Christie vs. Christie*, 53 Cal. 26, 27.

9. As to whether action is brought on contract of marriage, see *De Haley vs. Haley*, 74 Cal. 489, 492, 5 Am. St. Rep. 460, 16 Pac. Rep. 248.

See ante § 55 and note.

10. COMMUNITY PROPERTY to be equally divided between parties on decree of divorce, and court making decree shall make such order for division thereof.—*Kashaw vs. Kashaw*, 3 Cal. 312; *Gimmy vs. Gimmy*, 22 Cal. 633; *Reid vs. Reid*, 112 Cal. 274, 278, 44 Pac. Rep. 564.

See post § 146 and note.

11. Action for division brought by wife after decree of divorce, in her complaint must state such facts as give her right under statute to property demanded.—*Dye vs. Dye*, 11 Cal. 163.

12. Doubtful and partly overruled in *Gimmy vs. Doane*, 22 Cal. 635, 637, 638.

13. Same—Assigning to wife on divorce for extreme cruelty,—see §§ 94, 146 and notes.

14. Disposition after divorce.—See post §§ 146, 147.

15. Homestead out of may be set apart to wife, where it has been established on common property, although such relief is not demanded in complaint.—*Gimmy vs. Doane*, 22 Cal. 635, 639.

16. Stipulation as to division of,—as to force and effect of, see post § 146 and note.

17. Counsel fees and costs,—as to, see § 137 and note.

18. CROSS-COMPLAINT—As to necessary allegations in, see pars. 55, 69 this note.

19. Effect upon question of maintenance.—See par. 33 this note.

20. Property rights may be settled under.—Wadsworth vs. Wadsworth, 81 Cal. 182, 138, 15 Am. St. Rep. 43, 22 Pac. Rep. 648; Mott vs. Mott, 82 Cal. 413, 418, 22 Pac. Rep. 1140.

21. Practice impliedly sustained by Supreme Court in Coulthurst vs. Coulthurst, 58 Cal. 239, and Bovo vs. Bovo, 63 Cal. 77.

22. "It is at least doubtful whether codes provide for cross-complaint in actions for divorce" (dictum).—McKinstry, J., in De Haley vs. Haley, 74 Cal. 489, 5 Am. St. Rep. 460, 16 Pac. Rep. 248.

23. "It is safe to say that remarks in De Haley vs. Haley, supra, took the profession by surprise."—Wadsworth vs. Wadsworth, 81 Cal. 182, 138, 15 Am. St. Rep. 38, 22 Pac. Rep. 648 (overruling De Haley vs. Haley).

24. DEFAULT—Judgment on,—as to, see post § 130 and note.

25. Demurrer—Necessity for.—Objections to complaint for a divorce must be taken by demurrer; they cannot be raised for first time on appeal.—Gimmy vs. Gimmy, 22 Cal. 633, 635.

26. Demurrer must be interposed where complaint is defective in allegation as to time and place in charge of adultery, or objection will be waived.—Conant vs. Conant, 10 Cal. 249, 70 Am. Dec. 717.

27. Complaint in action for divorce stating existence of common property, being defective and uncertain in not stating facts showing property to be common, if not demurred to, defect is deemed waived.—Gimmy vs. Gimmy, 22 Cal. 633, 635.

28. Sufficiency.—A demurrer should specifically point out defect complained of. Thus where complaint in divorce contains two counts, one of which is good, general demurrer must be overruled.—Cassidy vs. Cassidy, 63 Cal. 352. See Hulsman vs. Todd, 96 Cal. 228, 230, 31 Pac. Rep. 39; Rose vs. Rose, 112 Cal. 341, 44 Pac. Rep. 658.

29. Order striking out and entering judgment pro confesso for failure to obey order to pay temporary alimony awarded, is beyond power of court; their jurisdiction is confined to fine and imprisonment for contempt.—Foley vs. Foley, 120 Cal. 33, 39, 42, 65 Am. St. Rep. 147, 52 Pac. Rep. 122; Younger vs. Superior Court of Santa Cruz County, 136 Cal. 682, 687, 69 Pac. Rep. 485. See Galland vs. Galland, 44 Cal. 475, 13 Am. Rep. 16; Johnson vs. Superior Court of San Francisco, 63 Cal. 578; McClatchy vs. Superior Court of Sacramento County, 119 Cal. 413, 419, 51 Pac. Rep. 696, 39 L. R. A. 691; Hovey vs. Elliott, 167 U. S. 409, 447, bk. 42 L. ed. 215, 17 Sup. Ct. Rep. 841.

30. DISMISSAL—Presumption of falsity of charge from.—See par. 32 this note.

31. EVIDENCE—Corroboration,—as to necessity for, see post § 130 and note.

32. Presumption of falsity of charge from dismissal by plaintiff.—Cooper vs. Cooper, 83 Cal. 45, 48, 25 Pac. Rep. 1062.

33. EFFECT UPON SUIT FOR MAINTENANCE BY WIFE, of cross-demand for divorce by husband.—See post §§ 136, 137 and notes.

34. FINDING on one good count of complaint not reversed because insufficient as to other causes of action.—Terrill vs. Terrill, 109 Cal. 413, 417, 42 Pac. Rep. 137; Huellmantel vs. Huellmantel, 117 Cal. 407, 49 Pac. Rep. 574.

35. Failure to find—Recrimination being set up by way of defense, but not in sufficient manner to warrant decree thereon, and evidence not being sufficient to justify divorce on that ground, failure to find on is not error.—Smith vs. Smith, 119 Cal. 183, 48 Pac. Rep. 730, 51 Id. 183.

36. Unnecessary, immaterial whether justified by evidence or not.—Smith vs. Smith, supra.

37. GUARDIAN IN DIVORCE PROCEEDINGS,—as to, see para. 44, 48 this note.

38. INJUNCTION—Restraining alienation of separate property by husband pending hearing, may issue on proper showing.—In re White, 113 Cal. 282, 45 Pac. Rep. 823.

39. INNOCENCE OF PLAINTIFF—Requisite for divorce.—Rule which governs courts in exercise of discretion in regard to divorce is that to entitle party to decree of absolute divorce from bonds of matrimony, applicant must be an innocent party—one who has faithfully discharged obligations of marriage relation, and seeks relief because aggrieved or injured by misconduct of the other.—Conant vs. Conant, 10 Cal. 249, 70 Am. Dec. 717; Sweasey vs. Sweasey, 126 Cal. 123, 128, 58 Pac. Rep. 456. See § 122.

40. Affirmative relief sought.—Plea in bar for action for divorce charging plaintiff with commission of any of wrongs maintained in section, and praying for divorce seeks affirmative relief.—De Haley vs. Haley, 74 Cal. 489, 492, 5 Am. St. Rep. 460, 16 Pac. Rep. 248.

See Code Civ. Proc. § 442 and note.

41. INSANITY—As defense to action for divorce on the ground of adultery, see post § 93 note para. 7-9.

42. After cause has accrued.—Insanity of defendant will not deprive plaintiff of divorce where acts upon which proceedings are based were committed during sanity of defendant.—Harrigan vs. Harrigan, 135 Cal. 397, 399, 87 Am. St. Rep. 118, 67 Pac. Rep. 506; Mansfield vs. Mansfield, 13 Mass. 412; Rathbun vs. Rathbun, 40 How. Pr. (N. Y.) 328; Stratford vs. Stratford, 92 N. C. 244.

43. Consent to filing.—Insane person who is in close confinement in another state cannot consent to filing of divorce proceeding in her name, and divorce procured under such circumstances will be set aside on application of such person.—Bradford vs. Abend, 89 Ill. 78, 31 Am. Rep. 67; Newcomb vs. Newcomb, 13 Bush (Ky.) 544, 26 Am. Rep. 222.

44. Guardian ad litem for plaintiff will be appointed where it is shown to court that plaintiff is insane.—Broadstreet vs. Broadstreet, 7 Mass. 474; Denny vs. Denny, 90 Mass. (8 Allen) 311.

45. In North Carolina where suit to annul marriage on account of insanity at time of marriage is declared to be in effect an action for divorce, it is held that guardian may conduct same on behalf of his ward.—Sims vs.

Sims, 121 N. C. 297, 61 Am. St. Rep. 665, 28 S. E. Rep. 407, 40 L. R. A. 737.

46. **Same**—For defendant, will be appointed in divorce proceedings where party has become insane since acts charged in complaint were committed.—*Mansfield vs. Mansfield*, 13 Mass. 412.

47. **Guardian of insane person—Complaint by**—Court has power to grant divorce on petition of guardian of insane person.—*Garnett vs. Garnett*, 114 Mass. 379, 19 Am. Rep. 369; *Cowan vs. Cowan*, 139 Mass. 377, 1 N. E. Rep. 152. See *Rathbun vs. Rathbun*, 40 How. Pr. (N. Y.) 328.

48. **Guardian of insane person has no right to maintain action to dissolve marriage relation of his ward**.—*Worthy vs. Worthy*, 36 Ga. 45, 91 Am. Dec. 758; *Mohler vs. Shank*, 93 Iowa 273, 57 Am. St. Rep. 273, 274, 61 N. W. Rep. 981, 34 L. R. A. 161; *Birdzell vs. Birdzell*, 33 Kan. 433, 52 Am. Rep. 539, 6 Pac. Rep. 561. See Code Civ. Proc. § 373 subd. 3.

49. **JURY TRIAL**, in divorce proceeding cannot be demanded as matter of right under constitution.—*Cassidy vs. Sullivan*, 64 Cal. 266, 28 Pac. Rep. 234; *Cleghorn vs. Cleghorn*, 66 Cal. 309, 310, 5 Pac. Rep. 516. See *Wheelock vs. Godfrey*, 100 Cal. 578, 585, 35 Pac. Rep. 317.

50. **Special issues may be submitted to jury at option of trial judge; his refusal to submit not reviewable on appeal**.—*Cleghorn vs. Cleghorn*, supra.

51. **MAINTENANCE—Divorce not proper, may be directed**.—"If husband has been guilty of all offenses described in this section, except desertion, and it is found upon recriminatory plea in defense that wife has deserted husband, and therefore cannot have divorce, court would hardly send her back to live with her husband, and I think, under § 136, might, in its discretion, compel husband to provide for her."—*Sweasey vs. Sweasey*, 126 Cal. 123, 128, 58 Pac. Rep. 456.

52. **As to recrimination**, see post § 622 and note.

53. **MARRIAGE—Allegation of necessary in complaint or cross-complaint**—see par. 55 this note.

54. **Need not be proved to entitle to decree of divorce**.—*Fox vs. Fox*, 25 Cal. 587; *Williams vs. Williams*, 63 Wis. 58, 71, 53 Am. Rep. 253, 261, 23 N. W. Rep. 110. See *Bennett vs. Bennett*, 28 Cal. 599, 601. Compare: *Coulthurst vs. Coulthurst*, 58 Cal. 239.

55. **PLEADING AND PRACTICE—Allegation of marriage and residence are necessary to sufficiency, both in complaint and cross-complaint**.—*Coulthurst vs. Coulthurst*, 58 Cal. 239, 240; *Collins vs. Bartlett*, 44 Cal. 371, 381; *Kreichbaum vs. Melton*, 49 Cal. 50, 55.

56. **Complaint of two or more counts—Inducement must be repeated or referred to in each count, "and omission to either repeat or refer to them is fatal; because without those allegations complaint fails to state facts sufficient to constitute cause of action"**.—*Haskell vs. Haskell*, 54 Cal. 262, 265; *Coulthurst vs. Coulthurst*, 58 Cal. 240 (rule applied to cross-complaint). See *Jerrett vs. Mahan*, 20 Nev. 89, 100, 17 Pac. Rep. 12.

57. **Pleading by reference**—"Unless second count expressly refers to first, no defect therein will be aided by preceding count; for, though both counts are in same declaration, yet they are for all purposes as distinct as if they were in separate declarations, and, consequently, they must independently contain all necessary allegations or latter count must expressly refer to former."—*Barlow vs. Burns*, 40 Cal. 351.

58. **Pleading matters of necessary inducement or constituting gravamen of cause of action by reference, simply, to preceding count in complaint, is not proper manner of pleading, although practice of doing so is all too general; where so pleaded, and preceding count is struck out for any cause, complaint, or cross-complaint, becomes insufficient, because of failure to state cause of action**. See 4 Encyc. of Pl. & Prac. 620 et seq.

59. **Supplemental complaint**—"Whether it was correct, as matter of practice, to allow supplemental complaint to be filed, is not involved on this appeal. We see no reason, however, why it may not be allowed on proper terms. It was done in this case, and the action, as to new ground of complaint set up, must be considered as being commenced when supplemental complaint was filed."—*Valensin vs. Valensin*, 73 Cal. 106, 109, 14 Pac. Rep. 397.

60. **Same—Answer denying material allegations of complaint, and as separate defense alleging "plaintiff deserted and abandoned defendant without cause and against his will, and that defendant has at all times been willing, and has repeatedly offered, and is now willing, to take plaintiff and the minor children and provide for them necessaries of life, and to perform and fulfil all obligations of husband and father," does not raise a new issue**.—*Terrill vs. Terrill*, 109 Cal. 413, 416, 42 Pac. Rep. 137.

61. **Referee finding facts, court should disregard findings and determine cause upon evidence**.—*Benkert vs. Benkert*, 32 Cal. 467.

62. **Presumption of falsity of charge from dismissal of action**—See par. 32 this note.

63. **Property rights, as to division of common property**, see pars. 10, 16 this note.

64. **Property rights may be settled on cross-complaint**.—*Mott vs. Mott*, 82 Cal. 413, 418, 22 Pac. Rep. 1140.

65. **Recrimination, as to effect on action for divorce**, see post § 122 and note.

66. **RESIDENCE—Allegation and proof of necessary—Complaint and cross-complaint**—See pars. 53-55 this note.

67. **Residence, though not statutory "cause" of divorce, is "ground" upon which jurisdiction of court to grant a divorce rests in all cases**.—*Bennett vs. Bennett*, 28 Cal. 599, 601.

68. **Though not controverted, bona fide residence must be proved**.—*Bennett vs. Bennett*, supra, p. 602. See *Coulthurst vs. Coulthurst*, 58 Cal. 239, 240; *Adams vs. Adams*, 154 Mass. 290, 295, 28 N. E. Rep. 260, 13 L. R. A. 275; *Dutcher vs. Dutcher*, 39 Wis. 651, 667.

69. **Same—Cross-complaint seeking divorce must allege marriage and residence during re-**

quired statutory period.—Coulthurst vs. Coulthurst, 58 Cal. 239, 240. See Collins vs. Bartlett, 44 Cal. 371, 381; Kreichbaum vs. Melton, 49 Cal. 50, 55; Haskell vs. Haskell, 54 Cal. 262; Harrison vs. McCormick, 69 Cal. 616, 618, 11 Pac. Rep. 456; Wadsworth vs. Wadsworth, 81 Cal. 182, 188, 15 Am. St. Rep. 38, 22 Pac. Rep. 648; Mott vs. Mott, 82 Cal. 413, 418, 22 Pac. Rep.

1140; Ferry vs. Ferry, 9 Wash. 239, 241, 37 Pac. Rep. 431.

70. STIPULATION as to division of property and maintenance of children,—as to effect of, see Parkhurst vs. Parkhurst, 118 Cal. 18, 50 Pac. Rep. 9.

71. SUMMONS—Service of,—as to, see Code Civ. Proc. § 411 and note.

§ 93. ADULTERY DEFINED. Adultery is the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Adultery — As constituting extreme cruelty.
3. Same—After separation.
- 4-6. Same—Second marriage during existence of first.
- 7-9. Defenses—Insanity.
10. Recrimination—Generally.
11. Same—Desertion.
12. Disposition of community property on divorce for adultery.
13. Pleading—Generally.
- 14, 15. Same—Charging fact of adultery.
16. Same—Same—"Living in adulterous intercourse."
17. Person with whom committed.
- 18-22. Same—Time and place.
23. Practice and evidence—Generally.
24. Same—Admissions and confessions—Competency.
25. Same—Same—Sufficiency.
- 26-28. Same—Circumstantial evidence—Generally.
29. Same—Same—Other adulterous acts after suit began.
30. Same—Same—Remaining over night in house of prostitution.
31. Same—Same—Character.
32. Variance.
33. Same—Proof beyond reasonable doubt not necessary.
34. Same—Cross-examination of paramour.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Devoe vs. Devoe, 51 Cal. 543, 544 (referred to with other sections and held not applicable).

2. ADULTERY, although in popular sense constitutes extreme cruelty, in legal sense does not.—Haskell vs. Haskell, 54 Cal. 262.
See post § 94 and note.

3. ADULTERY AFTER THE SEPARATION, brought about by husband's default, is not ground for divorce under statute which, although in one section makes adultery good ground without limitation, in another section allows divorce to be granted only on application of party injured.—Tew vs. Tew, 80 N. C. 216, 30 Am. Rep. 84.

4. Second marriage, in good faith, after spouse's absence for five years, without being known to the other to be living during that period, is not such adultery as will be ground for divorce, although it might be adultery in foro conscientie for parties to continue to cohabit after hearing that first husband or wife is still living.—Valleau vs. Valleau, 6 Paige Ch. (N. Y.) 207, 209.

5. Second marriage pending appeal—Bigamy.—See ante § 61 and note.

6. Second marriage before final decree—Bigamy.—See ante § 61 and note.

7. DEFENSES—Insanity of wife at time of commission is defense.—Nichols vs. Nichols, 31 Vt. 328, 73 Am. Dec. 352. See also Wray vs. Wray, 19 Ala. 522; Mims vs. Mims, 33 Ala. 98; Wray vs. Wray, 33 Ala. 187; Broadstreet vs. Broadstreet, 7 Mass. 474; Hill vs. Hill, 27 N. J. Eq. (12 C. E. Gr.) 214.

8. Contra: Matchin vs. Matchin, 6 Pa. St. 382, 47 Am. Dec. 466.

As to insanity in divorce cases, see ante § 92 note pars. 41, 42.

9. Insanity after cause of action arose, no defense.—See ante § 92 note pars. 41-48.

10. RECRIMINATION—Generally.—The several offenses enumerated in statute as ground for divorce may be equally pleaded in bar to suit for divorce—one to other within principle of recrimination.—Conant vs. Conant, 10 Cal. 249, 70 Am. Dec. 717.

11. Desertion on part of plaintiff, although without excuse, if not continued for time required by statute so as to constitute ground for divorce, will not bar decree for plaintiff for adultery of defendant, if established, although it may be considered by court in determining character of divorce to be granted.—Conant vs. Conant, 10 Cal. 249, 257, 70 Am. Dec. 717. See Wilson vs. Wilson, 40 Iowa 230.

Recrimination,—as to generally, see post § 122 and note.

12. DISPOSITION OF COMMUNITY PROPERTY ON DIVORCE FOR ADULTERY.—See post § 146, sub. 1 and note.

13. PLEADING—Generally.—Statute has not altered ordinary rules of pleading causes in divorce, except that nothing can be taken by admission or default.—Conant vs. Conant, 10 Cal. 249, 254, 70 Am. Dec. 717.

See Code Civ. Proc. § 484 and note.

14. The charge of adultery, whether of crimination or recrimination, is to be stated in pleadings in such manner that adverse party may be prepared to meet it on trial.—Conant vs. Conant, 10 Cal. 249, 70 Am. Dec. 717; Wood vs. Wood, 2 Paige Ch. (N. Y.) 108, 113. See Ind. Christianberry vs. Christianberry, 3 Blackf. 202, 25 Am. Dec. 96 (charging adultery with unknown persons sufficient, time and place being given). Miss. Farr vs. Farr, 34 Miss. 597, 69 Am. Dec. 406 (must be charged at particular time and place). N. H. Adams vs.

Adams, 20 N. H. 399, 51 Am. Dec. 219 (charging adultery with persons unknown sufficient, time and place being alleged; proof at different place not sufficient). *N. J. Marsh v. Marsh*, 16 N. J. Eq. (1 C. E. Gr.) 391, 84 Am. Dec. 164; *Mills vs. Mills*, 18 N. J. Eq. (3 C. E. Gr.) 444; *Miller vs. Miller*, 20 N. J. Eq. (5 C. E. Gr.) 216; *Reid vs. Reid*, 21 N. J. Eq. (6 C. E. Gr.) 331; *Goodwin vs. Goodwin*, 23 N. J. Eq. 8 C. E. Gr.) 210 (year, month, and day must be alleged; but fact need not be proved as alleged); *Black vs. Black*, 26 N. J. Eq. (11 C. E. Gr.) 432, 27 Id. 665 (month and year must be stated, but day need not be). *N. Y. Mitchell v. Mitchell*, 61 N. Y. 398; *Germond vs. Germond*, 6 John. Ch. (N. Y.) 347, 10 Am. Dec. 335; *Fyde vs. Heyde*, 4 Sandf. (N. Y.) 692.

15. **DEFENSE OF PLAINTIFF'S ADULTERY**, in action for divorce grounded on defendant's adultery, must be fully and plainly set forth.—*Jones vs. Jones*, 18 N. J. Eq. (3 C. E. Gr.) 33, 90 Am. Dec. 607; *Reid vs. Reid*, 21 N. J. Eq. (6 C. E. Gr.) 333.

16. **Averment that defendant was "living in adulterous intercourse"**—bill of particulars by plaintiff not necessary.—*Carpenter vs. Carpenter*, 17 N. Y. Supp. 176.

17. **Persons with whom committed**.—"If persons with whom adultery was committed are known, they must be named in defendant's answer, and adultery must be charged with reasonable certainty as to time and place. If the persons with whom committed are unknown, fact should be stated in answer, and time, place, and circumstances under which adultery was committed should be set forth. Neither party has right to make such charge against the other on mere suspicion, relying upon being able to fish up testimony before trial to support allegation."—*Wood vs. Wood*, 2 Paige Ch. (N. Y.) 108, 113.

18. **Time and place**.—Charge of adultery should be stated with reasonable certainty as to time and place, so as to enable defendant to prepare to meet it on trial.—*Conant vs. Conant*, 10 Cal. 249, 254, 70 Am. Dec. 717 (where allegation was that defendant "committed adultery, at the city of San Francisco, at divers times, with persons whose names are to plaintiff unknown," but defendant by failing to demur had waived the objection). See *Heyde vs. Heyde*, 4 Sandf. (N. Y.) 692; *Codd vs. Codd*, 3 John. Ch. (N. Y.) 224.

19. **Time when, place where, and person, if known, with whom offense was committed** must be stated, although in laying time, it is sufficient to state month and year, without specifying particular day.—*Scheffing vs. Scheffing*, 44 N. J. Eq. (17 Stew.) 438, 15 Atl. Rep. 577. See also *Farr vs. Farr*, 34 Miss. 597, 69 Am. Dec. 406.

20. This rule, however, is to be understood to apply only to cases where complainant has such knowledge or information of those facts as to enable him or her to state them.—*Mitchell vs. Mitchell*, 61 N. Y. 398, 406.

21. "Courts have required those particulars to be stated where it can be done; but where the offense is alleged to have occurred with person whose name is unknown to plaintiff,

and fact is alleged, it has uniformly held that allegation is sufficiently specific, and I do not understand that any well-considered case holds it to be necessary that particular locality or time of commission of offense should be stated, when there is an averment that they are unknown and that statement of specific time and place cannot be made, to permit proof of the commission of adultery to be given under it." *Mitchell vs. Mitchell*, 61 N. Y. 398, 402.

22. "It would seem that time and place should be specifically charged. A general charge must produce surprise and inability on part of most vigilant person to make necessary preparation for defense."—*Christianberry vs. Christianberry*, 3 Blackf. (Ind.) 202, 25 Am. Dec. 96, 98.

23. **PRACTICE AND EVIDENCE**.—Proof of second marriage to woman with whom adultery is alleged to have been committed, is not admissible to rebut presumption of first marriage resulting from proof of cohabitation and general reputation, when first marriage is not sought to be so proved, but it is shown by direct testimony of witnesses present at time plaintiff and defendant entered into contract of marriage.—*Kilburn vs. Kilburn*, 89 Cal. 46, 51, 33 Am. St. Rep. 447, 26 Pac. Rep. 636.

24. **Admission and confessions of defendant**.—**Competency**.—Admissions of defendant of fact of adultery are competent evidence, in connection with other evidence.—*Evans vs. Evans*, 41 Cal. 103, 104; *Baker vs. Baker*, 13 Cal. 87, 93. See *Redington vs. Redington*, 2 Colo. App. 3, 29 Pac. Rep. 811.

25. **Same**.—**Sufficiency**.—See post § 130 and note; Code Civ. Proc. § 3079 and note.

26. **Circumstantial evidence**.—**Generally**.—Fact of adultery, like any other fact, may be established by circumstantial proof.—*Evans vs. Evans*, 41 Cal. 103, 107.

27. "Evidence by which act of adultery is proved is seldom direct. The natural secrecy of act makes it ordinarily impossible to prove it, except by circumstantial evidence. The circumstances must be such, indeed, as to lead the guarded discretion of reasonable and just man to the conclusion of guilt."—*Thayer vs. Thayer*, 101 Mass. 111, 100 Am. Dec. 110.

28. "It is seldom that adultery is established by direct evidence, but, on the other hand, as general rule, report must be had to circumstantial evidence; and when facts and circumstances introduced in evidence fairly and reasonably lead to conclusion that the act has been committed, a court or jury will be justified in finding charge sustained."—*Cooke vs. Cooke*, 152 Ill. 286, 38 N. E. Rep. 1027.

29. **Other adulterous acts after suit began**—evidence of admissible.—"Concurrent adulterous disposition of defendant and the participes criminis cannot be shown by stronger evidence than the criminal act itself. There is no one act by which the moral status of parties is more clearly defined. And for purposes and with limitations here stated, evidence of it is always admissible."—*Thayer vs. Thayer*, 101 Mass. 111, 100 Am. Dec. 110.

30. **Same**.—**Remaining over night in house of prostitution**.—Mere fact that married man

enters house of prostitution in evening and remains all night, raises so strong a presumption of adulterous intercourse as to require the most satisfactory evidence to rebut it. "It would shock the moral sense of the community to hold that such proof as this, if unexplained, would not raise strong presumption of adulterous intercourse."—*Evans vs. Evans*, 41 Cal. 103, 107. See *Cooke vs. Cooke*, 152 Ill. 286, 33 N. E. Rep. 1027.

31. Evidence of general character for chastity and virtue is admissible in suit for divorce on ground of adultery.—*O'Bryan vs. O'Bryan*, 13 Mo. 16, 53 Am. Dec. 128.

32. Variance.—It is not necessary to prove adultery was committed at precise time alleged, but it must be proved to have been committed so near that time that the variance shall not operate to defendant's prejudice.—*Scheffing vs.*

Scheffing, 44 N. J. Eq. (17 Stew.) 438, 15 Atl. Rep. 577.

33. Fact of adultery need not be established beyond reasonable doubt. It "may be proved by such facts and circumstances as, under rules of law, are legal evidence, admissible in court of justice, which clearly satisfy mind of tribunal which is required to pass upon question, of commission of the act."—*Allen vs. Allen*, 101 N. Y. 658, 5 N. E. Rep. 341.

34. CROSS-EXAMINATION OF PARAMOUR—Denial by him of intimacy.—It is proper to permit him to be asked on cross-examination as to his relations with, and conduct toward, the wife, in traveling together, as affecting his credit as witness, and as enabling jury to see what effect these things had, or might have on his testimony.—*Fuller vs. Fuller*, 17 Cal. 605, 612.

§ 94. EXTREME CRUELTY, WHAT. Extreme cruelty is the wrongful infliction of grievous [1] bodily injury, or grievous [2] mental suffering, upon the other by one party to the marriage.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 337, held unconstitutional; see history, § 4 ante; amended March 7, 1905, Stats. and Amdts. 1905, c. LXXXIX, p. 75.

1. Applied, cited, construed, referred to, etc.
2. Bodily injury—Generally.
- 3, 4. Same—Mental suffering—Distinct things.
- 5-8. Same—Apprehension of future danger.
9. Same—Consideration of station in life.
10. Same—Conduct need not become fixed habit.
- 11, 12. Same—Assault and battery.
13. Same—Drunkenness, no excuse.
- 14, 15. Same—Insanity, as excuse.
16. Same—Single act of violence.
- 17-21. Grievous mental suffering—Generally.
- 22, 23. Same—Any unjustifiable conduct.
24. Same—Accusation of unchastity by husband against wife.
25. Same—Same—Allegation in answer.
26. Same—Same—Presumption of cruelty.
27. Same—Same—Truthful accusation.
- 28, 29. Same—Same—By wife against husband.
30. Same—Charging husband with larceny.
31. Same—Adulterous conduct and excessive drinking.
32. Same—Cruelty after separation.
33. Same—Desertion.
34. Same—Same—Cruelty justifying.
35. Same—Bad temper.
36. Same—Refusal of credit by husband's instructions.
37. Same—Removal of children from mother.
38. Same—Vile and profane language.
39. Same—Finding by court—Conclusion of law.
40. Provocation—Misconduct of complaining party.
- 41, 42. Question of law and fact.
43. Sexual intercourse—Excessive.
- 44, 45. Same—Refusal to permit.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Devoe vs. Devoe*, 51 Cal. 543, 544 (referred to with other sections and held not applicable); *Waldron vs. Waldron*, 85 Cal. 251, 255, 256 (construed and applied), 367.

269 (cited and construed, dis. op.), 24 Pac. Rep. 649, 858, 9 L. R. A. 487; *White vs. White*, 86 Cal. 219, 224, 24 Pac. Rep. 996 (construed and applied with other sections); *Barnes vs. Barnes*, 95 Cal. 171, 176, 177, 30 Pac. Rep. 298, 16 L. R. A. 660 (construed and applied); *Smith vs. Smith*, 124 Cal. 651, 652, 57 Pac. Rep. 573 (construed and applied).

2. GRIEVOUS BODILY INJURY or grievous mental suffering upon the other by one party to the marriage constitutes extreme cruelty.—*Barnes vs. Barnes*, 95 Cal. 171, 30 Pac. Rep. 298, 16 L. R. A. 660. See *Fleming vs. Fleming*, 95 Cal. 430, 434, 29 Am. St. Rep. 124, 30 Pac. Rep. 566; *Wolff vs. Wolff*, 102 Cal. 433, 437, 36 Pac. Rep. 767, 1087; *Smith vs. Smith*, 119 Cal. 183, 187, 48 Pac. Rep. 730, 51 Id. 183; *Andrews vs. Andrews*, 120 Cal. 184, 187, 183, 52 Pac. Rep. 298.

3. Bodily injury and mental suffering two entirely distinct things; each by itself constitutes extreme cruelty (dis. op.).—*Waldron vs. Waldron*, 85 Cal. 251, 266, 24 Pac. Rep. 649, 858, 9 L. R. A. 487.

4. As to mental suffering, see pars. 17-21 this note.

5. Apprehension of future danger—Violence by husband upon person of wife does not constitute extreme cruelty unless violence is such "as to endanger life, limb, or health, or to cause reasonable apprehension of future danger"; and it is not sufficient to justify divorce that husband on one occasion laid violent hands on wife and choked her in such manner as to leave visible marks.—*Morris vs. Morris*, 14 Cal. 76, 73 Am. Dec. 615. See *Gilbertson vs. Gilbertson*, 78 Iowa 755, 41 N. W. Rep. 573; *Nogees vs. Nogees*, 7 Tex. 538, 53 Am. Dec. 73.

6. Extreme cruelty, to be cause for divorce must be such cruelty or ill-treatment as will produce bodily harm or ill-health, or furnish

reasonable apprehension that further cohabitation would endanger life or physical health of complaining party.—*Waldron vs. Waldron*, 85 Cal. 251, 255, 24 Pac. Rep. 649, 858, 9 L. R. A. 487.

7. **Overruled:** *Barnes vs. Barnes*, 95 Cal. 171, 175, 177, 30 Pac. Rep. 298, 16 L. R. A. 660. See *Wolff vs. Wolff*, 102 Cal. 433, 437, 26 Pac. Rep. 767, 1037.

8. **TEST OF WHAT CONSTITUTES CRUELTY**, as cause for divorce, must be its actual or reasonably apprehended injurious effect upon body or health of the complaining party.—*Morris vs. Morris*, 14 Cal. 80, 73 Am. Dec. 615; *Powelson vs. Powelson*, 22 Cal. 359 (dangerous to physical safety); *Waldron vs. Waldron*, 85 Cal. 251, 256, 24 Pac. Rep. 649, 858, 9 L. R. A. 487 (may be effected without as well as with physical violence). See *Me. Holyoke vs. Holyoke*, 78 Me. 411 (sound body and sound mind required to constitute health; whatever seriously impairs or seriously threatens either is extreme cruelty). *Nev. Reed vs. Reed*, 4 Nev. 398, 399 (effect and probable consequences of conduct complained of should control action of court).

See 14 Cyc. 598-605; 9 Am. & Eng. Encyc. of L. (2d ed.) 783-808; notes 29 Am. Dec. 674-679; 81 Am. Dec. 92; 97 Am. Dec. 185; 17 Am. St. Rep. 319; 29 Am. St. Rep. 127.

9. **Consideration of station in life.**—In *David vs. David*, 27 Ala. 225, it was said: "Cruelty is frequently a term of relative meaning. Between persons of education, refinement and delicacy, the slightest blow in anger might be cruelty; while between persons of a different character and walk in life, a blow might occasionally pass without marring, to any great extent, their conjugal relations, or materially interfering with their happiness."—*Odom vs. Odom*, 36 Ga. 317; *Kline vs. Kline*, 50 Mich. 433, 15 N. W. 541; *Taylor vs. Taylor*, 76 N. C. 433.

10. **Conduct need not become fixed habit.**—Acts of cruelty, such as beating, kicking, choking, calling vile names, and the like, need not be persistent, need not become fixed habit, before relief and safety can be had by divorce.—*Mahone vs. Mahone*, 19 Cal. 626, 628, 81 Am. Dec. 91. See *Cole vs. Cole*, 23 Iowa 441; *Cooper vs. Cooper*, 17 Mich. 205, 97 Am. Dec. 182.

11. **Assault and battery.**—It is sufficient to justify divorce that on two occasions husband struck his wife with his fist and hand upon face and head so as to leave marks of violence, which remained several days, and on one of these occasions, in night, after she had taken refuge in room occupied by servant girl, and locked it, he broke door open, and taking her by arms dragged her back into their bedroom.—*Eidenmuller vs. Eidenmuller*, 37 Cal. 364.

12. **When husband, upon being asked by his wife for money for household expenses, slaps her and throws her violently on floor, and on other separate occasions kicks her and throws her out of house, such brutality is shown as will warrant divorce.**—*Matthal vs. Matthal*, 49 Cal. 90.

Bad temper or inveterate scoldings, wife's, will not justify divorce.—See par. 36 this note.

13. **Drunkenness is no excuse for, and does not qualify cruelty.**—*McVickar vs. McVickar*, 46 N. J. Eq. (1 Dick.) 490, 19 Am. St. Rep. 422, 19 Atl. Rep. 249. See *Lee vs. Lee*, 8 Wash. 236, 28 Pac. Rep. 355.

14. **Insanity.**—Acts and conduct, although cruel and inhuman, if done while party is insane do not constitute "inhuman treatment" or "inhuman cruelty," as ground for divorce.—*Cohn vs. Cohn*, 85 Cal. 108, 109, 24 Pac. Rep. 659; *Tiffany vs. Tiffany*, 34 Iowa 122, 50 N. W. Rep. 554.

15. **Compare:** *Smith vs. Smith*, 40 N. J. Eq. (11 Stew.) 566, 5 Atl. Rep. 109 (where defendant was not wholly insane, and decree a mensa et thoro was granted to plaintiff).

16. **Single act of violence.**—"One act of force and violence preceded by deliberate insult and abuse, even though committed wantonly and without provocation, does not constitute extreme and repeated cruelty."—*Fritz vs. Fritz*, 138 Ill. 436, 32 Am. St. Rep. 156, 28 N. E. Rep. 1058, 14 L. R. A. 635. See *Nye's Appeal*, 126 Pa. St. 341, 12 Am. St. Rep. 378, 17 Atl. Rep. 618.

17. **GRIEVOUS MENTAL SUFFERING**,—Independent of physical injury, is cause for divorce as one of constituents of extreme cruelty.—*Venzke vs. Venzke*, 94 Cal. 225, 29 Pac. Rep. 499; *Barnes vs. Barnes*, 95 Cal. 171, 30 Pac. Rep. 298, 16 L. R. A. 660; *Fleming vs. Fleming*, 95 Cal. 430, 29 Am. St. Rep. 124, 30 Pac. Rep. 566; *Andrews vs. Andrews*, 120 Cal. 184, 187, 53 Pac. Rep. 298.

18. While court should act with great caution in granting divorce on evidence where no acts of violence are proven, still such evidence may be sufficient. Course of ill-treatment, long continued, where acts of husband are studied and malicious, and wife is sensitive, may be cruel and inhuman treatment if it has serious effect on her health, or causes her great mental suffering; but effect on her must be of a serious character.—*Marks vs. Marks*, 56 Minn. 264, 45 Am. St. Rep. 466, 57 N. W. Rep. 651.

19. **Compare:** *Maddox vs. Maddox*, 139 Ill. 152, 59 N. E. Rep. 599, 52 L. R. A. 628.

20. "That cruelty may be extreme, without blows, cannot be doubted, and we have no difficulty in holding, that where causes are grave and weighty, and such as to show impossibility that duties of married life can be discharged—when violence is menaced, and there is reasonable apprehension of danger to life, limb, or health—the case comes within our statute, and court ought not to wait until hurt is actually done."—*Harratt vs. Harratt*, 7 N. H. 196, 26 Am. Dec. 730.

21. "Whether behavior proved is sufficient ground for divorce depends on question whether it has seriously injured health or endangered reason. This is sole test. The question is, not whether treatment reasonably ought, or could reasonably be expected, seriously to injure health or endanger reason of person of ordinary intelligence and mental strength, but whether it has in fact had that effect upon health or reason of person complaining."—*Robinson vs. Robinson*, 66 N. H.

600, 610, 49 Am. St. Rep. 632, 23 Atl. Rep. 362, 15 L. R. A. 121.

22. Any unjustifiable conduct on part of either husband or wife, which so grievously wounds feeling of other, or so utterly destroys peace of mind of other as to seriously impair health; or such as utterly destroys legitimate ends and objects of matrimony, constitutes extreme cruelty under the statute.—*Barnes vs. Barnes*, 95 Cal. 171, 176, 30 Pac. Rep. 298, 16 L. R. A. 680; *Carpenter vs. Carpenter*, 30 Kan. 712, 46 Am. Rep. 108, 2 Pac. Rep. 133. See *Iowa*. *Beebe vs. Beebe*, 10 Iowa 133; *Caruthers vs. Caruthers*, 13 Iowa 266; *Wheeler vs. Wheeler*, 53 Iowa 511, 36 Am. Rep. 240. *Kan.* *Gibbs vs. Gibbs*, 18 Kan. 419. *Mich.* *Bennett vs. Bennett*, 24 Mich. 482; *Goodman vs. Goodman*, 26 Mich. 417; *Palmer vs. Palmer*, 45 Mich. 150, 151, 40 Am. Rep. 461, 7 N. W. Rep. 760; *Whitmore vs. Whitmore*, 49 Mich. 417, 13 N. W. Rep. 800. *N. J.* *Cook vs. Cook*, 11 N. J. Eq. (3 Stock.) 195; *Black vs. Black*, 30 N. J. Eq. (3 Stew.) 215. *N. Y.* *Kennedy vs. Kennedy*, 73 N. Y. 369. *Oreg.* *Smith vs. Smith*, 8 Oreg. 100. *Pa.* *May vs. May*, 62 Pa. St. 206. *Wis.* *Beyer vs. Beyer*, 50 Wis. 254, 36 Am. Rep. 848, 6 N. W. Rep. 307.

23. Infliction of grievous bodily injury or grievous mental suffering does not imply wrong or injustice, and it may be justifiable; whereas the word cruelty alone is always understood as implying wrong or injustice; and extreme cruelty which is cause for divorce is necessarily wrong and never justifiable.—*Waldron vs. Waldron*, 85 Cal. 251, 256, 24 Pac. Rep. 649, 858, 9 L. R. A. 487.

24. Accusation of unchastity by husband against wife.—It is ground for divorce that husband falsely impugned his wife's virtue and charged her with unchastity.—*Haley vs. Haley* (Cal. May 28, 1887), 14 Pac. Rep. 92, 93; *Andrews vs. Andrews*, 120 Cal. 184, 187, 52 Pac. Rep. 298. See *Haight vs. Haight* (Iowa, April 4, 1900), 82 N. W. Rep. 443; *Wheeler vs. Wheeler*, 53 Iowa 511, 36 Am. Rep. 240, 5 N. W. Rep. 689; *Walton vs. Walton*, 57 Neb. 102, 77 N. W. Rep. 392; *Kelly vs. Kelly*, 18 Nev. 49, 51 Am. Rep. 732, 1 Pac. Rep. 194.

25. Same—Allegations in answer in suit by wife, of lewd and lascivious conduct, if made in good faith, though not proved, will not entitle wife to divorce.—*Johnson vs. Johnson*, 101 Ky. 623, 19 Ky. L. Rep. 822, 42 S. W. Rep. 109.

26. Same—Presumption of cruelty.—Where plaintiff in action for divorce on grounds of extreme cruelty alleges that defendant in former suit for divorce brought by him against plaintiff charged in his petition and by affidavit that she was pregnant at time of his marriage with her and that she concealed said state of facts from him; and court found charge to be false, and there being nothing in record to negative plaintiff's virtue, it was held that charges will be presumed to have had their natural consequence, and that it is no more necessary to prove that it induced suffering than to prove that bodily injury is followed by pain.—*Haley vs. Haley* (Cal. May 28, 1887), 14 Pac. Rep. 92, 93.

27. Same—Truthful accusation.—Accusations of unchastity towards wife is no ground

for divorce when she is guilty of the offense.—*Fuller vs. Fuller*, 108 Ga. 256, 33 S. E. Rep. 865.

28. Same—By wife against husband.—Husband is entitled to divorce on ground of extreme cruelty where his wife imputed to him, in presence of others, grossest immorality and personal impurity.—*Barnes vs. Barnes*, 95 Cal. 171, 176, 30 Pac. Rep. 298, 16 L. R. A. 680.

29. Contra: *McAllister vs. McAllister*, 71 Tex. 695, 10 S. W. Rep. 294.

30. Charging husband with larceny.—Accusations made by wife that husband had stolen from her, are alone insufficient to entitle husband to divorce, when made after his desertion of her.—*Kuhl vs. Kuhl*, 124 Cal. 57, 58, 59, 56 Pac. Rep. 629.

31. Adulterous conduct and excessive drinking, not amounting to adultery and habitual intemperance, do not constitute extreme cruelty.—*Haskell vs. Haskell*, 54 Cal. 262. See *Cline vs. Cline*, 10 Oreg. 474.

32. Cruelty after separation.—Whether false and malicious charge by defendant, made after actual separation of parties, would be less apt to inflict grievous mental anguish for that reason is for trial court to determine, in view of all the facts.—*Valensin vs. Valensin*, 73 Cal. 106, 109, 14 Pac. Rep. 397.

33. Desertion—Wife leaving husband to go abroad to study painting, and remaining abroad about three months, does not of itself constitute such cruelty as will entitle husband to divorce.—*Smith vs. Smith*, 62 Cal. 466. See *Waldron vs. Waldron*, 85 Cal. 251, 258, 24 Pac. Rep. 649, 858, 9 L. R. A. 487 (grievous mental suffering is not equivalent to extreme cruelty).

34. Same—Cruelty justifying.—Cruelty referred to in § 93, and which, when it causes desertion, makes cruel spouse deserter, is not necessarily same character and grade as "extreme cruelty" defined in § 94.—*White vs. White*, 86 Cal. 219, 224, 24 Pac. Rep. 996 (Conc. op. of Paterson, J.).

35. Wife's bad temper and persistent scoldings of her husband no defense to action for divorce on ground of extreme cruelty.—*Eidenmuller vs. Eidenmuller*, 37 Cal. 364, 365; *Boeck vs. Boeck*, 16 Neb. 196, 198, 20 N. W. Rep. 223 (mere austerity of temper and petulance of manner in the wife no justification or excuse).

36. Refusal of credit to wife by husband's instructions to merchant with whom she has been trading on credit, and mortification of wife in consequence of such action, constitutes sufficient ground for divorce.—*Young vs. Young* (Tenn. Mar. 7, 1900), 57 S. W. Rep. 438.

37. Removal of children from their mother to another state does not constitute such extreme cruelty as to warrant granting her divorce where removal was for purpose of sending them to school, and she was informed within two days where they were, and it appears that she succeeded in recovering some of them.—*Christie vs. Christie*, 53 Cal. 26.

38. Wife's vile and profane language toward husband, in absence of any effect upon him, is no ground for divorce.—*Hewitt vs. Hewitt* (N. J. Eq. June 25, 1897), 37 Atl. Rep. 1011.

39. **FINDING BY COURT—Conclusion of law.**—Finding "that repeated acts of cruelty, as established by evidence, upon part of said defendant toward her said husband and children during last several years, have inflicted upon plaintiff grievous mental suffering" is but conclusion of law, and does not find any fact in issue.—*Smith vs. Smith*, 62 Cal. 466, 468.

40. **PROVOCATION—Misconduct of complaining party—Not ground for divorce.**—*Johnson vs. Johnson*, 14 Cal. 459. See *Von Glahn vs. Von Glahn*, 46 Ill. 134; *Masterman vs. Masterman*, 58 Kan. 748, 51 Pac. Rep. 277; *Poor vs. Poor*, 8 N. H. 307, 29 Am. Dec. 664.

41. **QUESTION OF LAW AND FACT—What constitutes extreme cruelty.**—"Rule determining what conduct constitutes extreme cruelty as cause of divorce is matter of law; but whether evidence shows such conduct is question of fact to be decided upon trial."—*Kuhl vs. Kuhl*, 124 Cal. 57, 60, 56 Pac. Rep. 629.

42. **As to findings, generally, see ante § 92, note para. 34-36.**

43. **SEXUAL INTERCOURSE—Excessive, when "attended by danger and fear, and injury to plaintiff and to her health, and were rashly and roughly and unreasonably done; and each of them when defendant knew condition of plaintiff and suffering and injury it would be likely to inflict on her, and her inability to safely and properly accede to his wishes," is ground for divorce for extreme cruelty.**—*Mayhew vs. Mayhew*, 61 Conn. 233, 29 Am. St. Rep. 195. See *Morris vs. Morris*, 14 Cal. 76, 73 Am. Dec. 615; *Melvin vs. Melvin*, 58 N. H. 569, 42 Am. Rep. 605; *Gardner vs. Gardner*, 104 Tenn. 410, 78 Am. St. Rep. 124, 58 S. W. Rep. 342.

44. **Refusal to permit, does not of itself constitute "cruel and inhuman treatment."**—*Schoessow vs. Schoessow*, 83 Wis. 553, 53 N. W. Rep. 856.

45. **Refusal to permit—as amounting to desertion, see post § 95 and note para. 10-12, § 96 note para. 3-6.**

§ 95. **DESSERTION, WHAT.** Wilful desertion is the voluntary separation of one of the married parties from the other with intent to desert.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
- 2, 3. **Alimony**—No distinction as respects, and divorce.
4. **Bar of statute**—"Unreasonable delay."
- 5, 6. **Construction**—"Wilful" not technical—Malice or wrong.
7. **Evidence**—Admissibility and sufficiency.
- 8, 9. "Wilful desertion"—Generally.
- 10-12. **Same**—What constitutes—Cessation of cohabitation.
13. **Same**—Effect of as authorizing wife to sue in own name.
14. **Pleading and practice**—Complaint—Sufficiency of.
- 15, 16. **Same**—Evidence—Sufficiency.
17. **Same**—Same—Presumption of intent to desert.
18. **Same**—Same—Refusal to follow husband.
19. **Same**—Finding—Sufficiency.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in:** *Devoe vs. Devoe*, 51 Cal. 543, 544 (referred to with other sections); *Andrews vs. Runyon*, 65 Cal. 629, 632, 4 Pac. Rep. 669 (applied with § 103); *Humphrey vs. Pope*, 123 Cal. 253, 255, 54 Pac. Rep. 347 (applied with other sections); *Towle vs. Matheus*, 130 Cal. 574, 577, 62 Pac. Rep. 1064 (referred to with "wilful" as used in wilful shooting by officer); *Sheridan vs. Sheridan*, 134 Cal. 88, 89, 66 Pac. Rep. 73 (applied with other sections); *Greer vs. Greer*, 143 Cal. 519, 523, 77 Pac. Rep. 1106 (applied).

2. **ALIMONY for wife living apart from husband against his will.**—*Hagle vs. Hagle*, 74 Cal. 608, 16 Pac. Rep. 518.
See post § 137 and note.

3. **No distinction as respects right to alimony or divorce**—Desertion of husband which will authorize wife to maintain action for permanent alimony, must be of same character as would authorize her to maintain action for

divorce.—*Hardy vs. Hardy*, 97 Cal. 125, 130, 31 Pac. Rep. 906; *Greer vs. Greer*, 143 Cal. 519, 524, 77 Pac. Rep. 1106.

4. **BAR OF STATUTE** to action for divorce on ground of desertion under this section, is not raised by "unreasonable delay" in bringing action, under provisions of §§ 124 and 125 post.—*Thomson vs. Thomson*, 121 Cal. 11, 12, 53 Pac. Rep. 403.

COMPLAINT—Sufficiency of, see par. 14 this note.

CONDONATION,—as to, see post § 117 and note.

5. **CONSTRUCTION—"Wilful" not technical word.**—The word "wilful" is not necessarily technical and is within Code Civ. Proc. § 16, which provides that ordinary words shall be construed "according to context and approved usage of the language."—*Towle vs. Matheus*, 130 Cal. 574, 577, 62 Pac. Rep. 1064; *Thornburg vs. Thornburg*, 18 W. Va. 526.

6. **Malice or wrong.**—"Wilful" as used in this section does not imply malice or wrong towards the other party but "intentional."—*Benkert vs. Benkert*, 32 Cal. 467, 470. See *Thornburg vs. Thornburg*, 18 W. Va. 526.

7. **EVIDENCE, admissibility and sufficiency,**—as to, see para. 15-18 this note.

8. **"WILFUL DESERTION"**—Generally,—as to, see post §§ 96-104 and notes.

9. **Divorce may be granted for wilful desertion.**—*Harrigan vs. Harrigan*, 135 Cal. 397, 87 Am. St. Rep. 118, 67 Pac. Rep. 506.

10. **What constitutes wilful desertion.**—Wilful desertion is voluntary separation of one of married parties from other with intent to desert.—*Andrews vs. Runyon*, 65 Cal. 629, 632, 4 Pac. Rep. 669; *Greer vs. Greer*, 143 Cal. 519, 523, 77 Pac. Rep. 1106.

11. **Cessation of marital cohabitation, with intent to desert.**—*Hardenbergh vs. Harden-*

bergh, 14 Cal. 654; Morrison vs. Morrison, 20 Cal. 431, 432. See Segelbaum vs. Segelbaum, 39 Minn. 253, 260, 39 N. W. Rep. 492.

12. Cessation of marital cohabitation is not desertion unless both intentional and wrongful.—Benkert vs. Benkert, 32 Cal. 467, 470.

As to refusal of marital and sexual intercourse,—see ante § 94 note para. 43, 44; post § 36 note para. 4, 5.

13. Effect of an authorizing wife to sue in own name.—Voluntary separation of husband from wife, with intent to desert, under this section authorizes her to sue in her own name under § 370 of Code Civ. Proc.—Humphrey vs. Pope, 122 Cal. 253, 255, 54 Pac. Rep. 847.

14. PLEADING AND PRACTICE—COMPLAINT—Sufficiency of.—Complaint alleging that defendant left plaintiff intending no longer to perform his duty to her as husband, but to sever matrimonial relation so far as he was able, and had ever since continued his desertion, charges defendant with having abandoned plaintiff with fixed determination not to perform his matrimonial relations.—Sheridan vs. Sheridan, 134 Cal. 88, 89, 66 Pac. Rep. 73.

15. SAME—EVIDENCE—Sufficiency.—Complaint stating two grounds of divorce, evidence

being sufficient to support decree on one of the counts, failure of evidence to support the other will be immaterial.—Huellmantel vs. Huellmantel, 117 Cal. 407, 49 Pac. Rep. 574.

16. Desertion is made out when it is shown that absence commenced and has continued during prescribed period, without consent and against objections of other party.—Benkert vs. Benkert, 32 Cal. 467, 470.

17. Same—Presumption of intent to desert from prolonged abandonment without apparent cause.—Morrison vs. Morrison, 20 Cal. 431; Carey vs. Carey, 73 Cal. 630, 15 Pac. Rep. 313.

18. Same—Refusal on change of domicile to accompany husband, followed by cessation of cohabitation, without excuse or explanation, is evidence of desertion.—Hardenbergh vs. Hardenbergh, 14 Cal. 654.

See post § 99 note par. 9, and § 103 note para. 2-5.

19. SAME—FINDING—Sufficiency.—A finding as fact that "for more than one year prior to commencement of action defendant wilfully neglected and refused to live with plaintiff, and that during all of said time had intent to desert him," warrants decree of divorce.—Carey vs. Carey, 73 Cal. 630, 631, 15 Pac. Rep. 313.

§ 96. DESERTION, HOW MANIFESTED. Persistent refusal [1] to have reasonable matrimonial intercourse as husband and wife, when health or physical condition does not make such refusal reasonably necessary, or [2] the refusal of either party to dwell in the same house with the other party, when there is no just cause for such refusal, is desertion.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Construction—"Just cause for refusal"—Applies to both grounds.
- 3-5. Marital rights—Refusal of sexual intercourse merely.
- 6, 7. Same—Same—And other duties and rights.
8. Soliciting return to marriage couch.
9. "Wilful desertion."
10. Complaint—Averment of persistency of refusal.
11. Findings—Cruelty as cause of desertion.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Devos vs. Devos, 51 Cal. 543, 544 (referred to); Vosburg vs. Vosburg, 136 Cal. 195, 196, 68 Pac. Rep. 694 (applied); Fink vs. Fink, 137 Cal. 559, 560, 70 Pac. Rep. 623 (construed and applied).

2. CONSTRUCTION—"Just cause for refusal"—Applies to both grounds.—Clause reading, "when there is no just cause for such refusal" applies equally to either of the refusals specified in this section.—Fink vs. Fink, 137 Cal. 559, 560, 70 Pac. Rep. 623.

3. MARITAL RIGHTS—Refusal of, without just cause, constitutes desertion, such as withdrawal from cohabitation, or refusal of sexual intercourse.—Ga. Whitfield vs. Whitfield, 89 Ga. 471, 15 S. E. Rep. 543. Iowa. Pilgrim vs. Pilgrim, 57 Iowa 370, 10 N. W. Rep. 750. Oreg. Sisemore vs. Sisemore, 17 Oreg. 542, 21 Pac. Rep. 320.

See Rie vs. Rie, 34 Ark. 37 (holding cessation of sexual intercourse for one year, without justifiable cause, intentional on part of wife, entitles husband to divorce on ground of desertion, although there has not been denial of or refusal to perform other marital duties).

4. Refusal of sexual intercourse merely is not such abnegation of marital rights as to constitute desertion.—Ill. Kennedy vs. Kennedy, 87 Ill. 250; Fritts vs. Fritts, 133 Ill. 436, 32 Am. St. Rep. 156, 23 N. E. Rep. 1058, 14 L. R. A. 685. D. C. Steele vs. Steele, 1 McA. 505. Me. Stewart vs. Stewart, 73 Me. 548, 57 Am. Rep. 322, 7 Atl. Rep. 473. Mass. Cowles vs. Cowles, 112 Mass. 298; Southwick vs. Southwick, 97 Mass. 327, 33 Am. Dec. 95. Minn. Segelbaum vs. Segelbaum, 39 Minn. 253, 39 N. W. Rep. 492. N. J. Reid vs. Reid, 21 N. J. Eq. (6 C. E. Gr.) 331; Reese vs. Reese, 34 N. J. Eq. (7 Stew.) 32; Anonymous (Watson vs. Watson), 52 N. J. Eq. (7 Dick.) 349, 38 Atl. Rep. 467. Pa. Eshbach vs. Eshbach, 23 Pa. St. 343; Gordon vs. Gordon, 48 Pa. St. 226; Magill vs. Magill, 3 Pitts. (Pa.) 25. Wis. Schoessow vs. Schoessow, 83 Wis. 553, 55 N. W. Rep. 856. Eng. D'Aguiar vs. D'Aguiar, 1 Hagg. Ecc. 773.

See note 14 L. R. A. 635.

5. Refusal of sexual intercourse must be accompanied with intention to desert.—Morris vs. Morris, 20 Cal. 431, 432; Segelbaum vs. Segelbaum, 39 Minn. 253, 260, 39 N. W. Rep.

492. See *Conant vs. Conant*, 10 Cal. 249, 70 Am. Dec. 717; *Hardenbergh vs. Hardenbergh*, 14 Cal. 654; *Benkert vs. Benkert*, 32 Cal. 467.

6. Same—And other duties and rights.—Denial of sexual intercourse and refusal to live with, is evidence of desertion on part of husband, although he continues to contribute to wife's support.—*Magrath vs. Magrath*, 103 Mass. 577, 4 Am. Rep. 579.

7. Refusal of sexual intercourse with, refusal to occupy the same bedroom, and refusal of all matrimonial intercourse, companionship and communion,—is manifestation of actual desertion, though occupying same house and contributing to maintenance of wife.—*Stein vs. Stein*, 5 Colo. 55.

8. Soliciting return to marriage couch.—When husband, without cause, separates from his wife in manner stated in section and never thereafter seeks renewal of intercourse, statute does not contemplate that to make his refusal persistent, wife shall be called upon to solicit his return to marriage couch.—*Vosburg vs. Vosburg*, 136 Cal. 195, 203, 68 Pac. Rep. 694.

See post § 98 note par. 5.

9. "Wilful desertion," as used in the Illinois statute, was intended to mean abnegation of all duties of marital relation, and not of one alone, such as refusal of sexual intercourse.—*Fritts vs. Fritts*, 138 Ill. 436, 32 Am. St. Rep. 156, 28 N. E. Rep. 1058, 14 L. R. A. 685.

10. COMPLAINT—Averment of persistency of refusal.—Complaint specially charging that on given date, more than one year prior to beginning of action, without cause or reason, defendant withdrew from marriage bed, and ever since said time has refused to have any reasonable or any matrimonial intercourse with plaintiff, adequately charges persistency of refusal upon general demurrer; an allegation of "persistent refusal," is not necessary.—*Vosburg vs. Vosburg*, 136 Cal. 195, 197, 68 Pac. Rep. 694.

11. FINDINGS—Cruelty as cause of desertion.—Findings that for one year next preceding suit for divorce plaintiff refused to have matrimonial intercourse with defendant, when physically able, will not justify conclusion that she wilfully deserted defendant where it is not shown that extreme cruelty was not cause of her desertion.—*Fink vs. Fink*, 137 Cal. 559, 560, 70 Pac. Rep. 628.

§ 97. IN CASE OF STRATAGEM OR FRAUD, WHO COMMITS DESERTION. When one party is induced, by the stratagem or fraud of the other party, to leave the family dwelling-place, or to be absent, and during such absence the offending party departs with intent to desert the other, it is desertion by the party committing the stratagem or fraud, and not by the other.

History: Enacted March 21, 1872.

APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Devoe vs. Devoe*, 51 Cal. 543, 544 (referred to); *Hagle vs. Hagle*, 74 Cal.

608, 613, 16 Pac. Rep. 518 (applied with other sections).

§ 98. IN CASE OF CRUELTY, WHERE ONE PARTY LEAVES THE OTHER, WHO COMMITS DESERTION. Departure or absence of one party from the family dwelling-place, caused by cruelty or by threats of bodily harm from which danger would be reasonably apprehended from the other, is not desertion by the absent party, but it is desertion by the other party.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Code Commissioners' note.
- 3-5. Conduct cruel, separation justified.
6. Duty to seek return.
7. Same—Refusal of reconciliation is desertion.
- 8, 9. Cruelty need not be "extreme cruelty."
10. Complaint—Statutory designation of wilful desertion.
11. Findings negating cruelty.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Devoe vs. Devoe*, 51 Cal. 543, 544 (section sets forth state of facts which may manifest desertion); *Hagle vs. Hagle*, 74 Cal. 608, 613, 16 Pac. Rep. 518 (applied with other sections); *White vs. White*, 86 Cal. 219, 224, 24 Pac. Rep. 996 (distinguished from § 94); *Benton vs. Benton*, 122 Cal. 395, 397, 398, 55 Pac. Rep. 152 (applied); *Kepfler vs.*

Kepfler, 134 Cal. 205, 207, 66 Pac. Rep. 203 (applied).

2. CODE COMMISSIONERS' NOTE says: "This section was intended to settle a question discussed as doubtful in *I Bishop on Marriage and Divorce* §§ 787, 791 and 794."—See *White vs. White*, 86 Cal. 219, 224, 24 Pac. Rep. 996.

3. CONDUCT CRUEL—Separation is justified where conduct so cruel, long-continued, and persistent that it would have been unsafe to return at any time during statutory period.—*McVickar vs. McVickar*, 46 N. J. Eq. (1 Dick.) 490, 19 Am. St. Rep. 422, 19 Atl. Rep. 249. See *Warner vs. Warner*, 54 Mich. 492, 20 N. W. Rep. 557; *Levering vs. Levering*, 16 Md. 213 (cruelty compelling wife to leave home is as much desertion by husband as actual abandonment); *Cummins vs. Cummins*, 15 N. J. Eq. (2 McCart.) 138 (lapse of time will not

debar wife from protection, where her husband's cruelty has driven her from home); *Skean vs. Skean*, 33 N. J. Eq. (6 Stew.) 148 (wife compelled to leave home because of cruel treatment, or malignant conduct towards her).

4. Compare: *Fera vs. Fera*, 98 Mass. 155; *Pidge vs. Pidge*, 44 Mass. (3 Met.) 257; *Hester vs. Hester*, *Wright* (Ohio) 210.

5. "If wife quits her husband's house under probable cause to apprehend personal violence from him, or if he, by acts of cruelty, drives her from home, it is same as if he had thrown her out of doors. If acts of cruelty show intention on his part to drive her from him, he is held responsible for natural and probable consequences of such acts, and it is as much desertion on his part as if he had, without cause, left her, intending to desert her."—*White vs. White*, 86 Cal. 219, 224, 24 Pac. Rep. 996 (conc. op. Paterson, J.).

6. Duty to seek return.—If cruelty was not of such intensity as to amount to desertion, yet was sufficient to justify other spouse in temporary absence, it is duty of offending spouse to seek return; and failure so to do for many years, meantime manifesting no interest in other's welfare, or desire to resume marital relations, constitutes desertion.—*McVickar vs. McVickar*, 46 N. J. Eq. (1 Dick.) 490, 19 Am. St. Rep. 422, 19 Atl. Rep. 249. See ante § 96 note par. 8.

7. Same—Refusal of reconciliation is desertion and return on part of wife who has been driven from home by cruel treatment, or fault of husband, where latter sincerely solicits reconciliation and her return, constitutes desertion on her part.—*Hooper vs. Hooper*, 34 N. J. Eq. (7 Stew.) 93.

8. CRUELTY NEED NOT BE "EXTREME

CRUELTY."—Cruelty which would make offending party deserter is not necessarily same character or grade as "extreme cruelty" defined in § 94 as one of grounds for divorce.—*White vs. White*, 86 Cal. 219, 224, 24 Pac. Rep. 996.

9. Compare: *Van Dyke vs. Van Dyke*, 135 Pa. St. 459, 19 Atl. Rep. 1061, where wife kept boarders and refused to allow husband to eat at home unless he paid his board, it appearing that he paid the rent, coal, light, bread, and milk bill, and it not appearing but that he contributed to support of his family according to his ability, this was held wilful and malicious desertion; see also (on maliciousness of act), *Ingersoll vs. Ingersoll*, 49 Pa. St. 249, 88 Am. Dec. 500; *McClurg's Appeal*, 66 Pa. St. 366; *Bealor vs. Hahn*, 117 Pa. St. 169, 11 Atl. Rep. 776; *Detrick's Appeal*, 117 Pa. St. 452, 11 Atl. Rep. 882.

10. COMPLAINT—Sufficiency of allegation.—Complaint setting forth action upon ground of extreme cruelty, and averring that "by reason of said acts of defendant toward her and by reason of his cruelty toward her, plaintiff was compelled to depart from family dwelling-place"; and again, "defendant's treatment of her has been such as to render it impossible for plaintiff to continue living with defendant," states facts which constitute desertion under this section; and it is not necessary to give acts statutory designation of wilful desertion.—*Benton vs. Benton*, 122 Cal. 395, 397, 55 Pac. Rep. 152.

11. FINDINGS NEGATING CRUELTY as alleged in complaint must be treated as negating allegations of desertion under this section.—*Keptier vs. Keptier*, 134 Cal. 205, 206, 66 Pac. Rep. 208.

§ 99. SEPARATION BY CONSENT NOT DESERTION. Separation by consent, with or without the understanding that one of the parties will apply for a divorce, is not desertion.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
- 2, 3. Consent to separation—Effect of.
4. Same—Consent need not be in express words.
5. Same—Same—Assent presumed, when.
6. Same—Same—Corrupt connivance, etc.
- 7, 8. Same—Condonation—Not compulsory.
9. Quarrel while changing abode.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Hagle vs. Hagle*, 74 Cal. 608, 613, 16 Pac. Rep. 518 (applied with other sections); *Sargent vs. Sargent*, 106 Cal. 541, 544, 39 Pac. Rep. 931 (applied with other sections); *McMullin vs. McMullin*, 140 Cal. 112, 115, 73 Pac. Rep. 808 (applied with other sections).

2. CONSENT TO SEPARATION, absence does not constitute desertion and furnishes no ground for divorce.—*Benkert vs. Benkert*, 32 Cal. 467. See *Mich. Cooper vs. Cooper*, 17 Mich. 205, 97 Am. Dec. 182; *Rudd vs. Rudd*, 33 Mich. 101; *Cox vs. Cox*, 35 Mich. 461. *Minn. Hosmer vs. Hosmer*, 53 Minn. 502, 55 N. W. Rep. 630. *Mo. Simpson vs. Simpson*, 31 Mo. 24. N. J.

Hankinson vs. Hankinson, 33 N. J. Eq. (6 Stew.) 66; *De Witt vs. De Witt*, (N. J. Dec. 15, 1896), 36 Atl. Rep. 20. N. Y. *Adams vs. Adams*, 20 N. Y. Supp. 765. *Tex. McGowen vs. McGowen*, 52 Tex. 657, 666. *Va. Latham vs. Latham*, 30 Gratt. (Va.) 307. *Wis. McCormick vs. McCormick*, 19 Wis. 172.

3. Absence without consent for a period of two years constitutes desertion.—*Benkert vs. Benkert*, 32 Cal. 467, 469. See *Thornburg vs. Thornburg*, 18 W. Va. 526.

4. Consent need not be in express words but may be inferred from conduct.—See *Gray vs. Gray*, 15 Ala. 779, 784; *Gillinwater vs. Gillinwater*, 28 Mo. 60; *Cornish vs. Cornish*, 23 N. J. Eq. (8 C. E. Gr.) 208.

5. Same—Assent to separation presumed unless deserter has been requested to return.—*Olcott vs. Olcott* (N. J. Apr. 6, 1893), 26 Atl. Rep. 469; *Chipchase vs. Chipchase*, 48 N. J. Eq. 549, 49 N. J. Eq. (4 Dick.) 594, 22 Atl. Rep. 588, 26 Atl. Rep. 468.

6. Same—Corrupt connivance by,—as to, see post § 113 and notes.

7. **Condonation** of such desertion not compulsory; and offer to offending party to return and live and cohabit with wronged spouse, will not defeat action for divorce, unless offer is accepted and acted on.—*Benkert vs. Benkert*, 32 Cal. 467, 469.

8. **Original offense** is not destroyed by fact that after desertion has continued for period essential to make it ground for divorce, status of separation changes and desertion becomes in every way agreeable to deserted party and plaintiff has still her right of action for divorce because thereof, and is not obliged to

condone offense.—*McMullin vs. McMullin*, 140 Cal. 112, 117, 73 Pac. Rep. 808.

9. **Quarrel while changing abode**.—Divorce cannot be maintained on ground of desertion where parties were boarding at different places for certain time and contemplated making their future home at particular place, and quarrel between them was merely as to where they should live.—*Hagle vs. Hagle*, 74 Cal. 608, 613, 16 Pac. Rep. 518.

Husband may select home—Duty of wife to abide.—See post § 103 and note.

§ 100. ABSENCE BECOMES DESERTION, WHEN. Absence or separation, proper in itself, becomes desertion whenever the intent to desert is fixed during such absence or separation.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 189.

1. **Applied, cited, construed, referred to, etc.**, in: *Sargent vs. Sargent*, 106 Cal. 541, 544, 39 Pac. Rep. 931 (referred to).

2. **Desertion commences, not when separa-**

tion takes place, but when intention to desert is formed.—*Pinkard vs. Pinkard*, 14 Tex. 356, 65 Am. Dec. 129. See *Conger vs. Conger*, 18 N. J. Eq. (2 Beas.) 286.

§ 101. CONSENT TO SEPARATE REVOCABLE. Consent to a separation is a revocable act, and if one of the parties afterwards, in good faith, seeks a reconciliation and restoration, but the other refuses it, such refusal is desertion.

History: Enacted March 21, 1872.

1. **Applied, cited, construed, referred to, etc.**
2. **Consent to separation may be subsequent.**
3. **Offer to return may be refused after right to divorce accrued.**
4. **Revocation necessary before divorce.**
5. **Complaint—Need not allege offer of reconciliation.**
6. **Findings—Wilful desertion an ultimate fact.**

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc.**, in: *Sargent vs. Sargent*, 106 Cal. 541, 544, 39 Pac. Rep. 931 (construed and applied); *Howard vs. Howard*, 134 Cal. 346, 347, 66 Pac. Rep. 367 (applied); *McMullin vs. McMullin*, 140 Cal. 112, 115, 117 (construed and applied), 125 (applied), 73 Pac. Rep. 808.

2. **CONSENT TO SEPARATION MAY BE SUBSEQUENT.**—Separation without consent may become separation by consent, and whether or not it becomes such is question of fact, depending for its solution upon all circumstances of particular case.—*McMullin vs. McMullin*, 140 Cal. 112, 117, 73 Pac. Rep. 808.

3. **OFFER TO RETURN MAY BE REFUSED AFTER RIGHT TO DIVORCE HAS ACCRUED.**—Offer to return made by deserting party after right of action has accrued comes too late, and

injured party need not accept such an offer.—*Benkert vs. Benkert*, 32 Cal. 467, 471.

4. **REVOCATION NECESSARY BEFORE DIVORCE.**—Where findings of court are that parties separate by mutual consent, or by acquiescence, neither of spouses can maintain action for divorce on ground of desertion without first revoking his or her consent to separation by seeking, in good faith, reconciliation and restoration of conjugal rights and duties, refusal of which would constitute desertion by party so refusing (dis. op.).—*McMullin vs. McMullin*, 140 Cal. 112, 125, 73 Pac. Rep. 808.

5. **COMPLAINT—Need not allege offer of reconciliation.**—Complaint setting up wilful desertion in action for divorce need not allege offer of reconciliation.—*Howard vs. Howard*, 134 Cal. 346, 347, 66 Pac. Rep. 367.

6. **FINDINGS—Wilful desertion an ultimate fact.**—Finding that defendant wilfully and without cause deserted and abandoned plaintiff, and ever since has deserted and continues to live apart from him without his consent, finds ultimate fact, and finding of reconciliation is unnecessary.—*Howard vs. Howard*, 134 Cal. 346, 347, 66 Pac. Rep. 367.

§ 102. DESERTION, HOW CURED. If one party deserts the other, and before the expiration of the statutory period required to make the desertion a cause of divorce, returns and offers in good faith to fulfil the marriage contract, and solicits condonation, the desertion is cured. If the other party refuse such offer and condonation, the refusal shall be deemed and treated as desertion by such party from the time of refusal.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 190.

1. Applied, cited, construed, referred to, etc.
2. Offer to return—Must be free from unreasonable conditions.
3. Same—Actual physical return—When not required.
4. Same—Good faith.
5. Same—Same—Question of fact.
6. Same—Wife's claim for maintenance defeated by.
7. Pendency of suit for maintenance.
8. Refusal to return—Right of wife to sue as feme sole.
9. Return after decree for maintenance.
10. Voluntary refusal to renew suspended cohabitation.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Andrews vs. Runyon*, 65 Cal. 629, 632, 4 Pac. Rep. 669 (construed and applied); *McMullin vs. McMullin*, 123 Cal. 653, 654, 56 Pac. Rep. 554 (applied and held that period in which reconciliation may be made does not apply to offer during pendency of suit for maintenance); *Sweasey vs. Sweasey*, 126 Cal. 123, 128, 58 Pac. Rep. 456 (construed and applied with other sections).

2. **OFFER TO RETURN—Must be free from unreasonable conditions**, to be of avail.—*Day vs. Day*, 84 Iowa 221, 50 N. W. Rep. 979 (condition requiring wife, on return, to release all claim to any interest in his real estate—held unreasonable); *Williams vs. Williams*, 180 N. Y. 193, 27 Am. St. Rep. 517, 29 N. E. Rep. 98 (refusal of wife's offer to return except on condition of her holding no communication with her mother—husband guilty of desertion).

3. **Actual physical return is not required**, when wife in vicinity of her husband's home offers to go back and resume performance of marital duties, and he in effect tells her she need not come.—*Andrews vs. Runyon*, 65 Cal. 629, 632, 4 Pac. Rep. 669.

4. **Must be made in good faith and free from suspicious circumstances**.—*Allen vs. Allen*, 84 Ala. 347, 4 So. Rep. 590; *Olcott vs. Olcott* (N. J.), 26 Atl. Rep. 469.

5. **Same—Question of fact**.—Profession of reconciliation by defendant should be tested by

acceptance of plaintiff and if defendant thereafter proves derelict, her complaisance would not prejudice her claims upon him; she could not capriciously refuse to be satisfied of good faith of his offer.—*McMullin vs. McMullin*, 123 Cal. 653, 656, 56 Pac. Rep. 554; *McMullin vs. McMullin*, 140 Cal. 112, 118, 73 Pac. Rep. 808. See *Sisemore vs. Sisemore*, 17 Oreg. 542, 21 Pac. Rep. 820.

6. **Wife's claim for maintenance defeated**.—Claim for maintenance by wife defeated by offer of husband, pending suit, to provide home for her in any reasonable place of her own choosing, with request also to return and fulfil marriage contract, though such offer is made more than one year after desertion.—*McMullin vs. McMullin*, 123 Cal. 653, 654, 56 Pac. Rep. 554.

7. **Pendency of suit for maintenance by wife and apprehension of judgment coercing husband to performance of duty to support his wife may affect**, but does not conclude, question of integrity of his intentions towards her.—*McMullin vs. McMullin*, 123 Cal. 653, 655, 56 Pac. Rep. 554.

8. **Refusal to return—Right of wife to sue as feme sole**.—Wife who is deserted within meaning of section may maintain suit alone to recover damages for personal injuries.—*Andrews vs. Runyon*, 65 Cal. 629, 632, 4 Pac. Rep. 669; *Baldwin vs. Second St. Cable R. Co.*, 77 Cal. 390, 19 Pac. Rep. 644; *Humphrey vs. Pope*, 122 Cal. 253, 255, 54 Pac. Rep. 847.

9. **Return after decree for maintenance**.—Decree for maintenance in favor of wife is subject to this section, and if desertion is not continued long enough to entitle wife to divorce, husband can return and re-establish relation and rid himself of such decree. If lapse of time would interfere with his right to return it is statute and not decree which has that effect.—*Sweasey vs. Sweasey*, 126 Cal. 123, 128, 58 Pac. Rep. 456.

10. **Voluntary refusal to renew suspended cohabitation**, without justification either in consent or wrongful conduct of other spouse, amounts to desertion.—*Sisemore vs. Sisemore*, 17 Oreg. 542, 21 Pac. Rep. 820.

§ 103. WIFE MUST ABIDE BY HUSBAND'S SELECTION OF HOME, OR IT IS DESERTION ON HER PART. The husband may choose any reasonable place or mode of living, and if the wife does not conform thereto, it is desertion.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Change of abode—Husband's right to.
3. Same—Same—Selection must be reasonable.
4. Refusal of wife to follow husband.
5. Same—Excused, when.
6. Refusal of husband to follow wife.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Vosburg vs. Vosburg*, 136 Cal. 195, 203, 63 Pac. Rep. 694 (applied).

2. **CHANGE OF ABODE—Husband's right to change home of family at will is restricted only to bona fide exercise of power**, as the head of family, in determining what is best for it; it is wife's duty to acquiesce therein.—*Gulod vs. Gulod*, 14 Cal. 506, 76 Am. Dec. 440.

See *Ala. Strouse vs. Leipf*, 101 Ala. 433, 440, 46 Am. St. Rep. 122, 14 So. Rep. 677, 23 L. R. A. 622; *Houberly vs. Houberly*, 29 Ala. 79. Ill. *Ashbaugh vs. Ashbaugh*, 17 Ill. 476; *Davis vs. Davis*, 30 Ill. 180; *Elijah vs. Taylor*, 37 Ill. 247; *Kennedy vs. Kennedy*, 87 Ill. 250. Miss. *Williams vs. Moody*, 35 Minn. 280, 281, 282, 28 N. W. Rep. 510. N. J. *Boyce vs. Boyce*, 23 N. J. Eq. (3 C. E. Gr.) 337, 348. Tex. *Salvin vs. Wheeler*, 61 Tex. 659. Eng. In *Matter of Cockrane*, 8 Dowl. Pr. 630, 635; *Firebrace vs. Firebrace*, L. R. 4 P. D. 63, 67.

Difference between husband and wife as to place of future abode,—as to, see ante § 99 note par. 9.

3. **Same—Selection of by husband must be**

reasonable.—Recriminatory plea of desertion is not supported by refusal of wife to leave place where she has long resided, where her friends are gathered about her, and near to her aged father and mother, and where she is living in her own home suitable to her station and relation in life—where no adequate reason is shown, and where offer of new home is not made until after proceedings for divorce were commenced.—*Vosburg vs. Vosburg*, 136 Cal. 195, 203, 69 Pac. Rep. 694.

4. REFUSAL OF WIFE TO FOLLOW HUSBAND.—"The husband, being head of family, and bound for its support and maintenance, may change matrimonial domicile at pleasure, and it is duty of wife to submit to reasonable exercise of this right. We have no doubt that refusal of wife to accompany husband upon change of his residence, followed by actual cessation of matrimonial cohabitation, and unattended by any excusing or explanatory circumstances, would constitute sufficient evidence of desertion to authorize divorce. We do not see upon what principle different rule could be maintained, for whether wife abandon residence of husband, or refuse to follow him upon change of his residence, result, in fact, is same, and legal consequences should be same also."—*Hardenbergh vs. Hardenbergh*,

14 Cal. 654, 656. See *Ala. Strouse vs. Leipf*, 101 Ala. 433, 441, 46 Am. St. Rep. 122, 14 So. Rep. 667, 23 L. R. A. 622. Ill. *Kennedy vs. Kennedy*, 37 Ill. 250. N. J. *Hunt vs. Hunt*, 29 N. J. Eq. (2 Stew.) 96. Pa. *Beck vs. Beck*, 163 Pa. St. 649, 30 Atl. Rep. 236.

5. Excused and when.—While the rule just stated has been held to apply to emigration to foreign government as well as sister state, other principles, involving, among others, questions of health and conditions of civilization, may limit its application. There are many places to which wife would not be required to change her domicile, or be held guilty of desertion of her husband, so as to entitle him to divorce for that cause.—*Haymond vs. Haymond*, 74 Tex. 414, 12 S. W. Rep. 90 (where wife's refusal to emigrate to Central America from Texas was held not to constitute desertion).

6. REFUSAL OF HUSBAND TO FOLLOW WIFE.—"Law which assigns voluntary absence of husband for time, and render circumstances indicated as cause for divorce, must not be so construed as to require him to follow wife to such places as she may, for any cause, see fit to go, in order to escape imputation of voluntary absence."—*Frost vs. Frost*, 17 N. H. 251.

§ 104. IF THE PLACE IS UNFIT, AND WIFE REFUSES TO CONFORM, IT IS DESERTION BY THE HUSBAND. If the place or mode of living selected by the husband is unreasonable and grossly unfit, and the wife does not conform thereto, it is desertion on the part of the husband from the time her reasonable objections are made known to him.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc., in: *Hagle vs. Hagle*, 74 Cal. 608, 613, 16 Pac. Rep. 518 (referred to with other sections in discussion).

2. Object of requiring maintenance where

no cause for divorce exists, or where innocent party has condoned offense,—as to, see *Hagle vs. Hagle*, supra.

See post §§ 136, 137 and notes.

§ 105. WILFUL NEGLECT, WHAT. Wilful neglect is [1] the neglect of the husband to provide for his wife the common necessities of life, he having the ability to do so; or it is [2] the failure to do so by reason of idleness, profligacy, or dissipation.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Construction—Two classes of conduct.
3. Ability to support wife—Has reference to property.
4. Same—Not confined to actual ownership.
5. Duty of husband to support—Continuing obligation.
6. Same—Judgment for divorce in favor of husband.
7. Duration of neglect—One year.
8. Defenses—Wife's earnings sufficient for her support.
9. Same—Husband in prison.
10. Pleading and practice—Complaint.
11. Same—Same—Demurrer.
12. Same—Complaint on one class—Decree on other class.
13. Same—Findings.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Devoe vs. Devoe*, 51 Cal. 543, 544 (applied); *Wagner vs. Wagner*, 104 Cal. 293, 296, 37 Pac. Rep. 935 (construed and applied); *Towle vs. Matheus*, 130 Cal. 574, 577, 62 Pac. Rep. 1064 (referred to).

2. CONSTRUCTION—"Wilful neglect," under this section, consists of two distinct classes of conduct: 1. Neglect, having means to provide, and 2. Failure to provide, by reason of laziness and profligacy.—See *Devoe vs. Devoe*, 51 Cal. 543, 545.

3. ABILITY OF HUSBAND TO SUPPORT WIFE refers to possession by husband of means in property, and not to his capacity to acquire means by his labor.—*Washburn vs. Washburn*, 9 Cal. 475.

4. ABILITY OF HUSBAND.—Not confined

to actual ownership of property.—“Law is not limited or confined to property actually possessed by husband, but includes his capacity to earn or obtain means to support his wife.”—*State vs. Witham*, 70 Wis. 473, 35 N. W. Rep. 934.

5. DUTY OF HUSBAND TO SUPPORT—Continuing obligations—Wife having means of support,—failure of husband not ground for divorce.—See par. 8 this note.

Support of wife is continuing obligation on the part of husband, and his failure to meet this obligation is continuing cause for divorce, unless it appears to court that there has been unreasonable lapse of time before action is commenced.—*Wagner vs. Wagner*, 104 Cal. 293, 296, 17 Pac. Rep. 935.

6. Same—Judgment for divorce in favor of husband.—Judgment for divorce in favor of husband on ground of wilful neglect does not release him from obligation to support his wife.—*Wagner vs. Wagner*, 104 Cal. 293, 296, 17 Pac. Rep. 935.

7. DURATION OF NEGLECT.—Wilful neglect of husband to provide for his wife common necessities of life when he has ability to do, is ground for divorce, if such neglect continues for one year.—*Wagner vs. Wagner*, 104 Cal. 293, 296, 17 Pac. Rep. 935.

See post § 107 and note.

8. DEFENSES—Wife's earnings sufficient for her support.—Where evidence shows that wife owned some property and carried on business by which she earned sufficient for her support, and only evidence of ability to provide common necessities of life on part of husband is that he is a good workman and might earn enough for that purpose, and defendant never interfered with plaintiff in dis-

position of moneys earned by her, the action must fail.—*Washburn vs. Washburn*, 9 Cal. 476, 476-477, and *Rycraft vs. Rycraft*, 42 Cal. 444, 446 (both decided before enactment of this section).

9. Husband in prison, and unable to provide for his family, not wilful neglect or refusal to provide necessities.—*Hammond vs. Hammond*, 15 R. I. 40, 2 Am. St. Rep. 867, 23 Atl. Rep. 143.

10. PLEADING AND PRACTICE—Complaint charging “wilful neglect,” simply, under this section, will not comply with requirements of Code Civ. Proc. § 426; it would contain no “statement of facts.” “This is not within class of cases in which charge is sufficient, if it follows language of statute, because this section contains statement of two sets of facts (see par. 2 this note), differing from each other, which are included within expression ‘wilful neglect’ found in § 92 ante; and such allegation does not inform defendant of ultimate fact on which defendant relies.”—*Devoe vs. Devoe*, 51 Cal. 543, 545.

11. Demurrer to such complaint will be sustained.—*Ibid*.

12. Complaint alleging cause of action on one class of the cause of action provided in this section (see par. 2 this note), and evidence showing cause of action on other class, decree of divorce cannot be awarded.—*Ibid*.

13. Finding of court that defendant had wilfully neglected to supply common necessities of life, he having ability so to do, is outside issues; where issue is whether, by his idleness, profligacy, or dissipation, he had rendered himself unable to support them.—*Devoe vs. Devoe*, 51 Cal. 543, 545.

§ 106. HABITUAL INTEMPERANCE, WHAT. Habitual intemperance is that degree of intemperance from the use of intoxicating drinks which [1] disqualifies the person a great portion of the time from properly attending to business, or [2] which would reasonably inflict a course of great mental anguish upon the innocent party.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 337, held unconstitutional; see history, § 4 ante.

1. Applied, cited, construed, referred to, etc.
2. Definitions of habitual intemperance—Generally.
- 3, 4. Same—Fixed habit of drinking to excess.
5. Same—Occasional spree.
6. Duration of habit.
7. Morphine habit.
- 8, 9. Pleading and practice—Complaint.
10. Same—Same—Uncertainty.
11. Same—Finding.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Dunn vs. Dunn*, 62 Cal. 176, 178 (applied); *Forney vs. Forney*, 80 Cal. 528, 529, 22 Pac. Rep. 294 (applied); *Reading vs. Reading*, 96 Cal. 4, 7, 30 Pac. Rep. 803 (applied).

2. DEFINITIONS OF HABITUAL INTEMPERANCE—Generally.—Habitual intemperance is that degree of intemperance from use of intoxicating drinks which would reasonably in-

flct course of great mental anguish upon innocent party.—*Forney vs. Forney*, 80 Cal. 528, 529, 22 Pac. Rep. 294.

3. Fixed habit of drinking to excess to such degree as to disqualify person from attending to his business during principal portion of time usually devoted to business, is habitual intemperance,—although person may at intervals be in condition to attend to his business affairs. It is not necessary that habit of drinking to excess must be of such character as to render party at all times incapable of attending to business.—*Mahone vs. Mahone*, 19 Cal. 626, 81 Am. Dec. 91, 92.

4. Criticized as not furnishing sole standard by which to determine what is habitual intemperance.—*Wheeler vs. Wheeler*, 53 Iowa 511, 5 N. W. Rep. 689 (when the court say: “We are not prepared to say, however, if person has fixed habit of drinking intoxicating

3. **Contract not enforceable.**—Transfer of property by plaintiff to defendant upon part consideration of agreement by defendant to abandon her defense to divorce proceeding is

attended with fault and action will not lie to force performance of the contract.—*Beard vs. Beard*, 65 Cal. 354, 4 Pac. Rep. 229.

§ 115. **CONDONATION, WHAT.** Condonation is the conditional forgiveness of a matrimonial offense constituting a cause of divorce.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
- 2, 3. Contract of separation operates as condonation.
4. Effect of—On pending action.
5. Cruel and inhuman treatment.
6. Good faith of offer to condone.
7. Request for conditional forgiveness.
8. Revocation of condonation.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Wolff vs. Wolff*, 102 Cal. 433, 438, 36 Pac. Rep. 767, 1037 (applied); *McMullin vs. McMullin*, 123 Cal. 653, 656, 56 Pac. Rep. 554 (applied).

2. **CONTRACT OF SEPARATION OPERATES AS CONDONATION**, where after parties have separated, because of husband's cruelty, they enter into such contract and agree to separate, and husband, pursuant to such contract, transfers property to her, thereafter application by wife for divorce will be denied.—*Squires vs. Squires*, 53 Vt. 208, 38 Am. Rep. 668. See *Brown vs. Brown*, 5 Gill (Md.) 249; *Mathews vs. Mathews*, 1 Swab. & T. 499; *Williams vs. Williams*, 35 L. J. Rep. (N. S.) Pt. 5, 83.

3. **Compare:** *Wilson vs. Wilson*, 40 Iowa 230 (where it was held that voluntary separation is no defense to claim for alimony); *J. G. vs. H. G.*, 33 Md. 401, 3 Am. Rep. 183 (where it was held that voluntary deed of separation is not bar to divorce on ground of impotence of wife, there being in such case nothing to condone); *Rogers vs. Rogers*, 4 Paige Ch. (N. Y.) 516, 27 Am. Dec. 84 (where it was held that a wife was entitled to decree for separation, notwithstanding contract to live separate from

him, because such contract was invalid by reason of its not having been under sanction of court); *Durant vs. Durant*, 1 Hagg. 733, 3 Eng. Ecc. 310.

As to validity of contracts for separation, see post § 159 and note para. 2-14, particularly par. 2.

4. **Effect of condonation on pending action for divorce.**—Parties thereto admitting condonation is to work continuance of action, and it will be dismissed by court upon application.—*Reynolds vs. Reynolds*, 67 Cal. 176, 177, 7 Pac. Rep. 480.

5. **CRUEL AND INHUMAN TREATMENT** being charged in complaint, question whether or not it has been condoned is one of fact.—*Smith vs. Smith*, 119 Cal. 183, 189, 48 Pac. Rep. 730, 51 Id. 183.

As to condonation of recriminatory defense, see post § 123 and note.

6. **GOOD FAITH OF AN OFFER OF CONDONATION**, where reconciliation is attempted pending suit for maintenance, must clearly appear.—See *McMullin vs. McMullin*, 123 Cal. 653, 656, 56 Pac. Rep. 554.

See §§ 102, 107, 137 and notes.

7. **REQUEST FOR CONDITIONAL FORGIVENESS.**—Offer by defendant to plaintiff of home with him and asking her for reconciliation and fulfilment of marriage contract, himself agreeing to do likewise, implies request for conditional forgiveness which is condonation.—*McMullin vs. McMullin*, 123 Cal. 653, 656, 56 Pac. Rep. 554.

8. **Revocation of condonation.**—See post § 121 and note.

§ 116. **REQUISITES TO CONDONATION.** The following requirements are necessary to condonation:

1. A knowledge on the part of the condoner of the facts constituting the cause of divorce;
2. Reconciliation and remission of the offense by the injured party;
3. Restoration of the offending party to all marital rights.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Offer of reconciliation must be accepted.
3. Offer not made in good faith.
- 4, 5. Sexual intercourse.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Bohnert vs. Bohnert*, 95 Cal. 444, 446, 30 Pac. Rep. 590 (applied); *Wolff vs. Wolff*, 102 Cal. 433, 436, 36 Pac. Rep. 767, 1037 (applied).

2. **OFFER OF RECONCILIATION MUST BE ACCEPTED** and acted upon, or it is not binding upon party making it.—*Benkert vs. Benkert*, 32 Cal. 467, 471.

3. **OFFER NOT MADE IN GOOD FAITH.**—

Voluntary promise made by wife to husband to return to live with him, not meant to be kept, and not being kept, is not condonation.—*Wolff vs. Wolff*, 102 Cal. 433, 438, 36 Pac. Rep. 767, 1037.

4. **SEXUAL INTERCOURSE** on one occasion only, does not necessarily show forgiveness on part of defendant, nor intention to take plaintiff, his wife, back to his home and restore her to marital rights.—*Bohnert vs. Bohnert*, 95 Cal. 444, 446, 30 Pac. Rep. 590. See *Kennedy vs. Kennedy*, 87 Ill. 254; *Gardner vs. Gardner*, 68 Mass. (3 Gray) 434.

5. **Contra.**—Anonymous, 6 Mass. 147.

§ 117. CONDONATION IMPLIES WHAT. Condonation implies a condition subsequent; that the forgiving party must be treated with conjugal kindness.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
- 2, 3. Conjugal kindness requisite to condonation.
4. Same—Mere cohabitation.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Johnson vs. Johnson* (Cal. Jan. 26, 1894), 35 Pac. Rep. 637, 638 (applied); *Morton vs. Morton*, 117 Cal. 443, 446, 49 Pac. Rep. 557 (applied); *Andrews vs. Andrews*, 120 Cal. 184, 189, 52 Pac. Rep. 298 (applied).

2. **CONJUGAL KINDNESS REQUISITE TO CONDONATION**.—Condonation implies condition subsequent that forgiving party must be treated with conjugal kindness.—*Morton vs.*

Morton, 117 Cal. 443, 446, 49 Pac. Rep. 557; *Andrews vs. Andrews*, 120 Cal. 184, 189, 52 Pac. Rep. 298.

3. All condonation, especially implied, is upon condition both that offense shall not be repeated, and likewise that continually afterwards party forgiven shall treat other with conjugal kindness.—*Johnson vs. Johnson* (Cal. Jan. 26, 1894), 35 Pac. Rep. 637, 638.

4. Mere cohabitation by plaintiff with defendant until last of long series of acts of cruelty, has no tendency to imply condonation (dictum).—*Johnson vs. Johnson* (Cal. Jan. 26, 1894), 35 Pac. Rep. 636, 638.

§ 118. EVIDENCE OF CONDONATION. Where the cause of divorce consists [1] of a course of offensive conduct, or [2] arises, in cases of cruelty, from excessive acts of ill-treatment which may, aggregately, constitute the offense, [a] cohabitation, or [b] passive endurance, or [c] conjugal kindness, shall not be evidence of condonation of any of the acts constituting such cause, unless accompanied by an express agreement to condone.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 190.

1. Applied, cited, construed, referred to, etc.
2. Breach of condition revives right of action.
3. Cohabitation, passive endurance, or conjugal kindness not evidence of condonation.
4. Same—Letters written by plaintiff to defendant manifesting kindness.
5. Condonation is a specific defense.
6. Same—Failure to allege agreement to condone.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Johnson vs. Johnson* (Cal. Jan. 26, 1894), 35 Pac. Rep. 637, 638 (applied); *Morton vs. Morton*, 117 Cal. 443, 447, 49 Pac. Rep. 557 (applied); *Smith vs. Smith*, 119 Cal. 183, 188, 192, 48 Pac. Rep. 730, 51 Id. 183 (applied); *Hunter vs. Hunter*, 132 Cal. 473, 476, 64 Pac. Rep. 772 (applied).

2. **BREACH OF CONDITION REVIVES RIGHT OF ACTION**.—Breach of condition, both that offense shall not be repeated and that continually afterwards forgiven party shall treat other with conjugal kindness, revives original right of divorce.—*Johnson vs. Johnson* (Cal. Jan. 26, 1894), 35 Pac. Rep. 637, 638.

3. **COHABITATION**.—Passive endurance or conjugal kindness not evidence of condonation of acts constituting extreme cruelty, unless

accompanied by express agreement to condone.—*Johnson vs. Johnson* (Cal. Jan. 26, 1894), 35 Pac. Rep. 637, 638; *Morton vs. Morton*, 117 Cal. 443, 446, 49 Pac. Rep. 557; *Hunter vs. Hunter*, 132 Cal. 473, 476, 64 Pac. Rep. 772.

4. Letters written by plaintiff to defendant, manifesting kindness towards him, do not show condonation, unless accompanied by express agreement to condone.—*Hunter vs. Hunter*, 132 Cal. 473, 475, 64 Pac. Rep. 772.

5. **CONDONATION IS A SPECIFIC DEFENSE** to action for divorce, and should be pleaded like any other defense in order to be proved; nevertheless, even though such defense is not set up, if evidence shows condonation it is the duty of court to deny divorce.—*Hunter vs. Hunter*, 132 Cal. 473, 476, 64 Pac. Rep. 772.

6. **Failure to allege agreement to condone**.—Answer alleging that plaintiff condoned alleged charges of cruelty, and that plaintiff freely cohabited with defendant and restored him to marital rights, but failing to allege that acts were accompanied by agreement to condone, is conclusion of law and raises no issue.—*Smith vs. Smith*, 119 Cal. 183, 189, 48 Pac. Rep. 730, 51 Id. 183.

§ 119. CAN ONLY BE MADE, WHEN. In cases mentioned in the last section, condonation can be made only after the cause of divorce has become complete, as to the acts complained of.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 190.

§ 120. CONCEALMENT OF FACTS IN CERTAIN CASES MAKES CONDONATION VOID. A fraudulent concealment by the condonee of facts consti-

tuting a different cause of divorce from the one condoned, and existing at the time of condonation, avoids such condonation.

History: Enacted March 21, 1872.

§ 121. **CONDONATION, HOW REVOKED.** Condonation is revoked and the original cause of divorce revived:

1. When the condonee commits acts constituting a like or other cause of divorce; or,
2. When the condonee is guilty of great conjugal unkindness, not amounting to a cause of divorce, but sufficiently habitual and gross to show that the conditions of condonation had not been accepted in good faith, or not fulfilled.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Condonation is revoked, when.
3. Same—Resumption of cruelty.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Wade vs. Wade* (Cal. Oct. 20, 1892), 31 Pac. Rep. 258, 259 (applied); *Andrews vs. Andrews*, 120 Cal. 184, 189, 52 Pac. Rep. 298 (applied); *Thomson vs. Thomson*, 121 Cal. 11, 12, 53 Pac. Rep. 403 (applied).

2. **CONDONATION IS REVOKED WHEN** condonee is guilty of great conjugal unkind-

ness not amounting to cause of divorce, but sufficiently habitual and gross to show that conditions of condonation had not been accepted in good faith.—*Andrews vs. Andrews*, 120 Cal. 184, 188, 52 Pac. Rep. 298.

3. **Resumption of cruelty.**—Condonation of cruelty is not shown by return of wife, through intervention of friends, when former cruelties of husband are resumed toward wife.—*Andrews vs. Andrews*, 120 Cal. 184, 188, 52 Pac. Rep. 298.

§ 122. **RECRIMINATION, WHAT.** Recrimination is a showing by the defendant of any cause of divorce against the plaintiff, in bar of the plaintiff's cause of divorce.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Commissioners' note.
3. Recrimination—Definition of.
4. Same—Doctrine applicable to divorcees.
5. Same—Bars action, when.
- 6, 7. Same—Right of defendant to set up.
- 8, 9. Pleading—Must be pleaded—What must be shown.
10. Same—Plea in bar.
11. Finding by court—Necessity for—Sufficiency.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Cassidy vs. Cassidy*, 63 Cal. 352, 353 (applied); *De Haley vs. Haley*, 74 Cal. 489, 492, 5 Am. St. Rep. 460, 16 Pac. Rep. 248 (applied); *Smith vs. Smith*, 119 Cal. 183, 189, 48 Pac. Rep. 730, 51 Id. 183 (applied).

2. **COMMISSIONERS' NOTE** appended to this section says it "rests upon principle that he who is himself in the wrong cannot be heard to complain to court of justice of another's wrong pertaining to same matter," citing *Gregory vs. Haworth*, 25 Cal. 653 (assignee in fraud of creditors cannot recover property from such assignee; to same effect *Davis vs. Mitchell*, 34 Cal. 81, 90). *Mass. Freeman vs. Sedwick*, 6 Gill 28, 46 Am. Dec. 650. *Mass. Gregg vs. Wyman*, 53 Mass. (4 Cush.) 322. *N. H. Roby vs. West*, 4 N. H. 285, 17 Am. Dec. 423. *N. Y. Bush vs. Brainard*, 1 Cow. (N. Y.) 78, 18 Am. Dec. 513; *Hyatt vs. Wood*, 4 John. (N. Y.) 150, 4 Am. Dec. 258. *Eng. Collins vs. Blontern*, 2 Wills. 241.

3. **RECRIMINATION IS SHOWING BY DEFENDANT** of any facts constituting grounds

for divorce against plaintiff, in bar of plaintiff's cause of divorce.—*De Haley vs. Haley*, 74 Cal. 489, 492, 5 Am. St. Rep. 460, 16 Pac. Rep. 248.

4. **Doctrine of recrimination held applicable** in suits for divorce, and the several offenses which, under statute, constitute grounds for divorce, are pleadable in bar to such suits.—*Conant vs. Conant*, 10 Cal. 249, 254, 70 Am. Dec. 717. See *Colo. Redington vs. Redington*, 2 Colo. App. 8, 13, 29 Pac. Rep. 311. *Ind. Alexander vs. Alexander*, 140 Ind. 555, 559, 38 N. E. Rep. 855, 40 Id. 55. *Iowa. Wilson vs. Wilson*, 40 Iowa 232. *Mass. Handy vs. Handy*, 124 Mass. 395. *R. I. Church vs. Church*, 16 R. I. 667, 668, 19 Atl. Rep. 244, 7 L. R. A. 385. *W. Va. Wass vs. Wass*, 41 W. Va. 126, 130, 23 S. E. Rep. 537. *Wis. Pease vs. Pease*, 73 Wis. 136, 139, 39 N. W. Rep. 133.

5. **To be bar to suit for divorce, conduct of plaintiff must be such as to constitute basis for decree of divorce in suit for that purpose.**—*Conant vs. Conant*, supra.

6. **Right of defendant to set up.**—Defendant in action for divorce may allege and prove facts constituting cause of divorce against plaintiff in bar of plaintiff's cause of divorce.—*Cassidy vs. Cassidy*, 63 Cal. 352, 353.

7. **As to whether affirmative relief is sought by cross-demand in action for divorce, see** *De Haley vs. Haley*, 74 Cal. 489, 492, 5 Am. St. Rep. 460, 16 Pac. Rep. 248.

See ante § 92 and note.

8. **PLEADING—Must be pleaded.**—Recriminatory facts should be pleaded.—*De Haley vs.*

Haley, 74 Cal. 489, 492, 5 Am. St. Rep. 460, 16 Pac. Rep. 248.

9. Must show cause for divorce where one is sought.—See par. 5 this note.

10. Plea in bar.—Recrimination would seem to be pleaded and proved as defense simply, and in bar of plaintiff's cause.—*De Haley vs. Haley*, 74 Cal. 489, 492, 5 Am. St. Rep. 460, 16 Pac. Rep. 248.

11. FINDING BY COURT—Necessity for.—

§ 123. CONDONATION, WHEN TO BAR DEFENSE. Condonation of a cause of divorce, shown in the answer as a recriminatory defense, is a bar to such defense, unless the condonation be revoked, as provided in section one hundred and twenty-one, or two years have elapsed after the condonation, and before the accruing or completion of the cause of divorce against which the recrimination is shown.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdta. 1873-4, pp. 190-191.

§ 124. DIVORCE, WHEN DENIED. A divorce must be denied:

1. When the cause is adultery and the action is not commenced within two years after the commission of the act of adultery, or after its discovery by the injured party; or,

2. When the cause is conviction of felony, and the action is not commenced before the expiration of two years after a pardon, or the termination of the period of sentence.

3. In all other cases when there is an unreasonable lapse of time before the commencement of the action.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdta. 1873-4, p. 191.

1. Applied, cited, construed, referred to, etc.
2. Unreasonable lapse of time after desertion.
3. Non-support after judgment denying divorce to wife.

1. Applied, cited, construed, referred to, etc., in: *Hagle vs. Hagle*, 74 Cal. 608, 613, 16 Pac. Rep. 518 (cited with other sections); *Wagner vs. Wagner*, 104 Cal. 293, 296, 37 Pac. Rep. 935 (applied); *Thomson vs. Thomson*, 121 Cal. 11, 12, 53 Pac. Rep. 403 (applied); *McMullin vs. McMullin*, 140 Cal. 112, 117, 118, 73 Pac. Rep. 808 (applied).

Averment of facts constituting recriminatory defense and denial thereof by plaintiff (which law implies) creates material issue upon which court should find.—*Cassidy vs. Cassidy*, 63 Cal. 352, 353.

12. Insufficient recriminatory matter being set up in defense which is insufficient to justify decree of divorce in defendant's favor, failure of court to find upon such plea is immaterial.—*Smith vs. Smith*, 119 Cal. 183, 191, 48 Pac. Rep. 730, 51 Id. 183.

2. Unreasonable lapse of time after desertion.—Divorce on grounds of desertion will be denied in all cases where there is unreasonable lapse of time before commencement of action.—*McMullin vs. McMullin*, 140 Cal. 112, 117, 73 Pac. Rep. 808.

3. Non-support after judgment denying divorce to wife.—If, after judgment in his favor, husband continues to disregard obligation to support his wife for period required by statute as ground for divorce, former judgment cannot avail him in his defense.—*Wagner vs. Wagner*, 104 Cal. 293, 296, 37 Pac. Rep. 935.

§ 125. LAPSE OF TIME ESTABLISHES CERTAIN PRESUMPTIONS. Unreasonable lapse of time is such a delay in commencing the action as establishes the presumption that there has been connivance, collusion, or condonation of the offense, or full acquiescence in the same, with intent to continue the marriage relation[,] notwithstanding the commission of such offense.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Acquiescence—What is.
3. Connivance, etc., not presumed when there is wilful desertion.

1. Applied, cited, construed, referred to, etc., in: *Thomson vs. Thomson*, 121 Cal. 11, 12, 53 Pac. Rep. 403 (applied); *McMullin vs. McMullin*, 140 Cal. 112, 117 (applied), 73 Pac. Rep. 808.

2. Acquiescence is consent by silence.—

Thomson vs. Thomson, 121 Cal. 11, 12, 53 Pac. Rep. 403.

3. Connivance, etc., not presumed where there is wilful desertion.—Unreasonable lapse of time which will bar action for divorce does not raise presumption of connivance, collusion or condonation, where defendant wilfully and without cause deserted and abandoned plaintiff and ever since lived apart from her.—*Thomson vs. Thomson*, 121 Cal. 11, 12, 53 Pac. Rep. 403.

§ 126. PRESUMPTIONS MAY BE REBUTTED. The presumptions arising from lapse of time may be rebutted by showing reasonable grounds for the delay in commencing the action.

History: Enacted March 21, 1872.

§ 127. LIMITATION OF TIME. There are no limitations of time for commencing actions for divorce, except such as are contained in section one hundred and twenty-four.

History: Enacted March 21, 1872.

1. *Commissioners' note* appended to this section says: "Before adoption of this code there was no specific limitation in divorce cases. The only statute upon the subject was Act of 1850 (Stats. 1850, p. 343) as follows: 'An action for relief not hereinbefore provided for must be commenced within four years after cause of action shall have accrued.' The New York Civil Code provides four years' limitation in cases of adultery. Upon careful examination of the laws of different states upon the subject, it appears very difficult to

establish any exact rule of time, however desirable such rule might be. There are so many instances of efforts at reformation—so much waiting and hoping before finally attempting to break, judicially, the marriage relation—that any arbitrary rule which would force party to commence an action or lose remedy, would defeat discharge of most Christian duties arising from relation, or deprive party of all relief when all efforts fail.—*Pellew vs. Pellew*, 1 Swab. & T. 553; also, *Mathews vs. Mathews*, 1 Swab. & T. 499."

§ 128. ACTIONS IN DIVORCE CASES—[PLAINTIFF MUST BE RESIDENT]. A divorce must not be granted unless the plaintiff has been a resident of the state for one year, and of the county in which the action is brought three months next preceding the commencement of the action.

History: Enacted March 21, 1872; amended March 10, 1891, Stats. and Amdts. 1891, p. 52.

1. Applied, cited, construed, referred to, etc.
2. Constitutionality of statute.
3. Construction—Limitation.
4. Place of trial.
- 5, 6. Residence—Of plaintiff.
7. Same—Same—Must be bona fide.
8. Same—Of defendant—Controls place of trial.
- 9, 10. Pleading and practice—Joinder of causes of action.
11. Maintenance.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc.,** in: *Hagle vs. Hagle*, 74 Cal. 608, 613, 16 Pac. Rep. 518 (cited with other sections); *Warner vs. Warner*, 100 Cal. 11, 15, 17, 34 Pac. Rep. 523 (construed and applied with other sections); *People vs. Lee*, 128 Cal. 330, 333, 60 Pac. Rep. 854 (referred to in determining whether sheriff's return upon subpoena is proof of residence); *Deyoe vs. Superior Court of Mendocino County*, 140 Cal. 476, 483, 98 Am. St. Rep. 73, 74 Pac. Rep. 28 (determining constitutionality of this and other sections).

2. **CONSTITUTIONALITY** of this section, as amended, upheld.—*People vs. Central Pac. R. Co.*, 105 Cal. 576, 584, 38 Pac. Rep. 905; *Deyoe vs. Superior Court of Mendocino County*, 140 Cal. 476, 481, 98 Am. St. Rep. 73, 74 Pac. Rep. 28.

3. **CONSTRUCTION—Limitation.**—This section must be read in connection with §§ 395 and 397 of the Code of Civil Procedure. The former is limitation as to place of commencement of actions for divorce, and latter provides for place of trial of such actions.—*Warner vs. Warner*, 100 Cal. 11, 15, 34 Pac. Rep. 523.

4. **Place of trial,**—as to, see par. 3 this note.

5. **RESIDENCE—Of plaintiff** within state and county for statutory period essential to right to maintain action.—See ante § 92 and note.

6. Plaintiff must aver and prove requisite joinder.—*Bennett vs. Bennett*, 28 Cal. 599, 601.

7. **Residence must be bona fide.**—*Bennett vs. Bennett*, supra. See *Ala. Crossman vs. Crossman*, 33 Ala. 386. *Ill. Way vs. Way*, 64 Ill. 406. *Iowa. Whitcomb vs. Whitcomb*, 46 Iowa 437. *Mass. Sewall vs. Sewall*, 122 Mass. 156, 23 Am. Rep. 299; *Adams vs. Adams*, 154 Mass. 290, 295, 28 N. E. Rep. 260, 13 L. R. A. 275. *Wis. Dutcher vs. Dutcher*, 39 Wis. 661, 667.

8. **Of defendant—Controls place of trial.**—See par. 3 this note.

9. **PLEADING AND PRACTICE—Joinder of causes of action.**—Where in action for divorce real action is joined in complaint, defendant will be entitled to have place of trial removed to county of his residence.—*Warner vs. Warner*, 100 Cal. 11, 16, 34 Pac. Rep. 523.

10. Such case falls within provisions of § 395 of Code of Civil Procedure, and action must be brought in county wherein defendant resides; and if not, suit so brought must be removed thereto.—*Le Breton vs. Superior Court*, 66 Cal. 30, 4 Pac. Rep. 777; *Ah Fong vs. Sternes*, 79 Cal. 33, 21 Pac. Rep. 381; *Smith vs. Smith*, 88 Cal. 572, 26 Pac. Rep. 356; *Warner vs. Warner*, 100 Cal. 11, 16, 34 Pac. Rep. 523.

See Code Civ. Proc. §§ 395, 397 and notes.

11. **MAINTENANCE**—As to, where parties have no statutory ground for divorce.—*Hagle vs. Hagle*, 74 Cal. 608, 613, 16 Pac. Rep. 518.

See post § 136 and note.

§ 129. PROOF OF ACTUAL RESIDENCE REQUIRED—PRESUMPTIONS DO NOT APPLY. In actions for divorce the presumption of law, that the domicile of the husband is the domicile of the wife, does not apply. After separation, each may have a separate domicile, depending for proof upon actual residence, and not upon legal presumptions.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Domicile of wife—Presumption as to.
3. Same—Same—Does not apply, when.
4. Same—Same—Not limited to wife's action.
5. Same—Acquiring another pending action.
6. Same—Decree of divorce—Effect on.
7. Evidence—Sheriff's return, when.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Cleghorn vs. Cleghorn*, 65 Cal. 309, 310, 5 Pac. Rep. 516 (erroneously cited for § 137); *Estate of Wickes*, 128 Cal. 270, 274, 60 Pac. Rep. 867, 49 L. R. A. 138 (applied); *McGrew vs. Mutual Life Ins. Co.*, 132 Cal. 85, 92, 84 Am. St. Rep. 20, 64 Pac. Rep. 103 (construed and applied).

2. DOMICILE OF WIFE—Presumed to be that of husband, in absence of express authority in code for acquiring separate domicile.—See *Estate of Wickes*, 128 Cal. 270, 274, 60 Pac. Rep. 867, 49 L. R. A. 138.

3. Does not apply in divorce proceedings.—In such case theoretical identity of person and interests ceases to exist, legal fiction in one domicile no longer operates, and jurisdiction of court to undertake action depends upon actual existing facts.—*McGrew vs. Mutual Life Ins. Co.*, 132 Cal. 85, 91, 84 Am. St. Rep. 20, 64 Pac.

Rep. 103; *Mellen vs. Mellen*, 10 Abb. N. C. (N. Y.) 329.

4. Not limited to case where wife is plaintiff in such action.—*McGrew vs. Mutual Life Ins. Co.*, 132 Cal. 85, 92, 84 Am. St. Rep. 20, 64 Pac. Rep. 103.

5. Acquiring another pending action.—An action to dissolve the marriage contract brought by husband gives wife separate domicile where she acquires another residence in any county pending suit.—*McGrew vs. Mutual Life Ins. Co.*, 132 Cal. 85, 92, 84 Am. St. Rep. 20, 64 Pac. Rep. 103.

6. Decree of divorce—Effect on.—Fact that domicile of wife continued to be that of husband until date of decree need not be considered, yet upon entry of decree her actual residence instantly becomes her legal residence.—*McGrew vs. Mutual Life Ins. Co.*, 132 Cal. 85, 93, 84 Am. St. Rep. 20, 64 Pac. Rep. 103.

7. EVIDENCE—SHERIFF'S RETURN—When plaintiff is subpoenaed as witness.—On issue of residence raised by pleadings in action for divorce, sheriff's return of subpoena upon plaintiff as witness is not competent evidence to prove or disprove fact of residence (dictum).—*People vs. Lee*, 128 Cal. 330, 332, 60 Pac. Rep. 854.

§ 130. DIVORCE BY DEFAULT, ETC.—[NOT GRANTED]. No divorce can be granted upon the default of the defendant, or upon the uncorroborated statement, admission, or testimony of the parties, or upon any statement or finding of fact made by referee; but the court must, in addition to any statement or finding of the referee, require proof of the facts alleged, and such proof, if not taken before the court, must be upon written questions and answers.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 191.

1. Applied, cited, construed, referred to, etc.
2. Purpose and policy of statute.
3. Defendant in contempt—May defend.
4. 5. Same—Failure to pay alimony—Punishment.
6. Degree of corroboration required.
7. Same—Partial corroboration.
8. Same—Some corroborating evidence.
9. Same—Evidence may be direct or circumstantial.
10. Same—Cruel treatment.
11. Same—Reconciliation shown by declarations and conduct.
12. Attorney's corroborating testimony.
13. Same—Privileged communications.
14. Presumption as to mental suffering.
15. Stipulation not to defend.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Martin vs. Parsons*, 49

Cal. 94 (applied); *Johnson vs. Superior Court of San Francisco*, 63 Cal. 578, 580 (construed and applied); *Beard vs. Beard*, 65 Cal. 354, 355, 4 Pac. Rep. 229 (construed and applied); *Haley vs. Haley* (Cal. May 28, 1887), 14 Pac. Rep. 92, 95 (applied); *Haley vs. Haley*, 67 Cal. 24, 7 Pac. Rep. 3 (applied); *Hagle vs. Hagle*, 74 Cal. 608, 614, 16 Pac. Rep. 518 (applied); *White vs. White*, 86 Cal. 219, 221, 24 Pac. Rep. 996 (applied); *Cooper vs. Cooper*, 88 Cal. 45, 48, 25 Pac. Rep. 1062 (construed and applied); *Venzke vs. Venzke*, 94 Cal. 225, 227, 29 Pac. Rep. 499 (construed and applied); *Foley vs. Foley*, 120 Cal. 33, 37, 65 Am. St. Rep. 147, 52 Pac. Rep. 122 (construed and applied); *Andrews vs. Andrews*, 120 Cal. 184, 186, 52 Pac. Rep. 298 (construed and applied); *Kuhl vs. Kuhl*, 124 Cal. 57, 58, 56 Pac. Rep. 629 (applied); *McMullin vs. McMullin*, 140 Cal. 112, 119, 73 Pac. Rep. 808 (construed and applied); *Deyoe vs. Supe-*

rior Court of Mendocino County, 140 Cal. 476, 482, 74 Pac. Rep. 28 (referred to in discussing constitutionality of §§ 131 and 132).

2. PURPOSE AND POLICY OF STATUTE.—Purpose of this section is chiefly to prevent collusion.—*Baker vs. Baker*, 13 Cal. 38; *Evans vs. Evans*, 41 Cal. 103; *Johnson vs. Superior Court San Francisco*, 63 Cal. 578, 580; *Smith vs. Smith*, 119 Cal. 183, 48 Pac. Rep. 730, 51 Id. 183; *Foley vs. Foley*, 120 Cal. 33, 37, 65 Am. St. Rep. 147, 52 Pac. Rep. 122; *Andrews vs. Andrews*, 120 Cal. 184, 186, 52 Pac. Rep. 298; *McMullin vs. McMullin*, 140 Cal. 112, 119, 73 Pac. Rep. 808.

3. DEFENDANT IN CONTEMPT MAY DEFEND.—Court has no authority to strike out defendant's demurrer to petition for divorce, and refuse to permit him to answer, and then render judgment against him pro confesso for his failure to obey order for alimony.—*Foley vs. Foley*, 120 Cal. 33, 39, 65 Am. St. Rep. 147, 52 Pac. Rep. 122.

4. Disobedience of such order constitutes contempt for which only punishment it was competent to impose under code was fine and imprisonment.—*Foley vs. Foley*, 120 Cal. 33, 39, 65 Am. St. Rep. 147, 52 Pac. Rep. 122.

5. Court cannot punish defendant for contempt by depriving him of his right to establish defense to divorce proceeding.—*Johnson vs. Superior Court San Francisco*, 63 Cal. 578, 580. See *McClatchy vs. Superior Court of Sacramento*, 119 Cal. 413, 419, 51 Pac. Rep. 696; *Younger vs. Superior Court Santa Cruz Co.*, 136 Cal. 682, 686, 69 Pac. Rep. 485.

6. DEGREE OF CORROBORATION REQUIRED by this section has never been defined; and it has been said that in the very nature of the case it will be impossible to lay down any general rule as to the degree of corroboration which would be requisite.—*Venzke vs. Venzke*, 94 Cal. 225, 227, 29 Pac. Rep. 499; *Andrews vs. Andrews*, 120 Cal. 184, 187, 52 Pac. Rep. 298.

7. Partial corroboration.—Testimony of plaintiff that defendant had used towards her foul and profane language, indecently exposing his person in presence of her sister and herself, inflicting physical cruelties upon her, is sufficiently corroborated by testimony of sister to indecent exposure and obscene language.—*Matthal vs. Matthal*, 49 Cal. 90, 94; *Cooper vs. Cooper*, 88 Cal. 45, 48, 25 Pac. Rep. 1062 (corroboration need not be on every point).

8. Some corroborative evidence will constitute compliance with this section.—*Evans vs. Evans*, 41 Cal. 103, 104; *Cooper vs. Cooper*, 88 Cal. 45, 48, 25 Pac. Rep. 1062 (corroboration upon points supporting action sufficient); *Venzke vs. Venzke*, 94 Cal. 225, 227, 29 Pac. Rep. 449; *Wolff vs. Wolff*, 102 Cal. 433, 36 Pac. Rep. 767, 1037; *Smith vs. Smith*, 119 Cal. 183, 191, 48 Pac. Rep. 730, 51 Id. 183; *Andrews vs. Andrews*, 120 Cal. 183, 186, 187, 52 Pac. Rep. 298.

9. Evidence may be direct or circumstantial.—Corroboration of plaintiff's testimony is sufficient if considerable number of important and material facts are testified to by wit-

nesses, or where there is evidence circumstantial or direct which strongly tends to strengthen and confirm statements of plaintiff.—*Andrews vs. Andrews*, 120 Cal. 183, 184, 186, 52 Pac. Rep. 298.

10. Cruel treatment being ground alleged, it is not necessary where cruelty consists of successive acts of ill-treatment.—*Andrews vs. Andrews*, 120 Cal. 183, 184, 186, 52 Pac. Rep. 298.

See ante § 94 and note.

11. Reconciliation shown by declarations and conduct.—Sufficient corroboration of defendant's testimony as to his seeking reconciliation and restoration with plaintiff is shown by attitude and declaration of defendant to various parties at time of and subsequent to offer of reconciliation.—*McMullin vs. McMullin*, 140 Cal. 112, 119, 73 Pac. Rep. 808.

12. ATTORNEY'S CORROBORATING TESTIMONY.—Testimony of plaintiff's attorney stating that defendant had admitted in conversation with him of having committed towards plaintiff acts of cruelty testified to by plaintiff; that plaintiff was a frail and delicate woman, and that such cruelties were calculated to seriously injure her,—held sufficient corroboration under the section.—*Cooper vs. Cooper*, 88 Cal. 45, 48, 25 Pac. Rep. 1062.

13. Privileged communications.—Testimony of plaintiff as to extreme cruelty is not corroborated by testimony of her attorney where statements of defendant to her attorney were made in conversation of friendly and confidential character sought by plaintiff's attorney with her knowledge and with view to settle matters between parties, as they were merely statements of what he professes to believe to be true—together with his reasons for so believing.—*Haley vs. Haley*, 67 Cal. 24, 25, 7 Pac. Rep. 2.

14. PRESUMPTION AS TO MENTAL SUFFERING.—Where defendant in former action brought by him for divorce charged plaintiff with having concealed from him her pregnant condition by another at time of her marriage, and court found in said former action that said charges were false, and there being nothing in record to negative plaintiff's virtue, presumption is that charge had its natural and usual consequence, and it is not necessary to prove that it induced mental suffering to plaintiff.—*Haley vs. Haley* (Cal. May 28, 1887), 14 Pac. Rep. 92, 93.

15. STIPULATION NOT TO DEFEND.—Divorce which cannot be granted on default of defendant, or upon uncorroborated statement, admission, or testimony of parties, cannot be granted in case in which defendant, for consideration, has stipulated not to make any opposition to granting decree, and it is immaterial whether or not the defendant has defense.—*Beard vs. Beard*, 65 Cal. 354, 355, 4 Pac. Rep. 229.

As to remedy where judgment is suffered on ex parte showing, see *Foley vs. Foley*, 120 Cal. 33, 37, 65 Am. St. Rep. 147, 52 Pac. Rep. 122.

See Code Civ. Proc. § 473 and note.

As to when issue of fact arises, see *Foley vs. Foley*, 120 Cal. 33, 37, 65 Am. St. Rep. 147, 52 Pac. Rep. 122.

See Code Civ. Proc. §§ 588, 590 and note.

As to when re-examination is to be had, see *Foley vs. Foley*, 120 Cal. 33, 37, 65 Am. St. Rep. 147, 52 Pac. Rep. 122.

See post § 656 and note.

§ 131. INTERLOCUTORY JUDGMENT. In actions for divorce the court must file its decision and conclusions of law as in other cases, and if it determines that no divorce shall be granted, final judgment must thereupon be entered accordingly. If it determines that the divorce ought to be granted an interlocutory judgment must be entered, declaring that the party in whose favor the court decides is entitled to a divorce, and from such interlocutory judgment an appeal may be taken within six months after its entry, in the same manner and with like effect as if the judgment were final.

History: Enacted March 2, 1903, Stats. and Amdts. 1903, pp. 75-76.

1. Applied, cited, construed, referred to, etc.
- 2, 3. Constitutionality as respects title.
4. Decree that plaintiff is entitled to divorce—Proper form.
5. Remarriage at peril of judgment being set aside.
6. Appeal from final judgment—Interlocutory judgment not reviewable.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *De Yoe vs. Superior Court Mendocino Co.*, 140 Cal. 476, 480 (applied), 488 (constitutionally upheld), 98 Am. St. Rep. 73, 74 Pac. Rep. 28.

2. **CONSTITUTIONALITY AS RESPECTS TITLE.**—Title of section is sufficient to embrace every provision of act, with possible exception of provision as to effect of final judgment on status of parties (which subject is fully covered by § 91); and provision that entry of final judgment shall not validate any marriage contract by either party before entry, nor constitute any defense of any criminal proceeding made against either.—*Deyoe vs. Superior Court Mendocino Co.*, 140 Cal. 476, 488, 98 Am. St. Rep. 73, 74 Pac. Rep. 28.

See ante § 61, as amended in 1895.

3. **STATEMENT IN TITLE OF SECTION AS PURPOSE OF ACT** to amend Civil Code may be disregarded, as it further clearly appears in title that all that is intended thereby is addition to said code of two new sections relating to actions for divorce.—*Deyoe vs. Superior Court of Mendocino Co.*, *supra*.

4. Decree that plaintiff is entitled to divorce from defendant is in proper form, and refusal of the court, on demand made, to enter any other judgment is not error.—*Deyoe vs. Superior Court Mendocino Co.*, 140 Cal. 476, 479, 98 Am. St. Rep. 73, 74 Pac. Rep. 28.

5. **REMARRIAGE AT PERIL OF JUDGMENT BEING SET ASIDE.**—Divorced persons become unmarried immediately upon rendition of decree, and may at once contract another marriage,—but husband or wife so taken by subsequently contracted marriage would be taken subject to contingency of being displaced by reversal of an appealable and possibly erroneous decree, which appeal might be taken within six months of entry of judgment.—In *re Estate of Wood*, 137 Cal. 129, 137, 69 Pac. Rep. 900; *Deyoe vs. Superior Court Mendocino Co.*, 140 Cal. 476, 484, 98 Am. St. Rep. 73, 74 Pac. Rep. 28.

6. **APPEAL FROM FINAL JUDGMENT—Interlocutory judgment not reviewable.**—Intermediary judgment for divorce occupies as to matters properly embraced therein, same position as interlocutory decree in partition, and is not reviewable upon appeal from final judgment.—*McCourtney vs. Fortune*, 42 Cal. 387; *Regan vs. McMahon*, 43 Cal. 625; *Barry vs. Barry*, 56 Cal. 10; *Barham vs. Hostetter*, 67 Cal. 272, 7 Pac. Rep. 689; *Gutierrez vs. Hebbard*, 106 Cal. 167, 39 Pac. Rep. 529; *Deyoe vs. Superior Court Mendocino Co.*, 140 Cal. 476, 484, 98 Am. St. Rep. 73, 74 Pac. Rep. 28.

See ante § 61 and note.

§ 132. FINAL JUDGMENT, AFTER ONE YEAR. When one year has expired after the entry of such interlocutory judgment, the court on motion of either party, or upon its own motion, may enter the final judgment granting [1] the divorce, and such final judgment shall [2] restore them to the status of single persons, and [3] permit either to marry after the entry thereof; and [4] such other and further relief as may be necessary to complete disposition of the action, but

If any appeal is taken from the interlocutory judgment or motion for a new trial made, final judgment shall not be entered until such motion or appeal has been finally disposed of, nor then, if the motion has been granted or judgment reversed.

The death of either party after the entry of the interlocutory judgment does not impair the power of the court to enter final judgment as hereinbefore provided.

ed; but such entry shall not validate any marriage contracted by either party before the entry of such final judgment, nor constitute any defense of any criminal prosecution made against either.

History: Enacted March 2, 1903, Stats. and Amdts. 1903, p. 76.

1. Applied, cited, construed, referred to, etc.
2. Effect of rendition of final judgment.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *De Yoe vs. Superior Court of Mendocino Co.*, 140 Cal. 476, 480 (applied), 488 (constitutionality upheld), 98 Am. St. Rep. 73, 74 Pac. Rep. 28.

2. **EFFECT OF RENDITION OF FINAL JUDGMENT OF DIVORCE** is to at once restore parties to state of unmarried persons, regardless of fact that judgment is appealable, and regardless of fact that it may be set aside on motion.—*Deyoe vs. Superior Court of Mendo-*

cino Co., 140 Cal. 476, 484, 98 Am. St. Rep. 73, 74 Pac. Rep. 28.

See ante § 61 and note.

3. After judgment giving divorce, plaintiff is no longer a wife of the defendant; and he owes her no longer any marital duty.—*Howell vs. Howell*, 104 Cal. 45, 47, 48 Am. St. Rep. 70, 37 Pac. Rep. 770.

4. Decree of divorce a vinculo is final, and after the expiration of the time the jurisdiction of the courts over the parties is at an end.—*Egan vs. Egan*, 90 Cal. 15, 27 Pac. Rep. 22; *Howell vs. Howell*, 104 Cal. 45, 47, 48 Am. St. Rep. 70, 37 Pac. Rep. 770. See *Kamp vs. Kamp*, 59 N. Y. 212.

ARTICLE IV.

GENERAL PROVISIONS.

- § 136. Relief may be adjudged in some cases where separation is denied.
- § 137. Expenses of action for divorce.
- § 138. Orders respecting custody of children.
- § 139. Support of wife and children on divorce or separation granted wife.
- § 140. Security for maintenance and alimony.
- § 141. Court shall resort to what, in executing certain sections.

- § 142. If wife has sufficient for her support, court may withhold allowance.
- § 143. Community and separate property may be subjected to support.
- § 144. Legitimacy of issue—[Divorce for adultery of husband].
- § 145. Same—[Divorce for adultery of wife].
- § 146. Disposition of community property.
- § 147. Same—[Duty of court to dispose of].
- § 148. Same—[Subject to revision on appeal].

§ 136. **RELIEF MAY BE ADJUDGED IN SOME CASES, WHERE SEPARATION IS DENIED.** Though judgment of divorce is denied, the court may, in an action for divorce, provide for the maintenance by the husband, of the wife and children of the marriage, or any of them.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 337, held unconstitutional; see history, § 4 ante; amended March 21, 1905, Stats. and Amdts. 1905, c. CDLXXV, p. 634.

1. Applied, cited, construed, referred to, etc.
- 2-4. A mensa et thoro divorce.
- 5-7. Child over eighteen entitled to allowance, when.
8. "Children" defined.
- 9-11. Construction.
12. Discretion of court and review thereof.
13. Fixing amount—Station of wife as test.
14. Limited divorces.
- 15-21. Living apart.
22. Minor in custody of mother entitled to allowance.
- 23, 24. Suit by husband.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Hagle vs. Hagle*, 68 Cal. 583, 589, 590, 9 Pac. Rep. 842 (construed and applied); *Hagle vs. Hagle*, 74 Cal. 608, 612, 614, 16 Pac. Rep. 518 (construed and applied); *Peyre vs. Peyre*, 79 Cal. 336, 338, 339, 21 Pac. Rep. 338 (construed and applied); *Reade vs. Reade* (Cal. Oct. 2, 1889), 22 Pac. Rep. 284 (applied); *Anderson vs. Anderson*, 124 Cal. 48, 53, 54, 55,

71 Am. St. Rep. 17, 56 Pac. Rep. 630, 57 Id. 31 (construed and applied); *Sweasey vs. Sweasey*, 126 Cal. 123, 126, 127, 129, 58 Pac. Rep. 456 (construed and applied with other sections).

2. **A MENSA ET THORO DIVORCES** do not obtain in this state.—*Hagle vs. Hagle*, 74 Cal. 608, 612, 16 Pac. Rep. 518.

3. It should be left to discretion of court to say what is sufficient cause for divorce from bed and board.—*Hagle vs. Hagle*, 74 Cal. 608, 612, 16 Pac. Rep. 518. See *P— vs. P—*, 24 How. Pr. 197, for the construction of a provision—*New York Rev. Stats.* (5th ed.) § 68,—similar to that contained in this section, which case is cited by the Code Commissioners in support of rule.

4. It is true that in this state there can be no divorce a mensa et thoro, but decree a mensa et thoro is a very different thing from mere fact of married people living apart.—*Hagle vs. Hagle*, 74 Cal. 608, 614, 16 Pac. Rep. 518.

5. **CHILD OVER EIGHTEEN.**—Invalid daughter above eighteen years of age, under care of mother, is entitled to allowance for her support under this section.—*Anderson vs. Anderson*, 124 Cal. 48, 54, 71 Am. St. Rep. 17, 56 Pac. Rep. 630, 57 Id. 81.

6. **Presumption daughter above age of eighteen unable to maintain herself by work**, from ill-health or other causes, must be indulged where findings show she is dependent upon her parents for support.—*Anderson vs. Anderson*, 124 Cal. 48, 54, 71 Am. St. Rep. 17, 56 Pac. Rep. 630, 57 Id. 81.

7. **Exceptions arising from poverty or sickness** are made to provisions in other states to statute analogous to this section, and it is held that under these peculiar circumstances child over age of eighteen would be entitled to allowance for his or her support.—*Anderson vs. Anderson*, 124 Cal. 48, 54, 71 Am. St. Rep. 17, 56 Pac. Rep. 630, 57 Id. 81; *Fitch vs. Cornell*, 1 Sawy. C. C. 156, 9 Fed. Cas. 172. See *Snover vs. Snover*, 13 N. J. Eq. (2 Beas.) 261.

8. **"CHILDREN" DEFINED.**—Under Oregon statute, somewhat analogous to this section, it has been held that word "children" must be construed to mean "minor children," and for this reason children who have attained their majority are no longer in custody or under control of parents, nor are latter bound to maintain them.—*Anderson vs. Anderson*, 124 Cal. 48, 54, 71 Am. St. Rep. 17, 56 Pac. Rep. 630, 57 Id. 81, citing *Fitch vs. Cornell*, 1 Sawy. C. C. 156, 9 Fed. Cas. 172. See *Snover vs. Snover*, 13 N. J. Eq. (2 Beas.) 261.

9. **CONSTRUCTION.**—Object of section evidently is to enable court, in proper case, to aid in restoration of domestic harmony to prevent breaking up of family, especially where there are children of tender age and delicate health, and to require penurious husbands to furnish decent support for wife and for care and education of children, where parties have no cause for divorce on statutory grounds, or where innocent party has condoned offense.—*Hagle vs. Hagle*, 74 Cal. 608, 612, 16 Pac. Rep. 518; *Peyre vs. Peyre*, 79 Cal. 336, 339, 21 Pac. Rep. 338.

10. **Section does not authorize allowance of support for wife and at same time release her from her marital obligations.**—*Hagle vs. Hagle*, 74 Cal. 608, 612, 16 Pac. Rep. 518.

11. **It is obvious that action in which provision for separate maintenance is to be made, under this section, is action in which divorce was denied and that maintenance is for person to whom such divorce was denied.**—*Sweasey vs. Sweasey*, 126 Cal. 123, 126, 58 Pac. Rep. 456.

12. **DISCRETION OF COURT AND REVIEW THEREOF.**—Section allows court discretionary powers in granting maintenance to wife where divorce is denied, and unless court has abused its powers in exercise of such discretion, its rulings will not be disturbed on appeal.—*Hagle vs. Hagle*, 68 Cal. 588, 590, 9 Pac. Rep. 842.

See post § 136, 137 and notes.

13. **FIXING AMOUNT.**—Station in life of wife may be taken in consideration in fixing amount of maintenance.—*Anderson vs. Anderson*, 124 Cal. 48, 54, 71 Am. St. Rep. 17, 56 Pac. Rep. 630, 57 Id. 81.

14. **LIMITED DIVORCES.**—In absence of statute authorizing it, there is no limited divorce.—*Hagle vs. Hagle*, 74 Cal. 608, 612, 16 Pac. Rep. 518.

15. **LIVING APART.**—Support of wife cannot be required by court where she is living apart from her husband against his consent, and where she has no statutory grounds for divorce.—*Hagle vs. Hagle*, 74 Cal. 608, 612, 16 Pac. Rep. 518.

16. **If legislature had intended to provide for support of wife when she is living separate and apart from him without grounds for an absolute divorce, or statutory excuse for absence from his home, it would have specified grounds upon which separation might be declared.**—*Hagle vs. Hagle*, 74 Cal. 608, 612, 16 Pac. Rep. 518.

17. **Concurring opinion by Justice McFarland supports judgment, but dissents from view that decree in divorce case directing husband to furnish certain support to wife can be valid only when parties live together, because this section makes no such distinction, but provides that allowance for maintenance may be made in an action "for divorce" when judgment for divorce is denied, and there could be no bona fide action for divorce while parties are living together.**—*Hagle vs. Hagle*, 74 Cal. 608, 612, 16 Pac. Rep. 518.

18. **Where divorce is denied, and there is no proof tending to show that the parties were not living together, or that defendant then needed, or would need, alimony for her support and maintenance, permanent alimony will not be granted.**—*Peyre vs. Peyre*, 79 Cal. 336, 339, 21 Pac. Rep. 338.

Distinguished: *Benton vs. Benton*, 122 Cal. 395, 397, 25 Pac. Rep. 152 (maintenance granted in case of extreme cruelty causing desertion).

19. **Where husband has been guilty of all offenses described in § 92, except desertion, and it is found upon recriminatory defense that wife has deserted husband, and therefore cannot have divorce, court will hardly send her back to live with her husband, and under this section might in its discretion compel husband to provide for her (arguendo).**—*Sweasey vs. Sweasey*, 126 Cal. 123, 128, 58 Pac. Rep. 456.

20. **Where no statutory ground for absolute divorce is shown, or where wife remains apart from husband without any legal ground, permanent alimony will be refused.**—*Reade vs. Reade* (Cal. Oct. 2, 1889), 22 Pac. Rep. 284.

21. **Fact that allegations of cruelty in wife's petition for divorce were disproved and divorce denied, does not necessarily deprive her of maintenance, although she is living apart from her husband, where it is shown it would be impossible for them to live together.**—*Hagle vs. Hagle*, 68 Cal. 588, 589, 9 Pac. Rep. 842.

22. **MINOR CHILD IN CUSTODY OF MOTHER** entitles latter to allowance for its support.—*Anderson vs. Anderson*, 124 Cal. 48, 54, 71 Am. St. Rep. 17, 56 Pac. Rep. 630, 57 Id. 81.

23. **SUIT BY HUSBAND.**—Section does not apply where wife in cross-complaint asks for provision for maintenance during pendency of suit.—*Sweasey vs. Sweasey*, 126 Cal. 123, 126, 58 Pac. Rep. 456.

24. Grounds upon which court may require husband to provide for wife would not be enlarged by fact that husband asks for a divorce.

—Sweasey vs. Sweasey, 126 Cal. 123, 127, 38 Pac. Rep. 456.

§ 137. **EXPENSES OF ACTION FOR DIVORCE.** When an action for divorce is pending, the court may, in its discretion, require the husband to pay as alimony any money necessary to enable the wife to [1] support herself and her children, or [2] to prosecute or defend the action.

When the wife has any cause of action for divorce as provided in section ninety-two of this code, she may, without applying for a divorce, maintain in the superior court an action against him for permanent support and maintenance of [1] herself or of herself and [2] children. During the pendency of such action the court may, in its discretion, require the husband to pay as alimony any [3] money necessary for the prosecution of the action and for support and maintenance, and execution may issue therefor in the discretion of the court. The final judgment in such action may be enforced by the court by such order or orders as in its discretion it may from time to time deem necessary, and such order or orders may be varied, altered, or revoked at the discretion of the court.

History: Enacted March 21, 1872; amended March 20, 1878, Code Amdts. 1877-8, p. 76; April 6, 1880, Code Amdts. (C. C. pt.) p. 4; March 18, 1905, Stats. and Amdts. 1905, c. CCXVI, p. 205. In force March 21, 1905.

I. In General.

1. Applied, cited, construed, referred to, etc.

II. Alimony Pending Suit.

- 2, 3. Alimony—Defined and distinguished from maintenance.
4. Same—Use of term "permanent alimony" criticized.
5. Attorney's fee and costs—Existence of marriage in issue.
6. Same—Where husband prevails.
- 7-9. Same—Must be necessary to future prosecution of case.
10. Same—Contingent fee.
11. Same—Same—Effect of condonation on.
12. Same—Same—Recovery of.
13. Same—Fee a stipulated sum.
- 14, 15. Same—Services gratuitous.
16. Same—Counsel fees for past services.
- 17, 18. Same—Condonation and dismissal—Counsel fees.
19. Same—Mortgage to procure funds to pay.
- 20, 21. Same—Payment condition precedent.
22. Same—Included in decree for alimony.
23. Same—Modification on appeal.
24. Same—Final judgment not exhaust court's power.
25. Same—Same—Additional allowance—To prosecute motion for new trial.
26. Same—Same—Same—To prosecute motion to vacate.
- 27-29. Same—Same—Same—To prosecute appeal.
30. Same—Amount allowable—Where husband resists.
31. Construction—Object of statute.
- 32-34. Defenses and objections—Denial of allegation no objection to.
- 35-43. Discretion of court—Abuse of.
- 44, 45. Evidence—Burden of proof—Presumption.

- 46, 47. Husband's right to alimony.

- 48-54. Jurisdiction of court—To order payment of alimony.

55. Order for payment—Requisites of.

- 56, 57. Same—Process necessary.

- 58-60. Same—Finality and appealability.

- 61-64. Pleadings—Jurisdiction to grant alimony not dependent on.

- 65-67. Proof of marriage—Prerequisite to alimony, when.

68. Same—Need not be conclusively established.

69. Property conveyed to children—Not subject to alimony.

70. Purpose of alimony.

71. Receiver—On application of wife.

72. Same—On application of husband.

73. To whom alimony payable.

III. Suit for Maintenance Without Prayer for Divorce.

- 74-76. In general—Error in ground of—Repentance.

- 77-79. Amount of allowance—Earnings and property.

- 80-82. Same—Allowance out of future earnings.

83. Same—Circumstances of party.

- 84, 85. Same—Value of services rendered.

86. Conditions precedent to recovery—Wife must be without fault.

- 87-90. Same—Desertion by husband.

91. Same—Marriage must be proved.

- 92-95. Same—Desertion of husband must be "wilful."

- 96, 97. Defenses—In general.

98. Same—Condonation.

99. Same—Abandonment by wife without just cause.

100. Same—Misconduct of wife.

- 101, 102. Discontinuance of maintenance—When ordered.

103. Discretion of court.

104. Same—As to amount of maintenance allowed.
105. Enforcement of order—Court cannot compel to seek employment.
106. Same—By imprisonment.
107. Same—Contempt—Refusal to pay is.
- 108, 109. Same—Same—Proper procedure.
110. Same—Same—Imprisonment.
- 111, 112. Same—Same—Purging contempt—Discharge.
113. Same—Execution may issue, when.
- 114, 115. Same—Same—Faultless inability to pay relieves.
116. Same—Same—Filing petition in bankruptcy.
- 117-119. Modification of decree—Jurisdiction.
120. Same—Affidavit for new modification.
121. Nature of proceedings.
122. Order for payment—In gross sum.
- 123-125. Pleading—Allegation as to amount.
126. Wife's right to defeat fraudulent transfer.

I. IN GENERAL.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Lowell vs. Lowell*, 55 Cal. 316, 319, 320 (applied); *Reynolds vs. Reynolds*, 67 Cal. 176, 177, 178, 7 Pac. Rep. 480 (applied); *Sharon vs. Sharon*, 67 Cal. 185, 203, 7 Pac. Rep. 456, 635, 8 Id. 709 (applied and construed with other sections); *Sharon vs. Sharon*, 75 Cal. 1, 38, 16 Pac. Rep. 345 (construed and applied); *Turner vs. Turner*, 80 Cal. 141, 144, 22 Pac. Rep. 72 (construed and applied); *Ex parte Spencer*, 83 Cal. 460, 463, 17 Am. St. Rep. 266, 23 Pac. Rep. 395 (construed and applied); *Mudd vs. Mudd*, 98 Cal. 320, 321, 33 Pac. Rep. 114 (construed and applied); *Storke vs. Storke*, 99 Cal. 621, 34 Pac. Rep. 339 (construed and applied); *Loveren vs. Loveren*, 100 Cal. 493, 494, 35 Pac. Rep. 87 (construed and applied); *Howell vs. Howell*, 104 Cal. 45, 47, 43 Am. St. Rep. 70, 37 Pac. Rep. 770 (applied with other sections); *Wagner vs. Wagner*, 104 Cal. 293, 297, 37 Pac. Rep. 935 (referred to); *Rose vs. Rose*, 109 Cal. 544, 545, 42 Pac. Rep. 452 (construed and applied); *Ex parte Miller*, 109 Cal. 643, 648, 649, 42 Pac. Rep. 428 (referred to in discussion); *Smith vs. Smith*, 113 Cal. 268, 271, 45 Pac. Rep. 332 (applied); *Murray vs. Murray*, 115 Cal. 266, 278, 275, 56 Am. St. Rep. 97, 47 Pac. Rep. 37, 37 L. R. A. 626 (applied with other sections); *Livingston vs. Superior Court Los Angeles*, 117 Cal. 633, 634, 49 Pac. Rep. 836, 38 L. R. A. 175 (referred to in discussion); *Benton vs. Benton*, 122 Cal. 395, 397, 55 Pac. Rep. 152 (applied); *McMullin vs. McMullin*, 123 Cal. 653, 654, 56 Pac. Rep. 554 (applied); *Hite vs. Hite*, 124 Cal. 389, 396, 71 Am. St. Rep. 82, 57 Pac. Rep. 227, 45 L. R. A. 793 (construed and applied); *Sweasey vs. Sweasey*, 126 Cal. 123, 125, 127, 128, 129, 58 Pac. Rep. 456 (construed and applied with other sections); *Greer vs. Greer*, 125 Cal. 121, 125, 67 Pac. Rep. 20 (applied); *Baker vs. Baker*, 136 Cal. 302, 304, 68 Pac. Rep. 971 (applied); *Anderson vs. Anderson*, 137 Cal. 225, 226, 68 Pac. Rep. 1061 (construed and applied); *Grannis vs. Superior Court of San Francisco*, 143 Cal. 630, 633, 77 Pac. Rep. 647 (referred to with other sections).

Fund out of which alimony or maintenance payable.—See post § 139 and note.

Alimony allowed—Cannot be attached to satisfy previous debts of wife.—See post § 139 note.

II. ALIMONY PENDING SUIT.

2. ALIMONY DISTINGUISHED FROM MAINTENANCE AFTER DIVORCE.—Alimony, in its strictly technical sense, proceeds only from husband to wife, and where relation of husband and wife does not exist, strictly speaking, there can be no alimony.—*Ex parte Spencer*, 83 Cal. 460, 463, 17 Am. St. Rep. 266, 23 Pac. Rep. 395. See *Pretzinger vs. Pretzinger*, 45 Ohio St. 452, 4 Am. St. Rep. 542, 15 N. E. Rep. 471.

3. Legislature has used term only in its strict legal sense, and has therefore used the word "alimony" only when prescribing the provisions which court might make for support of wife pendente lite.—*Ex parte Spencer*, 83 Cal. 460, 463, 17 Am. St. Rep. 266, 23 Pac. Rep. 395.

4. There is no such thing as permanent alimony, strictly speaking. Allowance made to wife after decree of divorce should be called "allowance" or "permanent allowance" for maintenance and not "alimony."—*Ex parte Spencer*, 83 Cal. 460, 464, 17 Am. St. Rep. 266, 23 Pac. Rep. 395.
See post § 139 note.

5. ATTORNEYS' FEES AND COSTS OF SUIT.—Existence of marriage relation being in issue, allowance for costs and attorney's fees cannot be made until after judicial determination of existence of marriage relations.—*Hite vs. Hite*, 124 Cal. 389, 71 Am. St. Rep. 82, 57 Pac. Rep. 227, 45 L. R. A. 793; *Harron vs. Harron*, 128 Cal. 303, 305, 60 Pac. Rep. 932.
See par. 65 this note.

6. Where husband prevails.—Court may adjudge that husband pay wife's attorney fees, where wife sues husband for divorce and husband is awarded divorce on cross-complaint.—*Lowell vs. Lowell*, 55 Cal. 316, 319. See *Mott vs. Mott*, 82 Cal. 413, 418, 22 Pac. Rep. 1140.

7. MUST BE NECESSARY TO FUTURE PROSECUTION OF CAUSE.—Where expenses of action for divorce have been incurred, or paid by wife with means derived from her separate estate, or upon her credit, there can be no necessity for allowance; and under the statute court has no authority to make allowance to do that which she has already done, as there is no necessity therefor.—*Loveren vs. Loveren*, 100 Cal. 493, 494, 35 Pac. Rep. 87.

8. Allowance for expenses incurred by wife in prosecution of her cause can only be granted as to those necessary to be incurred in future prosecution or defense of action, and cannot be made in payment of past expenses, except where such payment is necessary to be made in order to enable wife to further prosecute or defend her cause.—*Loveren vs. Loveren*, 100 Cal. 493, 495, 35 Pac. Rep. 87; *Sharon vs. Sharon*, 75 Cal. 1, 42, 16 Pac. Rep. 345; *Mudd vs. Mudd*, 98 Cal. 320, 322, 33 Pac. Rep. 114; *Lacey vs. Lacey*, 108 Cal. 45, 46, 40 Pac. Rep. 1056. See *Beadleston vs. Beadleston*, 103 N. Y. 402, 8 N. E. Rep. 735; *McCarthy vs. McCarthy*, 137 N. Y. 500, 33 N. E. Rep. 550.

9. EXPENSES INCURRED BY WIFE, or paid in prosecution of her cause, may, where

it is proper to do so, be taxed as costs in the case; but they cannot be made basis of order within meaning of statute granting allowance therefor, compelling husband to pay them.—*Loveren vs. Loveren*, 100 Cal. 492, 495, 35 Pac. Rep. 87.

10. Counsel fee contingent, under contract with plaintiff, application for alimony for attorney fees pendente lite, will be disallowed.—*Sharon vs. Sharon*, 75 Cal. 1, 42, 16 Pac. Rep. 345; *White vs. White*, 86 Cal. 212, 213, 24 Pac. Rep. 1030.

11. Same—Effect on of condonation and dismissal of action, raised, but not decided, in *Reynolds vs. Reynolds*, 67 Cal. 176, 178, 7 Pac. Rep. 480.

See pars. 17, 18 this note.

12. Same—As to recovery of contingent fee of one third interest in community property, see *Newman vs. Freitas*, 129 Cal. 283, 287, 61 Pac. Rep. 907, 50 L. R. A. 548.

13. Counsel fee stipulated sum for taking charge of and conducting cause, allowance therefor will be denied.—*Mudd vs. Mudd*, 98 Cal. 320, 322, 33 Pac. Rep. 114.

14. Counsel's services gratuitous, allowance of alimony pendente lite therefor will be disallowed.—*Mudd vs. Mudd*, 98 Cal. 320, 322, 33 Pac. Rep. 114.

15. Same—Evidence may be heard, regarding such contract with wife, upon application.—*Mudd vs. Mudd*, supra.

16. Counsel fees for past services are not necessary to enable wife to prosecute suit, and allowance of them would be erroneous.—*Lacey vs. Lacey*, 108 Cal. 45, 40 Pac. Rep. 1056.

17. Same—When wife in open court admits condonation and asks that action be dismissed, as she no longer has an action to be prosecuted, it is not necessary that any money be paid for its prosecution.—*Reynolds vs. Reynolds*, 67 Cal. 176, 177, 7 Pac. Rep. 480.

18. Same—Allowance of counsel fees for attorneys of wife error. Court should at once dismiss cause and make no further order.—*Reynolds vs. Reynolds*, supra. See *McCulloch vs. Murphy*, 45 Ill. 258; *Newman vs. Newman*, 69 Ill. 163; *Persons vs. Persons*, 7 Humph. (Tenn.) 183.

19. SAME—MORTGAGE TO PROCURE FUNDS TO PAY.—Where decree is rendered in favor of wife and referee appointed to take testimony as to character, condition, and value of husband's property, and it is ordered that cost of proceedings be paid by husband, court has power to make an order authorizing husband to mortgage his realty for purpose of securing money to pay cost of proceedings before referee.—*White vs. White*, 97 Cal. 604, 606, 32 Pac. Rep. 600.

20. SAME—PAYMENT A CONDITION PRECEDENT TO TRIAL.—Court may refuse to proceed with case until order for payment of counsel fees has been complied with.—*Winter vs. Superior Court San Francisco*, 70 Cal. 295, 11 Pac. Rep. 632.

21. Discretion of court limited to suit-money, as distinguished from alimony, failure to pay which is ground for stay.—*Allen vs. Superior Court San Francisco*, 133 Cal. 504, 505, 65 Pac. Rep. 977.

22. SAME—INCLUDED IN DECREE FOR ALIMONY.—Attorney's fees and legal expenses may be included in decree for alimony.—*Ex parte Perkins*, 18 Cal. 60, 64.

23. Modification of order on appeal.—Supreme court may modify order directing counsel fees to be paid to plaintiff's attorney, and make it payable to plaintiff.—*Storke vs. Storke*, 99 Cal. 621, 622, 623, 34 Pac. Rep. 339. See *People ex rel. Smith vs. District Court*, 21 Colo. 251, 255, 40 Pac. Rep. 460 (such order is not void, but irregular exercise of jurisdiction).

24. SAME—COURT'S POWER NOT EXHAUSTED by final judgment.—*Bohnert vs. Bohnert*, 91 Cal. 428, 431, 27 Pac. Rep. 732; *Grannis vs. Superior Court San Francisco*, 143 Cal. 630, 633, 77 Pac. Rep. 647.

See par. 27 this note.

25. Additional allowance—To prosecute motion for new trial.—*Storke vs. Storke*, 116 Cal. 47, 51, 47 Pac. Rep. 869, 48 Id. 121, 132 Cal. 349, 64 Pac. Rep. 578.

26. Same—To prosecute motion to vacate decree.—*Grannis vs. Superior Court San Francisco*, 143 Cal. 630, 633, 77 Pac. Rep. 647.

27. Same—To prosecute appeal to supreme court; supreme court has no jurisdiction in premises; appeal does not take away jurisdiction of trial court therefor.—*Reilly vs. Reilly*, 60 Cal. 624, 626; *Ex parte Winter*, 70 Cal. 291, 294, 11 Pac. Rep. 630 (*Ross, J.*, dissenting, holding power in supreme court); *Larkin vs. Larkin*, 71 Cal. 330, 12 Pac. Rep. 227; *Bohnert vs. Bohnert*, 91 Cal. 428, 431, 27 Pac. Rep. 732; *Rose vs. Rose*, 109 Cal. 544, 546, 42 Pac. Rep. 452. See *Ala. King vs. King*, 27 Ala. 387. Ill. *Hunter vs. Hunter*, 100 Ill. 477. Iowa. *Miller vs. Miller*, 43 Iowa 325. Mo. *Rosenfield vs. Rosenfield*, 63 Mo. App. 413. N. Y. *Winton vs. Winton*, 12 Abb. N. C. 159. Ohio. *King vs. King*, 38 Ohio St. 370.

28. Compare: Fla. *State ex rel. Shrader vs. Phillips*, 32 Fla. 403, 406, 13 So. Rep. 920; *Prine vs. Prine*, 36 Fla. 676, 687, 18 So. Rep. 781, 34 L. R. A. 87. Mich. *Goldsmith vs. Goldsmith*, 6 Mich. 285; *Stafford vs. Stafford*, 53 Mich. 522, 19 N. W. Rep. 201. Nev. *Lake vs. Lake*, 16 Nev. 363, 17 Id. 230, 243, 30 Pac. Rep. 878. Wis. *Krause vs. Krause*, 23 Wis. 354; *Weishaupt vs. Weihaupt*, 27 Wis. 621.

29. Appeal must be in good faith, and showing of counsel to that effect may be required.—*Zeigenfuss vs. Zeigenfuss*, 21 Mich. 414; *Holthoefer vs. Holthoefer*, 47 Mich. 643.

30. SAME—AMOUNT ALLOWABLE—Where husband persistently resists wife's effort to succeed in her cause, one thousand dollars attorney's fee is not excessive.—*Schammel vs. Schammel*, 74 Cal. 36, 38, 15 Pac. Rep. 364.

31. CONSTRUCTION—Object of statute is to empower court during pendency of action for divorce upon proper showing made by wife for that purpose, to compel husband to provide her with means necessary to enable her to prosecute or defend action.—*Loveren vs. Loveren*, 100 Cal. 493, 494, 35 Pac. Rep. 87.

32. DEFENSES AND OBJECTIONS—Denial by husband of allegations in wife's petition for divorce is no objection to allowance of temporary alimony.—*Harding vs. Harding*, 144 Ill. 588, 32 N. E. Rep. 206, 21 L. R. A. 310.

33. Court say to hold that mere denial by defendant of matters alleged in complaint would put complainant upon proof, would be subversive to whole theory upon which allowance of temporary alimony is based.—Harding vs. Harding, *supra*. See *Ga. McGee vs. McGee*, 10 Ga. 477. *Kan. Litowich vs. Litowich*, 19 Kan. 451, 27 Am. Rep. 145. *Md. Daiger vs. Daiger*, 3 Md. Ch. 335. *Miss. Porter vs. Porter*, 41 Miss. 116. *N. Y. Wright vs. Wright*, 1 Edw. Ch. (N. Y. Ch.) 62. *N. C. Wilson vs. Wilson*, 19 N. C. 377; *Scoggins vs. Scoggins*, 30 N. C. 312.

34. DISCRETION OF COURT—Alimony pendente lite rests in sound discretion of court, and is not reviewable, unless there is abuse of discretion.—*Bohnert vs. Bohnert*, 91 Cal. 428, 431, 27 Pac. Rep. 732; *Rose vs. Rose*, 109 Cal. 544, 546, 42 Pac. Rep. 452.

See par. 37 this note.

35. Discretion with which section invests court is not arbitrary power, but is same legal discretion exercised by courts having jurisdiction of actions for divorce antecedent to and independent of expressed statutory authority.—*Turner vs. Turner*, 80 Cal. 141, 144, 22 Pac. Rep. 72.

36. Pending action for divorce court may in its discretion require husband to pay as alimony any money necessary to enable wife to support herself or her children, or to prosecute or defend action.—*Sharon vs. Sharon*, 75 Cal. 1, 28, 16 Pac. Rep. 345; *Turner vs. Turner*, 80 Cal. 141, 144, 22 Pac. Rep. 72.

37. Order granting alimony during pendency of suit for counsel fees or necessary expenses during prosecution of suit, will not be disturbed upon appeal, unless it is made to appear that court has been guilty of abuse of its discretion.—*Rose vs. Rose*, 109 Cal. 544, 546, 42 Pac. Rep. 452.

38. Court may in its discretion require husband to pay as alimony any money necessary for wife to support herself or children, or to prosecute or defend action for divorce.—*Mudd vs. Mudd*, 98 Cal. 320, 321, 33 Pac. Rep. 114.

39. Same—Abuse of discretion by lower court is shown where alimony for counsel fees and expenses of suit is granted upon prima facie showing by wife, when there is counter showing.—*Hite vs. Hite*, 124 Cal. 389, 392, 71 Am. St. Rep. 82, 57 Pac. Rep. 227, 45 L. R. A. 792.

40. Where wife has possession of homestead and has care of two of six young children, and where property which she enjoys use of is more valuable and productive than husband's, and it appears that his burdens and necessities are greater, and his means less, than hers, it is an excess of discretionary power by court to award temporary alimony.—*Turner vs. Turner*, 80 Cal. 141, 144, 22 Pac. Rep. 72.

41. Same—Discretion is to be exercised in view of circumstances of parties, their several necessities, and pecuniary ability of husband.—*Turner vs. Turner*, 80 Cal. 141, 144, 22 Pac. Rep. 72.

42. Unless it appear that order for alimony pendente lite was made without any evidence, or without opportunity on part of husband to be heard, and that it is of such character as on

its face is inordinate in amount, it must be assumed that discretion of court has been properly exercised.—*Rose vs. Rose*, 109 Cal. 544, 546, 42 Pac. Rep. 452.

43. Otherwise where made ex parte, before service of summons, and without notice of application for order.—*Baker vs. Baker*, 136 Cal. 302, 304, 68 Pac. Rep. 971.

44. EVIDENCE—Burden of proof in application for alimony pendente lite is upon plaintiff to establish marriage with defendant to satisfaction of court before provision will be made for her under this section.—See *Collins vs. Collins*, 71 N. Y. 269, 30 Id. 1.

45. Wife will be presumed entitled to support in divorce proceeding, until it is shown by result of trial that her claim is forfeited.—*Newman vs. Newman*, 69 Ill. 167; *Jenkins vs. Jenkins*, 91 Ill. 167; *Foss vs. Foss*, 100 Ill. 576; *Harding vs. Harding*, 144 Ill. 588, 32 N. E. Rep. 206, 21 L. R. A. 310.

46. HUSBAND'S RIGHT TO ALIMONY—Wife only can claim alimony under this section.—*Hite vs. Hite*, 124 Cal. 389, 395, 71 Am. St. Rep. 82, 57 Pac. Rep. 227, 45 L. R. A. 793.

47. When husband may maintain suit for maintenance out of wife's separate estate without prayer for divorce, see post § 176 and note.

48. JURISDICTION—Court has jurisdiction to order payment of alimony before issue of fact is joined in action, and order made pending demurrer to complaint which was afterwards sustained, is valid.—*Langan vs. Langan*, 91 Cal. 654, 655, 27 Pac. Rep. 1092.

49. Otherwise where there has been no service of summons, and no notice of application for order.—*Baker vs. Baker*, 136 Cal. 302, 304, 68 Pac. Rep. 971.

50. Power of court under this section to make allowance to wife for her support as alimony or allowance to her for purpose of defending or prosecuting action for divorce is not exhausted upon rendition of judgment in trial court.—*Reilly vs. Reilly*, 60 Cal. 624; *Ex parte Winter*, 70 Cal. 291, 11 Pac. Rep. 630; *Larkin vs. Larkin*, 71 Cal. 330, 12 Pac. Rep. 227; *Bohnert vs. Bohnert*, 91 Cal. 428, 431, 27 Pac. Rep. 732.

See pars. 24-27 this note.

51. Same—Courts of equity have power to decree alimony where no other relief is asked, independent of any statute. This is one of the legal powers of superior courts.—*Galland vs. Galland*, 38 Cal. 265, 268. See *Murray vs. Murray*, 115 Cal. 266, 274, 56 Am. St. Rep. 97, 47 Pac. Rep. 37, 37 L. R. A. 626; *Livingston vs. Superior Court Los Angeles*, 117 Cal. 633, 634, 49 Pac. Rep. 836, 38 L. R. A. 175; *Hinds vs. Hinds*, 80 Ala. 226; *Wood vs. Wood*, 54 Ark. 172, 176, 15 S. W. Rep. 459. See *Colo. Daniels vs. Daniels*, 9 Colo. 133, 148-151, 10 Pac. Rep. 657. *Iowa. Graves vs. Graves*, 36 Iowa 310, 314, 14 Am. Rep. 525. *Miss. Garland vs. Garland*, 50 Miss. 708, 710, 713. *Neb. Earle vs. Earle*, 27 Neb. 277, 282, 20 Am. St. Rep. 677, 43 N. W. Rep. 118; *Cochran vs. Cochran*, 42 Neb. 612, 620, 6 N. W. Rep. 942. *S. D. Milliron vs. Milliron*, 9 S. D. 181, 183, 62 Am. St. Rep. 863, 68 N. W. Rep. 236. *W. Va. Stewart vs. Stewart*, 27 W. Va. 172.

See note 13 Am. Dec. 257; 32 Am. Dec. 330; 60 Am. Dec. 667.

52. Compare: *Trotters vs. Trotters*, 77 Ill. 512.

53. Case of *Galland vs. Galland*, supra, was decided before enactment of Civil Code. This section provides for and authorizes such decree.—*Poole vs. Wilber*, 95 Cal. 339, 342, 30 Pac. Rep. 548.

54. DIVORCE CASES ARE EQUITY CAUSES within meaning of constitutional provision conferring jurisdiction upon supreme court.—*Sharon vs. Sharon*, 67 Cal. 185, 187-195, 3 Pac. Rep. 709. See 7 Id. 456, 635.

55. ORDER FOR PAYMENT—Requisite of—Court is not required by any rule of procedure to fix entire amount of counsel fees at beginning of action, nor is it prevented from making allowances from time to time as exigencies of case shall seem to demand.—*Bohnert vs. Bohnert*, 91 Cal. 428, 27 Pac. Rep. 732; *Rose vs. Rose*, 109 Cal. 544, 546, 42 Pac. Rep. 452.

56. Process or notice to sustain—Order requiring husband to pay as alimony any money necessary to enable wife to support herself or her children, or to prosecute or defend an action against him, may be made without any previous notice and is usually made ex parte.—*Mudd vs. Mudd*, 93 Cal. 320, 321, 33 Pac. Rep. 114.

57. Ex parte order for alimony made without service of process in action, or notice of application for order, was unauthorized and void, as court had not acquired jurisdiction over person of defendant at time it was made.—*Baker vs. Baker*, 136 Cal. 302, 304, 68 Pac. Rep. 971.

See Code Civ. Proc. § 350 and note.

58. SAME—FINALITY AND APPEALABILITY—Order for payment of alimony and counsel fees is in nature of final judgment, and is appealable.—*Sharon vs. Sharon*, 67 Cal. 185, 195, 3 Pac. Rep. 709. See 7 Id. 456, 635.

59. Order awarding alimony and counsel fees is no more than an interlocutory decree, though not one of the interlocutory orders designated in the code to which appeal attaches, even though it possesses the force and dignity of final judgment, and may be enforced by execution (dis. op.).—*Sharon vs. Sharon*, 67 Cal. 185, 201, 7 Pac. Rep. 456, 635, 3 Pac. Rep. 709.

60. Application for alimony is a proceeding for separate judgment, though not a separate suit, which, when granted, is final judgment from which appeal may be taken.—*Baker vs. Baker*, 136 Cal. 302, 304, 68 Pac. Rep. 971.

61. PLEADING—Jurisdiction to order alimony is not dependent upon averments in complaint as to husband's resources.—*Gaston vs. Gaston*, 114 Cal. 542, 545, 55 Am. St. Rep. 86, 46 Pac. Rep. 609; *Benton vs. Benton*, 122 Cal. 395, 398, 55 Pac. Rep. 152.

62. Averments as to what are reasonable attorney's fees unnecessary, as right to recover these, like ordinary right to recover costs, is necessary incident to judgment, and does not depend upon averments in complaint,

except such as are necessary to establish the right.—*Carrierre vs. Minturn*, 5 Cal. 435; *Rapp vs. Spring Valley Gold Co.*, 74 Cal. 532, 16 Pac. Rep. 325; *West Coast Lumber Co. vs. Newkirk*, 30 Cal. 275, 22 Pac. Rep. 231.

63. Averment in complaint that certain amount is reasonable for prosecution of suit does not preclude court from making new and additional allowance after allowance has already been made, as such allegations in petition are at most only the opinions held by plaintiff at time action was commenced, subject to be changed by developments of subsequent circumstances.—*Watson vs. Sutro*, 102 Cal. 169, 171, 37 Pac. Rep. 301; *Pacific Mutual Life Ins. Co. vs. Fisher*, 106 Cal. 224, 234, 39 Pac. Rep. 758; *Rose vs. Rose*, 109 Cal. 544, 546, 42 Pac. Rep. 452.

64. Value of services for which provision is made by this section is no part of plaintiff's cause of action, and need not have been named in complaint.—*Rose vs. Rose*, 109 Cal. 544, 546, 42 Pac. Rep. 452; *Benton vs. Benton*, 122 Cal. 395, 398, 55 Pac. Rep. 152. See *Pacific Mut. L. Ins. Co. vs. Fisher*, 106 Cal. 224, 234, 39 Pac. Rep. 758.

65. PROOF OF MARRIAGE PREREQUISITE—Alimony is not justified unless marriage is admitted or proved.—*Hite vs. Hite*, 124 Cal. 389, 391, 71 Am. St. Rep. 82, 57 Pac. Rep. 227, 45 L. R. A. 793.

See par. 5 this note.

66. Marriage being an issue and unproved, there is no one who may be entitled to support under this section, as it is only a wife who may claim alimony.—*Hite vs. Hite*, 124 Cal. 389, 395, 71 Am. St. Rep. 82, 57 Pac. Rep. 227, 45 L. R. A. 793.

67. Wife who seeks temporary alimony during pendency of her suit for divorce must present to court facts showing probable, and certainly possible, prospect of establishing her marriage with defendant.—*Brinkley vs. Brinkley*, 50 N. Y. 184, 10 Am. Rep. 460; *Collins vs. Collins*, 71 N. Y. 270.

68. Marriage need not be conclusively established for purpose of claiming alimony pendente lite, but reasonably plain case of existence of relation must be made out.—*Brinkley vs. Brinkley*, 50 N. Y. 184, 10 Am. Rep. 460; *Collins vs. Collins*, 71 N. Y. 270.

69. PROPERTY CONVEYED BY HUSBAND AND WIFE TO THEIR CHILDREN, as gift, cannot be afterwards subjected to alimony pending suit by second wife for divorce, and such conveyance cannot be questioned by second wife.—*Baker vs. Baker*, 136 Cal. 302, 304, 68 Pac. Rep. 971.

70. PURPOSE OF ALIMONY ALLOWED WIFE during action for maintenance is to give support to her and enable her to conduct her side of litigation pending trial of issue made by pleadings, and were court compelled to try and determine issue in action for divorce before it should allow alimony, entire purpose of allowing alimony during pendency of such action would be defeated.—*Storke vs. Storke*, 99 Cal. 621, 622, 34 Pac. Rep. 339.

71. RECEIVER—On application of wife to enforce her maintenance in cases where hus-

band attempts to defeat same by fraudulent transfer.—*Murray vs. Murray*, 115 Cal. 366, 274, 56 Am. St. Rep. 97, 47 Pac. Rep. 37, 37 L. R. A. 626.

See post §140 and note.

72. On application of husband, under similar circumstances, as to power of court, see *Livingston vs. Superior Court Los Angeles*, 117 Cal. 633, 636, 49 Pac. Rep. 336, 33 L. R. A. 175.

See post §176 and note.

73. To whom alimony payable.—This section requiring money to be paid to wife with which to prosecute suit, plainly intended that money be paid directly to her, and court has no authority to order it paid to her attorney.—*Sharon vs. Sharon*, 75 Cal. 1, 38, 16 Pac. Rep. 345.

III. SUIT FOR MAINTENANCE WITHOUT PRAYER FOR DIVORCE.

74. IN GENERAL.—Bringing action for permanent maintenance, on ground of desertion, under §137, instead of §136, is error where findings of fact plainly justify relief under latter section, but will not reverse cause.—*Sweasey vs. Sweasey*, 126 Cal. 123, 128, 53 Pac. Rep. 456.

75. Enforcing duty to support against defendant who seeks, in good faith, to fulfil his obligations, and at same time to exonerate plaintiff from correlative duty of living with defendant at some reasonable place of abode, would be granting of limited divorce, for which our law makes no provision.—*Hagle vs. Hagle*, 74 Cal. 608, 612, 16 Pac. Rep. 518; *Peyre vs. Peyre*, 79 Cal. 336, 338, 31 Pac. Rep. 338; *McMullin vs. McMullin*, 123 Cal. 653, 654, 56 Pac. Rep. 554.

76. Fact husband may have deserted wife does not necessarily shut door of repentance to him, nor is it necessarily closed by fact of suit brought for maintenance. This is true, not because of any tenderness of law for delinquent husbands, but because of its aversion to separation of spouses.—*McMullin vs. McMullin*, 123 Cal. 653, 655, 56 Pac. Rep. 554. See *Ill. Shraeder vs. Shraeder*, 26 Ill. App. 524; *Johnson vs. Johnson*, 125 Ill. 510, 16 N. E. Rep. 391. *N. H. Walker vs. Loughton*, 31 N. H. 111. *S. C. Taylor vs. Taylor*, 4 Des. Eq. 167; *Briggs vs. Briggs*, 24 S. C. 377. *Va. Almond vs. Almond*, 4 Rand. 662, 15 Am. Dec. 781. *Eng. Head vs. Head*, 3 Atk. 547.

77. AMOUNT OF ALLOWANCE.—Allowance to wife of house and lot, for procurement of which both parties contributed, and \$45 per month, is reasonable allowance, where husband's income is \$145 per month.—*Poole vs. Wilber*, 95 Cal. 339, 343, 30 Pac. Rep. 543.

78. Determination of amount.—Allowance may be based upon husband's earnings, or his ability to earn money.—*Eidenmuller vs. Eidenmuller*, 37 Cal. 364, 366.

79. Showing husband has money or property not necessary to allowance of alimony or maintenance.—*Peyre vs. Peyre*, 79 Cal. 336, 340, 21 Pac. Rep. 338; *Gaston vs. Gaston*, 114 Cal. 543, 547, 55 Am. St. Rep. 36, 46 Pac. Rep. 609.

See post §139 and note.

80. SAME—ALLOWANCE OUT OF FUTURE EARNINGS may be made.—*Ex parte Spencer*, 83 Cal. 460, 465, 17 Am. St. Rep. 266, 23 Pac. Rep. 395 (*Paterson, J.*, dissenting).

See post §139 note.

81. Doubtful: In *re Spencer*, 82 Cal. 110, 113, 23 Pac. Rep. 37.

82. Allowance of maintenance may be made in similar manner.—See post §139 and note.

83. SAME—CIRCUMSTANCES OF PARTY SHOULD BE CONSIDERED in determining amount of alimony to be awarded.—*Robinson vs. Robinson*, 79 Cal. 511, 516, 517, 21 Pac. Rep. 1095.

84. SAME—VALUE OF SERVICES RENDERED PLAINTIFF AND PECUNIARY CONDITION OF DEFENDANT are elements entering into determination by court of amount which it will direct to be paid to plaintiff, as counsel fees in suit for divorce.—*Rose vs. Rose*, 109 Cal. 544, 546, 42 Pac. Rep. 452.

85. Issue in case is not tried in taking evidence, for purpose of fixing amount of allowance, but court is merely seeking for information as basis of its order, and is not bound by technical rules of evidence applicable to controversies between contesting litigants.—*Rose vs. Rose*, 109 Cal. 544, 546, 42 Pac. Rep. 452.

86. CONDITIONS PRECEDENT TO AND GROUNDS OF RECOVERY.—Section requires that wife who seeks relief be without fault on her own part, in order that she may compel her husband to give support which this section provides.—*Hardy vs. Hardy*, 97 Cal. 125, 128, 31 Pac. Rep. 906.

87. When husband wilfully deserts wife she may, without applying for divorce, maintain action against him for permanent support and maintenance of herself and children.—*Benton vs. Benton*, 122 Cal. 395, 397, 55 Pac. Rep. 152.

88. Provision for alimony made by statute, in suit for divorce, is not declaration that alimony shall not be allowed in other actions.—*Galland vs. Galland*, 38 Cal. 265, 267-268; 44 Cal. 475, 477, 13 Am. Rep. 167. See *Poole vs. Wilber*, 95 Cal. 339, 342, 30 Pac. Rep. 543; *Murray vs. Murray*, 115 Cal. 266, 274, 56 Am. St. Rep. 97, 47 Pac. Rep. 37, 37 L. R. A. 626; *Livingston vs. Superior Court Los Angeles*, 117 Cal. 633, 634, 635, 49 Pac. Rep. 336, 38 L. R. A. 175.

89. Wife driven, without provocation, from her husband's house, with her infant child, who is wholly without means of support, may maintain action against husband for reasonable allowance for maintenance of herself and child, without coupling application with prayer for divorce.—*Galland vs. Galland*, 38 Cal. 265, 266, 269.

90. Statute gives permanent maintenance for desertion unaccompanied by cruelty, and it also gives relief where wife is compelled to depart from dwelling-place by the cruelty of her husband, as such action constitutes desertion.—*Benton vs. Benton*, 122 Cal. 395, 398, 55 Pac. Rep. 152.

See ante §98 and note.

91. SAME—MARRIAGE MUST BE PROVED TO SATISFACTION OF COURT before decree

of maintenance will be allowed under this section.—*Hite vs. Hite*, 124 Cal. 389, 392, 71 Am. St. Rep. 82, 57 Pac. Rep. 227, 45 L. R. A. 793. See *Brinkley vs. Brinkley*, 50 N. Y. 184, 10 Am. St. Rep. 460; *Collins vs. Collins*, 71 N. Y. 270.

92. SAME—WILFUL DESERTION BY HUSBAND IS ESSENTIAL ELEMENT in plaintiff's cause of action for maintenance, and must be proven.—*Hardy vs. Hardy*, 97 Cal. 125, 127, 31 Pac. Rep. 906.

93. Right of action for maintenance is limited to desertion on part of husband, and legislature has not authorized it to be maintained upon ground of neglect, intemperance, cruelty, or any other act on his part which might be sufficient ground for divorce.—*Hardy vs. Hardy*, 97 Cal. 125, 127, 31 Pac. Rep. 906.

94. Where wife is living separate and apart from husband at time she institutes action for permanent maintenance, essential for her to show it is by reason of his desertion, or by reason of his cruelty or threats of bodily harm she was forced to leave family dwelling-place.—*Hardy vs. Hardy*, 97 Cal. 125, 128, 31 Pac. Rep. 906.

95. Where findings of fact not only negative allegation of wilful desertion, but show that ample provision was made for wife's support, and that defendant left his home for purpose of obtaining medical treatment, and there is nothing to show that defendant's condition of health has changed, nor that he remains away with intent to desert plaintiff, such desertion as would entitle plaintiff to right to maintenance, or to set aside alleged fraudulent transfer made by him to a co-defendant, is not shown.—*Greer vs. Greer*, 135 Cal. 121, 125, 67 Pac. Rep. 20.

96. DEFENSES—IN GENERAL.—Grounds which would justify husband in leaving wife and living separate from her, or which would be sufficient defense to action by her for divorce from him, will be defense to action for permanent maintenance.—*Hardy vs. Hardy*, 97 Cal. 125, 128, 31 Pac. Rep. 906.

97. Foundation of rights of wife for permanent maintenance, and to maintain action therefor, is obligation of husband to support her, and whenever husband has become freed from such obligation this action cannot be maintained against him.—*Hardy vs. Hardy*, 97 Cal. 125, 128, 31 Pac. Rep. 906.

98. Condonation.—Where husband, pending suit for maintenance by wife, offers her a home with him and expresses his willingness for reconciliation, asks her to fulfil marriage contract and offers himself to do likewise, held to be condonation, and though such offer was made one year after his desertion, it would defeat plaintiff's present right to action.—*McMullin vs. McMullin*, 123 Cal. 653, 656, 56 Pac. Rep. 554. See *Newing vs. Newing*, 45 N. J. Eq. (18 Stew.) 498, 502.

See ante §§ 115-121 and notes.

99. Abandonment by wife of reasonable dwelling-place which husband has provided for her, precludes her from seeking support at expense of husband by virtue of this section; nor is she entitled to maintain such

action for his mere neglect to provide her with suitable support.—*Hardy vs. Hardy*, 97 Cal. 125, 128, 31 Pac. Rep. 906.

100. SAME—MISCONDUCT OF WIFE.—Wife must have right to be received and treated by her husband as his wife in order to enable her to maintain action for permanent maintenance; and if, in case of his desertion of her, her conduct after such desertion has been such as to forfeit her right to be received as his wife, husband cannot be made liable for maintenance under this section.—*Hardy vs. Hardy*, 97 Cal. 125, 128, 31 Pac. Rep. 906.

101. DISCONTINUANCE OF MAINTENANCE will be entered by court, where wife cohabits with husband after decree granting maintenance, although such subsequent cohabitation was suffered under mistake of law that divorce on part of husband would be prevented thereby.—*Wade vs. Wade* (Cal. Oct. 20, 1892), 31 Pac. Rep. 258, 259.

102. For inability to pay; discretion of court.—See *Smith vs. Smith*, 142 Cal. 636, 637, 76 Pac. Rep. 489.

103. DISCRETION OF COURT in requiring husband to pay alimony and costs of suit during pendency of action.—*Poole vs. Wilber*, 96 Cal. 339, 342, 30 Pac. Rep. 548.

104. Amount to be allowed as permanent maintenance to plaintiff becomes important fact where action is for support without divorce, although amount of maintenance is matter largely within discretion of court, over which it retains subsequent control, and may increase or decrease allowance.—*Kerry vs. Pacific Marine Co.*, 121 Cal. 564, 574, 66 Am. St. Rep. 65, 54 Pac. Rep. 89; *Benton vs. Benton*, 122 Cal. 395, 399, 55 Pac. Rep. 152.

105. ENFORCEMENT OF ORDER.—Court cannot compel man to seek employment in order to earn money to pay alimony, nor punish him for failure to do so.—*Ex parte Todd*, 119 Cal. 57, 58, 50 Pac. Rep. 1071.

106. By imprisonment.—Obligation to pay alimony ordered by court is not debt within meaning of the constitutional provision against imprisonment for debt except for fraud.—*Ex parte Perkins*, 18 Cal. 60, 64; *Livingston vs. Superior Court Los Angeles*, 117 Cal. 633, 636, 49 Pac. Rep. 836, 38 L. R. A. 175. See *Ind. Stonehill vs. Stonehill*, 146 Ind. 445, 447, 45 N. E. Rep. 600. *Vt. Andrew vs. Andrew*, 62 Vt. 495, 500, 20 Atl. Rep. 817.

See par. 110 this note.

107. CONTEMPT.—Refusal to pay alimony, made in open court, constitutes contempt in presence of court.—*Ex parte Robinson*, 71 Cal. 608, 610, 12 Pac. Rep. 794. See *Ex parte Bergman*, 3 Wyo. 396, 410, 26 Pac. Rep. 914.

108. Proper procedure against defendant who is in arrears of payment of permanent maintenance directed by court, is to proceed against him for contempt in failing to obey decree; no further order is necessary.—*Smith vs. Smith*, 113 Cal. 268, 271, 45 Pac. Rep. 332; *Livingston vs. Superior Court Los Angeles*, 117 Cal. 633, 636, 49 Pac. Rep. 836, 38 L. R. A. 175. See Code Civ. Proc. § 1209 and note.

109. Order to pay alimony for support of

minor children may be enforced by process for contempt.—Ex parte Gordan, 95 Cal. 374, 378, 30 Pac. Rep. 561.

110. **Imprisonment.**—Order to pay alimony may be enforced by imprisonment for contempt.—Ex parte Perkins, 18 Cal. 60, 64; Ex parte Cottrell, 59 Cal. 417, 419; Ex parte Spencer, 83 Cal. 460, 465, 17 Am. St. Rep. 266, 23 Pac. Rep. 395; Ex parte Hart, 94 Cal. 254, 255, 29 Pac. Rep. 774; Ex parte Gordan, 95 Cal. 374, 378, 30 Pac. Rep. 561. See Stonehill vs. Stonehill, 146 Ind. 445, 447, 45 N. E. Rep. 600; Snow vs. Snow, 13 Utah 15, 24, 43 Pac. Rep. 620.

See par. 106; also Code Civ. Proc. § 1218 et seq. and notes.

111. **Purging contempt by showing inability to comply with order.**—Ex parte Gordan, 95 Cal. 374, 378, 30 Pac. Rep. 561.

See par. 114 this note.

112. **Discharge from imprisonment for contempt in refusing to pay certain alimony relieves party from further contempt proceedings for non-payment of same.**—Ex parte Batchelder, 96 Cal. 233, 234, 31 Pac. Rep. 45.

113. **SAME—EXECUTION MAY ISSUE under order for alimony before defendant has been given opportunity to show cause why he has not obeyed order.**—Van Cleave vs. Bucher, 79 Cal. 600, 602, 21 Pac. Rep. 954.

114. **Faultless inability to pay relieves defendant of liability for contempt, unless he has voluntarily created such inability.**—Galland vs. Galland, 44 Cal. 475, 478, 13 Am. Rep. 167; Ex parte Spencer, 83 Cal. 460, 465, 17 Am. St. Rep. 266, 23 Pac. Rep. 395. See Ala. Ex parte Hardy, 68 Ala. 328. Ga. Pinckard vs. Pinckard, 23 Ga. 286. N. Y. In re Sweatman, 1 Cow. (N. Y.) 144. N. C. Kane vs. Haywood, 66 N. C. 1. S. C. Wall vs. Court of Wardens, 1 Bay 434. Fed. Hendryx vs. Fitzpatrick, 19 Fed. Rep. 810, 814.

115. **Question whether or not defendant is able to comply with order is one of fact to be determined by court making order, upon evidence.**—Ex parte Cottrell, 59 Cal. 417, 419.

116. **Filing of petition in insolvency by debtor subsequent to imprisonment will not entitle him to release on habeas corpus.**—Ex parte Wilson, 73 Cal. 97, 98, 14 Pac. Rep. 393.

As to release by habeas corpus, see note 22 Am. St. Rep. 422.

117. **MODIFIED DEGREE OF PERMANENT MAINTENANCE** cannot be assailed upon appeal for matters occurring before its rendition, on mere affidavit which shows no circumstance of mistake, inadvertence, surprise, or excusable neglect.—Smith vs. Smith, 113 Cal. 263, 271, 45 Pac. Rep. 332. See Livingston vs. Superior Court Los Angeles, 117 Cal. 633, 636, 49 Pac. Rep. 336, 38 L. R. A. 175.

118. **Jurisdiction of superior court to modify or change dispositions of original decree, remedy being enforced after analogies drawn from divorce jurisdiction.**—Smith vs. Smith, 113 Cal. 263, 271, 45 Pac. Rep. 332.

119. **To enter order diminishing wife's separate support and increasing amount allowed for support and education of child, where parent is relieved of care of such child, and need of child is subsequently increased in order to attend a boarding school.**—Smith vs. Smith, supra.

120. **Same—Affidavit for new modification of decree of permanent maintenance is addressed to discretion of court, and where record does not disclose anything to convince appellate court that in dismissing motion lower court exceeded its discretion arbitrarily or injudiciously, the decree will not be disturbed.**—Smith vs. Smith, supra.

121. **NATURE OF PROCEEDING—Application for alimony, though it cannot be considered as separate suit, is proceeding for separate judgment which, when granted, has nothing to do with final judgment in cause, and will not be affected by it.**—Baker vs. Baker, 136 Cal. 302, 304, 68 Pac. Rep. 971.

122. **ORDER FOR PAYMENT—Alimony may be ordered paid in one gross sum instead of being made payable at stated periods.**—Robinson vs. Robinson, 79 Cal. 511, 516, 517, 21 Pac. Rep. 1095; Murray vs. Murray, 115 Cal. 266, 275, 278, 56 Am. St. Rep. 97, 47 Pac. Rep. 37, 37 L. R. A. 626. See Wood vs. Wood, 59 Ark. 441, 43 Am. St. Rep. 42, 27 S. W. Rep. 641, 28 L. R. A. 157; Williams vs. Williams, 6 S. D. 234, 295, 61 N. W. Rep. 38.

123. **PLEADING—Rule of practice in regard to allegation of amount of alimony desired is that plaintiff is not entitled to recover more than her complaint demands.**—Benton vs. Benton, 122 Cal. 395, 398, 55 Pac. Rep. 152.

124. **Amount of maintenance to be allowed is an issuable fact, and plaintiff is not entitled to recover more than complaint demands.**—Benton vs. Benton, 122 Cal. 395, 398, 55 Pac. Rep. 152.

125. **WIFE'S RIGHT TO DEFEAT FRAUDULENT TRANSFER.**—Right of wife to maintenance when husband has deserted her gives her such interest in husband's separate property as will authorize her to maintain action to defeat fraudulent transfer of property by him.—Murray vs. Murray, 115 Cal. 266, 273, 56 Am. St. Rep. 97, 47 Pac. Rep. 37, 37 L. R. A. 626.

126. **Allowance for wife and children in grant of divorce or separation to wife, see post § 139 and note.**

§ 138. **ORDERS RESPECTING CUSTODY OF CHILDREN.** In actions for divorce the court may, [1] during the pendency of the action, or [2] at the final hearing or [3] at any time thereafter during the minority of any of the children of the marriage, make such order for the custody, care, education, maintenance and support of such minor children as may seem necessary or proper, and may at any time modify or vacate the same.

History: Enacted March 21, 1872; amended March 3, 1905, Stats. and Amdts. 1905, c. XLIX, p. 43.

1. Applied, cited, construed, referred to, etc.
2. In general—Children not parties.
3. Same—Maintenance of children.
- 4-7. Same—Same—Jurisdiction retained for what purpose.
8. Same—Same—Liability of father for.
9. Alimony—Application for after decree—Jurisdiction.
10. Same—Modification of decree.
- 11, 12. Same—Minor children's rights not involved.
13. Alimony distinguished from maintenance.
- 14-17. Award of children—In general.
18. Same—Pending appeal.
19. Same—To father.
- 20-22. Same—To mother—Without maintenance.
- 23, 24. Same—Same—Until further order—Discretion.
25. Same—Same—By stipulation of parties.
26. Same—To both parties.
27. Same—To another.
28. Construction—Expenses for care and education.
- 29, 30. Same—"Direction" and "payment"—Limitation.
- 31, 32. Discretion of court—Limitation.
33. Duty of court when divorce denied.
34. Implied contract of father for necessities.
- 35, 36. Judgment or order—For maintenance of children.
37. Same—Amendment.
38. Same—Appeal lies from.
39. Same—Finality in trial court.
- 40, 41. Same—Jurisdiction to make provisions for children.
- 42-44. Same—Power of court—Limitation.
- 45-49. Same—Same—After judgment for final decree.
- 50-53. Liability of father—Custody awarded mother.
- 54-60. Modification of order—Jurisdiction.
61. Past and future support—Jurisdiction to grant.
62. Past expenses—Allowance for.
- 63-65. Pleading—As affecting jurisdiction.
- 66-68. Practice—Effect of appeal.
- 69-71. Stipulation of parents—Effect on children's rights.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Ex parte Gordan*, 95 Cal. 374, 377, 30 Pac. Rep. 561 (applied); *Howell vs. Howell*, 104 Cal. 45, 48, 43 Am. St. Rep. 70, 37 Pac. Rep. 770 (applied); *Schammel vs. Schammel*, 105 Cal. 258, 261, 38 Pac. Rep. 729 (construed and applied); *Younger vs. Younger*, 106 Cal. 377, 380, 39 Pac. Rep. 779 (construed and applied with other sections); *Gaston vs. Gaston*, 114 Cal. 542, 545, 55 Am. St. Rep. 86, 46 Pac. Rep. 609 (construed and applied); *Parkhurst vs. Parkhurst*, 118 Cal. 18, 21, 50 Pac. Rep. 9 (applied); *McKay vs. Superior Court San Francisco*, 120 Cal. 143, 146, 147, 52 Pac. Rep. 147, 40 L. R. A. 585 (construed and applied); *McKay vs. McKay*, 125 Cal. 65, 69, 70, 72, 57 Pac. Rep. 677 (construed and applied); *Shattuck vs. Shattuck*, 135 Cal. 192, 193, 67 Pac. Rep. 45 (construed and applied); *Vosburg vs. Vosburg*, 137 Cal. 493, 495, 70 Pac. Rep. 473 (construed and applied with other sections).

2. IN GENERAL.—Children are not parties to litigation for divorce.—*McKay vs. McKay*,

125 Cal. 65, 72, 57 Pac. Rep. 677; *Shattuck vs. Shattuck*, 135 Cal. 192, 193, 67 Pac. Rep. 45.

3. Maintenance of children, provision for not being incorporated in decree, after final judgment court is without jurisdiction to make order compelling either party to pay other for supporting them.—*Ibid.* See *Mass. Foss vs. Hartwell*, 168 Mass. 66, 60 Am. St. Rep. 366, 46 N. E. Rep. 411, 37 L. R. A. 589. *Ohio. Fulton vs. Fulton*, 52 Ohio St. 229, 49 Am. St. Rep. 720, 39 N. E. Rep. 729, 29 L. R. A. 678. *R. L. Brown vs. Smith*, 19 R. L. 319, 33 Atl. Rep. 466, 30 L. R. A. 680.

See post § 139 and note.

4. Same—Jurisdiction retained by court can be exercised only for their benefit and on their behalf.—*McKay vs. McKay*, 125 Cal. 65, 72, 57 Pac. Rep. 677.

5. Children having been sufficiently cared for by voluntary act of mother, or stranger, court is not empowered to compel father to reimburse for such expenses.—*McKay vs. McKay*, 125 Cal. 65, 72, 77, 57 Pac. Rep. 677. See *Loveren vs. Loveren*, 100 Cal. 493, 35 Pac. Rep. 87; *Lacey vs. Lacey*, 108 Cal. 45, 40 Pac. Rep. 1056.

6. Children having been awarded to mother on divorce, on her subsequent application, court may enter order for allowance for past as well as future support.—*Wilson vs. Wilson*, 45 Cal. 399, 402. See *McKay vs. Superior Court San Francisco*, 120 Cal. 143, 146, 52 Pac. Rep. 147, 40 L. R. A. 585.

7. Distinguished: *Chester vs. Chester*, 17 Mo. App. 659, 660 (application made five years after decree granting divorce).

8. Liability of father for may be enforced, in absence of provision in decree of divorce in relation thereto, particularly where their custody is not taken from him.—*McKay vs. Superior Court San Francisco*, 120 Cal. 143, 52 Pac. Rep. 147, 40 L. R. A. 585; *Gibson vs. Gibson*, 18 Wash. 489, 51 Pac. Rep. 1041, 40 L. R. A. 587; *Zilley vs. Dunwiddle*, 98 Wis. 423, 67 Am. St. Rep. 320, 74 N. W. Rep. 126, 40 L. R. A. 579.

9. ALIMONY.—Application for not made until after final judgment in divorce proceeding and until after time for appeal has expired, court has lost jurisdiction of parties; on such application is not necessary to determine what order court might make under this section with respect to custody, care, and education of children of marriage; mention of children in application does not affect rule (held, but not decided).—*Howell vs. Howell*, 104 Cal. 45, 48, 43 Am. St. Rep. 70, 37 Pac. Rep. 770; *McKay vs. McKay*, 125 Cal. 65, 68, 57 Pac. Rep. 677; *Shattuck vs. Shattuck*, 135 Cal. 192, 193, 67 Pac. Rep. 45. See *Erkenbrach vs. Erkenbrach*, 98 N. Y. 456; *Washburn vs. Catlin*, 97 N. Y. 623; *Chamberlain vs. Chamberlain*, 17 N. Y. Supp. 578, 579.

10. Modification of decree already made is different.—*McKay vs. Superior Court San Francisco*, 120 Cal. 143, 146-147, 52 Pac. Rep. 147, 40 L. R. A. 585.

11. Minor children's rights to maintenance and support, held not to be before court in ap-

plication for alimony by wife (suggested, but not decided).—*Howell vs. Howell*, 104 Cal. 45, 43 Am. St. Rep. 70, 37 Pac. Rep. 770. See *McKay vs. Superior Court San Francisco*, 120 Cal. 143, 147, 52 Pac. Rep. 147, 40 L. R. A. 585.

12. Character of order for alimony under review not changed by mention of children (suggested, but not decided).—*Howell vs. Howell*, 104 Cal. 45, 43 Am. St. Rep. 70, 37 Pac. Rep. 770.

13. ALIMONY DISTINGUISHED FROM MAINTENANCE.—Alimony, in its proper significance, is not maintenance to children, but to wife.—*Pretzinger vs. Pretzinger*, 45 Ohio St. 452, 4 Am. St. Rep. 542, 15 N. E. Rep. 471.

14. AWARD OF CHILD to care and custody in divorce proceeding is merely incidental to, and depends alone upon divorce proceedings; where decree of divorce is denied to both parties, court is not required to make any order for care and custody of children.—*Brent vs. Brent*, 102 Cal. 294, 296, 36 Pac. Rep. 672.

As to action of husband or wife for exclusive control of children without application for divorce, see post § 199 and note.

Inquiry into custody of minor children where parties live in state of separation without being divorced, see post § 241 and note.

15. Same.—Absence from state of children, they being domiciled elsewhere, court has no jurisdiction to make order regarding their care and custody; even though the prayer of complaint is for care and custody of children as well as for divorce.—*De La Montanya vs. De La Montanya*, 112 Cal. 101, 103, 44 Pac. Rep. 345, 32 L. R. A. 82.

16. See monographic note on jurisdiction in such cases, 16 L. R. A. 231.

17. Dissent of *McFarland, J.*, concurred in by *Beatty, C. J.*, and *Van Fleet, J.*, among other things, says: "In an action brought for both divorce and custody of children, the latter is incident of former, and court has jurisdiction over status founded on the relation of parent and child, as well as of status founded on relation of husband and wife, even as against bona fide non-resident domiciled elsewhere. In such case, actual physical presence of children is no more necessary for jurisdiction over status in one instance than is presence of husband necessary in other."—*Ibid.* p. 120.

18. Appeal pending from decree granting divorce and awarding custody of children, trial court has no jurisdiction to change or modify decree regarding custody of children.—*Vosburg vs. Vosburg*, 137 Cal. 493, 495-497, 70 Pac. Rep. 473. See *Ex parte Queirolo*, 119 Cal. 635, 51 Pac. Rep. 956; *Foster vs. Superior Court San Francisco*, 115 Cal. 279, 47 Pac. Rep. 58; *Schwarz vs. Superior Court San Francisco*, 111 Cal. 106, 43 Pac. Rep. 580; *Stateler vs. Superior Court of Alameda County*, 107 Cal. 536, 40 Pac. Rep. 949; *Ruggles vs. Superior Court San Francisco*, 103 Cal. 125, 37 Pac. Rep. 211.

See par. 37 this note; also *Code Civ. Proc.* § 946 and note.

19. Same.—To father.—Custody of a child or children may be awarded to father.—*Miller vs. Miller*, 83 Cal. 353, 356.

20. Same.—To mother.—Naturally and pre-

sumptively, mother is entitled to custody and care of minor children of tender years, but it is for trial court to say upon all evidence adduced at trial whether she is more worthy of such trust than the father.—*Luck vs. Luck*, 92 Cal. 652, 654, 655, 28 Pac. Rep. 787.

21. Custody awarded without maintenance being provided in decree, she cannot afterwards, on application to court, have award for maintenance.—See par. 9 this note.

22. Custody not awarded to mother by decree, does not preclude allowance for its support so long as it remains with and is supported by her.—*Anderson vs. Anderson*, 124 Cal. 48, 54-56, 71 Am. St. Rep. 17, 56 Pac. Rep. 630, 57 Id. 81.

23. SAME—MOTHER AWARDED CUSTODY UNTIL FURTHER ORDER of court, on motion and sufficient cause shown by evidence, court may modify its decree and award care and custody of children to former husband, until further order.—*Baker vs. Baker*, 139 Cal. 626, 627, 73 Pac. Rep. 469.

24. Subsequent application by former husband for care and custody of children, or any of them, is addressed to sound discretion of court.—*Dickerson vs. Dickerson*, 108 Cal. 351, 353, 41 Pac. Rep. 475.

25. By stipulation of parties, by terms of which mother was to maintain, nurture, and educate children out of money and property stipulated as settlement, court on subsequent application of mother cannot make order awarding sum to be paid by her late husband for their support, etc.—*Parkhurst vs. Parkhurst*, 118 Cal. 18, 50 Pac. Rep. 9.

26. SAME—TO BOTH PARENTS.—They may award custody of some of children to father and others to mother.—*Eidenmuller vs. Eidenmuller*, 37 Cal. 364, 365.

27. SAME—TO ANOTHER without proceedings under § 1747 et seq. of the *Code of Civil Procedure*, is not valid objection to order.—*Ex parte Gordan*, 95 Cal. 374, 377, 30 Pac. Rep. 561 (awarding child to grandmother).

28. CONSTRUCTION—Provision for reasonable expenses to be incurred in care, custody, and education of children, within intention of legislature in forming this section.—*McKay vs. Superior Court San Francisco*, 120 Cal. 143, 52 Pac. Rep. 147, 40 L. R. A. 585; *McKay vs. McKay*, 125 Cal. 65, 69, 57 Pac. Rep. 677. See *Erkenbrach vs. Erkenbrach*, 96 N. Y. 456; *Washburn vs. Catlin*, 97 N. Y. 623; *Chamberlain vs. Chamberlain*, 17 N. Y. Supp. 578, 579.

29. Provisions of section are prospective and use of term "direction" instead of "payment" implies that action of court is to be limited to "care, custody, and education" which children are subsequently to receive under its directions.—*McKay vs. McKay*, 125 Cal. 65, 70, 57 Pac. Rep. 677.

30. Prior to its order, under this section, court could give no direction for care and education of children, and in absence of such direction no liability would exist against husband and no obligation could be created against him.—*McKay vs. McKay*, 125 Cal. 65, 70, 57 Pac. Rep. 677.

31. DISCRETION OF COURT limited to care,

custody, and education children are subsequently to receive under its direction.—*McKay vs. McKay*, 125 Cal. 65, 69, 57 Pac. Rep. 677.

32. Discretion of court in determining the proper custody of children will not be disturbed unless it clearly appears discretion has been abused.—*Dickerson vs. Dickerson*, 108 Cal. 351, 353, 41 Pac. Rep. 475.

33. DUTY OF COURT WHEN DIVORCE DENIED.—Custody of children is an element of case entirely incidental to main relief sought, and when decree of divorce is denied either of parties, court is not required to make any order as to care and custody of children.—*Brenot vs. Brenot*, 102 Cal. 294, 296, 36 Pac. Rep. 672.

As to awarding custody of children, see para. 14-27 this note.

34. IMPLIED CONTRACT FOR NECESSARIES IMPOSED BY LAW UPON FATHER where minor, because of cruelty and improper conduct of parent, is forced on to the world.—*Pretzinger vs. Pretzinger*, 45 Ohio St. 452, 4 Am. St. Rep. 542, 15 N. E. Rep. 471; *Weeks vs. Merrow*, 40 Me. 151. See *Stanton vs. Willson*, 3 Day (Conn.) 37, 3 Am. Dec. 255; *Dennis vs. Clark*, 3 Cush. (Mass.) 347, 352, 48 Am. Dec. 671.

As to obligation of parents for support and education of children, see post § 196 and note.

35. JUDGMENT OR ORDER—Order exclusively for maintenance and support of children is radically different from one with reference to alimony to wife.—*McKay vs. Superior Court San Francisco*, 120 Cal. 143, 146, 52 Pac. Rep. 147, 40 L. R. A. 585.

As to modification of order, see para. 10, 56 this note.

36. Order valid though no proceedings were had under Code of Civil Procedure, § 1747 et seq.—*Ex parte Gordan*, 95 Cal. 374, 377, 30 Pac. Rep. 561.

37. Amendment of judgment awarding custody of minor children in divorce proceeding while appeal is pending cannot deprive appellate court of jurisdiction.—*Savings Union vs. Myers*, 72 Cal. 161, 163, sub nom. *San Francisco Savings Union vs. Myers*, 13 Pac. Rep. 403; *Vosburg vs. Vosburg*, 137 Cal. 493, 496, 70 Pac. Rep. 473.

See par. 18 this note.

38. Appeal lies from order awarding custody of minor children in divorce proceeding, and effect of such appeal is to stay all further proceedings, or upon matters expressed therein.—*Dennery vs. Superior Court Sacramento*, 84 Cal. 7, 9, 24 Pac. Rep. 147; *Pennie vs. Superior Court San Francisco*, 89 Cal. 31, 33, 26 Pac. Rep. 617; *Vosburg vs. Vosburg*, 137 Cal. 493, 496, 70 Pac. Rep. 473.

See Code Civ. Proc. § 946 and note.

39. Finality.—Judgment or order of superior court final so far as that court is concerned, and cannot be further disturbed by said court except upon motion for new trial, or some other express statutory proceeding.—*Vosburg vs. Vosburg*, 137 Cal. 493, 496, 70 Pac. Rep. 473.

See par. 18 this note; also Code Civ. Proc. § 946 and note.

40. Jurisdiction of court to make provision

for minor children under this section is not dependent upon averments in complaint of husband's resources any more than its power to dispose of children depends upon allegation of relative fitness of parents for their custody.—*Ex parte Gordan*, 95 Cal. 374, 377, 30 Pac. Rep. 561; *Gaston vs. Gaston*, 114 Cal. 542, 545, 55 Am. St. Rep. 86, 46 Pac. Rep. 609.

41. Jurisdiction conferred by section subsists so long only as status of child remains that of child of the parties "of the marriage."—*Younger vs. Younger*, 106 Cal. 377, 380, 39 Pac. Rep. 779.

42. Power of court to make orders providing for custody, care, and education of minor children is limited to conditions and circumstances existing at time they are made; and court cannot then anticipate what may possibly thereafter happen and provide for future contingencies.—*Schammel vs. Schammel*, 105 Cal. 258, 261, 33 Pac. Rep. 729.

43. Section authorizes court in action for divorce to make any necessary or proper provision for custody, care, and education of minor children of marriage.—*Schammel vs. Schammel*, 105 Cal. 258, 261, 33 Pac. Rep. 729.

44. Court cannot, in making its orders for custody and support of minor children, under this section, anticipate that mother might die during minority of child, and that a guardian or person other than father might thereafter be appointed, and then proceed to direct allowance made to mother for support of child be paid such guardian.—*Schammel vs. Schammel*, 105 Cal. 258, 261, 33 Pac. Rep. 729.

45. Same.—After final judgment for divorce court may make order for maintenance of children.—*McKay vs. Superior Court San Francisco*, 120 Cal. 143, 146, 52 Pac. Rep. 147, 40 L. R. A. 585.

46. Maintenance of minor children, applied for long after final decree of divorce between parents has been entered, may be granted.—*Wilson vs. Wilson*, 45 Cal. 399; *McKay vs. Superior Court San Francisco*, 120 Cal. 143, 146, 52 Pac. Rep. 147, 40 L. R. A. 585. *N. Y. Erkenbrach vs. Erkenbrach*, 96 N. Y. 456; *Washburn vs. Catlin*, 97 N. Y. 623. *Ohio, Pretzinger vs. Pretzinger*, 45 Ohio St. 452, 4 Am. St. Rep. 542, 15 N. E. Rep. 471. *Vt. Buckminster vs. Buckminster*, 38 Vt. 248, 38 Am. Dec. 652. See *Holt vs. Holt*, 42 Ark. 495; *Plaster vs. Plaster*, 47 Ill. 290.

47. Section authorizes payment of money for maintenance of children to be made after final judgment, and that such payments can be enforced against father.—*McKay vs. Superior Court San Francisco*, 120 Cal. 143, 146, 52 Pac. Rep. 147, 40 L. R. A. 585. *N. Y. Erkenbrach vs. Erkenbrach*, 96 N. Y. 456; *Washburn vs. Catlin*, 97 N. Y. 623. *Ohio, Pretzinger vs. Pretzinger*, 45 Ohio St. 452, 4 Am. St. Rep. 542; 15 N. E. Rep. 471. *Vt. Buckminster vs. Buckminster*, 38 Vt. 248, 38 Am. Dec. 652. See *Holt vs. Holt*, 42 Ark. 495; *Plaster vs. Plaster*, 47 Ill. 290.

48. Fact that there has been judgment of divorce with alimony and custody of minor children to wife, will not of itself operate as bar to subsequent claim against husband for children's maintenance.—*Pretzinger vs. Pretz-*

inger, 45 Ohio St. 452, 4 Am. St. Rep. 542, 15 N. E. Rep. 471.

49. Decree of divorce making no provision for maintenance of minor children, the court has no jurisdiction to subsequently make such provision.—*Shattuck vs. Shattuck*, 135 Cal. 192, 193, 67 Pac. Rep. 45; *McKay vs. McKay*, 125 Cal. 65, 72, 57 Pac. Rep. 677.

50. **LIABILITY OF FATHER.—Custody awarded to mother.**—Liability of father for care and support of children after decree of divorce, in which their custody has been awarded to mother, cannot be enforced by action brought against him by strangers, or by the mother.—*McKay vs. McKay*, 125 Cal. 65, 71, 57 Pac. Rep. 677. *Comm. Finch vs. Finch*, 22 Conn. 411. *Ind. Ramsey vs. Ramsey*, 121 Ind. 215, 23 N. E. Rep. 69, 6 L. R. A. 682. *Kam. Harris vs. Harris*, 5 Kan. 46. *Mass. Hancock vs. Merrick*, 64 Mass. (10 Cush.) 41. *Me. Hall vs. Green*, 87 Me. 122, 47 Am. St. Rep. 311, 32 Atl. Rep. 796. *R. L. Brown vs. Smith*, 19 R. I. 319, 33 Atl. Rep. 466, 30 L. R. A. 680.

52. *Contra: Pretzinger vs. Pretzinger*, 45 Ohio St. 452, 4 Am. St. Rep. 542, 15 N. E. Rep. 471.

53. Maintenance, after decree of divorce in favor of husband, in which custody of minor children is awarded to wife without any provision for their support, cannot be enforced against husband, and he will not be liable thereafter for necessities furnished, where there is no proof that he promised to pay therefor.—*Fulton vs. Fulton*, 53 Ohio St. 229, 49 Am. St. Rep. 720, 29 N. E. Rep. 729, 29 L. R. A. 678.

54. **MODIFICATION OF ORDER.—Jurisdiction and powers of court** to modify decree awarding custody of minor, when child has been subsequently adopted in conformity with code, must be construed with and in view of the rights conferred by provisions of code with reference to adoption.—*Younger vs. Younger*, 106 Cal. 377, 380, 33 Pac. Rep. 779.

55. When child is awarded to custody of mother in decree of divorce, and afterwards in proper form, and with consent of its mother, child was adopted by mother's grandfather, it is held in application by father of child for modification of former decree awarding custody of child, that court is without jurisdiction.—*Younger vs. Younger*, 106 Cal. 377, 380, 33 Pac. Rep. 779.

56. Where court has relegated custody, maintenance, and control of minor children to mother and provided that she should be charged with education and maintenance of them at her own proper cost, and freed from any charges therefor against plaintiff, and where accepted terms of stipulation between parties as to division of property is embodied in decree, and where settlements between parties is equitable one, court will not modify same upon motion of wife, and cast burden for maintenance of children upon husband where, by terms of agreement, wife receives major part of property, which is sufficient to properly maintain and educate children.—*Parkhurst vs. Parkhurst*, 118 Cal. 18, 21, 50 Pac. Rep. 9.

57. Jurisdiction which court retains in orig-

inal case, either by expressed reservation in its decree or which it has by authority of statute, to modify its judgment with reference to custody and education of children, or to make new order in reference thereto, is not for purpose of reimbursing wife for any expenditure she may have voluntarily made in their behalf, but to provide for such expenses as may be subsequently incurred by reason of direction that may be given regarding such care and education.—*McKay vs. McKay*, 125 Cal. 65, 72, 57 Pac. Rep. 677.

58. Section authorizing court to vary or modify its decree after judgment has been limited to directions therein for custody, care, and education of children; its power to provide for their maintenance must be exercised at time of decree of divorce is granted.—*Shattuck vs. Shattuck*, 135 Cal. 192, 193, 67 Pac. Rep. 45.

59. Provision of section with reference to modification and vacation of decrees with reference to providing for minor children in cases of divorce has no reference to subject of appeals, or to the effect of an appeal—all of which is governed by Code Civil Procedure.—*Vosburg vs. Vosburg*, 137 Cal. 493, 495, 70 Pac. Rep. 473.

60. Purpose of section with reference to modification and vacation of decrees relating to provisions made for minor children in divorce proceedings is merely to relieve superior court of limitation of final judgment with reference to its power in matter of care and custody of minor children of parties, and to provide that it might change or vacate any judgment or order on that subject without any motion for new trial. But it clearly applies only to case where superior court has jurisdiction over judgment or order in question, and not to case where such jurisdiction has been, by appeal, removed to appellate court.—*Vosburg vs. Vosburg*, 137 Cal. 493, 495, 70 Pac. Rep. 473.

61. **PAST AND FUTURE SUPPORT.**—Court may make an order for past and future support of child.—*Wilson vs. Wilson*, 45 Cal. 399, 402, 403.

62. **PAST EXPENSES.**—Jurisdiction retained over minors, or which court is authorized to exercise in divorce proceedings between parents, is to be exercised in behalf of minors, and if they have already been sufficiently cared for by voluntary act of mother, or of strangers, the court is not empowered to compel father to reimburse these persons for such expenses.—*Loveren vs. Loveren*, 100 Cal. 493, 495, 35 Pac. Rep. 87; *Lacey vs. Lacey*, 108 Cal. 45, 46, 40 Pac. Rep. 1056; *McKay vs. McKay*, 125 Cal. 65, 72, 57 Pac. Rep. 677.

63. **PLEADING.**—Jurisdiction under this section to make a proper order for custody of a child during divorce proceeding does not depend upon specific allegations as to fitness of respective parties, or ability or willingness to care for offspring, nor upon specific prayer for custody of child.—*Ex parte Gordan*, 95 Cal. 374, 377, 30 Pac. Rep. 561.

64. Fact that pleading would seem to indicate that one of parties was oblivious to child's existence, and that both were indifferent as to what should become of her, does

not prevent court from taking care of her interest.—*Ex parte Gordan*, 95 Cal. 374, 377, 30 Pac. Rep. 561.

65. In actions for divorce court may always make such orders for custody and maintenance of minor children of the marriage as may seem to be necessary, although pleadings contain no specific allegation as to fitness of respective parties, or as to their ability or willingness to care for their offspring, nor specific prayer for custody of child.—*Ex parte Gordan*, 95 Cal. 374, 377, 30 Pac. Rep. 561.

66. PRACTICE—Effect of appeal from order awarding custody of children is to remove special matter of adjudication from jurisdiction of court below pending appeal.—*Ex parte Queirolo*, 119 Cal. 635, 51 Pac. Rep. 956; *Vosburg vs. Vosburg*, 137 Cal. 493, 495, 70 Pac. Rep. 473. Court say that the following cases are not to be distinguished in principle: *Ruggles vs. Superior Court San Francisco*, 103 Cal. 125, 37 Pac. Rep. 211; *Stateler vs. Superior Court Alameda County*, 107 Cal. 536, 40 Pac. Rep. 949; *Schwarz vs. Superior Court San Francisco*, 111 Cal. 106, 43 Pac. Rep. 580; *Foster vs. Superior Court San Francisco*, 115 Cal. 279, 47 Pac. Rep. 58.

67. Effect of appeal from judgment is purely matter of statutory regulation, to be determined by construction of the statute under which appeal is taken, and by terms of which, when clear and unambiguous, court is concluded.—*Foster vs. Superior Court San Francisco*, 115 Cal. 279, 282, 47 Pac. Rep. 58.

See Code Civ. Proc. § 946 and note.

§ 139. SUPPORT OF WIFE AND CHILDREN ON DIVORCE OR SEPARATION GRANTED TO WIFE. Where a divorce is granted for an offense of the husband, the court may compel him [1] to provide for the maintenance of the children of the marriage, and [2] to make such suitable allowance to the wife for her support, [a] during her life, or [b] for a shorter period, as the court may deem just, having regard to the circumstances of the parties respectively; and the court may, from time to time, modify its orders in these respects.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
- 2, 3. Alimony defined—As used in other states.
- 4-7. Same—As used in California.
- 8-10. Same—Error in using word—Effect of use.
- 11, 12. Allowance as "debt."
13. Same—Attachment of allowance.
- 14, 15. Antecedent debts of wife.
- 16-18. Construction—Contemplates alimony—Modification.
- 19-22. Determining allowance—Earnings of husband.
- 23, 24. Diminishing and increasing allowance.
25. Diversion of fund to other uses.
- 26-32. Enforcement of order—Contempt proceedings.
- 33, 34. Same—Inability to pay as purging contempt.
35. Same—Review of proceedings.
- 36, 37. Execution to enforce order—Monthly allowance.
- 38-41. Gross sum and instalments.
42. Judgment—In general.

68. Pending appeal from order providing for maintenance of minor children under this section, superior court has no more power to modify such order than it would have to proceed and enforce judgment in its entirety.—*Ruggles vs. Superior Court San Francisco*, 103 Cal. 125, 37 Pac. Rep. 211; *Vosburg vs. Vosburg*, 137 Cal. 493, 496, 70 Pac. Rep. 473.

See Code Civ. Proc. § 946.

69. STIPULATION OF PARENTS CANNOT DIVEST COURT OF AUTHORITY to modify decree providing for custody of minor children in proper case.—*Wilson vs. Wilson*, 45 Cal. 399; *Parkhurst vs. Parkhurst*, 118 Cal. 13, 22, 50 Pac. Rep. 9.

70. Stipulation between parties with reference to division of property upon which decree of court providing for custody of children was based, is held to be tantamount to agreed statement of facts, and not stipulation modifying or changing judgment of rights of parties; on contrary, it supports and upholds the judgment.—*Parkhurst vs. Parkhurst*, 118 Cal. 13, 22, 50 Pac. Rep. 9.

71. Where on settlement of the community property wife was awarded unencumbered property exceeding \$10,000 in value, husband taking only sufficient to offset his debts, and parties entered into agreement casting burden of supporting and educating children upon mother, it was held that application by her to have burden of educating and supporting children cast upon father, is without merit and properly refused.—*Parkhurst vs. Parkhurst*, 118 Cal. 13, 22, 50 Pac. Rep. 9.

- 43-48. Same—Alteration, amendment and modification.
- 49, 50. Same—Conclusiveness of.
- 51, 52. Same—Failure to specify period of maintenance, etc.
53. Same—Finality of.
- 54, 55. Same—Future earnings.
56. Same—Interest on.
- 57, 58. Same—Lien on husband's property.
59. Same—Same—Duration of.
60. Same—Same—Time to enforce.
- 61, 62. Same—Omissions in.
- 63-67. Same—Wife as judgment creditor.
- 68-71. Jurisdiction—After decree settling rights.
- 72, 73. Offenses of husband.
74. Property in husband not prerequisite.
75. Refused—Where wife at fault.
76. Same—Where wife sufficiently supplied.
- 77-81. Support of children—Compelling.
- 82, 83. Review of allowance—Reduction.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Everett vs. Everett*, 53

Cal. 383, 384 (construed and applied); *Ex parte Cottrell*, 59 Cal. 417, 418 (applied); *Sharon vs. Sharon*, 75 Cal. 1, 46, 16 Pac. Rep. 345 (referred to in discussion); *Robinson vs. Robinson*, 79 Cal. 511, 515, 21 Pac. Rep. 1095 (construed and applied); *Van Cleave vs. Bucher*, 79 Cal. 600, 602, 21 Pac. Rep. 954 (applied with § 1007 Code Civ. Proc.); *In re Spencer*, 82 Cal. 110, 112, 113, 23 Pac. Rep. 37 (construed and applied with other sections); *Ex parte Spencer*, 83 Cal. 460, 463, 17 Am. St. Rep. 266, 23 Pac. Rep. 395 (construed and applied); *Ex parte Hart*, 94 Cal. 254, 255, 29 Pac. Rep. 774 (applied); *Ex parte Gordan*, 95 Cal. 374, 377, 30 Pac. Rep. 561 (applied with other sections); *Wolff vs. Wolff*, 102 Cal. 433, 440, 36 Pac. Rep. 767, 1037 (applied); *Howell vs. Howell*, 104 Cal. 45, 47, 43 Am. St. Rep. 70, 37 Pac. Rep. 770 (construed and held not applicable); *Schammel vs. Schammel*, 105 Cal. 258, 261, 38 Pac. Rep. 729 (construed and applied); *Gaston vs. Gaston*, 114 Cal. 542, 545, 547, 55 Am. St. Rep. 86, 46 Pac. Rep. 609 (construed and applied with other sections); *Huellmantel vs. Huellmantel*, 124 Cal. 583, 588, 57 Pac. Rep. 582 (construed and applied); *McKay vs. McKay*, 125 Cal. 65, 68, 57 Pac. Rep. 677 (construed with other sections).

2. **ALIMONY DEFINED**—As used in other states alimony is very different thing from what it is under our codes. Under the statutes of most, if not all, the other states, alimony is an allowance for support and maintenance, having no other purpose, and is provided for no other object.—*Romaine vs. Chauncey*, 129 N. Y. 566, 26 Am. St. Rep. 544, 29 N. E. Rep. 826, 14 L. R. A. 712.

3. **Alimony**, like the *alimentum* of the Civil Law, from which the word was evidently derived, respects a provision for food, clothing, and habitation, or necessary support of wife after marriage-bond has been severed.—*Romaine vs. Chauncey*, 129 N. Y. 566, 26 Am. St. Rep. 544, 29 N. E. Rep. 826, 14 L. R. A. 712.

4. **SAME—IN CALIFORNIA**.—The word "alimony" as used in California codes, is to be distinguished from "maintenance," and failure to observe this distinction leads to confusion. Accurately, "alimony" is allowance made pending action to secure divorce, or permanent support without prayer for divorce; "maintenance" is allowance made for permanent support in decree after hearing. The latter is often inaccurately termed "permanent alimony"; there is no such thing in this state.—See ante § 137 note para. 2, 3.

5. **Alimony**, in its strict technical course, proceeds only from husband to wife, and where relation of husband and wife does not exist, strictly speaking, there can be no alimony.—*Ex parte Spencer*, 83 Cal. 460, 463, 17 Am. St. Rep. 266, 23 Pac. Rep. 395.

6. **Alimony as used by court** is confined to strict legal sense, and applies to provision which court might make for support of wife pendente lite.—*Ex parte Spencer*, 83 Cal. 460, 463, 17 Am. St. Rep. 266, 23 Pac. Rep. 395.

7. Word "alimony" has been frequently used by the courts as a mere name for another and different allowance, made and authorized to be made under this section.—*Ex parte Spencer*, 83 Cal. 460, 463, 17 Am. St. Rep. 266, 23 Pac. Rep. 395.

8. **Same—Error in using word "alimony"** with reference to suitable allowance to wife under this section is simple misnomer and would not justify a court in setting it aside, even upon appeal, much less upon application for discharge upon habeas corpus.—*Ex parte Spencer*, 83 Cal. 460, 464, 17 Am. St. Rep. 266, 23 Pac. Rep. 395.

9. **Allowance for future support of wife** is something more than consideration of or substitution for her interests in community property, and is compensation for wrong done to her.—*Ex parte Spencer*, 83 Cal. 460, 464, 17 Am. St. Rep. 266, 23 Pac. Rep. 395.

As to suit by wife for maintenance without prayer for divorce, see ante § 137 note par. 74 et seq.

10. "Necessaries" as used with reference to support of wife after divorce, more or less relate to condition, habit of life, and social position of wife, and is graded in judgment of court of equity somewhat by regard for these circumstances, but never loses its distinctive character.—*Romaine vs. Chauncey*, 129 N. Y. 566, 26 Am. St. Rep. 544, 29 N. E. Rep. 826, 14 L. R. A. 712.

11. **ALLOWANCE AS "DEBT."**—Allowance becomes debt only in sense that general duty over which husband had discretionary control has been changed to specific duty over which, not he, but court presides.—*Romaine vs. Chauncey*, 129 N. Y. 566, 26 Am. St. Rep. 544, 29 N. E. Rep. 826, 14 L. R. A. 712.

12. **Allowance to wife after divorce** is not in the nature of debt but continuance of husband's duty to support wife beyond the decree dissolving the relation; while the law compels the performance of this duty it does not change its character from what it was before the decree.—*Romaine vs. Chauncey*, 129 N. Y. 566, 26 Am. St. Rep. 544, 29 N. E. Rep. 826, 14 L. R. A. 712.

13. **Same—Attachment of allowance to wife**, either for purpose of defraying expenses of suit, or for maintaining herself and children during its pendency, or for maintenance of herself and children after divorce, is not permissible, it not being subject to payment of debt accruing before allowance was awarded.—*Romaine vs. Chauncey*, 129 N. Y. 566, 26 Am. St. Rep. 544, 29 N. E. Rep. 826, 14 L. R. A. 712.

See par. 14 this note.

14. **ANTECEDENT DEBTS OF WIFE**.—After divorce husband is not bound to pay wife's antecedent debts out of means furnished for her support nor otherwise.—*Romaine vs. Chauncey*, 129 N. Y. 566, 26 Am. St. Rep. 544, 29 N. E. Rep. 826, 14 L. R. A. 712.

15. **Decree of divorce** can not impose upon husband obligation under which he never stood, such as furnishing of fund for payment of his wife's antecedent debts.—*Romaine vs. Chauncey*, supra.

16. **CONSTRUCTION**.—Section clearly contemplates right to alimony, as well as other financial and property rights, which shall have been presented and litigated in action for divorce, as established by judgment; and where right to alimony has thus been established, amount may be changed by modification of the order.—*Howell vs. Howell*, 104 Cal. 45, 47, 43 Am. St. Rep. 70, 37 Pac. Rep. 770.

17. Where no alimony is awarded in decree of divorce, there is nothing to modify within meaning of this section.—Howell vs. Howell, 104 Cal. 45, 47, 43 Am. St. Rep. 70, 37 Pac. Rep. 770; McKay vs. Superior Court San Francisco, 120 Cal. 143, 147, 52 Pac. Rep. 147, 40 L. R. A. 585.

18. Even though there is judgment of divorce settling property rights of parties.—Howell vs. Howell, supra.

19. DETERMINATION OF ALLOWANCE.—Earnings of husband, or his ability to earn money may be taken into consideration by court in fixing allowance.—Eldenmuller vs. Eldenmuller, 37 Cal. 364; Ex parte Spencer, 83 Cal. 460, 465, 17 Am. St. Rep. 266, 23 Pac. Rep. 395.

20. As to circumstances of defendant being taken into consideration in fixing allowance, see ante § 137 note par. 83.

21. Future earnings, allowance of alimony and maintenance of.—Ex parte Spencer, 83 Cal. 460, 465, 17 Am. St. Rep. 270, 23 Pac. Rep. 395 (Paterson, J., dissenting); Gaston vs. Gaston, 114 Cal. 542, 547, 55 Am. St. Rep. 86, 46 Pac. Rep. 609 (present separate or community property of husband not necessary to decree).

See para. 54, 55 this note; also ante § 137 note para. 80-82.

22. Doubtful; In re Spencer, 82 Cal. 110, 113, 23 Pac. Rep. 37.

23. DIMINISHING OR INCREASING ALLOWANCE.—Allowances made under this section may be subsequently diminished or increased as, in court's opinion, changed circumstances of parties shall warrant.—Ex parte Cottrell, 59 Cal. 417; Ex parte Spencer, 83 Cal. 460, 465, 17 Am. St. Rep. 266, 23 Pac. Rep. 395.

24. As to when modification may be made, see par. 18 this note.

25. DIVERSION OF FUND TO OTHER USES.—Husband has right to insist that allowance made by him to wife shall not be diverted to use for which he did not in fact supply it, and was under no obligation to supply it, and he may resist claim upon it which, as against him, is wholly unauthorized, and complete perversion both of decree and of his duty.—Romaine vs. Chauncey, 129 N. Y. 566, 26 Am. St. Rep. 544, 29 N. E. Rep. 826, 14 L. R. A. 712.

26. ENFORCEMENT OF ORDER BY CONTEMPT PROCEEDINGS.—Compliance with order of court under provisions of this section may be enforced by imprisonment on contempt.—Ex parte Perkins, 18 Cal. 60; Ex parte Cottrell, 59 Cal. 417; Ex parte Spencer, 83 Cal. 460, 465, 17 Am. St. Rep. 266, 23 Pac. Rep. 295; Ex parte Gordan, 95 Cal. 374, 377, 30 Pac. Rep. 561; Foley vs. Foley, 120 Cal. 33, 39, 65 Am. St. Rep. 147, 52 Pac. Rep. 122. See Stonehill vs. Stonehill, 146 Ind. 445, 447, 45 N. E. Rep. 600; State ex rel. Huber vs. Judge, 49 La. Ann. 1503, 1509, 22 So. Rep. 887.

27. Commitment for contempt in failing to pay alimony out of property acquired subsequent to dissolution of marriage is void.—In re Spencer, 82 Cal. 110, 113, 23 Pac. Rep. 37.

28. Power to punish is regulated by statute in this land vs. Galland, 44 Cal. 475,

478, 13 Am. Rep. 167; Johnson vs. Superior Court San Francisco, 63 Cal. 578, 579; In re Jessup, 81 Cal. 408, 482, 21 Pac. Rep. 976, 22 Id. 742, 1028, 6 L. R. A. 594.

29. This statute is limitation upon power formerly exercised by courts.—Galland vs. Galland, supra.

30. Same—Child misnamed in order granting monthly allowance, although names are not idem sonans, will be immaterial, where child is referred to throughout the proceedings as the sole issue.—Ex parte Gordan, 95 Cal. 374, 378, 30 Pac. Rep. 561.

31. Same—Failure of order to specify period for which alimony is to be paid does not affect jurisdiction of court to enforce an order awarding alimony under this section by process of contempt.—Ex parte Hart, 94 Cal. 254, 255, 29 Pac. Rep. 774.

32. Same—Habeas corpus will not lie to commitment for contempt, where court has found defendant has ability to pay.—Ex parte Spencer, 83 Cal. 460, 466, 17 Am. St. Rep. 266, 23 Pac. Rep. 395. See Ex parte Kellogg, 64 Cal. 343, 345, 30 Pac. Rep. 1030; Hurd vs. Hurd, 63 Minn. 443, 445, 65 N. W. Rep. 728.

See par. 35 this note.

33. SAME—INABILITY TO PAY AS PURGING CONTEMPT.—Inability on part of husband to pay sum directed by court to be paid, purges him of contempt in failing to obey order of court.—Galland vs. Galland, 44 Cal. 475, 13 Am. Rep. 167; Ex parte Cottrell, 59 Cal. 417; In re Wilson, 75 Cal. 580, 17 Pac. Rep. 698; Ex parte Spencer, 83 Cal. 460, 465, 17 Am. St. Rep. 266, 23 Pac. Rep. 395; Ex parte Gordan, 95 Cal. 374, 378, 30 Pac. Rep. 561. See Ex parte Hardy, 68 Ala. 398; Hendryx vs. Fitzpatrick, 19 Fed. Rep. 810, 814.

34. Inability voluntarily created, it will be otherwise.—See Ex parte Kellogg, 64 Cal. 343, 345, 30 Pac. Rep. 1030.

35. SAME—REVIEW OF PROCEEDINGS.—Court has jurisdiction on habeas corpus to test matter of committing defendant for contempt in failing to pay alimony where facts show order to be void appear upon face of record.—In re Spencer, 82 Cal. 110, 113, 23 Pac. Rep. 37.

See par. 32 this note.

36. EXECUTION TO ENFORCE ORDER.—Execution issued under order incident to decree of divorce is not rendered invalid because issued before defendant had been given opportunity to show cause why he had not obeyed order of court.—Van Cleave vs. Bucher, 79 Cal. 600, 602, 21 Pac. Rep. 954.

37. Monthly allowances, right to execution for does not accrue until they become due.—Gaston vs. Gaston, 114 Cal. 542, 547, 55 Am. St. Rep. 86, 46 Pac. Rep. 609.

38. GROSS SUM AND INSTALMENTS.—In discretion of court, allowances may be ordered paid in one gross sum instead of being made payable at stated periods.—Robinson vs. Robinson, 79 Cal. 511, 516, 21 Pac. Rep. 1095. See Ala. Jeter vs. Jeter, 36 Ala. 391. Conn. Sanford vs. Sanford, 5 Day (Conn.) 353; Lyon vs. Lyon, 21 Conn. 185. Ill. Wheeler vs. Wheeler 18 Ill. 39. Ind. Hedrick vs. Hedrick, 28 Ind. 291. Mass. Burrows vs. Purple, 107 Mass. 432. N. H. Parsons vs. Parsons, 9 N. H. 309, 33 Am.

48. Custody of children awarded mother in decree of divorce, where no provision is made for their support, decree cannot be subsequently modified on application of mother, under this section, but provisions of § 138, ante, gives jurisdiction to court to make subsequent direction for care and education of children, on application in their behalf—*McKay vs. McKay*, 125 Cal. 65, 69, 67 Pac. Rep. 677.

49. Same—Consistency of.—Decree of divorce, without provision for maintenance, is final and concludes parties in regard thereto—*Kamp vs. Kamp*, 69 N. Y. 212; *Erkenbrach vs. Erkenbrach*, 86 N. Y. 466; *Cullen vs. Cullen*, 66 N. Y. Super. 346; *Park vs. Park*, 18 Hun (N. Y.) 467; *Rockwell vs. Carpenter*, 25 Hun (N. Y.) 682; *Winton vs. Winton*, 31 Hun (N. Y.) 290, 12 App. N. C. (N. Y.) 159; *Adams vs. Ash*, 11 N. Y. St. Rep. 622.

50. Compare: *Kerr vs. Kerr*, 8 Daly (N. Y.) 11 N. Y. St. Rep. 622.

51. Same—Failure to specify duration of payment of maintenance does not avoid decree.—*Ex parte Hart*, 94 Cal. 254, 255, 29 Pac. Rep. 774.

52. Failure to correctly designate name of child to be supported does not avoid, when.—See par. 30 this note.

53. Finality of.—Judgment in a divorce suit settling property rights of parties after time for appealing therefrom has expired, is final as any other kind of judgment, except so far as power to modify it is given by statutory provision—*Howell vs. Howell*, 104 Cal. 45, 47, 43 Am. St. Rep. 70, 37 Pac. Rep. 770.

54. Future earnings of divorced husband may be taken for support of former wife (inter alia).—*Eidenmuller vs. Eidenmuller*, 37 Cal. 364, 365; *Ex parte Spencer*, 83 Cal. 460, 464, 465, 17 Am. St. Rep. 266, 23 Pac. Rep. 395. But see in re *Spencer*, 83 Cal. 110, 112, 23 Pac. Rep. 37.

55. "Under these provisions divorced man does same thing. The man upon whom divorce has been released from all duties toward him, shall be devoted to her support, and his lawful wife and their children must take what is left. If he refuse to take bread from them and give it to her who owes him no duty, he may be thrown into jail, and be thus deprived of power to support any of them. Such a law as this—a law which permits or encourages a man to assume responsibilities of husband and father, and imposes at same time such inconsistent conditions, and such unequal and inequitable burdens—ought not to blister the pages of our statute-book. Either absolute divorce should be denied and privilege of re-marriage be abolished, or it should be provided—as I believe our laws under proper construction do now provide—that only property, separate and community, in existence at time marriage is dissolved, may be taken for support of divorced wife" (*Paterson*, J., dissenting).

Dec. 362; *Whittier vs. Whittier*, 31 N. H. 452, 248, 88 Am. Dec. 652.

38. *Vt. Buckminster vs. Buckminster*, 38 Vt. Williams vs. Platt, 9 Ohio 37, S. D. 1841, 61 N. W. Rep.

39. Gross sum allowed by court under provisions of this section may be required to be paid to plaintiff for her support.—*Robinson vs. Robinson*, 79 Cal. 511, 515, 21 Pac. Rep. 1095.

Practically same construction of similar statutes in other states.—See *Burrows vs. Purple*, 107 Mass. 428, 432.

40. Monthly installments.—Allowances made by court under this section may take form of pecuniary payments at successive monthly intervals.—*Gaston vs. Gaston*, 114 Cal. 542, 547, 55 Am. St. Rep. 86, 46 Pac. Rep. 609.

41. Allowance under this section may be exacted of husband monthly, after divorce, which allowance may be subsequently increased or diminished as court may deem just.—*Ex parte Cottrell*, 69 Cal. 417, 419; *Ex parte Spencer*, 83 Cal. 460, 463, 17 Am. St. Rep. 266, 23 Pac. Rep. 395.

See pars. 18, 43, 45 this note.

42. JUDGMENT—In general.—Order for permanent allowance may provide for payment of such allowance upon appearance of defendant in the action, or from its commencement.—*Wilson vs. Wilson*, 45 Cal. 399, 402; *Sharon vs. Sharon*, 76 Cal. 1, 46, 16 Pac. Rep. 345.

43. Alteration, amendment, and modification.—A modification cannot be made in those cases wherein there is no provision making allowance for maintenance.—See pars. 18, 41 this note.

44. Court does not exceed its authority under this section in increasing amount of money entered in judgment decreeing divorce.—*Ex parte Cottrell*, 69 Cal. 417, 418.

45. Court may from time to time modify its orders with reference to its provisions for an allowance to wife under this section.—*Eidenmuller vs. Eidenmuller*, 37 Cal. 364; *Ex parte Cottrell*, 69 Cal. 417, 418; *Ex parte Spencer*, 83 Cal. 460, 465, 17 Am. St. Rep. 266, 23 Pac. Rep. 395.

See par. 41 this note.

46. Power of court over subject-matter of allowance for maintenance is not exhausted by entry of original order in decree of divorce, where there is any provision therefor in decree; but is continuing, and may be used for purpose of making such alterations, therein, at any time, as shall appear to the judge, in exercise of sound judicial discretion, reasonable and proper.—See *Roote vs. Roote*, 23 Ill. 425; *Stillman vs. Stillman*, 99 Ill. 186, 39 Am. Rep. 21; *Lennahan vs. O'Keefe*, 107 Ill. 620; *Cole vs. Cole*, 143 Ill. 19, 34 Am. St. Rep. 56, 31 N. E. Rep. 109.

47. But decree of divorce in which property rights of parties are settled, and in which there is no award of permanent allowance, is not such order within meaning of this section as may be modified from time to time.—*Howell vs. Howell*, 104 Cal. 45, 47, 43 Am. St. Rep. 70, 37 Pac. Rep. 770.

See par. 18 this note.

senting).—*Ex parte Spencer*, 33 Cal. 460, 467, 468, 17 Am. St. Rep. 366, 23 Pac. Rep. 395.

56. *Interest on*.—Interest at seven per cent per annum upon sum awarded as alimony by decree may be recovered as follows: upon allowance for attorney's fees as originally made, from date of decree; upon instalments allowed as alimony, from date of each as they accrue, interest to be computed to date of last decree, but in no case interest upon interest; but no costs of former trial should carry interest.—*Huellmantel vs. Huellmantel*, 124 Cal. 583, 590, 57 Pac. Rep. 582.

57. *Lien upon husband's estate* may be created by court in awarding permanent allowance to wife under this section.—*Huellmantel vs. Huellmantel*, 124 Cal. 583, 588, 57 Pac. Rep. 582.

58. Judgment awarding sum to wife in final decree of divorce stands upon same footing as ordinary money judgments, and becomes lien upon real estate of husband, liable to execution, as soon as docketed.—*Conrad vs. Everich*, 50 Ohio St. 476, 40 Am. St. Rep. 679, 35 N. E. Rep. 58; *Keyes vs. Scanlan*, 63 Wis. 345.

See post § 140 and note.

59. *Same*.—Duration of lien fixed by judgment of divorce awarding permanent allowance does not derive its force from § 671 of Code Civil Procedure, and does not expire in two years after entry of judgment.—*Gaston vs. Gaston*, 114 Cal. 542, 547, 55 Am. St. Rep. 86, 46 Pac. Rep. 609. See *Burr vs. Burr*, 10 Paige Ch. (N. Y.) 20 (holding alimony may be granted to extend beyond life of husband).

60. *Same*.—Time to enforce.—Limitation against enforcement of lien created by judgment of divorce is not governed by § 681 Code Civil Procedure, and where decree provides for monthly payments, and one of instalments does not fall due until five years after the decree, the real property charged with lien may be sold in satisfaction thereof.—*Gaston vs. Gaston*, 114 Cal. 542, 547, 55 Am. St. Rep. 86, 46 Pac. Rep. 609.

61. *Omissions in*.—A decree of divorce which fails to make any provision for maintenance of wife is final as between the parties, in this state, and concludes all rights thereto.—See para. 18, 53 this note.

62. Elsewhere the rule is otherwise, and omission in decree of divorce to provide maintenance for wife does not estop her from afterwards applying therefor.—*Shotwell vs. Shotwell*, 1 Smed. & M. Ch. (Miss.) 51; *Lawson vs. Shotwell*, 27 Miss. 630, 635.

63. *Wife as judgment creditor*.—Wife in whose favor judgment has been entered for maintenance allowance, is, as to amount allowed, a judgment creditor.—*Wetmore vs. Wetmore*, 149 N. Y. 520, 52 Am. St. Rep. 752, 44 N. E. Rep. 169, 33 L. R. A. 708; *Conrad vs. Everich*, 50 Ohio St. 476, 40 Am. St. Rep. 679, 35 N. E. Rep. 58.

64. As such creditor, she is entitled to avail herself of all remedies given by statutes.—*Wetmore vs. Wetmore*, 149 N. Y. 520, 52 Am. St. Rep. 752, 44 N. E. Rep. 169, 33 L. R. A. 708.

65. *Analogous cases*.—The case of *Wetmore vs. Wetmore*, supra, is the first, and believed to be the only case in this country subjecting

income payable to husband, to payment of allowance ordered to be paid to his wife. In case of *Clinton vs. Clinton*, L. R. 1 P. & D. 215, 14 Week. Rep. 545, a portion of an income payable to husband under a trust created by a will was appropriated to pay allowance made to wife.

66. A portion of income of property held in trust for husband, has been appropriated to support of wife deserted without just cause, in *Poor Directors vs. Gorrecht*, 7 Lancaster L. Rev. (Pa.) 410.

See note 33 L. R. A. 708.

67. The case of *Clinton vs. Clinton*, supra, is thought not to be authority in this state, because in that case the husband had taken up permanent residence abroad, and holding of court in that case is thought to be in conflict with holding of our supreme court in *De La Montanya vs. De La Montanya*, 112 Cal. 101, 130 58 Am. St. Rep. 165, 44 Pac. Rep. 345, 33 L. R. A. 82.

See ante § 137 note par. 15.

68. *JURISDICTION—After decree settling rights*.—Allowance cannot be granted for maintenance of wife and children after final decree of divorce settling property rights of parties, on application of wife.—*Howell vs. Howell*, 104 Cal. 45, 48, 42 Am. St. Rep. 70, 37 Pac. Rep. 770.

See para. 16-18, 43-48 this note.

69. Unless right to make such decree is reserved by the court.—*Howell vs. Howell*, 104 Cal. 45, 48, 42 Am. St. Rep. 70, 37 Pac. Rep. 770.

70. Otherwise in other jurisdictions where, after final judgment, divorce court has jurisdiction to grant allowance for permanent maintenance of wife.—See *Wells vs. Wells*, 10 N. Y. 253; *Cullen vs. Cullen*, 55 N. Y. Super. 346, 18 N. Y. St. Rep. 381; *Erkenbrach vs. Erkenbrach*, 63 How. Pr. (N. Y.) 196, 96 N. Y. 456; *Kamp vs. Kamp*, 59 N. Y. 212.

See ante § 133 note para. 45 et seq.

71. *Support of children*.—As to jurisdiction to make allowance for support of children, the rule is otherwise, where application therefor is made in their behalf.—See ante § 133 note par. 46 et seq.

72. *OFFENSE OF HUSBAND*.—Allowance under this section for permanent maintenance can be made only when divorce is granted for offense of husband.—*Everett vs. Everett*, 52 Cal. 383; *Ex parte Spencer*, 33 Cal. 460, 465, 17 Am. St. Rep. 266, 23 Pac. Rep. 395.

See par. 75 this note.

73. It is otherwise as to alimony granted pending trial, or appeal to supreme court.—*Bohnert vs. Bohnert*, 91 Cal. 428, 431, 27 Pac. Rep. 732 (allowance of alimony to prosecute appeal made by wife charged with adultery).

See ante § 137 and note.

74. *PROPERTY IN HUSBAND NOT PRE-REQUISITE*.—Allowance for permanent maintenance, made to wife upon granting divorce to her for offense of husband, may be entirely independent of property then in esse.—*Ex parte Spencer*, 33 Cal. 460, 465, 17 Am. St. Rep. 266, 23 Pac. Rep. 395.

See para. 19-22 this note.

75. *REFUSAL WHERE WIFE AT FAULT*.—Courts are not authorized to require husband

to pay, subsequent to the divorce and out of his separate property, any sum towards the maintenance of former wife, when divorce was granted for her offense.—*Everett vs. Everett*, 52 Cal. 333, 334.

See par. 73 this note.

76. Where wife has sufficient means to support herself in rank of life to which she belongs, no allowance for maintenance will be made.—*Romaine vs. Chauncey*, 129 N. Y. 566, 26 Am. St. Rep. 544, 29 N. E. Rep. 326, 14 L. R. A. 712.

77. SUPPORT OF CHILDREN.—Power of court to compel father to support his minor child does not depend wholly upon this section, but it is primarily his duty to support his minor children, whether he is with or without fault in matters involved in divorce suit.—*Ex parte Gordan*, 95 Cal. 374, 377, 30 Pac. Rep. 561.

78. Minor children's rights to support under this section are not forfeited by default of mother.—*Ex parte Gordan*, 95 Cal. 374, 378, 30 Pac. Rep. 561.

79. Payment of money for support of minor children may be enforced by imprisonment.—*Ex parte Gordan*, 95 Cal. 374, 378, 30 Pac. Rep. 561.

See para. 26-32 this note.

§ 140. SECURITY FOR MAINTENANCE AND ALIMONY. The court may require the husband to give reasonable security for providing [1] maintenance or [2] making any payments required under the provisions of this chapter, and may enforce the same [a] by the appointment of a receiver, or [b] by any other remedy applicable to the case.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Allowance for alimony—Enforcement.
3. Same—Charge upon husband's estate.
4. Same—Cost of transcript.
- 5-7. Construction—Only statutory power.
- 8, 9. Credit of husband—Deserted wife may use.
10. Exacting security—Limitation of power to.
- 11, 12. Lien on property—Order of court necessary.
13. Maintenance—Enforcement of decree.
- 14, 15. Same—Same—Wife a creditor.
16. Same—Same—Attacking conveyance for fraud.
17. Maintenance without divorce.
- 18, 19. Receiver—Appointment of—In general.
- 20-22. Same—Action to enforce maintenance without divorce.
23. Same—Allegations not denied.
24. Same—Evidence showing no payment.
- 25-27. Same—Lienholders—Effect on.
28. Same—Object of appointment.
29. Same—Receiver to collect rents, etc.
- 30-32. Same—Suit against receiver.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Sharon vs. Sharon*, 67 Cal. 185, 202, 3 Pac. Rep. 709 (applied); *Petaluma Sav. Bank vs. Superior Court San Francisco*, 111 Cal. 488, 495, 44 Pac. Rep. 177 (construed and applied); *Gaston vs. Gaston*, 114 Cal. 542, 546, 55 Am. St. Rep. 86, 46 Pac. Rep.

80. There is no distinction in principle between orders for payment of alimony to wife and orders to pay money for support of minor children; and refusal to pay money for support of minor children may be punished as a contempt, same as refusal to pay alimony.—*Ex parte Gordan*, 95 Cal. 374, 378, 30 Pac. Rep. 561.

See ante § 137 note para. 105 et seq.

81. Husband having ability to pay money ordered by court to be paid for support of minor child, may be imprisoned until he obeys.—*Ex parte Perkins*, 18 Cal. 60; *Ex parte Cottrell*, 59 Cal. 417; *Ex parte Gordan*, 95 Cal. 374, 378, 30 Pac. Rep. 561.

See para. 27-29 this note; also ante § 137 note par. 110.

82. REVIEW OF ALLOWANCE.—Appellate court will not reverse allowance of permanent maintenance to wife for her support, unless it appears from whole cause that lower court has abused its discretion.—*Wolff vs. Wolff*, 102 Cal. 433, 440, 36 Pac. Rep. 767, 1037.

83. Reduction of award, where it is regarded by the supreme court as too great a portion of the husband's earnings, will be made by such court.—*Eidenmuller vs. Eidenmuller*, 37 Cal. 264, 266.

See para. 23, 24 this note.

609 (construed and applied); *Murray vs. Murray*, 115 Cal. 266, 274, 56 Am. St. Rep. 97, 47 Pac. Rep. 37, 37 L. R. A. 626 (construed and applied); *Storke vs. Storke*, 116 Cal. 47, 51, 47 Pac. Rep. 869, 48 Id. 121 (construed and applied); *Sun Ins. Co. vs. White*, 123 Cal. 196, 200, 55 Pac. Rep. 903 (applied and held to be the only statutory power given upon subject of enforcement of alimony); *Anderson vs. Anderson*, 124 Cal. 48, 55, 71 Am. St. Rep. 17, 56 Pac. Rep. 630, 57 Id. 81 (applied); *Huellmantel vs. Huellmantel*, 124 Cal. 583, 588, 57 Pac. Rep. 582 (applied); *Sweasey vs. Sweasey*, 126 Cal. 123, 129, 58 Pac. Rep. 456 (applied).

2. ALLOWANCE MADE BY COURT FOR ALIMONY until further order of court to provide for payment until judgment becomes final, may be enforced under provision of this section.—*Sweasey vs. Sweasey*, 126 Cal. 123, 130, 58 Pac. Rep. 456.

3. Money necessary to enable wife to prosecute her motion for new trial, or on appeal, may be charged against husband and payment of same may be enforced by any remedy applicable to case.—*Bohnert vs. Bohnert*, 91 Cal. 428, 431, 27 Pac. Rep. 732; *Storke vs. Storke*, 116 Cal. 47, 51, 47 Pac. Rep. 869, 48 Id. 121.

4. Cost of transcription of testimony may be charged against husband where wife appeals from judgment rendered in his favor for divorce, and same may be enforced by any remedy applicable to case.—*Storke vs. Storke*, 116 Cal. 47, 51, 47 Pac. Rep. 869, 48 Id. 121.

5. CONSTRUCTION—Establishes the law.—Provision of section for enforcement of alimony, or making any provision for payment of money under this chapter, establishes law of this state upon subject, and is held to be exclusive.—*Sun Ins. Co. vs. White*, 123 Cal. 196, 201, 55 Pac. Rep. 902.

6. Is the only statutory power given upon subject of enforcement of payment of alimony under this chapter.—*Sun Ins. Co. vs. White*, 123 Cal. 196, 201, 55 Pac. Rep. 902.

7. Has not been the subject of judicial construction, and powers and duties of receiver appointed in pursuance of its provisions have not been defined; but it would not seem difficult to determine what cases, and for what purposes he is to be appointed.—*Petaluma Sav. Bank vs. Superior Court San Francisco*, 111 Cal. 488, 495, 44 Pac. Rep. 177.

8. CREDIT OF HUSBAND—May be used by wife left unprovided for, to obtain necessities, and her right may be enforced under provision of this section.—*Sweasey vs. Sweasey*, 126 Cal. 123, 129, 58 Pac. Rep. 456.

9. No decree of court necessary to secure wife's right.—*Sweasey vs. Sweasey*, 126 Cal. 123, 129, 58 Pac. Rep. 456.

10. EXACTING SECURITY—Powers of court not limited to, in enforcing order of maintenance against husband to exact security of him, but may make decree awarding maintenance lien on real estate of husband.—*Gaston vs. Gaston*, 114 Cal. 542, 546, 55 Am. St. Rep. 86, 46 Pac. Rep. 609.

See ante § 137 note par. 105 et seq.; also § 139 note par. 26 et seq.

This section, authorizing the court to require the husband to give a reasonable security for providing maintenance, or making any payments required under the provisions of this chapter, and to enforce the same by the appointment of the receiver or by any other remedy applicable to the case, is the only statutory power given under this subject; and as a code establishes the law of this state, it must be held to be excluded, and that the wife can have the property of the husband set apart as security of the payment of alimony only by an order from the court.—*Sun Ins. Co. vs. White*, 123 Cal. 196, 201, 55 Pac. Rep. 902.

11. Lien on property of husband.—Power of court to make decree awarding alimony charge upon real estate of husband is not doubted, and it has been practice so to do in cases where it was deemed proper.—*Gaston vs. Gaston*, 114 Cal. 542, 546, 55 Am. St. Rep. 86, 46 Pac. Rep. 609. See III. *Wightman vs. Wightman*, 45 Ill. 167; *O'Callaghan vs. O'Callaghan*, 69 Ill. 552. *N. J. Holmes vs. Holmes*, 29 N. J. Eq. 9. *Ohio. Olin vs. Hungerford*, 10 Ohio 268.

12. Order of court necessary to have property of husband set apart as security for payment of alimony under provision of this section.—*Sun Ins. Co. vs. White*, 123 Cal. 196, 201, 55 Pac. Rep. 902.

13. MAINTENANCE—Enforcement of decree rests within discretion of court, and such enforcement may be (1) by proceedings for contempt, (2) by requiring reasonable security, (3) by appointment of a receiver, or (4) by any

other remedy applicable to the case.—*Sharon vs. Sharon*, 67 Cal. 185, 202, 8 Pac. Rep. 709.

As to enforcement by contempt proceedings, see par. 2 this note, and ante § 137 note par. 106 et seq.; § 139 note pars. 26-32.

14. Wife creditor of husband to extent of allowance made.—See ante § 139 note.

15. Position of wife having demand for maintenance is assimilated to that of a creditor of her husband.—*Murray vs. Murray*, 115 Cal. 266, 275, 56 Am. St. Rep. 97, 47 Pac. Rep. 37, 37 L. R. A. 626. See III. *Tyler vs. Tyler*, 126 Ill. 525, 9 Am. St. Rep. 642, 21 N. E. Rep. 616. *Md. Feigley vs. Feigley*, 7 Md. 537, 61 Am. Dec. 375. *Mass. Livermore vs. Boutelle*, 77 Mass. (11 Gray) 217, 71 Am. Dec. 708. *Vt. Green vs. Adams*, 59 Vt. 602, 59 Am. St. Rep. 761, 10 Atl. Rep. 742.

16. Attacking conveyance for fraud.—Claim to maintenance is equitable demand against husband, and there can be no doubt of wife's right to attack for fraud transfers of property made by him with intent to defeat her claim, and such fraudulent grantee may properly be made defendant to suit for alimony.—*Murray vs. Murray*, 115 Cal. 266, 274, 56 Am. St. Rep. 97, 47 Pac. Rep. 37, 37 L. R. A. 626. See *Hinds vs. Hinds*, 80 Ala. 225.

17. MAINTENANCE WITHOUT DIVORCE is within general power of court of equity to grant, and is not dependent upon statute.—*Galland vs. Galland*, 38 Cal. 265; *Murray vs. Murray*, 115 Cal. 266, 274, 56 Am. St. Rep. 97, 47 Pac. Rep. 37, 37 L. R. A. 626; *Hanscom vs. Hanscom*, 6 Colo. App. 97, 39 Pac. Rep. 885.

18. RECEIVER—APPOINTMENT—In general.—As to appointment of receivers, and proceedings on,—see par. 7 this note.

19. Action for divorce being in equity, the statute ought not to be construed as abridging the powers exercised by courts having cognizance of matrimonial causes commonly, though not always, as branch of their chancery jurisdiction, to decree lien of securing award of support to wife in such cases.—*Gaston vs. Gaston*, 114 Cal. 542, 546, 55 Am. St. Rep. 86, 46 Pac. Rep. 609.

20. Action to enforce permanent maintenance without divorce, receiver should be appointed where such action arises for reasons like those in which creditor, seeking to avoid fraudulent transfers of debtor, is permitted to employ same instrumentality.—*Murray vs. Murray*, 115 Cal. 226, 275, 56 Am. St. Rep. 97, 47 Pac. Rep. 37, 37 L. R. A. 626.

21. It is true that appointment of receiver in action for maintenance without divorce is only authorized under this section, it would seem that language of section is yet sufficient to justify appointment of receiver at commencement of suit.—*Murray vs. Murray*, 115 Cal. 266, 274, 56 Am. St. Rep. 97, 47 Pac. Rep. 37, 37 L. R. A. 626.

See par. 2 this note.

22. Action for permanent maintenance is, by reason of inadequacy of purely legal remedies, so much subject of equitable cognizance that it carries with it right to have receiver appointed under general provisions for such an officer in all cases where receivers have been

heretofore appointed by usages of courts of equity.—*Murray vs. Murray*, 115 Cal. 266, 274, 56 Am. St. Rep. 97, 47 Pac. Rep. 37, 37 L. R. A. 626.

23. Allegations in complaint not denied.—Complaint charging husband with attempting to transfer or encumber his property to deprive wife of support, and allegations not being denied, will entitle plaintiff to appointment of receiver for enforcement of decree of court awarding maintenance.—*Anderson vs. Anderson*, 124 Cal. 48, 56, 71 Am. St. Rep. 17, 56 Pac. Rep. 630, 57 Id. 81.

24. Evidence showing husband has never paid any part of sums awarded wife by first decree, and that defendant has enjoyed use and rentals of property since action was begun, and also further tends to show that husband conveyed said property to his daughter by a former wife, and to his son-in-law, without consideration, to prevent his wife from getting any part or interest, shows sufficient cause for appointment of receiver.—*Huellmantel vs. Huellmantel*, 124 Cal. 583, 589, 57 Pac. Rep. 582.

25. Lienholders—Effect on.—Receiver appointed under this section takes property of husband, or such portion of it as court may designate, subject to all prior liens and encumbrances, and right to enforce such liens could not be made to depend upon mere volition of court or judge making appointment.—*Petaluma Sav. Bank vs. Superior Court San Francisco*, 111 Cal. 488, 495, 44 Pac. Rep. 177.

26. Prior lien claimants to property held or claimed by receiver appointed under provisions of this section, not being parties to divorce suit, are not subject to jurisdiction of court in which it is pending, have right to take such proceedings elsewhere, as law exacts, for preserving or enforcing their liens, according to their priority.—*Petaluma Sav. Bank vs. Superior Court San Francisco*, 111 Cal. 488, 497, 44 Pac. Rep. 177.

27. Second lienholder upon real estate held by receiver appointed under provisions of this section, is entitled to protect and to preserve such rights as are given him, under his lien, and since plaintiff's lien is subsequent and sub-

ordinate to party represented by receiver, the only way she can preserve her right is to sell the land, subject to its liens, within two years, as prescribed by statute.—*Petaluma Sav. Bank vs. Superior Court San Francisco*, 111 Cal. 488, 499, 44 Pac. Rep. 177.

28. Object of appointment of receiver is to provide security for payment of such allowance as is made for maintenance of divorced wife, and this would be accomplished (1) by vesting him with title and control of some protective property of husband, out of income of which he could pay such allowance, or (2) by authorizing sale of property to create a fund, income of which would be applied for same purpose.—*Petaluma Sav. Bank vs. Superior Court San Francisco*, 111 Cal. 488, 495, 44 Pac. Rep. 177.

29. Receiver to take possession, collect rents, etc.—Where lien is created by court in its award of alimony under § 139, receiver may be appointed, and may be directed to take possession of the property, collect rents and profits, and proceed to sell property and pay wife sums adjudged to be due her.—*Huellmantel vs. Huellmantel*, 124 Cal. 583, 588, 57 Pac. Rep. 58.

30. Suit against receiver.—Receiver appointed under provision of this section will not be permitted by courts to be sued, nor will property in his possession be seized or sold without leave asked and granted.—*Petaluma Sav. Bank vs. Superior Court San Francisco*, 111 Cal. 488, 497, 44 Pac. Rep. 177.

31. QUESTION OF TITLE.—A question appertaining to another forum would not be tried by court with view to denying leave to sue, if in its opinion its title ascertained was not good one.—*Petaluma Sav. Bank vs. Superior Court San Francisco*, 111 Cal. 488, 498, 44 Pac. Rep. 177.

32. Motion of claimant of real property, under title adverse to that of other parties represented by receiver, asking leave to commence action of ejectment, will not be denied by any court.—*Petaluma Sav. Bank vs. Superior Court San Francisco*, 111 Cal. 488, 498, 44 Pac. Rep. 177.

§ 141. COURT SHALL RESORT TO WHAT, IN EXECUTING CERTAIN SECTIONS. In executing the five preceding sections the court must resort:

1. To the community property; then,
2. To the separate property of the husband.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
- 2-5. Construed.
- 6-8. Property which may be resorted to.
- 9, 10. Property acquired after divorce.
- 11, 12. Receiver—By court on its own motion.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Sharon vs. Sharon*, 67 Cal. 185, 202, 8 Pac. Rep. 709 (applied); *Ex parte Spencer*, 83 Cal. 460, 466, 17 Am. St. Rep. 266, 23 Pac. Rep. 895 (referred to in discussion); *Gaston vs. Gaston*, 114 Cal. 542, 547, 55 Am. St. Rep. 86, 46 Pac. Rep. 609 (absence of both kinds of property enumerated in this sec-

tion no bar to award of allowance); *Murray vs. Murray*, 115 Cal. 266, 275, 56 Am. St. Rep. 97, 47 Pac. Rep. 37, 37 L. R. A. 626 (applied in appointment of receiver).

As to homestead's liability for alimony decreed in favor of wife in decree of divorce, see *Byers vs. Byers*, 21 Iowa 268; *Biffle vs. Pullam*, 114 Mo. 50, 21 S. W. Rep. 450; *Stanley vs. Sullivan*, 71 Wis. 585, 5 Am. St. Rep. 245, 37 N. W. Rep. 801.

2. CONSTRUED—"Separate property" is a relative term; it implies the existence of the community.—In *re Spencer*, 82 Cal. 110, 113, 23 Pac. Rep. 37.

3. After divorce there is no community, and there can be no such thing as "separate property."—In re Spencer, 82 Cal. 110, 113, 23 Pac. Rep. 37.

4. Property acquired subsequent to dissolution of marriage is neither community property nor separate property.—In re Spencer, 82 Cal. 110, 113, 23 Pac. Rep. 37.

5. Property of either class mentioned in section need not have been owned at time of decree for future maintenance.—Ex parte Spencer, 83 Cal. 460, 465, 17 Am. St. Rep. 266, 23 Pac. Rep. 395; Gaston vs. Gaston, 114 Cal. 542, 546, 55 Am. St. Rep. 86, 46 Pac. Rep. 609.

6. **PROPERTY WHICH MAY BE RE-SORTED TO.**—Section 139 must be construed in connection with § 141, in determining what property may be liable for maintenance of wife under latter section.—In re Spencer, 82 Cal. 110, 113, 23 Pac. Rep. 37.

7. Court, on granting decree of divorce for husband's fault, may decree that he pay wife certain sum of money monthly, out of future earnings, independently of any common or separate property then in esse.—Ex parte Spencer, 83 Cal. 460, 465, 17 Am. St. Rep. 266, 23 Pac. Rep. 395.

8. Possession of either community or separate property by the husband at time decree is made, is not prerequisite to jurisdiction of the court to decree permanent maintenance.—

Gaston vs. Gaston, 114 Cal. 542, 547, 55 Am. St. Rep. 86, 46 Pac. Rep. 609.

9. **PROPERTY ACQUIRED AFTER DIVORCE.**—Property of husband acquired after divorce is neither community nor separate property, and therefore is not subject to decree of alimony.—In re Spencer, 82 Cal. 110, 113, 23 Pac. Rep. 37 (this case was subsequently passed upon in bank and different conclusion reached on many points, which fact weakens its authority upon this point. See Ex parte Spencer, 83 Cal. 460, 17 Am. St. Rep. 266, 23 Pac. Rep. 395).

10. "To permit a woman, who has by decree of divorce releasing her of all duties towards husband, to demand that his earnings, or a portion of them, shall be devoted to her support, and that his lawful wife and children must take what is left, would produce an anomalous condition of domestic affairs—such a law ought not to blister the pages of our statute books" (dissent of Paterson, J.).—Ex parte Spencer, 83 Cal. 460, 467, 17 Am. St. Rep. 266, 23 Pac. Rep. 395.

11. **RECEIVER.**—Court upon its own motion may appoint receiver and direct him to take possession of property, to collect rents and profits and proceed to sell property and pay the several sums adjudged to be due wife.—Huellmantel vs. Huellmantel, 124 Cal. 583, 588, 57 Pac. Rep. 582.

12. As to receiver in action for divorce or maintenance, see ante § 140 note par. 18 et seq.

§ 142. IF WIFE HAS SUFFICIENT FOR HER SUPPORT, COURT MAY WITHHOLD ALLOWANCE. When the wife has either [1] a separate estate, or [2] there is community property sufficient to give her [a] alimony or [b] a proper support, the court, in its discretion, may withhold any allowance to her out of the separate property of the husband.

History: Enacted March 21, 1872.

§ 143. COMMUNITY AND SEPARATE PROPERTY MAY BE SUBJECTED TO SUPPORT AND EDUCATE CHILDREN. The community property and the separate property may be subjected to the support and education of the children in such proportions as the court deems just.

History: Enacted March 21, 1872.

§ 144. LEGITIMACY OF ISSUE—[DIVORCE FOR ADULTERY OF HUSBAND]. When a divorce is granted for the adultery of the husband, the legitimacy of children of the marriage begotten of the wife before the commencement of the action is not affected.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, 338, held unconstitutional; see history, § 4 ante.

As to legitimacy of children, generally, see post § 193 et seq. and notes.

§ 145. SAME—[DIVORCE FOR ADULTERY OF WIFE]. When a divorce is granted for the adultery of the wife, the legitimacy of children begotten of her before the commission of the adultery is not affected; but the legitimacy of other children of the wife may be determined by the court, upon the evidence in the case.

History: Enacted March 21, 1872.

Legitimacy of child born in wedlock—Presumption as to, see post §§ 193, 194 and notes.

§ 146. DISPOSITION OF COMMUNITY PROPERTY. In case of the dissolution of the marriage by the decree of a court of competent jurisdiction, the community property, and the homestead, shall be assigned as follows:

1. If the decree be rendered on the ground of adultery, or extreme cruelty, the community property shall be assigned to the respective parties in such proportions as the court, from all the facts of the case, and the condition of the parties, may deem just.

2. If the decree be rendered on any other ground than that of adultery or extreme cruelty, the community property shall be equally divided between the parties.

3. If a homestead has been selected from the community property, it may be assigned to the innocent party, either absolutely or for a limited period, subject, in the latter case, to the future disposition of the court, or it may, in the discretion of the court, be divided, or be sold and the proceeds divided.

4. If a homestead has been selected from the separate property of either, it shall be assigned to the former owner of such property, subject to the power of the court to assign it for a limited period to the innocent party.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, pp. 191, 192; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 333, held unconstitutional; see history, § 4 *ante*.

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| <p>1. Applied, cited, construed, referred to, etc.</p> <p>2. Abuse of discretion distinguished from improper exercise.</p> <p>3, 4. Agreements—Prior division—Validity of.</p> <p>5. Same—Mortgager and mortgagee—Effect of.</p> <p>6, 7. Assignment of homestead—Not contravene code.</p> <p>8, 9. Same—Limited in separate estate homestead.</p> <p>10. Same—Of all to husband—When error.</p> <p>11. Character of property when destroyed.</p> <p>12-19. Community homestead—How divided.</p> <p>20. Same—When subject to equitable claims.</p> <p>21, 22. Construed at court's discretion.</p> <p>23. Conveyance by wife—When condition precedent.</p> <p>24-35. Court—Power and duty of over.</p> <p>36. Declaration of community property—How shown.</p> <p>37, 38. Decree—How far conclusive.</p> <p>39-46. Same—Effect of—Under void marriage.</p> <p>47. Same—When erroneous.</p> <p>48. Same—What should grant.</p> <p>49-52. Same—Power to review.</p> <p>53. Discretion—Extent of.</p> <p>54, 55. Division matter of discretion—When decreed.</p> <p>56-58. Same—Extent of.</p> <p>59. Same—When not modified.</p> <p>60. Same—Where marriage void.</p> <p>61. Excess of jurisdiction—Waiver.</p> <p>62, 63. Execution—When may issue after decree.</p> <p>64. Grantee not bound to make conveyance.</p> <p>65, 66. Homestead liable to division.</p> <p>67-71. Husband's interest—Nature of.</p> <p>72, 73. Same—Title not dependent on conveyance or payment.</p> <p>74. Jurisdiction—When acquired by another court.</p> <p>75. Legislative intention.</p> | <p>76-78. Lien—Existence and declaration of.</p> <p>79. Limited period construed.</p> <p>80. Misrepresentations of husband—Relief against.</p> <p>81-83. Partition—Power to direct.</p> <p>84, 85. Party guilty of cruelty—Rights of.</p> <p>86-88. Permanent maintenance—Power as to.</p> <p>89. Presumption as to court's intention.</p> <p>90. Property resided upon.</p> <p>91. Separate property not decreed.</p> <p>92. Same—Homestead limited.</p> <p>93. Settlement of property rights—Incident to divorce.</p> <p>94-96. Statute—Effect and extent of.</p> <p>97. Tenancy in common—Created by decree.</p> <p>98, 99. Trust not created.</p> <p>100. Welfare of children—Paramount.</p> <p>101-103. Wife "former owner"—Title of.</p> <p>104. Writ of assistance—When allowed.</p> |
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- 1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in:** Eslinger vs. Eslinger, 47 Cal. 62, 64 (construed and applied); Bovo vs. Bovo, 63 Cal. 77 (applied); Stockton vs. Knock, 73 Cal. 425, 429, 15 Pac. Rep. 51 (applied); Sharon vs. Sharon, 75 Cal. 1, 46, 16 Pac. Rep. 345 (referred to in discussion); Cummings vs. Cummings, 75 Cal. 434, 439, 17 Pac. Rep. 442 (construed and applied); Burkett vs. Burkett, 78 Cal. 310, 316, 12 Am. St. Rep. 58, 20 Pac. Rep. 715, 3 L. R. A. 781 (applied); Simpson vs. Simpson, 80 Cal. 237, 239, 22 Pac. Rep. 167 (construed and applied); Ex parte Spencer, 83 Cal. 460, 465, 17 Am. St. Rep. 266, 23 Pac. Rep. 395 (applied with other sections); Strozynski vs. Strozynski, 97 Cal. 189, 191, 31 Pac. Rep. 1130 (applied); Neary vs. Godfrey, 102 Cal. 338, 340, 36 Pac. Rep. 655 (construed and applied); Loveren vs. Loveren, 106 Cal. 509, 513, 39 Pac. Rep. 801 (applied); Frankel vs. Boyd, 106 Cal. 608, 613, 614, 39 Pac. Rep. 939 (applied); Reid vs. Reid, 112 Cal. 274, 277, 44 Pac. Rep. 564 (applied); Gaston vs. Gaston, 114 Cal. 542, 546, 55 Am. St. Rep. 36, 46 Pac. Rep. 609 (construed and ap-

plied); *Huellmantel vs. Huellmantel*, 117 Cal. 407, 409, 49 Pac. Rep. 574 (construed and applied); *Estate of Winslow*, 121 Cal. 92, 95, 53 Pac. Rep. 362 (referred to in discussion); *Huellmantel vs. Huellmantel*, 124 Cal. 583, 588, 57 Pac. Rep. 582 (applied with other sections); *Estate of James*, 124 Cal. 653, 657, 662, 57 Pac. Rep. 578 (construed and applied); *Newman vs. Freitas*, 129 Cal. 283, 292, 61 Pac. Rep. 907, 50 L. R. A. 548 (applied); *Gorman vs. Gorman*, 134 Cal. 378, 379, 380, 66 Pac. Rep. 313 (construed and applied).

2. AN ABUSE OF DISCRETION IS DISTINGUISHED from improper exercise thereof.—*Eidenmuller vs. Eidenmuller*, 37 Cal. 364, 366.

3. AGREEMENTS MADE PRIOR TO DIVORCE for division of property are subject to examination of court and only derive their sanction from decree made with knowledge of facts.—*Loveren vs. Loveren*, 106 Cal. 509, 513, 39 Pac. Rep. 801; *Speck vs. Dausmann*, 7 Mo. App. 165.

4. Division of property based upon consideration of withdrawal of defense, and all charges against defendant except that of desertion, is void as contra bonos mores.—*Loveren vs. Loveren*, 106 Cal. 509, 513, 39 Pac. Rep. 801; *Beard vs. Beard*, 65 Cal. 354, 356, 4 Pac. Rep. 229. See *Phillips vs. Thorp*, 10 Oreg. 494. See post § 159 note par. 8.

5. Between mortgager and mortgagee as to premises affected by decree does not defeat rights obtained under decree.—*Peshine vs. Ord*, 119 Cal. 311, 314, 63 Am. St. Rep. 131, 51 Pac. Rep. 536. See *Barber vs. Babel*, 36 Cal. 11, 20.

6. ASSIGNMENT OF HOMESTEAD either absolutely or for limited period, does not contravene code.—*Stockton vs. Knock*, 73 Cal. 425, 429, 15 Pac. Rep. 51.

7. Attention of court should be called to all of property.—*Jackson vs. Jackson*, 94 Cal. 447, 462, 463, 29 Pac. Rep. 957.

8. Of homestead from separate property for limited period cannot exceed life of party to whom it is assigned.—*Huellmantel vs. Huellmantel*, 117 Cal. 407, 409, 49 Pac. Rep. 574.

9. Award of homestead to wife out of husband's separate property for herself, her heirs and assigns forever, is error.—*Huellmantel vs. Huellmantel*, supra.

10. Of all community property to husband should not be made where extreme cruelty of wife alleged in cross-complaint is not proved.—*Reid vs. Reid*, 112 Cal. 274, 277, 44 Pac. Rep. 564.

Children.—See "welfare of children,—matter paramount," par. 100 this note.

11. CHARACTER OF PROPERTY DESTROYED by decree dividing homestead between parties.—*Shoemaker vs. Chalfant*, 47 Cal. 432, 435.

Collusive agreement.—See agreements as to division of property, para. 3 and 4 this note.

12. COMMUNITY HOMESTEAD—DIVISION IN SEVERALTY not necessary.—*Estate of James*, 124 Cal. 653, 67 Pac. Rep. 578.

13. Community homestead divided equally where wife was granted divorce for wilful neglect.—*Estate of James*, 124 Cal. 653, 57 Pac. Rep. 572.

14. Equally divided in case of decree on husband's cross-complaint on ground of extreme cruelty and wilful desertion.—*Reid vs. Reid*, 112 Cal. 274, 279, 44 Pac. Rep. 564.

15. Property disposed of by court, even though parties have agreed as to such disposition.—*Loveren vs. Loveren*, 106 Cal. 509, 512, 39 Pac. Rep. 801.

16. Proportions in which assigned such as court may deem just on decree for extreme cruelty.—*Eslinger vs. Eslinger*, 47 Cal. 62, 64; *Bovo vs. Bovo*, 63 Cal. 77, 78; *Gaston vs. Gaston*, 114 Cal. 542, 546, 55 Am. St. Rep. 86, 46 Pac. Rep. 609.

17. All may be awarded to prevailing party on divorce granted for adultery or extreme cruelty.—*Miller vs. Miller*, 33 Cal. 353, 356; *Eidenmuller vs. Eidenmuller*, 37 Cal. 364, 365; *Strozynski vs. Strozynski*, 97 Cal. 189, 193, 31 Pac. Rep. 1130.

18. Real and personal given to wife on decree for extreme cruelty.—*Strozynski vs. Strozynski*, 97 Cal. 189, 193, 31 Pac. Rep. 1130; *Eidenmuller vs. Eidenmuller*, 37 Cal. 364, 365.

19. Three fourths of community property awarded to wife on decree for extreme cruelty.—*Eslinger vs. Eslinger*, 47 Cal. 62, 64; *Brown vs. Brown*, 60 Cal. 579.

20. Subject to equitable claims, when.—Where all community property has been assigned to wife, leaving husband without separate property, it is subject to equitable claim of existing creditors, whose demands are due or to become due on account of credit extended during existence of marital relation.—*Frankel vs. Boyd*, 106 Cal. 608, 614, 39 Pac. Rep. 939. See *Packard vs. Arellanes*, 17 Cal. 525, 536; *Panaud vs. Jones*, 1 Cal. 488, 515. See *Jones vs. Jones*, 15 Tex. 143.

21. CONSTRUED—As laying down no general rule as to amount of property to be awarded innocent party on divorce for extreme cruelty, and as referring each case to court's discretion within limits implied from statutes.—*Gorman vs. Gorman*, 134 Cal. 378, 380, 66 Pac. Rep. 313.

22. This section leaves disposition of community property, in first instance, where divorce is granted on grounds of extreme cruelty or adultery, to discretion of trial court, with qualification inferred from entire section that, as general rule, more than one half of such property must be decreed to the innocent spouse in such case.—*Eslinger vs. Eslinger*, 47 Cal. 62; *Brown vs. Brown*, 60 Cal. 579; *Gorman vs. Gorman*, 134 Cal. 378, 379, 66 Pac. Rep. 313.

23. CONVEYANCE BY WIFE CONDITION PRECEDENT to payment by husband of amount decreed.—*Kirsch vs. Kirsch*, 113 Cal. 56, 62, 45 Pac. Rep. 164.

24. COURT HAS NO POWER TO TRANSFER property of either party to other, or otherwise dispose of it outside of statute.—*Simpson vs. Simpson*, 80 Cal. 237, 241, 22 Pac. Rep. 167; *Neary vs. Godfrey*, 102 Cal. 338, 341, 36 Pac. Rep. 655.

25. Has no power to assign homestead selected from separate property to other than innocent party.—*Neary vs. Godfrey*, 102 Cal. 338, 344, 36 Pac. Rep. 655.

22. Has duty imposed upon it to make proper division of community property.—*Ex parte Spencer*, 83 Cal. 460, 465, 17 Am. St. Rep. 266, 23 Pac. Rep. 395.

27. Can only make division of community property upon dissolution of marriage.—*Newman vs. Freitas*, 129 Cal. 283, 292, 61 Pac. Rep. 907, 50 L. R. A. 543.

28. May award all common property to innocent party where divorce is granted on ground of adultery.—*Miller vs. Miller*, 33 Cal. 353, 356.

29. May set aside homestead, in wife's suit, where she waives community right.—*Stockton vs. Knock*, 73 Cal. 425, 429, 15 Pac. Rep. 51.

Creditors' rights to follow, see par. 20 this note.

30. May award permanent maintenance in fixed sum for support, in lieu of wife's claim and right to homestead.—*Huellmantel vs. Huellmantel*, 124 Cal. 583, 588, 57 Pac. Rep. 582.

31. Not compellable to assign homestead to innocent party for limited period.—*Huellmantel vs. Huellmantel*, 124 Cal. 583, 588, 57 Pac. Rep. 582.

32. Has no authority to assign homestead for an equitable interest in it to children.—*Simpson vs. Simpson*, 80 Cal. 237, 241, 22 Pac. Rep. 167.

33. Trust of any kind cannot be created by court under its common-law power; certainly no express trust.—*Simpson vs. Simpson*, 80 Cal. 237, 242, 22 Pac. Rep. 167.

34. Will not set aside judgment of court below, in dividing community property, except there appears an abuse of discretion.—*Eidenmuller vs. Eidenmuller*, 37 Cal. 364.

35. Court other than that in which decree was made, otherwise competent, may determine disposition of property.—*De Godey vs. Godey*, 39 Cal. 157.

Death.—See pars. 61, 70, 71 this note.

Debts of husband chargeable upon.—See par. 20 this note.

36. DECLARATION OF COMMUNITY PROPERTY proved by husband's written offer to compromise by dividing.—*Rose vs. Rose*, 112 Cal. 341, 344, 44 Pac. Rep. 658.

37. DECREE—Dividing property conclusive of that matter as well as others.—*De Godey vs. Godey*, 39 Cal. 157, 163.

38. Not directing division of community property not conclusive as to such property.—*De Godey vs. Godey*, 39 Cal. 157, 163; *Kirschner vs. Dietrich*, 110 Cal. 502, 505, 42 Pac. Rep. 1064.

39. Effect of—Divorce for adultery simply, does not deprive guilty party of his interest in community property.—*De Godey vs. Godey*, 39 Cal. 157.

40. Dividing homestead by partition severs joint tenancy and destroys right of survivorship.—*Shoemaker vs. Chalfant*, 47 Cal. 432, 435.

41. Making equal division makes parties thereafter tenants in common eo nomine.—*McLeran vs. Benton*, 31 Cal. 29, 33.

42. Referring to property rights makes parties tenants in common of community property.—*Kirschner vs. Dietrich*, 110 Cal. 502, 505, 42 Pac. Rep. 1064.

43. Homestead to wife in trust for support of herself and children gives her absolute and unlimited estate.—*Simpson vs. Simpson*, 80 Cal. 237, 242, 22 Pac. Rep. 167.

44. Husband's abandonment, ground of divorce decree, does not affect acquired homestead rights of wife residing upon premises.—*Bonnell vs. Smith*, 53 Ill. 375; *Blandy vs. Asher*, 72 Mo. 27.

45. Permanent maintenance, decree for, leaves title in homestead free in husband.—*Huellmantel vs. Huellmantel*, 124 Cal. 583, 588, 57 Pac. Rep. 582.

46. Property acquired by parties during time they live together under void marriage contract, decree of equal division of property upheld.—*Werner vs. Werner*, 59 Kan. 399, 68 Am. St. Rep. 372, 53 Pac. Rep. 127, 41 L. R. A. 349. See *Fuller vs. Fuller*, 33 Kan. 582, 7 Pac. Rep. 241.

47. Same—Granting all to husband erroneous when extreme cruelty of wife not proved.—*Reid vs. Reid*, 112 Cal. 274, 277, 44 Pac. Rep. 564.

48. Same—What should grant.—Decree should grant more than half to innocent party in case of extreme cruelty.—*Eslinger vs. Eslinger*, 47 Cal. 62, 64; *Brown vs. Brown*, 60 Cal. 579, 580; *Gorman vs. Gorman*, 134 Cal. 378, 379, 66 Pac. Rep. 313.

49. Review of.—Decree making division of community property not disturbed on appeal in absence of abuse or palpable cause shown.—*Bovo vs. Bovo*, 63 Cal. 77, 78; *Rose vs. Rose*, 112 Cal. 341, 345, 44 Pac. Rep. 658. See *Eidenmuller vs. Eidenmuller*, 37 Cal. 364, 365.

50. Distinguished: *Brown vs. Brown*, 60 Cal. 579, distinguished in *Bovo vs. Bovo*, 63 Cal. 77.

51. DECREE FOR PERMANENT MAINTENANCE not subject to review where no abuse or improper exercise shown.—*Eidenmuller vs. Eidenmuller*, 37 Cal. 364, 365.

52. Subject to revision on appeal for apparent degree of error.—*Strozynski vs. Strozynski*, 97 Cal. 189, 193, 31 Pac. Rep. 1130.

53. DISCRETION OF COURT IN DIVIDING homestead community is of widest.—*Smith vs. Smith*, 124 Cal. 651, 653, 57 Pac. Rep. 573; *Estate of James*, 124 Cal. 653, 662, 57 Pac. Rep. 578.

54. DIVISION COMMITTED TO JUSTICE AND DISCRETION of trial court, whose opportunity to judge of equities is superior to that of supreme court, under divorce for extreme cruelty.—*Rose vs. Rose*, 112 Cal. 341, 345, 44 Pac. Rep. 658. See *Gimmy vs. Gimmy*, 22 Cal. 633, 634.

55. Decreed on complaint stating existence of community property without direct averment of facts showing same, and absence of prayer for such decree of division.—*Gimmy vs. Gimmy*, 22 Cal. 633, 634, 635.

56. Extent of.—Should be made of all community property.—*Jackson vs. Jackson*, 94 Cal. 447, 462, 29 Pac. Rep. 957.

57. Giving more than half to innocent party in cases of adultery or extreme cruelty.—*Eslinger vs. Eslinger*, 47 Cal. 62, 64.

53. Equal on decree against wife for desertion.—Reid vs. Reid, 112 Cal. 274, 277, 44 Pac. Rep. 564.

53. WHEN NOT MODIFIED.—Division as an equitable settlement of maintaining children not modified at instance of wife fully benefited.—Parkhurst vs. Parkhurst, 118 Cal. 18, 21, 50 Pac. Rep. 9.

60. Where marriage void.—Equitable division of property jointly accumulated by parties to void marriage decreed.—Fuller vs. Fuller, 33 Kan. 582, 7 Pac. Rep. 241; Werner vs. Werner, 59 Kan. 399, 68 Am. St. Rep. 372, 53 Pac. Rep. 127, 41 L. R. A. 349.

For full discussion of this subject, see monographic note 68 Am. St. Rep. 375, 379.

Evidence.—See declaration of community property, par. 36 this note.

61. EXCESS OF JURISDICTION IN AWARDING HOMESTEAD PROPERTY out of separate property of one party to innocent party for fixed term of years, regardless of death of such party prior to expiration of term, may be waived.—Neary vs. Godfrey, 102 Cal. 338, 343, 36 Pac. Rep. 655.

62. EXECUTION MAY ISSUE AGAINST HOMESTEAD property divided under decree.—Shoemaker vs. Chalfant, 47 Cal. 432, 435.

63. Cannot issue upon husband's interest in homestead set aside to him for fixed term of years out of wife's separate estate by decree of divorce for latter's cruelty.—Neary vs. Godfrey, 102 Cal. 338, 343, 36 Pac. Rep. 655.

64. GRANTEE OF PROPERTY covered by homestead cannot be compelled to make absolute conveyance to innocent party.—Huellmantel vs. Huellmantel, 117 Cal. 407, 409, 410, 49 Pac. Rep. 574.

65. HOMESTEAD SUBJECT TO DIVISION as common property after parties are divorced.—Gimmy vs. Doane, 22 Cal. 635, 638.

66. Set aside by court on wife's suit where she waives community right.—Stockton vs. Knock, 73 Cal. 425, 429, 15 Pac. Rep. 51.

67. HUSBAND'S INTEREST ACQUIRED under decree of divorce for wife's cruelty in the use of homestead created out of wife's separate property, cannot be sold.—Neary vs. Godfrey, 102 Cal. 338, 343, 36 Pac. Rep. 655.

68. Is not subject of inheritance.—Neary vs. Godfrey, 102 Cal. 338, 343, 36 Pac. Rep. 655.

69. Not subject to execution.—Neary vs. Godfrey, 102 Cal. 338, 343, 36 Pac. Rep. 655.

70. Right of husband to use of homestead assigned out of wife's separate property for limited period is not assignable by court on his death.—Neary vs. Godfrey, 102 Cal. 338, 343, 36 Pac. Rep. 655.

71. Is personal, terminating upon his death before designated period.—Neary vs. Godfrey, 102 Cal. 338, 341, 36 Pac. Rep. 655.

72. Title under decree giving all for wife's adultery, not dependent upon conveyance.—Kirsch vs. Kirsch, 113 Cal. 56, 61, 62, 45 Pac. Rep. 164.

73. Not dependent upon his paying amount decreed to wife.—Kirsch vs. Kirsch, 113 Cal. 56, 61, 62, 45 Pac. Rep. 164.

74. JURISDICTION AS TO COMMUNITY

PROPERTY acquired by another court when decree silent and question of division not presented.—De Godey vs. Godey, 39 Cal. 157, 163.

75. LEGISLATIVE INTENTION to subject discretion of trial court, dividing property, to revision on appeal for apparent degree of error.—Strozynski vs. Strozynski, 97 Cal. 189, 193, 31 Pac. Rep. 1130. See Eslinger vs. Eslinger, 47 Cal. 62, 64; Brown vs. Brown, 60 Cal. 579, 580; Eidenmuller vs. Eidenmuller, 37 Cal. 364, 365.

76. LIEN OF WIFE exists under decree against husband giving wife all.—Gaston vs. Gaston, 114 Cal. 542, 546, 55 Am. St. Rep. 86, n. 88, 46 Pac. Rep. 609; Blankenship vs. Blankenship, 19 Kan. 159; Foster vs. Foster, 56 Vt. 540.

77. Does not exist against husband receiving community property for amount payable under decree against her.—Kirsch vs. Kirsch, 113 Cal. 56, 62, 45 Pac. Rep. 164.

78. May be decreed upon homestead declared by wife upon husband's separate estate, for permanent maintenance.—Huellmantel vs. Huellmantel, 124 Cal. 533, 538, 57 Pac. Rep. 532.

79. "LIMITED PERIOD"—Construed as not extending beyond life of party to whom property is awarded.—Hutchinson vs. McNally, 85 Cal. 619, 621, 24 Pac. Rep. 1071; Neary vs. Godfrey, 102 Cal. 338, 341, 36 Pac. Rep. 655.

80. MISREPRESENTATIONS OF HUSBAND as to community property, which amount to mere misrepresentations at law, not relieved against.—Champion vs. Woods, 79 Cal. 17, 20, 12 Am. St. Rep. 126, 21 Pac. Rep. 534.

Mortgagee, agreement with mortgager.—See par. 5 this note.

81. PARTITION.—Direct result of divorce, and part of decree, a proper subject of action.—Kashaw vs. Kashaw, 3 Cal. 312, 322.

82. Not authorized by code in every case.—Cummings vs. Cummings, 75 Cal. 434, 438, 439, 17 Pac. Rep. 442.

83. Not decreed as against mortgagees in possession without satisfaction or redemption of lien.—Cummings vs. Cummings, 75 Cal. 434, 439, 17 Pac. Rep. 442.

84. PARTY GUILTY OF CRUELTY receives only such portion as court may deem just on facts of case.—Eslinger vs. Eslinger, 47 Cal. 62, 64.

85. Claiming rights under act of 1850 required to state facts giving right affirmatively.—Dye vs. Dye, 11 Cal. 163, 168.

86. PERMANENT MAINTENANCE in full of all future claims upon defendant for support, and in lieu of plaintiff's claim on right of homestead, may be awarded within power of court.—Huellmantel vs. Huellmantel, 124 Cal. 533, 538, 57 Pac. Rep. 532.

87. May be increased.—Brown vs. Brown, 60 Cal. 579, 580; Eslinger vs. Eslinger, 47 Cal. 62, 64; Strozynski vs. Strozynski, 97 Cal. 189, 193, 31 Pac. Rep. 1130.

88. When too great in proportion to husband's estate, may be inquired into.—Eidenmuller vs. Eidenmuller, 37 Cal. 364, 366.

89. PRESUMPTION that court, dealing with community or homestead property, intended to act within scope of its authority.—Simpson vs. Simpson, 80 Cal. 237, 241, 22 Pac. Rep. 167.

89. PROPERTY CLAIMED AS HOMESTEAD must have been family residence during existence of marriage.—*Elmore vs. Elmore*, 10 Cal. 224, 225.

91. SEPARATE PROPERTY OF WIFE cannot be decreed to husband in divorce granted in his favor.—*Reid vs. Reid*, 112 Cal. 274, 277, 44 Pac. Rep. 564.

92. Homestead only assignable under decree for period not exceeding life of assignee.—*Huellmantel vs. Huellmantel*, 117 Cal. 407, 409, 49 Pac. Rep. 574, 124 Cal. 583, 588, 57 Pac. Rep. 582; *Neary vs. Godfrey*, 102 Cal. 338, 341, 36 Pac. Rep. 655.

93. SETTLEMENT OF PROPERTY RIGHTS between parties is incident to every decree of divorce, where property is involved.—*Mott vs. Mott*, 82 Cal. 413, 419, 22 Pac. Rep. 1140.

94. STATUTE—Does not forfeit whole or any part of share of party guilty of adultery, but is merely permissive and discretionary to visit such consequence.—*De Godey vs. Godey*, 39 Cal. 157, 163.

95. Providing for disposition of common property on divorce is mere regulation of property-right and cannot be properly said to provide new right of action.—*Gimmy vs. Doane*, 22 Cal. 635, 638.

96. Of 1850 referred to and embraced property acquired after that date.—*Dye vs. Dye*, 11 Cal. 163, 168.

97. TENANCY IN COMMON exists where court decrees an equal division of property.—

McLeran vs. Benton, 31 Cal. 29. See para. 40-42 this note.

98. TRUST IN HOMESTEAD cannot be created under code.—*Simpson vs. Simpson*, 80 Cal. 237, 242, 22 Pac. Rep. 167.

99. Not created by decree ordering homestead awarded to wife in trust for her own and children's support.—*Simpson vs. Simpson*, 80 Cal. 237, 242, 22 Pac. Rep. 167.

100. WELFARE OF CHILDREN matter of paramount importance in decreeing division and permanent maintenance.—*Eldenmuller vs. Eldenmuller*, 37 Cal. 364, 365.

101. WIFE "FORMER OWNER" under deed conveying community homestead to her before divorce proceedings, subject to court's power. *Burkett vs. Burkett*, 78 Cal. 310, 317, 12 Am. St. Rep. 58, 20 Pac. Rep. 715, 3 L. R. A. 781.

102. Wife's title under decree giving community property for use of family is absolute upon her surviving husband.—*Bollinger vs. Manning*, 79 Cal. 7, 11, 21 Pac. Rep. 375; *Neary vs. Godfrey*, 102 Cal. 338, 342, 36 Pac. Rep. 656.

103. Under deed conveying community homestead before divorce proceedings absolute.—*Burkett vs. Burkett*, 78 Cal. 310, 317, 12 Am. St. Rep. 58, 20 Pac. Rep. 715, 3 L. R. A. 781. See *Taylor vs. Opperman*, 79 Cal. 468, 471, 21 Pac. Rep. 869; *Tilliaux vs. Tilliaux*, 115 Cal. 663, 671, 47 Pac. Rep. 691.

104. Writ of assistance allowed to enforce divisions of decree dividing property.—*Kirsch vs. Kirsch*, 113 Cal. 56, 64, 45 Pac. Rep. 164.

§ 147. SAME—[DUTY OF COURT TO DISPOSE OF]. The court, in rendering a decree of divorce, must make such order for the disposition of the community property, and of the homestead, as in this chapter provided, and, whenever necessary for that purpose, may order a partition or sale of the property and a division or other disposition of the proceeds.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 192.

1. Applied, cited, construed, referred to, etc.
- 2, 3. Agreement of parties—Disregarded, when.
4. Construction.
5. Duty of court on dissolving marriage.
6. Inference drawn from section.
- 7-9. Partition not practicable—Procedure.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Eslinger vs. Eslinger*, 47 Cal. 62, 64 (applied with preceding section); *Kimple vs. Conway*, 75 Cal. 413, 414, 415, 17 Pac. Rep. 546 (applied with preceding section); *Ex parte Spencer*, 83 Cal. 460, 465, 17 Am. St. Rep. 266, 23 Pac. Rep. 395 (applied with other sections); *Loveren vs. Loveren*, 106 Cal. 509, 513, 39 Pac. Rep. 801 (applied with preceding section); *Reid vs. Reid*, 112 Cal. 274, 278, 44 Pac. Rep. 564 (applied).

2. AGREEMENT OF PARTIES.—Disposition of community property, under this and preceding section, may be made in disregard of agreement between parties with reference to division of property, when court finds such agreement to be void, regardless of fact as to whether or not such agreement had been set

aside by independent action.—*Loveren vs. Loveren*, 106 Cal. 509, 513, 39 Pac. Rep. 801.

3. Executed collusively to facilitate divorce, is void.—*Loveren vs. Loveren*, supra.

4. CONSTRUCTION.—This section authorizes court to deal separately with that part of decree in divorce case which disposes of community property, without disturbing other parts of decree.—*Reid vs. Reid*, 112 Cal. 274, 278, 44 Pac. Rep. 564.

5. DUTY OF COURT IN DISSOLVING MARRIAGE with respect to community property,—as to, see *Ex parte Spencer*, 83 Cal. 460, 465, 17 Am. St. Rep. 266, 23 Pac. Rep. 395.

See ante § 146 and note par. 26.

6. INFERENCE TO BE DRAWN FROM this and preceding section,—as to, see *Eslinger vs. Eslinger*, 47 Cal. 62, 64.

7. PARTITION NOT BEING PRACTICABLE.—Community property may be ordered sold and proceeds, after satisfaction of any liens, divided equally between parties.—*Reid vs. Reid*, 112 Cal. 274, 278, 44 Pac. Rep. 564.

8. Whenever it is necessary for disposition

of community property, court may order partition or sale of property and division or other disposition of proceeds.—*Reid vs. Reid*, 112 Cal. 274, 278, 44 Pac. Rep. 564.

9. SALE OF COMMUNITY PROPERTY un-

§ 148. SAME—[SUBJECT TO REVISION ON APPEAL]. The disposition of the community property, and of the homestead, as above provided, is subject to revision on appeal in all particulars, including those which are stated to be in the discretion of the court.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 192.

1. Applied, cited, construed, referred to, etc.
- 2-7. Division of community property—Revision.
8. Decree authorizing sale—Appeal.
9. Findings not clear as to community property.
- 10, 11. Permanent allowance—Reduction, when made.
- 12, 13. Same—Abuse of discretion.
14. Same—Divorce for cruelty of husband.
15. Same—False representations as to character of property.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Brown vs. Brown*, 60 Cal. 579, 580 (applied); *Sharon vs. Sharon*, 67 Cal. 185, 212, 7 Pac. Rep. 456, 8 Id. 709 (applied); *Kimple vs. Conway*, 75 Cal. 413, 415, 17 Pac. Rep. 546 (applied); *Strozyński vs. Strozyński*, 97 Cal. 189, 191, 31 Pac. Rep. 1130 (construed and applied); *Reid vs. Reid*, 112 Cal. 274, 278, 44 Pac. Rep. 564 (applied); *Gorman vs. Gorman*, 134 Cal. 378, 379, 66 Pac. Rep. 313 (applied).

2. DIVISION OF COMMUNITY PROPERTY—Revision.—Decree of distribution of community property and of homestead, as provided in this chapter, is subject to revision, on appeal, in all particulars.—*Brown vs. Brown*, 60 Cal. 579, 580; *Bovo vs. Bovo*, 63 Cal. 77; *Sharon vs. Sharon*, 67 Cal. 185, 212, 7 Pac. Rep. 456, 8 Id. 709; *Strozyński vs. Strozyński*, 97 Cal. 189, 191, 31 Pac. Rep. 1130; *Reid vs. Reid*, 112 Cal. 274, 278, 44 Pac. Rep. 564.

3. Court is denied jurisdiction to disturb that part of decree granting divorce, but it has jurisdiction to revise that part of decree for division of an estate.—*Sharon vs. Sharon*, 67 Cal. 185, 212, 7 Pac. Rep. 456, 8 Id. 709.

4. Appellate court under provisions of this section can deal separately with that part of decree in divorce case which disposes of community property without disturbing other parts of decree.—*Reid vs. Reid*, 112 Cal. 274, 278, 44 Pac. Rep. 564.

5. Disposition of community property is subject to revision, on appeal, in all particulars, including those which are stated in discretion of court.—*Strozyński vs. Strozyński*, 97 Cal. 189, 191, 31 Pac. Rep. 1130.

6. Decree of lower court dividing community property can be modified upon appeal by special direction to court below to amend its judgment.—*Reid vs. Reid*, 112 Cal. 274, 278, 44 Pac. Rep. 564.

7. Division of community property by trial court is subject to revision on appeal, in all

under this section need not be confirmed before becoming complete.—*Kimple vs. Conway*, 75 Cal. 413, 415, 17 Pac. Rep. 546, 17 Id. 546.

See Code Civ. Proc. 684 and note.

particulars, including those matters which are in discretion of the court; but where it appears from record that the court below had advantages for reaching just conclusions in the premises, which supreme court does not possess—"the parties and witnesses appearing before it with details of evidence, while here we have but the conclusions reached in the findings, we do not feel disposed to interfere with the trial court."—*Gorman vs. Gorman*, 134 Cal. 378, 379, 66 Pac. Rep. 313.

8. DECREE AUTHORIZING SALE.—Appeal lies from judgment from decree of court authorizing sale of community property.—*Kimple vs. Conway*, 75 Cal. 413, 415, 17 Pac. Rep. 546.

9. FINDINGS NOT BEING CLEAR AS TO WHAT COMMUNITY PROPERTY IS, it will be necessary for court below to retry issue as to community property (unless parties can agree about it), to determine definitely what constitutes such property and amend decree by adjudging distribution thereof; it will be unnecessary to change any part of judgment.—*Reid vs. Reid*, 112 Cal. 274, 278, 44 Pac. Rep. 564.

10. PERMANENT ALLOWANCE—REVIEW on appeal.—*Ex parte Spencer*, 83 Cal. 460, 465, 17 Am. St. Rep. 266, 270, 23 Pac. Rep. 395.

11. Reduction of allowance.—When appellate court is of opinion that monthly allowance awarded wife is too great portion of husband's earnings, it may order same reduced.—*Eldenmuller vs. Eldenmuller*, 37 Cal. 364, 366.

12. Abuse of discretion not appearing, appellate court will not disturb lower court's award in disposing of common property.—*Eldenmuller vs. Eldenmuller*, 37 Cal. 364, 365; *Bovo vs. Bovo*, 63 Cal. 77, 78.

13. Apparent error, though not amounting to abuse of discretion, decree will be revised.—*Strozyński vs. Strozyński*, 97 Cal. 189, 192, 31 Pac. Rep. 1130.

14. Divorce was granted to wife on ground of extreme cruelty, and lower court awarded her one half of community property, supreme court remanded cause with an order to modify judgment so as to award wife three fourths thereof, after payment of community debts.—*Eslinger vs. Eslinger*, 47 Cal. 62, 64.

15. False representation made by husband to wife as to character of property acquired by him since their marriage, which he represented to be his separate estate, resulting in her failure to allege existence of any community property in divorce complaint, is mere misrepresentation of law and affords no grounds for relief.—*Champion vs. Woods*, 79 Cal. 17, 20, 13 Am. St. Rep. 126, 21 Pac. Rep. 534.

CHAPTER III.

HUSBAND AND WIFE.

- § 155. Mutual obligations of husband and wife.
- § 156. Rights of husband, as head of family.
- § 157. In other respects their interests separate.
- § 158. Husband and wife may make contracts.
- § 159. How far may impair their legal obligations.
- § 160. Consideration for agreement of separation.
- § 161. May be joint tenants, etc.
- § 162. Separate property of the wife.
- § 163. Separate property of the husband.
- § 164. Community property.
- § 165. Inventory of separate property of wife.
- § 166. Filing inventory notice of wife's title.
- § 167. Wife not competent to contract for payment of money.
- § 168. Earnings of wife not liable for debts of husband.
- § 169. Earnings of wife, when living separate, separate property.
- § 170. Liability for debts of wife contracted before marriage.
- § 171. Wife's property not liable for debts of the husband, but liable for her own debts.
- § 172. Power of the husband over community property.
- § 173. Courtesy and dower not allowed.
- § 174. Support of wife.
- § 175. Husband not liable when abandoned by wife.
- § 176. When wife must support husband.
- § 177. Rights of husband and wife governed by what.
- § 178. Marriage settlement contracts, how executed.
- § 179. To be acknowledged and recorded.
- § 180. Effect of recording.
- § 181. Minors may make marriage settlements.

§ 155. MUTUAL OBLIGATIONS OF HUSBAND AND WIFE. Husband and wife contract towards each other obligations of mutual respect, fidelity, and support.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Correlative rights and duties.
3. Decree of divorce absolves parties.
4. Husband assumes duty to support family.
5. Same—Source of right of alimony.
6. Wife must support husband, when.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Sharon vs. Sharon, 75 Cal. 1, 36, 16 Pac. Rep. 845 (construed and applied); Mott vs. Mott, 82 Cal. 413, 417, 22 Pac. Rep. 1140 (construed); Luck vs. Luck, 92 Cal. 653, 655, 28 Pac. Rep. 787 (referring by error to this section instead of § 156); Livingston vs. Superior Court Los Angeles, 117 Cal. 633, 635, 49 Pac. Rep. 836, 38 L. R. A. 175 (applied); Livingston vs. Conant (Cal. Jan. 10, 1898), 51 Pac. Rep. 859 (construed); Martin vs. Southern Pac. Co., 130 Cal. 285, 286, 62 Pac. Rep. 515.

2. CORRELATIVE RIGHTS AND DUTIES are prescribed.—There can be no rights of wife without corresponding duties. Rights of wife are to those things which she may claim of husband, and vice versa.—Sharon vs. Sharon, 75 Cal. 1, 36, 16 Pac. Rep. 845.

§ 156. RIGHTS OF HUSBAND, AS HEAD OF FAMILY. The husband is the head of the family. He may choose any reasonable place or mode of living, and the wife must conform thereto.

History: Enacted March 21, 1872.

Mother must aid in support of children, when.—See post § 196 and note.

3. DECREE OF DIVORCE ABSOLVES PARTIES from duties and obligations which marriage imposes.—Mott vs. Mott, 82 Cal. 413, 417, 22 Pac. Rep. 1140.

4. HUSBAND ASSUMES DUTY TO SUPPORT FAMILY, primarily.—Livingston vs. Superior Court Los Angeles, 117 Cal. 633, 635, 49 Pac. Rep. 836, 38 L. R. A. 175.

Failure to support ground for divorce.—See ante § 105 and note.

As to liability of husband for wife's necessities, see post §§ 174, 175 and notes.

As to support of wife after abandonment of husband, see post § 175 and note.

5. Source of right of alimony for wife who does not seek divorce is obligation assumed by parties of mutual respect, fidelity, and support.—Livingston vs. Superior Court Los Angeles, 117 Cal. 633, 635, 49 Pac. Rep. 836, 38 L. R. A. 175.

As to alimony, see ante §§ 136, 137, 139, 140-142 and notes.

6. WIFE MUST SUPPORT HUSBAND, WHEN.—See post § 176 and note.

1. Applied, cited, construed, referred to, etc.
2. Choice of husband must be exercised.
3. Dominion of husband over homestead.
- 4-6. Husband head of family—For homestead purposes.
7. Same—For fixing residence of child.
8. Same—For selecting dwelling-place of wife.
9. Same—Same—Wife's duty to live with husband.
10. Same—Insane wife subject to husband's custody.
11. Interment of wife—Husband's rights and duties.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Mauldin vs. Cox*, 67 Cal. 387, 391, 7 Pac. Rep. 804 (applied); *McMullin vs. McMullin*, 123 Cal. 653, 654, 56 Pac. Rep. 554 (applied); *Henley vs. Wilson*, 137 Cal. 273, 275, 92 Am. St. Rep. 160, 70 Pac. Rep. 21, 58 L. R. A. 941 (cited).

2. **CHOICE OF HUSBAND MUST BE EXERCISED**, otherwise there can arise no duty on part of wife to conform.—*Vosburg vs. Vosburg*, 136 Cal. 195, 203, 204, 68 Pac. Rep. 694.

3. **DOMINION OF HUSBAND OVER HOMESTEAD**.—Husband may manage and control common property and homestead, and may, with propriety, exercise acts of ownership, which in another would be evidence of an adverse holding, but which in husband indicates assertion of mutual rights or parties to marital relations.—*Mauldin vs. Cox*, 67 Cal. 387, 391, 7 Pac. Rep. 804.

4. **HUSBAND HEAD OF FAMILY**—For homestead purposes.—See post § 1261 and note.

5. On failure or neglect of husband to make selection of homestead, wife is authorized to do so under § 1262, and such selection will be good, even as against husband's recorded mort-

gage.—*First Nat. Bank vs. Bruce*, 94 Cal. 77, 29 Pac. Rep. 488.

6. **Husband may remove his family from homestead at will**, subject only to selection of reasonable place of residence.—*Mauldin vs. Cox*, 67 Cal. 387, 391, 7 Pac. Rep. 804.

7. **For fixing residence of child**.—See post § 213 and note.

8. **For selecting dwelling-place of wife**, and her refusal to conform thereto constitutes desertion, and ground for divorce.—See ante §§ 103, 104 and notes.

9. **Same—Wife's duty to live with husband at some reasonable place of abode**, which he is privileged to select, is recognized and upheld by the court.—*McMullin vs. McMullin*, 123 Cal. 653, 655, 56 Pac. Rep. 554.

10. **Insane wife subject to husband's custody** as against private institution for insane into whose custody he has given her, where his offer to care for her is made in good faith, and finding that his proposal to remove her was made in good faith will not be disturbed, notwithstanding fact that some suspicion was cast upon motives.—*St. Vincent Inst. for Insane vs. Davis*, 129 Cal. 17, 19, 20, 61 Pac. Rep. 476.

As to husband's liability for care of insane wife, see post § 174 and note para. 8, 9.

11. **INTERMENT OF WIFE**—Husband has control of body of deceased wife, and must care for the same, and may select a proper place for the interment, regardless of the wishes of parents and other relatives (dictum).—In re *Estate of Weringer*, 100 Cal. 345, 346, 347, 34 Pac. Rep. 825. See *Smyley vs. Reese*, 53 Ala. 89, 25 Am. Rep. 598; *Staples' Appeal*, 53 Conn. 426.

See post § 174 and note para. 11, 12; also § 655 and note para. 13, 14.

§ 157. IN OTHER RESPECTS THEIR INTERESTS SEPARATE. Neither husband nor wife has any interest in the property of the other, but neither can be excluded from the other's dwelling.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Conveyance in fraud of wife.

1. **Applied, cited, construed, referred to**, etc., in: *Murray vs. Murray*, 115 Cal. 266, 272, 56 Am. St. Rep. 97, 47 Pac. Rep. 37, 37 L. R. A. 626 (applied); *Greer vs. Greer*, 135 Cal. 121, 125, 67 Pac. Rep. 20 (applied).

2. **Conveyance in fraud of wife**.—Although it may be that wife has no standing under this section to attack voluntary disposition of her husband's separate property, yet in action against him for maintenance, without divorce,

upon his desertion, she is entitled to relief under §§ 137 and 3439 of this code, and, though not in strictness creditor of the husband, is, as concerns her right to maintenance, within protection of statute of frauds.—*Murray vs. Murray*, 115 Cal. 266, 272, 273, 56 Am. St. Rep. 97, 47 Pac. Rep. 37, 37 L. R. A. 626. See *Greer vs. Greer*, 135 Cal. 121, 125, 67 Pac. Rep. 20.

As to action for alimony without divorce, see ante § 137 and note.

As to action to set aside conveyance in fraud of marital rights, see post §§ 3439-3442 and notes.

§ 158. HUSBAND AND WIFE MAY MAKE CONTRACTS. Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title on trusts.

History: Enacted March 21, 1872.

CONTRACTS BY HUSBAND AND WIFE.

I. In General.

1. Applied, cited, construed, referred to, etc.
2. Abrogation of limitations and restrictions upon married woman.

II. Contracts by Wife before Enlargement of Powers.

3. Common-law incapacity of wife to contract.
- 4-6. Same—Enumeration of contracts.
7. Same—Exceptions to rule.
8. Inhibition of original code upon contracts for payment of money.
9. Limitation on wife to contracts binding separate property.
- 10-14. Same—Equity jurisdiction to enforce charges on separate property.
15. Repealing statute not retroactive.

III. Contracts between Husband and Wife.

16. Alimony—Validity of agreement as to.
17. Alteration of legal relations as to property.
18. Antenuptial contracts and marriage settlements.
19. Capacity of husband and wife equivalent.
20. Common and joint property—Contracts concerning.
21. Compromise agreement valid.
22. Consideration.
23. Construction—Application of general rules.
24. Conveyances from one spouse to other.
- 25-27. Same—Delivery of deed in escrow—Parol evidence.
28. Description of property.
29. Employment of husband by wife.
30. Formalities required not peculiar.
31. Homestead may be subject of contract.
32. Loan of money may be made by wife to husband.
- 33, 34. Note may be made by one spouse to other.
35. Public policy must not be contravened.
- 36-40. Sale and gift of chattels—Necessity for and requisites of delivery.
41. Rescission—Grounds for.
42. Specific performance—Fairness of contract considered.
43. Same—Facts showing lack of unfairness must be alleged.

IV. Confidential and Trust Relation between Husband and Wife.

44. Relation is confidential—Fair dealing required.
45. Same—Husband and wife not trustee and beneficiary.
46. Same—Husband entitled to same protection as wife.
47. Same—Strangers not within rule.
48. Advantage taken—Breach of confidence.
49. Same—Favorableness of contract not advantage.
- 50, 51. Consideration—Contract may be voluntary.
52. Same—Burden of proof not on beneficiary.

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53. Same—Presumption where contract is in writing.

54. Duress—Ground for rescission.

55. Same—Vexatious action for divorce constitutes.

56. Fraud—Ground for equitable relief.

57. Same—Betrayal of confidence by refusal to reconvey.

58. Same—Deed creates no presumption of.

59. Trust results where parties are incapable of contracting.

60. Undue influence—Ground for equitable relief.

61-66. Same—Presumption of undue influence.

V. Contracts of Husband with Strangers.

67. Adoption by husband of wife's void contract.

68. Consideration—Forbearance of wife's debt.

69. Parol promise to pay wife's debt void.

70. Pledge to secure wife's debt need not be in writing.

VI. Contracts of Wife with Strangers.

71. Antenuptial contracts—Liability of husband and wife.

72. Assumption of another's debt, when valid.

73. Same—Husband's debt—Payment of others not evidence.

74. Champertous contract by wife invalid.

75. Consideration—Necessity for.

76, 77. Same—Accommodation note valid.

78, 79. Same—Assumption of husband's debt.

80, 81. Same—Extension of time of payment sufficient.

82. Same—Negotiable instrument—Bona fide purchaser.

83. Same—Third person may receive consideration.

84. Contract to pay money valid.

85. Estoppel of wife—Incident to power to contract.

86. Formalities required by other statutes not dispensed with.

87. Fraud and undue influence vitiates contract.

88. Good-will may be sold by wife.

89. Judgment is valid contract.

90. Money may be borrowed by wife.

91. Necessaries—Express contract for valid.

92. Same—No implied contract to pay for.

93. Same—Oral contract within statute of frauds.

94. Note by wife is valid.

95. Purchase of land valid.

96. Remedies and rights against a married woman—Same as on ordinary contracts.

97. Same—Part performance insufficient.

98. Same—Specific performance decreed against married women.

99. Same—Same—Contract made before marriage enforceable.

100. Remedies and rights of wife—Same as ordinary contracts afford.

101. Same—Assumpsit on disaffirmance of void contract.

102. Same—Rescission—Ordinary equity jurisdiction.

103-105. Same—Specific performance—When decreed.

106. Same—Burden of proof on defendant as to capacity in which wife contracted.

VII. Contracts of Husband and Wife with Strangers.

107. Husband and wife may contract jointly.

108. Same—Joint note valid.

109. Husband bound although wife is not.

110. Mortgage by husband and wife binding.

VIII. Husband as Wife's Agent.

111. Agency of husband not implied.

112. Same—To execute wife's note for necessities.

113. Husband may be agent of wife.

114. Same—Authority of husband as agent.

115. Same—Note may be executed by husband as agent.

116. Same—Revocation of wife's contract may be by husband.

117. Evidence of agency—Circumstantial sufficient.

118. Same—Declarations of husband.

119. Same—Less than ordinarily required sufficient.

120. Liability of wife as undisclosed principal.

121. Ratification of unauthorized acts of husband.

122. Same—Wife's ignorance of rights.

IX. Wife as Husband's Agent.

123. Express agency—May be conferred on wife.

124. Same—Wife's acts binding on husband.

125. Implied agency of wife as to necessities.

126. Same—Limitation upon rule.

127. Same—Presumption that wife is husband's agent.

128. Ratification of unauthorized acts of wife.

X. Partnership Contracts.

129, 130. Contract of partnership by wife with stranger valid.

131, 132. Husband and wife may form partnership.

133. Same—Wife's consent necessary.

134. Transactions not within scope of partnership not binding on wife.

XI. Suretyship of Wife.

135. Wife may be surety for husband.

136, 137. Parol evidence to show suretyship.

I. IN GENERAL.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Parry vs. Kelley, 52 Cal. 334, 335 (construed and applied); Marlow vs. Barlew, 53 Cal. 456, 459, 460, 461 (construed and applied); Butler vs. Baber, 54 Cal. 178, 179 (construed); Leonis vs. Lazzarovich, 55 Cal. 52, 53, 59 (referred to); Wedel vs. Herman, 59 Cal. 507, 516 (referred to); Schuler vs. Savings & Loan Soc., 64 Cal. 397, 398, 399, 1 Pac. Rep. 479 (construed and applied); Sacramento Lumber Co. vs. Wagner, 67 Cal. 293, 294, 7 Pac. Rep. 705 (construed and applied); Goad vs. Moulton, 67 Cal. 536, 540, sub nom. Good vs. Moulton, 8

Pac. Rep. 68 (construed and applied); Burkle vs. Levy, 70 Cal. 250, 252, 11 Pac. Rep. 643 (construed and applied); Schuyler vs. Broughton, 70 Cal. 282, 285, 11 Pac. Rep. 719 (construed and applied); Estate of Noah, 73 Cal. 583, 585, 2 Am. St. Rep. 829, 15 Pac. Rep. 287 (construed and applied); Tolman vs. Smith, 74 Cal. 345, 348, 349, 16 Pac. Rep. 189 (construed and applied); Brison vs. Brison, 75 Cal. 525, 528, 7 Am. St. Rep. 189, 17 Pac. Rep. 689 (construed and applied); Burkett vs. Burkett, 78 Cal. 310, 312, 12 Am. St. Rep. 58, 20 Pac. Rep. 715, 3 L. R. A. 781 (construed and applied); Carter vs. McQuade, 83 Cal. 274, 278, 23 Pac. Rep. 348 (construed and applied); Corker vs. Corker, 87 Cal. 643, 649, 650, 25 Pac. Rep. 922 (cited); Jackson vs. Jackson, 94 Cal. 446, 461, 29 Pac. Rep. 957 (construed and applied); Wickersham vs. Comerford, 96 Cal. 433, 439, 31 Pac. Rep. 358 (construed and applied); Bogart vs. Woodruff, 96 Cal. 609, 610, 611, 31 Pac. Rep. 618 (construed and applied); Schwarze vs. Mahoney, 97 Cal. 131, 134, 31 Pac. Rep. 908 (construed and applied); Porter vs. Bucher, 98 Cal. 454, 460, 33 Pac. Rep. 335 (construed and applied); Wren vs. Wren, 100 Cal. 276, 279, 280, 38 Am. St. Rep. 287, 34 Pac. Rep. 775 (construed and applied); Dimond vs. Sanderson, 103 Cal. 97, 100, 101, 37 Pac. Rep. 189 (construed and applied); In re Estate of Davis, 106 Cal. 453, 455, 39 Pac. Rep. 756 (applied); Glas vs. Glas, 114 Cal. 566, 568, 55 Am. St. Rep. 90, 46 Pac. Rep. 667 (construed and applied); Tillaux vs. Tillaux, 115 Cal. 663, 672, 47 Pac. Rep. 691 (construed and applied); White vs. Warren, 120 Cal. 322, 323, 326, 52 Pac. Rep. 723 (applied); In re Estate of Winslow, 121 Cal. 92, 94, 95, 53 Pac. Rep. 363 (construed and applied); Davis vs. Green, 122 Cal. 364, 366, 55 Pac. Rep. 9 (referred to with § 159); Loupe vs. Smith, 123 Cal. 491, 496, 56 Pac. Rep. 254 (referred to with other sections); Yoakam vs. Kingery, 126 Cal. 80, 83, 58 Pac. Rep. 324 (construed and applied); Newman vs. Freitas, 129 Cal. 283, 289, 61 Pac. Rep. 907, 50 L. R. A. 548 (construed); Freiermuth vs. Steigleman, 130 Cal. 392, 393, 80 Am. St. Rep. 138, 62 Pac. Rep. 615 (construed); Stiles vs. Cain, 134 Cal. 170, 172, 173, 174, 175, 66 Pac. Rep. 231 (construed and applied); Hamilton vs. Hubbard, 134 Cal. 603, 606, 65 Pac. Rep. 321, 66 Id. 860 (construed and applied); McDougall vs. McDougall, 135 Cal. 316, 317, 318, 67 Pac. Rep. 778 (construed); Farmers' & M. Bank vs. De Shorb, 137 Cal. 685, 693, 695, 697, 70 Pac. Rep. 771 (construed and applied); McDonald vs. Randall, 139 Cal. 246, 253, 72 Pac. Rep. 997 (construed and applied); Hoeck vs. Greif, 142 Cal. 119, 124, 75 Pac. Rep. 670 (cited).

2. ABROGATION OF LIMITATIONS AND RESTRICTIONS UPON MARRIED WOMEN.—

The code has abrogated almost all the limitations and restrictions upon the capacity of married women to contract, and has relieved them from the disabilities under which they formerly labored; and, in respect to their property and contracts, has taken away the sort of supervision or control which husbands formerly exercised.—Marlow vs. Barlew, 53 Cal. 456, 459.

As to capacity of all persons to contract, except minors, insane persons, and persons deprived of civil rights, see ante §§ 33-40 and notes, and post §§ 1556, 1557 and notes.

As to conflict of laws concerning power of wife to convey separate property, see post § 162 and note par. 70.

As to contracts concerning separate property of husband and wife and community property, see, respectively, § 162 and note, pars. 42-65; § 163 and note, para. 16-37; and § 172 and note pars. 41-85.

As to contracts of separation and for support, see post §§ 159, 160 and notes.

As to married women becoming sole traders, rights, liabilities, etc., see Code Civ. Proc. §§ 811-821 and notes.

II. CONTRACTS BY WIFE BEFORE ENLARGEMENT OF POWERS.

2. COMMON-LAW INCAPACITY OF WIFE TO MAKE ANY CONTRACT was in force until Act April 17, 1850, and she could not make any contract so as to render her liable in a suit at law.—*Rowe vs. Kohle*, 4 Cal. 285; *Simpers vs. Sloan*, 5 Cal. 457, 458; *Poole vs. Gerrard*, 6 Cal. 71, 72, 65 Am. Dec. 481; *Luning vs. Brady*, 10 Cal. 265, 267; *Shaver vs. Bear River & Auburn W. & M. Co.*, 10 Cal. 396, 401; *Miller vs. Newton*, 23 Cal. 554, 563; *Brown vs. Orr*, 29 Cal. 120, 122; *Smith vs. Greer*, 31 Cal. 476, 478, 479; *Belloc vs. Davis*, 38 Cal. 242, 256; *Drais vs. Hogan*, 50 Cal. 121, 128; *Tillaux vs. Tillaux*, 115 Cal. 663, 671, 673, 47 Pac. Rep. 691; *Spangler vs. Sellers*, 5 Fed. Rep. 882, 891.

As to conveyance of separate property by wife, see post § 162 and note pars. 42-65.

4. Lease by wife not valid so as to render her liable for rent.—See *Aiken vs. Davis*, 17 Cal. 119, 121.

5. Note and mortgage of wife invalid and not enforceable.—*Simpers vs. Sloan*, 5 Cal. 457, 458, approved in *Vantilburg vs. Black*, 3 Mont. 459, 464, where the court say: "The decisions of the supreme court of California concerning this question have been uniform from the case of *Rowe vs. Kohle*, 4 Cal. 285, to that of *Drais vs. Hogan*, 50 Cal. 121."

6. Retainer of attorney by wife invalid so far as she contracts to pay him for his services.—*Drais vs. Hogan*, 50 Cal. 121, 128.

7. SAME—EXCEPTIONS TO THE RULE were made even at law. Thus, if the husband (1) became civiliter mortuus, or (2) was transported for a term of years, or (3) had been abroad and unheard of for seven years, or (4) had left the state without the intention of returning, it was held that she could contract in her own name, and was liable to be sued alone thereon.—*Miller vs. Newton*, 23 Cal. 554, 563, 564.

8. INHIBITION OF ORIGINAL CODE UPON CONTRACTS FOR PAYMENT OF MONEY by wife, § 167 was not modified by §§ 158, 159, 162, 171 and 1556, or by Code Civil Procedure, § 370, subd. 1, authorizing a wife to sue alone when the action concerned her separate property; nor did § 17 of the Code Civil Procedure overcome such inhibition by providing that the words "personal property" should include "money"; and accordingly it was held that a wife was prohibited from making a note which would bind her personally.—*Butler vs. Baber*, 54 Cal. 178, 179; *Brickell vs. Batchelder*, 62 Cal. 623, 629, 640.

9. LIMITATION ON WIFE TO CONTRACTS BINDING SEPARATE PROPERTY.—Contracts creating personal liability invalid, as at common law, although Act April 17, 1850, § 6, authorized the encumbrance or alienation of her separate property by an instrument in writing signed by her and her husband, and acknowledged by her upon a separate examination; and under such statute the wife could make no contracts, except such as were made in pursuance of its provisions for the purpose of binding her separate property.—*Smith vs. Greer*, 31 Cal. 476, 479; *Belloc vs. Davis*, 38 Cal. 242, 256; *Love vs. Watkins*, 40 Cal. 547, 558, 6 Am. Rep. 624; *Drais vs. Hogan*, 50 Cal. 121, 128. See *Althof vs. Conheim*, 38 Cal. 230, 233, 99 Am. Dec. 363; *Wedel vs. Herman*, 59 Cal. 507, 511.

As to conveyance and encumbrance of separate property by wife, see post § 162 and note pars. 42-65.

10. Equity jurisdiction.—Charge on separate property not enforceable in equity, unless it has been created by instrument in writing, executed in compliance with the requirements of Act April 17, 1850.—*Macclay vs. Love*, 25 Cal. 367, 374-383, 85 Am. Dec. 133, overruling *Miller vs. Newton*, 23 Cal. 554, 564, 565. See *Selover vs. American-Russian Com. Co.*, 7 Cal. 266, 274; *Barrett vs. Tewksbury*, 9 Cal. 13, 15; *Love vs. Watkins*, 40 Cal. 547, 558, 6 Am. Rep. 624.

11. LIEN UPON PERSONAL PROPERTY ENFORCEABLE IN EQUITY under Act May 12, 1862, amending Act April 17, 1850, § 6, by which the only limitation on the power of the wife to deal with her personal property was that her husband should join in the sale, assignment, or transfer of it, and she was not in terms prohibited from creating a lien or encumbrance on it by her own separate act; and accordingly, rendering separate personal property liable in equity upon an oral contract for services rendered in the protection and preservation of such property.—*Terry vs. Hammonds*, 47 Cal. 32, 38, 39, distinguishing *Macclay vs. Love*, 25 Cal. 367, 374-383, 85 Am. Dec. 133, and *Love vs. Watkins*, 40 Cal. 547, 558, 6 Am. Rep. 624. See *Miller vs. Newton*, 23 Cal. 554, 564, 565; *Friedenberg vs. Parker*, 50 Cal. 103, 105.

12. PROTECTION OF WIFE AGAINST IMPOSITION.—Equity will not enforce dealings with a married woman affecting her separate estate, unless they are free from fraud and reasonable in their terms, and it appears that no unfair advantage has been taken of her.—*Miller vs. Newton*, 23 Cal. 554, 566.

13. REFUSAL OF WIFE TO AID IN SUBJECTING SEPARATE PROPERTY IMMATERIAL after having orally pledged the credit of her separate estate, and a court of equity will nevertheless enforce such liability.—*Miller vs. Newton*, 23 Cal. 554, 568.

14. REPEALING STATUTE NOT RETROACTIVE.—Act March 30, 1872, § 38, which went into effect July 1, 1874, and which removed the incapacity of a wife to make a contract for the payment of money, and repealed the inhibition contained in § 167 of the Civil Code, was not retroactive and did not render enforceable a contract for the payment of money which was made while § 167 was in force.—*Brickell vs.*

Batchelder, 62 Cal. 623, 639, 640. See *Rico vs. Brandenstein*, 98 Cal. 465, 468, 35 Am. St. Rep. 192, 33 Pac. Rep. 480 20 L. R. A. 702.

See ante § 3 and note pars. 3, 4.

15. WRITTEN CONTRACT BY WIFE NOT REQUIRED, as equity will be guided solely by the nature and terms of the contract.—*Miller vs. Newton*, 23 Cal. 554, 566.

III. CONTRACTS BETWEEN HUSBAND AND WIFE.

16. Alimony—Validity of agreement as to.—See ante § 146 and note.

17. Alterations of legal relations as to property.—See post § 159 and note pars. 15-22.

18. Antenuptial contracts and marriage settlements.—See post § 178 and note.

19. CAPACITY OF HUSBAND AND WIFE EQUIVALENT, under this section, as respects making contracts between themselves, their unity to this extent no longer existing.—*Schuler vs. Savings & L. Soc.*, 64 Cal. 397, 398, 399, 1 Pac. Rep. 479.

As to gift by husband to wife of her earnings, see post § 164 and note par. 164.

20. COMMON AND JOINT PROPERTY—Contracts concerning.—See post § 161 and note par. 3.

21. COMPROMISE AGREEMENT BETWEEN HUSBAND AND WIFE IS VALID where it concerns pending litigation between them, and is entered into bona fide.—*McClure vs. McClure*, 100 Cal. 339, 342, 34 Pac. Rep. 822.

22. Consideration.—See pars. 50-53 this note.

23. CONSTRUCTION—Application of general rules governing ordinary contracts should be made, and contract in writing between husband and wife should not receive construction that does not appear upon its face to have been its object, or which will operate a different result from that which is fairly deducible from its terms.—*Corker vs. Corker*, 87 Cal. 643, 648, 25 Pac. Rep. 922. See *Porter vs. Bucher*, 98 Cal. 454, 460, 33 Pac. Rep. 335; *Reid vs. Reid*, 112 Cal. 274, 277, 44 Pac. Rep. 564.

24. CONVEYANCE FROM ONE SPOUSE TO OTHER.—Community property.—See post § 172 and note pars. 59-61.

Husband's separate property.—See post § 163 and note pars. 21-37.

Wife's separate property.—See post § 162 and note par. 64.

As to delivery of deed in escrow, see pars. 25-27 this section.

As to effect of conveyance of community property to wife, see post § 164 and note par. 156.

As to effect of conveyance of husband's separate property to wife, see post § 164 and note par. 157.

As to sales by husband to wife, see pars. 44-66 this note.

25. Same—Delivery in escrow may be made, and where pursuant to directions of one spouse the deed is delivered by third person to other spouse, as of date of its execution, such delivery by third person is effectual to accomplish intention of maker of deed.—*Ruiz vs. Dow*, 113 Cal. 490, 496, 45 Pac. Rep. 867.

26. Same—Conditional delivery is insufficient, as where husband and wife execute mutual deeds to each other and deliver them to third person, with understanding that party surviving should have his or her deed returned in case other party should die, that decedent's deed should be delivered to survivor and that no title to property described in deed of party surviving should vest; and where such method is resorted to no title vests under either deed upon death of one of spouses.—*Kenney vs. Parks*, 125 Cal. 146, 149, 151, 57 Pac. Rep. 772. See *Bury vs. Young*, 98 Cal. 446, 449-451, 35 Am. St. Rep. 186, 33 Pac. Rep. 338; *Wittenbrock vs. Cass*, 110 Cal. 1, 7, 42 Pac. Rep. 300; *Ruiz vs. Dow*, 113 Cal. 490, 497, 45 Pac. Rep. 867; *Canale vs. Copello*, 137 Cal. 22, 24, 69 Pac. Rep. 698; *Kenney vs. Parks*, 137 Cal. 527, 531, 70 Pac. Rep. 556.

27. Same—Parol evidence is admissible for the purpose of proving the declarations of maker of deed as to his intentions, whether such declarations were made before or after transaction.—*Ruiz vs. Dow*, 113 Cal. 490, 497, 45 Pac. Rep. 867.

See *Thornton's Gifts in Advancement* § 222, p. 224.

28. Description of property in contract between husband and wife.—See post § 159 and note par. 16.

29. EMPLOYMENT OF HUSBAND BY WIFE.—Implied contract to compensate husband for services in management, etc., of separate estate does not arise; there must be an express agreement to have that effect.—*Lewis vs. Johns*, 24 Cal. 93, 103, 85 Am. Dec. 49. See *Walsh vs. Walsh*, 84 Cal. 101, 103, 23 Pac. Rep. 1099; *Lake vs. Bender*, 18 Nev. 361, 4 Pac. Rep. 711, 7 Id. 74.

As to agency of husband, see pars. 111-122 this note.

30. Formalities required not peculiar, and contract between husband and wife may be in same form as if parties were strangers.—*Porter vs. Bucher*, 98 Cal. 454, 460, 33 Pac. Rep. 335. See par. 85 this note.

31. HOMESTEAD MAY BE SUBJECT OF CONTRACT.—See post § 159 and note par. 20.

As to contract abandoning homestead, see post §§ 159, 1243 and notes.

As to conveyance by husband of homestead after divorce, see post § 172 and note par. 60.

32. LOAN OF MONEY MAY BE MADE BY WIFE TO HUSBAND, and she may recover it back in like manner as feme sole may recover money loaned.—See *Pool vs. Clifford*, 78 Cal. 371, 372, 20 Pac. Rep. 857; *White vs. Warren*, 120 Cal. 322, 323, 52 Pac. Rep. 723, 49 Id. 129.

33. NOTE—Husband may make to wife where no unfair advantage is taken of marital relation.—*Diamond vs. Sanderson*, 103 Cal. 97, 102, 37 Pac. Rep. 189; *Glas vs. Glas*, 114 Cal. 566, 568, 55 Am. St. Rep. 90, 46 Pac. Rep. 667.

34. Wife may make note to husband as if married relation did not exist.—*May vs. May*, 9 Neb. 16, 31 Am. Rep. 399, 2 N. W. Rep. 221.

As to mortgage and note by wife, see post § 162 pars. 79-89.

**35. PUBLIC POLICY MUST NOT BE CON-
TRAVENED** in contract between husband and
wife; e. g. an agreement not to defend pending
action for divorce is void.—*Newman vs. Frel-
tas*, 129 Cal. 282, 289, 61 Pac. Rep. 907, 50
L. R. A. 548.

As to **champertous contract by wife with
stranger**, see par. 74 this note.

36. SALE OF CHATTELS—Delivery is nec-
essary, either actual or constructive, where
husband sells or gives chattels to his wife, as
in case of contract of sale or gift between
other parties.—See *Murphy vs. Mulgrew*, 102
Cal. 547, 550, 551, 41 Am. St. Rep. 200, 36 Pac.
Rep. 857 (sale); *Hayford vs. Wallace* (Cal. Oct.
6, 1896), 46 Pac. Rep. 301; *O'Kane vs. Whelan*,
124 Cal. 200, 202, 204, 71 Am. St. Rep. 42, 56
Pac. Rep. 880.

As to **delivery of chattels sold**, see post
§§ 1753, 1754, 1756, 1758 and notes.

As to **necessity for delivery as against cred-
itors**, see post § 3440 and note.

**37. Character of property must be con-
sidered**, and where husband sells hay to his
wife, it is not necessary that she should re-
move same; but it is question for jury whether
or not it is sufficient for her, under custom of
country, to allow the hay to remain where it
is and take her cattle to it to be fed.—*Porter
vs. Bucher*, 98 Cal. 454, 458-461, 33 Pac. Rep.
335.

38. Manual delivery is unnecessary where
property at time of sale is on premises occu-
pied by parties.—See *Kane vs. Desmond*, 63
Cal. 464, 465; *Carter vs. McQuade*, 83 Cal. 274,
278, 23 Pac. Rep. 348.

**39. Use of piano by wife as her separate
property** after it has been given to her by her
husband, sufficiently shows delivery and ac-
ceptance.—*Kane vs. Desmond*, 63 Cal. 464, 465.

**40. Use of property by husband after de-
livery and acceptance by wife** does not affect
the validity of the gift.—*Morgan vs. Ball*, 81
Cal. 93, 96, 97, 15 Am. St. Rep. 34, 22 Pac. Rep.
231, 5 L. R. A. 579. See *Farr vs. Swigart*, 13
Utah, 150, 44 Pac. Rep. 711.

41. RESCISSION—Grounds for, are same as
those for which equity frauds relieve in cases
of contracts between other persons, e. g. acci-
dent, mistake, fraud, and undue influence.—
Tillaux vs. Tillaux, 115 Cal. 663, 670, 47 Pac.
Rep. 691.

See pars. 44-66 this note.

As to **rescission of contracts of separation**,
see post § 159 and note pars. 42-55.

42. SPECIFIC PERFORMANCE—Contract
between husband and wife, although valid and
such as court of equity would not set aside for
fraud, mistake, or unfairness, will not be spe-
cifically enforced unless it is fair and just to
defendant.—*Stiles vs. Cain*, 134 Cal. 170, 171-
175, 66 Pac. Rep. 231.

**43. Facts must be alleged showing lack of
unfairness**, and that the contract was just and
founded upon adequate consideration.—*Stiles
vs. Cain*, 134 Cal. 170, 171-175, 66 Pac. Rep. 231.

IV. CONFIDENTIAL AND TRUST RELATION BETWEEN HUSBAND AND WIFE.

**44. RELATION BETWEEN HUSBAND AND
WIFE IS CONFIDENTIAL**, and all transactions

between them respecting property are made
subject to same rules that control dealings be-
tween trustee and his beneficiary, so that if
one spouse obtains advantage over other by
fraud, duress, undue influence, threat, or ad-
verse pressure, equity will give relief (1) by
decreasing rescission, or (2) declaring trust, or
(3) will give other appropriate relief, as courts
of equity are wont to do.—*Brison vs. Brison*,
75 Cal. 525, 527-532, 7 Am. St. Rep. 189, 17 Pac.
Rep. 689; *Jackson vs. Jackson*, 94 Cal. 446, 461,
29 Pac. Rep. 957; *Dolliver vs. Dolliver*, 94 Cal.
642, 646, 647, 30 Pac. Rep. 4; *Dimond vs. San-
derson*, 103 Cal. 97, 102, 37 Pac. Rep. 189; *White
vs. Warren*, 120 Cal. 322, 323, 325, 52 Pac. Rep.
723, 49 Id. 129; *Stiles vs. Cain*, 134 Cal. 170, 172,
66 Pac. Rep. 231. See *George vs. Ransom*, 14 Cal.
658, 660 (decided before adoption of code);
Adams vs. Lombard, 80 Cal. 426, 435, 22 Pac.
Rep. 180; *Hayne vs. Hermann*, 97 Cal. 259, 262,
32 Pac. Rep. 171, *Sheehan vs. Sullivan*, 126 Cal.
189, 192, 58 Pac. Rep. 543; *Sheehan vs. Sullivan*,
126 Cal. 197, 58 Pac. Rep. 1115; *McDougall vs.
McDougall*, 135 Cal. 316, 318, 67 Pac. Rep. 778.

**45. Husband and wife not in relation of
trustee and beneficiary**, although relation be-
tween them is confidential one, and transac-
tions between them are to be considered in
same light, and controlled by same general
rules affecting confidential relation of trustee
and beneficiary.—*Dimond vs. Sanderson*, 103
Cal. 97, 101, 37 Pac. Rep. 189; *White vs. War-
ren*, 120 Cal. 322, 324, 52 Pac. Rep. 723.

**46. Husband is entitled to protection be-
cause of confidential relation** to same extent
as wife is, and he is to be accorded same relief
against breach of confidence as would be given
her.—*Brison vs. Brison*, 75 Cal. 525, 528, 7 Am.
St. Rep. 189, 17 Pac. Rep. 689.

47. Strangers not within the rule, and payee
of note made by husband and wife is not
trustee or beneficiary within § 2235 post, and
if he has acted in good faith, is not affected by
any transactions between such husband and
wife.—*Farmers & Merchants' Bank vs. De
Shorb*, 137 Cal. 685, 693, 70 Pac. Rep. 771.

**48. ADVANTAGE MUST HAVE BEEN
TAKEN BY ONE SPOUSE OVER OTHER** in
order to constitute breach of confidential re-
lation existing between spouses; rule not being
that in every transaction between them one
stands as trustee and other as beneficiary.—
White vs. Warren, 120 Cal. 322, 324, 52 Pac.
Rep. 723, 49 Id. 129. See *Dimond vs. Sand-
erson*, 103 Cal. 97, 101-103, 37 Pac. Rep. 189.

**49. Favorableness of contract not alone ad-
vantage**, rule being that obtaining advantage,
within meaning of § 2235 post, does not neces-
sarily depend upon getting best of transaction.
—*Stiles vs. Cain*, 134 Cal. 170, 172, 66 Pac. Rep.
231, overruling *White vs. Warren*, 120 Cal. 322,
324, 52 Pac. Rep. 723.

50. CONSIDERATION—Contract may be
voluntary, or in consideration of love and affec-
tion and there is no resulting trust merely
because there was no valuable consideration
paid, if there was no undue influence or un-
fair advantage of relation existing between
parties.—*Tillaux vs. Tillaux*, 115 Cal. 663, 669,
47 Pac. Rep. 691; *McDougall vs. McDougall*, 135
Cal. 316, 318, 67 Pac. Rep. 778.

51. Compare: *Dimond vs. Sanderson*, 103 Cal. 97, 101, 102, 37 Pac. Rep. 189; *White vs. Warren*, 120 Cal. 322, 323, 52 Pac. Rep. 723, 49 Id. 139.

52. Burden of proof not on beneficiary, under § 2235, post, to show want of consideration or inadequacy of consideration.—*Stiles vs. Cain*, 134 Cal. 170, 173, 66 Pac. Rep. 231.

See post § 2235 and note.

53. Presumption of consideration where contract is in writing arises under § 1614, post, and accordingly in an action on note given by one spouse to another burden of proving consideration does not rest upon spouse who gave such consideration.—*Dimond vs. Sanderson*, 103 Cal. 97, 101, 102, 37 Pac. Rep. 189.

See post § 1614 and note.

54. DURESS UPON WIFE by husband will entitle her to rescission in equity.—See *Connecticut Life Ins. Co. vs. McCormick*, 45 Cal. 580, 582, 583; *Dolliver vs. Dolliver*, 94 Cal. 642, 646-648, 30 Pac. Rep. 4; *Hart vs. Church*, 126 Cal. 471, 480, 77 Am. St. Rep. 195, 53 Pac. Rep. 910.

As to undue influence, see para. 60-66 this note.

55. Vexatious action for divorce, brought by husband as means of coercing his wife and which aggravates her already existing bodily infirmities and nervous prostration, amounts to duress.—*Dolliver vs. Dolliver*, 94 Cal. 642, 646-648, 30 Pac. Rep. 4.

56. FRAUD—Is ground for equitable relief from transactions between husband and wife, especially where accompanied by want of consideration and undue influence.—*Brison vs. Brison*, 75 Cal. 525, 527-532, 7 Am. St. Rep. 189, 17 Pac. Rep. 689; *Dolliver vs. Dolliver*, 94 Cal. 642, 646, 648, 30 Pac. Rep. 4. See *Adams vs. Lambard*, 80 Cal. 426, 435, 22 Pac. Rep. 180; *Jackson vs. Jackson*, 94 Cal. 446, 461, 29 Pac. Rep. 957; *Hayne vs. Hermann*, 97 Cal. 259, 262, 32 Pac. Rep. 171; *Dimond vs. Sanderson*, 103 Cal. 97, 102, 37 Pac. Rep. 189.

57. Betrayal of confidence by refusal to convey on part of wife to whom deed was made with understanding that she should convey, constitutes such fraud as will entitle husband to rescission.—*Brison vs. Brison*, 75 Cal. 525, 527-532, 7 Am. St. Rep. 189, 17 Pac. Rep. 689. See *Adams vs. Lambard*, 80 Cal. 426, 435, 22 Pac. Rep. 180; *Jackson vs. Jackson*, 94 Cal. 446, 461, 29 Pac. Rep. 957; *Dimond vs. Sanderson*, 103 Cal. 97, 102, 37 Pac. Rep. 189.

58. Deed creates no presumption of fraud from mere naked fact that it is made by husband to his wife.—*Sheehan vs. Sullivan*, 126 Cal. 189, 192, 58 Pac. Rep. 543; *Sheehan vs. Sullivan*, 126 Cal. 197, 53 Pac. Rep. 1115.

59. TRUST RESULTS WHERE PARTIES ARE INCAPABLE OF CONTRACTING as where, assuming that husband and wife cannot contract with each other, wife gives her husband money in consideration for chattels owned by him, and she will be entitled to follow her money into such property, and equity will protect such property against her husband's creditors.—*George vs. Ransom*, 14 Cal. 653, 660 (decided before adoption of code).

See ante para. 3-14 this note.

60. UNDUE INFLUENCE exerted by one spouse upon other in obtaining advantage in transactions relating to property will, under § 1689 post, entitle spouse of whom advantage has been taken to go into equity for relief.—*Jackson vs. Jackson*, 94 Cal. 446, 461, 29 Pac. Rep. 957; *Dolliver vs. Dolliver*, 94 Cal. 642, 646, 647, 30 Pac. Rep. 4.

As to duress exerted by one spouse upon other, see para. 54, 55 this section.

61. Presumption of undue influence.—Arises from unfair advantage obtained by one spouse over other, because of existence of confidential relation between husband and wife.—See *Dimond vs. Sanderson*, 103 Cal. 97, 102, 37 Pac. Rep. 189; *White vs. Warren*, 120 Cal. 322, 325, 52 Pac. Rep. 723, 49 Id. 129.

62. Benefit accruing to one spouse creates no presumption of undue influence on part of such spouse, within meaning of § 1575, post, although presumption does exist as to "great influence" over other spouse.—*Stiles vs. Cain*, 134 Cal. 170, 175, 66 Pac. Rep. 231, overruling *White vs. Warren*, 120 Cal. 322, 323, 52 Pac. Rep. 723 (declaring, in effect, that mere favorableness of contract creates presumption of unfairness and undue influence). See *McDougall vs. McDougall*, 135 Cal. 316, 318, 67 Pac. Rep. 778.

63. Consideration repels presumption that advantage was obtained by undue influence by spouse who paid such consideration.—*Dimond vs. Sanderson*, 103 Cal. 97, 101, 102, 37 Pac. Rep. 189. See *White vs. Warren*, 120 Cal. 322, 324, 52 Pac. Rep. 723.

64. Conveyance of property to wife by husband, without consideration, does not of itself create presumption of undue influence on her part.—*Sheehan vs. Sullivan*, 126 Cal. 189, 192, 58 Pac. Rep. 543; *Sheehan vs. Sullivan*, 126 Cal. 197, 53 Pac. Rep. 1115; *McDougall vs. McDougall*, 135 Cal. 316-318, 67 Pac. Rep. 778.

65. Gift from wife to husband creates presumption of undue influence on his part.—*White vs. Warren*, 120 Cal. 322, 323, 325, 52 Pac. Rep. 723, 49 Id. 129.

66. Compare: *Stiles vs. Cain*, 134 Cal. 170, 172-175, 66 Pac. Rep. 231.

V. CONTRACT OF HUSBAND WITH STRANGERS.

67. ADOPTION BY HUSBAND OF WIFE'S VOID CONTRACT ACT WILL BE PRESUMED where she borrows money with which to buy land, and after it is bought and deed is taken in her name, he deals with property as his own.—*Althof vs. Conheim*, 38 Cal. 230, 233, 234, 99 Am. Dec. 363 (decided before enactment of code).

68. CONSIDERATION—Agreement for forbearance of wife's debt is sufficient consideration for contract of pledge made by husband with wife's creditor.—*Smith vs. Mott*, 76 Cal. 171, 172, 18 Pac. Rep. 260.

69. PAROL PROMISE OF HUSBAND TO PAY WIFE'S DEBT IS VOID so far as his personal liability to pay is concerned, as it is within the statute of frauds.—*Smith vs. Mott*, 76 Cal. 171, 172, 18 Pac. Rep. 260. See *Crooks vs. Tully*, 50 Cal. 254, 257.

As to validity of oral promise to answer for debt, default, or miscarriage of another, see post § 1624 subd. 3 and note.

VL CONTRACT OF WIFE WITH STRANGERS.

70. PLEDGE OF PROPERTY BY HUSBAND may be made after wife has made an invalid pledge of her husband's property to secure her own debt, and, being collateral to and distinct from contract to pay, need not, under § 2986 post, be in writing.—*Smith vs. Mott*, 76 Cal. 171, 172, 18 Pac. Rep. 260.

71. ANTENUPTIAL CONTRACTS—Liability of husband on.—See post § 170 and note par. 3. **Liability of wife on.**—See post § 171 and note par. 15.

72. Assumption of indebtedness of third person by wife is valid, if in consideration of the conveyance to her of a tract of land.—*Sacramento Lumber Co. vs. Wagner*, 67 Cal. 293, 294, 295, 7 Pac. Rep. 705.

73. Contract of wife to pay debt of husband is not shown by fact that after his death she paid off all of his debts except one in question, there being no offer to prove that such payments were made by her in pursuance of acknowledgment of obligation to pay them.—*Briswalter vs. Palomares*, 66 Cal. 259, 261, 5 Pac. Rep. 226.

74. CHAMPERTOUS CONTRACT BY WIFE INVALID; e. g. a contract with attorney to pay him fee, contingent upon his procurement of divorce, out of community property to be recovered is not enforceable.—*Newman vs. Freitas*, 129 Cal. 283, 289-292, 61 Pac. Rep. 907, 50 L. R. A. 548.

75. CONSIDERATION—Is necessary to support wife's contract in accordance with general rules governing contracts.—*Sullivan vs. Sullivan*, 99 Cal. 187, 193, 33 Pac. Rep. 862; *Chaffee vs. Browne*, 109 Cal. 211, 220, 41 Pac. Rep. 1028; *Sawtelle vs. Muncy*, 116 Cal. 435, 438, 48 Pac. Rep. 387; *Newman vs. Freitas*, 129 Cal. 283, 289, 292, 61 Pac. Rep. 907, 50 L. R. A. 548.

76. Accommodation note may be made by wife without consideration for so doing, and is enforceable against her separate estate.—*Goad vs. Moulton*, 67 Cal. 536, 540, 8 Pac. Rep. 63.

77. Same.—Note is valid in hands of purchaser although he knew that it was given by wife for accommodation of another and without any consideration.—*Goad vs. Moulton*, 67 Cal. 536, 540, 8 Pac. Rep. 63.

78. Assumption of husband's debt without consideration is invalid, and voluntary promise by her after contract has been made in behalf of him, and while such contract is being performed, to pay for services out of proceeds of sale of her separate property is not sufficient to shift obligation of payment from husband to wife, or to render latter liable.—*Flynn vs. Mesenger*, 28 Minn. 208, 41 Am. Rep. 279.

79. Wife is not liable for debts of deceased husband, and contract made by her to pay such debt is without consideration.—*Sullivan vs. Sullivan*, 99 Cal. 187, 193, 33 Pac. Rep. 862.

80. Extension of time of payment is sufficient consideration for contract made by married woman respecting her separate estate.—

Burkle vs. Levy, 70 Cal. 250, 252, 11 Pac. Rep. 643.

81. Extension of time of payment by husband sufficient consideration for note given by wife for husband's debt.—*McDonald vs. Randall*, 139 Cal. 246, 251, 253, 72 Pac. Rep. 997. See *Burkle vs. Levy*, 70 Cal. 250, 252, 11 Pac. Rep. 643.

82. Negotiable note of wife without consideration is valid in hands of bona fide purchaser for value before maturity.—*McDonald vs. Randall*, 139 Cal. 246, 249-251, 72 Pac. Rep. 997.

83. Third person may receive consideration, and as in case of contracts made by feme sole, it need not go directly to her.—*Burkle vs. Levy*, 70 Cal. 250, 252, 11 Pac. Rep. 643; *McDonald vs. Randall*, 139 Cal. 246, 251, 253, 72 Pac. Rep. 997.

84. CONTRACT TO PAY MONEY MAY BE MADE BY WIFE, money being "personal property" under Code Civil Procedure § 17.—*Marlow vs. Barlew*, 53 Cal. 456, 459; *Brickell vs. Batchelder*, 62 Cal. 623, 640; *Farmers & Merchants' Bank of Los Angeles vs. De Shorb*, 137 Cal. 685, 691, 692, 70 Pac. Rep. 771.

As to notes, see ante pars. 76, 77 and post par. 94.

85. ESTOPPEL OF WIFE.—As an incident to power of married women to deal with others is capacity to be bound and to be estopped by their conduct, when principle of estoppel is necessary for protection of those with whom they deal.—*Reis vs. Lawrence*, 63 Cal. 129, 134, 135, 49 Am. Rep. 83. See III. *Patterson vs. Lawrence*, 90 Ill. 174, 32 Am. Rep. 22. *Ind.* *Long vs. Crosson*, 119 Ind. 3, 21 N. E. Rep. 450, 4 L. R. A. 783. *Ky.* *McDanell vs. Landrum*, 87 Ky. 404, 12 Am. St. Rep. 500. *Minn.* *Dobbin vs. Cordiner*, 41 Minn. 163, 165, 16 Am. St. Rep. 685, 42 N. W. Rep. 870. *Neb.* *Reed vs. Morton*, 24 Neb. 760, 8 Am. St. Rep. 247, 40 N. W. Rep. 282, 1 L. R. A. 736.

86. FORMALITIES REQUIRED BY OTHER STATUTES NOT DISPENSED WITH in contracts by married women; e. g. necessity for acknowledgment of grant of land.—*Loupe vs. Smith*, 123 Cal. 491, 496, 56 Pac. Rep. 254.

As to acknowledgment by married woman, see post § 178 and note.

As to statute of frauds, see post § 1624 and note, and post par. 93 this note.

87. FRAUD AND UNDUE INFLUENCE upon wife vitiates any contract which she may make and renders it voidable.—*Sawtelle vs. Muncy*, 116 Cal. 435, 48 Pac. Rep. 387.

See post par. 102 this note.

88. GOOD-WILL MAY BE SOLD BY WIFE, and when she joins in such sale with her husband, with reference to business jointly conducted by them with community funds, contract is binding on her and is evidence of ownership in her so as to preclude her from relying upon rule prescribed by §§ 1673 and 1674 post, that a contract in restraint of trade can only be competently made by one who sells good-will of business.—*Potter vs. Ahrens*, 110 Cal. 674, 679, 43 Pac. Rep. 388.

See post §§ 1673, 1674 and notes.

89. JUDGMENT IS CONTRACT and wife may suffer one to be rendered against her by de-

fault, in like manner as she may execute any other contract.—*Bogart vs. Woodruff*, 96 Cal. 609, 611, 31 Pac. Rep. 618.

90. MONEY MAY BE BORROWED BY WIFE as if she were feme sole.—See *Schuyler vs. Broughton*, 70 Cal. 282, 285, 11 Pac. Rep. 719.

As to notes, see par. 94 this note.

91. NECESSARIES—Express contract of wife to pay for household expenses may be made, notwithstanding fact that it is incumbent upon husband to support family.—*Button vs. Higgins*, 5 Colo. App. 167, 38 Pac. Rep. 390.

As to agency of wife to buy necessities, see par. 125 this note.

92. No implied contract of wife to pay for her support, such as food, clothing, and lodging, and only promise which can be implied is that of her husband.—*Perkins vs. Westcoat*, 3 Colo. App. 338, 33 Pac. Rep. 139; *Kantrowitz vs. Prather*, 31 Ind. 92, 99 Am. Dec. 587.

93. Oral promise made by married woman to pay for care of herself and child is promise to pay debt of her husband, and is therefore within the statute of frauds and not valid.—*Perkins vs. Westcoat*, 3 Colo. App. 338, 33 Pac. Rep. 139. (Query, whether husband's liability had accrued before wife's promise, statement of case being defective.)

94. NOTE BY MARRIED WOMAN IS VALID even though it does not grow out of transaction "respecting property" other than the money involved in such note.—*Marlow vs. Barlew*, 53 Cal. 456, 459; *Goad vs. Moulton*, 67 Cal. 536, 539, 8 Pac. Rep. 63; *Farmers and Merchants' Bank of Los Angeles vs. De Shorb*, 137 Cal. 685, 691, 692, 70 Pac. Rep. 771. See *Parry vs. Kelly*, 52 Cal. 334, 335; *Wood vs. Orford*, 52 Cal. 412, 414; *Alexander vs. Bouton*, 55 Cal. 15, 19; *Brickell vs. Batchelder*, 62 Cal. 623, 639, 640; *Savings Bank San Diego County vs. Daley*, 121 Cal. 199, 200, 53 Pac. Rep. 420.

As to accommodation paper, see pars. 76, 77 this note.

95. PURCHASE OF LAND BY WIFE IS VALID, and her coverture is no defense in an action against her on her contract of purchase. *Sacramento Lumber Co. vs. Wagner*, 67 Cal. 292, 294, 7 Pac. Rep. 705. See *Goad vs. Moulton*, 67 Cal. 536, 539, 8 Pac. Rep. 63.

96. REMEDIES AS AGAINST A MARRIED WOMAN on contract duly executed by her are same as against any other contractor, and duty to perform and liability are same as if she were feme sole.—*Marlow vs. Barlew*, 53 Cal. 456, 461; *Alexander vs. Bouton*, 55 Cal. 15, 20; *Stevens vs. Holman*, 112 Cal. 345, 349, 53 Am. St. Rep. 216, 44 Pac. Rep. 670. See *Savings and Loan Soc. vs. Meeks*, 66 Cal. 371, 373, 5 Pac. Rep. 624; *Hickey vs. Thompson*, 52 Ark. 234, 12 S. W. Rep. 475.

As to reformation, see post § 162 and note, pars. 145, 146.

As to reformation of unacknowledged deed, see post §§ 1202-1204 and notes.

97. Part performance of contract by wife insufficient to extinguish, and, like contract of feme sole, it continues to exist until it is performed, unless it is released.—*Alexander vs. Bouton*, 55 Cal. 15, 20.

98. SPECIFIC PERFORMANCE DECREED AGAINST MARRIED WOMAN in like manner

as against other persons.—*Bodley vs. Ferguson*, 30 Cal. 511, 516. See *Racouillat vs. Sansevain*, 32 Cal. 376, 384; *Love vs. Watkins*, 40 Cal. 547, 558, 562, 6 Am. Rep. 624.

AS TO SPECIFIC PERFORMANCE OF UNACKNOWLEDGED DEEDS AND CONTRACTS, see post §§ 1093, 1187 and notes.

99. Contract made by married woman before marriage may be specifically enforced by court of equity after her marriage, as if she were feme sole.—*Love vs. Watkins*, 40 Cal. 547, 559, 6 Am. Rep. 624.

100. REMEDIES AND RIGHTS OF WIFE—Are correlative to her right to contract, and she may enforce any obligation incurred by person with whom she has contracted in like manner as if she were a feme sole.—*Schwarze vs. Mahoney*, 97 Cal. 131, 134, 31 Pac. Rep. 908. See *Wilson vs. Wilson*, 36 Cal. 447, 453, 454; 95 Am. Dec. 194; *Banbury vs. Arnold*, 91 Cal. 606, 609, 611, 27 Pac. Rep. 934; *White vs. Warren*, 120 Cal. 322, 323, 52 Pac. Rep. 723, 49 Id. 129; *Hill vs. Den*, 121 Cal. 42, 44, 53 Pac. Rep. 642; *Grubbe vs. Grubbe*, 26 Ore. 363, 38 Pac. Rep. 182.

101. Assumpsit on disaffirmance of void contract—Where wife orally contracts to perform services in consideration for conveyance of land, and she performs and is put into possession of premises, but other party refuses to convey, she, like feme sole, may disaffirm contract and bring action at law to recover value of services so rendered, after having previously restored, or offered to restore, possession, but not before.—*Hill vs. Den*, 121 Cal. 42, 44, 45, 46, 53 Pac. Rep. 642. See *Fuller vs. Reed*, 38 Cal. 99, 110; *Haynes vs. White*, 55 Cal. 38, 41; *Rhorer vs. Billa*, 83 Cal. 51, 55, 23 Pac. Rep. 274; *Hammond vs. Wallace*, 85 Cal. 522, 531, 532, 20 Am. St. Rep. 239, 24 Pac. Rep. 837.

102. RESCISSION DECREED IN FAVOR OF WIFE upon ordinary grounds recognized in equity, such as fraud and duress.—See *Sawtelle vs. Muncy*, 116 Cal. 435, 437, 438, 48 Pac. Rep. 337.

103. Specific performance will be decreed in favor of wife in accordance with principles of equity in like manner as if she were feme sole.—See *Banbury vs. Arnold*, 91 Cal. 606, 609, 611, 27 Pac. Rep. 934; *Hill vs. Den*, 121 Cal. 42, 44, 53 Pac. Rep. 642.

104. Same—Contract not binding on wife not enforceable by her; e. g. wife's unacknowledged contract to convey land, which by statute is not binding upon her, is not enforceable in her behalf, as there is no principle of equity that gives her rights under the contract not accorded to the purchaser.—*Banbury vs. Arnold*, 91 Cal. 606, 608, 27 Pac. Rep. 934. See *Cooper vs. Pena*, 21 Cal. 404, 412; *Vassault vs. Edwards*, 48 Cal. 458, 466.

105. Same—Part performance of oral contract which is required to be in writing will, under Code Civil Procedure § 1972, entitle wife to specific performance.—*Hill vs. Den*, 121 Cal. 42, 44, 53 Pac. Rep. 642.

See Code Civ. Proc. § 1972 and note.

106. Burden of proof as to capacity in which wife contracted is upon party who has assumed

obligation to her, to show that transaction was entered into by her as agent of community, and not for herself, if he would resist his obligation upon ground of her marriage.—*Schwarze vs. Mahoney*, 97 Cal. 131, 134, 31 Pac. Rep. 908. See *Wetherly vs. Straus*, 93 Cal. 232, 237, 23 Pac. Rep. 1045.

VII. CONTRACT OF HUSBAND AND WIFE WITH STRANGERS.

107. HUSBAND AND WIFE MAY CONTRACT JOINTLY FOR LABOR performed in and about business in which they are jointly engaged, and in which property used is separate property of wife, and right of action on such contract exists as well against wife as against husband.—*Silva vs. Holland*, 74 Cal. 530, 531, 16 Pac. Rep. 385.

108. Joint note of husband and wife valid as against wife.—*Cooper vs. Bank of Indian Ter.*, 4 Okla. 632, 46 Pac. Rep. 475 (decided under identical statute).

109. HUSBAND BOUND, ALTHOUGH WIFE IS NOT, where they jointly make note or bond in usual form as joint makers, and wife is under disability to make contract binding herself personally.—*Spear vs. Ward*, 20 Cal. 659, 675 (bond executed before adoption of code); *Brown vs. Orr*, 29 Cal. 120, 122 (note executed before adoption of code). See *Pfeiffer vs. Riehn*, 13 Cal. 643, 649; *Shartzler vs. Love*, 40 Cal. 93, 96.

110. MORTGAGE EXECUTED BY HUSBAND AND WIFE BINDS PROPERTY even though it was given to secure note which was executed by husband and wife and which was not binding on her personally.—*Pfeiffer vs. Riehn*, 13 Cal. 643, 649 (decided before adoption of code).

As to mortgages executed by husband, see post § 163 and note par. 20.

As to mortgages on community property, see post § 172 and note par. 62.

As to mortgages executed by wife, see post § 162 and note pars. 79-101.

VIII. HUSBAND AS WIFE'S AGENT.

111. AGENCY OF HUSBAND NOT IMPLIED because of marriage relation, and she is not bound by his acts unless she authorizes them or ratifies them.—*Greiner vs. Greiner*, 58 Cal. 115, 122; *Emerson vs. Bergin*, 71 Cal. 335, 338, 12 Pac. Rep. 242; *Mesnager vs. Engelhardt*, 103 Cal. 68, 70, 71, 41 Pac. Rep. 20; *Williams vs. Tam*, 131 Cal. 64, 66, 67, 63 Pac. Rep. 133; *Wagoner vs. Silva*, 139 Cal. 559, 561-563, 73 Pac. Rep. 433. See *Colo. Croth vs. Stahl*, 8 Colo. App. 8, 30 Pac. Rep. 1051; *Brown vs. Lapham*, 22 Colo. 264, 44 Pac. Rep. 504. *Wash. Cattell vs. Fergusson*, 3 Wash. 541, 23 Pac. Rep. 750. *Fed. Dodge vs. Knowles*, 114 U. S. 430, bk. 29 L. ed. 144, 5 Sup. Ct. Rep. 1108, 1197.

112. Note for necessities not binding where it was given by husband as trustee for wife, and it is not enforceable in equity against wife's separate estate.—*Dodge vs. Knowles*, 114 U. S. 430, bk. 29 L. ed. 144, 5 Sup. Ct. Rep. 1108, 1197.

113. HUSBAND MAY BE CONSTITUTED WIFE'S AGENT in like manner as feme sole may make any other person her agent.—*Sav-*

ings Bank San Diego County vs. Daley, 121 Cal. 199, 200, 53 Pac. Rep. 420; *Santa Cruz Rock & Pav. Co. vs. Lyons*, 133 Cal. 114, 118, 65 Pac. Rep. 329. See *Richmond vs. Voorhees*, 10 Wash. 316, 33 Pac. Rep. 1014.

114. Same—Authority of husband as wife's agent is the same as that of agent of feme sole, being governed by general rules, and being dependent upon circumstances of particular case.—*Snodgrass vs. Parks*, 79 Cal. 55, 59, 60, 21 Pac. Rep. 429.

115. Note may be executed by husband as agent of his wife where she has expressly authorized him to do so by power of attorney.—*Savings Bank San Diego County vs. Daley*, 121 Cal. 199, 200, 53 Pac. Rep. 420. See *Richmond vs. Voorhees*, 10 Wash. 316, 33 Pac. Rep. 1014.

116. REVOCATION OF CONTRACT BY HUSBAND IS WITHIN HIS AUTHORITY when he has been authorized by his wife to conduct all negotiations concerning matter in hand, and where he has made contract to purchase, he may substitute for it contract of lease.—*Snodgrass vs. Parks*, 79 Cal. 55, 59, 60, 21 Pac. Rep. 429.

117. EVIDENCE OF HUSBAND'S AGENCY—Circumstantial evidence may be resorted to to prove precedent authority of husband from wife to make purchases for improvement of her separate property.—*Puget Sound Lumber Co. vs. Krug*, 89 Cal. 237, 243, 244, 26 Pac. Rep. 902. See *Burnett vs. Fisher*, 57 Cal. 152.

118. Declarations of husband as to his agency for wife are incompetent as against wife to establish fact of agency, though they are competent for purpose of showing that third person dealt with husband as agent and not as principal.—*Ferris vs. Baker*, 127 Cal. 520, 523, 59 Pac. Rep. 937.

119. Less evidence is required than is ordinarily necessary to show agency between person between whom marriage relation does not exist.—*Wagoner vs. Silva*, 139 Cal. 559, 563, 73 Pac. Rep. 433. See *Cattell vs. Fergusson*, 3 Wash. 541, 23 Pac. Rep. 750.

120. LIABILITY OF WIFE AS UNDISCLOSED PRINCIPAL, where she is principal and her husband is agent, is enforced as if marital relations did not exist.—*Puget Sound Lumber Co. vs. Krug*, 89 Cal. 237, 244, 26 Pac. Rep. 902.

121. RATIFICATION OF HUSBAND'S UNAUTHORIZED CONTRACT results where wife knowingly receives benefits of such contract.—*Simons vs. Bedell*, 122 Cal. 341, 346, 347, 63 Am. St. Rep. 35, 55 Pac. Rep. 3; *Santa Cruz Rock & Pav. Co. vs. Lyons*, 133 Cal. 114, 118, 65 Pac. Rep. 329. See *Puget Sound Lumber Co. vs. Krug*, 89 Cal. 237, 243, 26 Pac. Rep. 902.

122. Wife's ignorance of rights.—Loan of money effected by husband, assuming without authority to act as agent of his wife and to execute note and mortgage as her agent, is not ratified by wife because of her acquiescence in payments of part of such money so borrowed on such note and mortgage, where it appears that such note and mortgage were not binding upon her, and that she thought they were.—*Brown vs. Rouse*, 104 Cal. 672, 675, 676.

38 Pac. Rep. 507. See *Brown vs. Rouse*, 125 Cal. 645, 649, 650, 58 Pac. Rep. 267.

IX. WIFE AS HUSBAND'S AGENT.

123. EXPRESS AGENCY of wife to act for husband may be conferred by him upon her as if they were not married.—*Althof vs. Conheim*, 38 Cal. 230, 233, 99 Am. Dec. 363; *Corbit vs. Kimball*, 107 Cal. 665, 667, 40 Pac. Rep. 1029.

As to adoption by husband of wife's void acts in her own behalf, see par. 67 this note.

124. Wife's acts within scope of her authority are binding upon her husband, and it is immaterial that husband believed his wife was acting otherwise than she did.—*Corbit vs. Kimball*, 107 Cal. 665, 666, 667, 40 Pac. Rep. 1029.

125. IMPLIED AGENCY TO PURCHASE NECESSARIES.—The agency of wife to purchase for her husband common supplies needed in conduct of their common domestic establishment is implied, and no contract for her personal credit will be implied from mere circumstance that she personally obtains the goods.—*Chaffee vs. Browne*, 109 Cal. 211, 219, 41 Pac. Rep. 1028. See *Mich. Powers vs. Russell*, 26 Mich. 179, 184. *Minn. Flynn vs. Messenger*, 28 Minn. 208, 41 Am. Rep. 279. *Fed. Lodge vs. Knowles*, 114 U. S. 430, bk. 29 L. ed. 144, 5 Sup. Ct. Rep. 1108, 1197. *Eng. Emmett vs. Norton*, 8 Car. & P. 506, 34 Eng. C. L. 503.

As to husband's liability for wife's necessities upon neglect to provide, see post § 174 and note.

126. Limitation upon rule is that orders of wife must be proper and not extravagant.—*Emmett vs. Norton*, 8 Car. & P. 506, 34 Eng. C. L. 503.

As to husband's liability for necessities when abandoned by wife, see post § 175 and note.

127. Third person bound to presume wife acting for husband and not on her own account in contracting for matters pertaining to their domestic arrangement, and cannot hold her personally liable, unless she expressly agrees to become so, even though statute conveys upon her power to transact business and make contracts which shall bind her.—*Flynn vs. Messenger*, 28 Minn. 208, 41 Am. Rep. 279.

128. RATIFICATION OF WIFE'S UNAUTHORIZED ACTS will result in accordance with general rules of law of agency, when husband with knowledge receives benefits of her acts without disavowing them.—See *Tryon vs. Sutton*, 13 Cal. 490, 493.

As to adoption by husband of wife's void contract, see par. 67 this note.

X. PARTNERSHIP CONTRACTS.

129. CONTRACT OF PARTNERSHIP BY WIFE WITH STRANGER VALID under statutes which have removed her disability to contract.—*Valensin vs. Valensin*, 28 Fed. Rep. 599, 602, 12 Sawy. C. C. (construing Cal. Civ. Code § 158). See *Ala. Le Grand vs. Eufaula Nat. Bank*, 81 Ala. 123, 60 Am. Rep. 140, 1 So. Rep. 460; *Reed Lumber Co. vs. Lewis*, 94 Ala. 626, 10 So. Rep. 833; *O'Neil vs. Birmingham Brew. Co.*, 101 Ala. 283, 13 So. Rep. 576. *Ark. Abbott vs. Jackson*, 43 Ark. 212. *Ind. Burk vs. Platt*, 88 Ind. 283;

Conant vs. National State Bank Terra Haute, 121 Ind. 323, 22 N. E. Rep. 250. *Iowa. Dupuy vs. Sheak*, 57 Iowa 361, 10 N. W. Rep. 721. *Mich. Vail vs. Winterstein*, 94 Mich. 230, 34 Am. St. Rep. 324, 53 N. W. Rep. 932, 18 L. R. A. 515. *N. J. Merritt vs. Day*, 38 N. J. L. (9 Vr.) 32, 20 Am. Rep. 362. *N. Y. Zimmerman vs. Erhard*, 83 N. Y. 74, 38 Am. Rep. 396. *Pa. Little vs. Hazlett*, 197 Pa. St. 591, 47 Atl. Rep. 855. *Va. Penn vs. Whitehead*, 17 Gratt. 503, 94 Am. Dec. 478 (holding that wife may enter into partnership by consent of her husband).

130. Compare: *Ark. Gilkerson-Sloss Com. Co. vs. Salinger*, 56 Ark. 294, 295, 35 Am. St. Rep. 105, 19 S. W. Rep. 747, 16 L. R. A. 526. *Ind. Haas vs. Shaw*, 91 Ind. 384, 46 Am. Rep. 607. *Md. Bradstreet vs. Baer*, 41 Md. 19. *Mass. Bowker vs. Bradford*, 140 Mass. 521, 5 N. E. Rep. 480; *Plumer vs. Lord*, 91 Mass. (9 Allen) 455, 85 Am. Dec. 773; *Lord vs. Parker*, 85 Mass. (3 Allen) 127. *Mich. Artman vs. Ferguson*, 73 Mich. 146, 16 Am. St. Rep. 572, 40 N. W. Rep. 907, 2 L. R. A. 343. *Ohio. Payne vs. Thompson*, 44 Ohio St. 192, 5 N. E. Rep. 654. *Wash. Board of Trade Seattle vs. Hayden*, 4 Wash. 263, 31 Am. St. Rep. 919, 30 Pac. Rep. 87, 32 Id. 224, 16 L. R. A. 530. *W. Va. Carey vs. Burruss*, 20 W. Va. 571, 43 Am. Rep. 790. *Wis. Fuller vs. McHenry*, 83 Wis. 573, 53 N. W. Rep. 896, 18 L. R. A. 512.

131. HUSBAND AND WIFE MAY FORM PARTNERSHIP under such statutes.—See *Silva vs. Holland*, 74 Cal. 530, 531, 16 Pac. Rep. 385; *Potter vs. Ahrens*, 110 Cal. 674, 679, 48 Pac. Rep. 388; *Williams vs. Tam*, 131 Cal. 64, 66, 67, 63 Pac. Rep. 133; *Valensin vs. Valensin*, 28 Fed. Rep. 599, 602 (construing Cal. Civ. Code § 158). See *Ill. Dressel vs. Lonsdale*, 46 Ill. App. 454. *Ky. Louisville & N. R. Co. vs. Alexander*, 16 Ky. L. Rep. 306, 27 S. W. Rep. 981. *N. Y. Zimmerman vs. Erhard*, 83 N. Y. 74, 38 Am. Rep. 396; *Suau vs. Caffé*, 122 N. Y. 308, 25 N. E. Rep. 488, 9 L. R. A. 593. *Eng. Butler vs. Butler*, L. R. 16, Q. B. Div. 374.

132. Compare: *Vannerson vs. Cheatham*, 41 S. C. 327, 19 S. E. Rep. 614 (decided under a statute disabling wife from becoming liable on any promise to pay debt of another).

133. Wife's consent is necessary and husband cannot make her partner with him otherwise.—*Atwood vs. Meredith*, 37 Miss. 635.

134. TRANSACTION NOT WITHIN SCOPE OF PARTNERSHIP NOT BINDING UPON WIFE; e. g. where husband and wife own race horses in common, and are partners in business of training and raising such horses, it is not within scope of husband's authority to sell his wife's interest in horses, and sale of them by him is, as to her interest in them, invalid.—*Williams vs. Tam*, 131 Cal. 64, 66, 67, 63 Pac. Rep. 133.

XI. SURETYSHIP OF WIFE.

135. WIFE MAY BE SURETY FOR HUSBAND, and note given by her as such surety is valid.—*Farmers & Merchants' Bank vs. De Shorb*, 137 Cal. 685, 688-694, 70 Pac. Rep. 771.

As to mortgages given by wife as surety, see post § 162 and note par. 79.

136. EVIDENCE—Suretyship of wife may be shown by parol where she and her husband

execute a bond and mortgage, notwithstanding the form of the instrument.—*Spear vs. Ward*, 20 Cal. 659, 675.

137. Where wife appears as principal her suretyship cannot be shown under § 2832, post; e. g. where she has signed joint and several note with her husband, parol evidence of

suretyship is not admissible as against payee of note who acted on faith of her apparent character of attorney.—*Farmers & Merchants Bank vs. De Shorb*, 137 Cal. 685, 692, 70 Pac. Rep. 771. See *Farmers' Nat. Gold Bank vs. Stover*, 60 Cal. 387, 392.

§ 159. HOW FAR MAY ALTER THEIR LEGAL RELATIONS. A husband and wife cannot, by any contract with each other, alter their legal relations, except [1] as to property, and except that [2] they may agree, in writing, to an immediate separation, and may [3] make provision for the support of [a] either of them and of [b] their children during such separation.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 193.

I. In General.

1. Applied, cited, construed, referred to, etc.

II. Validity and Requisites of Contracts of Separation and for Support.

2. Are lawful—Public policy allows.
3. Acknowledgment by wife—Necessity for.
4. Confidential relations between parties considered.
5. Consideration—What sufficient.
6. Contract incidental to decree of divorce valid.
7. Executory contract is enforceable.
8. Facilitation of divorce not allowed.
9. Future separation must not be contemplated.
10. Reasons for separation need not be recited.
11. Recordation necessary when land involved.
- 12, 13. Trustee—Is unnecessary.
14. Same—Acceptance of trust by trustee.

III. Division of Property and Alteration of Relations as to.

15. Capacity of wife same as husband's.
16. Description of property governed by general rules.
17. Division of community property permissible.
18. "Legal relations"—Include what.
19. "Property" as to which "legal relations" may be altered.
20. Same—Homestead may be dealt with.
21. Reasonableness of contract required.
22. Separate property may be transmuted into community property.

IV. Custody and Control of Children.

23. Contract may provide for.
24. Discretion of court not controlled.

V. Effect of Contract of Separation and for Support.

25. Alteration of relation of husband and wife.
26. Same—Legal separation a mensa et thoro not affected.
27. Same—Marriage not abrogated.
28. Lien upon husband's land for annuity—Priority.
29. Same—Description of property.

30. Renunciation of property rights—Intent must be manifest.

31, 32. Same—Allowance to widow for maintenance.

33, 34. Same—Homestead rights.

35-38. Right of succession.

VI. Enforcement.

39. Agreement for separation not enforceable.

40. Equity jurisdiction.

41. Successive actions to enforce lien for annuity maintainable.

VII. Rescission, Revocation, and Alteration.

42. Dismissal of divorce suit immaterial.

43. Divorce—Does not avoid contract.

44. Same—Express provision terminating contract upon.

45. Reconciliation and cohabitation—Avoid contract.

46. Same—Provision saving contract.

47. Same—Subsequent birth of child cannot be shown by hearsay.

48. Same—Temporary reconciliation immaterial.

49-51. Rescission—Grounds for in equity.

52. Revocation and alteration—At will of one spouse not permissible.

53. Same—Same—Provision for custody of children.

54. Same—By mutual consent permissible.

55. Same—Same—Beneficial provision for children immaterial.

I. IN GENERAL.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Marlow vs. Barlow*, 53 Cal. 456, 459 (construed); *Butler vs. Baber*, 54 Cal. 178 (referred to with other sections); *Schuler vs. Savings & L. Soc.*, 64 Cal. 397, 399, 1 Pac. Rep. 479 (referred to); *In re Estate of Noah*, 73 Cal. 583, 585, 2 Am. St. Rep. 829, 15 Pac. Rep. 287 (construed and applied); *Wickscham vs. Comerford*, 96 Cal. 433, 439, 31 Pac. Rep. 358 (construed and applied); *Wren vs. Wren*, 100 Cal. 276, 279, 38 Am. St. Rep. 287, 34 Pac. Rep. 775 (referred to with § 153); *In re Estate of Davis*, 106 Cal. 453, 455, 39 Pac. Rep. 756 (construed and applied); *Sargent vs. Sargent*, 106 Cal. 541, 545, 39 Pac. Rep. 931 (construed and applied); *Jones vs. Lamont*, 118 Cal. 499, 501, 62 Am. St. Rep. 251, 50 Pac. Rep. 766 (construed and applied); *In re Estate of Winslow*, 121 Cal. 92, 94, 53 Pac. Rep. 362

(construed and applied); *Davis vs. Green*, 122 Cal. 364, 366, 55 Pac. Rep. 9 (referred to); *Yokam vs. Kingery*, 126 Cal. 30, 33, 58 Pac. Rep. 324 (construed and applied).

II. VALIDITY AND REQUISITES OF SEPARATION AND SUPPORT.

2. CONTRACTS FOR SEPARATION AND FOR SUPPORT ARE LAWFUL, being expressly authorized by statute, and do not contravene public policy.—In *re Estate of Noah*, 73 Cal. 583, 585, 2 Am. St. Rep. 829, 15 Pac. Rep. 287; *Wickersham vs. Comerford*, 96 Cal. 433, 439, 31 Pac. Rep. 353; In *re Estate of Davis*, 106 Cal. 453, 455, 39 Pac. Rep. 756. See *Wells vs. Stout*, 9 Cal. 479, 491, 494 (decided before adoption of code; holding that contracts made through the medium of a trustee are not invalid). *Ark. Bowers vs. Hutchinson*, 67 Ark. 15, 53 S. W. Rep. 399. *Mass. Fox vs. Davis*, 113 Mass. 255, 258, 18 Am. Rep. 476. *Mich. Randall vs. Randall*, 37 Mich. 563. *Minn. Roll vs. Roll*, 51 Minn. 353, 355, 53 N. W. Rep. 716. *Mont. Stebbins vs. Morris*, 19 Mont. 115, 119, 47 Pac. Rep. 642. *N. Y. Clark vs. Fosdick*, 118 N. Y. 7, 14, 16 Am. St. Rep. 733, 22 N. E. Rep. 1111, 6 L. R. A. 132. *Tex. Rains vs. Wheeler*, 76 Tex. 390, 395, 13 S. W. Rep. 324. *Vt. Squires vs. Squires*, 53 Vt. 208, 211, 38 Am. Rep. 668. *Fed. Walker vs. Beal*, 76 U. S. (9 Wall.) 743, bk. 19 L. ed. 814.

As to capacity of husband and wife to contract inter se, see ante § 158 and note para. 16-43.

3. ACKNOWLEDGMENT BY WIFE IS UNNECESSARY where the only property involved in the contract is the separate property of the husband.—In *re Estate of Noah*, 73 Cal. 583, 586, 2 Am. St. Rep. 829, 15 Pac. Rep. 287.

As to acknowledgment of grant by married woman, see post §§ 1093, 1191 and notes.

4. CONFIDENTIAL RELATIONS BETWEEN PARTIES MUST BE CONSIDERED, as such contracts, under § 158, are subject to the rules which control the actions of persons occupying such relations with each other.—In *re Estate of Noah*, 73 Cal. 583, 585, 2 Am. St. Rep. 829, 15 Pac. Rep. 287.

See ante § 158 and note para. 44-66.

5. CONSIDERATION MAY BE LOVE AND AFFECTION, or a purpose to provide for the support and maintenance of the other spouse.—*Tillaux vs. Tillaux*, 115 Cal. 663, 669, 47 Pac. Rep. 691.

6. CONTRACT INCIDENTAL TO DECREE OF DIVORCE, obtained without collusion, is not invalid as being against public policy.—*Stebbins vs. Morris*, 19 Mont. 115, 47 Pac. Rep. 642.

7. EXECUTORY CONTRACT IS ENFORCEABLE, there being no distinction between executed and executory contracts, as respects their validity.—*Stebbins vs. Morris*, 19 Mont. 115, 47 Pac. Rep. 642.

8. FACILITATION OF DIVORCE NOT ALLOWED, and a contract made with view to that end is void.—*Beard vs. Beard*, 65 Cal. 354, 355, 356, 4 Pac. Rep. 229; *Loveren vs. Loveren*, 106 Cal. 509, 512, 39 Pac. Rep. 801. See *Cole. Smutzer vs. Stimpson*, 9 Colo. App. 326, 48 Pac. Rep. 314. *Ill. Storey vs. Storey*, 125

Ill. 603, 18 N. E. Rep. 329. *Mont. Stebbins vs. Morris*, 19 Mont. 115, 47 Pac. Rep. 642. *N. H. Cross vs. Cross*, 58 N. H. 373. *Oreg. Phillips vs. Thorp*, 10 Oreg. 494. *Pa. Kilborn vs. Field*, 78 Pa. St. 194.

See ante § 146 and note par. 4.

9. FUTURE SEPARATION MUST NOT BE CONTEMPLATED, but the contract must be in respect to separation which is to occur immediately, or for the continuance of one that has already taken place.—*Walker vs. Beal*, 76 U. S. (9 Wall.) 743, bk. 19 L. ed. 814.

As to enforceability of provision for separation, see par. 39 this note.

10. REASONS FOR SEPARATION NEED NOT BE RECITED; e. g. the pendency of an action for divorce, or the "existence of unhappy differences," need not be referred to in the contract.—*Jones vs. Lamont*, 118 Cal. 499, 501, 62 Am. St. Rep. 251, 50 Pac. Rep. 766.

11. RECORDATION OF CONTRACT IS NECESSARY, where such contract provides that land held by husband and wife in common shall be sold and divided between them, and that the husband shall have the control and management of such land until he sells the same, as against a purchaser under a decree of divorce which awards the wife an undivided half of the property.—*Schumacher vs. Truman*, 134 Cal. 430, 433, 66 Pac. Rep. 591.

As to lien for annuity, see para. 28, 29 this note.

As to necessity of recording conveyances of real property, see post §§ 1214, 1215 and notes.

12. TRUSTEE BETWEEN PARTIES.—Is unnecessary, as statute permits direct conveyance from one spouse to the other.—*Tillaux vs. Tillaux*, 115 Cal. 663, 670, 47 Pac. Rep. 691. See *Stebbins vs. Morris*, 19 Mont. 115, 47 Pac. Rep. 642.

13. Compare: *Wells vs. Stout*, 9 Cal. 479, 491, 494 (decided before the adoption of the code).

14. Acceptance of trust, by trustee, may be shown by his execution and detention of the instrument, his previous agreement to accept the trust, and his declarations.—*Wells vs. Stout*, 9 Cal. 479, 497.

III. DIVISION OF PROPERTY AND ALTERATION OF RELATIONS AS TO.

15. CAPACITY OF WIFE IS SAME AS THAT OF HUSBAND in making contracts altering their "legal relations" as to property, no other or different capacity being given to the husband than to the wife, nor any different mode being prescribed for her, except that her acknowledgment as to real property must be made as provided in §§ 1093, 1191.—*Marlow vs. Barlow*, 53 Cal. 456, 460.

As to contracts generally between husband and wife, see ante § 158 and note para. 16-43.

16. DESCRIPTION OF PROPERTY IS GOVERNED BY GENERAL RULES, and the court will apply the rule that is certain which is capable of being made certain.—*Higgins vs. Higgins*, 121 Cal. 487, 488, 489, 53 Pac. Rep. 1081.

See par. 29 this note.

17. DIVISION OF COMMUNITY PROPERTY MAY BE MADE BY CONTRACT, under which

the portion assigned to the wife will become her separate property.—*Carter vs. McQuade*, 88 Cal. 274, 278, 23 Pac. Rep. 348.

See post 164 and note par. 156.

18. "Legal relations" occupied by spouse as to property include the ownership, possession, and the power to transfer, encumber, and charge the property, present and future.—*Marlow vs. Barlew*, 53 Cal. 456, 460.

19. "Property" in respect to which spouses may alter their "legal relations" includes, it would seem, property held by them as mentioned in section 161 in joint tenancy, tenancy in common, and as community property, and perhaps such as is or would become the separate property of either.—*Marlow vs. Barlew*, 53 Cal. 456, 459, 460.

20. Homestead may be dealt with by the parties in manner not forbidden by law.—*In re Estate of Winslow*, 121 Cal. 92, 94, 53 Pac. Rep. 362.

21. REASONABLENESS OF CONTRACT as respects property arrangements is required.—*See Walker vs. Beal*, 76 U. S. (9 Wall.) 743, bk. 19 L. ed. 814.

As to reasonableness of antenuptial contracts, see post § 178 and note.

22. SEPARATE PROPERTY MAY BE TRANSMUTED INTO COMMUNITY PROPERTY by a contract between husband and wife under this section and section 158.—*Yoakam vs. Kingery*, 126 Cal. 30, 33, 53 Pac. Rep. 324.

As to contracts between husband and wife, see ante § 158 and note pars. 16-43.

As to community property, see post § 164 and note par. 156.

IV. CUSTODY AND CONTROL OF CHILDREN.

23. CUSTODY AND CONTROL OF CHILDREN MAY BE PROVIDED FOR in a contract of separation.—*Sargent vs. Sargent*, 106 Cal. 541, 546, 39 Pac. Rep. 931. See *State vs. Smith*, 6 Me. (6 Greenlf.) 462, 20 Am. Dec. 324.

As to right to custody of children, see post § 197-200 and notes.

24. DISCRETION OF COURT AS TO CUSTODY OF CHILDREN, it would seem, is not controlled by such contract (dictum).—*Sargent vs. Sargent*, 106 Cal. 541, 546, 39 Pac. Rep. 931. See *State vs. Smith*, 6 Me. (6 Greenlf.) 462, 20 Am. Dec. 324.

V. EFFECT OF CONTRACT OF SEPARATION AND FOR SUPPORT.

25. SITUATION OF RELATION OF HUSBAND AND WIFE.—The effect of contract of separation is to take place, as far as it extends, of duties and obligations imposed by law upon husband and wife towards each other and towards children.—*Clark vs. Fosdick*, 118 N. Y. 7, 16 Am. St. Rep. 733, 22 N. E. Rep. 1111, 6 L. R. A. 132.

26. Legal separation a *mensa et thoro* is not effected by contract of separation and for division of property.—*Labbe's Heirs vs. Abat*, 2 La. 553, 22 Am. Dec. 151.

27. Marriage is not abrogated, but parties remain husband and wife, although living apart from each other, and bound to observe all other marital duties resting upon them as

husband and wife and parents not provided for in deed of separation.—*Jones vs. Lamont*, 118 Cal. 499, 501, 62 Am. St. Rep. 251, 50 Pac. Rep. 766. See *Clark vs. Fosdick*, 118 N. Y. 7, 16 Am. St. Rep. 733, 22 N. E. Rep. 1111, 6 L. R. A. 132.

28. Lien upon husband's land for annuity.—Subsequent purchasers from husband takes subject to contract of separation whereby husband agrees to pay his wife stated annuity during her life, to construct lien "upon his estate" during his lifetime and after his death during lifetime of his wife, where such instrument is duly acknowledged and recorded.—*Higgins vs. Higgins*, 121 Cal. 487, 488, 489, 56 Am. St. Rep. 57, 53 Pac. Rep. 1081.

As to necessity for recordation, see par. 11 this note.

29. Description of property in such contract as being husband's "estate" is sufficient, and extrinsic evidence may be admitted to identify property, although it may be that no lien is created against personalty, contract not having been executed in manner of mortgage or chattel.—*Higgins vs. Higgins*, 121 Cal. 487, 488, 489, 56 Am. St. Rep. 57, 53 Pac. Rep. 1081.

See ante par. 16 this note.

30. THE RENUNCIATION OF PROPERTY RIGHTS growing out of married relation must be manifested by clear and unmistakable intention, and court will not aid contract by resorting to intendments not expressed.—*Jones vs. Lamont*, 118 Cal. 502, 62 Am. St. Rep. 251, 50 Pac. Rep. 766.

31. Allowance to widow for maintenance should not be made under Code Civil Procedure §§ 1465-1467, where, during life of husband, he and wife made contract of separation, whereby it was agreed that she would not demand alimony or support from him, and that property thereby conveyed to her by him should be in full satisfaction of "all her marital claims," etc.—*In re Estate of Noah*, 78 Cal. 533, 536-539, 2 Am. St. Rep. 829, 15 Pac. Rep. 287. See *In re Estate of Noah*, 88 Cal. 463, 472, 26 Pac. Rep. 361.

32. Amount or value of estate is immaterial in determining whether or not right to allowance has been relinquished.—*In re Estate of Noah*, 88 Cal. 463, 472, 26 Pac. Rep. 361.

33. Homestead.—Right of selection by wife during life of husband is barred as respects any part of property allotted by contract of separation to husband as his separate property.—*Wickersham vs. Comerford*, 96 Cal. 433, 438, 439, 31 Pac. Rep. 358.

As to power to contract with reference to homestead, see par. 20 this note.

34. Setting aside to widow permissible under Code Civil Procedure, § 1465, where contract of separation is silent as to wife's claim of homestead, and provides merely that husband shall, during his lifetime, pay certain amounts at stated times.—*Eproson vs. Wheat*, 53 Cal. 715, 719.

See Code Civ. Proc. § 1465 and note.

35. Setting aside to widow not permissible where it was agreed that "each party shall have" hereafter no claim upon other for support or sustenance, and that she "relinquishes all right, as his wife, in law or equity, or by

descent," and therefore she, upon his death, is not entitled to family allowance out of his estate under Code Civil Procedure §§ 1465, 1466, 1468.—*Wickersham vs. Comerford*, 96 Cal. 433, 438, 31 Pac. Rep. 358. See *In re Estate of Noah*, 78 Cal. 583, 585, 2 Am. St. Rep. 829, 15 Pac. Rep. 287; *In re Estate of Noah*, 88 Cal. 468, 472, 26 Pac. Rep. 361.

See Code Civ. Proc. §§ 1465, 1466, 1468 and notes.

36. Right of succession.—Release from present and future debts and obligations, without any release in terms by either spouse of claims upon future acquisition of other, or of claims by either upon estate of other in case of death, does not operate as waiver or release of husband's right to succeed to his wife's estate upon her death.—*Jones vs. Lamont*, 118 Cal. 499, 500-503, 62 Am. St. Rep. 251, 50 Pac. Rep. 766.

37. Same—Inventory and appraisement of property by executors on ground that part of estate of her deceased husband has been concealed, where she has by contract of separation relinquished "all her marital claims," etc., as she is not party "aggrieved."—*In re Estate of Noah*, 88 Cal. 468, 472, 26 Pac. Rep. 361. See *In re Estate of Noah*, 78 Cal. 583, 586-589, 2 Am. St. Rep. 829, 15 Pac. Rep. 287.

38. Right to letters of administration upon estate of husband, relinquished by articles of separation, by which wife receives property from husband "in full satisfaction of all claims she may have, as wife" of such husband, "on any property he now has or may in any manner acquire," and surrenders forever all claims that she has or hereafter may have against his property, as Code of Civil Procedure § 1365 provides that administration must be granted to relatives of deceased "only when they are entitled to succeed to his personal estate or some part thereof."—*In re Estate of Davis*, 106 Cal. 453, 454-457, 39 Pac. Rep. 756.

See Code Civ. Proc. § 1365 and note.

VII. ENFORCEMENT.

39. AGREEMENT FOR SEPARATION NOT ENFORCEABLE, although full force will be given to collateral covenants of husband and trustee.—*Wells vs. Stout*, 9 Cal. 479, 495, 496 (this case arose under the Spanish law).

As to contracts for future separation, see ante par. 9 this note.

As to enforceability of executory contracts, see ante par. 7 this note.

40. EQUITY HAS JURISDICTION TO ENFORCE AGREEMENTS OF SEPARATION, and for separate maintenance of wife, even though divorce is not asked (dictum).—*Galland vs. Galland*, 38 Cal. 265, 270. See *Butler vs. Butler*, 4 Litt. (Ky.) 202.

41. SUCCESSIVE ACTION TO ENFORCE LIEN FOR ANNUITY, which is payable in different instalments may be brought as the respective instalments become due, and after having brought one action to foreclose lien for accrued instalment it is not necessary, under Code Civil Procedure § 728, when subsequent instalment becomes due, to proceed by motion in action which was first brought, unless judgment in such action provides for future sales to enforce payments which court

has determined will be due in future.—*Higgins vs. San Diego Sav. Bank*, 129 Cal. 184, 186-188, 61 Pac. Rep. 943, distinguishing *Bank of Napa vs. Godfrey*, 77 Cal. 612, 20 Pac. Rep. 142. See *McDougal vs. Downey*, 45 Cal. 165-167.

As to priority of lien for annuity, see para. 27, 28 this note.

VII. RESCISSION, REVOCATION, AND ALTERATION.

42. DISMISSAL OF DIVORCE SUIT WILL NOT AFFECT CONTRACT entered into in view of, and subsequently to, action for divorce.—*Jones vs. Lamont*, 118 Cal. 499, 501, 62 Am. St. Rep. 251, 50 Pac. Rep. 766.

43. DIVORCE SUBSEQUENTLY DECREED.—Does not avoid contract where decree of divorce makes no provision with reference to it, and where there is nothing in contract with reference to what effect decree of divorce shall have.—*Clark vs. Fosdick*, 118 N. Y. 7, 16 Am. St. Rep. 733, 22 N. E. Rep. 1111, 6 L. R. A. 132.

44. Express provision terminating contract upon divorce may be made in contract.—See *Sargent vs. Sargent*, 106 Cal. 541, 546, 547, 39 Pac. Rep. 931.

45. RECONCILIATION AND COHABITATION.—Avoid the contract as respects provisions for maintenance of wife while living separately from her husband.—*Wells vs. Stout*, 9 Cal. 479, 498. See *Sargent vs. Sargent*, 106 Cal. 541, 546, 39 Pac. Rep. 931; *Jones vs. Lamont*, 118 Cal. 501, 502, 62 Am. St. Rep. 251, 50 Pac. Rep. 766.

46. Provision that contract shall not be abrogated by future reconciliation, and that wife shall enjoy property allotted to her, although she should subsequently become reconciled to her husband and cohabit with him, is valid.—*Walker vs. Beal*, 76 U. S. (9 Wall.) 743, bk. 19 L. ed. 814; *Wilson vs. Mushett*, 3 Barn. & Ad. 743, 1 L. J. N. S. K. B. 250, 23 Eng. C. L. 175, 37 Rev. Rep. 542.

47. Subsequent birth of child, as tending to show reconciliation, cannot be proved by mere hearsay which connects with birth of child name of its reputed father.—*Wells vs. Stout*, 9 Cal. 479, 498.

48. Temporary reconciliation not followed by cohabitation does not avoid contract, and it is not sufficient to show occasional incidents of resumption of marital relations.—*Wells vs. Stout*, 9 Cal. 479, 498.

49. RESCISSION.—Adultery of husband, in view of which contract of separation is made, does not amount to such constraint or coercion of wife as will authorize court to decree rescission of contract.—*Labbe's Heirs vs. Abat*, 2 La. 553, 22 Am. Dec. 151.

50. Fraud and undue influence is ground for rescinding contract. See *Dolliver vs. Dolliver*, 94 Cal. 642, 646-648, 30 Pac. Rep. 4; *Tillaux vs. Tillaux*, 115 Cal. 663, 670, 47 Pac. Rep. 691.

See ante § 158 para. 41, 56, 60-66.

51. Non-fulfilment of promise not to molest other spouse is not ground for rescinding deed made by husband to his wife as incident to contract of separation, where husband does not

exercise his right to live separately, and does not give his wife opportunity to comply with her agreement.—*Tillaux vs. Tillaux*, 115 Cal. 463, 675, 676, 47 Pac. Rep. 691, distinguishing *Brisson vs. Brisson*, 90 Cal. 323, 333, 334, 27 Pac. Rep. 186; *Warnock vs. Harlow*, 96 Cal. 298, 31 Am. St. Rep. 209, 31 Pac. Rep. 166 (where the ground for rescission relied upon was betrayal of confidence and breach of agreement to reconvey).

52. REVOCATION AND ALTERATION OF CONTRACT.—At will of one spouse not permissible, and one spouse is not empowered to renounce the contract by § 101, and which provides that consent to revocation is revocable act, and that if one of parties in good faith seeks reconciliation and restoration, but other refuses, such refusal is desertion, as such provision is merely declaration of effect of such revocation upon legal status of parties as affecting desertion as ground of divorce.—*Sar-*

gent vs. Sargent, 106 Cal. 541, 544, 39 Pac. Rep. 931.

See ante § 101 and note.

53. Same—Provision with reference to custody of children is not revocable at option of one of parties.—*Sargent vs. Sargent*, 106 Cal. 541, 546, 39 Pac. Rep. 931.

54. By mutual consent contract may be rescinded or altered, under § 1698 post, by parties thereto, so long as it is executory in its character.—*Hochstein vs. Berghauser*, 123 Cal. 681, 688, 56 Pac. Rep. 547.

55. Contract in part for benefit of children may be modified or revoked by husband and wife, as children are not parties thereto, but only beneficiaries, and parties are under no obligation to children to adhere to terms of contract, so long as it remains executory.—*Hochstein vs. Berghauser*, 123 Cal. 681, 686, 56 Pac. Rep. 547.

§ 160. CONSIDERATION FOR AGREEMENT OF SEPARATION. The mutual consent of the parties is a sufficient consideration for such an agreement as is mentioned in the last section.

History: Enacted March 21, 1872.

§ 161. MAY BE JOINT TENANTS, ETC. A husband and wife may hold property as joint tenants, tenants in common, or as community property.

History: Enacted March 21, 1872; amended by Code Commissioners, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 338; held unconstitutional, see history, § 4 ante.

1. Applied, cited, construed, referred to, etc.
2. Community property held by spouses as joint tenants.
3. Contract between husband and wife as to, valid.
4. Cotenancy of husband and wife may exist.
5. Deposit in bank in name of husband and wife.
6. Effect of decree of divorce—Tenancy in common of community property.
7. Same—Enforcement of rights after death of party.
8. Husband not wife's agent as to property held in common.
9. Partition—Breach of contract to divide property on divorce.
10. Same—Of chattels held by wife and stranger.
11. Purchase of property with community and separate funds.
12. Rights of spouses substantially equivalent.
13. Sale of wife's interest by husband invalid.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Marlow vs. Barlew*, 53 Cal. 456, 459 (referred to in discussion); *Schuyler vs. Broughton*, 70 Cal. 282, 285, 11 Pac. Rep. 719 (construed and applied); *Spreckels vs. Spreckels*, 116 Cal. 339, 342, 343, 58 Am. St. Rep. 170, 48 Pac. Rep. 228, 36 L. R. A. 497 (construed); *Williams vs. Tam*, 131 Cal. 64, 67, 68 Pac. Rep. 133 (construed and applied); *Wagoner vs. Silva*, 139 Cal. 559, 562, 73 Pac. Rep. 433 (applied).

2. **COMMUNITY PROPERTY HELD BY SPOUSES AS JOINT TENANTS**, under Act 7850.—*Beard vs. Knox*, 5 Cal. 252, 256, 63 Am. Dec. 125.

As to ownership of, and title to, community property, see post § 172 and note pars. 5-24.

3. **CONTRACT BETWEEN HUSBAND AND WIFE VALID**, where it relates to property owned by them as joint tenants or tenants in common.—*Schuler vs. Savings & Loan Soc.*, 64 Cal. 397, 398, 399, 1 Pac. Rep. 479.

4. **COTENANCY OF HUSBAND AND WIFE IN LAND MAY EXIST** under this section, *Wagoner vs. Silva*, 139 Cal. 559, 560, 73 Pac. Rep. 433.

As to what constitutes joint tenancy and tenancy in common, see, respectively, post §§ 683, 685 and notes.

5. **DEPOSIT IN BANK IN NAME OF HUSBAND AND WIFE**, "payable to either," such deposit consisting of the wife's separate funds, and being made by her, does not of itself make the husband a joint owner with her.—*Denigan vs. San Francisco Sav. Union*, 127 Cal. 142, 147, 78 Am. St. Rep. 35, 59 Pac. Rep. 390.

6. **EFFECT OF DECREE OF DIVORCE, SILENT AS TO COMMUNITY PROPERTY**, is to leave the parties tenants in common, each holding the legal title to the one-half thereof.—*Biggl vs. Biggl*, 98 Cal. 35, 38, 35 Am. St. Rep. 141, 32 Pac. Rep. 803; *Kirschner vs. Dietrich*, 110 Cal. 502, 505, 42 Pac. Rep. 1064; *In re Estate of Burdick*, 112 Cal. 387, 397, 44 Pac. Rep. 734. See *De Godey vs. Godey*, 39 Cal. 157, 183, 164.

7. **Upon death after decree of party, administrator cannot be substituted**, as an action of divorce does not survive, and the rights of the survivor and others in community property must be enforced in an independent action.—*Kirschner vs. Dietrich*, 110 Cal. 502, 505, 42 Pac. Rep. 1064.

As to abatement and survival of actions, see Code Civ. Proc. § 385 and note.

As to disposal of community property by decree of divorce, see ante §§ 146-148 and notes.

8. HUSBAND NOT WIFE'S AGENT AS TO PROPERTY HELD IN COMMON, and a settlement made by him without authority of the wife with one who has injured such property, is not binding upon her.—*Wagoner vs. Silva*, 139 Cal. 559, 561-563, 73 Pac. Rep. 433. See *Williams vs. Tam*, 131 Cal. 64, 67, 63 Pac. Rep. 133.

As to husband being agent of wife, see ante § 158 and note para. 111-122.

9. PARTITION—BREACH OF CONTRACT TO DIVIDE PROPERTY ON DIVORCE.—Where pending an action for divorce a contract is made between the husband and wife by which it is provided that land held by them as tenants in common, which is community property, shall be sold and the proceeds thereof equally divided between them, and, after a decree of divorce which is silent as to the disposition of the community property, the husband refuses to join in the sale of the land, partition will be decreed, or if it is found that the land cannot be partitioned beneficially, the court will decree a sale and division of the proceeds.—*Biggi vs. Biggi*, 98 Cal. 35, 40, 35 Am. St. Rep. 141, 32 Pac. Rep. 303.

10. Chattels held by wife in common with one not her husband will be partitioned, and if necessary a sale and accounting decreed.—*Williams vs. Tam*, 131 Cal. 64, 66, 67, 63 Pac. Rep. 133.

As to effect of partitioning land in which husband and wife have community interest, see post § 164 and note para. 14.

As to actions for partition, generally, see Code Civ. Proc., ch. IV, pt. II, tit. X.

As to procedure, generally, in an action for partition, see 15 Encyc. Pl. & Prac. 769.

11. PURCHASE OF LAND WITH COMMUNITY FUNDS AND SEPARATE FUNDS, such land is in part separate property of the spouse who provided the separate funds, and in part community property; and the purchaser becomes a tenant in common of the land with the other spouse in proportion of the separate estate to the whole purchase price.—*Schuyler vs. Broughton*, 70 Cal. 232, 235, 11 Pac. Rep. 719. See *Jackson vs. Torrence*, 83 Cal. 521, 530, 32 Pac. Rep. 695.

As to effect of purchasing land with separate and community funds, see post § 164 and note para. 135, 137, 134-137.

12. RIGHTS OF SPOUSES SUBSTANTIALLY EQUIVALENT, as respects property which they hold as tenants in common or joint tenants.—*Schuler vs. Savings & Loan Soc.*, 64 Cal. 397, 399, 1 Pac. Rep. 479.

13. SALE OF WIFE'S INTEREST AS TENANT IN COMMON BY HUSBAND INVALID as against purchaser who knows that the wife is an owner in common of a chattel with her husband, and who is put upon inquiry as to husband's authority.—*Williams vs. Tam*, 131 Cal. 64, 67, 63 Pac. Rep. 133. See *Wagoner vs. Silva*, 139 Cal. 559, 561-563, 73 Pac. Rep. 433.

As to husband being wife's agent, see ante § 158 and note para. 111-122.

§ 162. SEPARATE PROPERTY OF THE WIFE. All property of the wife, [1] owned by her before marriage, and that [2] acquired afterwards by gift, bequest, devise, or descent, with [3] the rents, issues, and profits thereof, is her separate property. The wife may, without the consent of her husband, convey her separate property.

History: Enacted March 21, 1872.

SEPARATE PROPERTY OF WIFE.

I. In General.

1. Applied, cited, construed, referred to, etc.
2. All incidents of property attach.
3. Policy of law is to recognize.
4. Status of wife—Feme sole sub nomina.
5. Testamentary capacity of wife.

II. Constitutional Origin and Protection.

6. Constitution creates wife's separate property.
7. Laws "defining" rights of wife.
8. Same—Impairment of wife's rights.
9. Rents, issues, and profits protected.
10. Safeguarding jus disponendi.

III. What Constitutes Separate Property.

11. Definition of separate property.
12. Same—"All property" includes what.
13. Same—Estate for exclusive benefit.
14. Adverse possession—Acquisition by.
15. Same—Husband's possession not.
16. Burden of proof.
- 17, 18. Choses in action acquired before marriage.

19. Commingled property.
20. Conflict of laws.
21. Descent—Property acquired by.
22. Earnings of wife.
23. Estoppel—Of husband as against wife.
24. Same—Of wife by relinquishing part.
25. Gifts to wife—All constitute separate property.
26. Same—By husband to wife.
27. Same—Delivery and acceptance necessary.
28. Same—To husband and wife jointly.
29. Homestead—Separate property may be.
30. Improvements on separate property.
- 31, 32. Insurance policy payable to wife.
33. Money borrowed.
34. Personal injuries—Right of action for.
35. Property purchased during coverture.
36. Property rights of wife.
37. Rents, issues, and profits of separate property.
38. Statute is exclusive.
39. Time of acquisition—"Afterwards" defined.

40. Title—Immaterial in name of which spouse taken.
41. Transmutation of property.
- IV. Conveyances, Mortgages, and Powers of Attorney—1. Conveyances under Constitution and Code.
 42. Constitution and code authorize conveyances by wife.
 43. Compliance with statute necessary.
 44. Same—Estoppel by fraud.
 45. Same—Same—Purchaser with notice estopped.
 46. Same—Executive contracts.
 - 47, 48. Same—Lease.
 - 49-53. Same—Statute of frauds.
 54. Conveyances which wife may make—In general.
 55. Same—Exchange of property.
 56. Same—License.
 57. Same—Sublease.
 58. Deed—Application of general rules.
 59. Same—Consideration need not be expressed.
 60. Same—Construction of deed.
 61. Same—Delivery of deed.
 62. Same—Same—Deed executed in blank.
 63. Same—Signature of wife.
 64. Husband may be wife's grantee.
 65. Property to which wife has no title.
- V. Same—2. Joinder of Husband and Wife under Act 1850.
 66. Instrument in writing signed by husband and wife necessary.
 67. Constitutionality of statute.
 68. Same—Object of constitutional provision.
 69. Same—Object of requiring husband to join.
 70. Conflict of laws.
 71. Equitable estates within statute.
 72. Husband incapable of being wife's grantee.
 73. Limitation upon power of wife—Extent of.
 74. Recital that husband is grantor is unnecessary.
 75. Seal of husband is unnecessary.
 76. Signature of husband necessary.
 77. Same—Receipt of consideration by husband insufficient.
 78. Statute not retroactive.
- VI. Same—3. Mortgages.
 79. Wife may mortgage separate property.
 80. Agency of husband.
 81. Consideration—Is required.
 82. Same—Antecedent debt of husband.
 83. Same—Bona fide purchaser protected.
 84. Same—Extension of time of payment.
 85. Same—Foreclosure—Defense.
 86. Same—Note which is not binding.
 87. Same—Recitals overcome by parol.
 88. Death of wife does not terminate liability.
 89. Deed of trust in nature of mortgage.
 - 90, 91. Deficiency judgment.
 92. Property held in common may be mortgaged.
 93. Statutory requirements.
94. To secure debt of another—May be given.
95. Same—Husband's debt.
96. Same—Suretyship of wife.
97. Same—Same—Bond given by husband and wife.
98. Same—Same—Heirs of wife—Posture of.
99. Same—Same—Husband's purchase on foreclosure sale.
- 100, 101. Same—Same—Discharge of surety.
- VII. Same—4. Powers of Attorney.
 102. Capacity of wife to make.
 103. Joinder of husband necessary—Act 1850.
 104. Same—Compliance with statute necessary.
 105. Remedial statute—Constitutionality of Act 1850.
 106. Same—Signature, etc., of husband.
 107. Same—Statute not retroactive.
 108. Statute of frauds—Oral authority insufficient.
 109. Same—Specific performance denied.
 110. Execution of deed under power—General rules.
 111. Same—Execution in wife's name.
 112. Same—Necessary covenants—Power to insert.
 113. Same—Excess of authority—Change of lien not.
 114. Power given to wife by husband invalid.
- VIII. Husband's Power to Manage, Control, and Convey.
 115. Authority not in husband under code.
 116. Agency of husband not implied.
 117. Conveyance by husband unauthorized.
 118. Same—Chattel mortgage void.
 119. Same—Same—Estoppel of wife to attack.
 120. Same—Easement cannot be created by husband.
 121. License by wife not revocable by husband.
 122. Right of action in wife—Settlement by husband invalid.
 123. Statutory authority of husband—Act 1850.
 124. Same—Constitutionality of statute doubtful.
 125. Same—Death of husband terminates dominion.
 - 126, 127. Same—Fraud vitiates acts of husband.
 128. Same—Husband entitled to possession.
 129. Same—Intent of statute.
 130. Same—Limited power of husband.
 131. Same—Payment by husband of judgment against wife.
 132. Same—Payment of wife's money to husband sufficient.
 133. Same—Personal property exempt from husband's control—Act 1862.
 134. Same—Wife living separate—Act 1870.
- IX. Remedies—Pleading and Practice.
 135. Action by wife lies to enforce rights.
 136. Charge on separate property—Enforcement in equity.
 137. Complaint—Averment of coverture unnecessary.

138. Same—Averment that property is separate unnecessary.
139. Evidence—Assessment of property as husband's.
140. Same—Marriage—How shown.
141. Husband—Wife has remedies against.
142. Same—Same—Appointment of trustee.
143. Laches imputable to married women.
144. Quieting title—Wife entitled to decree.
145. Reformation decreed against wife.
146. Same—Fraudulent omission of land.
147. Rescission—Assignee of mortgage not entitled to.
148. Specific performance.
149. Trover maintainable by wife.

I. IN GENERAL.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Meagher vs. Thompson*, 49 Cal. 189, 192 (referred to); *Marlow vs. Barlow*, 53 Cal. 456, 459 (referred to); *Butler vs. Baber*, 54 Cal. 178 (applying §167 of original code, forbidding a wife to make a contract to pay money); *Leonis vs. Lazzarovich*, 55 Cal. 52, 58 (construed and applied); *Schuyler vs. Broughton*, 70 Cal. 282, 284, 11 Pac. Rep. 719 (applied); *Smith vs. Furnish*, 70 Cal. 424, 426, 427, 12 Pac. Rep. 392 (construed with reference to §169); *Danglarde vs. Elias*, 80 Cal. 65, 67, 22 Pac. Rep. 69 (referred to and held inapplicable); *McFadden vs. Santa Ana O. & T. St. R. Co.*, 87 Cal. 464, 468, 25 Pac. Rep. 681, 11 L. R. A. 252 (referred to); *Neale vs. Depot R. Co.*, 94 Cal. 425, 429, 29 Pac. Rep. 954 (referred to); *Diefendorff vs. Hopkins*, 95 Cal. 343, 352, 23 Pac. Rep. 265 (applied); *Lamb vs. Harbaugh*, 105 Cal. 680, 691, 39 Pac. Rep. 56 (referred to); *Frankel vs. Boyd*, 106 Cal. 608, 612, 39 Pac. Rep. 939 (referred to); *Heney vs. Pesoli*, 109 Cal. 53, 59, 41 Pac. Rep. 819 (construed and applied); *Prey vs. Stanley*, 110 Cal. 423, 425, 42 Pac. Rep. 908 (applied); *Siddall vs. Haight*, 132 Cal. 320, 323, 64 Pac. Rep. 410 (applied); *Hamilton vs. Hubbard*, 134 Cal. 603, 604, 606, 65 Pac. Rep. 321 (applied).

2. ALL INCIDENTS OF PROPERTY ATTACH to separate property of the wife, including the right to hold and enjoy the same, and the right to judicial protection and enforcement thereof.—*Wilson vs. Wilson*, 36 Cal. 447, 454; *Love vs. Watkins*, 40 Cal. 547, 559, 6 Am. Rep. 624.

See par. 36 this note.

3. POLICY OF LAW IS TO RECOGNIZE separate legal and civil existence of wife, and separate rights of property.—*Wilson vs. Wilson*, 36 Cal. 447, 454.

4. STATUS OF WIFE WITH RESPECT TO SEPARATE PROPERTY is not that of a feme sole, but of a feme sole sub nomine.—*Selover vs. American-Russian Com. Co.*, 7 Cal. 266, 270. See *Lewis vs. Johns*, 24 Cal. 98, 103, 85 Am. Rep. 49. *N. Y. Methodist Episcopal Church vs. Jaques*, 3 John. Ch. 77; *Jaques vs. Methodist Episcopal Church*, 17 John. 548; *Gardner vs. Gardner*, 22 Wend. 526. *S. C. Ewing vs. Smith*, 3 Des. L. 417, 5 Am. Dec. 557.

5. TESTAMENTARY CAPACITY OF WIFE IS ABSOLUTE and she may devise her separate property as if she were a feme sole.—See *Arkle vs. Beedle*, 141 Cal. 459, 462, 74 Pac. Rep. 1033.

II. CONSTITUTIONAL ORIGIN AND PROTECTION.

6. CONSTITUTION CREATES WIFE'S SEPARATE PROPERTY; and her peculiar rights therein, and the peculiar character of such property, are not dependent upon any statute.—*Selover vs. American-Russian Com. Co.*, 7 Cal. 266, 271; *George vs. Ransom*, 15 Cal. 322, 323, 76 Am. Dec. 490; *Lewis vs. Johns*, 24 Cal. 98, 103, 85 Am. Dec. 49; *Bodley vs. Ferguson*, 30 Cal. 511, 517, 518; *Racouillat vs. Sansevain*, 32 Cal. 376, 385; *Love vs. Watkins*, 40 Cal. 547, 559, 6 Am. Rep. 624. See *Dow vs. Gould & Curry S. M. Co.*, 31 Cal. 629, 639.

7. Laws "defining" rights of wife, which the constitution authorizes the legislature to enact, are such as prescribe, fix the bounds to, establish and declare the limits of, the rights, powers, duties, etc., of married women with respect to such property.—*Dow vs. Gould & Curry S. M. Co.*, 31 Cal. 629, 639.

8. SAME — IMPAIRMENT OF WIFE'S RIGHTS by the legislature in any degree is not allowable, but the legislature is limited to the enactment of laws for its further assurance.—*Lewis vs. Johns*, 24 Cal. 98, 103, 85 Am. Dec. 49; *Dow vs. Gould & Curry S. M. Co.*, 31 Cal. 629, 639; *Love vs. Watkins*, 40 Cal. 547, 559, 6 Am. Rep. 624.

9. "RENTS, ISSUES, AND PROFITS" PROTECTED BY CONSTITUTION.—See post §164 and note par. 168.

10. SAFEGUARDING JUS DISPONENDI.—Constitution forbids impairment of wife's right to dispose of separate property, although it is competent for the legislature to enact laws throwing safeguards around the jus disponendi.—See *Lewis vs. Johns*, 24 Cal. 98, 103, 85 Am. Dec. 49.

III. WHAT CONSTITUTES SEPARATE PROPERTY.

11. DEFINITION OF SEPARATE PROPERTY.—Property owned by a spouse before marriage, and that acquired during coverture by a spouse by gift, bequest, devise, or descent.—In re *Estate of Spencer*, 82 Cal. 110, 113, 23 Pac. Rep. 37.

12. "All property" embraces property of every description, including real, personal, or mixed, and all the rents, issues, profits, and increase thereof, whether the same be the fruit of trade and commerce, of loans and investments, or the spontaneous production of the soil, or wrested from it by the hand of industry.—*Lewis vs. Johns*, 24 Cal. 98, 102, 85 Am. Dec. 49.

13. Estate for exclusive benefit.—"Separate property," as used in the Constitution, is that which prevailed at common law as applied to a wife's separate property, and it is "an estate held as well in its use as in its title for the exclusive benefit and advantage of the wife."—*George vs. Ransom*, 15 Cal. 322, 324; *Kraemer vs. Kraemer*, 52 Cal. 302, 304, 305.

14. ADVERSE POSSESSION.—Acquisition of separate property by wife results where the initiation of such adverse possession is a parol gift to the wife.—*Siddall vs. Haight*, 132 Cal. 220, 222, 64 Pac. Rep. 410.

15. Husband's possession cannot be adverse

to wife's, and does not affect her right to perfect title to land by adverse possession, where his possession consists merely of his living on land with her.—*Siddall vs. Haight*, 132 Cal. 320, 322, 64 Pac. Rep. 410.

16. **BURDEN OF PROVING THAT PROPERTY IS SEPARATE PROPERTY.**—See post § 164 and note para. 3, 15.

17. **CHOSES IN ACTION ACQUIRED BEFORE MARRIAGE** by wife are her separate property.—*Wilson vs. Wilson*, 36 Cal. 447, 454. See *Terry vs. Hammonds*, 47 Cal. 32, 39.

18. Note given by husband to wife before marriage becomes, upon her marriage, her separate property, and entitles her to a right of action against her husband.—*Wilson vs. Wilson*, 36 Cal. 447, 454. See *Terry vs. Hammonds*, 47 Cal. 32, 39.

19. **COMMINGLING SEPARATE PROPERTY OF WIFE WITH PROPERTY OF OTHERS** does not affect the character of such separate property; e. g. where a husband has money in his hands as wife's agent and trustee, and commingles it with funds of other persons, her rights are not divested.—*Moore vs. Jones*, 63 Cal. 12, 14.

As to effect of commingling funds generally, see post § 164 and note para. 181-191.

20. **CONFLICT OF LAWS** as to what constitutes separate or community property.—See post § 164 and note para. 26-35.

As to conflict of laws respecting alienation, etc., of wife's separate property, see par. 70 this note.

21. **DESCENT OF PROPERTY TO WIFE BEFORE CESSION OF CALIFORNIA** to the United States, resulted in such property becoming her separate property under the Mexican law.—*Racouillat vs. Sansevain*, 32 Cal. 376, 383.

22. **EARNINGS OF WIFE.**—See post § 164 and note para. 162-165.

23. **ESTOPPEL.**—Of husband to deny that land is wife's separate property results where he signs as a witness deed by her which recites that property conveyed is the separate property and estate of his wife.—*Stockton Sav. Bank vs. Staples*, 98 Cal. 189, 191, 32 Pac. Rep. 936.

24. Of wife—**Relinquishing part of separate property** does not estop the wife from claiming residue; as where a wife having cattle which are her separate property allows the community to receive a portion of the profits of the business of stock-raising, engaged in by her with such cattle.—*Harris vs. Van De Vanter*, 17 Wash. 489, 50 Pac. Rep. 50.

25. **GIFTS TO WIFE**, result in the acquisition of separate property by her.—*Hart vs. Robertson*, 21 Cal. 346, 348; *Shumway vs. Leakey*, 67 Cal. 458, 460, 3 Pac. Rep. 12; *Diefendorf vs. Hopkins*, 95 Cal. 343, 352, 353, 28 Pac. Rep. 265, 30 Id. 549; *Prey vs. Stanley*, 110 Cal. 423, 425, 42 Pac. Rep. 908; *Siddall vs. Haight*, 132 Cal. 320, 322, 64 Pac. Rep. 410; *Hamilton vs. Hubbard*, 134 Cal. 603, 606, 65 Pac. Rep. 221, 66 Id. 860.

As to adverse possession under parol gift, see par. 14 this note.

26. **By husband to wife.**—Separate property acquired.—See post § 164 and note para. 140-169, and particularly para. 140-145, 148-157.

27. **Delivery and acceptance necessary**, in case of gift of chattels to wife, in order to complete the gift and render such chattels her separate property, both upon principle and in analogy to other contracts of gift (dictum).—*Dow vs. Gould & Curry S. M. Co.*, 31 Cal. 629, 652.

As to necessity for delivery upon gift or sale by husband to wife, see ante § 158 and note, para. 36-40.

28. **SAME—TO HUSBAND AND WIFE JOINTLY.**—See post § 164 and note para. 8, 52-54, 60.

29. **HOMESTEAD—DECLARATION OF—DOES NOT AFFECT CHARACTER OF PROPERTY**, and if the wife's separate property is set apart or claimed as a homestead, its character as her separate property is not changed.—*Prey vs. Stanley*, 110 Cal. 423, 425, 42 Pac. Rep. 908. See *Revalk vs. Kraemer*, 8 Cal. 66, 71, 72, 68 Am. Dec. 304.—See post § 172 and note para. 60.

30. **IMPROVEMENTS ON SEPARATE PROPERTY OF WIFE.**—See post § 164 and note para. 192-195.

31. **INSURANCE POLICY PAYABLE TO WIFE**, her executors, administrators or assigns, whether paid for with the separate funds of husband or community funds, constitutes a gift by husband to wife and is her separate property.—In re Estate of Dobbel, 104 Cal. 432, 43 Am. St. Rep. 123, 38 Pac. Rep. 87; *Crowe vs. Dobbel*, 105 Cal. 350, 353, 38 Pac. Rep. 957. See *Heydenfeldt vs. Jacobs*, 107 Cal. 373, 376, 377, 40 Pac. Rep. 492. *Ind. Harley vs. Heist*, 36 Ind. 196, 44 Am. Rep. 285. *Mina. Ricker vs. Charter Oak Life Ins. Co.*, 27 Minn. 193, 38 Am. Rep. 289, 6 N. W. Rep. 771. *Mo. Charter Oak Life Ins. Co. vs. Brant*, 47 Mo. 419, 4 Am. Rep. 328; *Gamb vs. Covenant Mut. L. Ins. Co.*, 50 Mo. 44. *Fed. Brockhaus vs. Kemna*, 7 Fed. Rep. 609, 617.

32. **Compare: Clark vs. Durand, 12 Wis. 348. As to insurance policy assigned to wife by stranger, see post § 164 and note para. 12.**

33. **MONEY BORROWED.**—See post § 164 and note para. 126-139, and particularly para. 180-184.

34. **PERSONAL INJURIES.**—Right of action for.—See post § 164 and note para. 179, 180.

35. **PROPERTY PURCHASED DURING COVERTURE.**—See post § 164 and note para. 46-64.

As to property purchased on credit, see post § 164 and note para. 126-139, and particularly para. 126, 136, 139.

As to property purchased with separate funds, see post § 164 and note para. 205, 208-211.

36. **PROPERTY RIGHTS OF WIFE** in separate property are such, and such only, as attach to property generally, and the word "separate," as used in the constitution, neither enlarges nor limits the rights of married women in or to the property mentioned, but serves merely to distinguish such property from other property, in which she may have rights,—to wit, community property.—*Dow vs. Gould & Curry S. M. Co.*, 31 Cal. 629, 639.

See par. 2 this note.

37. RENTS, ISSUES, AND PROFITS OF SEPARATE PROPERTY.—See post §164 and note para. 163-177.

38. STATUTE IS EXCLUSIVE, and property which was not acquired by the wife before marriage, or afterwards by gift, bequest, devise, or descent, is not the separate property of the wife.—*Bessie vs. Earle*, 4 Cal. 200, 201. See *Dye vs. Dye*, 11 Cal. 163, 166-168, 170.

39. TIME OF ACQUISITION.—"Afterwards" defined to mean, as used in this section, after the marriage and during the existence of the community.—In re Estate of Spencer, 32 Cal. 110, 113, 23 Pac. Rep. 37.

40. TITLE—Immaterial in name of which spouse taken.—See post §164 and note para. 212-14.

41. TRANSMUTATION OF PROPERTY.—See post §164 and note para. 196-215.

IV. CONVEYANCES, MORTGAGES AND POWERS OF ATTORNEY—1. CONVEYANCES UNDER CONSTITUTION AND CODE.

42. CONVEYANCE BY WIFE ALONE AUTHORIZED BY CONSTITUTION AND CODE, without the joinder of her husband, and also by the Mexican law, which was in force prior to the enactment of Act April 17, 1850, §6, which required an instrument in writing signed by her husband.—*Marlow vs. Barlew*, 53 Cal. 456, 459; *Burkle vs. Levy*, 70 Cal. 250, 252, 11 Pac. Rep. 643; *Emerson vs. Bergin*, 71 Cal. 335, 338, 12 Pac. Rep. 242; *Tolman vs. Smith*, 74 Cal. 345, 349, 16 Pac. Rep. 189; *Bull vs. Coe*, 77 Cal. 54, 57, 58, 11 Am. St. Rep. 235, 13 Pac. Rep. 808; *Loring vs. Stuart*, 79 Cal. 200, 202, 203, 21 Pac. Rep. 651; *Schwarze vs. Mahoney*, 97 Cal. 131, 135, 31 Pac. Rep. 908; *Chaffee vs. Browne*, 109 Cal. 211, 220, 41 Pac. Rep. 1023; *Tillaux vs. Tillaux*, 115 Cal. 663, 668, 47 Pac. Rep. 691; *Farmers & Merchants' Bank vs. De Shorb*, 137 Cal. 685, 693, 70 Pac. Rep. 771; *McDonald vs. Randall*, 139 Cal. 246, 249, 251, 72 Pac. Rep. 997. See *Ingoldsby vs. Juan*, 12 Cal. 564, 575; *Bodley vs. Ferguson*, 30 Cal. 511, 516; *Racouillat vs. Sansevain*, 32 Cal. 376, 383 (involving conveyances made prior to the adoption of Act April 17, 1850, §6).

43. COMPLIANCE WITH STATUTE IS NECESSARY, where peculiar formalities are prescribed, in the execution of deeds by married women; e. g. with respect to acknowledgments, and where the statute is restrictive and provides a mode which is not followed, her deed is inoperative and is void ab initio.—*Leonis vs. Lazzarovich*, 55 Cal. 52, 59; *Wedel vs. Herman*, 59 Cal. 507, 511; *Bank of Healdsburg vs. Ballhache*, 65 Cal. 327, 330, 4 Pac. Rep. 106; *Durfee vs. Garvey*, 65 Cal. 406, 4 Pac. Rep. 377; *Carlton vs. Williams*, 77 Cal. 89, 11 Am. St. Rep. 243, 19 Pac. Rep. 185; *Danglarde vs. Elias*, 80 Cal. 65, 67, 68, 22 Pac. Rep. 69; *Banbury vs. Arnold*, 91 Cal. 606, 27 Pac. Rep. 934; *Mathews vs. Davis*, 103 Cal. 202, 207, 36 Pac. Rep. 358. See *Stevens vs. Holman*, 113 Cal. 345, 349, 53 Am. St. Rep. 216, 44 Pac. Rep. 670; *Elliott vs. Peirsol*, 26 U. S. (1 Pet.) 328, 338, bk. 7 L. ed. 164.

As to acknowledgment by married woman, see post §§1092, 1125 and notes.

44. Estoppel—Fraudulent representation of wife as to capacity to convey, and execution of deed without formalities required by statute of married women, will estop her from insisting that her deed was ineffectual; as where she represents that she is widow.—*Ramboz vs. Stowell*, 103 Cal. 588, 593, 37 Pac. Rep. 519. See *Reis vs. Lawrence*, 63 Cal. 129, 132-135, 49 Am. Rep. 83; *Hand vs. Hand*, 68 Cal. 135, 137, 58 Am. Rep. 5, 8 Pac. Rep. 705.

45. Purchaser with notice from wife is also estopped as against her first grantee.—*Ramboz vs. Stowell*, 103 Cal. 588, 593, 37 Pac. Rep. 519.

46. Executory contract to convey land must be made in compliance with statutory requirements.—*Banbury vs. Arnold*, 91 Cal. 606, 608, 27 Pac. Rep. 934. See *Leonis vs. Lazzarovich*, 55 Cal. 52, 55, 56.

47. Lease must be executed in accordance with statute and formalities thereby prescribed.—*Carlton vs. Williams*, 77 Cal. 89, 11 Am. St. Rep. 243, 19 Pac. Rep. 185.

48. Same—Acceptance of rent does not validate lease which was not executed with proper formalities, but at most creates tenancy terminable by proper notice.—*Carlton vs. Williams*, 77 Cal. 89, 11 Am. St. Rep. 243, 19 Pac. Rep. 185.

49. Statute of frauds is applicable to contracts of married women respecting their separate property.—*Brison vs. Brison*, 75 Cal. 525, 526, 7 Am. St. Rep. 189, 17 Pac. Rep. 689.

50. Parol agreement for partition of land made by wife, where she is one of several tenants in common, as to her individual interest which is her separate property is invalid.—*Gates vs. Salmon*, 46 Cal. 361, 374. See *Hill vs. Den*, 54 Cal. 6, 23.

51. Other tenants in common are not bound, in equity, by oral contract of partition which is not binding upon feme covert who was party thereto, their assent to contract having been given under belief that all tenants in common were parties to agreement, and consideration for undertaking on their part being undertaking on part of all parties.—*Gates vs. Salmon*, 46 Cal. 361, 374, 375.

53. Promise by wife to reconvey land conveyed to her, must be in writing, under §852 and §1624 subd. 4, and oral promise is not enforceable.—*Brison vs. Brison*, 75 Cal. 525, 526, 7 Am. St. Rep. 189, 17 Pac. Rep. 689.

See post §§852, 1624 subd. 4 and notes.

54. CONVEYANCES WHICH WIFE MAY MAKE includes deeds which are absolute or conditional, partial or complete, and mortgages; and by general law she may make contracts with respect to her separate property, executory or executed, or on conditions precedent or subsequent, and they may be evidenced in various forms, as (1) by mere memoranda in writing, or (2) deed under seal, by (3) agreement for title.—*Ingoldsby vs. Juan*, 12 Cal. 564, 575, 576. See *Selover vs. American-Russian Com. Co.*, 7 Cal. 266, 273, 274; *Scarborough vs. Watkins*, 9 B. Mon. (Ky.) 540, 50 Am. Dec. 523.

As to effect of wife's deed, see post §1187 and note.

55. Exchange on property is authorized as well as deeds of purchase and sale.—See

Corker vs. Corker, 37 Cal. 643, 649, 650, 25 Pac. Rep. 922.

54. License may be given by wife with respect to land which constitutes her separate estate.—Emerson vs. Bergin, 71 Cal. 335, 338, 12 Pac. Rep. 242. See Carlton vs. Williams, 77 Cal. 39, 11 Am. St. Rep. 243, 19 Pac. Rep. 185.

57. Sublease may be made by wife where she leases premises in her own name and right.—Schwarze vs. Mahoney, 97 Cal. 131, 135, 31 Pac. Rep. 903.

58. DEED.—Application of general rules as to form, nature, and requisites.—A wife's deed governed by general rule applicable to conveyances, and where statute specifies formalities which shall be complied with, only limits upon her power to convey are those decreed by statute.—Selover vs. American-Russian Com. Co., 7 Cal. 266, 273, 274; Ingoldsby vs. Juan, 12 Cal. 564, 575, 576; Emerson vs. Bergin, 71 Cal. 335, 337, 338, 12 Pac. Rep. 242; Corker vs. Corker, 37 Cal. 643, 650, 25 Pac. Rep. 922; Schwarze vs. Mahoney, 97 Cal. 131, 135, 31 Pac. Rep. 903; Tillaux vs. Tillaux, 115 Cal. 662, 663, 47 Pac. Rep. 691. See De Arnaz vs. Escandon, 59 Cal. 486, 489, 490. Ky. Scarborough, vs. Watkins, 9 B. Mon. 540, 50 Am. Dec. 523. Minn. Dobbin vs. Cordiner, 41 Minn. 165, 16 Am. St. Rep. 683, 42 N. W. Rep. 870. Neb. Reed vs. Morton, 24 Neb. 760, 8 Am. St. Rep. 247, 40 N. W. Rep. 232, 1 L. R. A. 736. Ohio. Baldwin vs. Snowden, 11 Ohio St. 203, 78 Am. Dec. 303.

59. Consideration need not be expressed in deed executed by wife, as her deed, like the deeds of other persons, imports consideration.—Tillaux vs. Tillaux, 115 Cal. 663, 668, 47 Pac. Rep. 691.

60. Construction of deed governed by ordinary rules; e. g., it should not be given construction which does not appear from terms of instrument to have been in minds of parties.—See Corker vs. Corker, 37 Cal. 643, 650, 25 Pac. Rep. 922.

61. Delivery may be made by agent in like manner and with like effect as other grantors may, and grantee may regard her execution and acknowledgment of instrument as evidence of her consent to its delivery.—De Arnaz vs. Escandon, 59 Cal. 486, 489, 490. See Minn. Dobbin vs. Cordiner, 41 Minn. 165, 16 Am. St. Rep. 683, 42 N. W. Rep. 870. Neb. Reed vs. Morton, 24 Neb. 760, 8 Am. St. Rep. 247, 40 N. W. Rep. 232, 1 L. R. A. 736. Ohio. Baldwin vs. Snowden, 11 Ohio St. 203, 78 Am. Dec. 303.

62. Deed executed in blank and handed to her husband for delivery may, without any express authorization of husband to fill in name of the grantee, be filled in by him and delivered to purchaser in good faith, and should operate as estoppel upon her, and will preclude her from defeating title of purchaser in court of equity.—Dobbin vs. Cordiner, 41 Minn. 165, 16 Am. St. Rep. 683, 42 N. W. Rep. 870. See Reed vs. Morton, 24 Neb. 760, 8 Am. St. Rep. 247, 40 N. W. Rep. 232, 1 L. R. A. 736.

As to authority of husband as agent in delivery of mortgage, see par. 30 this note.

63. Signature of wife does not show that she executed deed on her own behalf, where she signs as attorney in fact of her husband

and individually thus: "James Meagher (L. S.), by his attorney in fact, Mary Meagher (L. S.)."—Meagher vs. Thompson, 49 Cal. 189, 192.

64. HUSBAND MAY BE WIFE'S GRANTEE where the wife has under statute same rights of alienation of her separate property as those enjoyed by feme sole.—See Rico vs. Brandenstein, 98 Cal. 465, 472, 35 Am. St. Rep. 192, 33 Pac. Rep. 480, 20 L. R. A. 702; In re Estate Cudworth, 133 Cal. 462, 463, 469, 65 Pac. Rep. 1041.

As to effect of gift by wife to husband, see post § 164 and note par. 158.

As to deed to husband procured by wife, see post § 164 and note para. 146, 147.

65. PROPERTY TO WHICH WIFE HAS NO TITLE may be conveyed by her as if she were feme sole, and with like effect, and title subsequently acquired by her will inure to grantee where her deed is one of grant.—Parry vs. Kelley, 53 Cal. 334, 335.

V. SAME—2. JOINDER OF HUSBAND AND WIFE UNDER ACT 1850.

66. INSTRUMENT IN WRITING SIGNED BY HUSBAND AND WIFE, and acknowledged by her upon examination separate and apart from her husband, was required by Act April 17, 1850, § 6 (Stat. 1850, c. 103, p. 254), under which it was held that wife could not convey her separate property by her own individual deed, and that strict compliance with the statute was necessary.—Selover vs. American-Russian Com. Co., 7 Cal. 266, 274, 275; Barrett vs. Tewksbury, 9 Cal. 13, 15; Ingoldsby vs. Juan, 12 Cal. 564, 576; Morrison vs. Wilson, 13 Cal. 494, 497, 73 Am. Dec. 593; Mott vs. Smith, 16 Cal. 533, 537; MacLay vs. Love, 25 Cal. 367, 374, 35 Am. Dec. 133; Landers vs. Bolton, 23 Cal. 393, 408; Dentzel vs. Waldie, 30 Cal. 133, 148-150; Dow vs. Gould & Curry S. Min. Co., 31 Cal. 629, 655; Smith vs. Greer, 31 Cal. 476, 478, 479; Ewald vs. Corbett, 32 Cal. 493, 497; Belloc vs. Davis, 33 Cal. 242, 256; Gates vs. Salmon, 46 Cal. 361, 374, 375; Meagher vs. Thompson, 49 Cal. 189, 191; Rico vs. Brandenstein, 98 Cal. 465, 469, 35 Am. St. Rep. 192, 33 Pac. Rep. 480, 20 L. R. A. 702.

67. CONSTITUTIONALITY OF STATUTE REQUIRING JOINDER OF HUSBAND, as statute does not confer upon him any right in wife's separate property, but it is intended merely to guard and protect same.—Dow vs. Gould & Curry S. Min. Co., 31 Cal. 629, 637-647. See Callahan vs. Patterson, 4 Tex. 61, 51 Am. Dec. 712.

68. Object of constitutional provision is protection against husband's improvidence.—George vs. Ransom, 15 Cal. 322, 323, 76 Am. Dec. 490.

69. Object of requiring husband to join wife is to afford her protection against imposition and fraud, and aid of his counsel and advice.—Selover vs. American-Russian Com. Co., 7 Cal. 266, 273; Ingoldsby vs. Juan, 12 Cal. 564, 576; Meagher vs. Thompson, 49 Cal. 189, 191; Rico vs. Brandenstein, 98 Cal. 465, 469, 35 Am. St. Rep. 192, 33 Pac. Rep. 480, 20 L. R. A. 702. See Douglas vs. Fulda, 50 Cal. 77, 80.

70. CONFLICT OF LAWS—Act April 17, 1850, concerning alienation and encumbrance

of separate property of married women, was not applicable to an assignment of note and mortgage owned by married woman who, and whose husband, were married without state, and had never been within state, because § 15, by extending its provisions to persons who were married out of state and who should reside and acquire property therein, by implication, excluded from its operation those who were married without limits of state and never lived within them.—*Bayerque vs. Haley*, 1 McAll. C. C. 97, 2 Fed. Cas. 1071.

As to conflict of laws concerning what constitutes separate or community property, see post § 164 and note pars. 26-25.

71. EQUITABLE ESTATES OF WIFE WITHIN STATUTE, as well as legal estates, and her husband must join her in conveyance thereof.—*Morrison vs. Wilson*, 13 Cal. 494, 497, 73 Am. Dec. 593.

72. HUSBAND INCAPABLE OF BEING WIFE'S GRANTEE, under Act April 16, 1850, § 19, which permitted married woman to convey any of her real estate by any conveyances thereof, executed and acknowledged by herself and her husband, and deed by wife and her husband to husband was not authorized, because such statute did not remove husband's common-law disability, but was intended merely for protection of wife as well against her husband as against others.—*Rico vs. Brandenstein*, 98 Cal. 465, 468, 471, 35 Am. St. Rep. 192, 33 Pac. Rep. 480, 20 L. R. A. 702.

73. LIMITATION UPON POWER OF WIFE was prescribed by Act 1850, requiring instrument in writing signed by husband, as it disabled her from disposing of her property as she could before have done, and statute is not to be construed as restraining her further than was manifestly intended.—*Ingoldsby vs. Juan*, 12 Cal. 564, 575.

74. RECITAL THAT DEED IS JOINT DEED UNNECESSARY, as husband is not grantor, and requisites of joint deed by wife and her husband are merely that he shall sign and acknowledge instrument with her.—*Dentzel vs. Waldie*, 30 Cal. 138, 148-150. See *Ingoldsby vs. Juan*, 12 Cal. 564, 576; *Meagher vs. Thompson*, 49 Cal. 189, 191.

75. SEAL OF HUSBAND UNNECESSARY, but it is sufficient that she signs and seals deed and that he signs and acknowledges it.—*Ingoldsby vs. Juan*, 12 Cal. 564, 576-579.

76. SIGNATURE TO INSTRUMENT IN WRITING BY HUSBAND "is evidence required by statute of his assent to sale as well as to the conveyance."—*Dow vs. Gould & Curry S. Min. Co.*, 31 Cal. 629, 655; *Meagher vs. Thompson* 49 Cal. 189, 191.

77. Receipt of proceeds of sale by husband insufficient as evidence of his assent to sale of his wife's separate property.—*Dow vs. Gould & Curry S. Min. Co.*, 31 Cal. 629, 655.

78. STATUTE NOT RETROACTIVE, and it applied only to women married subsequent to its passage, and property acquired after its enactment by women who were married in state before its passage, or married out of the state and residing and acquiring property in it thereafter.—*Bodley vs. Ferguson*, 30 Cal. 511, 516. See *Ingoldsby vs. Juan*, 12 Cal. 564, 575.

VI. SAME—3. MORTGAGES.

79. WIFE MAY MORTGAGE SEPARATE PROPERTY, and, since adoption of code, she has same right to execute mortgage which will bind her separate property as has feme sole.—*Marlow vs. Barlew*, 53 Cal. 456, 459; *Alexander vs. Bouton*, 55 Cal. 15, 16-20; *Hassey vs. Wilke*, 55 Cal. 525, 528; *Brickell vs. Batchelder*, 62 Cal. 623, 639; *Burkle vs. Levy*, 70 Cal. 250, 252, 11 Pac. Rep. 643; *Tolman vs. Smith*, 74 Cal. 345, 349, 16 Pac. Rep. 189; *Bull vs. Coe*, 77 Cal. 54, 61, 62, 11 Am. St. Rep. 235, 18 Pac. Rep. 808; *Loring vs. Stuart*, 79 Cal. 200, 202, 21 Pac. Rep. 651; *Farmers & Merchants' Bank vs. De Shorb*, 137 Cal. 685, 693, 70 Pac. Rep. 771; *McDonald vs. Randall*, 139 Cal. 246, 249-251, 72 Pac. Rep. 997. See *Spear vs. Ward*, 20 Cal. 659, 674; *Camden vs. Vail*, 23 Cal. 633, 636; *Brown vs. Orr*, 29 Cal. 120, 122 (each of which cases was decided under Act April 17, 1850, § 6, requiring joinder of husband).

80. AGENCY OF HUSBAND.—Where wife conveys her separate estate by deed absolute in form "in trust, the conditions of which are stated in a separate instrument," and authorizes her husband to deliver it, he has power to deliver it in accordance with its terms and manifest purpose, and, as against grantee, she cannot assert that he has delivered mortgage for sum larger than that to which she agreed.—*Bull vs. Coe*, 77 Cal. 54, 57, 58, 11 Am. St. Rep. 235, 18 Pac. Rep. 808.

81. CONSIDERATION—Is required in accordance with rule applicable to mortgages executed by other persons.—*Chaffee vs. Browne*, 109 Cal. 211, 220, 41 Pac. Rep. 1023; *Sawtelle vs. Muncy*, 116 Cal. 435, 439, 48 Pac. Rep. 387. See *Feeney vs. Howard*, 79 Cal. 525, 530, 12 Am. St. Rep. 162, 21 Pac. Rep. 984, 4 L. R. A. 826; *McDonald vs. Randall*, 139 Cal. 246, 249-251, 72 Pac. Rep. 997; *Bayler vs. Commonwealth*, 40 Pa. St. 37, 80 Am. Dec. 551; *Depeau vs. Waddington*, 6 Whart. (Pa.) 220, 36 Am. Dec. 216.

82. Antecedent debt of husband—Mortgage to secure, given by wife without any new consideration being given to either her or her husband, is not binding upon her.—*Chaffee vs. Browne*, 109 Cal. 211, 220, 41 Pac. Rep. 1023. See *Bayler vs. Commonwealth*, 40 Pa. St. 37, 80 Am. Dec. 551; *Depeau vs. Waddington*, 6 Whart. (Pa.) 220, 36 Am. Dec. 216; *California Fruit Trans. Co. vs. Anderson*, 79 Fed. Rep. 404-406.

83. Bona fide purchaser for value, to whom mortgage is assigned with negotiable note, which is secured by such mortgage, is not subject to defense that mortgage was given to secure antecedent debt.—*McDonald vs. Randall*, 139 Cal. 246, 249, 251, 72 Pac. Rep. 997.

84. Extension of time of payment by husband is sufficient consideration to uphold mortgage given by wife to secure her husband's debt.—*McDonald vs. Randall*, 139 Cal. 246, 251, 253, 72 Pac. Rep. 997.

85. In action to foreclose want of consideration may be set up as defense.—*Sawtelle vs. Muncy*, 116 Cal. 435, 438, 48 Pac. Rep. 387.

86. Note which is not binding on husband, to secure which note the mortgage was given, renders mortgage invalid as being without consideration.—*Sawtelle vs. Muncy*, 116 Cal. 435, 439, 48 Pac. Rep. 387.

87. Recital that mortgage is given for joint indebtedness of husband and wife for goods, etc., had and received by them from mortgagee is not conclusive upon wife, and under Code Civil Procedure § 1962 subd. 2 does not estop her from showing that there was no consideration for mortgage.—*Chaffee vs. Browne*, 103 Cal. 211, 220, 41 Pac. Rep. 1023. See *Feeney vs. Howard*, 79 Cal. 525, 530, 12 Am. St. Rep. 162, 21 Pac. Rep. 984, 4 L. R. A. 826; *Bayler vs. Commonwealth*, 40 Pa. St. 37, 80 Am. Dec. 551.

See Code Civ. Proc. § 1962 subd. 2 and note.

88. DEATH OF WIFE DOES NOT TERMINATE LIABILITY of mortgaged property, where her death occurs before debt matures.—*Cross vs. Allen*, 141 U. S. 528, bk. 35 L. ed. 843, 12 Sup. Ct. Rep. 67.

89. DEED OF TRUST IN NATURE OF MORTGAGE may be executed by married woman upon her separate property.—*Burkle vs. Levy*, 70 Cal. 250, 252, 11 Pac. Rep. 643. See *Bull vs. Coe*, 77 Cal. 54, 57, 11 Am. St. Rep. 235, 18 Pac. Rep. 808.

90. DEFICIENCY JUDGMENT MAY BE RENDERED against wife in action to foreclose mortgage, for any deficiency that may remain after sale under mortgage, and such judgment may be enforced against any separate property owned by her, where such mortgage has been executed since amendment of § 167 of the original code, forbidding wife from making contract for payment of money, by Act March 30, 1874, § 38 (Code Amdts., 1873-4, p. 193); her personal liability under such amendment being same as that on mortgage executed by feme sole.—*Marlow vs. Barlew*, 53 Cal. 456, 461; *Alexander vs. Bouton*, 55 Cal. 15, 16-20. See *Brickell vs. Batchelder*, 62 Cal. 623, 639.

91. Compare: *Brown vs. Orr*, 29 Cal. 120, 122, involving mortgage executed by husband and wife under Act 1850, holding that deficiency judgment could not be rendered against wife personally.

92. PROPERTY HELD IN COMMON BY WIFE AND COMMUNITY, being in part her separate property, and in part community property, may be mortgaged by wife, and sold under decree of foreclosure, as respects whatever separate interest she has therein.—*Loring vs. Stuart*, 79 Cal. 200, 202, 203, 21 Pac. Rep. 651.

93. STATUTORY REQUIREMENTS MUST BE COMPLIED WITH, otherwise mortgage will be absolutely void; e. g. mortgage which is not properly acknowledged by her is invalid.—*Tolman vs. Smith*, 74 Cal. 345, 349, 16 Pac. Rep. 189.

As to acknowledgments by married woman, see post § 1187 and note.

As to validity of wife's deed where statute is not complied with, see pars. 43-53, 65, 66-68, 70, 75, 76 this note.

94. TO SECURE DEBT OF ANOTHER IS VALID, and mortgage executed for such purpose may be enforced in same manner and to same extent as if she were a feme sole.—*Hassey vs. Wilke*, 55 Cal. 525, 528; *Burkle vs. Levy*, 70 Cal. 250, 252, 11 Pac. Rep. 643; *Bull vs. Coe*, 77 Cal. 54, 61, 62, 11 Am. St. Rep. 235, 18 Pac. Rep. 808; *Farmers & Merchants' Bank vs. De*

Shorb, 137 Cal. 685, 688, 694, 70 Pac. Rep. 771; *McDonald vs. Randall*, 139 Cal. 246, 253, 72 Pac. Rep. 997. See *Spear vs. Ward*, 20 Cal. 659, 674 (decided under Act 1850 requiring joinder of husband in execution of instrument).

95. Husband's debt may be secured by mortgage executed by wife upon her separate property in like manner as may be debt of any other person.—*Burkle vs. Levy*, 70 Cal. 250, 252, 11 Pac. Rep. 643; *Bull vs. Coe*, 77 Cal. 54, 61, 62, 11 Am. St. Rep. 235, 18 Pac. Rep. 808; *Farmers & Merchants' Bank vs. De Shorb*, 137 Cal. 685, 688, 694, 70 Pac. Rep. 771; *McDonald vs. Randall*, 139 Cal. 246, 253, 72 Pac. Rep. 997.

96. Suretyship of wife results where she mortgages her separate property to secure debt of another, and she will be discharged by anything that will discharge surety.—*Spear vs. Ward*, 20 Cal. 659, 674; *Hassey vs. Wilke*, 55 Cal. 525, 528; *Bull vs. Coe*, 77 Cal. 54, 61, 62, 11 Am. St. Rep. 235, 18 Pac. Rep. 808; *McDonald vs. Randall*, 139 Cal. 246, 253, 72 Pac. Rep. 997. See *N. Y. Bank of Albion vs. Burns*, 46 N. Y. 170; *Gahn vs. Niemcewicz*, 11 Wend. 312. *N. C. Gore vs. Townsend*, 105 N. C. 228, 11 S. E. Rep. 160, 8 L. R. A. 443; *Hinton vs. Greenleaf*, 113 N. C. 6, 18 S. E. Rep. 56. *Fed. Cross vs. Allen*, 141 U. S. 528, bk. 35 L. ed. 843, 12 Sup. Ct. Rep. 67.

97. Same—Bond given by husband and wife.—Admission in one consideration clause that mortgage was executed for moneys received by husband and wife "and each of them," in absence of parol evidence, countervails effect otherwise arising on form of transaction, and mortgage being executed to secure bond signed by husband and wife which is husband's obligation alone, it will be deemed to have been executed in consideration for money received by both husband and wife, and wife will not be deemed surety for husband.—*Spear vs. Ward*, 20 Cal. 659, 666.

98. Heirs of wife occupy same position where they succeed by inheritance to her estate and interest.—*Cross vs. Allen*, 141 U. S. 528, bk. 35 L. ed. 843, 12 Sup. Ct. Rep. 67. See *Bank of Albion vs. Burns*, 46 N. Y. 170; *Miner vs. Graham*, 24 Pa. St. 491, 495.

99. Purchasing on foreclosing sale becomes trustee of wife, when mortgage is given to secure his debt, as he thereby merely pays his own debt, and thereafter he holds property in trust for his wife.—*Hassey vs. Wilke*, 55 Cal. 525, 528. See *Fitch vs. Cotheal*, 2 Sand. Ch. (N. Y.) 29.

100. Discharge of surety—Additional security will not operate as release, where there is no material alteration of original terms of contract.—*Cross vs. Allen*, 141 U. S. 528, bk. 35 L. ed. 843, 12 Sup. Ct. Rep. 67. See *Prairie State Nat. Bank vs. United States*, 164 U. S. 227, 238, bk. 41 L. ed. 412, 17 Sup. Ct. Rep. 142.

101. Extension of time and renewal discharge wife where same are made without her consent.—*Bank of Albion vs. Burns*, 46 N. Y. 170; *Hinton vs. Greenleaf*, 113 N. C. 6, 18 S. E. Rep. 56.

VII. SAME—4. POWERS OF ATTORNEY.

102. CAPACITY OF WIFE TO MAKE POWER OF ATTORNEY with reference to her

separate property, unless controlled by statute, is same as that of feme sole, or of her husband with reference to his separate property; e. g. she may empower her husband as her attorney in fact to execute mortgage.—*Savings Bank San Diego Co. vs. Daley*, 121 Cal. 199, 200, 53 Pac. Rep. 420. See *Racoullat vs. Sansevain*, 32 Cal. 376, 385 (decided under state of facts which arose prior to the enactment of the Act April 17, 1850, § 6, requiring joinder of her husband in written instrument).

103. JOINDER OF HUSBAND AND WIFE IN WRITTEN INSTRUMENT, being required by Act April 17, 1850, § 6, wife could not execute in her own name, alone and without joinder of her husband, valid power of attorney.—*Mott vs. Smith*, 16 Cal. 533, 556; *Dow vs. Gould & Curry S. Min. Co.*, 31 Cal. 629, 653, 654; *Dentzel vs. Waldie*, 30 Cal. 138, 142.

104. COMPLIANCE WITH STATUTE NECESSARY, and under Act April 3, 1863, § 1 (Stat. 1863, c. 132, p. 165), expressly authorizing married woman to make powers of attorney provided her husband join in execution thereof and same be acknowledged, etc., power of attorney in which husband did not join was void.—*Dow vs. Gould & Curry S. Min. Co.*, 31 Cal. 629, 655; *Heinlen vs. Martin*, 53 Cal. 321, 328. See *Douglas vs. Fulda*, 50 Cal. 77, 79.

105. REMEDIAL STATUTE—Constitutionality of Act April 3, 1863, § 4, validating sales made under powers of attorney previously made by married women with their husbands and acknowledged and certified in manner provided in § 1, upheld because design of statute was merely to confirm contracts made in good faith, but not in precise mode prescribed by law and because it did not operate to devise vested rights.—*Dentzel vs. Waldie*, 30 Cal. 138, 143-145.

106. Signature and acknowledgment by husband sufficient as respects his execution thereof, to bring power within remedial provision of Act 1863, and it was not necessary he should have appeared in body of instrument as joint maker with his wife.—*Dentzel vs. Waldie*, 30 Cal. 138, 146, 148.

107. Statute not retrospective and its remedial provisions applied only to prior powers of attorney.—*Dow vs. Gould & Curry S. Min. Co.*, 31 Cal. 629, 656.

108. STATUTE OF FRAUDS MUST BE COMPLIED WITH and oral authority to convey married woman's separate property is invalid under § 1624 subd. 5, and § 2309, which required such authority to be in writing, etc.—*Nason vs. Lingle*, 143 Cal. 363, 366, 77 Pac. Rep. 71.

See post § 1624 subd. 5, 2309 and notes.

109. Specific performance of written contract made pursuant to oral authority will not be decreed.—*Nason vs. Lingle*, 143 Cal. 363, 366, 77 Pac. Rep. 71.

110. EXECUTION OF DEED UNDER POWER OF ATTORNEY is governed by ordinary rules applicable to execution by attorneys in fact.—*Douglas vs. Fulda*, 50 Cal. 77, 79, 80; *Savings Bank San Diego County vs. Daley*, 121 Cal. 199, 201, 53 Pac. Rep. 420. See *Richmond vs. Voorhees*, 10 Wash. 316, 38 Pac. Rep. 1014; *Holladay vs. Dally*, 86 U. S. (19 Wall.) 606, 608, 22 L. ed. 187.

111. Execution in name of wife sufficient and it is not necessary that attorney, even though he be her husband, should execute deed as grantor.—*Douglas vs. Fulda*, 50 Cal. 77, 79, 80. See *Dentzel vs. Waldie*, 30 Cal. 138, 150; *Holladay vs. Dally*, 86 U. S. (19 Wall.) 608, 22 L. ed. 187.

112. Necessary covenants may be inserted in mortgage where such mortgage is executed pursuant to power of attorney which authorizes attorney to borrow money to sign and deliver any promissory note or notes, and to "execute and deliver as collateral thereto any mortgage or mortgages," etc.—*Richmond vs. Voorhees*, 10 Wash. 316, 38 Pac. Rep. 1014.

113. POWER GIVEN TO WIFE BY HUSBAND INVALID, notwithstanding statute authorizing execution of powers of attorney, where statute with reference to alienation of real property of wife required an instrument in writing executed by husband and wife, as it contemplated that husband should express his judgment in respect to each transaction of wife involving her real estate.—*Meagher vs. Thompson*, 49 Cal. 189, 190, 192.

114. Excess of authority—Changing form of lien is not, where attorney is empowered to mortgage property which is subject to deed of trust which is subsisting lien, and his change in form of lien does not affect her possession.—*Savings Bank San Diego County vs. Daley*, 121 Cal. 199, 201, 53 Pac. Rep. 420.

VIII. HUSBAND'S POWER TO MANAGE, CONTROL AND CONVEY.

115. AUTHORITY NOT IN HUSBAND to manage, control, and convey wife's separate property since repeal of Act April 17, 1850, § 6 (Stats. 1850, c. 103, p. 254).—*Emerson vs. Bergin*, 71 Cal. 335, 337, 12 Pac. Rep. 242; *Mesnager vs. Engelhardt*, 108 Cal. 68, 70, 71, 41 Pac. Rep. 20; *Williams vs. Tam*, 131 Cal. 64, 66, 63 Pac. Rep. 133; *Wagoner vs. Silva*, 139 Cal. 559, 561-563, 73 Pac. Rep. 433. See *Nason vs. Lingle*, 143 Cal. 363, 366, 77 Pac. Rep. 71.

116. AGENCY OF HUSBAND MUST BE EXPRESSLY CONFERRED by wife and he has no authority as agent from the mere fact of marriage relation.—*Wagoner vs. Silva*, 139 Cal. 559, 563, 73 Pac. Rep. 433. See *Greiner vs. Greiner*, 58 Cal. 115, 122; *Nason vs. Lingle*, 143 Cal. 363, 366, 77 Pac. Rep. 71.

117. CONVEYANCE BY HUSBAND UNAUTHORIZED and is ineffectual to pass title to her separate property.—*Mesnager vs. Engelhardt*, 108 Cal. 68, 70, 71, 41 Pac. Rep. 20; *Butler vs. Gosling*, 130 Cal. 423, 426, 62 Pac. Rep. 596. See *Nason vs. Lingle*, 143 Cal. 363, 366, 77 Pac. Rep. 71.

118. Chattel mortgage given by husband upon his wife's separate chattels is invalid as against her.—*Taylor vs. Riley*, 37 Kan. 90, 14 Pac. Rep. 476.

119. Estoppel of wife to attack chattel mortgage made by her husband without her knowledge or consent does not result from fact that, after being informed of mortgage by her husband before it became due, she did not inform mortgagee that she was owner of property and failed to protest against possession being taken by mortgagee.—*Taylor vs. Riley*, 37 Kan. 90, 14 Pac. Rep. 476.

120. Easement over wife's separate property cannot be created by husband; e. g. he cannot convey right of way over land which is her separate property.—*Mesnager vs. Englehardt*, 103 Cal. 68, 70, 71, 41 Pac. Rep. 20.

121. LICENSEE OF WIFE, FREE FROM INTERFERENCE BY HUSBAND, where such licensee claims under license given by her with respect to land which is her separate property.—*Emerson vs. Bergin*, 71 Cal. 335, 337, 338, 12 Pac. Rep. 242.

122. RIGHT OF ACTION ACQUIRED AFTER MARRIAGE, because of an injury to wife's separate property, is her separate property, under her control, and settlement made by husband is invalid with respect to such injury to wife's separate property.—*Wagoner vs. Silva*, 139 Cal. 559, 561-563, 73 Pac. Rep. 433.

123. STATUTORY POWER TO MANAGE AND CONTROL GIVEN BY HUSBAND by Act April 17, 1850, § 6 (Stats. 1850, c. 103, p. 254).—*Panaud vs. Jones*, 1 Cal. 438, 513; *Pixley vs. Huggins*, 15 Cal. 127, 131; *Kays vs. Phelan*, 19 Cal. 128, 129; *Mahone vs. Grimshaw*, 20 Cal. 175, 176. See *Drais vs. Hogan*, 50 Cal. 121, 125.

124. Constitutionality of statute giving husband dominion over wife's separate property doubtful.—*Lewis vs. Johns*, 24 Cal. 98, 103, 35 Am. Dec. 49.

125. Death of husband terminates his dominion, and where he has constituted another his agent with reference to wife's separate property, release and discharge given such agent by personal representative of husband, upon husband's death, is invalid.—*Dickinson vs. Owen*, 11 Cal. 71, 76.

126. Fraudulent agreement between husband and purchaser, whereby it is stipulated that purchaser shall buy wife's separate property for less than its value, and give husband difference between value and price agreed, cannot be made by husband; and probably she might at her election, upon returning amount received by her after sale, set aside or recover from purchaser balance of sum to be paid by him.—*Beaudry vs. Felch*, 47 Cal. 183, 185, 186.

127. Effect of receipt of entire amount by wife upon her refusal to sell, unless she receives full purchase price, is to fully and fairly close transaction so far as she is concerned; and note secretly given by purchaser to her husband for amount which he had intended to pay husband, is not property of wife, nor is money thereby promised to be paid.—*Beaudry vs. Felch*, 47 Cal. 183, 186.

128. Husband entitled to possession of wife's separate property under such statute.—*Kays vs. Phelan*, 19 Cal. 128, 129; *Mahone vs. Grimshaw*, 20 Cal. 175, 176.

129. Intention of statute was to guard wife against her own improvidence, incapacity, or ignorance of business affairs, but not to place her and her personal estate completely in power of her husband that she could contract no debt upon faith of it, even for purpose of preventing him from wasting it, or to compel him to account for it.—*Terry vs. Hammonds*, 47 Cal. 32, 39.

130. Limitations upon husband's control and management of wife's separate property are

such that he must control and manage it in her interests and not deprive her of enjoyment of its fruits.—*Wilson vs. Wilson*, 36 Cal. 447, 452, 453, 95 Am. Dec. 194.

131. Payment by husband of judgment against wife in order to protect her separate estate against forced sale, is in effect payment made by wife, such payment being within scope of his agency conferred by statute, and in an action against attorney for negligence in allowing such judgment to be rendered such payment may be counted upon by wife, or by husband and wife, as payment made by her.—*Drais vs. Hogan*, 50 Cal. 121, 125, 126.

132. Payment of money to husband sufficient, where such money belongs to separate estate of wife, and in action by wife to recover such money payment to husband is defense (dictum).—*Kays vs. Phelan*, 19 Cal. 128, 129.

133. Personal property not subject to alienation by husband without joinder of wife under Act May 12, 1862 (Stats. 1862, c. 394, p. 513), amendatory of Act April 17, 1850, § 6, and no title was acquired by purchaser from husband where his wife did not join in sale.—*O'Brien vs. Foreman*, 46 Cal. 80, 82. See *Terry vs. Hammonds*, 47 Cal. 32, 38; *Friedberg vs. Parker*, 50 Cal. 103, 105.

134. Wife living separate and apart from husband was given sole and exclusive control of her property by Act March 9, 1870 (Stats. 1869-70, p. 226); under which it was held statute contemplated abandonment of one of spouses by other or separation intended to be final and not mere temporary absence of wife from her husband.—*Tobin vs. Galvin*, 49 Cal. 84, 86, 87.

IX. REMEDIES—PLEADING AND PRACTICE.

135. ACTION TO ENFORCE OR PROTECT RIGHTS of wife in separate property is maintained by wife alone, under Code of Civil Procedure, § 370 subd. 1.—*Prey vs. Stanley*, 110 Cal. 423, 425, 42 Pac. Rep. 908.

See Code Civ. Proc. § 370 subd. 1 and note.

As to remedies by and against wife on contracts, see ante § 158 and note paras. 41-43, 54-56, 86-106.

136. CHARGE ON SEPARATE PROPERTY—ENFORCEMENT IN EQUITY.—See ante § 158 note paras. 10-14.

137. COMPLAINT—AVERMENT OF COVERTURE UNNECESSARY, in an action involving her separate property, it being sufficient to draw her complaint, as if she were feme sole, and, when defendant shows her coverture, for her to prove that property is her separate property; but if she does allege that she is married it is necessary to aver in complaint such facts as are necessary to entitle her to maintain action.—*Shumway vs. Leakey*, 67 Cal. 458, 8 Pac. Rep. 13. See *Thomas vs. Desmond*, 63 Cal. 426, 427, 428.

138. Averment that property is separate property is unnecessary if plaintiff does not allege that she is married woman.—*Hand vs. Scodeletti*, 123 Cal. 674, 676, 61 Pac. Rep. 373.

139. EVIDENCE—Assessment of property by husband as his own is not evidence against his wife's title, unless accompanied by evidence that such return was made with her

knowledge and consent.—*Shumway vs. Leakey*, 67 Cal. 458, 459, 8 Pac. Rep. 12, distinguishing *Arnold vs. Skaggs*, 35 Cal. 634, 686. See *Chamberlin vs. Vance*, 51 Cal. 75, 84; *De Votie vs. McGerr*, 15 Colo. 467, 22 Am. St. Rep. 426, 24 Pac. Rep. 928.

As to evidence to overcome presumption that property is community property, see § 164 and note pars. 84-107.

140. Marriage of woman is shown, in action to reform deed, by recital in deed that she is married woman, by certificate of acknowledgment describing her as such, and by testimony of witnesses that she is wife of man whose name she bears.—*Leonis vs. Lazzarovich*, 55 Cal. 52, 55.

141. HUSBAND—Remedies against, growing out of wife's separate property rights, exist in favor of wife; e. g. wife has right of action against her husband to enforce debt contracted before marriage.—*Wilson vs. Wilson*, 36 Cal. 447, 452, 95 Am. Dec. 194.

As to rights of action growing out of contracts between husband and wife, see ante § 158 and note pars. 42, 43, 54-56, 60-66.

As to wife as party plaintiff in action against her husband, see post § 370 par. 2 and note.

142. Appointment of trustee authorized by Act April 17, 1850, § 8, where wife apprehended mismanagement or waste of her separate property by her husband.—*Mahone vs. Grimshaw*, 20 Cal. 175, 176. See *Wilson vs. Wilson*, 36 Cal. 447, 453, 95 Am. Dec. 194.

143. LACHES IMPUTABLE TO MARRIED WOMEN in respect to enforcement of rights arising out of their separate property to same extent as if they were *femes sole*.—*Burkle vs. Levy*, 70 Cal. 250, 254, 11 Pac. Rep. 643. See *Gibson vs. Herriott*, 55 Ark. 85, 29 Am. St. Rep. 17, 17 S. W. Rep. 589; *De Votie vs. McGerr*, 15 Colo. 467, 22 Am. St. Rep. 426, 24 Pac. Rep. 923.

144. QUIETING TITLE—Married woman is entitled to decree quieting title to real property granted to her in like manner as are other persons.—*Prey vs. Stanley*, 110 Cal. 423, 425, 42 Pac. Rep. 908.

145. REFORMATION OF MARRIED WOMAN'S DEED DECREED in equity, so as to cor-

rect mistake therein, when such deed has been executed and acknowledged in every formality prescribed by statute.—*Savings & L. Soc. vs. Meeks*, 66 Cal. 371, 373, 5 Pac. Rep. 624, distinguishing *Barrett vs. Tewksbury*, 9 Cal. 13, 14 (action to compel married woman to acknowledge conveyance of her separate property); and *Leonis vs. Lazzarovich*, 55 Cal. 52, 55, 56 (action to reform deed of married woman so as to make it include other lands than those conveyed). See *Hayford vs. Kocher*, 65 Cal. 389, 390, 4 Pac. Rep. 350; *Stevens vs. Holman*, 112 Cal. 345, 349-352, 53 Am. St. Rep. 216, 44 Pac. Rep. 670; *Gardner vs. Moore*, 75 Ala. 394, 51 Am. Rep. 454; *Murdoch vs. Leonard*, 15 Wash. 142, 45 Pac. Rep. 751.

As to reformation of unacknowledged deeds, see post §§ 1202-1204 and note.

146. Fraudulent omission of part of land agreed to be mortgaged and acceptance of mortgage under mistaken notion that mortgage covers land agreed to be mortgaged, will entitle mortgagee to reformation where mortgage as respects its execution is in compliance with statute and is valid instrument by married woman.—*Stevens vs. Holman*, 112 Cal. 345, 349-352, 53 Am. St. Rep. 216, 44 Pac. Rep. 670.

147. RESCISSION—Assignee of mortgage not entitled to, where such mortgage given by wife to secure purchase money, on ground that mortgage is void because of her disability to make it, and consequent failure of consideration, but remedy of assignee, if any is against assignor.—*Camden vs. Vail*, 24 Cal. 392, 397, 398. See *Camden vs. Vail*, 23 Cal. 633.

See ante § 158 and note pars. 41, 54, 55, 87, 102.

148. SPECIFIC PERFORMANCE.—See ante § 158 and note pars. 98, 99, 103-105.

As to specific performance of unacknowledged deeds and contracts, see post §§ 1093, 1187 and notes.

149. TROVER MAINTAINABLE BY WIFE for conversion of her separate property which consists of chattels.—*Hand vs. Scodeletti*, 128 Cal. 674, 677, 61 Pac. Rep. 373. See *Kane vs. Desmond*, 63 Cal. 464, 465.

§ 163. SEPARATE PROPERTY OF THE HUSBAND. All property [1] owned by the husband before marriage, and that [2] acquired afterwards by gift, bequest, devise, or descent, with [3] the rents, issues, and profits thereof, is his separate property.

History: Enacted March 21, 1872.

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8. Earnings of husband.
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17. Same—Signature of wife unnecessary.

18. Fraud on wife—Provision for child not.
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22. Same—Antenuptial contract unnecessary.
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24. Same—Estate granted presumed fee simple.
25. Same—Homestead may be conveyed to wife.
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27. Same—Interposition of trustee unnecessary.
28. Same—Mortgage to wife valid.
29. Same—Same—Priority over subsequent homestead.
30. Same—Quitclaim deed passes husband's title.
31. Same—Reformation of mistake.
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- 35-37. Same—Same—Sufficiency of evidence.
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38. Control, right of possession, and title not in wife.
39. Same—Title obtainable by transfer only.
40. Same—Vested interest not in wife.
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- 42, 43. Remedies of wife—Injunction and trover not maintainable.
44. Sole trader—Acquires no title.
45. Same—May invest separate property of husband in business.

L IN GENERAL.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Schuyler vs. Broughton*, 70 Cal. 282, 284, 11 Pac. Rep. 719 (referred to); *In re Estate of Bauer*, 79 Cal. 304, 310, 21 Pac. Rep. 759 (referred to); *McFadden vs. Santa Ana O. & T. St. R. Co.*, 87 Cal. 464, 468, 25 Pac. Rep. 681, 11 L. R. A. 252 (referred to); *Neale vs. Depot R. Co.*, 94 Cal. 425, 429, 29 Pac. Rep. 954 (referred to); *Frankel vs. Boyd*, 106 Cal. 608, 612, 39 Pac. Rep. 939 (referred to); *Herey vs. Pesoli*, 109 Cal. 53, 59, 41 Pac. Rep. 819 (referred to); *Siddall vs. Haight*, 132 Cal. 220, 223, 64 Pac. Rep. 410 (referred to); *Hamilton vs. Hubbard*, 134 Cal. 603, 604, 65 Pac. Rep. 321, 66 Id. 860 (referred to); *In re Estate Granniss*, 142 Cal. 1, 5, 75 Pac. Rep. 324 (cited).

2. TESTAMENTARY CAPACITY OF HUSBAND.—Separate property of husband is subject to his testamentary disposition.—*In re Estate of Granniss*, 142 Cal. 1, 6, 75 Pac. Rep. 324.

As to what property may be disposed of by will, see post § 1274 and note.

II. WHAT CONSTITUTES SEPARATE PROPERTY.

3. DEFINITION OF SEPARATE PROPERTY.—See ante § 162 and note par. 11.

4. BURDEN OF PROVING THAT PROPERTY IS SEPARATE PROPERTY.—See post § 164 and note para. 3, 75.

5. CHOSES IN ACTION owned by husband at time of marriage, such as notes, are his separate property.—*In re Estate of Granniss*, 142 Cal. 1, 5, 75 Pac. Rep. 324.

6. COMMINGLED PROPERTY.—See post § 164 and note para. 181-191.

7. CONFLICT OF LAWS as to what constitutes separate or community property.—See post, § 164, and note para. 26-35.

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13. RENTS, ISSUES AND PROFITS OF SEPARATE PROPERTY.—See post § 164 and note para. 168-77.

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III. CONVEYANCES BY HUSBAND.

16. ABSOLUTE POWER OF DISPOSITION IN HUSBAND, whether by sale or gift, unrestrained by his wife, in the absence of fraud upon her marital vital rights.—*Smith vs. Smith*, 12 Cal. 217, 223, 73 Am. Dec. 533; *Greer vs. Greer*, 142 Cal. 519, 522, 523, 77 Pac. Rep. 1106. See *Boreham vs. Byrne*, 83 Cal. 23, 28, 23 Pac. Rep. 212. See para. 20-37 this note.

17. Signature of wife is mere superfluity and imparts no efficacy whatever to deed and hence it is immaterial whether such signature is genuine or forged.—*Boreham vs. Byrne*, 83 Cal. 23, 28, 23 Pac. Rep. 212. See para. 38 this note.

18. FRAUD ON WIFE—Reasonable provision for child not fraudulent, where the husband leaves the wife in possession of a reasonable amount of property, personal and real.—*Greer vs. Greer*, 142 Cal. 519, 522, 523, 77 Pac. Rep. 1106.

19. Subsequent desertion of wife by husband does not render invalid, as a fraud upon wife's marital rights, a prior conveyance made by the husband to his daughter, which conveyance was valid at time of execution.—*Greer vs. Greer*, 142 Cal. 523, 77 Pac. Rep. 1106.

20. MORTGAGE BY HUSBAND OF HIS SEPARATE PROPERTY VALID without aid of his wife.—*Bernal vs. Gleim*, 33 Cal. 668, 675.

As to mortgage by husband to wife, see post para. 28, 29 this note.

21. TRANSFER BY HUSBAND TO WIFE.—Gift valid, whether the separate property so conveyed consists of realty or chattels, in a

case where no fraud is shown and rights of creditors or other third persons do not intervene.—*Barker vs. Koneman*, 13 Cal. 9, 11; *Hart vs. Robertson*, 21 Cal. 346, 349; *Burkett vs. Burkett*, 78 Cal. 310, 312, 12 Am. St. Rep. 58, 20 Pac. Rep. 715, 3 L. R. A. 781; *In re McEachran*, 82 Cal. 219, 225, 23 Pac. Rep. 46; *Knox vs. Moses*, 104 Cal. 502, 505, 33 Pac. Rep. 318; *Emmons vs. Barton*, 109 Cal. 662, 671, 42 Pac. Rep. 303; *Tillaux vs. Tillaux*, 115 Cal. 663, 668, 47 Pac. Rep. 691; *Hamilton vs. Hubbard*, 134 Cal. 603, 606, 65 Pac. Rep. 321, 66 Id. 860. See *Kohner vs. Ashenauer*, 17 Cal. 578, 581; *Adams vs. Knowlton*, 21 Cal. 283, 288; *Swain vs. Duane*, 48 Cal. 358-60; *Wedel vs. Herman*, 59 Cal. 507, 516; *Schuler vs. Savings & L. Soc.*, 64 Cal. 397, 399, 1 Pac. Rep. 479; *Klumpke vs. Baker*, 68 Cal. 559, 561, 10 Pac. Rep. 197; *Morgan vs. Lones*, 78 Cal. 58, 62, 20 Pac. Rep. 248; *Carter vs. McQuade*, 83 Cal. 274, 278, 23 Pac. Rep. 348; *Oaks vs. Oaks*, 94 Cal. 66-68, 29 Pac. Rep. 330; *In re Estate Dobbels*, 104 Cal. 432, 435, 43 Am. St. Rep. 123, 38 Pac. Rep. 87; *Wright vs. Wright* (Cal. Aug. 28, 1895), 41 Pac. Rep. 695, 696; *Ions vs. Harbison*, 112 Cal. 260, 266, 44 Pac. Rep. 572; *Tillaux vs. Tillaux*, 115 Cal. 663, 672, 47 Pac. Rep. 691; *Arkle vs. Beedie*, 141 Cal. 459, 460-462, 74 Pac. Rep. 1033; *Hoeck vs. Greiff*, 142 Cal. 119, 122, 75 Pac. Rep. 670; *Furrow vs. Athey*, 21 Neb. 671, 59 Am. Rep. 867; *Thorpe vs. Sampson*, 84 Fed. Rep. 63, 65.

As to separate property of husband given to wife becoming wife's separate property, see post § 164 and note par. 157.

22. Antenuptial contract is unnecessary, and a conveyance by husband to his wife is valid whether or not it is in compliance with an antenuptial contract.—*Barker vs. Koneman*, 13 Cal. 9, 11.

23. Equity need not be resorted to to uphold a deed from husband to his wife, because the statute has entirely abrogated common-law rule, although under common law equity would enforce such deed.—*Tillaux vs. Tillaux*, 115 Cal. 663, 671, 47 Pac. Rep. 691.

24. Estate granted presumed to be fee simple, under § 1105 post, when the deed contains the word "grant" in the proper clause thereof, without other words indicating a less estate.—*Klumpke vs. Baker*, 68 Cal. 559, 561, 10 Pac. Rep. 197. See post § 1105 and note.

25. Homestead out of husband's separate estate may be conveyed to wife without her joining him in the deed, although effect of declaring homestead is to convert the separate title of husband into joint title in himself and wife, and §§ 1242, 1243 post provide that the homestead cannot be conveyed or encumbered except by an instrument executed and acknowledged by both husband and wife; the requirement of the statute applying only to conveyance or abandonment of homestead, and being intended to prevent conveyance in abrogation of homestead rights of wife.—*Burkett vs. Burkett*, 78 Cal. 310, 312, 316, 12 Am. St. Rep. 58, 20 Pac. Rep. 715, 3 L. R. A. 781; *Oaks vs. Oaks*, 94 Cal. 66, 67, 68, 29 Pac. Rep. 330.

As to abandonment and conveyance of homestead, see post §§ 1242, 1243 and notes.

As to contracts between husband and wife concerning homestead, see ante § 158 and note par. 31.

26. Same—Rights of wife subordinate to homestead rights of husband in property conveyed to her.—*Oaks vs. Oaks*, 94 Cal. 66, 67, 68, 29 Pac. Rep. 330.

27. Interposition of trustee unnecessary, as the statute permits direct conveyances from one spouse to the other.—*Burkett vs. Burkett*, 78 Cal. 310, 312, 12 Am. St. Rep. 58, 20 Pac. Rep. 715, 3 L. R. A. 781; *Tillaux vs. Tillaux*, 115 Cal. 663, 670, 47 Pac. Rep. 691. See *Comm. Deming vs. Williams*, 26 Conn. 236, 68 Am. Dec. 386. *Mich. Burdeno vs. Amperse*, 14 Mich. 91, 90 Am. Dec. 225. *Miam. Wilder vs. Brooks*, 10 Minn. 50, 88 Am. Dec. 49. *Neb. Furrow vs. Athey*, 21 Neb. 671, 59 Am. Rep. 867, 33 N. W. Rep. 208. *N. Y. Hunt vs. Johnson*, 44 N. Y. 27.

28. Same—Mortgage may be given by husband to wife on his separate property.—*Glas vs. Glas*, 114 Cal. 566, 568, 55 Am. St. Rep. 90, 46 Pac. Rep. 667.

As to description of property, see ante § 159 and note par. 16.

29. Same—Same—Subsequent declaration of homestead will not defeat mortgage given by the husband to his wife.—*Glas vs. Glas*, 114 Cal. 566-568, 55 Am. St. Rep. 90, 46 Pac. Rep. 667.

30. Quitclaim deed to wife is sufficient, such deed being as effectual to pass whatever title the husband has as any other deed.—*Taylor vs. Opperman*, 79 Cal. 468, 470, 21 Pac. Rep. 869.

31. Reformation on ground of mistake of deed from husband to wife will not be decreed except upon the grounds usually recognized by equity; e. g. it must be shown that the instrument as written does not express the intention of the parties, or that the mistake was mutual or was accompanied by fraud, reformation will not be decreed.—*Hochstein vs. Berghauser*, 123 Cal. 681, 684, 685, 56 Pac. Rep. 547.

32. Subsequently acquired title inures to wife under a deed to her from her husband, in like manner as if he had conveyed to a stranger.—*Merrill vs. Clark*, 103 Cal. 367, 370, 37 Pac. Rep. 238.

33. Title acquired by wife is legal title to the land where the deed purports to convey an unqualified ownership and title, although in fact it is intended that the title shall be in trust for the husband.—*Warnock vs. Harlow*, 96 Cal. 298, 303, 31 Am. St. Rep. 209, 31 Pac. Rep. 166.

34. Trust may be created by parol where one spouse conveys separate property to the other, as where a husband conveys land and personal property to his wife upon the oral understanding that same shall be held in trust for the husband during his life and for the wife and child in equal proportions after his death.—*Hayne vs. Hermann*, 97 Cal. 259, 260-262, 32 Pac. Rep. 171.

35. Same—Evidence as to absolute deed being in trust, after husband's death, for his children must be clear, convincing, and con-

clusive.—*Sheehan vs. Sullivan*, 126 Cal. 189, 193, 58 Pac. Rep. 543. See *Mahoney vs. Bostwick*, 96 Cal. 53, 31 Am. St. Rep. 175, 30 Pac. Rep. 1020; *Sherman vs. Sandell*, 106 Cal. 373, 375, 39 Pac. Rep. 797; *N. Y. Wilson vs. Parshall*, 129 N. Y. 223, 29 N. E. Rep. 297. Pa. *Fisher vs. Witham*, 133 Pa. St. 488, sub nom. *App. of Fisher*, 19 Atl. Rep. 276. Fed. *Coyle vs. Davis*, 116 U. S. 108, bk. 29 L. ed. 583, 6 Sup. Ct. Rep. 314.

36. Declarations of husband as to trust under which his wife held property conveyed by him to her are not competent for purpose of preventing trust but are admissible in corroboration of testimony of other witnesses.—*Hayne vs. Hermann*, 97 Cal. 259, 263, 32 Pac. Rep. 171.

37. Declaration of wife made after execution of deed that she would take care of property "for us," i. e. the family, is not sufficiently certain and definite to show that it was intended as conveyance in trust for children.—*Sheehan vs. Sullivan*, 126 Cal. 189, 195, 58 Pac. Rep. 543.

IV. WIFE'S RIGHTS IN, CONTROL OVER, ETC.

38. CONTROL, RIGHT OF POSSESSION, AND TITLE NOT IN WIFE, as respects her husband's separate property.—*Thomas vs. Desmond*, 63 Cal. 426, 427, 428; In re Estate of Noah, 73 Cal. 583, 586, 2 Am. St. Rep. 829, 15 Pac. Rep. 287. See *Smith vs. Mott*, 76 Cal. 171, 172, 18 Pac. Rep. 260; *Steffins vs. Stewart*, 53

Kan. 92, sub nom. *Stewart vs. Steffins*, 36 Pac. Rep. 55.

39. Title to husband's separate property obtainable only by transfer by husband to her in mode prescribed by law and by mutual consent of herself and husband.—*Thomas vs. Desmond*, 63 Cal. 426, 428.

40. Vested interest not in wife, at least she has no "separate" interest in separate property of her husband.—In re Estate of Noah, 73 Cal. 583, 586, 2 Am. St. Rep. 829, 15 Pac. Rep. 287.

41. PLEDGE OF HUSBAND'S SEPARATE PROPERTY by wife in invalid.—See *Smith vs. Mott*, 76 Cal. 171, 18 Pac. Rep. 260.

42. REMEDIES OF WIFE.—Injunction not maintainable by wife against collection of tax levied on her husband's land, as she has no such inchoate interest in such land as will enable her to contest validity of assessment.—*Steffins vs. Stewart*, 53 Kan. 92, sub nom. *Stewart vs. Steffins*, 36 Pac. Rep. 55.

43. Trover not maintainable by wife for conversion of husband's separate property even though it be taken out of her possession wrongfully.—*Thomas vs. Desmond*, 63 Cal. 426, 427, 428.

44. SOLE TRADER—ACQUIRES NO TITLE to her husband's separate property.—*Thomas vs. Desmond*, 63 Cal. 426, 428.

45. May invest separate property of husband in business, to an amount not exceeding \$500.—See Code Civ. Proc. § 1416 and note.

§ 164. COMMUNITY PROPERTY—CONVEYANCES OF REAL ESTATE [TO AND] BY MARRIED WOMEN—TIME LIMIT FOR BRINGING ACTION.

All other property acquired after marriage by either husband or wife, or both, is community property; but whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property. And in case the conveyance be to such married woman and to her husband, or to her and any other person, the presumption is that the married woman takes the part conveyed to her, as tenant in common, unless a different intention is expressed in the instrument, and the presumption in this section mentioned is conclusive in favor of a purchaser or encumbrancer in good faith and for a valuable consideration. And in cases

Where married women have conveyed, or shall hereafter convey, real property which they acquired prior to May nineteenth, eighteen hundred and eighty-nine, the husbands, or their heirs or assigns, of such married women, shall be barred from commencing or maintaining any action to show that said real property was community property, or to recover said real property, as follows: [1] As to conveyances heretofore made, from and after one year from the date of the taking effect of this act; and [2] as to conveyances hereafter made, from and after one year from the filing for record in the recorder's office of such conveyances, respectively.

History: Enacted March 21, 1872; amended March 19, 1889, Stats. and Amdts. 1889, p. 328; March 3, 1893, Stats. and Amdts. 1893, p. 71; March 4, 1897, Stats. and Amdts. 1897, p. 63; by Code Commissioners, Act March 16, 1900-1, p. 193; held unconstitutional, see history, § 4 ante.

COMMUNITY PROPERTY—WHAT IS—ACQUISITION—TRANSMUTATION OF PROPERTY.

I. In General.

1. Applied, cited, construed, referred to, etc.
2. All property presumed community property.
3. Burden of proving that property is separate.
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5. Contracts between spouses concerning.
6. Conveyance of community property.
7. Divorce—Effect of.
8. Gift to husband and wife jointly.
9. Husband cannot acquire as separate property.
10. Husband not presumed to preserve.
11. Husband not required to acquire and accumulate.
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13. Interest retained by husband upon transferring.
14. Partition—Character not changed.
- 15, 16. Possessory right acquired before marriage.
17. Presumption from possession.
- 18, 19. Same—Bank deposits.
20. Same—Evidence to overcome presumption.
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23. Statute is exclusive.
24. Taxation of community property.
25. Testamentary capacity of husband.

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26. Acquisition of property in transitu.
- 27-29. Importation of property.
- 30, 31. Marriage—Law of place of solemnization.
- 32, 33. Matrimonial domicile—Law of.
34. Place of acquisition not presumed.
35. Presumption as to sameness of foreign law.

III. Property Acquired After Marriage by Deed, etc.

36. Consideration—Conditions distinguished from.
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- 38, 39. Same—Love and affection and money.
40. Same—Nominal consideration.
41. Same—Parol evidence to explain consideration.
42. Same—Want of consideration.
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46. Presumption that community property is acquired—Before Act 1889.
47. Same—Definition of presumption.
48. Same—Character of deed immaterial.
49. Same—Deed by husband to wife.
50. Same—Deed procured by husband to wife.
51. Same—Deed procured by wife to husband.
- 52-54. Same—Deed to husband and wife.

55. Same—Note and mortgage to wife.

56. Same—Stronger presumption from deed to husband.

57. Same—Trust results.

58. Statutory presumption in favor of wife—Act 1889.

59. Same—Contract of purchase raises none.

60. Same—Deed to husband and wife raises.

61. Same—Deed to wife procured by husband.

62. Same—Note and mortgage to wife.

63. Same—Persons in whose favor presumption arises.

64. Same—Statute not retroactive.

65. Same—Limitation upon husband's right of action—Valid.

66. Same—Same—Statute extending time not retroactive.

67-70. Parol evidence to overcome presumption of community.

71-73. Same—Grantee of spouse may introduce.

74. Same—Presumption in favor of wife may be overcome.

75. Proof—Burden of overcoming presumption.

76, 77. Same—Same—Statutory presumption in favor of wife.

78, 79. Same—Recitals in deed—Character of property shown by.

80. Same—Same—Conveyance subject to mortgage.

81. Same—Same—Husband not concluded.

82, 83. Same—Same—Parol evidence to overcome recitals.

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89-107. Same—Same—Applications of rule.

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- 140, 141. Deed by husband to wife—Wife presumed to take separate property.

- 142. Same—Parol evidence admissible.
- 143-145. Same—Recitals as to consideration.
- 146. Deed to husband procured by wife—Gift not presumed.
- 147. Same—Resulting trust.
- 148, 149. Deed to wife procured by husband—Gift not presumed.
- 150. Same—Statutory presumption in favor of wife.
- 151, 152. Same—Parol evidence—As to gift.
- 153. Same—Same—To overcome statutory presumption of gift.
- 154. Same—Recitals showing gift.
- 155. Same—Same—Parol evidence inadmissible to explain.
- 156. Effect of gift by husband to wife—Of community property.
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- 158. Effect of gift by wife to husband.
- 159, 160. Title acquired after gift—To whom inures.

VII. Earnings of Spouses.

- 161. Earnings of husband.
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- 168. Constitutional safeguard of wife's.
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- 187. Separate funds of each spouse traced.
- 188. Tacit acquiescence—Forfeiture.
- 189. Trifling sum commingled in losing business.
- 190. Practice—Accounting in equity.
- 191. Same—Burden of proof.

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- 192, 193. Character of funds used considered.
- 194. Improvements on separate property with community funds.
- 195. Presumption that improvements are community property.

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- 196. Character of property preserved.
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201. Proceeds of separate property.

202, 203. Same—Joinder of one spouse in another's deed.

204, 205. Property purchased—With community funds.

206. Same—With community and separate funds.

207. Same—With husband's separate funds.

208. Same—With wife's separate funds.

209. Same—Same—Note given to wife by husband.

210. Same—Same—Power of wife to change form of investment.

211. Same—Same—Redemption of husband's property with wife's funds.

212-214. Same—Title—Immaterial in whose name taken.

215. Same—Trust resulting.

I. IN GENERAL.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO,** etc., in: *Schuyler vs. Broughton*, 70 Cal. 282, 284, 11 Pac. Rep. 719 (referred to); *Smith vs. Furnish*, 70 Cal. 424, 426, 12 Pac. Rep. 392 (construed and applied); *People vs. Swalm*, 80 Cal. 46, 48, 18 Am. St. Rep. 96, 22 Pac. Rep. 67 (applied); *Jackson vs. Torrence*, 83 Cal. 521, 529, 23 Pac. Rep. 695 (construed); *McFadden vs. Santa Ana O. & T. St. R. Co.*, 87 Cal. 464, 468, 25 Pac. Rep. 681, 11 L. R. A. 252 (construed and applied); *Neale vs. Depot R. Co.*, 94 Cal. 425, 429, 29 Pac. Rep. 954 (construed and applied); *Jordan vs. Fay*, 98 Cal. 264, 267, 33 Pac. Rep. 95 (applied); *Gwynn vs. Dierssen*, 101 Cal. 563, 565, 36 Pac. Rep. 103 (construed and applied); *Lamb vs. Harbaugh*, 105 Cal. 680, 691, 39 Pac. Rep. 56 (construed and applied); *Directors Fallbrook Irr. Dist. vs. Abila*, 106 Cal. 355, 361, 39 Pac. Rep. 793 (construed and applied); *Frankel vs. Boyd*, 106 Cal. 608, 612, 39 Pac. Rep. 939 (cited); *Heney vs. Pesoli*, 109 Cal. 53, 59, 60, 41 Pac. Rep. 819 (construed and applied); *Santa Cruz Rock Pav. Co. vs. Lyons* (Cal. Jan. 31, 1896), 43 Pac. Rep. 599, 601, 602 (construed); *Lewis vs. Burns*, 122 Cal. 353, 360, 361, 55 Pac. Rep. 132 (construed and applied); *Svetinich vs. Sheean*, 124 Cal. 216, 218, 71 Am. St. Rep. 50, 56 Pac. Rep. 1023 (construed and applied); *Peiser vs. Griffin*, 125 Cal. 9, 13, 14, 57 Pac. Rep. 690 (construed and applied); *Yoakam vs. Kingery*, 126 Cal. 30, 32, 58 Pac. Rep. 334 (construed and applied); *Siddall vs. Haight*, 132 Cal. 320, 322, 323, 64 Pac. Rep. 410 (referred to); *Rowe vs. Hibernia Sav. & L. Soc.*, 134 Cal. 403, 405, 406, 66 Pac. Rep. 569 (held not affected by § 575); *Hamilton vs. Hubbard*, 134 Cal. 603, 604, 606, 65 Pac. Rep. 321, 66 Id. 860 (construed and applied); *Collins vs. O'Laverty*, 136 Cal. 31, 33, 68 Pac. Rep. 327 (construed and applied); *Peiser vs. Bradbury*, 138 Cal. 570, 572, 72 Pac. Rep. 165 (construed); *Hoeck vs. Greif*, 142 Cal. 119, 121, 75 Pac. Rep. 670 (applied).

2. **ALL PROPERTY PRESUMED TO BELONG TO COMMUNITY.** and this presumption can be repelled only by clear and decisive proof that it was either owned before marriage or subsequently acquired in one of the particular ways in the statute.—*Meyer vs. Kinzer*, 12 Cal. 248, 252-255, 73 Am. Dec. 538

See *Smith vs. Smith*, 12 Cal. 217, 224, 73 Am. Dec. 533.

As to presumption that property acquired during coverture is community, see pars. 46-64 this note.

2. BURDEN OF PROVING THAT PROPERTY IS SEPARATE ESTATE rests upon the party who makes such claim.—*Fennell vs. Drinkhouse*, 131 Cal. 447, 451, 82 Am. St. Rep. 361, 63 Pac. Rep. 734.

As to burden of proof where deed is taken during coverture, see pars. 75, 77 this note.

4. CONSTRUCTION OF STATUTE MUST BE IN LIGHT OF CIVIL AND SPANISH LAWS, as the whole of our system of laws by which the rights of property between the husband and wife are regulated and determined is borrowed from those laws, and it is necessary to look to these sources for the reasons which induce the adoption of such system, and the rules and principles which govern its operation and effect.—*Packard vs. Arellanes*, 17 Cal. 525, 537; *Frankel vs. Boyd*, 106 Cal. 608, 613, 39 Pac. Rep. 932.

5. CONTRACT BETWEEN HUSBAND AND WIFE concerning.—See ante §159 and note par. 17.

As to effect of gift of community property to wife, see par. 156 this note.

As to power of husband to give to wife, see post §172 and note par. 59.

6. CONVEYANCE OF COMMUNITY PROPERTY.—See post §172, and note pars. 41-85.

7. DIVORCE, EFFECT OF, upon community property.—See ante §§146-148, 161 and notes.

8. GIFT TO HUSBAND AND WIFE JOINTLY NOT PROVIDED FOR by Act 1850, in which respect the statute differed from the Spanish and Mexican law, under which property acquired by them during the marriage by onerous or lucrative title belonged to the community, while property acquired by either of them by lucrative title solely constituted separate property.—*Scott vs. Ward*, 13 Cal. 458, 471. See ante §161 and note.

9. HUSBAND CANNOT ACQUIRE COMMUNITY PROPERTY, while the marriage relation exists, so that it will become his separate property, there being no mode provided therefor by the statute (dictum).—*Spreckels vs. Spreckels*, 116 Cal. 339, 342, 58 Am. St. Rep. 170, 48 Pac. Rep. 228, 36 L. R. A. 497.

10. HUSBAND NOT PRESUMED TO PRESERVE COMMUNITY PROPERTY and use separate funds to support family, where it appears that he had an income derived from his separate estate and also earned money which became community property.—In re Estate of Cudworth, 133 Cal. 462, 469, 65 Pac. Rep. 1041. See In re Estate of Granniss, 142 Cal. 1, 6, 75 Pac. Rep. 324.

11. HUSBAND UNDER NO LEGAL OBLIGATION TO ACQUIRE PROPERTY; he owes no duty to the community or to the wife to labor or accumulate money, or to save or practice economy, to that end; and if he earns more than is sufficient for maintenance of his wife and children he violates no legal obligation if he spends surplus in extravagance, or gives it away (dictum).—*Spreckels vs. Spreckels*, 116

Cal. 339, 345, 58 Am. St. Rep. 170, 48 Pac. Rep. 228, 36 L. R. A. 497.

12. INSURANCE POLICY ASSIGNED TO WIFE in consideration for raising and educating child of insured, the policy being made payable to the wife, and assessments being paid by the husband, is community property.—*Bollinger vs. Wright*, 148 Cal. 292, 294, 295, 76 Pac. Rep. 1108.

But see ante §162 note pars. 31, 32.

13. INTEREST RETAINED BY HUSBAND IN PROPERTY TRANSFERRED, REMAINS COMMUNITY PROPERTY, subject to such rights of wife as she had before the transfer.—*Greiner vs. Greiner*, 58 Cal. 115, 119.

14. PARTITION OF LAND IN WHICH HUSBAND AND WIFE HAVE COMMUNITY INTEREST, whereby a portion of such land is allotted to them jointly, is not to change community character of property so allotted to them, but merely to ascertain portion of land in which they shall have community interest.—*Cunha vs. Hughes*, 122 Cal. 111, 113, 68 Am. St. Rep. 27, 54 Pac. Rep. 535.

15. POSSESSORY RIGHT ACQUIRED BEFORE MARRIAGE, although not amounting to title as against stranger, is, as between husband and wife, separate property of spouse having such possessory right.—*Harris vs. Harris*, 71 Cal. 314, 317, 12 Pac. Rep. 274.

16. Compare: Par. 43 this note.

17. PRESUMPTION ATTENDING POSSESSION OF PROPERTY by either husband or wife is that it is community property.—*Meyer vs. Kinzer*, 12 Cal. 248, 252, 73 Am. Dec. 538; *Scott vs. Ward*, 13 Cal. 458, 470; *Fennell vs. Drinkhouse*, 131 Cal. 447, 451, 82 Am. St. Rep. 361, 63 Pac. Rep. 734; *Rowe vs. Hibernia Sav. & L. Soc.*, 134 Cal. 403, 405, 66 Pac. Rep. 569; *Freese vs. Hibernia Sav. & L. Soc.*, 139 Cal. 392, 394, 73 Pac. Rep. 174; *Cooke vs. Bremond*, 27 Tex. 457, 86 Am. Dec. 626.

See note 86 Am. Dec. 629.

18. Bank deposits presumed to be community property in absence of clear and convincing evidence to contrary; and §575, which provides that married women may, in their own right, make and draw deposits, does not affect this rule as to deposit in name of married woman, and is not to be construed as repealing §164, but merely providing that married women may make such deposits in their own right without changing status of property deposited.—*Rowe vs. Hibernia Sav. & L. Soc.*, 134 Cal. 403, 405, 406, 66 Pac. Rep. 569. See *Fennell vs. Drinkhouse*, 131 Cal. 447, 451, 82 Am. St. Rep. 361, 63 Pac. Rep. 734.

See post §575 and note.

19. Bank account in name of both spouses, i. e. in name of "Frank Denigan or Ellen Denigan," although presumptively community property, is separate property of wife if funds were her separate funds, the form in which account is kept being immaterial.—*Freese vs. Hibernia Sav. & L. Soc.*, 139 Cal. 392, 396, 73 Pac. Rep. 172. See *Denigan vs. Hibernia Sav. & L. Soc.*, 127 Cal. 137, 141, 59 Pac. Rep. 389; *Denigan vs. San Francisco Sav Union*, 127 Cal. 142, 146, 147, 78 Am. St. Rep. 35, 59 Pac. Rep. 390.

20. Evidence admissible to overcome such presumption, as it is a mere disputable one.—*Meyer vs. Kinzer*, 12 Cal. 248, 252, 73 Am. Dec. 623; *Freese vs. Hibernia Sav. & L. Soc.*, 139 Cal. 392, 394, 73 Pac. Rep. 172.

As to parol evidence to explain deed taken during coverture, see pars. 67-74 this note.

21. Husband may intrust wife with management and control of property without affecting its character as community property.—*Yesler vs. Hochstetler*, 4 Wash. 349, 30 Pac. Rep. 398.

As to husband's management and control, see post § 172 and note.

22. RIGHT OF WIFE FOUNDED UPON THEORY that community property acquired by joint efforts of husband and wife and should be divided between them, if marriage tie is dissolved either by death of husband or by decree of court, etc.—*Galland vs. Galland*, 38 Cal. 265, 271; *De Godey vs. Godey*, 39 Cal. 157, 164.

23. STATUTE IS EXCLUSIVE, and spouse who asserts that property is community property must bring himself within its provisions.—*Dye vs. Dye*, 11 Cal. 163, 166-168, 170. See *Bessie vs. Earle*, 4 Cal. 200.

24. TAXATION OF COMMUNITY PROPERTY.—See post § 172 and note par. 10.

25. TESTAMENTARY CAPACITY OF HUSBAND AS TO COMMUNITY PROPERTY.—See post § 172 and note.

II. CONFLICT OF LAWS.

26. ACQUISITION OF PROPERTY BY SPOUSES WHILE IN TRANSITU, after having abandoned their residence, and while on their way to acquire future residence, results in necessity of determining the separate or community character of the property by laws of the state in which they fix their residence rather than by laws of the state in which such property was acquired.—*State vs. Barrow*, 14 Tex. 179, 65 Am. Dec. 109, distinguishing *McIntyre vs. Chappel*, 4 Tex. 187 (where there was merely an intention expressed, manifested by no act of removing, to the state to which parties removed after acquisition of the property).

27. IMPORTATION OF PROPERTY—Impressed with laws of foreign state, upon its removal into this state, and is separate or community property according to law of state from which it was brought.—*Kraemer vs. Kraemer*, 52 Cal. 302, 305, 306. See *In re Estate of Higgins*, 65 Cal. 407, 409, 4 Pac. Rep. 389; *Shumway vs. Leakey*, 67 Cal. 458, 460, 3 Pac. Rep. 12.

28. Not appearing that laws of foreign state distinguish between separate and community property, money brought into this state which is the proceeds of property acquired in such other state by the use of property owned by husband before marriage, upon being invested in this state, results in acquisition of separate property by husband.—*In re Estate of Higgins*, 65 Cal. 407, 409, 4 Pac. Rep. 389.

29. Purchased with separate funds imported into this state, which funds constitute separate property under laws of state from which they were brought, results in acquisition of separate property, even though such funds, if C. C.—15

acquired in this state, would have been community property.—*Kraemer vs. Kraemer*, 52 Cal. 302, 305, 306.

30. MARRIAGE—Place of solemnization—Law of, immaterial in determining whether or not property is community property, if parties resided and acquired property within the state.—*Dye vs. Dye*, 11 Cal. 163, 167 (decided under Act 1850).

31. Law of place in which property is acquired after marriage governs in determining whether such property is community or separate property, in absence of expressed agreement of spouses, and not law of the place in which they were married.—*Saul vs. His Creditors*, 5 Mart. N. S. (La.) 569, 16 Am. Dec. 212. See *Kraemer vs. Kraemer*, 52 Cal. 302, 305.

32. MATRIMONIAL DOMICILE—Law of governs capacity to acquire separate property, and where the domicile of husband, at the time of a gift to his wife, was in this state and the acts of delivery and acceptance were performed in this state, the law of this state governs regardless of where wife resided or state in which marriage ceremony was performed.—*Dow vs. Gould & Curry S. M. Co.*, 31 Cal. 629, 650-653.

33. Temporary residence in another state immaterial where spouse did not go there to reside permanently.—*Dow vs. Gould & Curry S. M. Co.*, 31 Cal. 629, 651.

34. PLACE WHERE PERSONAL PROPERTY ACQUIRED NOT PRESUMED, but must be proven, when a statute required that it should have been acquired within the state.—*Dye vs. Dye*, 11 Cal. 163, 167 (decided under Act 1850).

35. PRESUMPTION THAT FOREIGN LAW IS SAME AS THAT OF DOMESTIC LAW is indulged in absence of any proof as to what is the law of the foreign state.—*Shumway vs. Leakey*, 67 Cal. 458, 460, 3 Pac. Rep. 12; *Mortimer vs. Marder*, 93 Cal. 172, 177, 178, 28 Pac. Rep. 814.

III. PROPERTY ACQUIRED AFTER MARRIAGE BY DEED, ETC.

36. CONSIDERATION—Condition is distinguished from consideration, and where land is conveyed without consideration, on condition that grantee shall fence and improve it, the land is none the less the separate property of grantee.—*Scott vs. Ward*, 13 Cal. 458, 468, 477.

37. Generosity on the part of grantor immaterial, and where in fact a valuable consideration is paid and not a mere nominal consideration, land conveyed is presumptively community property, as where a grant from the United States is made "at the minimum price."—*Morgan vs. Lones*, 78 Cal. 53, 60, 61, 20 Pac. Rep. 248.

As to grants of public land, see pars. 108-125 this note.

38. Love and affection and money paid being consideration for deed to spouse, and the deed being one of bargain and sale, and not deed of gift, the property conveyed presumptively becomes community property.—*Tustin vs. Faught*, 23 Cal. 237, 241.

39. Compare: *Peck vs. Vandenberg*, 30 Cal. 11, 50 (holding that when consideration is love and affection and the nominal sum of \$5.00,

the property at least is to be considered pro rata separate property, because of its having been given to grantee).

40. Nominal consideration being expressed in an ordinary deed from a stranger to a spouse, the deed is presumed to convey community property (dictum).—*Wedel vs. Herman*, 59 Cal. 507, 516. See *Swink vs. League*, 6 Tex. Civ. App. 309, 311, 25 S. W. Rep. 807.

41. Parol evidence is admissible to show gift and to overcome recital in deed which expresses a consideration, as where the deed is one from a mother to her children.—*Peck vs. Vandenberg*, 30 Cal. 11, 62-64; *Salmon vs. Wilson*, 41 Cal. 595, 605-608, disapproving *Tustin vs. Faught*, 23 Cal. 237, 241 (involving the same deed, where it was held, without argument or careful consideration by the court, that the deed was one of bargain and sale).

As to parol evidence, see para. 67-74 this note.

As to recitals in deed, see para. 78-81 this note.

42. Want of consideration.—Where land is conveyed during coverture without consideration the property becomes the separate property of the grantee.—*Scott vs. Ward*, 13 Cal. 468, 469, 477.

As to grant of public land, see post para. 108-111 this note.

43. SAME — SAME — DEED TO SPOUSE HOLDING WITHOUT RIGHT, pursuant to an agreement between such spouse and owner, by which deed the spouse receives a portion of land which he has held without right and as a squatter since a time antedating his marriage, in consideration of his conveying the remaining portion of the land to true owner, results in making the land so conveyed to the spouse community property.—*Pancoast vs. Pancoast*, 57 Cal. 320, 322 (this decision has been criticized, and, it would seem, justly, on the theory that the conveyance to the spouse was a gift).

44. CUMULATIVE TITLE ACQUIRED AFTER MARRIAGE DOES NOT AFFECT STATUS OF PROPERTY, as where land is conveyed to a woman before her marriage in fee simple for valuable consideration, a conveyance to her after her marriage, by the grantor, does not affect her title, and does not change the character of the property from separate to community property.—*Maguire vs. De Fremery*, 76 Cal. 401, 403, 404, 13 Pac. Rep. 410.

45. Procurement of outstanding title after marriage to land which spouse, prior to his marriage, had purchased with his own funds, does not change character of the estate into that of community property; as where grant from the government of Mexico is rejected by a United States district court on appeal from board of commissioners appointed by the United States for the settlement of private lands in California, and afterwards, and subsequently to his marriage, grantee buys the land from United States under Act Congress March 2, 1865.—*Lake vs. Lake*, 52 Cal. 428, 430.

46. Presumption that deed conveys community property arises where land is conveyed during existence of marriage relation to a husband, or to a wife, where the deed was

executed prior to amendment of this section by Act March 19, 1889 (Stats. and Amdts. 1889, p. 328), and where the deed to such husband or wife does not show source of the consideration paid for the land, or that the land was conveyed as separate property of grantee, or as a gift, because of the presumption that the land was purchased with community funds; or, as it is otherwise expressed, the fact that deed is taken in name of one of spouses creates no presumption that the property thereby acquired is separate property of such spouse.—*Meyer vs. Kinzer*, 12 Cal. 248, 253, 256, 73 Am. Dec. 538; *Pixley vs. Huggins*, 15 Cal. 127, 131; *Burton vs. Lies*, 21 Cal. 88, 91; *Hart vs. Robertson*, 21 Cal. 346, 348; *Adams vs. Knowlton*, 22 Cal. 283, 288; *Riley vs. Pehl*, 23 Cal. 71, 74; *Tustin vs. Faught*, 23 Cal. 237, 241; *McDonald vs. Badger*, 23 Cal. 394, 398, 83 Am. Dec. 123; *Landers vs. Bolton*, 26 Cal. 393, 420; *Ramsdell vs. Fuller*, 28 Cal. 37, 42, 87 Am. Dec. 103; *Peck vs. Brummagim*, 31 Cal. 440, 445, 447, 89 Am. Dec. 195; *Vassault vs. Austin*, 36 Cal. 691, 698; *Althof vs. Conheim*, 38 Cal. 230, 233, 99 Am. Dec. 363; *Higgins vs. Higgins*, 46 Cal. 259, 263; *Moore vs. Jones*, 63 Cal. 12, 14; *Schuyler vs. Broughton*, 70 Cal. 282, 283, 11 Pac. Rep. 719; *McComb vs. Spangler*, 71 Cal. 418, 426, 12 Pac. Rep. 347; *Jackson vs. Torrence*, 83 Cal. 521, 523, 23 Pac. Rep. 695; *Mortimer vs. Marder*, 93 Cal. 172, 177, 28 Pac. Rep. 814; *Dimmick vs. Dimmick*, 95 Cal. 323, 327, 30 Pac. Rep. 547; *Jordan vs. Fay*, 98 Cal. 264, 267, 33 Pac. Rep. 95; *Gwynn vs. Dierssen*, 101 Cal. 563, 565, 36 Pac. Rep. 103; *Directors Fallbrook Irr. Dist. vs. Abila*, 106 Cal. 355, 361, 39 Pac. Rep. 793; *Wright vs. Wright* (Cal. Aug. 28, 1895), 41 Pac. Rep. 695, 696; *Heney vs. Pesoli*, 109 Cal. 53, 60, 41 Pac. Rep. 819; *In re Estate of Boody*, 113 Cal. 632, 636, 45 Pac. Rep. 858; *Lewis vs. Burns*, 122 Cal. 358, 360, 55 Pac. Rep. 132; *Davis vs. Green*, 122 Cal. 364, 366, 367, 55 Pac. Rep. 9; *Svetinich vs. Sheean*, 124 Cal. 216, 218, 71 Am. St. Rep. 50, 56 Pac. Rep. 1028; *Rowe vs. Hibernia Sav. & L. Soc.*, 134 Cal. 403, 405, 66 Pac. Rep. 569; *Hamilton vs. Hubbard*, 134 Cal. 603, 604, 65 Pac. Rep. 321, 66 Id. 860; *Hoeck vs. Greif*, 142 Cal. 119, 121, 75 Pac. Rep. 670; *Otto vs. Long* (Cal. July 16, 1904), 77 Pac. Rep. 885. See *Kohner vs. Ashenauer*, 17 Cal. 578, 581; *Wedel vs. Herman*, 59 Cal. 507, 516; *Diefendorff vs. Hopkins*, 95 Cal. 343, 352, 28 Pac. Rep. 265, 30 Id. 549; *Santa Cruz Rock Pav. Co. vs. Lyons* (Cal. Jan. 31, 1896), 43 Pac. Rep. 599; *In re Estate of Boody*, 119 Cal. 402, 405, 51 Pac. Rep. 634. *Tex. Higgins vs. Johnson's Heirs*, 20 Tex. 389, 70 Am. Dec. 394; *Morris vs. Hastings*, 70 Tex. 26, 8 Am. St. Rep. 570. *Wash. Yesler vs. Hochstettler*, 4 Wash. 349, 30 Pac. Rep. 398. *Fed. Thorpe vs. Sampson*, 84 Fed. Rep. 63-65.

As to conveyances by husband and wife and doctrine of caveat emptor, see post §172 note para. 65-69.

As to presumption in favor of wife under Act 1889, see para. 53-64 this note.

As to presumption that transmuted property is community property, see par. 173 this note.

47. SAME — DEFINITION OF PRESUMPTION, under Code Civ. Proc., §§1959, 1961: a deduction which the law expressly directs to be made from certain facts in accordance with which presumption the court must find, unless

It is controverted.—*Alferits vs. Arrivillaga*, 148 Cal. 646, 647, 77 Pac. Rep. 657, 658.

48. Character of deed is immaterial, and quitclaim deed taken by spouse during coverture is within the rule, and, if deed of purchase, is presumed to convey community property to such spouse.—*Riley vs. Pehl*, 23 Cal. 71, 74.

49. DEED—By husband to wife.—See para. 140-145 this note.

50. Procured by husband to wife.—See para. 143-155 this note.

51. Procured by wife to husband.—See para. 146, 147 this note.

52. SAME—DEED TO HUSBAND AND WIFE.—The presumption is that community property is taken, under deed executed prior to Act March 19, 1889, amendatory of this section, where such deed is an ordinary deed of bargain and sale.—*Biggi vs. Biggi*, 98 Cal. 35, 38, 35 Am. St. Rep. 141, 32 Pac. Rep. 803; *Jordan vs. Fay*, 98 Cal. 264, 268, 33 Pac. Rep. 95; *Svetinich vs. Sheean*, 124 Cal. 216, 218, 71 Am. St. Rep. 50, 56 Pac. Rep. 1028.

53. Compare: Par. 8 this note.

54. Deed to husband and quitclaim deed to wife convey community property, where it appears that two separate deeds were made to husband at different times, and that same grantor, on date of the last deed, also made a quitclaim deed to the wife, and that the deed to the wife was one of purchase and not of gift.—*Riley vs. Pehl*, 23 Cal. 71, 74.

55. Note and mortgage made to wife within rule are not presumed to be her separate estate.—*Tryon vs. Sutton*, 13 Cal. 490, 493.

56. Stronger presumption as to deed to husband being a conveyance to the community, under ordinary circumstances, than when the deed is to the wife, because he has control and disposition of community property, and sells and purchases same in his own name; and also because conveyances are rarely by the husband in the joint name of himself and wife, or in her name alone.—See *Peck vs. Vandenberg*, 30 Cal. 11, 52; *Higgins vs. Johnson's Heirs*, 20 Tex. 389, 70 Am. Dec. 394.

57. Same—Trust results under § 853, as to deed made before Act March 19, 1889, and spouse who made purchase holds it in trust for the community.—*Shanahan vs. Crampton*, 92 Cal. 9, 13, 28 Pac. Rep. 59.

See post § 853 and note.

58. Statutory presumption in favor of wife arises under Act March 19, 1889, amendatory of this section, which provides that when property is conveyed to a married woman by an instrument in writing the presumption is that title is thereby vested in her as her separate property, the effect of which amendment is to make a deed to a wife prima facie evidence that the property purchased by her is her separate property.—*Heney vs. Pesoli*, 109 Cal. 53, 60, 41 Pac. Rep. 819; *Santa Cruz Rock Pav. Co. vs. Lyons* (Cal. Jan. 31, 1896), 48 Pac. Rep. 699; *In re Estate of Young*, 123 Cal. 337, 346, 56 Pac. Rep. 1011; *Yoakam vs. Kingery*, 126 Cal. 30, 32, 58 Pac. Rep. 324; *Peiser vs. Bradbury*, 138 Cal. 570, 571, 573, 72 Pac. Rep. 165; *Bollinger vs. Wright*, 143 Cal. 292, 295, 76 Pac.

Rep. 1108; *Alferits vs. Arrivillaga*, 148 Cal. 646, 649, 77 Pac. Rep. 657.

59. SAME—CONTRACT OF PURCHASE BY WIFE NOT WITHIN STATUTE, as it is from "conveyances" alone that the presumption arises that "title" is vested in wife; and hence where wife makes contract to purchase land, a deed thereafter executed by her conveying the land so purchased to a grantee with notice, is void as against her husband, who, upon taking an assignment of the contract from his wife, paid the purchase money out of community funds.—*Peiser vs. Bradbury*, 138 Cal. 570, 572, 72 Pac. Rep. 165.

60. SAME—DEED TO HUSBAND AND WIFE gives rise to presumption that wife takes separate property, and hence the wife is tenant in common with her husband or with the community, being tenant in common with her husband where he has paid for the land out of his separate funds.—*Yoakam vs. Kingery*, 126 Cal. 30, 32, 58 Pac. Rep. 324.

61. SAME—DEED TO WIFE PROCURED BY HUSBAND.—See para. 143-155 this note.

62. SAME—NOTE AND MORTGAGE EXECUTED TO WIFE are presumed, under the statute, to be her separate property.—*In re Estate of Young*, 123 Cal. 337, 346, 56 Pac. Rep. 1011.

63. SAME—PERSONS IN WHOSE FAVOR PRESUMPTION ARISES are only purchasers or encumbrancers in good faith and for valuable consideration.—*Peiser vs. Bradbury*, 138 Cal. 570, 572, 72 Pac. Rep. 165.

64. Statute is not retroactive, as rule declared thereby is not a mere rule of evidence, but is a rule of property as well; and it was not intended by the legislature, nor did the legislature have power by changing the rule, to affect and change titles already vested.—*Jordan vs. Fay*, 98 Cal. 264, 267, 268, 33 Pac. Rep. 95; *Gwynn vs. Dierssen*, 101 Cal. 563, 565, 566, 36 Pac. Rep. 103; *Directors Fallbrook Irr. Dist. vs. Abila*, 106 Cal. 355, 361, 39 Pac. Rep. 793; *Lewis vs. Burns*, 122 Cal. 358, 360, 55 Pac. Rep. 132. See *Tolman vs. Smith*, 85 Cal. 280, 283, 24 Pac. Rep. 743; *Svetinich vs. Sheean*, 124 Cal. 216, 218, 71 Am. St. Rep. 50, 56 Pac. Rep. 1028; *Hoeck vs. Greif*, 142 Cal. 119, 121, 75 Pac. Rep. 670.

65. SAME—LIMITATION UPON HUSBAND'S RIGHT OF ACTION—Valid in so far as it fixes the time within which action to avoid past conveyance of wife must be brought.—*Peiser vs. Griffin*, 125 Cal. 9, 13, 57 Pac. Rep. 690.

66. Statute extending time not retroactive (Act March 4, 1897); and on appeal an order refusing to allow plaintiff to amend his complaint will not be disturbed when it appears that at time such amendment was offered the cause of action was barred under Act March 3, 1898, even though at time when the action was commenced an action was open and available to the plaintiff.—*Peiser vs. Griffin*, 125 Cal. 9, 13, 57 Pac. Rep. 690.

67. Parol evidence is admissible to overcome presumption that property conveyed to a husband or wife during coverture is community property; and to this end it is competent to show by parol the true nature of consideration,

intention of parties, and circumstances attending transaction.—*McDonald vs. Badger*, 23 Cal. 393, 398, 83 Am. Dec. 123; *Ramsdell vs. Fuller*, 28 Cal. 37, 42, 87 Am. Dec. 103; *Peck vs. Brummagim*, 31 Cal. 440, 448, 89 Am. Dec. 195; *Ingersoll vs. Truebody*, 40 Cal. 603, 610-612; *Woods vs. Whitney*, 42 Cal. 353, 361, 362; *Higgins vs. Higgins*, 46 Cal. 259, 263, 264; *Wedel vs. Herman*, 59 Cal. 507, 516; *Moore vs. Jones*, 63 Cal. 12, 14; *Read vs. Rahm*, 65 Cal. 343, 344, 4 Pac. Rep. 111; *Schuyler vs. Broughton*, 70 Cal. 232, 233, 11 Pac. Rep. 719; *McComb vs. Spangler*, 71 Cal. 418, 426, 427, 12 Pac. Rep. 347; *Morgan vs. Lones*, 78 Cal. 58, 62, 20 Pac. Rep. 248; *Jackson vs. Torrence*, 83 Cal. 521, 529, 532, 23 Pac. Rep. 695; *Mortimer vs. Marder*, 93 Cal. 172, 177, 28 Pac. Rep. 814; *Dimmick vs. Dimmick*, 95 Cal. 323, 327, 30 Pac. Rep. 547; *Gwynn vs. Dierssen*, 101 Cal. 563, 565, 36 Pac. Rep. 103; *Wright vs. Wright* (Cal. Aug. 28, 1895), 41 Pac. Rep. 695, 696; *Heney vs. Pessoli*, 109 Cal. 58, 60, 41 Pac. Rep. 819; *Santa Cruz Rock Pav. Co. vs. Lyons* (Cal. Jan. 31, 1896), 43 Pac. Rep. 599; *In re Estate of Boody*, 119 Cal. 403, 405, 51 Pac. Rep. 634; *Svetinich vs. Sheean*, 124 Cal. 216, 218, 71 Am. St. Rep. 50, 56 Pac. Rep. 1028; *Hamilton vs. Hubbard*, 134 Cal. 603, 605, 65 Pac. Rep. 321, 66 Id. 360; *Hoeck vs. Greif*, 142 Cal. 119, 121, 75 Pac. Rep. 670. See *Rhine vs. Ellen*, 36 Cal. 362, 369; *Adams vs. Lambard*, 80 Cal. 426, 434, 435, 22 Pac. Rep. 180; *Diefendorff vs. Hopkins*, 95 Cal. 343, 352, 23 Pac. Rep. 265, 30 Id. 549; *Jordan vs. Fay*, 98 Cal. 264, 267, 33 Pac. Rep. 95. *Tex. Higgins vs. Johnson's Heirs*, 20 Tex. 389, 70 Am. Dec. 394. *Wash. Yesler vs. Hochstetler*, 4 Wash. 349, 30 Pac. Rep. 398. *Fed. Thorpe vs. Sampson*, 34 Fed. Rep. 63, 65.

68. Compare: *Jackson vs. Lodge*, 36 Cal. 28, 53, 54 (overruled in *Higgins vs. Higgins*, 46 Cal. 259, 263, 264).

69. Deed is not varied or contradicted by such evidence, but sole effect of it is to explain the consideration, which it is always competent to do.—*Higgins vs. Higgins*, 46 Cal. 259, 263, 264. See *Ramsdell vs. Fuller*, 28 Cal. 37, 42, 87 Am. Dec. 103; *Rhine vs. Ellen*, 36 Cal. 362, 369.

70. Deed to husband and wife—Parol evidence admissible to overcome presumption that land conveyed is community property, and husband may show that deed was made in consideration of his separate funds and that it conveyed separate property to him.—*Svetinich vs. Sheean*, 124 Cal. 216, 217, 218, 71 Am. St. Rep. 50, 56 Pac. Rep. 1028.

71. Grantee of spouse may introduce parol evidence—To show that property was community property, as against subsequent purchaser to whom property was sold as belonging to estate of deceased wife.—*Dean vs. Parker*, 83 Cal. 283, 287, 288, 26 Pac. Rep. 91. See *Tolman vs. Smith*, 35 Cal. 280, 284, 24 Pac. Rep. 742.

72. Same—To show that property was separate property, grantee of spouse may introduce parol evidence that property was paid for with separate funds of his grantor.—*Ingersoll vs. Truebody*, 40 Cal. 603, 612.

73. Mortgagee of husband may introduce parol evidence, and thereby show, in suit to foreclose mortgage, character of property; and question whether property which had been con-

veyed to wife was separate or community property may be tried in such action, rule that adverse titles cannot be litigated in action to foreclose mortgage having no application.—*Tolman vs. Smith*, 35 Cal. 280, 284, 24 Pac. Rep. 743, distinguishing *Tolman vs. Smith*, 74 Cal. 345, 350, 16 Pac. Rep. 189 (where it appeared that property was separate property of wife and decision related to certificate of acknowledgment).

74. PRESUMPTION IN FAVOR OF WIFE MAY BE OVERCOME BY PAROL, as, notwithstanding provision of this section as amended by Act March 19, 1889, that property transferred to married woman by instrument in writing is to be presumed to be her separate property, such presumption is not conclusive, and deed to wife during coverture is merely prima facie evidence that property conveyed is her separate property.—*Santa Cruz Rock Pav. Co. vs. Lyons* (Cal. Jan. 31, 1896), 43 Pac. Rep. 599; *In re Estate of Young*, 123 Cal. 337, 346, 55 Pac. Rep. 1011; *Bollinger vs. Wright*, 143 Cal. 292, 295, 76 Pac. Rep. 1108.

As to deed procured by husband to wife, see para. 151-153, 155 this note.

75. PROOF—Burden of proof to overcome presumption that property conveyed to a spouse during coverture prior to Act 1889 is community property rests upon the spouse who claims that separate property was conveyed by the deed or upon one who derails title under such deed as conveyance of separate property.—*Alverson vs. Jones*, 10 Cal. 9, 12, 40 Am. Dec. 689; *Meyer vs. Kinzer*, 12 Cal. 247, 254, 73 Am. Dec. 533; *Adams vs. Knowlton*, 22 Cal. 283, 288; *McDonald vs. Badger*, 23 Cal. 393, 398, 83 Am. Dec. 123; *Ramsdell vs. Fuller*, 28 Cal. 37, 43, 87 Am. Dec. 103; *Wedel vs. Herman*, 59 Cal. 507, 516; *Moore vs. Jones*, 63 Cal. 12, 14; *Dimmick vs. Dimmick*, 95 Cal. 323, 327, 30 Pac. Rep. 547; *In re Estate of Boody*, 113 Cal. 632, 686, 45 Pac. Rep. 858; *Lewis vs. Burns*, 122 Cal. 353, 361, 55 Pac. Rep. 132; *Davis vs. Green*, 122 Cal. 364, 366, 55 Pac. Rep. 9; *Rowe vs. Hibernia Sav. & L. Soc.*, 134 Cal. 403, 405, 66 Pac. Rep. 569. See *Smith vs. Smith*, 12 Cal. 217, 225, 73 Am. Dec. 533; *Jackson vs. Torrence*, 83 Cal. 521, 529, 23 Pac. Rep. 695; *Hughes vs. Doe*, 114 Cal. 199, 203, 45 Pac. Rep. 1066; *Morris vs. Hastings*, 70 Tex. 26, 8 Am. St. Rep. 570.

76. Same—Statutory presumption in favor of wife, under Act March 19, 1889, amendatory of this section, puts burden of proof that property conveyed to her during coverture was not her separate property upon one who claims that it was not her separate property; e. g. burden of proof is upon one who, in an action to quiet title, derails his title under mortgage executed by husband subsequently to conveyance to wife.—*Alferitz vs. Arrivillaga*, 143 Cal. 646, 649, 77 Pac. Rep. 657.

77. Same—Same—Deed to wife procured by husband, where he buys land, burden of overcoming presumption arising under statute that wife takes separate property rests upon party who asserts that land so conveyed to her vested in her as community property.—*Alferitz vs. Arrivillaga*, 143 Cal. 646, 649, 77 Pac. Rep. 657, 658.

78. Recitals in deed—Character of property shown by, prima facie, as where land is con-

vayed to wife as of her own separate estate and for her use, or where it appears from such recital that consideration is paid by wife out of her own separate funds.—*Swain vs. Duane*, 48 Cal. 358, 360; *Shanahan vs. Crampton*, 92 Cal. 9, 13 (concurring opinion by McFarland, J., p. 14, following but disapproving *Swain vs. Duane*, 48 Cal. 358, 360); *Sanches vs. Grace M. E. Church*, 114 Cal. 295, 297, 46 Pac. Rep. 2. See *Morrison vs. Wilson*, 13 Cal. 494, 500, 73 Am. Dec. 593; *Peck vs. Vandenberg*, 30 Cal. 11, 62, 64; *Salmon vs. Wilson*, 41 Cal. 595, 604-608; *Tolman vs. Smith*, 85 Cal. 280, 284, 24 Pac. Rep. 743; *Gwynn vs. Dierssen*, 101 Cal. 563, 565, 36 Pac. Rep. 103.

79. Compare: *McComb vs. Spangler*, 71 Cal. 418, 426-428, 12 Pac. Rep. 347 (declaring that such recital, if it amounts to anything, is, at most, prima facie evidence only, and that what was said in *Morrison vs. Wilson*, 13 Cal. 494, 500, 73 Am. Dec. 593, is mere dictum).

80. Same—Conveyance subject to mortgage recited in deed, where enough appears on the face of deed, when construed in connection with condition of the parties, their relations to each other, and their circumstances, to render it apparent that transaction is in fact donation, is not controlling, and such recital is not to be taken as showing that grantee takes in consideration for paying mortgage instead of taking gift of separate property.—*Salmon vs. Wilson*, 41 Cal. 595, 607, 608.

81. Husband not concluded by recital in deed to his wife that land was her sole and separate property acquired by her while living separate and apart from him, but such recital is evidence that property was not acquired by her by way of gift from husband or third person.—*Lewis vs. Burns*, 122 Cal. 358, 362, 55 Pac. Rep. 132.

82. Parol evidence is admissible to overcome recital in deed which shows prima facie that wife takes separate property, when such deed is attacked by creditor or one who deraigns title under such deed as conveyance of community property.—*McComb vs. Spangler*, 71 Cal. 418, 426, 427, 12 Pac. Rep. 347; *Tolman vs. Smith*, 85 Cal. 280, 283, 284, 24 Pac. Rep. 743.

83. Compare: *Swain vs. Duane*, 48 Cal. 358, 360 (holding that in ejectment by wife against stranger no inquiry is to be permitted to either party for purpose of defeating or controlling legal effect of such recital in deed).

84. Sufficiency of evidence to overcome presumption.—In order to overcome presumption that property conveyed to one of spouses by ordinary deed during coverture is community property, evidence must be clear, certain, and convincing.—*McDonald vs. Badger*, 23 Cal. 394, 398, 33 Am. Dec. 123; *Hutchinson vs. Hutchinson*, 59 Cal. 313, 314; *Dimmick vs. Dimmick*, 95 Cal. 323, 327, 30 Pac. Rep. 547; *Jordan vs. Fay*, 98 Cal. 264, 267, 33 Pac. Rep. 95; *In re Estate of Boody*, 113 Cal. 682, 686, 687, 45 Pac. Rep. 853; *Lewis vs. Burns*, 122 Cal. 358, 360, 55 Pac. Rep. 132; *Davis vs. Green*, 123 Cal. 364, 366, 55 Pac. Rep. 9; *Rowe vs. Hibernia Sav. & L. Soc.*, 134 Cal. 403, 405, 66 Pac. Rep. 569; *Freese vs. Hibernia Sav. & L. Soc.*, 139 Cal. 392, 394-396, 73 Pac. Rep. 172. See *Smith vs. Smith*, 12 Cal. 216, 224, 73 Am. Dec. 533;

Meyer vs. Kinser, 13 Cal. 247, 252, 255, 73 Am. Dec. 533. Pa. *Blum vs. Ross*, 116 Pa. St. 163, 10 Atl. Rep. 32. Tex. *Jones vs. Epperson*, 69 Tex. 586, 7 S. W. Rep. 438; *Morris vs. Hastings*, 70 Tex. 26, 3 Am. St. Rep. 570, 7 S. W. Rep. 649. Wash. *Yesler vs. Hochstettler*, 4 Wash. 349, 30 Pac. Rep. 393. Fed. *Thorpe vs. Sampson*, 84 Fed. Rep. 63, 65.

85. Deed to wife procured by husband, when he buys land, deed to her, under statute as amended by Act March 19, 1889, creates presumption that she takes separate property, which can be overcome only by clear and satisfactory evidence.—*Aliferitis vs. Arrivillaga*, 143 Cal. 646, 649, 77 Pac. Rep. 657, 658.

86. Degree of proof required by rule requiring clear and satisfactory evidence is such that party seeking to overcome presumption that community property was taken must produce legal evidence which, under all circumstances of particular case, will ordinarily produce conviction in unprejudiced mind; and such evidence is satisfactory without necessity of demonstration or exclusion of possibility of error, court being governed by Code Civil Procedure §§ 1826, 1835, which prescribe the quantum of evidence necessary to constitute proof.—*Freese vs. Hibernia Sav. & L. Soc.*, 139 Cal. 392, 394, 396, 73 Pac. Rep. 172.

See Code Civ. Proc. §§ 1826, 1835 and notes.

87. Same—Conjecture and surmise are insufficient, and it is incumbent upon parties claiming land as separate estate not merely to show that spouse had separate property at time of her marriage, but it is necessary to trace clearly sources of particular funds with which lands were purchased to separate property.—*In re Estate of Boody*, 113 Cal. 682, 686, 687, 45 Pac. Rep. 853.

88. Same—Doubts resolved in favor of community where evidence as to separate funds having been furnished leaves matter in doubt, and presumption will weigh for community and decide question.—*Yesler vs. Hochstettler*, 4 Wash. 349, 30 Pac. Rep. 393.

89. Agreement made pending suit for divorce by which it was provided that land conveyed to both husband and wife after marriage should be sold and proceeds equally divided is recognition by husband that property is community property.—*Biggl vs. Biggl*, 98 Cal. 35, 38, 35 Am. St. Rep. 141, 32 Pac. Rep. 303.

90. Compromise offer made by husband to wife in action for divorce in which property is described as community property is in such action admissible on question as to whether property was community or separate, because declaration as to community character of property was not essential to purposes of compromise, and is therefore not to be regarded as concession made for that purpose.—*Rose vs. Rose*, 112 Cal. 341, 344, 44 Pac. Rep. 653.

See Code Civ. Proc. § 2078 and note.

91. Declarations—Of agent and friend who purchased land and had same conveyed to wife, paying for same in part with wages earned by husband and wife, are admissible for purpose of showing that wife took property as community property and not as separate property under Code Civil Procedure

§§ 1849, 1850, even though such declarations were made in absence of wife as illustrative of his intent, and as forming part of *res gesta*.—*Lewis vs. Burns*, 106 Cal. 381, 383-385, 39 Pac. Rep. 778.

92. Same—Of husband—At time of purchase to person from whom land was purchased that land was her separate property is admissible in evidence as part of the *res gesta* within Code Civil Procedure § 1850.—*Moore vs. Jones*, 63 Cal. 12, 16; *Heney vs. Pesoli*, 109 Cal. 53, 60, 61, 41 Pac. Rep. 819.

As to declarations which are part of *res gesta*, see Code Civ. Proc. § 1850.

93. Same—Same—In support of statutory presumption that land was wife's separate estate, such contemporaneous declarations of husband are admissible.—*Heney vs. Pesoli*, 109 Cal. 53, 60, 61, 41 Pac. Rep. 819.

94. Same—Subsequent declarations of husband that property conveyed to his wife is her separate property, admissible against him.—*Wright vs. Wright* (Cal. Aug. 28, 1895), 41 Pac. Rep. 695, 696, 697.

95. Same—Wife's declarations in absence of husband not admissible in action in which issue is whether land is separate property of husband as against purchaser under execution against his wife.—*Svetinich vs. Sheean*, 124 Cal. 216, 217, 71 Am. St. Rep. 50, 56 Pac. Rep. 1028.

96. Hearsay evidence is not admissible to overcome presumption that property acquired after marriage was community, and such presumption is not overcome by testimony of wife that her husband told her funds were used in purchase.—*Tolman vs. Smith*, 85 Cal. 280, 284, 24 Pac. Rep. 743.

97. Homestead declaration by husband and wife reciting that property was to extent of \$3,000 acquired and improved with separate estate of husband can be used against wife when she claims that such property was community property; standing alone, this admission is not sufficient to overcome presumption that property belonged to community, but tends to show how she regarded property at time declaration was made, and does not estop her from asserting to contrary.—*In re Estate of Bauer*, 79 Cal. 304, 310, 311, 21 Pac. Rep. 759.

98. Inventory of deceased husband's estate—Admission in by wife, as executrix, that property acquired during marriage was in part purchased and improved with decedent's separate estate, is admissible against her as tending to show how she regarded property, but she is not estopped from asserting to contrary.—*In re Estate of Bauer*, 79 Cal. 304, 311, 21 Pac. Rep. 759. See *Anthony vs. Chapman*, 65 Cal. 73, 76, 2 Pac. Rep. 889.

99. Joinder of husband in wife's deed—Not admission that property was separate property of wife, where by statute it is not necessary for him to join in conveyances of her separate property; but proper inference is that by joining in her deed he was treating land as community property.—*Yesler vs. Hochstetler*, 4 Wash. 349, 30 Pac. Rep. 398.

100. Same—Not evidence that property was community property, where it was not neces-

sary for him to join, as he may have joined in deed merely as excess of caution suggested by purchaser.—*Thorpe vs. Sampson*, 84 Fed. Rep. 63, 65 (this section code involved).

101. Mortgage given by husband and wife on land which has been previously conveyed to wife reciting that, in case of foreclosure, overplus, if any, shall be paid to wife, her heirs, executors, etc., is admission by husband that wife acquired title as separate property and operates as estoppel not only as against mortgagee, but also as against wife.—*Hoeck vs. Greif*, 142 Cal. 119, 123, 124, 75 Pac. Rep. 670.

102. Petition for letters of administration—Do not estop husband from claiming land as community property, although petition stated that his deceased wife was owner of interest in such land, where he also stated that property was community property, as it may have been his intention to administer upon her estate for purpose of clearing up apparently defective title.—*Bollinger vs. Wright*, 143 Cal. 292, 294, 295, 76 Pac. Rep. 1108.

103. Same—Grantee of husband not estopped by husband's petition for letters of administration on estate of his deceased wife, describing the land as her separate property, from showing that land was not her separate property, as against subsequent purchaser to whom land as sold belonging to estate of such deceased wife.—*Dean vs. Parker*, 88 Cal. 283, 287, 288, 26 Pac. Rep. 91. See *Biddle Boggs vs. Merced Min. Co.*, 14 Cal. 279, 367, 368; *Davis vs. Davis*, 26 Cal. 23, 41, 85 Am. Dec. 157; *Smith vs. Penny*, 44 Cal. 161, 165, 166.

104. Possession of separate funds by one of spouses is not sufficient to show property was purchased with separate funds of such spouse.—*Yesler vs. Hochstetler*, 4 Wash. 349, 30 Pac. Rep. 398.

105. Power of attorney by husband to dispose of property in name of wife as his own, or as community property, is not controlling evidence that property is not separate property of wife, and it may be shown that such power of attorney was executed by husband as mere matter of form, or for mere purpose of satisfying one who was dealing with wife concerning property.—*Diefendorff vs. Hopkins*, 95 Cal. 343, 351, 28 Pac. Rep. 265, 30 Id. 549.

106. Taxation of land in husband's name may be shown, where in action by purchaser under execution against wife husband files cross-complaint in which he alleges he is, and has been for five years, owner of the land and has paid taxes thereon.—*Svetinich vs. Sheean*, 124 Cal. 216, 218, 71 Am. St. Rep. 50, 56 Pac. Rep. 1028.

107. Will of wife containing declaration made without knowledge of her husband is not admissible to show such fund was separate, in action in which husband claims such fund was community property.—*Rowe vs. Hibernia Sav. & L. Soc.*, 134 Cal. 403, 407, 66 Pac. Rep. 569; *In re Estate of Granniss*, 142 Cal. 1, 4, 75 Pac. Rep. 324.

IV. PUBLIC LAND GRANTS.

108. DONATIVE GRANT TO HUSBAND (Mexican land grant) vests land in him as

his separate property.—*Scott vs. Ward*, 13 Cal. 453, 471-475; *Noe vs. Card*, 14 Cal. 576, 597-609; *Fuller vs. Ferguson*, 26 Cal. 546, 565; *Wilson vs. Castro*, 31 Cal. 420, 433; *Hood vs. Hamilton*, 33 Cal. 698, 702, 703.

109. Condition requiring occupancy, cultivation, etc., does not preclude donative grant to spouse during coverture from vesting separate property in such spouse.—*Scott vs. Ward*, 13 Cal. 453, 468, 477; *Noe vs. Card*, 14 Cal. 576, 597-609.

110. Expenditure of community funds in paying fees on receiving grant creates claim in favor of community against separate estate so acquired without power, however, on part of wife, to enforce its payment while conjugal relation exists.—*Fuller vs. Ferguson*, 26 Cal. 546, 566-568 (decided prior to the adoption of code).

111. Solicitation "for family"—Operative words of grant controlling, and it is immaterial it contains recital that the grantee solicited the land "for his personal benefit, and that of his family."—*Scott vs. Ward*, 13 Cal. 453, 477.

112. INITIATION OF TITLE BEFORE MARRIAGE to swamp land and consummation of title after marriage by purchase with separate funds result in acquisition of separate property.—*In re Estate of Boody*, 113 Cal. 403, 405, 51 Pac. Rep. 634. See *Lake vs. Lake*, 52 Cal. 423, 429.

113. Entry on homestead before marriage and patent obtained after marriage give husband title to land as his separate property, although before marriage he had not fully completed term for which he was resident upon and cultivated it, as by his prior act of entry, residence, and cultivation he had acquired equitable interest in land which was his separate property, and which legal title afterwards conveyed by patent related.—*In re Estate of Lamb*, 95 Cal. 397, 403-405, 30 Pac. Rep. 553.

114. Payment by other spouse with separate funds.—Possessory title acquired before marriage confers equitable interest which is separate property, and other spouse by advancing separate funds necessary under townsite act to obtain legal title cannot turn such equitable estate into community property.—*Morgan vs. Lones*, 80 Cal. 317, 318, 319, 22 Pac. Rep. 253, overruling expressions in *Fuller vs. Ferguson*, 26 Cal. 546, 566, to the contrary.

115. Payment with community funds—Pre-emption, declaration, and exclusive occupation of wife preceding marriage culminating in certificate of purchase and patent after marriage result in acquisition of separate property by wife, even if money was paid out of community funds, where all of acts of wife are done with full knowledge and consent of husband, because Act Congress Sept. 4, 1841, §13, provides that if pre-emptor "directly or indirectly made agreement or contract in any way or manner, with any person whatsoever, by which title she might acquire from government of United States should inure, in whole or in part, to benefit of any person except herself," the patent should be void.—*Harris vs. Harris*, 71 Cal. 314, 315-317, 12 Pac. Rep. 274.

116. Payment with money borrowed on possessory title under pre-emption laws, based on possession which commenced prior to marriage, does not make land community property, because money so borrowed constitutes separate fund of wife and not loan to community.—*Harris vs. Harris*, 71 Cal. 314, 317, 318, 12 Pac. Rep. 274.

117. Possessory right good against other spouse.—Possessory right obtained by married woman before her marriage under pre-emption laws, if land is never proved up and paid for, is her separate property as between herself and husband, even though her mere possession in connection with her pre-emption declaration gives her no vested interest which United States is bound to recognize.—*Harris vs. Harris*, 71 Cal. 314, 317, 12 Pac. Rep. 274.

118. PATENT ISSUED TO WIFE AS APPLICANT OF HUSBAND vests land in her as separate property, as where husband having grant from Mexican government, and before petition to Land Commission for confirmation, conveyed rancho to his wife, and she afterwards obtained patent.—*Butler vs. Gosling*, 130 Cal. 422, 425, 426, 62 Pac. Rep. 596.

119. PRE-EMPTION AND PAYMENT AFTER MARRIAGE, community funds being paid, result in acquisition of community property, although land is taken by husband in his name.—*Eslinger vs. Eslinger*, 47 Cal. 62, 63.

120. Entry after marriage and subsequent deed under townsite acts (Act Congress, 1867; Act Cal., Mar. 24, 1868), where payment for land is made to city trustees out of separate property of husband or out of community funds, do not result in acquisition of separate property by wife, even though husband files affidavit that his wife is owner and in possession of premises.—*Morgan vs. Lones*, 78 Cal. 58, 59-62, 20 Pac. Rep. 248, distinguishing *Harris vs. Harris*, 71 Cal. 314, 317, 12 Pac. Rep. 274 (where land was acquired by pre-emption and statute forbade pre-emptor from directly or indirectly agreeing that title should inure in whole or in part to benefit of any person except himself).

121. Husband is not estopped by statement in affidavit, as such statement was not made to wife or for purpose of deceiving her.—*Morgan vs. Lones*, 78 Cal. 58, 61, 20 Pac. Rep. 248.

122. Intention of husband to make gift to wife is not shown by mere statements in such affidavit.—*Morgan vs. Lones*, 78 Cal. 58, 62, 20 Pac. Rep. 248.

123. Mining property acquired under laws of United States during coverture is community property.—*Jacobson vs. Bunker Hill & S. M. & Con. Co.*, 2 Idaho 863, 28 Pac. Rep. 396.

124. Naked right of possession prior to marriage in swamp and overflowed land does not render such land separate property where husband, having such naked right of possession, after his marriage, files declaratory statement, and thereafter makes proof of his pre-emption right and receives patent therefor, purchasing land with funds which are presumed to be community funds.—*In re Estate of Boody*, 113 Cal. 682, 684-687, 45 Pac.

Rep. 853, distinguishing *Harris vs. Harris*, 71 Cal. 314, 317, 12 Pac. Rep. 274; *In re Estate of Lamb*, 95 Cal. 397, 404, 30 Pac. Rep. 568 (in each of which cases legal steps had been initiated by filing of application, prior to marriage, to procure title to the land).

125. TITLE ACQUIRED BY HUSBAND AFTER DEATH OF WIFE.—Where husband and wife occupy public land as their home until death of wife, and thereafter husband continues to occupy premises as his home, and land is granted to corporate authorities of town in which it is situated in trust for bona fide occupants of it at date of passage of act, and premises are conveyed to surviving husband, he holds under his sole occupancy, and land is not to be regarded as having become community property under such prior occupancy by him and his wife, which terminated before passage of act under which he acquired title.—*Labish vs. Hardy*, 77 Cal. 327, 329, 330, 19 Pac. Rep. 531.

V. LOANS—PROPERTY ACQUIRED ON CREDIT.

126. CROP RAISED ON RENTED LAND WITH SEED PURCHASED ON CREDIT by wife, rent being paid out of such crop, and seed being bought on credit without charging her separate property, is community property.—*Davis vs. Green*, 122 Cal. 364, 365-367, 55 Pac. Rep. 9.

127. MONEY BORROWED—BY HUSBAND.—Credit obtained by husband personally, without pledging property as security, money borrowed is community property.—See *In re Estate of Holbert*, 57 Cal. 257, 259; *People vs. Swalm*, 80 Cal. 46, 48, 13 Am. St. Rep. 96, 23 Pac. Rep. 67; *Perry vs. Ross*, 104 Cal. 15, 18, 43 Am. St. Rep. 66, 37 Pac. Rep. 757.

128. Compare: *Pool vs. Clifford*, 78 Cal. 371, 372, 20 Pac. Rep. 857 (holding that property bought by husband with money borrowed from his wife is his separate property).

129. Same—Husband's contract of purchase given as security for loan made by him, money so borrowed is community property, and consequently when title to such land is acquired with such money land is community property.—See *Perry vs. Ross*, 104 Cal. 15, 18, 43 Am. St. Rep. 66, 37 Pac. Rep. 757.

130. By wife.—Credit obtained by wife personally, and her separate property not being given as security, money borrowed by her is community property.—*Schuyler vs. Broughton*, 70 Cal. 282, 285, 11 Pac. Rep. 719. See *Davis vs. Green*, 122 Cal. 364, 365-367, 55 Pac. Rep. 9; *Yesler vs. Hochstetler*, 4 Wash. 249, 30 Pac. Rep. 398.

131. Same—Separate property of wife given as security, money borrowed by her is her separate property.—*Harris vs. Harris*, 71 Cal. 314, 317, 318, 12 Pac. Rep. 274; *Heney vs. Pesoli*, 109 Cal. 53, 60-63, 41 Pac. Rep. 819.

132. Same—Joinder of husband in wife's note and mortgage is immaterial where such mortgage is given on land purchased with wife's separate funds and money so borrowed.—*Heney vs. Pesoli*, 109 Cal. 53, 60-63, 41 Pac. Rep. 819, following *Flournoy vs. Flournoy*, 86 Cal. 286, 294, 21 Am. St. Rep. 39, 24 Pac. Rep.

1012, and distinguishing *Schuyler vs. Broughton*, 70 Cal. 282, 11 Pac. Rep. 719 (where land was conveyed to wife in her own name by deed which upon its face showed consideration paid by wife, but did not show that land was conveyed to her to hold as her separate property).

133. Same—Payment by husband without wife's knowledge or consent of money borrowed by wife on faith of her separate property, gives him no right or interest in property purchased by her, with money borrowed, nor does such payment change it from separate to community property.—*Flournoy vs. Flournoy*, 86 Cal. 286, 294, 21 Am. St. Rep. 39, 24 Pac. Rep. 1012. See *Morgan vs. Lones*, 80 Cal. 317, 319, 22 Pac. Rep. 253.

134. Same—Presumption that husband advanced money for benefit of wife's separate estate will be indulged when she purchases property with money borrowed on faith of her separate property and he voluntarily and without her knowledge repays such money.—*Flournoy vs. Flournoy*, 86 Cal. 286, 294, 21 Am. St. Rep. 39, 24 Pac. Rep. 1012. See *Peck vs. Brummagin*, 31 Cal. 440, 449, 39 Am. Dec. 195; *Swain vs. Duane*, 43 Cal. 358, 360.

135. Community property given as security, money borrowed by one of spouses is community property (dictum).—*Heney vs. Pesoli*, 109 Cal. 53, 63, 41 Pac. Rep. 819.

136. PROPERTY PURCHASED WITH BORROWED MONEY takes its character from the character of money borrowed; e. g. land purchased by wife with money borrowed by her is community property where loan was not secured by mortgage, lien, or otherwise upon her existing separate property.—*Schuyler vs. Broughton*, 70 Cal. 282, 285, 11 Pac. Rep. 719 (doubted though not overruled, in so far as it holds that money borrowed by wife to invest in property is community property, unless it be borrowed upon faith of existing separate property "which she mortgages or pledges as security for its payment, or against which her contract may be enforced," in *Flournoy vs. Flournoy*, 86 Cal. 286, 292, 21 Am. St. Rep. 39, 24 Pac. Rep. 1012). See *Pool vs. Clifford*, 78 Cal. 371, 372, 20 Pac. Rep. 857; *Perry vs. Ross*, 104 Cal. 15, 18, 43 Am. St. Rep. 66, 37 Pac. Rep. 757; *Davis vs. Green*, 122 Cal. 364, 365-367, 55 Pac. Rep. 9.

137. Separate funds and borrowed money used in making purchase—Where husband buys land and makes part payment with his separate funds, and he and his wife borrow money on their joint note with which to pay remainder of purchase money, giving mortgage to secure note on purchased land, and husband afterwards sells portion of land and pays note with proceeds, portion of land unsold constitutes his separate property.—*Martin vs. Martin*, 52 Cal. 235, 237.

138. Understanding between husband and creditor that separate estate shall be liable "may" result in land paid for with funds borrowed becoming separate estate of husband (dictum).—*In re Estate of Holbert*, 57 Cal. 257, 259.

139. PURCHASE BY WIFE ON HUSBAND'S CREDIT—Community property is acquired,

payment being made by him, but whether it is separate property of either spouse not appearing.—*People vs. Swalm*, 80 Cal. 46, 48, 18 Am. St. Rep. 96, 22 Pac. Rep. 67.

VI. DEEDS AND GIFTS BETWEEN HUSBAND AND WIFE.

140. DEED BY HUSBAND TO WIFE—Presumed to vest separate property in wife in absence of any intention outside of deed, whether property conveyed by him is separate or community property.—*Burkett vs. Burkett*, 78 Cal. 310, 317, 12 Am. St. Rep. 58, 20 Pac. Rep. 715, 3 L. R. A. 781 (separate property); *Taylor vs. Opperman*, 79 Cal. 468, 471, 21 Pac. Rep. 869 (community property); *Carter vs. McQuade*, 83 Cal. 274, 278, 23 Pac. Rep. 348 (separate and community property); *Ions vs. Harblson*, 113 Cal. 260, 266, 44 Pac. Rep. 572 (separate property); *Tillaux vs. Tillaux*, 115 Cal. 663, 672, 47 Pac. Rep. 691 (community property). See *Hussey vs. Castle*, 41 Cal. 239, 241; *Wedel vs. Herman*, 59 Cal. 507, 516; *Wright vs. Wright* (Cal. Aug. 28, 1895), 41 Pac. Rep. 695, 696; *Hamilton vs. Hubbard*, 134 Cal. 603, 606, 65 Pac. Rep. 321, 66 Id. 360; *Storey vs. Marsnall*, 24 Tex. 305, 76 Am. Dec. 106; *Thorpe vs. Sampson*, 84 Fed. Rep. 63, 65 (referring to rule in this state).

141. Contra: *Kohner vs. Ashenauer*, 17 Cal. 578, 581 (holding that deed of community property vests community property in wife unless same is transferred as gift or in exchange for separate property of wife).

142. Parol evidence is admissible to show that deed was intended to convey husband's separate property to wife as gift and that thereafter it vested separate property in her.—*Wedel vs. Herman*, 59 Cal. 507, 516. See *Woods vs. Whitney*, 42 Cal. 358, 361.

As to parol evidence to explain deed procured by husband to be made to wife, see para. 151-153, 155 this note.

143. Payment of nominal consideration by wife, being recited in deed conveying husband's separate property to her, presumption is not, it would seem, that land was conveyed to her as community property.—*Wedel vs. Herman*, 59 Cal. 507, 516.

144. Payment of separate funds being recited in deed conveying husband's separate property to her, presumption does not arise that land was conveyed to her as community property.—*Hussey vs. Castle*, 41 Cal. 239, 241.

145. Quitclaim deed upon consideration of love and affection from husband to wife vests property in her as her separate property.—*Thorpe vs. Sampson*, 84 Fed. Rep. 63, 65 (arising under laws of California).

146. DEED TO HUSBAND PROCURED BY WIFE—Gift not presumed where wife pays for land with her separate funds, and has it conveyed to him, unless an intention to make gift to him on the part of wife is clearly shown by extrinsic evidence.—*Hutchinson vs. Hutchinson*, 59 Cal. 313, 314. See *Gage vs. Downey*, 79 Cal. 140, 153, 21 Pac. Rep. 527, 555.

As to its being immaterial which spouse takes title, see para. 211-213 this note.

147. Resulting trust arises and husband

will be deemed to hold as trustee for his wife.—*Hutchinson vs. Hutchinson*, 59 Cal. 313, 314.

148. DEED TO WIFE PROCURED BY HER HUSBAND—Presumption that community property is taken arises under deed executed prior to Act March 19, 1889, amendatory of this section, where deed is in ordinary form, and intention of parties is not manifested therein, and where consideration is paid by husband with his separate funds.—*Ingersoll vs. Truebody*, 40 Cal. 603, 611; *Higgins vs. Higgins*, 46 Cal. 259, 263. See *McDonald vs. Badger*, 23 Cal. 393, 398, 83 Am. Dec. 123; *Lataillade vs. Orefia*, 91 Cal. 565, 579, 25 Am. St. Rep. 219, 27 Pac. Rep. 924.

149. Compare: *Hamilton vs. Hubbard*, 134 Cal. 603, 606, 607, 65 Pac. Rep. 321, 66 Id. 360 (as to presumption arising where husband in consideration for community funds procures deed to be made to wife); *Smith vs. Strahan*, 16 Tex. 314, 67 Am. Dec. 622; *Higgins vs. Johnson's Heirs*, 20 Tex. 389, 70 Am. Dec. 394 (holding that if payment is made by husband with community funds deed does not, prima facie, convey the land to wife as separate property).

150. Statutory presumption in favor of wife arises, under Act March 19, 1889, and deed is presumed to vest property in her as separate property, even though it be shown or is conceded that husband paid for same.—*Alferitz vs. Arrivillaga*, 143 Cal. 646, 77 Pac. Rep. 657, 658.

151. Parol evidence admissible—As to gift to wife, and where surrounding circumstances show that husband intended to make gift, wife will take under deed as of her separate estate, whether land was purchased by husband with separate or community funds.—*McDonald vs. Badger*, 23 Cal. 393, 398, 83 Am. Dec. 123; *Ingersoll vs. Truebody*, 40 Cal. 603, 610-612; *Woods vs. Whitney*, 42 Cal. 358, 361, 362; *Higgins vs. Higgins*, 46 Cal. 259, 263; *Swain vs. Duane*, 43 Cal. 358, 360; *Jackson vs. Torrence*, 83 Cal. 521, 529, 23 Pac. Rep. 695; *Wright vs. Wright* (Cal. Aug. 28, 1895), 41 Pac. Rep. 695, 696; *Hamilton vs. Hubbard*, 134 Cal. 603, 606, 65 Pac. Rep. 321, 66 Id. 360; *Arkle vs. Beedie*, 141 Cal. 459, 460-462, 74 Pac. Rep. 1033. See *Rhine vs. Ellen*, 36 Cal. 363, 369-373; *Read vs. Rahm*, 65 Cal. 343, 344, 4 Pac. Rep. 111; *Morgan vs. Lones*, 78 Cal. 58, 62, 20 Pac. Rep. 248; *Lataillade vs. Orefia*, 91 Cal. 565, 579, 25 Am. St. Rep. 219, 27 Pac. Rep. 924; *Heney vs. Pesoli*, 109 Cal. 53, 60, 41 Pac. Rep. 819; *Higgins vs. Johnson's Heirs*, 20 Tex. 389, 70 Am. Dec. 394.

152. Same—Consideration consisting of indebtedness due community, it is competent to show by parol consent of husband that conveyance should be made to his wife with intent that it should become her separate property, and in such case transaction will operate as gift from husband to her so as to make land vest in her separate estate.—*Read vs. Rahm*, 65 Cal. 343, 344, 4 Pac. Rep. 111.

153. Same—To overcome statutory presumption of gift parol evidence is admissible, as when husband buys land, and has deed made to her, it creates only prima facie presumption, under this section as amended by Act March 19, 1889, that she takes separate prop-

erty.—See *Alferitz vs. Arrivillaga*, 143 Cal. 646, 77 Pac. Rep. 657, 658.

154. Recital in deed that land is conveyed as wife's separate property and for her separate use, etc., makes instrument one which on its face conveys separate property to wife, although deed recites that it is made for valuable consideration paid to grantor, and consideration, as shown by parol evidence, was paid by husband.—*Swain vs. Duane*, 48 Cal. 358-360.

155. Same—In ejectment by husband, parol evidence is inadmissible for purpose of defeating or controlling legal effect of deed, as vesting premises in wife as of her separate estate.—*Swain vs. Duane*, 48 Cal. 358, 360.

156. EFFECT OF GIFT FROM HUSBAND TO WIFE—Of community property, is that wife acquires such property as her separate property.—*Woods vs. Whitney*, 42 Cal. 353, 362; *Taylor vs. Opperman*, 79 Cal. 463, 470, 471, 21 Pac. Rep. 869; *Von Glahn vs. Brennan*, 81 Cal. 261, 264, 22 Pac. Rep. 596; *Carter vs. McQuade*, 83 Cal. 274, 278, 23 Pac. Rep. 348; *Jackson vs. Torrence*, 83 Cal. 521, 529, 23 Pac. Rep. 695; *Oaks vs. Oaks*, 94 Cal. 66-68, 29 Pac. Rep. 330; *Wren vs. Wren*, 100 Cal. 276, 280, 38 Am. St. Rep. 287, 34 Pac. Rep. 775; *In re Estate of Dobbel*, 104 Cal. 432, 435, 43 Am. St. Rep. 123, 38 Pac. Rep. 87; *Hamilton vs. Hubbard*, 134 Cal. 603, 606, 65 Pac. Rep. 321, 66 Id. 860; *Arkle vs. Beedie*, 141 Cal. 459, 460-462, 74 Pac. Rep. 1033; *Hoeck vs. Greif*, 142 Cal. 119, 122, 75 Pac. Rep. 670; *Alferitz vs. Arrivillaga*, 143 Cal. 646, 649, 77 Pac. Rep. 657. See *Harris vs. Harris*, 71 Cal. 314, 315-317, 12 Pac. Rep. 274; *Diefendorff vs. Hopkins*, 95 Cal. 343, 352, 23 Pac. Rep. 265, 30 Id. 549; *Spreckels vs. Spreckels*, 116 Cal. 339, 342, 58 Am. St. Rep. 170, 48 Pac. Rep. 228, 36 L. R. A. 497; *Yake vs. Pugh*, 13 Wash. 78, 52 Am. St. Rep. 17, 19, 42 Pac. Rep. 528.

157. Of separate property by husband to wife is that wife acquires such property as her separate property.—*Hart vs. Robertson*, 21 Cal. 346, 348; *Swain vs. Duane*, 48 Cal. 358, 360; *Wedel vs. Herman*, 59 Cal. 507, 516; *Burkett vs. Burkett*, 78 Cal. 310, 312, 12 Am. St. Rep. 58, 20 Pac. Rep. 715, 3 L. R. A. 781; *Carter vs. McQuade*, 83 Cal. 274, 278, 23 Pac. Rep. 348; *In re Estate of Dobbel*, 104 Cal. 432, 435, 43 Am. St. Rep. 123, 38 Pac. Rep. 87; *Wright vs. Wright* (Cal. Aug. 28, 1895), 41 Pac. Rep. 695, 696; *Tillaux vs. Tillaux*, 115 Cal. 663, 672, 47 Pac. Rep. 691; *Hamilton vs. Hubbard*, 134 Cal. 603, 606, 65 Pac. Rep. 321, 66 Id. 860; *Hoeck vs. Greif*, 142 Cal. 119, 122, 75 Pac. Rep. 670. See *Kohner vs. Ashenauer*, 17 Cal. 573, 581; *Heney vs. Pesoli*, 109 Cal. 53, 60, 41 Pac. Rep. 819; *Butler vs. Gosling*, 130 Cal. 422, 425, 426, 62 Pac. Rep. 596; *Higgins vs. Johnson's Heirs*, 20 Tex. 389, 70 Am. Dec. 394.

158. EFFECT OF GIFT OF SEPARATE PROPERTY BY WIFE TO HUSBAND is to make same his separate property as much as any gift of separate property by him to her would have effectuated charge in character of the property.—*In re Estate of Cudworth*, 133 Cal. 462, 468, 469, 65 Pac. Rep. 1041.

159. SUBSEQUENTLY ACQUIRED TITLE DOES NOT INURE TO COMMUNITY where

husband makes gift to his wife by deed which contains the word "grant," but under §§1072, 1108 post such subsequently acquired title passes by operation of law to wife as her separate property.—*Klumpke vs. Baker*, 68 Cal. 559, 561, 10 Pac. Rep. 197.

160. Quitclaim deed from husband to wife does not by operation of law pass title subsequently acquired by husband, and, as respects such title, husband, although quitclaim deed was executed as gift, may hold land free from any trust in her favor.—*Brannock vs. Monroe*, 65 Cal. 491, 492, 4 Pac. Rep. 488.

VII. EARNINGS OF SPOUSES.

161. EARNINGS OF HUSBAND during coverture constitute community property.—*In re Estate of Burdick*, 112 Cal. 387, 397, 44 Pac. Rep. 734. See *Fuller vs. Ferguson*, 26 Cal. 546, 565, 566 (decided prior to adoption of code; holding that under Mexican law all property, of whatever nature, which spouses acquired by their own labor, becomes part of the community); *Spreckels vs. Spreckels*, 116 Cal. 339, 342, 58 Am. St. Rep. 170, 48 Pac. Rep. 228, 36 L. R. A. 497.

162. EARNINGS OF WIFE during coverture, and while she is living with her husband, constitute community property.—*Moselev vs. Heney*, 66 Cal. 478, 480, 6 Pac. Rep. 134; *Smith vs. Furnish*, 70 Cal. 424-426, 12 Pac. Rep. 392; *In re Estate of Burdick*, 112 Cal. 387, 397, 44 Pac. Rep. 734. See *Fuller vs. Ferguson*, 26 Cal. 546, 565, 566 (decided prior to adoption of code; holding that under Mexican law all property, of whatever nature, which spouses acquired by their own labor, becomes part of the community); *Martin vs. Southern Pac. Co.*, 130 Cal. 285, 286, 62 Pac. Rep. 515; *Abbott vs. Wetherby*, 6 Wash. 507, 36 Am. St. Rep. 176, 23 Pac. Rep. 1070; *Yake vs. Pugh*, 13 Wash. 78, 52 Am. St. Rep. 17, 19, 42 Pac. Rep. 528.

163. Contra: *Marlow vs. Barlow*, 53 Cal. 456, 459 (saying, obiter, "her earnings are her separate property," referring to §§168, 169 post).

As to earnings and accumulations of wife while living separate from husband, see post §169 and note.

164. Relinquishment by husband to wife of wife's earnings will result in such earnings constituting separate property.—*Von Glahn vs. Brennan*, 81 Cal. 261, 264, 22 Pac. Rep. 596; *Wren vs. Wren*, 100 Cal. 276, 279-281, 38 Am. St. Rep. 287, 34 Pac. Rep. 775 (holding that dictum in *Read vs. Rahm*, 65 Cal. 343, 4 Pac. Rep. 111, that husband cannot make gift to his wife of her future earnings, because gift is not consummated without delivery, and subject of it must be in esse, is not to be regarded as authoritative). See *Grosse-Becker vs. Becker*, 102 Cal. 226, 228, 36 Pac. Rep. 433; *Yake vs. Pugh*, 13 Wash. 78, 52 Am. St. Rep. 17, 19, 42 Pac. Rep. 528.

165. JOINT EARNINGS OF HUSBAND AND WIFE, or, as it is sometimes expressed, earnings of the community, constitute community property.—*Alexander vs. Jackson* (Cal. Dec. 23, 1890), 25 Pac. Rep. 415, 417.

166. UPON DISSOLUTION OF MARRIAGE earnings of either spouse are neither com-

munity nor separate property, because it would be solecism to designate such earnings as either.—In re Estate of Spencer, 82 Cal. 110, 113, 23 Pac. Rep. 37.

As to allowance to wife after divorce out of husband's future earnings, see ante § 139 and note.

167. DISTINCTION BETWEEN EARNINGS AND PROFITS OF SEPARATE PROPERTY, one being community property and other separate property, does not seem to have attracted much attention; and so far as the attempt has been made to apportion acquisitions which have resulted from separate property and earnings of a spouse, decisions are not quite reconcilable. It has been held that profits of husband's business, minus separate estate invested by him, constitute community property (Lewis vs. Lewis, 13 Cal. 654, 659); that entire profits of such business constitute separate property (In re Estate of Bauer, 79 Cal. 304, 310, 21 Pac. Rep. 759); that where wife conducts business with her separate capital entire acquisitions constitute her separate property (Diefendorff vs. Hopkins, 95 Cal. 343, 352, 353, 28 Pac. Rep. 265, 30 Id. 549); and that fruits and profits of wife's land are entirely her separate property, without any deduction for labor which husband may have bestowed in acquisition of such fruits and profits (Lewis vs. Johns, 24 Cal. 98, 101-104, 85 Am. Dec. 49); and it would seem, in view of the court's willingness to trace separate property when it is commingled with other separate property or with community property, and to apportion same, that acquisitions derived from separate property and labor of one or both of spouses should be similarly apportioned, or that, at least, any other rule is to be adopted and maintained merely as rule of necessity or convenience. In Diefendorff vs. Hopkins, supra, the court, in holding that entire proceeds of wife's business are her separate estate, as being profits of her separate property (without passing upon rights of husband's creditors), say: "It is true that they may have been, to some extent, profits of her labor and personal attention, but so must, in some degree, be rents, issues, and profits of any estate of either spouse, and wife must have same right to manage her separate estate, so as to turn it to profit, that husband has to manage his separate estate."

As to effect of commingling funds, see pars. 181-191 this note.

VIII. RENTS, ISSUES, AND PROFITS OF SEPARATE PROPERTY.

168. CONSTITUTIONAL ORIGIN OF WIFE'S SEPARATE PROPERTY is such that legislature cannot make rents, issues, and profits of wife's estate community property.—George vs. Ransom, 15 Cal. 322, 323, 324, 76 Am. Dec. 490; Lewis vs. Johns, 24 Cal. 98, 101-104, 85 Am. Dec. 49. See Lake vs. Bender, 18 Nev. 361, 7 Pac. Rep. 74.

See ante § 162 and note pars. 6-10.

169. HUSBAND'S MANAGEMENT, ETC., OF WIFE'S SEPARATE PROPERTY gives him no right to acquire any interest therein or fruits thereof; e. g. a crop raised by him on her land does not constitute community prop-

erty.—Lewis vs. Johns, 24 Cal. 98, 101-104, 85 Am. Dec. 49. See Walsh vs. Walsh, 84 Cal. 101, 102, 103, 23 Pac. Rep. 1099; Carn vs. Royer, 55 Iowa 650, 8 N. W. Rep. 629.

See par. 167 this note.

170. Right to compensation for services is not implied, and does not exist in absence of express agreement to that effect.—Lewis vs. Johns, 24 Cal. 98, 103, 104, 85 Am. Dec. 49.

171. INCOME CONSTITUTES SEPARATE PROPERTY where it consists of rents, interest, dividends, and the like, derived from separate property.—In re Estate of Cudworth, 133 Cal. 462, 468, 65 Pac. Rep. 1041; In re Estate of Granniss, 142 Cal. 1, 5, 75 Pac. Rep. 324.

172. INCREASE OF CATTLE CONSTITUTES SEPARATE PROPERTY, where such increase is derived from cattle which are separate estate of wife.—Shumway vs. Leakey, 67 Cal. 458, 460, 3 Pac. Rep. 12. See Harris vs. Van De Vanter, 17 Wash. 489, 50 Pac. Rep. 50.

173. INTEREST ACCRUING AFTER MARRIAGE on note is separate property of spouse to whom such note was given before marriage.—In re Estate of Granniss, 142 Cal. 1, 5, 75 Pac. Rep. 324.

174. PROPERTY AND PROFITS ACQUIRED IN BUSINESS CONDUCTED BY SPOUSE, whether husband or wife, with separate property of such spouse, constitute separate property and not community property.—In re Estate of Bauer, 79 Cal. 304, 310, 21 Pac. Rep. 759 (husband); Diefendorff vs. Hopkins, 95 Cal. 343, 350-352, 28 Pac. Rep. 265, 30 Id. 549 (wife). See Walsh vs. Walsh, 84 Cal. 101, 102, 103, 23 Pac. Rep. 1099 (wife).

See par. 167 this note.

175. Contra: Lewis vs. Lewis, 13 Cal. 654, 659 (holding that where husband has separate cattle, and therewith engages in business of buying and selling cattle, profits of business, ascertained by deducting value of cattle owned by him originally from value of cattle owned by him at time of his death, are community property).

176. Furniture in boarding-house conducted by wife which furniture has been acquired with her separate funds commingled with knowledge or tacit consent of her husband with funds furnished by him as an allowance made for her separate support, constitutes separate property of wife.—Diefendorff vs. Hopkins, 95 Cal. 343, 352, 353, 28 Pac. Rep. 265, 30 Id. 549.

177. SPANISH AND MEXICAN LAW, in force in this state prior to Act 1850, provided that fruits, profits, and increase of separate property should belong to community.—Scott vs. Ward, 13 Cal. 458, 471.

IX. RIGHTS OF ACTION FOR PERSONAL INJURY.

178. INJURIES TO HUSBAND during coverture give rise to cause of action which constitutes community property.—See Neale vs. Depot R. Co., 94 Cal. 425, 429, 29 Pac. Rep. 954; Martin vs. Southern Pac. Co., 130 Cal. 285, 286, 62 Pac. Rep. 515.

179. INJURIES TO WIFE during coverture give rise to cause of action which constitutes

community property.—*McFadden vs. Santa Ana O. & T. Street R. Co.*, 87 Cal. 464, 467, 468, 28 Pac. Rep. 681, 11 L. R. A. 252; *Neale vs. Depot R. Co.*, 94 Cal. 428, 429, 29 Pac. Rep. 954; *Lamb vs. Harbaugh*, 105 Cal. 680, 691, 39 Pac. Rep. 56; *Paine vs. San Bernardino Valley Traction Co.*, 143 Cal. 654, 658, 77 Pac. Rep. 659. See *Tell vs. Gibson*, 66 Cal. 247, 248, 5 Pac. Rep. 228; *Martin vs. Southern Pac. Co.*, 130 Cal. 285, 286, 287, 62 Pac. Rep. 515.

As to right of action for wife's personal injuries being in husband, see post § 172 and note para. 34, 35.

180. RIGHT OF ACTION FOR INJURY TO WIFE RESULTING IN DEATH is not community property, where his claim to damages is for injuries personal to himself and for injuries inflicted upon wife, and which passes to him under statute relating to succession or inheritance of property; hence under Code Civil Procedure § 377, which gives right of action in such cases to "heirs or personal representatives," damages recoverable are not based solely upon community relation, and heirs of wife other than husband, are entitled to recover damages as well as he.—*Redfield vs. Oakland Con. St. R. Co.*, 110 Cal. 277, 289, 290, 42 Pac. Rep. 822.

See Code Civ. Proc. § 377 and note.

X. COMMINGLING SEPARATE AND COMMUNITY PROPERTY.

181. FORFEITURE OF SEPARATE CHARACTER OF FUNDS will result when they have been commingled with separate funds of other spouse or with community funds, and it is impossible to trace them or determine proportion in which property represents commingled funds invested or transmuted.—In re Estate of Bauer, 79 Cal. 304, 309, 21 Pac. Rep. 759; *Dimmick vs. Dimmick*, 95 Cal. 323, 328, 30 Pac. Rep. 547. See *Yesler vs. Hochstetler*, 4 Wash. 349, 30 Pac. Rep. 398.

182. Dividends earned by separate and community property will be considered community property, where it does not appear in what proportion separate property and community property, respectively, contributed to such dividends.—In re Estate of Bauer, 79 Cal. 304, 309, 21 Pac. Rep. 759.

183. Speculation in land with separate funds of each spouse by husband will result in necessity of treating land which represents result of such speculation as community property where it is impossible to trace funds so used.—*Dimmick vs. Dimmick*, 95 Cal. 323, 328, 30 Pac. Rep. 547.

184. SEPARATE FUNDS COMMINGLED WITH COMMUNITY FUNDS TRACED, if possible, so as to preserve separate character of separate funds or their equivalent in property into which they have been converted.—In re Estate of Bauer, 79 Cal. 304, 309, 21 Pac. Rep. 759; *Jackson vs. Torrence*, 83 Cal. 521, 532, 23 Pac. Rep. 695. See *Lewis vs. Lewis*, 18 Cal. 654, 659; *Schmidt vs. Huppman*, 73 Tex. 112, 11 S. W. Rep. 175.

185. Interest in separate funds considered in determining amount of separate funds contributed by spouse in purchase of property with separate and community funds.—*Jackson vs. Torrence*, 83 Cal. 521, 532, 23 Pac. Rep. 695.

186. Separate funds invested in business and commingled with profits which constitute community property will, upon settlement, be restored, or if property has been replaced, its equivalent, to spouse who furnished such separate funds.—*Schmidt vs. Huppman*, 73 Tex. 112, 11 S. W. Rep. 175. See *Lewis vs. Lewis*, 18 Cal. 654, 659.

187. SEPARATE FUNDS COMMINGLED WITH SEPARATE FUNDS OF OTHER SPOUSE TRACED, if possible, and property of each spouse will retain its separate character.—In re Estate of Cudworth, 133 Cal. 462, 468, 65 Pac. Rep. 1041. See *Lewis vs. Johns*, 24 Cal. 98, 103, 104, 85 Am. Dec. 49; *Walsh vs. Walsh*, 84 Cal. 101, 102, 103, 23 Pac. Rep. 1099.

188. SEPARATE PROPERTY ACQUIRED BY COMMINGLING monthly allowance for support of wife, made to her by husband, with her separate funds in business conducted by her, where commingling is with knowledge and express or tacit consent of husband, so that entire fund created by such commingling will be her separate property.—*Diefendorff vs. Hopkins*, 95 Cal. 343, 352, 28 Pac. Rep. 265, 30 Id. 549.

189. TRIFLING SUM COMMINGLED IN LOSING BUSINESS, as where wife invests \$900 of her separate property and husband invests \$20, and at time of his death proceeds of business amount to less than \$900, such proceeds will be regarded as sufficiently traced to original capital of wife, and as impressed with character of her separate property.—*Walsh vs. Walsh*, 84 Cal. 101, 102, 103, 23 Pac. Rep. 1099. See *Lewis vs. Johns*, 24 Cal. 98, 103, 104, 85 Am. Dec. 49; In re Estate of Cudworth, 133 Cal. 462, 468, 65 Pac. Rep. 1041.

190. PRACTICE—ACCOUNTING IN EQUITY IS NECESSARY where separate property of each spouse is commingled and put together in common pool and used in carrying on business without keeping any account and without any separation of property made; and whatever may be rights of parties in equity, wife cannot maintain an action at law against her husband for moneys had and received where her object is to recover her share of proceeds of such business.—*Valensin vs. Valensin*, 28 Fed. Rep. 599, 601, 602, 12 Sawy. C. C. 39.

191. Burden of third person to trace.—Where husband commingles community funds with funds of third person in purchase of property and conveys property so purchased to such third person in fraud of community, and wife brings action to rescind husband's deed, burden is upon defendant to show adequate consideration for such deed, and, it would seem, to show what proportion of his own funds were used in purchasing the land.—*Hughes vs. Doe*, 114 Cal. 199, 203, 45 Pac. Rep. 1066.

XI. IMPROVEMENTS ON SEPARATE AND COMMUNITY PROPERTY.

192. CHARACTER OF FUNDS USED CONSIDERED.—Improvements on separate or community property, in the absence of any intention to make gift, take their character from character of funds or of property with which such improvements were made; e. g. improvements erected on separate property with com-

munity funds constitute community property.—*Smith vs. Smith*, 12 Cal. 216, 223-225, 73 Am. Dec. 532. See *Martin vs. Martin*, 52 Cal. 235, 237; *In re Estate of Boody*, 119 Cal. 402, 405, 51 Pac. Rep. 634.

183. Compare: *Peck vs. Brummagin*, 31 Cal. 440, 448, 449, 39 Am. Dec. 195.

184. IMPROVEMENTS ON WIFE'S SEPARATE PROPERTY WITH COMMUNITY FUNDS, made by husband, become part of her separate property.—*Peck vs. Brummagin*, 31 Cal. 440, 448, 449, 39 Am. Dec. 195, citing *Smith vs. Smith*, 12 Cal. 216, 225, 73 Am. Dec. 532 (holding that building placed by man on property of his children cannot be claimed by him).

XII. TRANSMUTATION OF PROPERTY.

195. PRESUMPTION IS THAT IMPROVEMENTS ARE COMMUNITY PROPERTY where they are constructed during existence of community, and spouse who claims that they are separate property must clearly trace, as separate property, funds or property which were used in making such improvements.—*Smith vs. Smith*, 12 Cal. 217, 224, 73 Am. Dec. 533.

196. CHARACTER OF PROPERTY PRESERVED.—Transmutation of funds or other property results in acquisition of property whose character as separate property of wife or husband, or as community property, depends upon character of funds or property so transmuted; rule being that property, in order to retain its character as separate or community property, need not be preserved in specie or in kind.—*Johnson vs. Johnson*, 11 Cal. 200, 205, 70 Am. Dec. 774; *Smith vs. Smith*, 12 Cal. 217, 223, 73 Am. Dec. 533; *Meyer vs. Kinzer*, 12 Cal. 247, 255, 73 Am. Dec. 538; *Kays vs. Phelan*, 19 Cal. 128, 129; *Ramsdell vs. Fuller*, 28 Cal. 37, 42, 87 Am. Dec. 103; *Rich vs. Tubbs*, 41 Cal. 34, 35; *Hussey vs. Castle*, 41 Cal. 339, 241; *Beaudry vs. Felch*, 47 Cal. 133, 135; *Martin vs. Martin*, 52 Cal. 235, 237; *Kraemer vs. Kraemer*, 52 Cal. 302, 305; *In re Estate of Higgins*, 65 Cal. 407, 409, 4 Pac. Rep. 339; *Schuyler vs. Broughton*, 70 Cal. 232, 235, 11 Pac. Rep. 719; *Harris vs. Harris*, 71 Cal. 314, 317, 12 Pac. Rep. 374; *Pool vs. Clifford*, 78 Cal. 371, 373, 20 Pac. Rep. 357; *Gage vs. Downey*, 79 Cal. 140, 153, 21 Pac. Rep. 527, 555; *In re Estate of Bauer*, 79 Cal. 304, 309, 21 Pac. Rep. 759; *Von Glahn vs. Brennan*, 81 Cal. 261, 264, 22 Pac. Rep. 596; *Jackson vs. Torrence*, 83 Cal. 521, 531, 532, 23 Pac. Rep. 695; *Walsh vs. Walsh*, 84 Cal. 101, 103, 23 Pac. Rep. 1099; *Goldman vs. Rogers*, 85 Cal. 574, 579, 24 Pac. Rep. 782; *Flournoy vs. Flournoy*, 86 Cal. 286, 293, 21 Am. St. Rep. 39, 24 Pac. Rep. 1012; *Alexander vs. Jackson* (Cal. Dec. 23, 1890), 25 Pac. Rep. 415, 417; *Shanahan vs. Crampton*, 92 Cal. 9, 13, 23 Pac. Rep. 50; *Oaks vs. Oaks*, 94 Cal. 66, 68, 29 Pac. Rep. 330; *Dimmick vs. Dimmick*, 95 Cal. 323, 328, 30 Pac. Rep. 547; *Dieffendorff vs. Hopkins*, 95 Cal. 343, 353, 358, 23 Pac. Rep. 265, 30 Id. 549; *Lewis vs. Burns*, 106 Cal. 331, 333-334, 39 Pac. Rep. 778; *In re Estate of Burdick*, 112 Cal. 337, 397, 44 Pac. Rep. 784; *In re Estate of Boody*, 113 Cal. 332, 336, 337, 45 Pac. Rep. 553; *Sanchez vs. Grace M. El. Church*, 114 Cal. 295, 298, 46 Pac. Rep. 2; *In re Estate of Moody*, 119 Cal. 402, 405, 51 Pac. Rep. 634; *Yoakam vs. Kingery*, 126 Cal. 30, 33, 53 Pac. Rep. 324; *Williams vs.*

Tam, 131 Cal. 64, 67, 63 Pac. Rep. 133; *Rowe vs. Hibernia Sav. & L. Soc.*, 134 Cal. 403, 405, 66 Pac. Rep. 569; *Freese vs. Hibernia Sav. & L. Soc.*, 139 Cal. 392, 73 Pac. Rep. 172; *In re Estate of Granniss*, 142 Cal. 1, 5, 75 Pac. Rep. 324; *Bollinger vs. Wright*, 143 Cal. 292, 295, 76 Pac. Rep. 1108. See *George vs. Ransom*, 14 Cal. 658, 660; *Parry vs. Kelley*, 52 Cal. 334, 335; *Greiner vs. Greiner*, 53 Cal. 115, 122; *Jordan vs. Fay*, 98 Cal. 264, 268, 33 Pac. Rep. 95; *Gwynn vs. Dierssen*, 101 Cal. 563, 565, 36 Pac. Rep. 103; *Perry vs. Ross*, 104 Cal. 15, 18, 43 Am. St. Rep. 66, 36 Pac. Rep. 757; *Hughes vs. Doe*, 114 Cal. 199, 200-203, 45 Pac. Rep. 1066; *Heney vs. Pesoli*, 109 Cal. 53, 60-63, 41 Pac. Rep. 319; *Svetinich vs. Sheean*, 124 Cal. 216, 218, 71 Am. St. Rep. 50, 56 Pac. Rep. 1028; *Nev. Lake vs. Bender*, 18 Nev. 361, 7 Pac. Rep. 74. *Tex. Love vs. Robertson*, 7 Tex. 6, 56 Am. Dec. 41; *Schmidt vs. Huppmann*, 78 Tex. 112, 11 S. W. Rep. 175. *Wash. Yesler vs. Hochstetler*, 4 Wash. 349, 30 Pac. Rep. 398. *Fed. Thorpe vs. Sampson*, 34 Fed. Rep. 63, 65.

197. EVIDENCE.—Presumption of being community property, arises as to property which has undergone changed conditions, and burden of proof is same and proof must be of same certain and convincing character as where property is acquired by deed.—*Dimmick vs. Dimmick*, 95 Cal. 323, 327, 328, 30 Pac. Rep. 547; *Rowe vs. Hibernia Sav. & L. Soc.*, 134 Cal. 403, 405, 66 Pac. Rep. 569.

198. Property must be clearly traced and located when it has undergone mutations and assumed other conditions, in order to maintain its original character, and surmises and probabilities are insufficient.—*Dimmick vs. Dimmick*, 95 Cal. 323, 328, 30 Pac. Rep. 547. See *Rose vs. Houston*, 11 Tex. 324, 62 Am. Dec. 478; *Chapman vs. Allen*, 15 Tex. 283; *Schmelts vs. Garey*, 49 Tex. 60.

199. EXCHANGE OF PROPERTY results in acquisition of property which takes its character from that of property which was given for property so acquired; e. g. where wife exchanges her separate property for other property she acquires separate property.—*Sanchez vs. Grace M. El. Church*, 114 Cal. 295, 298, 46 Pac. Rep. 2.

200. Intention to give property acquired to other spouse; e. g. where husband gives his land for land conveyed to his wife, and deed is made to wife with husband's consent and in pursuance of his agreement with grantor, operates as gift by husband to wife and acquisition by her of separate property.—*Hamilton vs. Hubbard*, 134 Cal. 603, 605, 607, 65 Pac. Rep. 331, 66 Id. 860.

201. PROCEEDS OF SEPARATE PROPERTY do not constitute community property, but separate property of spouse from whose property such proceeds were derived.—*Kays vs. Phelan*, 19 Cal. 128, 129; *Beaudry vs. Felch*, 47 Cal. 133, 135; *Oaks vs. Oaks*, 94 Cal. 66, 68, 29 Pac. Rep. 330; *Freese vs. Hibernia Sav. & L. Soc.*, 139 Cal. 392, 396, 73 Pac. Rep. 172.

202. Husband can claim no part of proceeds as consideration for joining wife in deed whereby her separate property was sold.—*Beaudry vs. Felch*, 47 Cal. 133, 135.

203. Money paid to wife in consideration for

joining husband in deed to land which they hold jointly, where he deals with her as feme sole, becomes separate property of wife.—*Schuler vs. Sav. & L. Soc.*, 64 Cal. 397, 399, 1 Pac. Rep. 479.

204. PROPERTY PURCHASED — WITH COMMUNITY FUNDS becomes and is community property.—*Johnson vs. Johnson*, 11 Cal. 200, 205, 70 Am. Dec. 774; *Meyer vs. Kinzer*, 12 Cal. 247, 255, 73 Am. Dec. 538; *Peck vs. Brummagin*, 31 Cal. 440, 445, 89 Am. Dec. 195; *Schuyler vs. Broughton*, 70 Cal. 282, 285, 11 Pac. Rep. 719; *Shanahan vs. Crampton*, 92 Cal. 9, 13, 28 Pac. Rep. 50. See *Peck vs. Vandenberg*, 30 Cal. 11, 50; *Parry vs. Kelley*, 52 Cal. 334, 335; *McComb vs. Spangler*, 71 Cal. 418, 426, 427, 12 Pac. Rep. 347; *Gwynn vs. Dierssen*, 101 Cal. 563, 565, 36 Pac. Rep. 103; *Santa Cruz Rock Pav. Co. vs. Lyons* (Cal. Jan. 31, 1896), 43 Pac. Rep. 599, 602; *Yesler vs. Hochstettler*, 4 Wash. 349, 30 Pac. Rep. 398.

205. Same—Possession of one spouse before marriage without title immaterial and where after marriage he purchases property with community funds it becomes community property.—*Johnson vs. Johnson*, 11 Cal. 200, 205, 206, 70 Am. Dec. 774.

206. With community funds and separate funds is in part community property and in part separate property in proportion to community and separate funds invested.—*Schuyler vs. Broughton*, 70 Cal. 282, 285, 11 Pac. Rep. 719; *In re Estate of Bauer*, 79 Cal. 304, 309, 310, 21 Pac. Rep. 759; *Jackson vs. Torrence*, 83 Cal. 521, 529, 23 Pac. Rep. 695; *Heney vs. Pesoli*, 109 Cal. 53, 60, 41 Pac. Rep. 819.

As to cotenancy of spouse and community, see ante § 161 and note par. 11.

As to commingling community and separate funds, see para. 181-191 this note.

207. With husband's separate funds becomes and is his separate property.—*Smith vs. Smith*, 12 Cal. 216, 217, 223, 73 Am. Dec. 533; *In re Estate of Moody*, 119 Cal. 403, 405, 51 Pac. Rep. 634; *Svetinich vs. Sheean*, 124 Cal. 216, 217, 218, 71 Am. St. Rep. 50, 56 Pac. Rep. 1023. See *McDonald vs. Badger*, 23 Cal. 293, 398, 33 Am. Dec. 123; *In re Estate of Bauer*, 79 Cal. 304, 310, 21 Pac. Rep. 759.

As to purchase with husband's separate funds in name of wife, see para. 148-155 this note.

208. With wife's separate funds becomes her separate property.—*Ramsdell vs. Fuller*, 28 Cal. 37, 42, 87 Am. Dec. 103; *Rich vs. Tubbs*, 41 Cal. 34, 35; *Hussey vs. Castle*, 41 Cal. 239, 241; *Martin vs. Martin*, 52 Cal. 235, 237; *Greiner vs. Greiner*, 58 Cal. 115, 122; *Hutchinson vs. Hutchinson*, 59 Cal. 313, 314; *Schuyler vs. Broughton*, 70 Cal. 282, 285, 11 Pac. Rep. 719; *Goldman vs.*

Rogers, 85 Cal. 574, 579, 24 Pac. Rep. 782; *Flournoy vs. Flournoy*, 86 Cal. 236, 293, 21 Am. St. Rep. 39, 24 Pac. Rep. 1012; *Diefendorff vs. Hopkins*, 95 Cal. 343, 352, 353, 28 Pac. Rep. 265, 30 Id. 549; *Heney vs. Pesoli*, 109 Cal. 53, 59, 41 Pac. Rep. 819; *Sanchez vs. Grace M. E. Church*, 114 Cal. 295, 298, 46 Pac. Rep. 2; *Williams vs. Tam*, 131 Cal. 64, 67, 63 Pac. Rep. 133; *Freese vs. Hibernia Sav. & L. Soc.*, 129 Cal. 392, 396, 73 Pac. Rep. 172. See *George vs. Ransom*, 14 Cal. 658, 660; *McDonald vs. Badger*, 23 Cal. 293, 398, 33 Am. Dec. 123; *Ingersoll vs. Truebody*, 40 Cal. 603, 612; *Oaks vs. Oaks*, 94 Cal. 66, 68, 29 Pac. Rep. 380; *Diefendorff vs. Hopkins*, 95 Cal. 343, 350, 352, 28 Pac. Rep. 265, 30 Id. 549; *Thorpe vs. Sampson*, 84 Fed. Rep. 63, 65.

209. Note given to wife by husband for valuable consideration traceable to her separate funds constitutes her separate property.—*May vs. May*, 9 Neb. 16, 31 Am. Rep. 399, 2 N. W. Rep. 221.

210. Power of wife to change form of investment essential to full enjoyment of her separate estate.—*Ramsdell vs. Fuller*, 28 Cal. 37, 42, 87 Am. Dec. 103.

211. Redemption of husband's pledged property with wife's separate funds constitutes wife's separate property, she being entitled to be subrogated to lien of the pledgee.—*Greiner vs. Greiner*, 58 Cal. 115, 122.

212. TITLE, IMMATERIAL IN WHOSE NAME TAKEN; and where property is transmuted or acquired, its true character as separate property of one of spouses or as community property is to be determined by nature of transaction and intention of parties, without reference to particular name in which title is taken.—*Meyer vs. Kinzer*, 12 Cal. 247, 255, 73 Am. Dec. 538; *Tryon vs. Sutton*, 18 Cal. 490, 493; *Pixley vs. Huggins*, 15 Cal. 127, 131; *Rich vs. Tubbs*, 41 Cal. 34, 35; *Eslinger vs. Eslinger*, 47 Cal. 62, 63; *Gage vs. Downey*, 79 Cal. 140, 153, 21 Pac. Rep. 527, 555; *Shanahan vs. Crampton*, 92 Cal. 9, 13, 28 Pac. Rep. 50.

213. Community property may be taken in name of husband or wife or both jointly.—*Vasault vs. Austin*, 36 Cal. 691, 698.

214. May be taken in name of third person, and if property is purchased by husband with his separate fund his wife has no interest therein.—*Smith vs. Smith*, 12 Cal. 216, 217, 223, 73 Am. Dec. 533.

215. Trust is created when one spouse buys property with separate funds in name of other, if there was no intention to make gift.—*Ingersoll vs. Truebody*, 40 Cal. 603, 611.

§ 165. INVENTORY OF SEPARATE PROPERTY OF WIFE. A full and complete inventory of the separate personal property of the wife may be made out and signed by her, acknowledged or proved in the manner required by law for the acknowledgment or proof of a grant of real property by an unmarried woman, and recorded in the office of the recorder of the county in which the parties reside.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Chattel mortgage made by wife and filed sufficient.

3. Deed of land to wife—Record of sufficient.
4. Delivery of goods necessary to consummate sale or gift.

- 5-7. Description of property—Necessity for, and requisites of.
- 8, 9. Filing inventory not indispensable.
10. Inclusion of community property in inventory immaterial.
11. Purpose of recording inventory.
12. Recordation after abandoning residence may be in any county.
13. Rents and profits of separate property need not be inventoried.
14. Signature in maiden name is sufficient.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc.** in: *Shumway vs. Leakey*, 47 Cal. 458, 459, 8 Pac. Rep. 12 (construed and applied); *Morgan vs. Ball*, 81 Cal. 93, 96, 15 Am. St. Rep. 34, 22 Pac. Rep. 331, 5 L. R. A. 579 (construed); *Carter vs. McQuade*, 83 Cal. 274, 278, 23 Pac. Rep. 348 (construed and applied); *Murphy vs. Mulgrew*, 103 Cal. 547, 552, 41 Am. St. Rep. 200, 36 Pac. Rep. 857 (construed); *O'Kane vs. Whelan*, 124 Cal. 200, 203, 204, 71 Am. St. Rep. 42, 56 Pac. Rep. 880 (cited).

2. **CHATTEL MORTGAGE BY WIFE, FILED AND ENTERED, IS SUFFICIENT**, although it is merely entered in proper indexes, and is not required to be transcribed on to pages of book kept in the office of recorder, where such mortgage contains list of the property, in absence of provision that record of married woman's separate property shall appear in any particular form or book or instrument recorded in the office of recorder.—*Kelley vs. Jeffries*, 13 Mont. 170, 32 Pac. Rep. 753.

3. **DEED OF LAND TO WIFE DULY RECORDED IS SUFFICIENT** compliance with statute which provides that the provisions of the statute relative to separate property of married woman "shall extend only to such property as shall be mentioned in a list of such married woman on record in the office of the register of deeds for the county in which such married woman resides"; it not being required that she should make any specific claim in list to property therein mentioned.—*Montana Impr. Co. vs. Colter*, 7 Mont. 541, 19 Pac. Rep. 216. See *Griswold vs. Boley*, 1 Mont. 545, 556; *Herman vs. Jeffries*, 4 Mont. 513, 525, 1 Pac. Rep. 111.

4. **DELIVERY OF GOODS SOLD OR GIVEN TO WIFE NOT DISPENSED WITH** by filing inventory, and §3440, requiring delivery, must be complied with.—*Murphy vs. Mulgrew*, 103 Cal. 547, 552, 41 Am. St. Rep. 200, 36 Pac. Rep. 857 (sale); *O'Kane vs. Whelan*, 124 Cal. 200, 203, 204, 71 Am. St. Rep. 42, 56 Pac. Rep. 880 (gift).

See post § 3440 and note.

5. **DESCRIPTION OF PROPERTY.**—Is necessary, and an absence of any or all description would perhaps be ground for excluding the inventory.—*Palmer vs. Murray*, 8 Mont. 174, 19 Pac. Rep. 553.

6. **Imperfect description of property does not**

require exclusion of inventory, but in such case it is proper to admit it and let jury decide from the evidence, as the statute does not require a description of the property, but merely a list or inventory thereof.—*Palmer vs. Murray*, 8 Mont. 174, 19 Pac. Rep. 553.

As to admissibility of parol evidence to identify property, see post § 166 note par. 5.

7. **Reference to complaint may be made for description** where the court, title of cause, and date of filing the complaint are given.—*Palmer vs. Murray*, 8 Mont. 174, 19 Pac. Rep. 553. See *Palmer vs. Murray*, 6 Mont. 125, 9 Pac. Rep. 896.

8. **FILING INVENTORY IS NOT INDISPENSABLE** for protection of married woman's separate property against mere wrong-doer.—*Selover vs. American-Russian Com. Co.*, 7 Cal. 266, 271; *Morgan vs. Ball*, 81 Cal. 93, 96, 15 Am. St. Rep. 34, 22 Pac. Rep. 331, 5 L. R. A. 579. See *Palmer vs. Murray*, 6 Mont. 125, 9 Pac. Rep. 896.

9. **Acquisition of separate property not dependent upon inventory**, as wife's title is created by the constitution and vests before inventory can be filed.—*Selover vs. American-Russian Com. Co.*, 7 Cal. 266, 271.

As to constitutional origin of wife's separate property, see ante § 163 and note pars. 6-10.

10. **INCLUSION OF COMMUNITY PROPERTY IN INVENTORY IMMATERIAL**, and does not estop wife to avail herself of the inventory in so far as it pertains to her separate estate, even if the doctrine of estoppel applies to married women.—*Riley vs. Pehl*, 23 Cal. 70, 74.

11. **PURPOSE OF RECORDING INVENTORY** is notice.—*Herman vs. Jeffries*, 4 Mont. 513, 1 Pac. Rep. 11; *Montana Impr. Co. vs. Colter*, 7 Mont. 541, 19 Pac. Rep. 216.

As to effect of recording inventory, see post § 166 and note par. 2.

12. **RECORDATION AFTER ABANDONING RESIDENCE MAY BE IN ANY COUNTY** through which the wife passes on way to, and while seeking, a future residence, and recordation in every county in the state is proper precaution and is permissible.—*Herman vs. Jeffries*, 4 Mont. 513, 1 Pac. Rep. 11 (decided under a statute essentially similar).

13. **RENTS AND PROFITS OF SEPARATE PROPERTY NEED NOT BE INVENTORIED** while in specie, but when they are converted into property other than money, it is the wife's duty to record an inventory of the same.—*Lake vs. Bender*, 18 Nev. 361, 7 Pac. Rep. 74.

14. **SIGNATURE IN MAIDEN NAME IS SUFFICIENT** where the attempt to comply with the statute is made at or about time of marriage.—*Palmer vs. Murray*, 8 Mont. 174, 19 Pac. Rep. 553 (decided under statute essentially similar to our code provisions). See *Palmer vs. Murray*, 6 Mont. 125, 9 Pac. Rep. 896.

§ 166. **FILING INVENTORY NOTICE OF WIFE'S TITLE, ETC.** The filing of the inventory in the recorder's office is notice and prima facie evidence of the title of the wife.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amnts. 1873-4, p. 193.

1. Applied, cited, construed, referred to, etc.
2. Effect of filing inventory is to give notice.
3. Inventory is admissible in evidence.
- 4-6. Other evidence is admissible.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Shumway vs. Leakey*, 67 Cal. 458, 459, 3 Pac. Rep. 12 (referred to); *Morgan vs. Ball*, 81 Cal. 93, 95, 96, 15 Am. St. Rep. 34, 22 Pac. Rep. 331, 5 L. R. A. 579 (cited with §166); *Carter vs. McQuade*, 83 Cal. 274, 278, 23 Pac. Rep. 348 (cited); *O'Kane vs. Whelan*, 124 Cal. 200, 202, 71 Am. St. Rep. 42, 56 Pac. Rep. 880 (referred to).

2. **EFFECT OF FILING INVENTORY IS TO GIVE NOTICE** of title of wife.—*Selover vs. American-Russian Commercial Co.*, 7 Cal. 266, 272; *Carter vs. McQuade*, 83 Cal. 274, 278, 23 Pac. Rep. 348.

See ante §165 note par. 11.

3. **INVENTORY IS ADMISSIBLE IN EVIDENCE** in an action by a married woman to recover her separate property upon which an attachment against her husband has been levied.—*Shumway vs. Leakey*, 67 Cal. 458, 459, 3 Pac. Rep. 12.

4. **OTHER EVIDENCE IS ADMISSIBLE**, and non-compliance with §165 does not render invalid, as against creditors, a gift of chattels from husband to his wife where there have been such immediate delivery and actual and continuous change of possession as are required by §3440.—*Morgan vs. Ball*, 81 Cal. 93, 95, 15 Am. St. Rep. 34, 22 Pac. Rep. 331, 5 L. R. A. 579.

As to requisites and sufficiency of delivery and change of possession, see ante §158 and note pars. 36-40; post §3440 and note.

5. **Evidence allunde as to identity of property is admissible** where chattels seized by sheriff are of same general kind as those described in inventory.—*Shumway vs. Leakey*, 67 Cal. 458, 459, 3 Pac. Rep. 12.

6. **Inventory may be overcome by parol evidence**, as it only gives notice that property in question is ostensibly held in name of a married woman as her own property, and is not conclusive evidence of ownership.—*Kelley vs. Jeffers*, 13 Mont. 170, 22 Pac. Rep. 753. See *Yesler vs. Hochstettler*, 4 Wash. 349, 30 Pac. Rep. 398.

§ 167. **COMMUNITY PROPERTY, CONTRACTS BY WIFE.** The property of the community is not liable for the contracts of the wife, made after marriage, unless secured by a pledge or mortgage thereof executed by the husband.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 193.

I. In General.

- 1, 2. Applied, cited, construed, referred to, etc.
3. Debts—What are.
4. Payment of community debts after death of spouse.

II. Liability for Debts of Husband.

5. Antenuptial debts.
6. Postnuptial debts.
- 7, 8. Same—Community debts—Effect of divorce and assignment of community property to wife.
9. Same—Debt incurred for husband's separate estate.
10. Land partly separate and partly community property.

III. Liability for Wife's Debt.

- 11, 12. Antenuptial debts.
- 13, 14. Postnuptial debts.

I. IN GENERAL.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Bogart vs. Woodruff*, 36 Cal. 609, 611, 31 Pac. Rep. 618 (construed and applied); In re Estate of *Burdick*, 112 Cal. 387, 398, 44 Pac. Rep. 784 (construed); *Spreckels vs. Spreckels*, 116 Cal. 339, 342, 58 Am. St. Rep. 170, 48 Pac. Rep. 228, 36 L. R. A. 497 (referred to).

2. For cases applying, construing, and referring to section 167 of the original code, forbidding married women from making contracts, which was repealed by Act March 30, 1874, §38, see *Marlow vs. Barlew*, 53 Cal. 456, 459 (referred to); *Butler vs. Baber*, 54 Cal. 173, 179 (construed and applied); *Brickell vs. Batchelder*, 63 Cal. 623, 629 (applied).

As to capacity of married women to make contracts, see ante §158 and note.

3. **DEBTS—What are.**—See post §168 and note par. 2.

4. **PAYMENT OF COMMUNITY DEBTS AFTER DEATH OF SPOUSE OUT OF COMMUNITY PROPERTY.**—See Code Civ. Proc., §1643 and note.

II. LIABILITY FOR DEBTS OF HUSBAND.

5. **LIABILITY FOR DEBTS OF HUSBAND.**—Antenuptial debts of husband are not in terms made collectable out of community property, the statute being silent; yet such property is liable therefor (dictum).—*Van Maren vs. Johnson*, 15 Cal. 308, 311 (decided before the code was adopted, but under statutes essentially the same).—See *Packard vs. Arellanes*, 17 Cal. 525, 528.

6. **POSTNUPTIAL DEBTS OF HUSBAND** are collectable out of community property.—*McDonald vs. Badger*, 23 Cal. 393, 398, 83 Am. Dec. 123 (decided before adoption of code, but under statutes essentially similar); *Schuyler vs. Broughton*, 70 Cal. 282, 283, 11 Pac. Rep. 719. See *Adams vs. Knowlton*, 22 Cal. 282, 288; *Tibbetts vs. Fore*, 70 Cal. 242, 245, 11 Pac. Rep. 648; *Spreckels vs. Spreckels*, 116 Cal. 339, 343, 58 Am. St. Rep. 170, 48 Pac. Rep. 228, 36 L. R. A. 497.

7. **Community debts incurred by husband for the benefit of community** are collectable out of community property.—*Frankel vs. Boyd*, 106 Cal. 603, 609-614, 39 Pac. Rep. 929. See *Meyer vs. Kinser*, 13 Cal. 247, 253, 73 Am. Dec. 538.

8. **Same—After divorce and assignment of community property to wife**, under §146, the community property remains liable for such community debts incurred by the husband.—*Frankel vs. Boyd*, 106 Cal. 603, 614, 39 Pac. Rep. 929.

9. Same.—Debts incurred by husband in management of separate estate are debts for which community property is liable (dictum).—Spreckels vs. Spreckels, 116 Cal. 339, 343, 53 Am. St. Rep. 170, 43 Pac. Rep. 228, 36 L. R. A. 497.

10. LAND IN PART SEPARATE PROPERTY OF WIFE AND IN PART COMMUNITY PROPERTY, the land having been purchased with wife's separate funds and with community funds, is subject to execution upon judgment against husband to the extent that the land is community property and, under § 700 Code Civil Procedure, the purchaser at execution sale becomes substituted to and acquires whatever interest husband had in the land so as to entitle him to sheriff's deed.—Schuyler vs. Broughton, 70 Cal. 282, 285, 286, 11 Pac. Rep. 719.

See Code Civ. Proc. § 700 and note.

III. LIABILITY FOR WIFE'S DEBTS.

11. ANTENUPTIAL DEBTS OF WIFE are enforceable out of community property.—Van

Maren vs. Johnson, 15 Cal. 303, 311, 312; Vlautin vs. Bumpus, 35 Cal. 214, 215. See Packard vs. Arellanes, 17 Cal. 525, 537, 538; Bogart vs. Woodruff, 96 Cal. 609, 611, 31 Pac. Rep. 613.

12. Compare—Contracts made by wife before marriage are not declared not to be a charge upon community property (dictum).—In re Estate of Burdick, 112 Cal. 387, 398, 44 Pac. Rep. 734.

13. POSTNUPTIAL DEBTS OF WIFE are not enforceable against community property.—Schuyler vs. Broughton, 70 Cal. 282, 285, 11 Pac. Rep. 719; In re Estate of Burdick, 112 Cal. 387, 398, 44 Pac. Rep. 734; Svetinich vs. Sheean, 124 Cal. 216, 218, 71 Am. St. Rep. 50, 56 Pac. Rep. 1028. See Bogart vs. Woodruff, 96 Cal. 609, 611, 31 Pac. Rep. 613.

14. PURCHASER AT EXECUTION SALE WITH NOTICE TAKES NO TITLE where he is notified at time of sale that husband claims the land as community property, even though title stands in name of husband and wife.—Svetinich vs. Sheean, 124 Cal. 216, 218, 71 Am. St. Rep. 50, 56 Pac. Rep. 1028.

§ 168. EARNINGS OF WIFE NOT LIABLE FOR DEBTS OF HUSBAND.

The earnings of the wife are not liable for the debts of the husband.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. "Debts"—What are.
3. Earnings of wife, not as sole trader, exempt from husband's debt.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Marlow vs. Barlew, 53 Cal. 456, 459 (referred to); Finnigan vs. Hibernia Sav. & L. Soc., 63 Cal. 390, 391 (applied); Smith vs. Furnish, 70 Cal. 424, 426, 12 Pac. Rep. 392 (referred to); Spreckels vs. Spreckels, 116 Cal. 339, 342, 53 Am. St. Rep. 170, 43 Pac. Rep. 228, 36 L. R. A. 497 (referred to); Melvin vs. State, 121 Cal. 16, 25, 53 Pac. Rep. 416 (referred to in construing "debt").

2. "DEBTS" CONSTRUED TO MEAN not simply contracts for sums of money due by

certain and express agreement which fixes amount due independent of extrinsic circumstances,—from such contracts as would have supported an action for debt at common law,—but rather obligations to pay money and "what either of the spouses owes."—Melvin vs. State, 121 Cal. 16, 25, 53 Pac. Rep. 416.

3. EARNINGS OF WIFE, ALTHOUGH NOT SOLE TRADER, in renting rooms and conducting saloon business, cannot be taken for debts of her husband.—Finnigan vs. Hibernia Sav. & L. Soc., 63 Cal. 390, 391.

As to sole traders, see Code Civ. Proc. §§ 1811-1821 and notes.

As to earnings of wife being separate or community property, see ante § 164, para. 162-164.

§ 169. EARNINGS OF WIFE, WHEN LIVING SEPARATE, SEPARATE PROPERTY. The [1] earnings and accumulations of the wife, and [2] of her minor children living with her or in her custody, while she is living separate from her husband, are the separate property of the wife.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Communications between husband and wife immaterial.
3. Land purchased by wife not presumptively earnings.
4. Profits of joint enterprise of husband and wife.
5. Separation essential to application of statute.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Marlow vs. Barlew, 53 Cal. 456, 459 (referred to); Smith vs. Furnish, 70 Cal. 424, 426, 12 Pac. Rep. 392 (referred to in construing § 164); McComb vs. Spangler, 71 C. C.—16

Cal. 413, 426, 12 Pac. Rep. 347 (referred to); Loring vs. Stuart, 79 Cal. 200, 202, 21 Pac. Rep. 651 (construed and applied); McFadden vs. Santa Ana O. & T. St. R. Co., 37 Cal. 464, 468, 25 Pac. Rep. 681, 11 L. R. A. 252 (referred to with other sections); Neale vs. Depot R. Co., 94 Cal. 425, 429, 29 Pac. Rep. 954 (referred to with other sections); Spreckels vs. Spreckels, 116 Cal. 339, 342, 53 Am. St. Rep. 170, 43 Pac. Rep. 228, 36 L. R. A. 497 (referred to).

2. COMMUNICATIONS BETWEEN HUSBAND AND WIFE DURING SEPARATION IMMATERIAL; e. g. the statute is applicable

where it appears that wife was abandoned by husband because of domestic infelicity, without an intention on his part to resume marital relations, and that such abandonment had continued nearly two years, during which time she worked for the support of her children without being visited by him, although she received several letters from him, and small sums of money were sent to the children.—*Loring vs. Stuart*, 79 Cal. 200-202, 21 Pac. Rep. 661.

2. LAND ACQUIRED BY WIFE BY PURCHASE DURING COVERTURE is presumptively community property and does not constitute "earnings and accumulations of the

wife."—*McComb vs. Spangler*, 71 Cal. 418, 426, 12 Pac. Rep. 347.

See ante § 164 and note pars. 36-107.

4. PROFITS OF JOINT ENTERPRISE OF HUSBAND AND WIFE—See ante § 164 and note par. 165.

5. SEPARATION ESSENTIAL TO APPLICATION OF STATUTE, and earnings of wife while living with her husband are not her separate property, but constitute community property.—*Fennell vs. Drinkhouse*, 131 Cal. 447, 461, 32 Am. St. Rep. 361, 63 Pac. Rep. 734.

As to character of wife's earnings while living with husband, see ante § 164 pars. 162-164.

§ 170. LIABILITY FOR DEBTS OF WIFE CONTRACTED BEFORE MARRIAGE. The separate property of the husband is not liable for the debts of the wife contracted before the marriage.

History: Enacted March 21, 1872; amended by Code Commissioners, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 193; held unconstitutional, see history, § 4, ante.

L. In General.

1. Applied, cited, construed, referred to, etc.
2. "Debts"—What are.

II. Exemption of Husband's Separate Property from Wife's Debt.

3. Debts of wife not collectable.
4. Judgment against husband not recoverable.

- 5, 6. Levy of execution on husband's property—Purchaser takes no title.

III. Liability of Husband's Separate Property for His Debts.

7. Husband's debts collectable.
8. Same—Community debts.

IV. Wife's Torts.

9. Husband is liable for.

I. IN GENERAL.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Marlow vs. Barlew*, 53 Cal. 456, 460 (referred to); *Schuyler vs. Broughton*, 70 Cal. 282, 285, 11 Pac. Rep. 719 (cited erroneously for § 167); *McComb vs. Spangler*, 71 Cal. 418, 422, 12 Pac. Rep. 347 (cited erroneously for § 172); *Melvin vs. State*, 121 Cal. 16, 25, 53 Pac. Rep. 416 (referred to with other sections); *Henley vs. Wilson*, 137 Cal. 273, 276, 70 Pac. Rep. 21, 58 L. R. A. 941 (erroneously reciting provision of § 170).

2. "DEBTS"—What are.—See ante § 163 and note par. 2.

II. EXEMPTION OF HUSBAND'S SEPARATE PROPERTY FROM WIFE'S DEBTS.

3. DEBTS OF WIFE ARE NOT COLLECTABLE out of separate property of husband, whether they are antenuptial or postnuptial debts.—*Van Maren vs. Johnson*, 15 Cal. 308, 312 (antenuptial; decided under Act April 17, 1850, § 13); *Svetinich vs. Sheean*, 124 Cal. 216, 218, 71 Am. St. Rep. 50, 56 Pac. Rep. 1028 (postnuptial). See *Wood vs. Orford*, 52 Cal. 412, 414 (antenuptial); *Marlow vs. Barlew*, 53 Cal. 456, 560 (antenuptial).

4. JUDGMENT AGAINST HUSBAND NOT RECOVERABLE in an action on the wife's

antenuptial contract in which husband and wife are joined as defendants.—*Wood vs. Orford*, 52 Cal. 412, 414.

5. EXECUTION AGAINST WIFE NOT LEVIABLE upon separate property of husband.—*Svetinich vs. Sheean*, 124 Cal. 216, 218, 71 Am. St. Rep. 50, 56 Pac. Rep. 1028.

6. Purchaser at execution sale with notice takes no title as against husband, even though record shows a deed to husband and wife jointly, where notice was given at time of sale that the property was claimed by husband, and it is immaterial that such notice stated that it was claimed by him as community property, for, whether the property was community property or separate property of husband, it was not subject to execution and sale under an execution against wife individually.—*Svetinich vs. Sheean*, 124 Cal. 218, 71 Am. St. Rep. 50, 56 Pac. Rep. 1028.

III. LIABILITY OF HUSBAND'S SEPARATE PROPERTY FOR HIS DEBTS.

7. HUSBAND'S DEBTS COLLECTABLE OUT OF HIS SEPARATE PROPERTY, and wife's possession of husband's chattels is immaterial and does not render the property any the less liable for his debts.—*Thomas vs. Desmond*, 63 Cal. 426, 428.

8. Community debts are enforceable against his separate property; e. g. obligations incurred by him in a business the proceeds of which would be community property. If the community loses, the loss may fall upon husband's separate estate, but his separate estate cannot profit by success of the community (dictum).—*Spreckels vs. Spreckels*, 116 Cal. 339, 343, 58 Am. St. Rep. 170, 48 Pac. Rep. 223, 36 L. R. A. 497.

IV. WIFE'S TORTS.

9. WIFE'S TORTS—HUSBAND IS LIABLE FOR, and a judgment can be rendered against him therefor.—*Henley vs. Wilson*, 137 Cal. 273, 274-277, 70 Pac. Rep. 21, 58 L. R. A. 941.

See monographic note, 30 L. R. A. 521-530.

§ 171. WIFE'S PROPERTY NOT LIABLE FOR DEBTS OF THE HUSBAND, BUT LIABLE FOR HER OWN DEBTS. The separate property of the wife is liable for her own debts contracted before or after her marriage, but is not liable for her husband's debts; provided, that such property is liable for the payment of debts contracted by the husband or wife for the necessities of life furnished to them or either of them while they are living together. Provided, that the provisions of this act shall not apply to the separate property of the wife held by her at the time of her marriage or acquired by her by devise or succession after marriage.

History: Enacted March 21, 1872; amended March 18, 1905, Stats. and Amdts. 1905, ch. CCXVII, p. 206.

I. In General.

1. Applied, cited, construed, referred to, etc.
2. "Debts"—What are.

II. Exemption of Wife's Separate Property from Husband's Debts.

3. Debts of husband not collectable.
4. Same—Commingleing wife's funds with husband's immaterial.
5. Same—Attachment against husband.
6. Same—Execution against husband.
7. Same—Set-off of claim against husband not permissible.

III. Wife's Remedies When Her Property Taken for Husband's Debts.

8. Action for damages his.
9. Cloud on title will be removed.
- 10-12. Injunction allowable against sale.
- 13, 14. Trover maintainable by wife—Bailee liable.

IV. Liability of Wife's Separate Property for Her Debts.

15. Debts of wife are collectable.
16. Costs in action concerning separate property.
17. Deficiency judgment on mortgage foreclosure.
18. Form of judgment—Provision as to going against separate property.

I. IN GENERAL.

1. APPLIED, CITED, CONTRUED, REFERRED TO, etc., in: Marlow vs. Barlew, 53 Cal. 456, 460, 461 (applied); Butler vs. Baber, 54 Cal. 178 (construed and held inapplicable); Melvin vs. State, 121 Cal. 16, 25, 53 Pac. Rep. 416 (referred to and "debts" construed).

2. "DEBTS"—What are.—See ante § 168 and note par. 2.

II. EXEMPTION OF WIFE'S SEPARATE PROPERTY FROM HUSBAND'S DEBTS.

3. DEBTS OF HUSBAND NOT COLLECTABLE out of wife's separate property.—Alverson vs. Jones, 10 Cal. 9, 11, 12, 70 Am. Dec. 689; Dickinson vs. Owen, 11 Cal. 71, 76; George vs. Ransom, 15 Cal. 322, 323, 76 Am. Dec. 490; Spear vs. Ward, 20 Cal. 659, 674; Lewis vs. Johns, 24 Cal. 98, 102, 85 Am. Dec. 49; Peck vs. Brummagin, 31 Cal. 440, 449, 39 Am. Dec. 195; Shumway vs. Leakey, 67 Cal. 458, 459, 8 Pac. Rep. 12; Tibbetts vs. Fore, 70 Cal. 242, 245, 11 Pac. Rep. 648; Carter vs. McQuade, 83 Cal. 274, 278, 23 Pac. Rep. 348; Goldman vs. Rogers, 85 Cal. 574, 579, 24 Pac. Rep. 782; Mortimer vs. Marder, 93 Cal. 172, 176, 28 Pac. Rep. 814;

Wetherly vs. Straus, 93 Cal. 283, 286, 28 Pac. Rep. 1045; Siddall vs. Haight, 132 Cal. 320, 321, 64 Pac. Rep. 410. See Linnell vs. Battey, 17 R. I. 241, 21 Atl. Rep. 606; Farr vs. Swigart, 13 Utah 150, 44 Pac. Rep. 711; Elliot vs. Hawley (Wash. Apr. 6, 1904), 76 Pac. Rep. 93.

As to rents, issues, profits, etc., of separate property, see ante § 162 and note par. 9.

4. Commingleing wife's funds with husband's and investment thereof in property does not render wife's interest in such property liable for her husband's debts, where the amount invested by each was a definite sum, each sum yielded its definite increase, and whole of each has at all times been easily ascertainable.—Elliot vs. Hawley (Wash., Apr. 6, 1904), 76 Pac. Rep. 93.

5. Attachment against husband will not reach wife's separate property.—Mortimer vs. Marder, 93 Cal. 172, 176, 28 Pac. Rep. 814; Wetherly vs. Straus, 93 Cal. 283, 286, 28 Pac. Rep. 1045. See Shumway vs. Leakey, 67 Cal. 458, 459, 8 Pac. Rep. 12.

6. Execution against husband not leviable on wife's separate property.—Tibbetts vs. Fore, 70 Cal. 242, 245, 11 Pac. Rep. 648; Carter vs. McQuade, 83 Cal. 274, 278, 23 Pac. Rep. 348; Goldman vs. Rogers, 85 Cal. 574, 579, 24 Pac. Rep. 782; Siddall vs. Haight, 132 Cal. 320, 321, 64 Pac. Rep. 410. See Linnell vs. Battey, 17 R. I. 241, 21 Atl. Rep. 606; Farr vs. Swigart, 13 Utah 150, 44 Pac. Rep. 711.

7. Set-off of claim against husband is not permissible by one who holds money which is separate property of wife, and to whom husband is indebted.—Dickinson vs. Owen, 11 Cal. 71, 76.

III. WIFE'S REMEDIES WHEN HER PROPERTY TAKEN FOR HUSBAND'S DEBTS.

8. ACTION FOR DAMAGES MAINTAINABLE by wife for wrongful seizure of her property under an attachment against her husband.—Mortimer vs. Marder, 93 Cal. 172, 176, 28 Pac. Rep. 814.

See par. 13 this note.

9. CLOUD ON TITLE WILL BE REMOVED and judgment quieting her title will be rendered, where the wife's land is sold under execution against her husband and purchaser sues her to recover possession.—Goldman vs. Rogers, 85 Cal. 574, 579, 24 Pac. Rep. 782.

10. INJUNCTION AGAINST SALE UNDER EXECUTION AGAINST HUSBAND WILL LIE, because such sale would be a cloud upon her

title.—*Alverson vs. Jones*, 10 Cal. 9, 11, 12, 70 Am. Dec. 689; *Tibbetts vs. Fore*, 70 Cal. 242, 245, 11 Pac. Rep. 648. See *Englund vs. Lewis*, 25 Cal. 337, 357; *Linnell vs. Battey*, 17 R. I. 241, 21 Atl. Rep. 606.

11. Compare: *Roman Catholic Archbishop of San Francisco vs. Shipman*, 69 Cal. 586, 588, 593, 11 Pac. Rep. 343.

12. Where property was purchased by wife with separate funds during coverture, the sale thereof under an execution against husband will be enjoined, because in an action of ejectment by her she would have burden of proof to show that premises were purchased with her separate funds, as record of her title would not be conclusive that property was her separate property.—*Tibbetts vs. Fore*, 70 Cal. 242, 245, 11 Pac. Rep. 648. See *Linnell vs. Battey*, 17 R. I. 241, 243, 21 Atl. Rep. 606 (injunction to prevent cloud on title).

13. TROVER MAY BE BROUGHT BY WIFE where her separate property is wrongfully taken on an execution or attachment against her husband.—*Carter vs. McQuade*, 33 Cal. 274, 278, 23 Pac. Rep. 343 (execution); *Wetherly vs. Straus*, 93 Cal. 283, 286, 28 Pac. Rep. 1045 (attachment). See *Farr vs. Swigart*, 13 Utah 150, 44 Pac. Rep. 711 (execution).

See par. 8 this section.

14. Bailee of wife is liable for conversion when his only justification for failure to deliver up property of wife is that it was taken on attachment against husband, unless he has given the notice required by §§ 1822, 1825 post.—*Wetherly vs. Straus*, 93 Cal. 283, 286, 28 Pac. Rep. 1045.

As to duty of depository to give notice of adverse proceedings, see post §§ 1822, 1825 and notes.

IV. LIABILITY OF WIFE'S SEPARATE PROPERTY FOR HER DEBTS.

15. DEBTS OF WIFE ARE COLLECTABLE out of her separate property, whether such debts were contracted before or after marriage.—*Van Maren vs. Johnson*, 15 Cal. 308,

312 (antenuptial; decided under Act April 17, 1850, § 13); *Miller vs. Newton*, 23 Cal. 554, 568 (antenuptial; decided under Act April 17, 1850, § 13); *Marlow vs. Barlew*, 53 Cal. 456, 460 (postnuptial; dictum as to antenuptial); *Alexander vs. Bouton*, 55 Cal. 15, 20 (postnuptial); *Goad vs. Moulton*, 67 Cal. 536, 540, 8 Pac. Rep. 63 (postnuptial); *Schuyler vs. Broughton*, 70 Cal. 282, 285, 11 Pac. Rep. 719 (postnuptial); *Defendorf vs. Hopkins*, 95 Cal. 343, 349, 28 Pac. Rep. 265, 30 Id. 549 (postnuptial); *Bogart vs. Woodruff*, 96 Cal. 609, 611, 31 Pac. Rep. 618 (antenuptial; dictum as to postnuptial). See *Leonard vs. Townsend*, 26 Cal. 435, 445-447 (postnuptial).

As to liability when wife's separate property is put into business of husband and wife, see ante § 158 and note.

As to liability of wife's separate property in equity under Act 1850, see ante § 158 and note.

16. Costs are a charge upon wife's separate property, when judgment is rendered against her therefor in an action brought by her as sole plaintiff concerning her separate property, and an execution upon judgment therefor may run against her in the usual form as if she were feme sole.—*Leonard vs. Townsend*, 26 Cal. 435, 445-447 (decided under Act April 17, 1850). See *Moncrief vs. Ward*, cited in a note to *Baldwin vs. Kimmel*, 16 Abb. Pr. (N. Y.) 353, 364.

17. DEFICIENCY JUDGMENT ON FORECLOSURE OF MORTGAGE executed by married woman to secure her note, may be rendered and is a charge upon her separate property.—*Marlow vs. Barlew*, 53 Cal. 456, 461.

See ante § 162, pars. 90, 91; also Code Civ. Proc., §§ 726, 1578 and notes.

18. Judgment should provide for enforcement out of wife's separate estate where such judgment is rendered in an action brought during coverture on an antenuptial contract of wife or in an action on judgment so recovered on the note (dictum).—*Bogart vs. Woodruff*, 96 Cal. 609, 612, 31 Pac. Rep. 618.

See Code Civ. Proc., § 726 and note.

§ 172. MANAGEMENT, CONTROL, AND DISPOSITION OF COMMUNITY PROPERTY. The husband has the management and control of the community property, with the like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he cannot make a gift of such community property, or convey the same without a valuable consideration, unless the wife, in writing, consent thereto; and provided also, that no sale, conveyance or encumbrance of the furniture, furnishings and fittings of the home, or of the clothing and wearing apparel of the wife or minor children, which is community property shall be made without the written consent of the wife.

History: Enacted March 21, 1872; amended March 31, 1891, Stats. and Amdts. 1891, p. 425; March 23, 1901, Stats. and Amdts. 1900-1, p. 598.

I. In General.

1. Applied, cited, construed, referred to, etc.
2. Contracts between husband and wife concerning.
3. Descent and distribution of community property.

4. Divorce—Disposition of community property upon.

II. Title, Estate, and Possession of Spouses.

5. Husband has ownership and title.
6. Same—Definition of ownership.
7. Same—Deed taken in name of wife.

8. Same—Larceny—Ownership laid in husband.
9. Same—"Reputed owner" is husband.
10. Same—Taxation must be in husband's name.
11. Same—Same—Purchase at tax sale.
12. Possession—Husband has right of.
13. Wife's estate—Defined by law.
- 14, 15. Same—Equivalent to that of husband.
- 16-18. Same—Expectancy or mere contingent estate.
19. Same—"Freeholder owning land"—Wife is not.
20. Same—In specific property.
21. Same—Powers of owner are wanting.
22. Same—Rights not affected by divorce.
23. Same—Same—Court other than divorce court may decree division.
24. Same—Title of community is adverse to wife.

III. Management and Control of Community Property.

25. Husband has management and control.
26. Same—Community and husband's separate property not distinguished.
27. Same—Death of wife terminates husband's powers.
28. Same—Divorce suit pending immaterial.
29. Same—Property purchased with earnings.
30. Same—Transmutation of property immaterial.
31. Rights of action are in husband.
32. Same—Money is receivable by husband.
33. Same—Earnings of wife.
- 34, 35. Same—Personal injuries to wife.
- 36, 37. Same—Presentation of claim against decedent's estate.
38. Same—Trove maintained by husband.
39. Sole trader—Wife as, may invest community property in business.
40. Wife has not management and control.

IV. Disposition by Deed, Gift, etc.

41. Husband's power to dispose of community property.
42. Same—Object of giving husband power of disposal.
43. Same—Community and separate property of husband not distinguishable.
44. Same—Divorce suit pending immaterial.
45. Same—Fraud on wife—Not permitted.
46. Same—Same—Advancement to child.
- 47, 48. Same—Same—Fraudulent intent.
49. Same—Same—Gift of portion of community.
50. Same—Same—Heirs of husband are bound.
51. Same—Same—Inconsiderable portion may be conveyed.
52. Same—Same—Remedies of wife—At law.
53. Same—Same—Same—After divorce.
- 54, 55. Same—Same—Same—Injunction.
- 56-58. Same—Same—Same—Rescission.
59. Same—Gift to wife.
60. Same—Same—Homestead—Conveyance to wife after divorce.
61. Same—Same—Mode of transfer.
62. Same—Mortgage by husband is valid.
63. Same—Pledge is valid.
64. Same—Property in part wife's separate property.

- 65-69. Same—Record title in husband or wife—Caveat emptor.
70. Same—Signature of wife is unnecessary.
71. Same—Transmutation of property.
72. Transfer without consideration—Consent of wife unnecessary.
73. Same—Statute not retroactive.
74. Wife has no power to dispose of community property.
75. Same—Assignment of mortgage.
76. Same—Deed of wife not void.
- 77, 78. Same—Desertion of wife by husband.
79. Same—Estoppel of husband to attack wife's deed.
80. Same—Larceny—Wife cannot consent to.
- 81, 82. Same—Mortgage by wife invalid.
- 83-85. Same—Record title in wife—Caveat emptor—Remedy of husband.

I. IN GENERAL.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Greiner vs. Greiner, 53 Cal. 115, 120 (construed and applied); Tibbetts vs. Fore, 70 Cal. 242, 245, 11 Pac. Rep. 648 (construed and applied); In re Gilmore, 81 Cal. 240, 242, 22 Pac. Rep. 655 (construed and applied); Alexander vs. Jackson (Cal. Dec. 23, 1890), 25 Pac. Rep. 415, 416 (construed and applied); McFadden vs. Santa Ana O. & T. R. Co., 87 Cal. 464, 468, 25 Pac. Rep. 681, 11 L. R. A. 252 (referred to in discussion); In re Burdick, 112 Cal. 337, 397, 44 Pac. Rep. 734 (construed and applied); Spreckels vs. Spreckels, 116 Cal. 339, 342, 344, 345, 350, 58 Am. St. Rep. 170, 48 Pac. Rep. 228, 36 L. R. A. 497 (construed and applied); Greer vs. Greer, 135 Cal. 121, 125, 67 Pac. Rep. 20 (referred to in discussion); Wagoner vs. Silva, 139 Cal. 559, 563, 73 Pac. Rep. 433 (construed); Greer vs. Greer, 142 Cal. 519, 523, 77 Pac. Rep. 1108 (construed).

2. CONTRACT BETWEEN HUSBAND AND WIFE CONCERNING.—See ante § 159 and note para. 15-22.

As to division of community property by contract of separation, see ante § 159 and note.

3. DESCENT AND DISTRIBUTION OF COMMUNITY PROPERTY.—See post §§ 1401, 1402 and note.

4. DIVORCE—Disposition of community property upon.—See ante §§ 146-148 and notes.

II. TITLE, ESTATE, AND POSSESSION OF SPOUSE.

5. HUSBAND HAS OWNERSHIP AND TITLE, as respects community property, and wife has no classifiable estate therein.—Tryon vs. Sutton, 13 Cal. 490, 493; People vs. Swalm, 80 Cal. 46, 47-49, 18 Am. St. Rep. 96, 23 Pac. Rep. 67; Gwynn vs. Dierssen, 101 Cal. 563, 565, 566, 36 Pac. Rep. 103; Santa Cruz Rock Pav. Co. vs. Lyons (Cal. Jan. 31, 1896), 48 Pac. Rep. 599; In re Estate of Burdick, 112 Cal. 387, 392, 44 Pac. Rep. 734; Spreckels vs. Spreckels, 116 Cal. 339, 341, 58 Am. St. Rep. 170, 48 Pac. Rep. 228, 36 L. R. A. 497; Peiser vs. Griffin, 135 Cal. 9, 12, 57 Pac. Rep. 690.

As to nature of wife's interest, see para. 13-24 this note.

6. "Definition of ownership is, in accordance with § 654, 'the right of one or more per-

sons to possess and use it [property] to the exclusion of others."—*Spreckels vs. Spreckels*, 116 Cal. 339, 341, 58 Am. St. Rep. 170, 48 Pac. Rep. 228, 36 L. R. A. 497.

See post § 654 and note.

7. Deed taken in name of wife, nevertheless legal title is in husband and not in her.—*Tryon vs. Sutton*, 13 Cal. 490, 493; *Peiser vs. Griffin*, 125 Cal. 9, 12, 57 Pac. Rep. 690.

8. Larceny—Ownership may be laid in husband on prosecution for larceny of community property.—*People vs. Swalm*, 80 Cal. 46, 47-49, 13 Am. St. Rep. 96, 22 Pac. Rep. 67.

9. "Reputed owner" is husband, and where land is conveyed to wife, and he, representing that property is community property, signs with other landowners contract for street improvement, case is within Code Civ. Proc., § 119, as amended by Act 1885, § 6, and Act 1887, which gives lien for street work when it is done at the request of the "reputed owner."—*Santa Cruz Rock Pav. Co. vs. Lyons* (Cal. Jan. 31, 1896), 43 Pac. Rep. 599.

10. Taxation must be in husband's name, and an assessment in name of wife, and tax sale under decree against her, are void as to husband.—*Gwynn vs. Dierssen*, 101 Cal. 563, 565, 566, 36 Pac. Rep. 103.

11. Same—Purchaser at tax sale, the land having been assessed in name of wife, is within doctrine of caveat emptor, even though the record title is in wife, the land having been conveyed to her during coverture, and he acquires no title, if in fact the land is community property.—*Gwynn vs. Dierssen*, 101 Cal. 563, 565, 36 Pac. Rep. 103.

12. POSSESSION—Husband has right of, and the law regards the possession as being in husband, even though the property is in custody or under the manual control of wife.—*People vs. Swalm*, 80 Cal. 46, 49, 13 Am. St. Rep. 96, 22 Pac. Rep. 67; *Fennell vs. Drinkhouse*, 131 Cal. 447, 451, 82 Am. St. Rep. 361, 63 Pac. Rep. 734.

13. WIFE'S ESTATE—Defined by law, and is neither more nor less than what the statute makes it.—In re Estate of *Burdick*, 112 Cal. 387, 393, 44 Pac. Rep. 734.

14. Equivalent to that of husband, even during the marriage, and is as well defined and ascertained as is right of husband, as the property "belongs to the matrimonial community."—*De Godey vs. Godey*, 39 Cal. 157, 164.

15. Compare: *Spreckels vs. Spreckels*, 116 Cal. 339, 343, 344, 347, 58 Am. St. Rep. 170, 48 Pac. Rep. 228, 36 L. R. A. 497 (declaring that the wife has no element of ownership whatever; that right of wife is to take one half of the residue after payment of debts in case marriage be dissolved during the wife's life; and that such right is "not to property, but as against the community").

16. Expectancy or mere contingent estate is all that wife has during existence of the community, and it is an estate which never becomes absolute until she ceases to be wife by reason of dissolution of the marriage otherwise than by her own death.—*Van Maren vs. Johnson*, 15 Cal. 308, 311; *Packard vs. Arellanes*, 17 Cal. 525, 538; *De Godey vs. Godey*,

39 Cal. 157, 164; *Greiner vs. Greiner*, 58 Cal. 115, 119; *McComb vs. Spangler*, 71 Cal. 418, 422, 423, 12 Pac. Rep. 347; *People vs. Swalm*, 80 Cal. 46, 49, 13 Am. St. Rep. 96, 22 Pac. Rep. 67; In re Estate of *Burdick*, 112 Cal. 387, 393, 44 Pac. Rep. 734; *Spreckels vs. Spreckels*, 116 Cal. 339, 346, 347, 58 Am. St. Rep. 170, 48 Pac. Rep. 228, 36 L. R. A. 497.

17. Compare: *Directors Fallbrook Irr. Dist. vs. Abila*, 106 Cal. 355, 362, 39 Pac. Rep. 793 (declaring that wife's interest is, no doubt, more tangible than the mere expectancy of a general heir).

18. SAME—SAME—NOT CLASSIFIABLE AS ANY SPECIES OF ESTATE known to the law, her estate being a mere possible interest in whatever remains upon dissolution of the community, otherwise than by her own death.—In re Estate of *Burdick*, 112 Cal. 387, 393, 44 Pac. Rep. 734.

19. "Freeholder owning land"—Wife is not, because of existence of community property, within a statute making such owners qualified signers of a petition, as her interest is a mere contingency and the ownership is in her husband.—*Directors Fallbrook Irr. Dist. vs. Abila*, 106 Cal. 355, 361, 362, 39 Pac. Rep. 793.

20. Same—In specific property, the wife has no right or title of any kind.—In re Estate of *Burdick*, 112 Cal. 387, 392, 44 Pac. Rep. 734.

21. Same—Powers of owner are not incidental to the peculiar relations which a married woman bears to community property during the existence of the coverture; e. g. "she cannot control or sell or mortgage or pledge it," "and therefore she cannot be properly said to own it in any legal sense, or in any other sense."—*Directors Fallbrook Irr. Dist. vs. Abila*, 106 Cal. 355, 362, 39 Pac. Rep. 793.

22. Same—Rights of wife not affected by divorce if the decree makes no disposition of the community property, even though the decree be granted because of her adultery.—*De Godey vs. Godey*, 39 Cal. 157, 164.

23. Same—Same—Court other than divorce court may decree division of community property between the parties, where the decree for divorce was silent as to the disposition of such property.—*De Godey vs. Godey*, 39 Cal. 157, 163.

As to disposition of community property upon divorce, see ante §§ 146-148 and notes.

24. Same—Title of community is adverse and paramount to a claim of separate property asserted or pretended in the wife.—*McComb vs. Spangler*, 71 Cal. 418, 422, 12 Pac. Rep. 347.

III. MANAGEMENT AND CONTROL OF COMMUNITY PROPERTY.

25. HUSBAND HAS MANAGEMENT AND CONTROL of community property, free from any restraint of his wife or duty to defer to her wishes; he is vested with discretionary power in all matters pertaining to community business or property; and his authority in administration of affairs of community is exclusive and absolute.—*Panaud vs. Jones*, 1 Cal. 488, 513; *Smith vs. Smith*, 12 Cal. 216, 217, 225, 73 Am. Dec. 533; *Meyer vs. Kinzer*, 13 Cal. 247,

255, 73 Am. Dec. 538; Pixley vs. Huggins, 15 Cal. 127, 131; Van Maren vs. Johnson, 15 Cal. 308, 311; Packard vs. Arellanes, 17 Cal. 525, 533; Ord vs. De La Guerra, 18 Cal. 67, 74; Tustin vs. Faught, 23 Cal. 237, 241; McDonald vs. Badger, 23 Cal. 393, 398, 83 Am. Dec. 123; Landers vs. Bolton, 26 Cal. 393, 420; Fuller vs. Ferguson, 28 Cal. 546, 567; Bernal vs. Gleim, 33 Cal. 663, 675; Althof vs. Conheim, 38 Cal. 230, 233, 99 Am. Dec. 363; De Godey vs. Godey, 39 Cal. 157, 164; Lord vs. Hough, 43 Cal. 581, 585; Greiner vs. Greiner, 58 Cal. 115, 119; Moseley vs. Heney, 66 Cal. 478, 480, 6 Pac. Rep. 134; Tibbetts vs. Fore, 70 Cal. 242, 245, 11 Pac. Rep. 648; Smith vs. Furnish, 70 Cal. 424, 427, 12 Pac. Rep. 392; McComb vs. Spangler, 71 Cal. 418, 422, 12 Pac. Rep. 347; In re Estate of Stewart, 74 Cal. 98, 103, 15 Pac. Rep. 445; Tolman vs. Smith, 85 Cal. 280, 283, 24 Pac. Rep. 743; Alexander vs. Jackson (Cal. Dec. 23, 1890), 25 Pac. Rep. 415, 416; McFadden vs. Santa Ana O. & T. St. R. Co. 87 Cal. 464, 468, 25 Pac. Rep. 681, 11 L. R. A. 252; Neale vs. Depot R. Co., 94 Cal. 425, 429, 29 Pac. Rep. 954; Perry vs. Ross, 104 Cal. 15, 18, 43 Am. St. Rep. 66, 36 Pac. Rep. 757; Lamb vs. Harbaugh, 105 Cal. 680, 691, 39 Pac. Rep. 56; Directors Fallbrook Irr. Dist. vs. Abila, 106 Cal. 355, 362, 39 Pac. Rep. 793; In re Estate of Burdick, 112 Cal. 387, 392, 44 Pac. Rep. 734; Spreckels vs. Spreckels, 116 Cal. 339, 349, 58 Am. St. Rep. 170, 48 Pac. Rep. 228, 36 L. R. A. 497; Sun Ins. Co. vs. White, 123 Cal. 196, 200, 55 Pac. Rep. 903; Hand vs. Scodeletti, 128 Cal. 674, 677, 61 Pac. Rep. 373; Martin vs. Southern Pac. Co., 130 Cal. 285, 286, 287, 62 Pac. Rep. 515; Fennell vs. Drinkhouse, 131 Cal. 447, 450, 82 Am. St. Rep. 361, 63 Pac. Rep. 734. See Kohnner vs. Ashenauer, 17 Cal. 578, 581; Ramsdell vs. Fuller, 28 Cal. 37, 43, 87 Am. Dec. 103; Vassault vs. Austin, 36 Cal. 691, 698; Parry vs. Kelley, 52 Cal. 334, 335; Hassey vs. Wilke, 55 Cal. 525, 528, 529; Shannah vs. Crampton, 92 Cal. 9, 13, 14, 28 Pac. Rep. 50; Bay City Bldg. & Loan Assoc. vs. Broad, 136 Cal. 525, 527, 69 Pac. Rep. 225; Hoeck vs. Greif, 142 Cal. 119, 123, 75 Pac. Rep. 670; Valensin vs. Valensin, 28 Fed. Rep. 599, 603, 12 Sawy. C. C. 95 (arising under laws of this state).

26. Community property and husband's separate property not distinguishable, as respects husband's power to manage and control.—McComb vs. Spangler, 71 Cal. 418, 422, 12 Pac. Rep. 347. See Alexander vs. Jackson (Cal. Dec. 23, 1890), 25 Pac. Rep. 415, 417; Spreckels vs. Spreckels, 116 Cal. 339, 343, 345, 58 Am. St. Rep. 170, 48 Pac. Rep. 228, 36 L. R. A. 497.

27. Death of wife terminates husband's control as respects so much of community property as belongs to wife's separate estate, and he cannot incur any separate debt or liability which would be charge thereon to prejudice of creditors of community.—Johnson vs. San Francisco Sav. Union, 75 Cal. 134, 143-145, 7 Am. St. Rep. 129, 16 Pac. Rep. 753. See In re Cannon's Estate, 18 Wash. 101, 50 Pac. Rep. 1021.

28. Divorce proceedings pending do not interrupt husband's powers with respect to management and control of community property, as effect of such proceedings is not to take

property into custody of court.—Lord vs. Hough, 43 Cal. 581, 585.

See par. 43 this note.

29. Property purchased with earnings of husband or wife is community property of which law invests husband with absolute power of disposition.—Alexander vs. Jackson (Cal. Dec. 23, 1890), 25 Pac. Rep. 415, 417.

30. Transmutation of property immaterial, and change in its form does not affect husband's power to manage and control it.—Meyer vs. Kinzer, 12 Cal. 247, 255, 73 Am. Dec. 538.

31. RIGHTS OF ACTION ARE IN HUSBAND, where they have arisen out of invasions of community property, or where result of action will be acquisition of community property.—Moseley vs. Heney, 66 Cal. 478, 480, 6 Pac. Rep. 134; Smith vs. Furnish, 70 Cal. 424, 427, 12 Pac. Rep. 392; McFadden vs. Santa Ana O. & T. St. R. Co., 87 Cal. 464, 467, 468, 25 Pac. Rep. 681, 11 L. R. A. 252; Neale vs. Depot R. Co., 94 Cal. 425, 429, 29 Pac. Rep. 954; Lamb vs. Harbaugh, 105 Cal. 680, 691, 692, 39 Pac. Rep. 56; Spreckels vs. Spreckels, 116 Cal. 339, 349, 58 Am. St. Rep. 170, 48 Pac. Rep. 228, 36 L. R. A. 497; Hand vs. Scodeletti, 128 Cal. 674, 677, 61 Pac. Rep. 373; Martin vs. Southern Pac. Co., 130 Cal. 285, 286, 287, 62 Pac. Rep. 515; Fennell vs. Drinkhouse, 131 Cal. 447, 450, 82 Am. St. Rep. 361, 63 Pac. Rep. 734.

As to proper party plaintiff in action involving community property, see Code Civ. Proc. § 370 and note.

32. Money is recoverable by husband, when debt is due to community, he being proper party plaintiff.—Moseley vs. Heney, 66 Cal. 478, 480, 6 Pac. Rep. 134. See Fennell vs. Drinkhouse, 131 Cal. 447, 450, 82 Am. St. Rep. 361, 63 Pac. Rep. 734.

33. Same—Earnings of wife, being community property, are recoverable by husband.—Moseley vs. Heney, 66 Cal. 478, 480, 6 Pac. Rep. 134. See Smith vs. Furnish, 70 Cal. 424, 427, 12 Pac. Rep. 392.

As to competency of wife as witness in an action by husband to recover for her services, see Code Civ. Proc. § 1880 and note.

As to wife's earnings being community property, see ante § 164 and note pars. 162-164.

34. Personal injuries to wife give rise to right of action which is community property, within rule that such property is subject to management, control, and absolute power of disposition of husband, and therefore wife cannot sue alone to recover damages for such injuries, as she is permitted to do "when action concerns her separate property," under Code of Civil Procedure § 370, and husband is proper and necessary party plaintiff.—McFadden vs. Santa Ana O. & T. St. R. Co., 87 Cal. 464, 467, 468, 25 Pac. Rep. 681, 11 L. R. A. 252; Lamb vs. Harbaugh, 105 Cal. 680, 691, 692, 39 Pac. Rep. 56; Martin vs. Southern Pac. Co., 130 Cal. 285, 286, 287, 62 Pac. Rep. 515. See Tell vs. Gibson, 66 Cal. 247, 248, 5 Pac. Rep. 223.

See Code Civ. Proc. § 370 and note.

35. Compare: Baldwin vs. Second St. Cable R. Co., 77 Cal. 390, 391, 392, 19 Pac. Rep. 644

(where wife was living separate and apart from her husband by reason of his desertion of her, and she was permitted to bring action in her name, without joining her husband, under Code Civil Procedure § 370).

36. Presentation of claim against decedent's estate should be by husband, even though claim is for wife's services, as her earnings constitute community property.—*Smith vs. Furnish*, 70 Cal. 424, 427, 12 Pac. Rep. 392.

As to presentation of claims against decedent, see Code Civ. Proc. § 1490 et seq.

37. Presentation by wife is harmless error, where claim is properly rejected by executors but without objecting to manner of its presentation.—*Smith vs. Furnish*, 70 Cal. 424, 427, 12 Pac. Rep. 392.

38. Trover maintainable by husband, as are similar actions for conversion of or injury to community property.—*Hand vs. Scodetelli*, 128 Cal. 674, 677, 61 Pac. Rep. 373. See *Martin vs. Southern Pac. Co.*, 130 Cal. 285, 286, 287, 62 Pac. Rep. 515; *Fennell vs. Drinkhouse*, 131 Cal. 447, 450, 82 Am. St. Rep. 361, 63 Pac. Rep. 734.

39. SOLE TRADER—Wife as, may invest community property in business.—See Code Civ. Proc. § 1814 and note.

40. Wife has not management and control.—See pars. 35-38 this note.

IV. DISPOSITION BY DEED, GIFT, ETC.

41. HUSBAND HAS POWER TO DISPOSE OF COMMUNITY PROPERTY and (prior to amendatory Act March 31, 1891, requiring wife's consent to gift of community property) he is competent to sell, convey, and encumber such property, untrammelled and unrestrained by his wife, and regardless of her wishes, or of such estate in property as she may have.—*Smith vs. Smith*, 12 Cal. 216, 217, 225, 73 Am. Dec. 533; *Pixley vs. Huggins*, 15 Cal. 127, 131; *Van Maren vs. Johnson*, 15 Cal. 308, 311; *Ord vs. De La Guerra*, 18 Cal. 67, 74; *Tustin vs. Faught*, 23 Cal. 237, 241; *McDonald vs. Badger*, 23 Cal. 393, 398, 83 Am. Dec. 123; *Fuller vs. Ferguson*, 26 Cal. 546, 567; *Bernal vs. Gleim*, 23 Cal. 668, 675; *Althof vs. Conheim*, 38 Cal. 230, 233, 99 Am. Dec. 363; *De Godey vs. Godey*, 39 Cal. 157, 164; *Lord vs. Hough*, 43 Cal. 581, 585; *Greiner vs. Greiner*, 58 Cal. 115, 119; *Alexander vs. Jackson* (Cal. Dec. 23, 1890), 25 Pac. Rep. 415, 416; *Sun Ins. Co. vs. White*, 123 Cal. 196, 200, 55 Pac. Rep. 902. See *Kohner vs. Ashenauer*, 17 Cal. 578, 581; *Directors Fallbrook Irr. Dist. vs. Abila*, 106 Cal. 355, 362, 39 Pac. Rep. 793; *Hoock vs. Greif*, 142 Cal. 119, 122, 75 Pac. Rep. 670.

42. Object of giving husband power of disposition of community property, as of his separate estate, was to facilitate bona fide alienation, and to prevent clogs upon its transfer by claims of wife.—*Smith vs. Smith*, 12 Cal. 216, 217, 225, 73 Am. Dec. 533.

43. Community property and husband's separate property not distinguishable, as respects husband's power to convey, prior to amendatory Act March 31, 1891.—See *McComb vs. Spangler*, 71 Cal. 418, 422, 12 Pac. Rep. 347; *Alexander vs. Jackson* (Cal. Dec. 23, 1890), 25

Pac. Rep. 415; *Spreckels vs. Spreckels*, 116 Cal. 339, 342, 343, 58 Am. St. Rep. 170, 48 Pac. Rep. 228, 36 L. R. A. 497.

44. Divorce suit pending immaterial, and does not affect husband's power to convey community property, unless court sets aside portion of community property as security for payment of alimony, etc., or makes other orders which will prevent husband from alienating or encumbering the property.—*Sun Ins. Co. vs. White*, 123 Cal. 196, 200, 55 Pac. Rep. 902. See *Lord vs. Hough*, 43 Cal. 581, 585. See par. 28 this note.

45. Fraud on wife—Not permitted; and, notwithstanding broad terms of statute, husband is held to good faith in all transactions relating to community property, and must not alienate it for mere purpose of divesting wife.—*Smith vs. Smith*, 12 Cal. 216, 217, 225, 73 Am. Dec. 533; *De Godey vs. Godey*, 39 Cal. 157, 164; *Lord vs. Hough*, 43 Cal. 581, 585; *Hughes vs. Doe*, 114 Cal. 199, 203, 45 Pac. Rep. 1066; *In re Estate of Burdick*, 112 Cal. 387, 397, 44 Pac. Rep. 734. See *Peck vs. Brummagim*, 31 Cal. 440, 446, 447, 89 Am. Dec. 195; *Greiner vs. Greiner*, 58 Cal. 115, 121; *Cummings vs. Cummings* (Cal. 1887), 14 Pac. Rep. 562, 564.

46. Same—Advancement to child, if just and proper, and if an abundant residue is left for wife and remaining children, will not be regarded as fraud upon community.—*Corker vs. Corker*, 95 Cal. 308, 309, 30 Pac. Rep. 541.

47. Fraudulent intent.—Deed of gift by husband of community property in order to be fraud upon wife, must be made with fraudulent intent.—*Corker vs. Corker*, 95 Cal. 308, 309, 30 Pac. Rep. 541. See *Lord vs. Hough*, 43 Cal. 581, 585.

48. Same—Determinable from circumstances attending transaction, and will made by him after he has conveyed community property cannot be looked to for purpose of discovering his intent in making such conveyance.—*Lord vs. Hough*, 43 Cal. 581, 585, 586.

49. Gift of portion of community property is not void per se.—*Corker vs. Corker*, 95 Cal. 308, 309, 30 Pac. Rep. 541. See *Lord vs. Hough*, 43 Cal. 581, 585.

50. Heirs of husband are bound by any conveyance of community made by husband, whether in fraud of community or not, and in absence of creditors such conveyance cannot be questioned by administrator of his estate.—*In re Estate of Burdick*, 112 Cal. 387, 397, 44 Pac. Rep. 734.

51. Inconsiderable portion of community may be conveyed by husband and will not be regarded as fraud upon wife.—*Lord vs. Hough*, 43 Cal. 581, 585 (\$4,000 out of \$100,000); *Greiner vs. Greiner*, 58 Cal. 115, 120. See *Smith vs. Smith*, 12 Cal. 216, 225, 73 Am. Dec. 533; *Peck vs. Brummagim*, 31 Cal. 440, 446, 447, 89 Am. Dec. 195.

52. Remedies of wife.—At law wife has no remedy during coverture.—*Valensin vs. Valensin*, 28 Fed. Rep. 599, 602, 12 Sawy. C. C. 95.

53. Same—After divorce has been obtained wife can bring action to redress any wrong that has been sustained by her husband's

fraudulent conveyance of community property (dictum).—*Cummings vs. Cummings* (Cal. 1887), 14 Pac. Rep. 562, 564.

54. Same—Injunction.—After divorce disposition of community with view to place its proceeds beyond reach of process of courts, and to deprive former wife of its benefits, will be enjoined, where decree of divorce makes no disposition of community.—*De Godey vs. Godey*, 39 Cal. 157, 165.

55. Same—During coverture, it may be that wife may bring action in nature of bill quia timet to procure injunction to restrain the husband from carrying out threatened fraudulent transfer of community property which would result in loss to her, or to compel fraudulent donee or grantee with notice of fraudulent intent to give security to satisfy any claim which she may be found to have to it on settlement of affairs of community when marriage has been dissolved (dictum).—*Greiner vs. Greiner*, 58 Cal. 115, 121.

56. Same—Rescission will be decided at suit of wife, but only after marriage has been dissolved.—*Greiner vs. Greiner*, 58 Cal. 115, 119, 121; *Cummings vs. Cummings* (Cal. 1887), 14 Pac. Rep. 562, 564. See *Van Maren vs. Johnson*, 16 Cal. 308, 311.

57. Same—Same—Burden of proof on grantee to show consideration for deed made by husband in fraud of community.—*Hughes vs. Doe*, 114 Cal. 199, 203, 45 Pac. Rep. 1066.

58. Same—Same—Lapse of time before dissolution of community is no bar to action brought by wife on dissolution of coverture to set aside transfer made by husband with intent to defraud community (dictum).—*Greiner vs. Greiner*, 58 Cal. 116, 120.

59. Gift to wife.—Husband may convey community property to his wife by way of gift.—*Woods vs. Whitney*, 42 Cal. 358, 361; *Higgins vs. Higgins*, 46 Cal. 259, 263; *Read vs. Rahm*, 65 Cal. 343, 344, 4 Pac. Rep. 111; *Jackson vs. Torrence*, 83 Cal. 521, 529, 532, 23 Pac. Rep. 695; *Wright vs. Wright* (Cal. Aug. 28, 1895), 41 Pac. Rep. 695, 696; *Arkle vs. Beedie*, 141 Cal. 459, 460-462, 74 Pac. Rep. 1033. See *Kohner vs. Ashenauer*, 17 Cal. 578, 581; *Peck vs. Brummagin*, 81 Cal. 440, 448, 449, 89 Am. Dec. 195; *Morgan vs. Lones*, 78 Cal. 58, 62, 20 Pac. Rep. 248; *Taylor vs. Opperman*, 79 Cal. 468, 470, 471, 21 Pac. Rep. 869; *Carter vs. McQuade*, 83 Cal. 274, 278, 23 Pac. Rep. 348; *Diefendorff vs. Hopkins*, 95 Cal. 343, 352, 28 Pac. Rep. 265, 30 Id. 549; *Gwynn vs. Dierssen*, 101 Cal. 563, 565, 36 Pac. Rep. 103; *In re Estate of Dobbel*, 104 Cal. 432, 435, 43 Am. St. Rep. 123, 38 Pac. Rep. 87; *Heney vs. Pesoli*, 109 Cal. 53, 60, 41 Pac. Rep. 619; *Tillaux vs. Tillaux*, 115 Cal. 663, 672, 47 Pac. Rep. 691; *Spreckels vs. Spreckels*, 116 Cal. 339, 342, 58 Am. St. Rep. 170, 48 Pac. Rep. 228, 35 L. R. A. 497; *Hamilton vs. Hubbard*, 134 Cal. 603, 606, 65 Pac. Rep. 321, 66 Id. 860; *Hoeck vs. Greif*, 142 Cal. 119, 122, 75 Pac. Rep. 670; *Alferits vs. Arrivillaga*, 143 Cal. 646, 649, 77 Pac. Rep. 657; *Higgins vs. Johnson's Heirs*, 20 Tex. 389, 70 Am. Dec. 394; *Yake vs. Pugh*, 12 Wash. 78, 51 Am. St. Rep. 17, 19, 42 Pac. Rep. 523.

As to community property given to wife be-

coming her separate property, see ante § 164 and note par. 156.

60. Homestead may be conveyed by husband to wife after divorce, where decree of divorce makes no disposition of homestead, and effect of such deed is to vest property absolutely in wife so that mortgage subsequently executed by her upon premises is enforceable upon land in its entirety, and is not mere lien to extent that its value exceeds \$5,000.—*Grupe vs. Byers*, 73 Cal. 271, 272, 14 Pac. Rep. 863.

61. Mode of converting community into wife's separate property.—Community property cannot be conveyed by husband to wife unless conveyance is made as gift, he being at time free from debts or liabilities, or unless conveyance is in exchange for her separate property.—*Kohner vs. Ashenauer*, 17 Cal. 578, 581.

See ante § 164 and note pars. 156, 157.

62. Mortgage by husband is valid and binds community property without consent or joinder of his wife.—*Bernal vs. Gleim*, 33 Cal. 668, 675; *Tolman vs. Smith*, 85 Cal. 280, 283, 24 Pac. Rep. 748. See *Sun Ins. Co. vs. White*, 123 Cal. 196, 200, 201, 55 Pac. Rep. 902; *Bay City Bldg. & L. Assn. vs. Broad*, 136 Cal. 525, 527, 69 Pac. Rep. 225.

63. Pledge by husband of community property is valid (dictum).—*Directors Fallbrook Irr. Dist. vs. Abila*, 106 Cal. 355, 362, 39 Pac. Rep. 792.

64. Property in part community property and in part wife's separate property cannot be conveyed by husband alone so as to affect separate property of wife, and executory contract by husband and wife to convey such property, being vested as to wife, because it was not acknowledged by wife in mode prescribed, specific performance will not be enforced against husband on payment by purchaser of portion of agreed price, because to do so would be to enforce contract other than that which husband made.—*Jackson vs. Torrence*, 83 Cal. 521, 537-539, 23 Pac. Rep. 695. But see *Barber vs. Burrows*, 51 Cal. 404, 406; *Olson vs. Lovell*, 91 Cal. 506, 508, 27 Pac. Rep. 765.

65. Record title being in husband, to land conveyed to him during coverture, purchaser from him may rely upon legal presumption that premises are community property, and such purchaser although he knows that land may be separate property of wife, notwithstanding form of deed, is not chargeable either with negligence or fault if he fails to inquire as to true nature of title, and doctrine caveat emptor is not applicable.—*Vassault vs. Austin*, 36 Cal. 691, 698, 699, distinguishing *Ramsdell vs. Fuller*, 28 Cal. 37, 43, 44, 67 Am. Dec. 103 (where land conveyed by husband stood in name of wife).

As to presumption that land conveyed to spouse during coverture is community property, see ante § 164 pars. 46-61.

66. Same—Joinder of wife with husband does not put purchaser on inquiry as to whether land standing in husband's name is separate estate of wife.—*Vassault vs. Austin*, 36 Cal. 691, 699.

67. Same—Purchaser is charged with trust where record shows that property in question

was conveyed as gift by husband to his wife; that thereafter wife mortgaged property to secure individual note of her husband; and that subsequently on decree of foreclosure third person purchased property and having obtained sheriff's deed on next day conveyed premises to husband.—*Hassey vs. Wilke*, 55 Cal. 525, 528, 529. See *Ramsdell vs. Fuller*, 28 Cal. 37, 44, 87 Am. Dec. 103.

68. Record title being in wife to land conveyed to her during coverture, and prior to Act March 19, 1889, doctrine caveat emptor applies to purchaser from husband, and if in fact land is separate property of wife because of her having paid for it out of her separate funds she may claim and hold it as against such purchaser.—*Ramsdell vs. Fuller*, 28 Cal. 37, 43, 44, 87 Am. Dec. 103; *Jackson vs. Torrence*, 83 Cal. 521, 529, 23 Pac. Rep. 695. See *Vassault vs. Austin*, 36 Cal. 691, 697-699.

69. Same—Wife is not estopped to show that property is separate property, when such property stands in her name and is sold by her husband, as against purchaser by reason of fact that she knew of her husband's intention to convey same and did not inform the purchaser of her claim.—*Jackson vs. Torrence*, 83 Cal. 521, 532-534, 23 Pac. Rep. 695.

70. Signature of wife is unnecessary to husband's deed (prior to amendatory Act March 31, 1891), and if she signs it she thereby adds nothing to validity or completeness of transfer.—*Pixley vs. Huggins*, 15 Cal. 127, 131; *Tustin vs. Faught*, 23 Cal. 237, 241. See *Bernal vs. Gleim*, 33 Cal. 668, 675; *Bay City Bldg. & L. Assoc. vs. Broad*, 136 Cal. 525, 527, 69 Pac. Rep. 225.

71. Transmutation of property, or change of it from one form to another, does not affect husband's power to dispose of it, so long as it retains its character as community property.—See *Meyer vs. Kinzer*, 12 Cal. 247, 255, 73 Am. Dec. 538.

72. TRANSFER WITHOUT CONSIDERATION—Consent of wife necessary under section as amended by Act March 31, 1891.—See *In re Estate of Burdick*, 112 Cal. 387, 397, 44 Pac. Rep. 734.

73. Statute requiring wife's consent not retroactive, and operation of statute must be confined "at least," to community property acquired after its passage, because the right of a husband to convey in any manner property previously acquired is valid right which cannot be interfered with by legislature.—*Spreckels vs. Spreckels*, 116 Cal. 339, 340-349, 58 Am. St. Rep. 170, 48 Pac. Rep. 228, 36 L. R. A. 497. (Italics are by the court, and seem to indicate that the constitutionality of the statute may be open to further question.)

74. WIFE HAS NO POWER TO DISPOSE OF COMMUNITY PROPERTY, and purchaser from her takes no title as against community.—*Tryon vs. Sutton*, 13 Cal. 490, 493; *Landers vs. Bolton*, 26 Cal. 393, 420; *Parry vs. Kelley*, 52 Cal. 334, 335; *Pelzer vs. Griffin*, 125 Cal. 9, 12, 57 Pac. Rep. 690. See *People vs. Swalm*, 90 Cal. 46, 49, 50, 13 Am. St. Rep. 96, 22 Pac. Rep. 67; *McComb vs. Spangler*, 71 Cal. 418, 422, 12 Pac. Rep. 347; *Shanahan vs. Crampton*, 92 Cal. 9, 13, 14, 28 Pac. Rep. 50.

75. Assignment of mortgage which is part of community property is within rule, and cannot be made by wife without concurrence of her husband.—*Tryon vs. Sutton*, 13 Cal. 490, 493.

76. Deed of wife is not void, but it stands on same footing as deed made by any other person conveying property to which he has no title, and consequently subsequently acquired title by wife will inure to grantee; e. g. where wife mortgages community property, interest which she acquires in land upon death of her husband inures, under § 2930, to grantee.—*Parry vs. Kelley*, 52 Cal. 334, 335, 336.

See post § 2930 and note.

77. Desertion of wife and country by husband for five years confers upon her right to control and dispose of community property, even though by statute he alone has power to dispose of such property.—*Wright vs. Hays*, 10 Tex. 130, 60 Am. Dec. 200.

78. Same—Death is presumed as to "a person not heard from in seven years," under Code Civil Procedure, § 1963 subd. 26. It is to be observed that *Wright vs. Hays*, 10 Tex. 130, 60 Am. Dec. 200, was decided without any reference to a similar statute, but upon broad general rule of common law that "where husband absolutely deserts his wife, or leaves the state without any intention of returning, or becomes the subject of a foreign state, or is civiliter mortuus, his wife is regarded as a feme sole, and may hold property by deed, make contracts, and be sued upon them."—See Code Civ. Proc. § 1963, subdivision 26 thereof and note.

79. Estoppel of husband to deny wife's authority to dispose of community property may result where he expressly represents her to be feme sole or assents to her acts (dictum).—*Tryon vs. Sutton*, 13 Cal. 490, 493.

80. Larceny of community property—Wife cannot consent to, and on prosecution for larceny her consent is of no defense if defendant took it with felonious intent of depriving the husband of it, and when her consent was given she had repudiated marriage relation and had entered into adulterous relation with defendant.—*People vs. Swalm*, 80 Cal. 46, 49, 50, 13 Am. St. Rep. 96, 22 Pac. Rep. 67.

See Pen. Code § 484 and note.

81. Mortgage by wife is invalid to extent that it does not create valid lien upon community property.—*Parry vs. Kelley*, 52 Cal. 334, 335. See *McComb vs. Spangler*, 71 Cal. 418, 422, 12 Pac. Rep. 347.

82. Same—Husband is not estopped by a judgment of foreclosure nor is one who derails his title through deed from husband and wife executed subsequently to mortgage even though husband is made party defendant to suit foreclosure, and is, under Code Civil Procedure § 370, proper party defendant, and does not assert any claim that property is community property, because he is proper party only for purpose of aiding in protection of his wife's rights and is not compellable in such suit to litigate independent legal title of community.—*McComb vs. Spangler*, 71 Cal.

418, 422-426, 12 Pac. Rep. 347. See *San Francisco vs. Lawton*, 18 Cal. 465, 474, 79 Am. Dec. 187.

83. Record title being in wife, her deed prima facie passes title, but, as she may be married, and as property may be community property, purchasers from her must ascertain at their peril whether or not she is married, and if so whether or not she has any estate which she is competent to convey.—*Ramsdell vs. Fuller*, 28 Cal. 37, 42, 43, 87 Am. Dec. 103. See *Shanahan vs. Crampton*, 92 Cal. 9, 13, 14, 28 Pac. Rep. 50.

84. Compare: *Warnock vs. Harlow*, 96 Cal.

298, 303, 307, 31 Am. St. Rep. 309, 31 Pac. Rep. 166, 168 (holding that where wife holds title under deed from her husband, subject to secret trust which does not appear upon deed to her, her grantee, under §§ 856, 2243, takes property discharged of trust).

85. Same—Husband's relief against purchaser from wife can consist only of adjudication that he holds legal title in trust for benefit of community and such relief is not, under Code Civil Procedure § 738, appropriate in action to quiet title.—*Shanahan vs. Crampton*, 92 Cal. 9, 13, 14, 28 Pac. Rep. 50.

See Code Civ. Proc. § 738 and note.

§ 173. **COURTESY AND DOWER NOT ALLOWED.** No estate is allowed the husband as tenant by courtesy upon the death of his wife, nor is any estate in dower allotted to the wife upon the death of her husband.

History: Enacted March 21, 1872. The Act of April 17, 1850, § 10 (Stats. 1850, ch. 103, p. 254), contained the same provision.—See *Beard vs. Knox*, 6 Cal. 252, 756, 63 Am. Dec. 125; *Panaud vs. Jones*, 1 Cal. 488, 513.

1. Applied, cited, construed, referred to, etc.
2. Constitutionality of statute abolishing courtesy.
3. Dower abolished—Husband's power to dispose of property.
- 4, 5. Substitutes for dower—Community and wife's separate property.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc.**, in: *In re Stewart*, 74 Cal. 98, 103, 15 Pac. Rep. 445 (referred to).

2. **CONSTITUTIONALITY OF STATUTE**—Statute abolishing courtesy initiate and excepting courtesy consummate in husband, i. e. right to courtesy after death of his wife, does not impair any vested right, and is constitutional.—*Alexander vs. Alexander*, 85 Va. 353, 7 S. E. Rep. 335.

3. **HUSBAND HAS ABSOLUTE POWER TO DISPOSE OF SEPARATE PROPERTY**; as a consequence of there being no dower his wife need not join in his conveyances to cut the right to dower, and he may devise his land without making any provision for the wife.—See *In re Estate of Stewart*, 74 Cal. 98, 103, 15 Pac. Rep. 445.

4. **SUBSTITUTE FOR DOWER IN COMMUNITY PROPERTY**, in which the wife, on the dissolution of the marriage by death, has a half interest.—See *Beard vs. Knox*, 5 Cal. 252, 256, 63 Am. Dec. 125.

5. And it may also be said that the wife's separate property, and the abolition of courtesy, to some extent at least, compensate the wife for the loss of dower.

§ 174. **SUPPORT OF WIFE.** If the husband neglect to make adequate provision for the support of his wife, except in the cases mentioned in the next section, any other person may, in good faith, supply her with articles necessary for her support, and recover the reasonable value thereof from the husband.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 193.

1. Applied, cited, construed, referred to, etc.
2. Common-law rule.
3. Creditor's ignorance that wife was married immaterial.
4. Husband's ignorance that necessities were supplied immaterial.
5. Judgment in action against wife's administrator does not conclude husband.
6. Neglect of wife by husband—Must be shown.
7. Same—Burden of proof on creditor.
8. Same—Effect of husband's offer to provide for insane wife.
9. Same—Presumption as to abandonment of insane wife.
10. Necessaries—Expenses of last illness of wife.
- 11, 12. Same—Burial expenses—Monument.
- 13, 14. Same—Furniture.
15. Pleading—Complaint need not allege sale, etc., to husband.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc.**, in: *Nissen vs. Bendixsen*, 69 Cal. 521, 522, 523, 11 Pac. Rep. 29 (construed and applied); *In re Weringer*, 100 Cal. 345, 346, 34 Pac. Rep. 825 (construed and applied); *St. Vincent's Inst. for Insane vs. Davis*, 129 Cal. 17, 20, 61 Pac. Rep. 476 (construed and applied); *St. Vincent's Inst. for Insane vs. Davis*, 129 Cal. 20, 23, 61 Pac. Rep. 477 (construed and applied).

2. **COMMON-LAW RULE IS** that "if the husband has turned the wife out of doors, and does not give her adequate means of subsistence according to his degree in life and his fortune, the law makes her his agent to order such things as are reasonable and necessary for herself, but it gives her no liberty to go into any extravagance, or to pledge his credit for anything beyond what would be reasonable and necessary for her subsistence."—*Fremett vs. Norton*, 8 Car. & P. 506, 34 Eng. C. L. 503.

3. CREDITOR'S IGNORANCE THAT WIFE WAS MARRIED IMMATERIAL and does not render husband any the less liable.—*St. Vincent's Inst. for Insane vs. Davis*, 129 Cal. 20, 23, 61 Pac. Rep. 477. See *Davis vs. St. Vincent's Inst. for Insane*, 61 Fed. Rep. 277, 9 C. C. App. 501, 15 U. S. App. 432.

4. HUSBAND'S IGNORANCE THAT NECESSARIES WERE SUPPLIED IMMATERIAL, as, nevertheless, his request is implied.—*St. Vincent's Inst. for Insane vs. Davis*, 129 Cal. 20, 22, 61 Pac. Rep. 477. See *Davis vs. St. Vincent's Inst. for Insane*, 61 Fed. Rep. 277, 9 C. C. App. 501, 15 U. S. App. 432.

5. JUDGMENT IN ACTION AGAINST WIFE'S ADMINISTRATOR—THAT HUSBAND IS LIABLE and not wife's estate for medical services rendered to wife, the husband not being a party, does not estop husband, in an action against him, from denying that he was the husband of the deceased, and that he contracted for the services rendered to her.—*Gerlach vs. Turner*, 89 Cal. 446, 451, 26 Pac. Rep. 870.

As to estoppel by judgment, see Code Civ. Proc. §§ 1908-1915 and notes.

6. NEGLIGENCE OF HUSBAND TO SUPPLY WIFE WITH NECESSARIES—Must be shown to entitle the person who furnished them to recover value thereof from husband.—*St. Vincent's Inst. for Insane vs. Davis*, 129 Cal. 17, 20, 61 Pac. Rep. 478.

7. Burden of proving husband's neglect to make provisions for wife rests upon person who has supplied her with necessities.—*St. Vincent's Inst. for Insane vs. Davis*, 129 Cal. 17, 20, 61 Pac. Rep. 476.

8. Effect of husband's offer to provide and care for insane wife and demand in good faith that she be delivered by an institution for insane into his custody to enable him to provide for her elsewhere, is to relieve him from liability for care and necessities thereafter bestowed and furnished.—*St. Vincent's Inst. for Insane vs. Davis*, 129 Cal. 17, 19, 20, 61 Pac. Rep. 476.

9. Presumption as to abandonment of insane wife by husband arises where it appears that she was found at a hotel with a trunk which she could not have taken there unaided.

—*St. Vincent's Inst. for Insane vs. Davis*, 129 Cal. 20, 23, 61 Pac. Rep. 477.

10. NECESSARIES.—Expenses of wife's last illness must be defrayed by her husband and does not constitute a charge upon wife's estate.—*In re Estate of Weringer*, 100 Cal. 345, 346, 347, 34 Pac. Rep. 825.

11. Burial expenses must be defrayed by husband, and they are not a charge upon deceased wife's estate.—*In re Estate of Weringer*, 100 Cal. 345, 346, 347, 34 Pac. Rep. 825. See *Smyley vs. Reese*, 53 Ala. 89, 25 Am. Rep. 598; *Staple's Appeal*, 52 Conn. 426.

See post § 655 and note par. 14.

12. Monument over grave is included in the obligation of husband to give his deceased wife decent burial; but if husband be poor and the wife leaving considerable estate, the former ought not to be expected to contribute much to a monument, and it would be proper for the court to fix a reasonable amount for that purpose out of her estate, the amount being governed by the custom of people of like rank and condition of society.—*In re Estate of Weringer*, 100 Cal. 345, 347, 34 Pac. Rep. 825. See *Smyley vs. Reese*, 53 Ala. 89, 25 Am. Rep. 598.

13. Furniture constitutes articles necessary for support.—See *Heney vs. Sargent*, 54 Cal. 396, 397.

14. Same—Agency of wife to purchase furniture on husband's credit is implied where the husband rents a house for her to live in without supplying furniture.—*Heney vs. Sargent*, 54 Cal. 396-398.

As to agency of wife to purchase necessities, see ante § 158 and note pars. 91-93.

15. PLEADING.—Allegation that goods were sold and delivered to husband unnecessary, in action for necessities supplied by plaintiff to wife, when facts are alleged which render the husband liable under the statute.—*Nissen vs. Bendixsen*, 69 Cal. 521, 522, 523, 11 Pac. Rep. 29, distinguishing *Jacobs vs. Scott*, 53 Cal. 74, 76 (holding that the complaint should have alleged that the goods were sold and delivered to the husband, facts not being alleged which would support an action under the statute).

§ 175. SAME—WHEN SEPARATE FROM HUSBAND. A husband abandoned by his wife is not liable for her support until she offers to return, unless she was justified, by his misconduct, in abandoning him; nor is he liable for her support when she is living separate from him, by agreement, unless such support is stipulated in the agreement.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 193.

1. Applied, cited, construed, referred to, etc.
2. At common law—Adultery of wife.
3. Same—Where husband provides for wife after separation.
4. Living separate by agreement—What is.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Heney vs. Sargent*, 54 Cal. 396, 397 (construed and applied).

2. AT COMMON LAW.—If wife be living in open adultery her husband is not bound by

any contract which she may make even for necessities.—*Emmett vs. Norton*, 8 Car. & P. 506, 34 Eng. C. L. 503.

3. Where husband provides the wife after separation in consequence of domestic differences, husband not having turned wife out of doors, and she has from her husband wherewithal to provide herself with necessities suitable to his degree, he is not liable even for necessities.—*Emmett vs. Norton*, 8 Car. & P. 506, 34 Eng. C. L. 503.

4. LIVING SEPARATE BY AGREEMENT is where there is an agreement which contemplates more than the mere temporary separation of husband and wife, and the fact that the wife is maintaining a separate estab-

lishment, in which she is occasionally visited by the husband, this will not constitute such a living separate by agreement as the statute contemplates.—*Heney vs. Sargent*, 54 Cal. 396, 397.

§ 176. WIFE TO SUPPORT HUSBAND, WHEN. The wife must support the husband, when he has not deserted her, out of her separate property, when he has no separate property, and there is no community property, and he is unable, from infirmity, to support himself.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 194.

1. Applied, cited, construed, referred to, etc.
2. Nature of wife's obligation—Corresponds to husband's.
3. Husband's remedy—Original proceeding in superior court.
- 4, 5. Same—Injunction against transfer of property—Contempt.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Livingston vs. Superior Court*, 117 Cal. 633, 636, 49 Pac. Rep. 836, 38 L. R. A. 175 (construed and applied).

2. **NATURE OF WIFE'S OBLIGATION** is same as that which ordinarily rests upon the husband.—*Livingston vs. Superior Court*, 117 Cal. 633, 636, 49 Pac. Rep. 836, 38 L. R. A. 175. See *Livingston vs. Conant* (Cal. Jan. 10, 1898), 51 Pac. Rep. 859.

As to obligation of husband to support wife, see ante § 155 and note.

3. **HUSBAND'S REMEDY IS PROCEEDING IN SUPERIOR COURT** to compel the wife to

support him out of her separate property, and to obtain an order requiring her to pay for his support what the court may deem reasonable and proper at stated intervals, and he need not resort to successive ordinary actions to enforce such obligation, as any remedy which did not provide for his future support would be inadequate.—*Livingston vs. Superior Court*, 117 Cal. 633, 636, 49 Pac. Rep. 836, 38 L. R. A. 175; *Livingston vs. Conant* (Cal. Jan. 10, 1898), 51 Pac. Rep. 859.

4. **Injunction may be issued** on making order for support of husband, restraining the wife from conveying her property so as to defeat such order.—*Livingston vs. Superior Court of L. A. Co.*, 117 Cal. 633-636, 49 Pac. Rep. 836, 38 L. R. A. 175.

5. **Disobedience of injunction is contempt** and may be punished as such.—*Livingston vs. Superior Court*, 117 Cal. 633-636, 49 Pac. Rep. 836, 38 L. R. A. 175.

§ 177. RIGHTS OF HUSBAND AND WIFE GOVERNED BY WHAT. The property rights of husband and wife are governed by this chapter, unless there is a marriage settlement containing stipulations contrary thereto.

History: Enacted March 21, 1872.

Applied, cited, construed, referred to, etc., in: *Corker vs. Corker*, 87 Cal. 643, 647, 35 Pac. Rep.

922 (referred to in discussing change of "marriage contracts" to "marriage settlements").

§ 178. MARRIAGE SETTLEMENT CONTRACTS, HOW EXECUTED. All contracts for marriage settlements must be in writing, and executed and acknowledged or proved in like manner as a grant of land is required to be executed and acknowledged or proved.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Contract for "marriage settlement"—What is.
3. Same—Postnuptial gift is not.
4. Legality of marriage settlements—Law favors.
5. Same—Statute of frauds recognizes.
6. Same—Unlimited right to stipulate as to property.
7. Consideration—Agreement to marry sufficient.
- 8, 9. Construction—Ordinary rules govern.
10. Effect of contract.
- 11-13. Parol evidence—What may be shown by.

14. Promise to woman's parents binding.
15. Property to be acquired may be settled on wife.
16. Reasonableness—Provisions must be fair.
- 17, 18. Same—Circumstances of parties considered.
19. Same—Discretion of court not substituted for that of parties.
20. Remedy for breach—Not dependent on marriage.
- 21-28. Rescission—Various grounds for.
29. Separation of parties—Must not be encouraged.
30. Trustee—Propriety of, and necessity for.

31, 32. Writing—Necessity for.

33. Same—Execution before or after negotiations sufficient.

34. Same—Form of immaterial.

35. Same—Performance validates oral contract.

36-39. Same—What is sufficient part performance.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Peek vs. Peek*, 75 Cal. 298, 300, 17 Pac. Rep. 213 (referred to); *Corker vs. Corker*, 87 Cal. 643, 647, 25 Pac. Rep. 922 (referred to).

2. CONTRACT FOR "MARRIAGE SETTLEMENT" MEANS same as "marriage contract" found in Act April 17, 1850, and refers only to antenuptial contracts; and term "marriage contract," as used in § 1299 of the Civil Code, concerning revocation of wills by subsequent marriage, unless provision is made for the wife by marriage contract, has reference to such antenuptial contracts.—*Corker vs. Corker*, 87 Cal. 643, 647, 648, 25 Pac. Rep. 922.

As to revocation of will by subsequent marriage unless marriage contract is made, see post § 1299 and note.

3. Contract made after marriage by which a husband makes a gift to his wife is not a contract for marriage settlement within this section, or a marriage contract within § 1299.—*Corker vs. Corker*, 87 Cal. 643, 650, 25 Pac. Rep. 922.

4. LAW ALLOWS AND REGARDS WITH FAVOR MARRIAGE SETTLEMENTS made by parties who are competent to contract and are in solvent circumstances, when they are entered into in good faith and are reasonable and just in their provisions.—*Snyder vs. Webb*, 3 Cal. 83, 87; *Barker vs. Koneman*, 13 Cal. 9, 11. See *Kam. Hafer vs. Hafer*, 33 Kan. 449, 6 Pac. Rep. 537; *Neddo vs. Neddo*, 56 Kan. 507, 44 Pac. Rep. 1; *Matney vs. Linn*, 59 Kan. 613, 54 Pac. Rep. 668. *N. Y. Pierce vs. Pierce*, 71 N. Y. 154. *Ohio. Stillely vs. Folger*, 14 Ohio, 649.

As to gifts from husband to wife, see ante § 162 and note; and § 172 note par. 21.

As to reasonableness of marriage settlements, see pars. 16-19 this note.

5. Statute requiring writing recognizes validity of such contracts.—*Snyder vs. Webb*, 3 Cal. 83, 87.

As to necessity for writing, see post para. 31-39 this note.

6. Unlimited right to stipulate as to property before marriage, is possessed by the parties, and they may incorporate such provisions in the settlement as they may agree upon.—*Snyder vs. Webb*, 3 Cal. 83, 87.

7. CONSIDERATION.—Agreement to marry is sufficient consideration to support an antenuptial contract for marriage settlement.—*Conner vs. Stanley*, 65 Cal. 183, 186, 3 Pac. Rep. 668; *Klauber vs. Vigneron* (Cal. Feb. 14, 1893), 32 Pac. Rep. 248, 249. See *Smith vs. Allen*, 87 Mass. (5 Allen) 454, 458, 81 Am. Dec. 758.

8. CONSTRUCTION OF CONTRACT is governed by ordinary rules applicable to contracts generally.—*Clark vs. Fosdick*, 118 N. Y. 7, 16 Am. St. Rep. 733, 22 N. E. Rep. 1111, 6 L. R. A. 132.

9. Intention to deed over property is sufficient if expressed in writing, without a direct promise or stipulation to make deed where such expression of intention is treated by all the parties in interest as words of promise and contract and are acted upon as such.—*North Platte Milling & E. Co. vs. Price*, 4 Wyo. 293, 33 Pac. Rep. 664.

10. EFFECT OF ANTENUPTIAL CONTRACT is to operate as a rule of property and take the place of that prescribed by law.—*Hafer vs. Hafer*, 33 Kan. 449, 6 Pac. Rep. 537.

11. PAROL EVIDENCE.—Acceptance of contract by woman may be shown by parol when the writing is signed by the man only.—*North Platte Milling & E. Co. vs. Price*, 4 Wyo. 293, 33 Pac. Rep. 664.

12. Attendant circumstances may be shown by parol under which contract was made in order to inform the court of position and condition of contracting parties; e. g. that the woman was a minor, that her father had been dead for many years, as to who was her mother, and as to her mother's participation in and approval of the contract.—*North Platte Milling & E. Co. v. Price*, 4 Wyo. 293, 33 Pac. Rep. 664.

13. Contract for marriage settlement cannot be shown by parol; the instrument alone must be looked to.—*Corker vs. Corker*, 87 Cal. 643, 649, 25 Pac. Rep. 922.

As to necessity for writing, see post pars. 31-39 this note.

14. PROMISE MADE TO WOMAN'S MOTHER to settle property on daughter at her marriage, made to mother in order to obtain latter's consent to the marriage, is valid and binding on the man, whether communicated to the daughter or not.—*North Platte Milling & E. Co. vs. Price*, 4 Wyo. 293, 33 Pac. Rep. 664.

15. PROPERTY NOT IN ESSE AND TO BE ACQUIRED AFTER MARRIAGE by wife may be subject of antenuptial contract, and provision with reference to wife's right to acquire such property as her separate property is binding.—*Snyder vs. Webb*, 3 Cal. 83, 87.

16. REASONABLENESS.—Antenuptial contract must be reasonable when it makes provision for property of respective spouses, otherwise it will not be upheld.—*Neddo vs. Neddo*, 56 Kan. 507, 44 Pac. Rep. 1.

17. Circumstances of the parties must be considered,—to wit, the nature and extent of their property, etc.,—in determining the reasonableness of the contract.—*Hafer vs. Hafer*, 33 Kan. 449, 6 Pac. Rep. 537; *Matney vs. Linn*, 59 Kan. 613, 54 Pac. Rep. 668.

18. Same—Illustration of fair division of property.—The contract cannot be attacked by woman aged twenty-six who, in addition to her clothing, has two cows and forty dollars, and who contracts to marry a man fifty-six years of age having property valued at over fourteen thousand dollars, it being stipulated that she shall have the sole control of her own property, together with the increase and profits thereof, and that, in case of her surviving him, she shall share equally in his estate with his children.—*Hafer vs. Hafer*, 33 Kan. 449, 6 Pac. Rep. 537.

19. Discretion of court not substituted for that of parties, and reasonableness of provision cannot be inquired into when the parties are satisfied; and so long as execution of contract is not impeached, it is as binding upon the parties as would be any other contract, and the court will not substitute its judgment for theirs as to its sufficiency.—*Corker vs. Corker*, 87 Cal. 643, 649, 25 Pac. Rep. 922.

20. REMEDY FOR BREACH not dependent upon consummation of marriage, and where the parties contract to marry, and in consideration of the woman's promise the man agrees to convey property to her, and a failure to consummate the marriage is his fault, she has a remedy for his failure to convey the property.—*Conner vs. Stanley*, 65 Cal. 183, 186-187, 3 Pac. Rep. 668. See *Smith vs. Allen*, 87 Mass. (5 Allen) 454, 458, 81 Am. Dec. 758.

21. RESCISSION.—Desertion of husband by wife not ground for rescission, and her promise to live with him during their joint lives, alleged to have been an inducement for making the contract, is of no consequence, it being in the marriage contract itself.—*Barnes vs. Barnes*, 110 Cal. 418, 421, 42 Pac. Rep. 904.

22. Duress and undue influence imposed by the woman upon the man will invalidate the contract.—*Connor vs. Stanley*, 72 Cal. 556, 561, 562, 14 Pac. Rep. 306.

23. Same.—Contract made with spiritualistic medium between whom and the man there existed a relation of peculiar trust and confidence, similar to that between a religious devotee and his spiritual adviser, will be set aside if undue advantage was taken of such relationship, and the burden rests upon such medium to show fair dealing.—*Conner vs. Stanley*, 72 Cal. 556, 558-561, 14 Pac. Rep. 306.

24. Fraud is ground for relief in equity, as where the man, by fraudulent representations, procured the marriage without previously executing deed which he had agreed to make.—*Peek vs. Peek*, 77 Cal. 106, 109-111, 11 Am. St. Rep. 244, 19 Pac. Rep. 227, 1 L. R. A. 185. See *White vs. White*, 86 Cal. 219, 222, 223, 24 Pac. Rep. 996. *Kam. Green vs. Green*, 34 Kan. 740, 56 Am. Rep. 256, 10 Pac. Rep. 156. *Ky. Petty vs. Petty*, 4 B. Mon. 215, 39 Am. Dec. 501; *Sutherland vs. Administrator*, 5 Bush 591. *Mass. Glass vs. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418.

25. Same.—In action for divorce where the defendant in his answer to the cross-complaint denies that there is any community property, and introduces in evidence an antenuptial contract whereby it was agreed that all property acquired by him after marriage should be his separate property, the court has jurisdiction to set aside and annul such contract for fraud, it being unnecessary for the wife to resort to a direct action for its rescission.—*White vs. White*, 86 Cal. 219, 222, 223, 24 Pac. Rep. 996.

26. Same.—Misrepresentation of woman as to chastity and worthiness not ground for rescission, because public policy forbids an inquiry as to her chastity, and the doctrine of caveat emptor governs.—*Barnes vs. Barnes*, 110 Cal. 418, 421, 422, 43 Pac. Rep. 904.

27. Insanity is a ground for rescission of ar

antenuptial contract.—*Conner vs. Stanley*, 72 Cal. 556, 558-560, 14 Pac. Rep. 306.

28. Non-consummation of marriage, as where a woman merely goes through the marriage ceremony and then refuses to act further as wife, may perhaps be ground for rescission (dictum).—*Barnes vs. Barnes*, 110 Cal. 418, 422, 42 Pac. Rep. 904.

29. SEPARATION MUST NOT BE ENCOURAGED, and a contract conducive to separation will not be upheld, as where it is in effect stipulated that where one of spouses abandons other, the guilty party shall be relieved from the duty of support which the law enjoins.—*Neddo vs. Neddo*, 56 Kan. 507, 44 Pac. Rep. 1.

30. TRUSTEE.—Intervention of, may be resorted to or not as the parties see fit, not being necessary.—*Snyder vs. Webb*, 3 Cal. 83, 87; *Barker vs. Koneman*, 13 Cal. 9, 11.

As to intervention generally, see *Code Civ. Proc.* §§ 386, 387 and notes.

31. WRITING.—Oral promise to convey land is invalid where such promise is made in consideration of marriage.—*Peek vs. Peek*, 77 Cal. 106, 108, 11 Am. St. Rep. 244, 19 Pac. Rep. 227, 1 L. R. A. 185. See *Lloyd vs. Fulton*, 91 U. S. 479, bk. 23 L. ed. 363.

See post § 1624 subd. 3 and note.

32. Compare: *Sutherland vs. Administrator*, 5 Bush (Ky.) 591 (holding that, as between the parties, an oral antenuptial contract that neither party should claim or interfere with the property of the other any more than if they had not married, is unquestionable, and also as to all claiming as volunteers under them).

33. Execution of writing before or after negotiations is sufficient if it is correct statement of resulting agreement.—*North Platte Milling & E. Co. vs. Price*, 4 Wyo. 293, 33 Pac. Rep. 664.

34. Form of immaterial, as no particular form of words is necessary in order to constitute a marriage settlement.—*North Platte Milling & E. Co. vs. Price*, 4 Wyo. 293, 33 Pac. Rep. 664.

35. Performance of contract renders it unassailable by the parties thereto, or by third parties, on the ground that it was not in writing.—*Hussey vs. Castle*, 41 Cal. 239, 242.

36. Same.—What is sufficient part performance.—Improvement of premises by wife with her own means sufficient part performance to take out of the statute an antenuptial oral contract whereby the father of husband agreed to convey such premises to the wife, in furtherance of the marriage, if she, with her own means, should erect a suitable dwelling-house thereon; and after such part performance equity will decree specific performance.—*Neale vs. Neale*, 76 U. S. (9 Wall.) 1, bk. 19 L. ed. 590.

37. Marriage alone is not such part performance as will take an oral contract to convey land in consideration of marriage out of the statute.—*Peek vs. Peek*, 77 Cal. 106, 108, 11 Am. St. Rep. 244, 19 Pac. Rep. 227, 1 L. R. A. 185. See *Mass. Glass vs. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418. *Mich. Welch vs. Whelpley*, 62 Mich. 15, 4 Am. St. Rep. 810, 28 N. W. Rep. 744. *Oreg. Adams vs. Adams*, 17 Oreg. 247, 20 Pac. Rep. 633.

38. Compare: *Green vs. Green*, 34 Kan. 740, 55 Am. Rep. 256, 10 Pac. Rep. 156.

39. Prior ancillary acts, merely preparatory to the agreement, such as delivering an abstract of title, measuring the land, drawing up deeds, etc., marriage alone, payment of the price in whole or in part, do not constitute a part performance within the doctrine that a court of equity will avoid a fraudulent use being made of the statute when there has been part performance.—*Adams vs. Adams*, 17 Oreg. 247, 20 Pac. Rep. 633.

§ 179. TO BE ACKNOWLEDGED AND RECORDED. When such contract is acknowledged or proved, it must be recorded in the office of the recorder of every county in which any real estate may be situated which is granted or affected by such contract.

History: Enacted March 21, 1872.

Applied, cited, construed, referred to, etc., in: 922 (referred to in discussing change of "marriage contracts" to "marriage settlements").
Corker vs. Corker, 37 Cal. 643, 647, 25 Pac. Rep.

§ 180. EFFECT OF RECORDING. The recording or non-recording of such contract has a like effect as the recording or non-recording of a grant of real property.

History: Enacted March 21, 1872.

Applied, cited, construed, referred to, etc., in: 922 (referred to in discussing change of "marriage contracts" to "marriage settlements").
Corker vs. Corker, 37 Cal. 643, 647, 25 Pac. Rep.

§ 181. MINORS MAY MAKE MARRIAGE SETTLEMENTS. A minor capable of contracting marriage may make a valid marriage settlement.

History: Enacted March 21, 1872.

Applied, cited, construed, referred to, etc., in: 922 (referred to in discussing change of "marriage contracts" to "marriage settlements").
Corker vs. Corker, 37 Cal. 643, 647, 25 Pac. Rep.

TITLE II.

PARENT AND CHILD.

Chapter I. BY BIRTH, §§ 193-215.

II. BY ADOPTION, §§ 221-230.

CHAPTER I.

CHILDREN BY BIRTH.

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| § 203. Remedy for parental abuse. | § 215. When child becomes legitimate. |
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§ 193. LEGITIMACY OF CHILDREN BORN IN WEDLOCK. All children born in wedlock are presumed to be legitimate.

History: Enacted March 21, 1872; amended by Code Commission, Act March 26, 1901, Stats. and Amdts. 1900-1, p. 339, held unconstitutional; see history, § 4 ante.

1. Applied, cited, construed, referred to, etc.
2. Children born in wedlock—Presumption.

1. Applied, cited, construed, referred to, etc.
In: In re Romero, 75 Cal. 379, 381, 17 Pac. Rep. 434 (applied).

2. Children born in wedlock presumed to be legitimate, and children of their mother's husband.—In re Romero, 75 Cal. 379, 381, 17 Pac. Rep. 434. See Estate of Mills, 137 Cal. 298, 300, 92 Am. St. Rep. 175, 70 Pac. Rep. 91. See Code Civ. Proc. § 1962 subd. 5 and note.

Adultery—Legitimacy of children,—as to, see ante §§ 144, 145 and notes.

Acknowledgment by father—Legitimizing effect,—as to, see post § 230 and note; also § 1387 and note.

Illegitimate child—Acknowledgment by the father,—as to effect of, see post §§ 230, 1387 and notes.

Same—Custody of, mother entitled to.—See post § 200 and note.

Same—Earnings of,—as to, see post § 200 and note.

Same—Heir of,—as to, see post §§ 1387, 1388 and notes.

Marriage of parents—Effect on legitimacy of illegitimate children,—as to, see post § 215 and note.

Nullified marriage—Effect on legitimacy of children, born or conceived during status,—as to, see ante § 84 and note.

Presumption of legitimacy—Rebutting,—as to, see post §§ 194, 195 and notes.

§ 194. CHILDREN AFTER DISSOLUTION OF MARRIAGE. All children of a woman who has been married, born within ten months after the dissolution of the marriage, are presumed to be legitimate children of that marriage.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 194.

1. Applied, cited, construed, referred to, etc.
2. Children born within ten months.
3. "Dissolution of marriage."
4. Evidence tending to prove paternity.

1. Applied, cited, construed, referred to, etc.
In: In re Romero, 75 Cal. 379, 381, 17 Pac. Rep. 434 (cited with other sections); In re Estate of Wood, 137 Cal. 129, 133, 69 Pac. Rep. 900 (construed and applied).

2. Children born within ten months after dissolution of marriage ties presumed to be

legitimate.—In re Romero, 75 Cal. 379, 381, 17 Pac. Rep. 434; In re Estate of Wood, 137 Cal. 129, 133, 69 Pac. Rep. 900.

3. "Dissolution of marriage" refers only to the time when decree of divorce is rendered.—In re Estate of Wood, 137 Cal. 129, 134, 69 Pac. Rep. 900.

4. Evidence tending to prove paternity—as to admissibility of, see In re Estate of Jessup, 81 Cal. 408, 21 Pac. Rep. 976, 22 Id. 742, 1028, 6 L. R. A. 594.

§ 195. WHO MAY DISPUTE THE LEGITIMACY OF A CHILD. The presumption of legitimacy can be disputed only by the [1] husband or [2] wife, or the [3] descendant of one or both of them. Illegitimacy, in such case, may be proved like any other fact.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
- 2.4. Birth in wedlock—Presumption.
- 5, 6. Conclusive presumption—Effect.
7. Impotency of husband.
8. Illegitimacy—How proven.
- 9-11. Non-access—Method of proof.
12. Presumption of legitimacy—Who may question.

1. Applied, cited, construed, referred to, etc.
In: In re Romero, 75 Cal. 379, 381, 17 Pac. Rep. 434 (cited with other sections); In re Estate of Mills, 137 Cal. 298, 303, 92 Am. St. Rep. 175, 70 Pac. Rep. 91 (applied).

2. Birth in lawful wedlock, legitimacy presumed.—Ala. Weatherford vs. Weatherford, 20 Ala. 548, 56 Am. Dec. 206. Ga. Wright vs. Hicks, 15 Ga. 160, 60 Am. Dec. 687. Ill. Orthwein vs. Thomas, 127 Ill. 554, 11 Am. St. Rep. 159, 21 N. E. Rep. 430, 4 L. A. R. 434. See monographic notes 56 Am. Dec. 210-223; 72 Am. Dec. 649-654.

3. Same—Proof of non-access of husband overcomes this presumption.—See Ga. Wright vs. Hicks, 12 Ga. 155, 56 Am. Dec. 451, 15 Ga. C. C.—17

160, 60 Am. Dec. 687. Mass. Phillips vs. Allen, 84 Mass. (2 Allen) 453. Miss. Herring vs. Goodson, 43 Miss. 392. Pa. Kleinert vs. Ehlers, 38 Pa. St. 439. S. C. Shuler vs. Bull, 15 S. C. 421. Fed. Stegall vs. Stegall, 2 Brock. C. C. 256, 22 Fed. Cas. 1226. Eng. Hargrave vs. Hargrave, 9 Beav. 552; Morris vs. Davis, 5 Cl. & Fin. 230, note; Pendrel vs. Pendrel, 2 Stra. 925.

As to proof of non-access,—see par. 9 this note.

4. Proof must be clear that there was no such access as could have enabled husband to be father of the child.—Cross vs. Cross, 3 Paige Ch. (N. Y.) 137, 139, 23 Am. Dec. 778; Woodward vs. Blue, 107 N. C. 407, 22 Am. St. Rep. 897, 12 S. E. Rep. 453, 10 L. R. A. 662.

5. Conclusive presumption being made by law, evidence to contrary cannot be received.—In re Estate of Mills, 137 Cal. 298, 303, 92 Am. St. Rep. 175, 70 Pac. Rep. 91.

6. "Child born of married woman is in first instance presumed to be legitimate. Presumption thus established by law is not to be rebutted by circumstances, which only create

doubt and suspicion; but it may be wholly removed by proper and sufficient evidence showing that husband was: 1. Incompetent; 2. Entirely absent, so as to have no intercourse or communication of any kind with the mother; 3. Entirely absent at period during which child must, in course of nature, have been begotten; or 4. Only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse. Such evidence as this puts an end to question, and establishes legitimacy of the child of married woman."—Scanlon vs. Walshe, 81 Md. 118, 130, 48 Am. St. Rep. 488, 31 Atl. Rep. 498, following Hargrave vs. Hargrave, 9 Beav. 553.

7. **Impotency of husband not being shown**, no evidence can be admitted to show that any man other than husband may have been or probably was father of wife's child.—Scanlon vs. Walshe, 81 Md. 118, 131, 48 Am. St. Rep. 488, 31 Atl. Rep. 498. See Commonwealth vs. Wentz, 1 Ashm. (Pa.) 269; Commonwealth vs. Shepherd, 6 Blinn. (Pa.) 283, 6 Am. Dec. 449; Legg vs. Edmonds, 25 L. J. Ch. 125.

8. **Illegitimacy of children must be proven**, like any other fact. Expression of code was not intended to do away with well-known rules of evidence.—In re Estate of Mills, 137 Cal. 298, 303, 92 Am. St. Rep. 175, 70 Pac. Rep. 91.

As to method of proof of illegitimacy and sufficiency of evidence,—see notes 60 Am. Dec. 687; 72 Am. Dec. 649.

9. **Non-access of husband and wife**.—Illegitimacy cannot be proved by evidence of hus-

band or wife that, while living together, they did not have sexual intercourse.—In re Estate of Mills, 137 Cal. 298, 303, 92 Am. St. Rep. 175, 70 Pac. Rep. 91. See La. Vernon vs. Vernon, 6 La. Ann. 243. *Mass.* Hemmenway vs. Towner, 33 Mass. (1 Allen) 209. *N. H.* Parker vs. Way, 15 N. H. 45; Carson vs. Carson, 44 N. H. 587. *Pa.* Tioga County vs. South Creek Tp., 75 Pa. St. 433; Commonwealth vs. Shepherd, 6 Blinn. 283, 6 Am. Dec. 449. *Eng.* Anonymous, 22 Beav. 431; King vs. Inhabitants Sourton, 5 Ad. & El. 180; Cope vs. Cope, 5 Car. & P. 604, 24 Eng. C. L. 475; Goodright ex d. Stevens vs. Moss, 2 Cowp. 591; King vs. Inhabitants of Kea, 11 East 132, 10 Rev. Rep. 448; Legg vs. Edmonds, 25 L. J. Ch. 125.

See par. 3 this note.

10. **Declarations of parents not admissible to disprove presumption of legitimacy**.—Crauford vs. Blackburn, 17 Md. 49, 56, 77 Am. Dec. 323.

11. **"It is a rule founded in decency, morality, and policy, that father and mother shall not be permitted to say, after marriage, . . . that their offspring is spurious."**—Scanlon vs. Walshe, 81 Md. 118, 131, 48 Am. St. Rep. 488, 31 Atl. 498, quoting Goodright vs. Moss, 2 Cowp. 594.

12. **Presumption of legitimacy of children** can only be disputed by husband and wife, or a descendant of one or both of them.—In re Estate of Mills, 137 Cal. 298, 303, 92 Am. St. Rep. 175, 70 Pac. Rep. 91.

§ 196. OBLIGATION OF PARENTS FOR THE SUPPORT AND EDUCATION OF THEIR CHILDREN. The parent entitled to the custody of a child must give him support and education suitable to his circumstances. If the support and education which the father of a legitimate child is able to give are inadequate, the mother must assist him to the extent of her ability.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Care and custody of child—Right of father to.
3. Desertion of child by parent—Felony.
4. Disposing of child for mendicity—Misdemeanor.
5. Expenses paid by father as guardian.
6. Failure of parent to support child—Misdemeanor.
- 7, 8. Guardian—Applying ward's estate to support.
9. Imprisonment for disobedience of order to support.
10. Injuries to child—Action for.
11. Necessaries for children—Supplied by third party.
- 12, 13. Obligation of parent to support child.
14. Same—Where deprived of control.
15. Paternal authority—Abuse of—Control of.
16. Poor relative—Duty to support.
17. Relationship of "parents in loco."
18. Same—Nephews and nieces.
19. Same—Stepfather.
20. Same—Seduction of minor—Action by for.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc. in: Starkie vs. Perry, 71

Cal. 495, 497, 12 Pac. Rep. 508 (applied); Ex parte Gordan, 95 Cal. 374, 377, 378, 30 Pac. Rep. 561 (applied); Ex parte Miller, 109 Cal. 643, 648, 42 Pac. Rep. 428 (construed and applied); In re Campbell, 130 Cal. 380, 382 (construed and applied); sub nom. Campbell vs. Wright, 62 Pac. Rep. 613; In re Estate and Guardianship of Ceas, 134 Cal. 114, 116, 66 Pac. Rep. 187 (applied).

2. CARE AND CUSTODY OF CHILD—Right of parent to.—See post § 197 note pars. 2-5.

3. DESERTION OF CHILD BY PARENT—Felony.—See Pen. Code § 271 and note.

4. DISPOSING OF CHILD FOR MENDICITY—Misdemeanor.—See Pen. Code § 272 and note.

5. EXPENSES PAID BY FATHER AS GUARDIAN.—Father, who is guardian of estate of his infant child, is properly charged for misappropriation of funds belonging to said estate, and cannot claim credit for expenses paid his child's maintenance.—In re Guardianship of Ceas, 134 Cal. 114, 66 Pac. Rep. 187.

See par. 12 this note.

As to guardian not parent, it is otherwise.—See par. 7 this note.

6. FAILURE OF PARENT TO SUPPORT CHILD—MISDEMEANOR, where wilful.—See Pen. Code §270 and note.

7. GUARDIAN MAY HAVE ORDER TO APPLY WARD'S ESTATE TO SUPPORT.—Guardian may apply for and obtain an order from court to apply part of principal of ward's estate toward support of ward, where income is insufficient; but it is duty of parent to support his child.—In re Guardianship of Ceas, 134 Cal. 116, 66 Pac. Rep. 187.

Parent guardian the rule is otherwise.—See par. 5 this note.

8. Must be frugal.—Manifest duty is incumbent upon guardian to frugally manage estate of ward. Income and profits of estate, as far as may be necessary, shall be applied to comfortable and suitable maintenance of ward.—In re Guardianship of Ceas, 134 Cal. 114, 116, 66 Pac. Rep. 187.

9. IMPRISONMENT FOR DISOBEDIENCE OF ORDER TO SUPPORT.—Imprisonment is lawful for refusal to obey an order to pay money for support of minor children, made in divorce proceeding; habeas corpus will not lie.—Ex parte Gordan, 95 Cal. 374, 378, 30 Pac. Rep. 561.

10. INJURY TO CHILD—Action for.—See Code Civ. Proc. §376 and note.

11. NECESSARIES FOR CHILDREN—Supplied by third person, as to, see post §§ 207, 208 and notes.

12. OBLIGATION OF PARENT TO SUPPORT CHILD.—Parent's right to custody and society of his child is coupled with obligation to support and educate such child, and is also qualified and strictly limited by fact that child itself is human being, and as such is vested with rights for which it is entitled to protection.—In re Campbell, 130 Cal. 380, 382, sub nom. Campbell vs. Wright, 62 Pac. Rep. 613. See Hutchinson vs. Hutchinson, 124 Cal. 677, 680, 57 Pac. Rep. 674.

See par. 5 this note.

13. Primarily it is father's duty to support his minor children, whether he is with or without fault in matters involved in divorce

suit.—Ex parte Gordan, 95 Cal. 377, 30 Pac. Rep. 561.

14. Where deprived of custody of child is not, as general proposition of law, liable for its support and education.—Ex parte Miller, 109 Cal. 643, 648, 42 Pac. Rep. 428.

15. PATERNAL AUTHORITY—Abuse of, as to control by court, see post § 203 and note.

16. POOR RELATIVE—Duty to support.—See post § 206 and note.

17. RELATIONSHIP OF PARENT IN LOCO, carries with it duty of such parent to support and maintain infant according to his circumstances.—Starkie vs. Perry, 71 Cal. 495, 497, 12 Pac. Rep. 508.

18. Nephews and nieces received in family as members thereof, without any understanding regarding pay for their services or compensation for their maintenance, the law will not imply promise on either side, although uncle is not legally bound to support them.—Starkie vs. Perry, 71 Cal. 495, 497, 12 Pac. Rep. 508; Larsen vs. Hansen, 74 Cal. 320, 322, 16 Pac. Rep. 5. See Ky. Weir vs. Weir, 3 B. Mon. 645, 39 Am. Dec. 487. N. Y. Williams vs. Hutchinson, 3 N. Y. 312, 53 Am. Dec. 301; Robinson vs. Cushman, 3 Den. 149. Pa. Swires vs. Parsons, 5 Watts & S. 357. Vt. Fitch vs. Peckham, 16 Vt. 150; Andrus vs. Foster, 17 Vt. 556.

19. Stepfather receiving child of step-daughter into his family cannot recover for its support, maintenance, and education, and is entitled to its services and earnings.—Larsen vs. Hansen, 74 Cal. 320, 322, 16 Pac. Rep. 5. See McKay vs. McKay, 125 Cal. 65, 70, 57 Pac. Rep. 677. Ga. Russell vs. Switzer, 63 Ga. 722. Iowa. Bradford vs. Bodfish, 39 Iowa 681; Gerdes vs. Weiser, 54 Iowa 591, 593, 37 Am. Rep. 229, 7 N. W. Rep. 42. Kan. Smith vs. Rogers, 24 Kan. 140, 36 Am. Rep. 254. Mass. Mulhern vs. McDavitt, 32 Mass. (16 Gray) 404, 406. N. Y. Williams vs. Hutchinson, 3 N. Y. 313, 53 Am. Dec. 301; Hill vs. Hanford, 11 Hun 538 (distinguished, but declared sound on this point).

See post § 209 and note.

20. Same—Seduction—May maintain suit for.—Certwell vs. Hoyt, 6 Hun (N. Y.) 581.

See Code Civ. Proc. § 375 and note.

§ 197. CUSTODY OF LEGITIMATE CHILD. The father of a legitimate unmarried minor child is entitled to its custody, services, and earnings; but he cannot transfer such custody or services to any other person, except the mother, without her written consent, unless she has deserted him, or is living separate from him by agreement.

If the father [1] be dead, or [2] be unable, or [3] refuse to take the custody, or [4] has abandoned his family, the mother is entitled thereto.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 194.

1. Applied, cited, construed, referred to, etc.
2-5. Care and custody of child—Right of father.

6. Same—As against mother.

7. Same—Mother's right on default of others.

8. Same—Presumption as to parent's right.

9, 10. Same—Question for court in divorce proceedings.

11. Emancipation—Relinquishment of earnings.

12-14. Guardian for minor—Appointment of.

15. Property of child—Parents' control over.

16. Relinquishment of right to earnings.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Ex parte Gordan*, 95 Cal. 374, 377, 378, 30 Pac. Rep. 561 (cited with other sections); In *re Campbell*, 130 Cal. 380, 382, 62 Pac. Rep. 613 (construed and applied); Guardianship of *Ceas*, 134 Cal. 114, 116, sub nom. In *re Ceas' Estate*, 66 Pac. Rep. 137 (cited in discussion; *Henley vs. Wilson*, 137 Cal. 273, 276, 92 Am. St. Rep. 160, 70 Pac. Rep. 21, 58 L. R. A. 941 (applied); In *re Guardianship of Van Loan*, 142 Cal. 423, 426, sub nom. In *re Van Loan*, 76 Pac. Rep. 37 (applied).

2. **CARE AND CUSTODY OF CHILD—Right of father.**—Under general law, and under penalty of provisions of codes, father has natural right to care and custody of his child.—In *re Campbell*, 130 Cal. 380, 382, sub nom. *Campbell vs. Wright*, 62 Pac. Rep. 613.

See post § 198 note par. 2.

3. Subject to certain considerations going to question of welfare of minor, parent is entitled, as matter of right, to custody and guardianship of child.—In *re Guardianship Van Loan*, 142 Cal. 423, 426, sub nom. In *re Van Loan*, 76 Pac. Rep. 37.

See post § 246 and note; Code Civ. Proc. § 1751 and note.

4. Provisions of this section, together with those of § 1751 Code of Civ. Proc. are to be regarded as but a re-expression of the principles of the common law governing the subject.—In *re Campbell*, 130 Cal. 380, 382, sub nom. *Campbell vs. Wright*, 62 Pac. Rep. 613.

See ante § 5 and note.

5. **Correlative right to care and custody, and duty to support a child**, carries with it right to services and earnings of child, which is strictly a property right, and comes within the reason, if not within the strict letter, of the constitutional provisions for the protection of property.—*Ex parte Miller*, 109 Cal. 643, 648, 662, 42 Pac. Rep. 428; In *re Campbell*, 130 Cal. 380, 382, sub nom. *Campbell vs. Wright*, 62 Pac. Rep. 613.

6. **Father as against wife** is entitled to control and custody, and to the earnings of his minor children, unless during separation.—*Henley vs. Wilson*, 137 Cal. 273, 276, 92 Am. St. Rep. 160, 70 Pac. Rep. 21, 58 L. R. A. 941.

See post § 198 note par. 2.

7. **Mother's right to custody on default of father.**—Where father is (1) unable, or (2) refuses to take custody, mother is entitled there-

to, and where father and mother are living separate and apart, the father, as such, has no rights superior to those of the mother in regard to the care and custody or control of their children.—In *re Guardianship of Van Loan*, 142 Cal. 423, 426, sub nom. In *re Van Loan*, 76 Pac. Rep. 37.

8. **Presumption as to parent's right.**—Presumption is, *prima facie*, that parent is competent to be awarded guardianship of his minor child, and court has no authority to appoint another as such guardian unless it finds contrary to be true.—In *re Campbell*, 130 Cal. 380, 382, sub nom. *Campbell vs. Wright*, 62 Pac. Rep. 613.

See pars. 2-5 this note.

9. **Question for court in divorce proceedings.** In an action for divorce court has jurisdiction to make such orders for custody and maintenance of minor children as it may deem necessary and expedient, regardless of whether or not fitness of respective parties is pleaded.—*Ex parte Gordan*, 95 Cal. 374, 377-378, 30 Pac. Rep. 561.

See ante §§ 138, 139 and note.

10. Custody may be awarded in such case, although pleadings contain no allegation as to fitness of either parent to have care, custody, and control.—*Ex parte Gordan*, supra. See *Gaston vs. Gaston*, 114 Cal. 542, 545, 55 Am. St. Rep. 87, 46 Pac. Rep. 609 (awarding alimony without allegation as to husband's means).

11. **EMANCIPATION—Relinquishment of earnings**,—as to, see post § 211 and note.

12. **GUARDIAN FOR MINOR—Appointment of**,—as to, see post § 421 and note.

13. In appointment of guardian under §§ 1747, 1751 Code Civ. Proc., father is entitled to appointment to exclusion of others, where it appears that he is competent to act.—In *re Guardianship of Salter*, 142 Cal. 412, 413, sub nom. In *re Salter*, 76 Pac. Rep. 51.

See Code Civ. Proc. §§ 1747-1751 and notes.

14. Fact that father is poor, and that on account of child's ill-health, an abode with father may be less beneficial to its health than would be an abode with its grandmother, furnishes no legal ground for depriving him of custody of child.—*Ibid.* p. 415.

15. **PROPERTY OF CHILD—Parent's control over**,—as to, see post § 202 and note.

16. **Relinquishment of right to earnings**,—as to, see post § 214 and note.

§ 198. **HUSBAND AND WIFE LIVING SEPARATE, NEITHER TO HAVE SUPERIOR RIGHT TO CUSTODY OF CHILDREN.** The husband and father, as such, has no rights superior to those of the wife and mother, in regard to the care, custody, education, and control of the children of the marriage, while such husband and wife live separate and apart from each other.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Parents living apart—Father's right not superior.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Henley vs. Wilson*, 137 Cal. 273, 276, 92 Am. St. Rep. 160, 70 Pac. Rep.

21, 58 L. R. A. 941 (applied); In *re Guardianship of Van Loan*, 142 Cal. 423, 426, sub nom. In *re Van Loan*, 76 Pac. Rep. 37 (applied).

2. **PARENTS LIVING APART—Father's right not superior.**—During separation husband and father has no rights, relating to custody

and care of his children, superior to those of wife and mother.—*Henley vs. Wilson*, 137 Cal. 273, 276, 93 Am. St. Rep. 160, 70 Pac. Rep. 21, 53 L. R. A. 941; *In re Guardianship of Van Loan*,

142 Cal. 423, 426, sub nom. *In re Van Loan*, 76 Pac. Rep. 37.

As to custody of child in divorce, see ante § 138 and note.

§ 199. WHEN HUSBAND OR WIFE MAY BRING ACTION FOR THE EXCLUSIVE CONTROL OF CHILDREN—DECREE IN SUCH CASES. Without application for a divorce, the husband or the wife may bring an action for the exclusive control of the children of the marriage; and the court may, [1] during the pendency of such action, or [2] at the final hearing thereof, or [3] afterwards, make such order or decree in regard to the support, care, custody, education, and control of the children of the marriage, as may be just, and in accordance with the natural rights of the parents and the best interests of the children, and may [4] at any time thereafter amend, vary, or modify such order or decree, as the natural rights and the interests of the parties, including the children, may require.

History: Enacted March 21, 1872.

- 1, 2. Depriving parent of custody pending action.
3. As to when wife entitled to custody.

4. Awarding custody—Considerations governing.

1. **Depriving parent of custody pending action.**—Court has authority to deprive parent of custody of his child in event of controversy between parents regarding custody of said child.—*Ex parte Miller*, 109 Cal. 643, 649, 42 Pac. Rep. 428.

2. In interest of child's welfare, court may terminate his control over his child, independently of any statutory provision therefor.—*In re Campbell*, 130 Cal. 380, 382, sub nom. *Campbell vs. Wright*, 62 Pac. Rep. 613.

3. As to when wife is entitled to custody of child, see post § 214 and note.

4. Awarding custody—Considerations governing court in,—as to, see post § 200 note par. 4; also § 246 and note.

§ 200. CUSTODY OF AN ILLEGITIMATE CHILD. The mother of an illegitimate unmarried minor is entitled to its custody, services, and earnings.

History: Enacted March 21, 1872.

1. Custody—Mother's right to.
- 2, 3. Same—Putative father's right to.
4. Same—Welfare of child considered.
5. Estate of—Mother inherits.
6. Mother's duty to support.

1. **CUSTODY—Mother has right to, as against all other persons.**—See *Ill. Wright vs. Bennett*, 7 Ill. 537. *Ind. Copeland vs. State*, 60 Ind. 394. *N. J. State vs. Stigall*, 22 N. J. L. (2 Zab.) 286. *N. M. Bustamento vs. Analla*, 1 N. M. 255. *N. Y. People vs. Mitchell*, 44 Barb. 245; *In re Doyle*, 1 Clarke Ch. 154, 156.

2. **Putative father, as against all but mother, if proper person, is entitled to custody and control.**—*Pa. Pote's Appeal*, 106 Pa. St. 574, 51 Am. Rep. 540; *Commonwealth vs. Anderson*, 1 Ashm. 55; *Moritz vs. Garnhart*, 7 Watts 302, 32

Am. Dec. 762. *Tex. Barela vs. Roberts*, 34 Tex. 554. *Eng. Newland vs. Osmer*, 1 Burns' Just. 234; *Richards vs. Hodges*, 2 Saund. 83; *Bardwell's Case*, Vent. 48; *Sherman's Case*, Vent. 210.

3. Compare: *Mathews vs. Hobbe*, 51 Ala. 210.

4. **Welfare of child considered by court in awarding custody.**—See *State vs. Noble*, 70 Iowa 174; *In matter Nofsinger*, 25 Mo. App. 116; *People vs. Kling*, 6 Barb. (N. Y.) 366.

See post § 246 and note.

5. **Estate of illegitimate child, dying intestate, goes to mother.**—See post § 1387 and note.

6. **Mother's duty to support.**—See ante § 196 and note.

§ 201. ALLOWANCE TO PARENT. The proper court may direct an allowance to be made to the parent of a child, out of its property, for its past or future support and education, on such conditions as may be proper, whenever such direction is for its benefit.

History: Enacted March 21, 1872.

1. Allowance to father.
2. Same—Annuity granted during minority.
- 3, 4. Same—Valid limitation over.
5. Allowance to mother.
- 6, 7. Allowance for past maintenance.

1. **ALLOWANCE TO FATHER**—From estate of infant, for its support and education, without statutory provision giving power, may be made by court of equity, in those cases where father is financially unable to give it that care

and education requisite to fit it for the station in life which it will, or should, occupy on attaining majority.—See 15 Am. & Eng. Encyc. of L. (2d ed.) 102, 21 Id. 1051.

2. **Annuity granted during minority** for support and education of children, together with distributive share of estate, court may grant allowance, on proper showing, out of rents and profits, directed to be accumulated for their benefit.—In re Davison, 6 Paige Ch. (N. Y.) 136; Gilman vs. Healey, 1 Dem. (N. Y.) 408. See Campbell vs. Robertson, 62 Ga. 716; In re Ryder, 11 Paige Ch. (N. Y.) 185, 187, 42 Am. Dec. 109, 111.

3. **Valid limitation upon estate given to infant**, court will not decree maintenance out of corpus of fund.—In re Davison, 6 Paige Ch. (N. Y.) 136. See In re Turner, 10 Barb. (N. Y.) 552; Deen vs. Cozzens, 7 Robt. (N. Y.) 186.

4. Except persons to whom estate is limited consent thereto.—N. J. Fowler vs. Colt, 22 N. J. Eq. (7 C. E. Gr.) 51. N. Y. Smith vs. Smith, 2 Dem. 43; In re Davison, 6 Paige Ch. 136; In re Ryder, 11 Paige Ch. 185, 186, 42 Am. Dec. 109. Eng. Kime vs. Wellfitt, 3 Sim. 533, 30 Rev. Rep. 211; Greenwell vs. Greenwell, 5 Ves. 194 (not followed in any case admitting a distinction); Cavendish vs. Mercer, 5 Ves. 195, 5 Rev. Rep. 26 note 27; Evans vs. Massey, 1 Younge & J. 196.

5. **ALLOWANCE TO MOTHER**, where par-

ents have been living apart, she having cared for and supported child.—Pierce vs. Pierce, 64 Wis. 72, 73, 54 Am. Rep. 581, 24 N. W. Rep. 498. See In re Davison, 6 Paige Ch. (N. Y.) 136; Voessing vs. Voessing, 4 Redf. (N. Y.) 360.

6. **ALLOWANCE FOR PAST MAINTENANCE** will be made only in cases of clearest proof that justice requires it.—See D. C. Holtzman vs. Castleman, 2 McAr. (D. C.) 555. N. Y. Beardsley vs. Hotchkiss, 96 N. Y. 201; Smith vs. Geortner, 40 How. Pr. (N. Y.) 185. Va. Evans vs. Pearce, 15 Gratt. (Va.) 513, 78 Am. Dec. 635; Stigler vs. Stigler, 77 Va. 163. Eng. Andrews vs. Partington, 3 Bro. C. C. 60, 2 Cox Ch. 223; Ex parte Bond, 2 Myl. & K. 439, 4 L. J. N. S. Ch. 84, 39 Rev. Rep. 232; In re Knapp (1895), 1 Ch. 91, 64 L. J. Ch. 112.

7. "In absence of special statutory authority to entitle father, even to inquiry as to propriety of making allowance for past support, he should state special case, showing extent of his means at time such support was furnished, and particulars of extraordinary expenditure for actual benefit of infant, which created an equitable claim in his favor."—In matter Kane, 2 Barb. Ch. (N. Y.) 375; Beardsley vs. Hotchkiss, 96 N. Y. 201, 220. See Wilkes vs. Rogers, 6 John. (N. Y.) 566; In re Howarth, L. R. 8 Ch. App. 415; In re Hodges, L. R. 7 Ch. Div. 754; Carmichael vs. Hughes, L. J. Rep. (N. S.) Ch. 396.

§ 202. **PARENT CANNOT CONTROL PROPERTY OF CHILD.** The parent, as such, has no control over the property of the child.

History: Enacted March 21, 1872.

1. **Guardian alone can control infant's property.**—See post § 242 and note.

2. **As to appointment of guardian by parent,** see post § 241 and note.

§ 203. **REMEDY FOR PARENTAL ABUSE.** The abuse of parental authority is the subject of judicial cognizance in a civil action brought [1] by the child, or [2] by its relative within the third degree, or [3] by the supervisors of the county where the child resides; and when the abuse is established, the child may be freed from the dominion of the parent, and the duty of support and education enforced.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Abuse of parental authority—Judicial control.
3. Authority to appoint guardian.
4. Child's welfare first consideration.
5. Disability without fault or misconduct of parents.
6. Emancipation and support of child.
- 7, 8. Jurisdiction of superior court.
9. Parents must have hearing.
10. Summons and copy of complaint must be served on defendant.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: In re Hunt, 103 Cal. 355, 356, 357, 37 Pac. Rep. 206 (applied); Ex parte Miller, 109 Cal. 643, 647, 649 (construed and applied), 651, 656, 659 (cited in dis. op.), 653, 654 (held not applicable in dis. op.), 655 (construed in dis. op.), 42 Pac. Rep. 428 (construed in dis. op.); Hutchinson vs. Hutchinson, 124 Cal. 677, 678, 57 Pac. Rep. 674 (applied).

2. **Abuse of parental authority** is subject of judicial cognizance in civil action. There is no reason to suppose that words "abuse of parental authority" were used in sense less comprehensive than that which will comprehend every sort of neglect or misconduct by which parent may justly forfeit his parental rights.—Ex parte Miller, 109 Cal. 643, 654, 42 Pac. Rep. 428.

3. **Authority to appoint guardian** of child is not conferred by this section, and it is dependent upon enforcement in behalf of child of right of action thereby authorized.—Ex parte Miller, 109 Cal. 643, 647, 42 Pac. Rep. 248.

See post § 241 and note.

4. **Child's welfare first consideration.**—Statute is enacted for benefit and protection of children, and first consideration of trial court should be their welfare.—Hutchinson vs. Hutchinson, 124 Cal. 677, 680, 57 Pac. Rep. 674.

Desertion of child by parent—Felony.—See Pen. Code § 271 and note.

5. **Disability without fault or misconduct of parent.**—Where parent becomes unfit to have custody of his children, without any fault or misconduct on his part, as in case of insanity, permanent or temporary, it is generally convenient and often necessary to appoint guardian of persons of his minor children during continuance of such disability, but § 203 has no application to such and similar cases.—*Ex parte Miller* (dis. op.), 109 Cal. 648, 652, 42 Pac. Rep. 428.

6. **Emancipation and support of child.**—Primary purpose of § 203 is to confer right of action in favor of child against parent for abuse of parental authority, and as an incident thereto, when establishing cause of action, to emancipate child from control of parent, at same time enforcing in its favor parent's obligation of support and education.—*Ex parte Miller*, 109 Cal. 648, 647, 42 Pac. Rep. 428.

Failure to supply child with necessities—Misdemeanor, where wilful.—Pen. Code § 270 and note.

7. **Jurisdiction of superior court.**—Statute is not limitation upon jurisdiction conferred by

constitution upon superior court nor upon exercise of that jurisdiction authorized by § 243 post.—*Ex parte Miller*, 109 Cal. 648, 647, 42 Pac. Rep. 428.

8. **Court has no jurisdiction to commit custody of child from natural guardians to stranger in any proceeding not inaugurated under this section.**—*In re Hunt*, 108 Cal. 355, 356, 37 Pac. Rep. 206.

Parental duty,—as to, see ante § 196 and note.

9. **Parents must have hearing.**—Court has no authority to appoint guardian other than the parents, unless such parents are served with notice, and have opportunity for hearing and appeal.—*Ex parte Miller*, 109 Cal. 643, 648, 42 Pac. Rep. 428.

10. **Summons and copy of complaint must be served on defendant.**—Defendant in action to free infant from parental custody where right to such custody is abused, should be served with summons and copy of complaint containing statement of specific facts, and should have at least 10 days to demur or answer.—*Ex parte Miller*, 109 Cal. 643, 655, 42 Pac. Rep. 428.

§ 204. WHEN PARENTAL AUTHORITY CEASES. The authority of a parent ceases:

1. Upon the appointment, by a court, of a guardian of the person of a child;
2. Upon the marriage of the child; or,
3. Upon its attaining majority.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.

2. Void contract respecting female over eighteen.

1. Applied, cited, construed, referred to, etc., in: *Ex parte Miller*, 109 Cal. 643, 649, 42 Pac. Rep. 428 (referred to); *Dittrich vs. Gobey*, 119 Cal. 599, 601, 51 Pac. Rep. 962 (applied); *In re Guardianship of Van Loan*, 142 Cal. 423, 426, sub nom. *In re Van Loan*, 76 Pac. Rep. 87.

2. Void contract respecting female over eighteen years old.—Any contract between husband and wife as to custody of their daughter, after she arrives at age of eighteen, is void, because at that age she is emancipated.—*Dittrich vs. Gobey*, 119 Cal. 599, 601, 51 Pac. Rep. 962.

§ 205. REMEDY WHEN A PARENT DIES WITHOUT PROVIDING FOR THE SUPPORT OF HIS CHILD. If a parent chargeable with the support of a child dies, [1] leaving it chargeable to the county, and [2] leaving an estate sufficient for its support, the supervisors of the county may claim provision for its support from the parent's estate by civil action, and for this purpose may have the same remedies as any creditors against that estate, and against the heirs, devisees, and next of kin of the parent.

History: Enacted March 21, 1872.

Applied, cited, construed, referred to, etc., in: *Ex parte Miller*, 109 Cal. 643, 649, 42 Pac. Rep. 428 (referred to).

§ 206. RECIPROCAL DUTIES OF PARENTS AND CHILDREN IN MAINTAINING EACH OTHER. It is the duty of the [1] father, the [2] mother, and the [3] children of any poor person who is unable to maintain himself by work, to maintain such person to the extent of their ability. The promise of an adult child to pay for necessities previously furnished to such parent is binding.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.

2. Allowance.—For invalid daughter on divorce.

3. Same.—To mother out of child's estate—Past support.

1. Applied, cited, construed, referred to, etc., in: *Anderson vs. Anderson*, 124 Cal. 48, 54, 55, 71 Am. St. Rep. 17, 56 Pac. Rep. 630, 57 Id. 81 (construed and applied).

2. Allowance for invalid daughter.—Upon issuing decree for wife's maintenance, court may properly make allowance to her for support of invalid daughter over the age eighteen years.—Anderson vs. Anderson, 124 Cal. 48, 54, 71 Am. St. Rep. 17, 56 Pac. Rep. 630, 57 Id. 31.

See Snover vs. Snover, 18 N. J. Eq. (2 Beas.) 261; Fitch vs. Cornell, 1 Sawy. C. C. 156, 9 Fed. Cas. 172, 177.

See ante §§ 138, 139 and notes.

3. To mother—Out of allowance of child's estate—Past support.—See ante § 201 and notes.

§ 207. WHEN A PARENT IS LIABLE FOR NECESSARIES SUPPLIED TO A CHILD. If a parent neglects to provide articles necessary for his child who is under his charge, according to his circumstances, a third person may in good faith supply such necessities, and recover the reasonable value thereof from the parent.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.

2, 3. Liability of parent for necessities, when.

4. Liability of infant for necessities, when.

1. Applied, cited, construed, referred to, etc., in: Ex parte Miller, 109 Cal. 643, 649, 42 Pac. Rep. 428 (referred to).

2. Liability of parent for necessities supplied his infant child.—See 21 Am. & Eng. Encyc. of L. (3d ed.) 1050.

3. Otherwise as to adult child.—See Blachley vs. Loba, 63 Iowa 22, 50 Am. Rep. 724, 18 N. W. Rep. 658; Crane vs. Baudouine, 55 N. Y. 256, 259.

See 21 Am. & Eng. Encyc. of L. (2d ed.) 1054.

4. Liability of infant for necessities furnished, when.—See ante § 36 and note.

5. Same—Furnished for purpose of business.—See ante § 36 note para. 32, 36.

§ 208. WHEN A PARENT IS NOT LIABLE FOR SUPPORT FURNISHED HIS CHILD. A parent is not bound to compensate [1] the other parent, or [2] a relative, for the voluntary support of his child, without an agreement for compensation, nor [3] to compensate a stranger for the support of a child who has abandoned the parent without just cause.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.

2. Reimbursement—None required in divorce.

1. Applied, cited, construed, referred to, etc., in: McKay vs. McKay, 125 Cal. 65, 72, 57 Pac. Rep. 677 (applied).

2. Reimbursement not required in action

for divorce.—In actions for divorce, if it be shown that children have already been sufficiently cared for by voluntary act of mother, or of strangers, court is not empowered to compel father to reimburse these persons for such expenses.—McKay vs. McKay, 125 Cal. 65, 72, 57 Pac. Rep. 677.

§ 209. HUSBAND NOT BOUND FOR THE SUPPORT OF HIS WIFE'S CHILDREN BY A FORMER MARRIAGE. A husband is not bound to maintain his wife's children by a former husband; but if he receives them into his family and supports them, it is presumed that he does so as a parent, and, where such is the case, they are not liable to him for their support, nor he to them for their services.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.

2. Maintenance—Illegitimate child of stepdaughter.

1. Applied, cited, construed, referred to, etc., in: Larsen vs. Hansen, 74 Cal. 320, 322, 16 Pac. Rep. 5 (applied); McKay vs. McKay, 125 Cal. 65, 70, 57 Pac. Rep. 677 (applied).

2. Maintenance of illegitimate child of stepdaughter.—A man is not legally bound to

maintain illegitimate child of his stepdaughter, nor his nephews and nieces; yet if they lived with him as members of his family without any contract or understanding that he shall pay for their services, or receive pay for their maintenance, the law will not imply a promise to pay on either side.—Larsen vs. Hansen, 74 Cal. 320, 322, 16 Pac. Rep. 5.

See ante § 196 note par. 19.

§ 210. COMPENSATION AND SUPPORT OF ADULT CHILD. Where a child, after attaining majority, continues to serve and to be supported by the parent, neither party is entitled to compensation, in the absence of an agreement therefor.

History: Enacted March 21, 1872.

§ 211. PARENT MAY RELINQUISH SERVICES AND CUSTODY OF CHILD.

The parent, whether solvent or insolvent, may relinquish to the child the right of controlling him and receiving his earnings. Abandonment by the parent is presumptive evidence of such relinquishment.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Relinquishment—Consent to illegal adoption.

1. Applied, cited, construed, referred to, etc., in: *Taylor vs. Hill*, 115 Cal. 143, 151, 44 Pac. Rep. 336, 46 Id. 922 (referred to).

2. Relinquishment—Consent to illegal adoption does not amount to, and does not estop legal parents from reclaiming custody.—*Ex parte Clark*, 87 Cal. 628, 642, 25 Pac. Rep. 967. See *Markwell vs. Pereles*, 95 Wis. 406, 69 N. W. Rep. 798.

§ 212. WAGES OF MINOR. The wages of a minor employed in service may be paid to him, until the parent or guardian entitled thereto gives the employer notice that he claims such wages.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 194.

§ 213. RIGHT OF PARENT TO DETERMINE THE RESIDENCE OF CHILD.

A parent entitled to the custody of a child has a right to change his residence, subject to the power of the proper court to restrain a removal which would prejudice the rights or welfare of the child.

History: Enacted March 21, 1872.

1. Residence of children—Father may determine what shall be.—*Luck vs. Luck*, 92

Cal. 653, 655, 28 Pac. Rep. 787. See § 156 and note.

§ 214. WIFE IN CERTAIN CASES MAY OBTAIN CUSTODY OF MINOR CHILDREN.

When a husband and wife live in a state of separation, without being divorced, any court of competent jurisdiction, upon application of either, if an inhabitant of this state, may inquire into the custody of any unmarried minor child of the marriage, and may award the custody of such child to either, for such time and under such regulations as the case may require. The decision of the court must be guided by the rules prescribed in section two hundred and forty-six.

History: Enacted March 21, 1872.

1. Action for control without prayer for divorce.—See ante § 199 and note.

2. Custody pending divorce proceedings.—See ante §§ 138, 139 and notes.

§ 215. WHEN CHILD BECOMES LEGITIMATE. A child born before wedlock becomes legitimate by the subsequent marriage of its parents.

History: Enacted March 30, 1874, Code Amdts. 1873-4, p. 195.

1. Applied, cited, construed, referred to, etc.
2. Construction—By Massachusetts court.
3. Letter acknowledging legitimacy.
4. Rights of inheritance.

1. Applied, cited, construed, referred to, etc., in: *In re Estate of Wardell*, 57 Cal. 484, 491 (construed and applied); *Blythe vs. Ayres*, 96 Cal. 532, 572, 21 Pac. Rep. 915, 19 L. R. A. 40 (applied).

2. Construction—Supreme Judicial Court Massachusetts.—Marriage of father and mother of illegitimate child, which is void by reason of the fact that father had not obtained legal residence before being granted divorce from previous wife, does not legitimate such child.—*Adams vs. Adams*, 164 Mass. 290, 28 N. E.

Rep. 260, 13 L. R. A. 275 (construing § 215 of California Civil Code).

The court say: "If we assume that § 84 applies where there has been no judgment annulling the marriage, the general words 'children begotten before the judgment' must be confined to children born after the marriage, in view of § 1387. Neither § 84 nor § 1387, nor both together, can be taken to enlarge the meaning of § 215, discussed at the beginning of this opinion, so that a void marriage shall legitimate children previously born. The view which we take seems to be that of the supreme court of California so far as they have expressed an opinion."—*Adams vs. Adams*, 154 Mass. 290, 28 N. E. Rep. 260, 13 L. R. A. 275.

3. Letter acknowledging legitimacy.—Let-

ter to illegitimate child beginning: "My darling child" and ending "From your loving father," and one to child's grandfather requesting child to be baptized with father's name, and brought up in specified church, being signed in the presence of competent witness, constitutes sufficient acknowledgment of child to make it heir, although letters contained no recital of fact that child is illegitimate.—*Blythe vs. Ayres*, 96 Cal. 532, 563, 31 Pac. Rep. 915, 19 L. R. A. 40.

4. **Rights of inheritance.**—Children born out of lawful wedlock, whose parents subsequently intermarry, as well as the children by acknowledgment or adoption of their father, are all legitimate. Between them and legitimate offspring of same parents, the law has established cognatic relations, and either is as capable as the other of exercising inheritable rights.—*In re Estate of Wardell*, 57 Cal. 484, 491.

See post § 1837 and note.

CHAPTER II.

ADOPTION.

- § 221. Child may be adopted.
- § 222. Who may adopt.
- § 223. Consent to adoption [by wife].
- § 224. Adoption of children, consent necessary—
Orphans and abandoned children.
- § 225. Consent of child.

- § 226. Proceedings on adoption.
- § 227. Judge's order in adoption proceedings.
- § 228. Effect of adoption.
- § 229. Effect on former relations of child.
- § 230. Adoption of illegitimate child.

§ 221. CHILD MAY BE ADOPTED. Any minor child may be adopted by any adult person, in the cases and subject to the rules prescribed in this chapter.

History: Enacted March 21, 1872.

- 1. Applied, cited, construed, referred to, etc.
- 2-5. Construction—Adoption statutes strictly construed.

- 6. Same—Plain intent must not be exceeded.

1. **Applied, cited, construed, referred to, etc.**, in: *In re Estate of Romero*, 75 Cal. 379, 381, 17 Pac. Rep. 434 (applied); *In re Estate of Jessup*, 81 Cal. 408, 441, 21 Pac. Rep. 976, 22 Id. 742, 1028, 6 L. R. A. 594 (compared with statutes of 1869-70), 446 (construed); *In re Estate of Williams*, 102 Cal. 70, 79, 41 Am. St. Rep. 163, 36 Pac. Rep. 407 (construed).

2. **Construction.**—Adoption statutes, being in derogation of the common law, must be strictly construed.—*In re Estate of Jessup*, 81 Cal. 441-443, 21 Pac. Rep. 976, 979, 22 Id. 742, 1028, 6 L. R. A. 594. See *In re Estate of Sandford*, 4 Cal. 12; *Pina vs. Peck*, 31 Cal. 359, 361. See ante § 4 note para. 12, 13.

3. All sections of code relating to subject of adoption should be construed together.—*In re Estate of Johnson*, 98 Cal. 531, 536-537, 33 Pac. Rep. 460, 21 L. R. A. 380.

4. "Statute is to receive sensible construction, and its intention is to be ascertained, not from literal meaning of any particular word or single section, but from consideration of entire statute, its spirit and purpose."—*Ibid.*

5. "It is one of the great maxims of interpretation to keep always in view general scope, object, and purpose of the law, rather than the mere letter. He who considers merely the letter of an instrument goes but skin deep into its meaning."—*Rutledge vs. Crawford*, 91 Cal. 526, 533, 25 Am. St. Rep. 212, 27 Pac. Rep. 779, 13 L. R. A. 761; *Broom's Legal Max.* 611.

6. **Plain limit not to be extended by construction.**—*In re Estate of Jessup*, 81 Cal. 408, 419, 21 Pac. Rep. 976, 22 Id. 742, 1028, 6 L. R. A. 594; *Blythe vs. Ayres*, 96 Cal. 532, 577, 31 Pac. Rep. 915, 19 L. R. A. 40 (discussing provisions respecting adoption of illegitimate children). See *In re Estate of Johnson*, 98 Cal. 531, 551, 33 Pac. Rep. 460, 21 L. R. A. 380 (dissenting opinion of Harrison, J., discussing provisions for adoption of children of other parents).

§ 222. WHO MAY ADOPT. The person adopting the child must be at least ten years older than the person adopted.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 195.

- 1. Right of adoption a creature of statute.
- 2, 3. Same—To whom applies.
- 4, 5. Wife's right to adopt.

1. **Right of adoption is pure creature of statute.**—*In re Estate of Johnson*, 98 Cal. 531, 536-537, 33 Pac. Rep. 460, 21 L. R. A. 380.

2. **Statute applies to adoption by persons other than parent.**—*In re Estate of Jessup*, 81 Cal. 408, 446, 21 Pac. Rep. 979, 22 Id. 742, 1028, 6 L. R. A. 594.

3. **Civil law recognized adoption of child of another parent, but it is unknown to the common law, and exists in this country only by special statute.**—See *In re Estate of Stevens*, 83 Cal. 322, 17 Am. St. Rep. 252, 23 Pac. Rep. 379; *Ex parte Clark*, 87 Cal. 638, 25 Pac. Rep. 967. *Ala. Abney vs. De Loach*, 84 Ala. 393, 4 So. Rep. 757. *Mich. Morrison vs. Estate of Sessions*, 70 Mich. 297, 14 Am. St. Rep. 500, 38 N. W. Rep. 249. *Oreg. Furgeson vs. Jones*, 17 Oreg. 204, 214, 11 Am. St. Rep. 308.

20 Pac. Rep. 842, 3 L. R. A. 620. Pa. Ballard vs. Ward, 89 Pa. St. 358. Wyo. Nugent vs. Powell, 4 Wyo. 173, 62 Am. St. Rep. 17, 33 Pac. Rep. 23, 20 L. R. A. 199.

See also 1 Am. & Eng. Encyc. of L. (2d ed.) 726.

4. Wife's right to adopt child same as husband's, where parents are legally separated.—

In re Williams, 102 Cal. 70, 79, 41 Am. St. Rep. 163, 36 Pac. Rep. 407.

5. "Wife has precisely same right to adopt child as husband, and both may unite in application for adoption of child as child of both."—In re Williams, 102 Cal. 70, 79, 41 Am. St. Rep. 163, 36 Pac. Rep. 407. See King vs. Davis, 87 Ind. 590.

§ 223. **CONSENT TO ADOPTION [BY WIFE].** A married man, not lawfully separated from his wife, cannot adopt a child without the consent of his wife, nor can a married woman, not thus separated from her husband, without his consent, provided the husband or wife, not consenting, is capable of giving such consent.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 195.

1. Applied, cited, construed, referred to, etc., in: In re Estate of Johnson, 98 Cal. 531, 536-537, 33 Pac. Rep. 460, 21 L. R. A. 380 (con-

strued); In re Estate of Williams, 102 Cal. 70, 79, 41 Am. St. Rep. 163, 36 Pac. Rep. 407 (construed).

§ 224. **ADOPTION OF CHILDREN; CONSENT NECESSARY—ORPHANS AND ABANDONED CHILDREN.** A legitimate child cannot be adopted without

the consent of its parents, if living; nor an illegitimate child without the consent of its mother, if living; except that consent is not necessary from a father or mother [1] deprived of civil rights, or [2] adjudged guilty of [a] adultery or cruelty, and [b] for either cause divorced, or [3] adjudged to be habitually intemperate in the use of intoxicants, or who [4] has been judicially deprived of the custody of the child on account of [a] cruelty or [b] neglect; [Abandoned child.] neither is the consent of any one necessary in the case of any abandoned child; provided, however, that any such child, being a half orphan, and kept and maintained in any orphan asylum in this state for more than two years, may be adopted with the consent of the managers of such orphans' home without the consent of the parent unless such parent has paid toward the expenses of maintenance of such half orphan at least a reasonable sum during the said time, if able to do so. [Deserted child.] Any child [1] deserted by both parents, or [2] left in the care and custody of another by its parent or parents, [a] without any agreement or provision for its support, [b] for the period of one year, is deemed to be an abandoned child within the meaning of this section, and where the parent is a non-resident of this state such child may without the consent of either parent be adopted with the consent of the managers of such home whenever it has been left in such home for more than one year.

History: Enacted March 21, 1872; amended March 2, 1891, Stats. and Amdts. 1891, p. 24; March 9, 1893, Stats. and Amdts. 1893, p. 112; March 9, 1895, Stats. and Amdts. 1895, p. 39; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 339, held unconstitutional; see history, § 4 ante; amended March 10, 1903, Stats. and Amdts. 1903, p. 114. In force immediately.

1. Applied, cited, construed, referred to, etc.

2. Father's consent—When not necessary.

3. Mother's consent—Not necessary, when.

1. Applied, cited, construed, referred to, etc., in: In re Estate of Wardell, 57 Cal. 484, 491 (construed); In re Estate of Johnson, 98 Cal. 531, 536-537, 33 Pac. Rep. 460, 21 L. R. A. 380 (referred to with other sections); In re Estate of Williams, 102 Cal. 70, 81, 41 Am. St. Rep. 163, 36 Pac. Rep. 407 (construed); Younger vs. Younger, 106 Cal. 377 (applied), 379 (referred to with § 381), 39 Pac. Rep. 779.

2. Consent of father who has been divorced from mother on ground of his own misconduct, is not necessary.—In re Estate of Williams, 102 Cal. 70, 81, 41 Am. St. Rep. 163, 36 Pac. Rep. 407.

3. Consent of mother is not necessary where adoption is by father, especially when it is result of his conduct toward child, and does not depend upon any further proceedings.—In re Jessup's Estate, 81 Cal. 408, 446, 21 Pac. Rep. 976, 22 Id. 742, 1028, 6 L. R. A. 594.

§ 225. CONSENT OF CHILD. The consent of a child, if over the age of twelve years, is necessary to its adoption.

History: Enacted March 21, 1872.

Consent of child—Where over age of twelve, Johnson, 98 Cal. 531, 537, 33 Pac. Rep. 460, 21 necessary to adoption.—In re Estate of L. R. A. 380.

§ 226. PROCEEDINGS ON ADOPTION. Any person desiring to adopt a child may, for that purpose, petition the superior court of the county in which the petitioner resides. The [1] person adopting a child, and [2] the child adopted, and [3] the other persons, if within or residents of this state, whose consent is necessary, must appear before the court, and [4] the necessary consent must thereupon be signed and [5] an agreement executed by the person adopting, to the effect that the child shall be adopted and treated in all respects as his own lawful child should be treated. If the persons whose consent is necessary are not within or are not residents of this state, then [6] their written consent, duly proved or acknowledged, according to sections eleven hundred and eighty-two and eleven hundred and eighty-three, [7] must be filed in said superior court at the time of the application for adoption.

History: Enacted March 21, 1872; amended Feb. 9, 1876, Code Amdts. 1875-6, p. 70; April 6, 1880, Code Amdts. 1880 (C. C. pt.), p. 4; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 339, held unconstitutional; see history, § 4 ante; re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXV, p. 555.

1. Applied, cited, construed, referred to, etc.
2. Adoption—Nature of proceedings.
- 3, 4. Collateral attack.
5. Consent necessary.
- 6, 7. Nature of proceedings.
8. Object of section.
9. Practice.
10. Presumption.
11. Record of proceedings.
- 12, 13. Statutory provisions—Substantial compliance.

1. Applied, cited, construed, and referred to in: Ex parte Clark, 87 Cal. 638, 640, 25 Pac. Rep. 967 (construed); Blythe vs. Ayres, 96 Cal. 532, 567, 31 Pac. Rep. 915, 19 L. R. A. 40 (referred to in discussion); In re Estate of Johnson, 98 Cal. 531 (cited), 537 (referred to with other sections dis. op.), 547 (construed dis. op.), 552, 33 Pac. Rep. 460, 21 L. R. A. 380; In re Estate of Williams, 102 Cal. 70, 77, 41 Am. St. Rep. 163, 36 Pac. Rep. 407 (construed).

2. Adoption—Nature of proceedings.—See post.

3. Collateral attack.—Judge of superior court in adoption proceeding performs judicial function, not subject to collateral attack.—Estate of Camp, 131 Cal. 469, 470, 82 Am. St. Rep. 371, 63 Pac. Rep. 736.

4. In determining matter before court, order fixes status of each party toward other; and unless attack for fraud, will be held valid and conclusive upon parties and their privies, until reversed or set aside, in jurisdiction in which it was rendered.—Ill. Roth vs. Roth, 104 Ill. 35, 44 Am. Rep. 81; Van Matre vs. Sankey, 148 Ill. 536, 39 Am. St. Rep. 196, 36 N. E. Rep. 628, 23 L. R. A. 665. Mass. Adams vs. Adams, 154 Mass. 290, 295, 23 N. E. Rep. 260, 13 L. R. A. 275. N. J. Nichols vs. Nichols, 25 N. J. Eq.

(10 C. E. Gr.) 60. N. Y. People vs. Baker, 76 N. Y. 78, 83, 32 Am. Rep. 274. Fed. Cheever vs. Wilson, 76 U. S. (9 Wall.) 108, bk. 19 L. ed. 604.

5. Consent necessary.—Statute having made consent of certain parties necessary, there can be no valid adoption without such consent.—In re Johnson, 98 Cal. 531, 541, 33 Pac. Rep. 460, 21 L. R. A. 380.

6. Nature of proceeding.—Adoption is not judicial proceeding.—In re Johnson, 98 Cal. 531, 538, 33 Pac. Rep. 460, 21 L. R. A. 380; In re Williams, 102 Cal. 70, 77, 41 Am. St. Rep. 163, 36 Pac. Rep. 407; Estate of Camp, 131 Cal. 469, 470, 82 Am. St. Rep. 371, 63 Pac. Rep. 736. See post § 227 note par. 5.

7. Adoption proceeding is one of contract between both parties whose consent is required.—In re Johnson, 98 Cal. 531, 538, 33 Pac. Rep. 460, 21 L. R. A. 380.

8. Object of this section is that consent to agreement shall be approved by judge, and it is immaterial whether they are signed before parties appear before him, or in his presence, if their execution be conceded and sanctioned by the judge (dis. op.).—In re Johnson, 98 Cal. 531, 552, 33 Pac. Rep. 460, 21 L. R. A. 380.

9. Practice.—Whether children have been abandoned by their parents is judicial fact to be determined by the judge.—Estate of Camp, 131 Cal. 469, 471, 82 Am. St. Rep. 371, 63 Pac. Rep. 736; Estate of McKeag, 141 Cal. 403, 406, 99 Am. St. Rep. 80, 74 Pac. Rep. 1039.

10. Presumption.—No presumption that minor children living with man who is not their father have been adopted by him.—In re Romero, 75 Cal. 379, 381, 17 Pac. Rep. 434.

11. Record of adoption proceeding must show that person adopting child is resident of county in which adoption order was made.—

Ex parte Clark, 87 Cal. 638, 640, 25 Pac. Rep. 967.

12. Statutory provision must be complied with strictly, in proceedings for adoption.—*Ferguson vs. Jones*, 17 Oreg. 204, 214, 11 Am. St. Rep. 808, 20 Pac. Rep. 842, 3 L. R. A. 620.

13. Substantial compliance with essential provisions of statute is all that is required in order to effect valid adoption.—In *re Johnson*, 98 Cal. 531, 542, 33 Pac. Rep. 460, 21 L. R. A. 380, construing and limiting *Ex parte Clark*, 87 Cal. 638, 25 Pac. Rep. 967 to facts of that case.

§ 227. **JUDGE'S ORDER IN ADOPTION PROCEEDINGS.** The court must [1] examine all persons appearing before it pursuant to the last section, each separately, and if satisfied that the interests of the child will be promoted by the adoption, it must [2] make an order declaring that the child shall thenceforth be regarded and treated in all respects as the child of the person adopting. The petition, agreement, consent, and order must be filed and registered in the office of the county clerk in the same manner as papers in other special proceedings.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 340, held unconstitutional; see history, § 4 ante; re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXV, p. 556.

1. Applied, cited, construed, referred to, etc.
4. 3. Construction—Directory as to separate examination.
4. Same—Mandatory as to appearance.
5. Same—Nature of proceedings.
6. Examination—In general.
- 7-10. Same—Children under age of consent.
- 11, 12. Same—Object of examination.
13. Same—Separate examination.
14. Examination of other parties.
- 15-19. Order of adoption.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc.,** in: *Estate of Wardell*, 57 Cal. 484, 491 (cited and discussed); In *re Newman*, 75 Cal. 213, 218-219, 7 Am. St. Rep. 146, 16 Pac. Rep. 887 (construed); In *re Johnson*, 98 Cal. 531, 536 (construed with other sections), 537, 538, 547 (construed *dis. op.*), 33 Pac. Rep. 460, 21 L. R. A. 380 (construed); In *re Williams*, 102 Cal. 70, 77, 41 Am. St. Rep. 163, 36 Pac. Rep. 407 (construed and applied); In *re Evans*, 106 Cal. 562, 564, 566, 39 Pac. Rep. 860 (construed); *Estate of Camp*, 131 Cal. 469, 470, 471, 82 Am. St. Rep. 371, 63 Pac. Rep. 736 (construed and applied); *Estate of McKeag*, 141 Cal. 403, 406, 99 Am. St. Rep. 80, 74 Pac. Rep. 1039 (construed and applied).

2. **CONSTRUCTION—Directory as to separate examination.**—This section must be regarded as directory in so far as it requires the parties to be separately examined.—In *re Williams*, 102 Cal. 70, 80, 41 Am. St. Rep. 163, 36 Pac. Rep. 407.

3. Provision in relation to separate examination of parties, in so far as it is applicable to child under age of consent, is simply directory, and is to be complied with or not in discretion of judge.—In *re Johnson*, 98 Cal. 531, 538, 33 Pac. Rep. 460, 21 L. R. A. 380.

4. **Mandatory as to appearance.**—Provision of this section requiring examination of all persons appearing before the court, is imperative and mandatory. Fact that consent of child who is under twelve years of age is not required, does not obviate necessity of its examination (*dis. op.*).—In *re Johnson*, 98 Cal. 531, 548, 33 Pac. Rep. 460, 21 L. R. A. 380.

Compare: Pars. 7-10 this note.

5. **Nature of proceedings.**—Adoption under

this section is not judicial proceeding, although sanction of judicial officer is required for its consummation.—In *re Johnson*, 98 Cal. 531, 538, 33 Pac. Rep. 460, 21 L. R. A. 380.

See ante § 226 pars. 6, 7.

6. **EXAMINATION—In general.**—In order that the judge may satisfy himself that child over age of twelve years, or wife whose consent is necessary, do really consent to adoption, judge is required to examine the parties separately.—In *re Johnson*, 98 Cal. 531, 538, 33 Pac. Rep. 460, 21 L. R. A. 380.

7. **Child under age of consent.**—The judge need not examine child whose consent to contract is unnecessary and who is of such tender years that it is incapable of exercising any judgment as to effect of such contract upon its interests.—In *re Johnson*, 98 Cal. 531, 538, 33 Pac. Rep. 460, 21 L. R. A. 380.

Compare: Par. 4 this note.

8. There would seem to be greater necessity for examination by the judge of child under twelve years of age than one above that age (*dis. op.*).—In *re Johnson*, 98 Cal. 531, 548, 33 Pac. Rep. 460, 21 L. R. A. 380.

9. Examination of child under twelve years of age is entirely discretionary with the judge.—In *re Williams*, 102 Cal. 70, 80, 41 Am. St. Rep. 163, 36 Pac. Rep. 407.

10. Examination of child under age of consent should not be deemed indispensable to validity of adoption proceedings.—In *re Johnson*, 98 Cal. 531, 539, 33 Pac. Rep. 460, 21 L. R. A. 380.

11. **Object of examination.**—Only object of this section in directing judge to examine parties who are required to appear before him is that he may satisfy himself in relation to existence of requisite facts, and subject of examination is to be confined to them.—In *re Johnson*, 98 Cal. 531, 538, 33 Pac. Rep. 460, 21 L. R. A. 380.

12. Examination is not for purpose of gaining any consent, as that must have been previously given, but it is for purpose of satisfying judge whether interests of child will be promoted by the adoption (*dis. op.*).—In *re Johnson*, 98 Cal. 531, 547-548, 33 Pac. Rep. 460, 21 L. R. A. 380.

12. Separate examination of parties in adoption proceedings is not absolutely necessary in order to effect adoption of minor.—In re Williams, 102 Cal. 70, 80, 41 Am. St. Rep. 163, 36 Pac. Rep. 407.

14. EXAMINATION OF OTHER PARTIES to contract by judge making order is not absolutely necessary to validity of adoption.—In re Williams, 102 Cal. 70, 80, 41 Am. St. Rep. 163, 36 Pac. Rep. 407.

15. ORDER OF ADOPTION is not judgment of court.—In re Williams, 102 Cal. 70, 77, 41 Am. St. Rep. 163, 36 Pac. Rep. 407; Estate of Camp, 131 Cal. 469, 470, 82 Am. St. Rep. 371, 63 Pac. Rep. 738.

16. Order of adoption may declare that child shall henceforth be treated and regarded as child of both spouses.—In re Williams, 102 Cal. 70, 79, 41 Am. St. Rep. 163, 36 Pac. Rep. 407.

17. Order herein indorsed upon contract of adoption, when set off in full with statement of facts, held to be compliance with provisions of this section.—In re Evans, 106 Cal. 562, 564, 566, 39 Pac. Rep. 860.

18. Contract of adoption cannot be declared invalid because of some merely technical objection to manner in which judge who signed order of adoption may have discharged his duty in premises.—In re Johnson, 98 Cal. 531, 543, 33 Pac. Rep. 460, 21 L. R. A. 380.

19. It is necessary to validity of order consenting to action of adoption that adopting parents and judge making order shall both be residents of same county.—Ex parte Clark, 37 Cal. 638, 641, 25 Pac. Rep. 967; In re Williams, 102 Cal. 70, 77, 41 Am. St. Rep. 163, 36 Pac. Rep. 407.

As to revoking and setting aside contract of adoption, see 1 Cyc. 923 et seq.

§ 228. EFFECT OF ADOPTION. A child, when adopted, may take the family name of the person adopting. After adoption, the two shall sustain towards each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 195.

1. Applied, cited, construed, referred to, etc.
2. Domicile.
- 3-6. Inheritance.
- 7, 8. Status.

1. Applied, cited, construed, referred to, etc., in: Estate of Wardell, 57 Cal. 484, 491 (construed); In re Newman, 75 Cal. 213, 219, 7 Am. St. Rep. 146, 16 Pac. Rep. 887 (construed); Younger vs. Younger, 106 Cal. 377, 380, 39 Pac. Rep. 779 (construed); Estate of Taylor, 131 Cal. 180, 182, 63 Pac. Rep. 345 (construed).

As to effect of adoption, see ante § 193 and note.

2. Domicile—Residence of foster parent is that of adopted child.—Estate of Taylor, 131 Cal. 180, 182, 63 Pac. Rep. 345. See Younger vs. Younger, 106 Cal. 377, 379, 39 Pac. Rep. 779; Washburn vs. White, 140 Mass. 568, 569, 5 N. E. Rep. 813.

3. Inheritance—Adopted child inherits estate of adopted parent.—In re Newman, 75 Cal. 213, 219, 7 Am. St. Rep. 146, 16 Pac. Rep. 887.

4. "The use of the word 'issue' in § 1386, post, does not limit right of inheritance to natural children only. That section prescribes rule of inheritance. The word 'issue' is there used in same sense as words 'child' and 'children.' If the adopted child is by virtue of its status to be 'regarded and treated in all respects as the child of the person

adopting,' and is to 'have all the rights and be subject to all the duties of the legal relation of parent and child,' right to succeed to estate of deceased parent must be included."—In re Newman, supra. See Estate of Wardell, 57 Cal. 484, 491; Estate of Jessup, 81 Cal. 408, 447, 21 Pac. Rep. 976, 22 Id. 742, 1028, 6 L. R. A. 594; Ross vs. Ross, 129 Mass. 243, 37 Am. Rep. 321; Fosburg vs. Rogers, 114 Mo. 122, 133, 21 S. W. Rep. 82, 19 L. R. A. 201.

5. Legally adopted child, under our statutes, is, to all intents and purposes, same as if born to its adopting parents in lawful wedlock, and is lineal descendant within meaning of statute of inheritance.—Warren vs. Prescott, 84 Me. 483, 30 Am. St. Rep. 370, 24 Atl. Rep. 943, 17 L. R. A. 435.

6. Between illegitimate children acknowledged or adopted by their father and legitimate children, law has established cognate relations, and either is as capable of inheriting as the other.—Estate of Wardell, 57 Cal. 484, 491.

7. Status—After adoption child ceases to sustain any relation to its actual parent.—Younger vs. Younger, 106 Cal. 377, 380, 39 Pac. Rep. 779.

8. Prior adoption proceedings oust jurisdiction of divorce court over children of divorced parents.—Younger vs. Younger, 106 Cal. 377, 379, 39 Pac. Rep. 779.

§ 229. EFFECT ON FORMER RELATIONS OF CHILD. The parents of an adopted child are, from the time of the adoption, relieved of all parental duties towards, and all responsibility for, the child so adopted, and have no right over it.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc., in: Younger vs. Younger, 106 Cal. 377, 378,

39 Pac. Rep. 779 (quoted in discussion declaring status changed by adoption proceedings).

§ 230. **ADOPTION OF ILLEGITIMATE CHILD.** The father of an illegitimate child, by [1] publicly acknowledging it as his own, [2] receiving it as such, [3] with the consent of his wife, if he is married, [4] into his family, and [5] otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
- 2-6. In general—Distinction between adoption and legitimation.
7. Consent of mother—When unnecessary.
8. Consent of wife—When unnecessary.
- 9-11. Construction in general.
12. Same—"Adopts" construed.
13. Same—"He shall otherwise treat it as legitimate."
14. Same—Liberal.
15. Same—Not retroactive.
16. Same—"Receiving it into his family" construed.
17. Extraterritorial operation.
- 18, 19. Effect on legitimacy.
20. Effect on status of child.
- 21, 22. Effect on right to inherit.
- 23-26. Evidence.
27. Facts held insufficient to establish acknowledgment.
- 28-31. Family—Necessity for.
- 32-34. Same—Receiving into family.
- 35-37. Prerequisites of acknowledgment.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc.,** in: *Estate of Pico*, 52 Cal. 84, 86, 87 (construed); *Estate of Pico*, 56 Cal. 413, 419 (referred to); *Estate of Wardell*, 57 Cal. 484, 491, 492 (construed); *In re Romero*, 75 Cal. 379, 381, 17 Pac. Rep. 434 (applied); *In re Jessup*, 81 Cal. 408, 421, 432, 434, 443, 446, 447, 458, 21 Pac. Rep. 976, 22 Id. 742, 6 L. R. A. 594 (construed and applied); *Blythe vs. Ayres*, 96 Cal. 532, 555, 559, 560, 561, 576, 578, 580, 592, 31 Pac. Rep. 915, 19 L. R. A. 40 (construed and applied); *Garner vs. Judd* (Cal. May 4, 1901), 64 Pac. Rep. 1076 (construed); *Blythe vs. Hinckley*, 127 Cal. 431, 434, 59 Pac. Rep. 787 (referred to with other sections); *Estate of Heaton*, 135 Cal. 385, 386 (cited in discussion), 388 (admissible to prove legitimation), 67 Pac. Rep. 321; *Garner vs. Judd*, 136 Cal. 394, 396, 68 Pac. Rep. 1026 (defining family); *Estate of Mills*, 137 Cal. 298, 299, 300, 93 Am. St. Rep. 175, 70 Pac. Rep. 91 (referred to with other sections); *Estate of De Laveaga*, 142 Cal. 158, 160 (cited), 168, 169 (construed, and former decisions reviewed and reconciled), 172 (dis. op.), 75 Pac. Rep. 790.

2. **IN GENERAL—Distinction between adoption and legitimation.**—Adoption refers to persons who are strangers in blood; legitimation to persons related in blood.—*Blythe vs. Ayres*, 96 Cal. 532, 559, 31 Pac. Rep. 915, 19 L. R. A. 40.

3. **Legitimation** refers to persons related in blood; adoption to persons who are strangers in blood.—*Blythe vs. Ayres*, 96 Cal. 532, 559, 31 Pac. Rep. 915, 19 L. R. A. 40.

4. **Method of adoption.**—No distinction exists between the rules of law applicable to

adoption of illegitimates by subsequent marriage and by acknowledgment.—*Blythe vs. Ayres*, 96 Cal. 532, 572, 573, 31 Pac. Rep. 915, 19 L. R. A. 40.

5. **Paternity of illegitimate child.**—There is no provision by which paternity of illegitimate child may be judicially determined and father compelled to contribute to its support.—*In re Jessup*, 81 Cal. 408, 443, 21 Pac. Rep. 976, 22 Id. 742, 1028, 6 L. R. A. 594.

6. **Section 1387 Civil Code not a limitation upon section 230,** and does not exclude illegitimate child, adopted as provided in latter section, from inheriting.—*In re Jessup*, 81 Cal. 408, 447, 21 Pac. Rep. 976, 22 Id. 742, 1028, 6 L. R. A. 594.

7. **CONSENT—Of mother is unnecessary** to adoption by father, where such adoption is result of his personal conduct towards child.—*In re Jessup*, 81 Cal. 408, 446, 21 Pac. Rep. 976, 22 Id. 742, 1028, 6 L. R. A. 594.

8. **Of wife is not necessary** where father has no wife.—*Blythe vs. Ayres*, 96 Cal. 532, 578, 31 Pac. Rep. 915, 19 L. R. A. 40.

9. **CONSTRUCTION IN GENERAL.**—"This section is broad in its terms. It contains no limitations or conditions, and to the extent of power vested in legislature of state, applies to all illegitimates, wherever located and wherever born."—*Blythe vs. Ayres*, 96 Cal. 532, 559, 31 Pac. Rep. 915, 19 L. R. A. 40.

10. **Only minors** may be adopted under this section.—*In re Jessup*, 81 Cal. 408, 421, 21 Pac. Rep. 976, 22 Id. 742, 1028, 6 L. R. A. 594.

11. **Only illegitimate minor children** may be adopted under this provision.—*Estate of Pico*, 52 Cal. 84, 87, followed as res adjudicata in *Estate of Pico*, 56 Cal. 413, 419.

12. **"Adopts,"** as used in this section, is used in the sense of "legitimizes."—*Blythe vs. Ayres*, 96 Cal. 532, 555, 31 Pac. Rep. 915, 19 L. R. A. 40.

13. **"He shall otherwise treat it as a legitimate child"** means that father must treat an illegitimate child as he would naturally treat his legitimate child, not as majority of men in his financial condition would or should treat their children.—*Blythe vs. Ayres*, 96 Cal. 532, 580, 31 Pac. Rep. 915, 19 L. R. A. 40.

14. **Liberal construction** to be given to this statute.—*In re Jessup*, 81 Cal. 408, 421, 21 Pac. Rep. 976, 22 Id. 742, 1028, 6 L. R. A. 594.

15. **Not retroactive,** but retrospective only in its effect.—*Estate of Pico*, 52 Cal. 84, 86, 56 Id. 413; *In re Jessup*, 81 Cal. 408, 421, 21 Pac. Rep. 976, 22 Id. 742, 1028, 6 L. R. A. 594.

16. **"Receiving it into his family"** does not necessarily mean an actual reception into an

actual family, but may mean constructive reception into constructive family.—*Blythe vs. Ayres*, 96 Cal. 532, 530, 31 Pac. Rep. 915, 19 L. R. A. 40.

17. **EXTRATERRITORIAL OPERATION.**—Father may by acknowledgment legitimate child born in England, father at all times being domiciled in California, mother and child being up to date of father's death domiciled in England.—*Blythe vs. Ayres*, 96 Cal. 532, 560, 561, 576, 31 Pac. Rep. 915, 19 L. R. A. 40.

18. **EFFECT ON LEGITIMACY of child.**—Children by acknowledgment or adoption of their father are legitimate.—*Estate of Wardell*, 57 Cal. 484, 491.

19. **Object and effect of section** is to change the status and capacity of illegitimates to that of legitimate children.—*Blythe vs. Ayres*, 96 Cal. 532, 560, 31 Pac. Rep. 915, 19 L. R. A. 40.

20. **EFFECT ON STATUS OF CHILD.**—Acts sufficient to constitute adoption fixes the status of illegitimate child irrevocably.—*In re Jessup*, 81 Cal. 408, 458, 21 Pac. Rep. 976, 22 Pac. Rep. 742, 1028, 6 L. R. A. 594.

21. **EFFECT ON RIGHT TO INHERIT.**—Children by acknowledgment are endowed by statute with inheritable blood.—*Estate of Wardell*, 57 Cal. 484, 492.

22. **Inheritance from adopted father** is one of legal consequences of adoption.—*In re Jessup*, 81 Cal. 408, 447, 21 Pac. Rep. 976, 22 Id. 742, 1028, 6 L. R. A. 594.

23. **EVIDENCE.**—Acts and declaration of father made after illegitimate child has attained majority are inadmissible to prove legitimation.—*Estate of Heaton*, 135 Cal. 385, 388, 67 Pac. Rep. 321.

24. **Declarations are competent and material** for purpose of establishing paternity of child.—*Estate of Heaton*, 135 Cal. 385, 388, 67 Pac. Rep. 321.

25. **No presumption** that minor children living with man who is not their father have been adopted by him.—*In re Romero*, 75 Cal. 379, 17 Pac. Rep. 434.

26. **Evidence reviewed and held insufficient** to establish acknowledgment of illegitimate child.—*In re Jessup*, 81 Cal. 408, 458, 21 Pac. Rep. 976, 22 Id. 742, 1028, 6 L. R. A. 594.

27. **FACTS HELD INSUFFICIENT TO ESTABLISH ACKNOWLEDGMENT** of an illegitimate child.—*In re Jessup*, 81 Cal. 408, 432, 434, 21 Pac. Rep. 976, 22 Id. 742, 1028, 6 L. R. A.

594; *Estate of De Laveaga*, 142 Cal. 158, 171, 75 Pac. Rep. 790.

28. **FAMILY—NECESSITY FOR.**—Father having no family cannot adopt an illegitimate child, as it is impossible for him to receive such child into his family (dis. op.).—*Blythe vs. Ayres*, 96 Cal. 532, 592, 31 Pac. Rep. 915, 19 L. R. A. 40.

29. **When man has home where he lives** with woman whom he holds out to the world as his wife, he has family into which he may receive illegitimate child in order to legitimate it.—*Garner vs. Judd*, 138 Cal. 394, 396, 64 Pac. Rep. 1076, 68 Id. 1026.

30. **Having a family, or at least a home** in which a child can be received, is one of the cardinal conditions precedent to such adoption.—*Estate of De Laveaga*, 142 Cal. 158, 169, 75 Pac. Rep. 790.

31. **Where father has no family and no home**, he is not by that circumstance deprived of power to confer status of legitimacy upon his illegitimate offspring (dis. op.).—*Estate of De Laveaga*, supra, p. 172.

32. **RECEIVING INTO FAMILY.**—Where father, an unmarried man, never received child into home in which he lived, there was no legitimation.—*Estate of De Laveaga*, 142 Cal. 158, 168, 170, 75 Pac. Rep. 790.

33. **Fact that father is unmarried man, having no family**, does not dispense with provision requiring that child be received into father's family.—*Estate of De Laveaga*, supra, p. 169.

34. **Acknowledging illegitimate child** by father without receiving it into his family is not sufficient for its adoption.—*Garner vs. Judd* (Cal. May 4, 1901), 64 Pac. Rep. 1076.

35. **PREREQUISITES OF LEGITIMATION BY ACKNOWLEDGMENT** are public acknowledgment of child and receiving it into family with consent of wife, if any.—*Estate of De Laveaga*, 142 Cal. 158, 169, 75 Pac. Rep. 790.

36. **Complete legitimation by adoption** can only be accomplished by compliance with all provisions of this section.—*Estate of De Laveaga*, supra, pp. 168, 170.

37. **Compliance of section** can only be effected by doing three things: 1, publicly acknowledging the child; 2, receiving it into the family, and 3, otherwise treating it as legitimate (dis. op.).—*Blythe vs. Ayres*, 96 Cal. 532, 592, 31 Pac. Rep. 915, 19 L. R. A. 40.

TITLE III.

GUARDIAN AND WARD.

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| § 236. Guardian, what. | § 247. Powers of guardian appointed by court (repealed). |
| § 237. Ward, what. | § 248. Duties of guardian of the person (repealed). |
| § 238. Kinds of guardians. | § 249. Duties of guardian of estate (repealed). |
| § 239. General guardian, what. | § 250. Relation confidential. |
| § 240. Special guardian, what. | § 251. Guardian under direction of court. |
| § 241. Guardian appointed by will, etc. | § 252. Death of a joint guardian. |
| § 242. No person guardian of estate without appointment (repealed). | § 253. Removal of guardian. |
| § 243. Appointment of guardian by court (repealed). | § 254. Guardian appointed by parent, how superseded. |
| § 244. Rules for awarding custody (repealed). | § 255. Suspension of power of guardian. |
| § 245. Jurisdiction (repealed). | § 256. Release by ward. |
| § 246. Rules for awarding the custody, or appointing a general guardian of minors. | § 257. Guardian's discharge. |
| | § 258. Insane persons. |

[Under this head the Code Commissioners placed not only the provisions relating to the guardianship of the person and estate of minors, but also those relating to the custody and care of the person and property of persons of unsound mind. "Committee" of a lunatic is termed "guardian."]

§ 236. GUARDIAN, WHAT. A guardian is a person appointed to take care of the person or property of another.

History: Enacted March 21, 1872.

§ 237. WARD, WHAT. The person over whom or over whose property a guardian is appointed, is called his ward.

History: Enacted March 21, 1872.

§ 238. KINDS OF GUARDIANS. Guardians are either:

1. General; or,
2. Special.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Four kinds of guardians.
- 3-6. Natural guardian.
7. Power of natural guardian.
8. Nurture guardian.
- 9, 10. Socage guardian.
- 11, 12. Chivalry guardianship.
13. Guardian de son tort.
1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *De Greayer vs. Superior Court of San Francisco*, 117 Cal. 640, 643, 59 Am. St. Rep. 220, 49 Pac. Rep. 988.
2. FOUR KINDS OF GUARDIANS AT COMMON LAW; namely, natural, nurture, socage, chivalry.—*Lord vs. Hough*, 37 Cal. 657, 660.
3. NATURAL GUARDIAN was father and, in some cases, mother.—*Lord vs. Hough*, 37 Cal. 657, 660.
4. Natural guardian is father, and on his death, mother.—*Combs vs. Jackson*, 2 Wend. (N. Y.) 153, 157, 19 Am. Dec. 568.
5. Natural guardian has no control over property of his infant children.—*Combs vs. Jackson*, 2 Wend. (N. Y.) 153, 157, 19 Am. Dec. 568.
6. All children being heirs apparent under our statute, father is guardian by nature of person of his children until they attain majority.—*Combs vs. Jackson*, 2 Wend. (N. Y.) 153, 157, 19 Am. Rep. 568.
7. Power of natural guardian over person of ward is governed in this state by laws governing the relation of parent and child; in fact, all ancient forms of guardianship have yielded to statutes, which seem to govern the relation of guardian and ward to the exclusion of the common law.
8. NURTURE GUARDIANS were also father or mother and continued until child attained the age of fourteen.—*Lord vs. Hough*, 37 Cal. 657, 660.
9. SOCAGE GUARDIANSHIP took place only when infant was entitled to an estate in lands by descent. Next of kin to whom estate could possibly descend became guardian in socage. Socage guardianship, like those for nurture, continued only until infant was fourteen years of age, when he was presumed to have attained sufficient discretion to choose his own guardian, which he was allowed to do, subject to approval of chancery court. Socage

guardians had custody of both the person and the estate of ward.—*Lord vs. Hough*, 37 Cal. 657, 660.

10. Socrage guardianship, it seems, prevailed in New York, but was never common in the United States.—*Byrne vs. Van Hoesen*, 5 John. (N. Y.) 66, 67; *Combs vs. Jackson*, 2 Wend. (N. Y.) 153, 157, 19 Am. Dec. 568.

11. CHIVALRY GUARDIANSHIP—A feature of feudal system, and took place only when lands came to ward by descent, which were held by knight-service. Chivalry guardianship continued until infant reached age of twenty-one years, if male, and sixteen, if female, and related to both the person and the estate without any obligation to account for profit of latter. Chivalry guardians were appointed by common law itself, except that chancellor, by virtue of his authority as representative of the king, was allowed to appoint guardians by common law. Chivalry guardianship in tenure by knight-service were

abolished by statute.—*Lord vs. Hough*, 37 Cal. 657, 660.

12. Chivalry guardianship was abolished in England by statute Car. II., and, as it related only to lands held by knight-service, it never obtained in this country.

13. GUARDIAN DE SON TORT.—One wrongfully intermeddling with property of infant is sometimes held by equity as guardian, but only for purpose of accounting; he acquires none of rights of guardian.—*Aldrich vs. Willis*, 55 Cal. 81, 85. See III. *Wadsworth vs. Connell*, 104 Ill. 369; *Bedford vs. Bedford*, 136 Ill. 354, 26 N. E. Rep. 662. Ky. *Hannah vs. Spotts*, 5 B. Mon. 565; *Bush vs. White*, 3 B. Mon. 100. Md. *Chaney vs. Smallwood*, 1 Gill 367. Mo. *Johnson vs. Smith*, 27 Mo. 591. N. Y. *Sherman vs. Ballou*, 8 Cow. 304; *Cromwell vs. Kirk*, 1 Dem. 599, 602; *Van Epps vs. Van Deusen*, 4 Palge Ch. 64, 25 Am. Dec. 516.

Testamentary guardian,—as to, see post § 241 and note para. 3-8.

§ 239. GENERAL GUARDIAN, WHAT. A general guardian is a guardian of the person or of all the property of the ward within this state, or of both.

History: Enacted March 21, 1872.

§ 240. SPECIAL GUARDIAN, WHAT. Every other is a special guardian.

History: Enacted March 21, 1872.

§ 241. GUARDIAN APPOINTMENT BY WILL, ETC. A guardian of the person or estate, or of both, of a child born, or likely to be born, may be appointed by will or by deed, to take effect upon the death of the parent appointing:

1. If the child be legitimate, by the father, with the written consent of the mother; or by either parent, if the other be dead or incapable of consent.

2. If the child be illegitimate, by the mother.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 195, 196.

1. Applied, cited, construed, referred to, etc.
2. In general—Parent's power of disposition of custody.
- 3, 4. Testamentary guardians — Origin and powers.
- 5, 6. Same—Mode of appointment, powers, removal.
7. Same—Appointment by deed.
- 8, 9. Same—Nature of the office.
10. Same—When appointment takes effect.
- 11, 12. Same—Bond—Necessity for.
13. Custody of ward's person.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Murphy vs. Superior Court Santa Clara County*, 84 Cal. 592, 597, 24 Pac. Rep. 310 (construed); *Ex parte Miller*, 109 Cal. 643, 646, 647 (referred to with other sections); *Estate of Henning*, 128 Cal. 214, 218, 79 Am. St. Rep. 43, 60 Pac. Rep. 762 (referred to with other sections); *In re Campbell*, 130 Cal. 380, 383 (construed), sub nom. *Campbell vs. Wright*, 62 Pac. Rep. 613.

2. IN GENERAL.—Power given parent to dispose of custody of child by will or deed must be taken as recognition of general right of parent to dispose of custody of child.—In

re Campbell, 130 Cal. 380, 383, sub nom. *Campbell vs. Wright*, 62 Pac. Rep. 613. See *In matter Guardianship Van Loan*, 142 Cal. 423, 426, sub nom. *In re Van Loan*, 76 Pac. Rep. 37; *In re Lundberg*, 143 Cal. 402, 408, 77 Pac. Rep. 156.

3. TESTAMENTARY GUARDIANS—Origin and powers.—The common law did not recognize power of testator to appoint guardian for his minor child. The origin of such right was the English statute (Eng. Stats. at Large, 12 Cha. II., 7 and 8), and under it testamentary guardian was endowed with all powers of guardian in socage. His claims were expressly declared to be superior to all persons claiming custody of children as guardians, or in any other capacity. Under it no power over or right to custody or tuition of her children was recognized as existing with mother. On the contrary the power conferred upon the father was an unqualified one.—*Lord vs. Hough*, 37 Cal. 657, 662.

4. Otherwise where there was contract that children should be brought up in religion of mother, in which case testamentary guardian has been held not entitled to possession of child as against its maternal grandmother; such contract overriding subsequent testa-

mentary document appointing testamentary guardian, and authorizing him to bring up child in religion of father.—*Andrews vs. Salt*, 12 Week. Rep. 431, 21 Week. Rep. 616; *In re Andrews*, L. R. 8 Q. B. 153, 4 Moak Eng. Rep. 261.

See note 4 Moak Eng. Rep. 267-281.

5. Mode of appointment, powers, removal, etc.—as to, see 15 Am. and Eng. Encyc. of L. (2d ed.) 29, 31, monographic note 29 Am. Dec. 712-716, and 4 Moak Eng. Rep. 267-281.

6. Court has control of and may remove for cause; guardian has legal right in trust, and cannot be deprived of it except for reasons in equity.—*Lord vs. Hough*, 37 Cal. 657, 664; *De Greayer vs. Superior Court San Francisco*, 117 Cal. 640, 644, 59 Am. St. Rep. 220, 49 Pac. Rep. 983.

7. Appointment by deed.—Guardian appointed by deed must be held to be a testamentary guardian, as such appointment cannot take effect until death of parent.—*Murphy vs. Superior Court Santa Clara County*, 84 Cal. 592, 597, 24 Pac. Rep. 310.

8. Nature of office.—Testamentary guardianship is personal trust and not an assignable office.—*Aldrich vs. Willis*, 55 Cal. 81, 85.

9. Testamentary guardians were but trustees under English statutes.—*Lord vs. Hough*, 37 Cal. 657, 663.

10. When appointment takes effect.—Appointment of testamentary guardian cannot take effect until death of parent.—*Murphy vs. Superior Court Santa Clara County*, 84 Cal. 592, 597, 24 Pac. Rep. 310.

11. Bond—Necessity for.—Testamentary guardian must give bond as other guardians.—*Aldrich vs. Willis*, 55 Cal. 81, 85; *Murphy vs. Superior Court Santa Clara County*, 84 Cal. 592, 596, 24 Pac. Rep. 310; *Farnsworth vs. Sutro*, 136 Cal. 241, 243, 68 Pac. Rep. 705; *Hatch vs. Ferguson*, 57 Fed. Rep. 966, 970.

12. He cannot act until he qualifies, and letters of guardianship are issued to him.—See *Aldrich vs. Willis*, 55 Cal. 81; *Farnsworth vs. Sutro*, 136 Cal. 241, 243, 68 Pac. Rep. 705.

13. CUSTODY OF WARD'S PERSON.—Testamentary guardian cannot take personal custody and tuition of minor so long as there is mother who is competent, willing, and worthy to have custody and tuition of her child.—*Lord vs. Hough*, 37 Cal. 657, 669. See *In re Andrews*, L. R. 8 Q. B. 153, 4 Moak Eng. Rep. 261.

§ 242. NO PERSON GUARDIAN OF ESTATE WITHOUT APPOINTMENT (repealed).

History: Enacted March 21, 1872; repealed by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 340, held unconstitutional; see history, § 4 ante; re-repealed March 21, 1905, Stats. and Amdts., c. DLXII, p. 728.

Control of estate without guardianship,—as to, see ante § 202 and note.

Power of guardian appointed by court,—as to, see post § 247 and note.

§ 243. APPOINTMENT OF GUARDIAN BY COURT (repealed).

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 196; April 6, 1880, Code Amdts. 1880 (C. C. pt.), p. 4; repealed by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 340, held unconstitutional; see history, § 4 ante; re-repealed March 21, 1905, Stats. and Amdts. 1905, c. DLXII, p. 728.

1. Applied, cited, construed, referred to, etc.
- 2, 3. Appeal lies from order.
4. Same—Practice.
5. Construction.
6. Effect of prior appointment by deed.
- 7-9. Jurisdiction of superior court.
10. Same—Collateral attack upon.
- 11, 12. Nature of proceeding.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Murphy vs. Superior Court Santa Clara County*, 84 Cal. 592, 596, 24 Pac. Rep. 310 (construed); *Ex parte Miller*, 109 Cal. 643, 646, 647, 42 Pac. Rep. 428 (referred to with other sections); *Estate of Henning*, 128 Cal. 214, 218, 79 Am. St. Rep. 43, 60 Pac. Rep. 762 (referred to with other sections); *In re Campbell*, 130 Cal. 381, 383, sub nom. *Campbell vs. Wright*, 62 Pac. Rep. 613 (referred to in discussion).

2. APPEAL LIES FROM ORDER of superior court appointing guardian.—*Ex parte Miller*, 109 Cal. 643, 646, 42 Pac. Rep. 428.

3. Appeal to be taken within sixty days after order of appointment is entered, or it becomes final.—*Ex parte Miller*, supra.

4. Practice.—It appearing upon appeal that testamentary guardian had already been legally appointed, order granting letters of guardianship will be reversed.—*Murphy vs. Superior Court Santa Clara County*, 84 Cal. 592, 596, 24 Pac. Rep. 310.

5. CONSTRUCTION.—Section 203, ante, Civil Code has no bearing whatever upon the construction to be given to this section.—*Ex parte Miller*, 109 Cal. 643, 649, 42 Pac. Rep. 428.

6. EFFECT OF PRIOR APPOINTMENT BY DEED.—Appointment by deed being established, order appointing guardian will be nullity.—*Murphy vs. Superior Court Santa Clara County*, 84 Cal. 592, 596, 24 Pac. Rep. 310.

7. JURISDICTION OF SUPERIOR COURT.—Constitution gives the superior court jurisdiction over persons and estates of minors.—*Ex parte Miller*, 109 Cal. 643, 647, 42 Pac. Rep. 428. See *Wilson vs. Roach*, 4 Cal. 366.

8. Superior court has general jurisdiction of matter of appointment of guardian.—*Murphy vs. Superior Court Santa Clara County*, 84 Cal. 592, 596, 24 Pac. Rep. 310.

9. POWER OF SUPERIOR COURT to appoint guardian carries with it power to determine fact whether testamentary guardian has been appointed.—*Murphy vs. Superior Court Santa Clara County*, supra.

10. Collateral attack upon.—Jurisdiction of superior court over appointed guardians cannot be collaterally attacked.—*Murphy vs. Superior Court Santa Clara County*, supra.

11. NATURE OF PROCEEDING.—Action of superior court in appointing guardian is judicial proceeding.—*Ex parte Miller*, 109 Cal. 643, 646, 42 Pac. Rep. 428.

12. APPEAL LIES THEREFROM.—In *re Get Young*, 90 Cal. 77, 78, 27 Pac. Rep. 158; *Ex parte Miller*, supra (but see dissent of Mr. Chief Justice Beatty, p. 662).
See Code Civ. Proc. § 963 and note.

§ 244. RULES FOR AWARDING CUSTODY (repealed).

History: Enacted March 21, 1872; amended April 6, 1880, Code Amdts. 1880 (C. C. pt.), p. 4; repealed by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 340, held unconstitutional; see history § 4 ante; re-repealed March 21, 1905, Stats. and Amdts. 1905, c. DLXII, p. 728.

Non-resident.—Appointment of guardian over property situated in this state of non-resident infant. See Code Civ. Proc. § 1793 et seq. and notes.

§ 245. JURISDICTION (repealed).

History: Enacted March 21, 1872; repealed by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 340, held unconstitutional; see history, § 4 ante; re-repealed March 21, 1905, Stats. and Amdts. 1905, c. DLXII, p. 728.

Maintenance.—Failure, neglect, or refusal of guardian to supply ward with suitable and necessary maintenance, etc., court may compel.—See Code Civ. Proc. § 1771 and note.

§ 246. RULES FOR AWARDING THE CUSTODY, OR APPOINTING A GENERAL GUARDIAN OF MINORS. In awarding the custody of a minor, or in appointing a general guardian, the court or officer is to be guided by the following considerations:

1. By what appears to be for the best interest of the child in respect to its temporal and its mental and moral welfare; and if the child is of a sufficient age to form an intelligent preference, the court may consider that preference in determining the question;

2. As between parents adversely claiming the custody or guardianship, neither parent is entitled to it as of right; but other things being equal, if the child is of tender years, it should be given to the mother; if it is of an age to require education and preparation for labor and business, then to the father;

3. Of two persons equally entitled to the custody in other respects, preference is to be given as follows:

- (1) To a parent;
- (2) To one who was indicated by the wishes of a deceased parent;
- (3) To one who already stands in the position of a trustee of a fund to be applied to the child's support;
- (4) To a relative.

4. Any parent who [1] knowingly or wilfully abandons, or [2] having the ability so to do, [3] fails to maintain his minor child under the age of fourteen years, forfeits the guardianship of such child; and any parent or guardian who [1] knowingly permits his child or ward to remain for the space of one year in any orphan asylum of this state, wherein such child is supported by charity, and who, [2] during such period, fails to give notice in writing to the managers or officers of such asylum that he is such parent or guardian, abandons and forever forfeits all right to the guardianship, care, custody, and control of such child. The officers and

managers of any orphan asylum having any such abandoned child in its care have the preferred right to the guardianship of such child.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 196; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 340, held unconstitutional; see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts., c. DLXII, pp. 728-729.

1. Applied, cited, construed, referred to, etc.
2. Discretion of court.
- 3, 4. Father's right.
5. Same—Effect of abandonment.
- 6, 7. Parent's right—Child's welfare.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Ex parte Miller*, 109 Cal. 643, 661, 42 Pac. Rep. 428 (referred to in discussion); *In re Campbell*, 130 Cal. 380, 381, 382, sub nom. *Campbell vs. Wright*, 62 Pac. Rep. 613 (construed); *Guardianship of Van Loan*, 142 Cal. 428, 426, sub nom. *In re Van Loan*, 76 Pac. Rep. 37 (construed).

2. DISCRETION OF COURT in appointing guardian other than father, is not unlimited.—*In re Campbell*, 130 Cal. 380, 381, sub nom. *Campbell vs. Wright*, 62 Pac. Rep. 613.

3. FATHER'S RIGHT AS TO CHILD, IS "PROPERTY" within meaning of constitutional provisions for protection of property.—*In re Campbell*, 130 Cal. 380, 382, sub nom. *Campbell vs. Wright*, 62 Pac. Rep. 613.

4. Under general law, and independent of code provisions, father has natural right to care and custody of his child.—*In re Campbell*, 130 Cal. 380, 382, sub nom. *Campbell vs. Wright*, 62 Pac. Rep. 613.

5. Effect of abandonment.—Where father

abandoned children, and left them to the custody and care of grandmother, it was held that grandmother was entitled to their custody and guardianship as against father.—*In re Guardianship of Vance*, 92 Cal. 195, 198, 28 Pac. Rep. 229 (distinguished in dis. op. of Mr. Chief Justice Beatty in *Ex parte Miller*, 109 Cal. 643).

6. PARENT'S RIGHT.—Subject to certain considerations owing to question of welfare of child, parent is entitled, as matter of right, to custody and guardianship of child.—*In re Campbell*, 130 Cal. 380, 382, sub nom. *Campbell vs. Wright*, 62 Pac. Rep. 613; *Guardianship of Van Loan*, 142 Cal. 428, 426, sub nom. *In re Van Loan*, 76 Pac. Rep. 37. See *Brooke vs. Logan*, 112 Ind. 182, 2 Am. St. Rep. 177, 13 N. E. Rep. 669; *State vs. Baldwin*, 5 N. J. Eq. (1 Halst.) 454, 45 Am. Dec. 399.

See monographic note 2 Am. St. Rep. 182-187.

7. Child's welfare controlling consideration with courts.—See *Richards vs. Collins*, 45 N. J. Eq. (18 Stew.) 282, 14 Am. St. Rep. 726, 17 Atl. Rep. 831. *Merritt vs. Swimley*, 82 Va. 433, 3 Am. St. Rep. 115; *Green vs. Campbell*, 35 W. Va. 698, 29 Am. St. Rep. 843, 14 S. E. Rep. 212.

See post § 247 note par. 4.

§ 247. POWERS OF GUARDIAN APPOINTED BY COURT (repealed).

History: Enacted March 21, 1872; repealed by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 341, held unconstitutional; see history, § 4 ante; re-repealed March 21, 1905, Stats. and Amdts. 1905, c. DLXII, p. 729.

1. Applied, cited, construed, referred to, etc.
2. Custody of ward.
3. Same—Collateral attack upon.
4. Same—Wishes and best interests of child consulted.
- 5, 6. Property—Custody of.
7. Same—Power of court over.
8. Same—Sale of.
9. Same—Mechanic's lien on.
10. Origin and extent of power.
11. Suspension of power—Majority of ward.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *De Greayer vs. Superior Court San Francisco*, 117 Cal. 640, 644, 49 Pac. Rep. 983.

2. CUSTODY OF WARD.—Guardian regularly appointed unqualifiedly, is entitled to custody of ward's person.—*Burger vs. Frakes*, 67 Iowa 460, 23 N. W. Rep. 746, 25 Id. 735. See *Ex parte Bartlett*, 4 Bradt. Surr. (N. Y.) 221, 223-224; *Ward vs. Roper*, 26 Tenn. (7 Humph.) 111.

3. Collateral attack upon right.—Right of guardian to custody of ward can be attacked collaterally only upon want of jurisdiction of superior court to make order.—*Ex parte Miller*, 109 Cal. 643, 646, 42 Pac. Rep. 428.

4. Wishes and best interests of child will be consulted in determining right to custody.—*In the Matter of Heather*, 50 Mich. 261, 15 N. W. Rep. 487.

See ante § 246 note par. 7.

Right of testamentary guardian to custody of ward's person,—as to, see ante § 241 note par. 13.

5. PROPERTY—CUSTODY OF.—Guardian has such possession of property of ward, and such property right therein, as will support larceny against one taking it with felonious intent.—*Jones vs. Jones*, 71 Cal. 89, 92, 11 Pac. Rep. 817.

See Pen. Code § 484 and note.

6. General guardian is entitled to exclusive possession at common law, with general care and management of estate committed to his charge.—*De Greayer vs. Superior Court San Francisco*, 117 Cal. 640, 643, 49 Pac. Rep. 983.

7. Power of court over.—Court has no right to take custody and management of estate out of hands of guardian.—*De Greayer vs. Superior Court San Francisco*, 117 Cal. 640, 643, 49 Am. St. Rep. 220, 49 Pac. Rep. 983. See *Estate of Welch*, 110 Cal. 605, 42 Pac. Rep. 1089; *Estate of Sarment*, 123 Cal. 331, 337, 55 Pac. Rep. 1015; *Lee vs. Lee*, 55 Ala. 590.

8. **Sale of**—Power to sell real or personal estate of ward.—See Code Civ. Proc. §§ 770, 777 and notes; also 15 Am. & Eng. Encyc. of L. (2d ed.) 56-60.

As to sale of infant's stock, see 40 L. R. A. 498.

9. **Mechanic's lien on**—Guardian cannot subject property of ward to mechanic's lien without first obtaining order of court authorizing him to do so.—*Guy vs. Du Uprey*, 16 Cal. 196, 198, 76 Am. Dec. 518; *Hunt vs. Maldonado*, 89 Cal. 636, 27 Pac. Rep. 56; *Fish vs. McCarthy*,

96 Cal. 484, 485, 31 Am. St. Rep. 237, 31 Pac. Rep. 529.

10. **ORIGIN AND EXTENT OF POWER** of guardian in chancery under common law discussed in note 18 Am. Dec. 689.

11. **SUSPENSION OF POWER**—Guardian's power over both his person and his property is suspended by majority of ward (§ 254 erroneously cited for this section).—*Estate of Curtis*, 121 Cal. 468, 474, sub nom. *Curtis vs. Devoe*, 53 Pac. Rep. 936.

§ 248. DUTIES OF GUARDIANS OF THE PERSON (repealed).

History: Enacted March 21, 1872; repealed by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 341, held unconstitutional; see history, § 4 ante; re-repealed March 21, 1905, Stats. and Amdts. 1905, c. DLXII, p. 729.

1. Applied, cited, construed, referred to, etc.
2. Custody of ward's person.

1. **Applied, cited, construed, referred to, etc.**, in: *Estate of Henning*, 128 Cal. 214, 218, 79 Am. St. Rep. 43, 60 Pac. Rep. 762 (referred to with other sections); *Guardianship of Van*

Loan, 142 Cal. 423, 426, sub nom. *In re Van Loan*, 76 Pac. Rep. 37 (referred to with other sections).

2. **Custody of ward's person**,—as to, see ante § 247 note pars. 3, 4.

§ 249. DUTY OF GUARDIAN OF ESTATE (repealed).

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 197; April 6, 1880, Code Amdts. 1880 (C. C. pt.), p. 5; repealed by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 341, held unconstitutional; see history, § 4 ante; re-repealed March 21, 1905, Stats. and Amdts. 1905, c. DLXII, p. 729.

1. Applied, cited, construed, referred to, etc.
2. Control of court over.
- 3-5. Duty to manage estate.
6. Extent of expenditures.
7. Same—General rule.
8. Responsibility of guardian.

1. **Applied, cited, construed, referred to, etc.**, in: *De Greayer vs. Superior Court San Francisco*, 117 Cal. 640, 644, 59 Am. St. Rep. 220, 49 Pac. Rep. 983 (cited with other sections); *Estate of Curtis*, 121 Cal. 468, 472, sub nom. *Curtis vs. Devoe*, 53 Pac. Rep. 936 (referred to in discussion); *Morse vs. Hinckley*, 124 Cal. 154, 157, 56 Pac. Rep. 896 (quoted in opinion); *Guardianship of Ceas*, 134 Cal. 114, 116, sub nom. *In re Ceas' Estate*, 66 Pac. Rep. 187 (construed).

2. **Control of court over**.—In the performance of his duties guardian is under control and supervision of the court appointing him, but the court has no power to interfere with the custody and general management of property of ward, except for conduct authorizing suspension or removal of the guardian.—*De Greayer vs. Superior Court San Francisco*, 117 Cal. 640, 643, 59 Am. St. Rep. 220, 49 Pac. Rep. 983. See *In re Welch*, 110 Cal. 605, 608, 42 Pac. Rep. 1089; *Lee vs. Lee*, 55 Ala. 590.

3. **Duty to manage estate and maintain the ward properly and suitably**.—See Code Civ. Proc. § 770 and note.

4. **Guardian must manage estate of his ward frugally and without waste**, and apply income and profits, as far as may be necessary, for comfortable and suitable maintenance and support of his ward and his family, if

there be any.—*Guardianship of Ceas*, 134 Cal. 114, 116, sub nom. *In re Ceas' Estate*, 66 Pac. Rep. 187.

5. **To encumber property of ward with liens which may be foreclosed or enforced**, and property sold, would not be complying with this provision of the code.—*Morse vs. Hinckley*, 124 Cal. 154, 157, 56 Pac. Rep. 896; *Guy vs. Du Uprey*, 16 Cal. 196, 76 Am. Dec. 518.

6. **Extent of expenditures allowed by guardian**, when courts may and will authorize an encroachment of principal, and court's and ward's ratification of encroachment of principal of ward's estate, discussed in note 49 Am. Dec. 657, 660.

7. **Same**—The general rule is thought to be that guardian may make necessary, proper, and economical disbursements for benefit of ward, and will be protected therein, even though there was no order of court specially authorizing the expenditures.—See *Ala. Calhoun vs. Calhoun*, 41 Ala. 369. **Ill.** *Bond vs. Lockwood*, 33 Ill. 212. **Ind.** *State ex rel. Druliner vs. Clark*, 16 Ind. 97. **Ky.** *Jaret vs. Andrews*, 7 Bush 311; *Maupin vs. Dulany*, 5 Dana 589, 30 Am. Dec. 699. **Mich.** *Gott vs. Culp*, 45 Mich. 265. **N. Y.** *In matter of Bostwick*, 4 John. Ch. 100; *Wilkes vs. Rogers*, 6 John. 566; *Smith's Appeal*, 30 Pa. St. 397. **S. C.** *McDowell vs. Caldwell*, 2 McC. Eq. 43, 16 Am. Dec. 635. **Tenn.** *Rosenborough vs. Rosenborough*, 59 Tenn. 314. **Eng.** *Carmichael vs. Wilson*, 3 Moll. 84, 88; *Reeves vs. Brymer*, 6 Ves. 425; *Sherwood vs. Smith*, 6 Ves. 454; *Walker vs. Wetherell*, 6 Ves. 474 (overruled *Umbeby vs. Kirk* (1838), 1 C. P. Coop. 254); *Sisson vs. Shaw*, 9 Ves. 285, 7 Rev. Rep. 190; *Chambers*

vs. Goldwin, 11 Ves. 1, 8 Rev. Rep. 61; Maberly vs. Turton, 14 Ves. 499; Stopford vs. Canterbury, 11 Sim. 82, 34 Eng. Ch. Rep. 82. See Ex parte Bond, 2 Myl. & K. 439, 440, 39 Rev. Rep. 232.

8. Responsibility of guardian.—Guardian, and not court, is responsible for proper administration of trust.—De Greayer vs. Superior Court San Francisco, 117 Cal. 640, 643, 59 Am. St. Rep. 220, 49 Pac. Rep. 983.

§ 250. RELATION CONFIDENTIAL. The relation of guardian and ward is confidential, and is subject to the provisions of the title on Trust.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Guardian is trustee.
3. Transactions between guardian and ward.
4. Same—Are not favored.

As to trusts, generally, see post §§ 2215-2250 and notes.

3. Transactions between guardian and ward.—Mortgage given by general guardian for money which was property of ward, for which guardian is responsible, founded upon sufficient consideration.—Jennings vs. Jennings, 104 Cal. 150, 153, 37 Pac. Rep. 794. See Plummer vs. Green, 49 Neb. 316, 320, 68 N. W. Rep. 500.

1. Applied, cited, construed, referred to, etc., in: People vs. Page, 116 Cal. 386, 391, 48 Pac. Rep. 326.

2. Guardian is trustee, within meaning of Penal Code, which declares that every trustee who appropriates trust property is guilty of embezzlement.—People vs. Page, 116 Cal. 386, 390, 391, 48 Pac. Rep. 326.

See Pen. Code § 506 and note.

4. Are not favored by courts, and will be set aside where they redound to profit or guardian.—McClellan vs. Kennedy, 8 Md. 230; Fridge vs. State for use of Kirk, 8 Gill & J. (Md.) 103, 20 Am. Dec. 463.

§ 251. GUARDIAN UNDER DIRECTION OF COURT. In the management and disposition of the person or property committed to him, a guardian may be regulated and controlled by the court.

History: Enacted March 21, 1872.

§ 252. DEATH OF A JOINT GUARDIAN. On the death of one of two or more joint guardians, the power continues to the survivor until a further appointment is made by the court.

History: Enacted March 21, 1872.

Supervisorsnip between cotrustees,—as to, see post § 2238 and note.

§ 253. REMOVAL OF GUARDIAN. A guardian may be removed by the superior court for any of the following causes:

1. For abuse of his trust;
2. For continued failure to perform its [his] duties;
3. For incapacity to perform its [his] duties;
4. For gross immorality;
5. For having an interest adverse to the faithful performance of his duties;
6. For removal from the state;
7. In the case of a guardian of the property, for insolvency; or,
8. When it is no longer proper that the ward should be under guardianship.

History: Enacted March 21, 1872; amended April 6, 1880, Code Amdts. 1880 (C. C. pt.), p. 5.

- 1, 2. Accounting after removal.
3. Grounds for removal.
4. Same—Removal of father.
- 5, 6. Power conferred on probate judge—Discharge at chambers.
7. Presumptions in favor of.

2. Such settlement is conclusive as against his bondsmen and his successor as guardian.—Reynolds vs. Brumigan, 54 Cal. 258; Trumpler vs. Cotton, 109 Cal. 250, 255-256, 41 Pac. Rep. 1033.

3. Grounds for removal.—Chancery will not remove guardian who has been regularly appointed, unless for misbehavior.—Lord vs. Hough, 37 Cal. 657, 664; De Greayer vs. Superior Court San Francisco, 117 Cal. 640, 643, 59 Am. St. Rep. 220, 49 Pac. Rep. 983.

1. Accounting after removal.—Probate court has authority to settle accounts of guardians, even after their letters are revoked.—Graft vs. Mesmer, 53 Cal. 636, 637.

4. Removal of father who, as guardian of his minor children, was in receipt of annual income of \$2,000 from their property, and who persistently refused for several years to provide for their support and education, sustained.—In matter Guardianship of Swift, 47 Cal. 629, 631.

5. Power conferred upon probate judge to discharge guardian may be exercised by him at chambers, and when so exercised, constitutes act of probate court.—Warder vs. Elkins, 38 Cal. 439, 442 (under Stats. 1850, p. 272, as amended by act 1861, § 16 p. 607).

6. Power to discharge guardian at cham-

bers necessarily includes and implies that power to perform any act preliminary to this ultimate act, at chambers, and same becomes act of probate court.—Warder vs. Elkins, 38 Cal. 439, 442.

7. Presumptions—Removal proceedings are, in absence of contrary proof, presumed to have been with jurisdiction and proceedings correct.—Brodribb vs. Tibbits, 63 Cal. 30; Latham vs. Blake, 77 Cal. 646, 649, 18 Pac. Rep. 150, 20 Id. 417; Smith vs. Biscailuz, 33 Cal. 344, 354, 21 Pac. Rep. 15, 23 Id. 314.

Removal and resignation of guardian,—as to, see Code Civ. Proc. § 1801 and note.

§ 254. GUARDIAN APPOINTED BY PARENT, HOW SUPERSEDED. The power of a guardian appointed by a parent is superseded:

1. By his removal, as provided by section two hundred and fifty-three;
2. By the solemnized marriage of the ward; or,
3. By the ward's attaining majority.

History: Enacted March 21, 1872.

Applied, cited, construed, referred to, etc., in: Estate of Curtis, 121 Cal. 468, 474, 53 Pac.

Rep. 936 (miscited for § 255 in connection with Code Civ. Proc. § 1753).

§ 255. SUSPENSION OF POWER OF GUARDIAN. The power of a guardian appointed by a court, is suspended only:

1. By order of the court; or,
2. If the appointment was made solely because of the ward's minority, by his attaining majority; or,
3. The guardianship over the person of the ward, by the marriage of the ward.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 197; repealed by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 341, held unconstitutional; see history, § 4 ante.

§ 256. RELEASE BY WARD. After a ward has come to his majority, he may settle accounts with his guardian, and give him a release, which is valid if obtained fairly and without undue influence.

History: Enacted March 21, 1872.

1. Consideration.
2. Validity of release.
- 3, 4. Same—After attaining majority.
5. Same—Female under twenty-one.

1. **CONSIDERATION.**—Release executed by ward in consideration of guardian's note is prejudicial of ward's interests, because slighter security by guardian's bond, and is void.—Fridge vs. State, use of Kirk, 3 Gill & J. (Md.) 103, 20 Am. Dec. 463.

2. **VALIDITY OF RELEASE.**—Voluntary settlement between guardian and ward is no bar to new settlement under order of court without proof of actual fraud.—Say vs. Barnes, 4 Serg. & R. (Pa.) 112, 8 Am. Dec. 679. See Pa. Hickman's Appeal, 7 Pa. St. 465; Stanley's Appeal, 8 Pa. St. 431, 49 Am. Dec. 530; Commonwealth vs. Moltz, 10 Pa. St. 527, 51 Am. Dec. 499. S. C. Johnson vs. Johnson, 2 Hill Eq. 277, 29 Am. Dec. 72. Va. Waller vs. Armistead, 2 Leigh 11, 21 Am. Dec. 594.

3. **After attaining majority.**—Release executed by ward shortly after attaining majority, or before or after time of giving up estate, will be set aside, as against public policy, without any proof of actual fraud.—Waller vs. Armistead, 2 Leigh (Va.) 11, 21 Am. Dec. 594; Johnson vs. Johnson, 2 Hill (S. C.) Eq. 277, 29 Am. Dec. 72.

See 15 Am. & Eng. Encyc. of L. (2d ed.) 111.

4. **VALIDITY OF RELEASE BY WARD AFTER ATTAINING MAJORITY.**—as to, see Scatterfield vs. John, 53 Ala. 127; Malone vs. Kelly, 54 Ala. 582; Hunter vs. Atkins, 3 Myl. & K. 135.

5. **Female under twenty-one years of age** cannot execute release of her guardian, although by statute guardianship terminates upon her attaining age of sixteen.—Fridge vs. State, use of Kirk, 3 Gill & J. (Md.) 103, 20 Am. Dec. 463. See Greenwood vs. Greenwood, 28 Md. 369, 385.

§ 257. GUARDIAN'S DISCHARGE. A guardian appointed by a court is not entitled to his discharge until one year after the ward's majority.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Discharge of guardian of insane person.
3. Marriage of ward discharges guardian.

1. Applied, cited, construed, referred to, etc.
in: Estate of Curtis, 121 Cal. 468, 475, sub nom. Curtis vs. Devoe, 53 Pac. Rep. 936 (cited in construing Code Civ. Proc. § 1753; miscited).

2. Discharge of guardian of insane person on showing, on application of ward or otherwise, that guardianship is no longer necessary.—See Code Civ. Proc. § 1802 and note.

3. Marriage of minor ward terminates guardianship.—See Code Civ. Proc. § 1802 and note.

§ 258. INSANE PERSONS (repealed).

History: Enacted March 21, 1872; amended April 6, 1880, Code Amdts. 1880 (C. C. pt.), p. 5; repealed by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 341, held unconstitutional; see history, § 4 ante; re-repealed March 21, 1905, Stats. and Amdts. 1905, c. DLXII, p. 729.

Guardianship of insane person and incompetent person, when and how made, hearing

and examination, etc.—as to, see Code Civ. Proc. §§ 1763-1767 and notes.

TITLE IV.

MASTER AND APPRENTICE.

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| <p>§ 264. Minors, when and to whom may be bound as apprentices.</p> <p>§ 265. Persons who may bind minor with his consent.</p> <p>§ 266. Indenture of apprenticeship, how to be executed and what to contain.</p> <p>§ 267. Jury trial as to facts of incapacity, etc., of parent.</p> <p>§ 268. Apprenticing of poor and homeless minors.</p> <p>§ 269. Master to keep apprentice within the state, to deliver him money and other property therein.</p> | <p>§ 270. Duty to inquire into the treatment of minor apprentices.</p> <p>§ 271. Hearing of complaints of apprentices.</p> <p>§ 272. Power of court to discharge apprentice from apprenticeship.</p> <p>§ 273. Liability of master for breach of his covenant.</p> <p>§ 274. Liability of, and proceedings against, apprentice guilty of gross misbehavior.</p> <p>§ 275. Enticing away apprentices and liability for.</p> <p>§ 276. Release of master removing out of state or quitting business.</p> |
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§ 264. MINORS, WHEN AND TO WHOM MAY BE BOUND AS APPRENTICES. Every minor of the age of fourteen years or upwards may be bound by indenture as an apprentice to any mechanical trade or art or the occupation of farming to the age of eighteen years, if a female, or to the age of twenty-one years, if a male.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 341, held unconstitutional; see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXVII, p. 560.

I. In General.

- 1, 2. Common law—Infant's right to contract.
- 3-6. Statute law—Rights under.
- 7, 8. Parent's right to bind infant.
- 9-14. Same—Consent of infant.

II. How Far Binding Upon Infant.

- 15, 16. Contract of apprenticeship not binding—Necessaries.
- 17, 18. Same—Effect of consent of father.
- 19, 20. Rescission of contract—Right and effect of.

III. Legislative Control.

- 21-24. Nature and effect of legislative control.

IV. Evidence.

- 25, 26. Parol evidence—When admissible.

I. IN GENERAL.

As to assignments of contracts of apprenticeship, see note 25 Am. Dec. 180.

As to contract of apprenticeship and the power of an infant to bind himself thereby, see notes 23 Am. Dec. 659, 34 Am. Dec. 588, 32 Am. Rep. 155, and monographic note 18 Am. St. Rep. 619-627.

As to the effect of part performance of contract for services by infants, see monographic note by Irvin Taylor, 24 L. R. A. 231-235.

As to right of infant to disaffirm or rescind contract, see ante § 235 and note.

As to right of an infant to repudiate contract for services and sue on quantum meruit, see note by H. P. Farnham, 15 L. R. A. 211.

1. **COMMON LAW.**—Infant's right to make binding contracts of apprenticeship did not exist at common law.—*Ala. Clark & Co. vs. Goddard*, 39 Ala. 164, 84 Am. Dec. 777. *Ind. Harney vs. Owen*, 4 Blackf. 337, 30 Am. Dec. 662. *Mass. Vent vs. Osgood*, 86 Mass. (19 Pick.) 572. *N. C. Francis vs. Felnut*, 4 Dev. & B. 498. *Eng. Gilbert vs. Fletcher*, Cro. Car. 179.

2. **Under contract by which infant acquires knowledge of some mechanical or other business is not obligatory under the principles of common law.**—*Moses vs. Stevens*, 19 Mass. (2 Pick.) 332, 335; *Gaffney vs. Hayden*, 110 Mass. 137, 14 Am. Rep. 580.

3. **STATUTE LAW AS TO INFANT'S RIGHT.**—English statute 5 Ellis. c. 4 § 41, relating to apprentices and servants, makes void all contract binding minor in service, unless made pursuant thereto.—*Day vs. Everett*, 7 Mass. 145, 148.

4. **Containing orders for artificers, laborers, servants of husbandry, and apprentices not in force in United States.**—*Clark & Co. vs. Goddard*, 39 Ala. 164, 84 Am. Dec. 777.

5. **Infant cannot contract under seal but in manner and to the extent prescribed by statute.**—*Charles vs. Matlock*, 3 Cr. C. C. 330, 5 Fed. Cas. 507.

6. **Statute must be strictly complied with.**—*Ballard vs. Edmonston*, 2 Cr. C. C. 419, 2 Fed. Cas. 553. See *Harper vs. Gilbert*, 59 Mass. (5 Cush.) 417, 418.

See pars. 11, 23, 24 this note.

7. **PARENT'S RIGHT.**—Parent at common law could bind infant children as apprentices.—*In re McDowle*, 8 John. (N. Y.) 328, 331.

8. **Assigning services of child to others for consideration inuring to himself.**—*Day vs. Everett*, 7 Mass. 145, 147.

Doubted in *United States vs. Bainbridge*, 1 Mas. C. C. 71, 24 Fed. Cas. 946.

9. **Consent of child necessary to contract of apprenticeship made by father.**—*In re McDowle*, 8 John. (N. Y.) 328, 331.

See pars. 23, 24 this note.

10. **Father has no authority under statute, or even at common law, to bind his infant son as apprentice without free will and action of child.**—*People ex rel. Bentley vs. Hanna*, 3 How. Pr. (N. Y.) 39, 43.

See pars. 6, 23, 24 this note.

11. **Statute must be considered as controlling common law with respect to right of parent to apprentice minor child.**—*In re McDowle*, 8 John. (N. Y.) 328, 331.

See pars. 6, 23, 24 this note.

12. **Without his consent, and thereby convey permanent custody of person of child, and also benefit of labor, to master during minority, said to be doubted.**—*United States vs. Bainbridge*, 1 Mas. C. C. 71, 24 Fed. Cas. 946, 949.

13. **Without his consent, distinctly denied.**—*Pierce vs. Massenburg*, 4 Leigh (Va.) 493, 26 Am. Dec. 333. See *King vs. Arnesby*, 3 Barn. & Ald. 584, 5 Eng. C. L. 855; *King vs. Cromford*, 8 East 25.

14. **Ratified by infant by continuing to work after majority under contract void under statute of frauds, as not being signed by party to**

be charged.—*Baker vs. Lauterbach*, 68 Md. 64, 11 Atl. Rep. 703.

II. HOW FAR BINDING UPON INFANT.

15. **HOW FAR BINDING.**—Contract of apprenticeship not contract for necessities binding upon infant.—*Thomas vs. Dike*, 11 Vt. 273, 34 Am. Dec. 690.

See par. 17 this note.

16. **Contract of apprenticeship not binding upon infant, as he cannot judge for himself value of his services, time suitable to bind himself, or nature of employment.**—*Thomas vs. Dike*, 11 Vt. 273, 34 Am. Dec. 690.

17. **Contract entered into by minor with consent of father to work in pattern-making business, is contract for necessities and beneficial, as stipulating for instruction by which he can earn livelihood.**—*Pardey vs. American Ship Windlass Co.*, 20 R. I. 147, 78 Am. St. Rep. 844, 37 Atl. Rep. 706.

See par. 15 this note.

18. **Contract by infant, with consent of father, for term of years, with provisions for retaining certain amounts until end of term, unless minor previously discharged, binds infant after majority, and he cannot recover amount so retained upon quitting before expiration of term.**—*Pardey vs. American Ship Windlass Co.*, 20 R. I. 147, 78 Am. St. Rep. 844, 37 Atl. Rep. 706.

19. **RESCISSION BY INFANT.**—Minor entering into contract, apparently to his advantage, obtained fairly without attempting to mislead his judgment, or impose upon his inexperience, cannot maintain action for what he may have advanced under it in labor, property, or money, upon his rescinding same after receiving, in part or in full, stipulated consideration.—*Ind. Harney vs. Owen*, 4 Blackf. 337, 30 Am. Dec. 662. *Mass. Badger vs. Phinney*, 15 Mass. 359, 8 Am. Dec. 105; *Stone vs. Dennison*, 30 Mass. (13 Pick.) 1, 23 Am. Dec. 654. *N. H. Weeks vs. Leighton*, 5 N. H. 343. *N. Y. McCoy vs. Huffman*, 8 Cow. 84. *Eng. Holmes vs. Blogg*, 8 Taunt. 35, 508, 4 Eng. C. L. 29, 252, 1 Moore 466, 2 Moore 552, 19 Rev. Rep. 445. But see *Wheatly vs. Miscal*, 5 Ind. 142.

20. **Infant cannot recover for services rendered on contract of apprenticeship providing for his board, clothing, instruction, and necessities, and guarding his morals, whether able to labor or not, to exceed in value articles furnished him at time he saw fit to disaffirm, in absence of proof of undue means.**—*Harney vs. Owen*, 4 Blackf. (Ind.) 337, 30 Am. Dec. 662.

III. LEGISLATIVE CONTROL.

21. **LEGISLATIVE CONTROL.**—Contracts intended by legislature to be salutary or essential to public interests, cannot be declared void or voidable because entered into by parties within contemplation of law, such as infants.—*United States vs. Bainbridge*, 1 Mas. C. C. 71, 24 Fed. Cas. 946, 951.

22. **Rights of parents in relation to custody and services of children dependent upon mere municipal rule of state and enlarged, restrained, or limited as wisdom or policy of times dictate.**—*United States vs. Bainbridge*, 1 Mas. C. C. 71, 24 Fed. Cas. 946, 949.

22. Statute calling for consent of infant to be expressed in indenture of apprenticeship and testified by minor's signature, must be strictly complied with.—*Harper vs. Gilbert*, 59 Mass. (5 Cush.) 417, 418. See *Catlin vs. Ware*, 9 Mass. 218, 6 Am. Dec. 56; *Lufkin vs. Curtis*, 13 Mass. 223.

See par. 6 this note.

24. Words expressing consent must be shown in contract of apprenticeship, under statute.—*Harper vs. Gilbert*, 59 Mass. (5 Cush.) 417, 418. See *Catlin vs. Ware*, 9 Mass. 218, 6 Am. Dec. 56; *Lufkin vs. Curtis*, 13 Mass. 223.

§ 265. PERSONS WHO MAY BIND MINOR WITH HIS CONSENT. A minor, with his consent, may be bound by [1] his father, or, in case of his [a] death or [b] incompetency, or where he has [c] wilfully abandoned his family for one year without making suitable provision for their support, or [d] is habitually intemperate in the use of intoxicants, or [e] is a vagrant, then by [2] his mother or [3] legal guardian. An [4] executor who, by the will of the father, is directed to bring up a child to a trade or calling, has power to bind by indenture in like manner as the father might have done, if living. If a child is illegitimate, the mother alone has power to bind him. If a minor has no parent or guardian competent to act for him, he may bind himself, with the approval of the superior court of the county wherein he resides. [Mother marrying.] If the mother of a minor, whether legitimate or illegitimate, marries after his birth, she cannot bind him without the approval of such superior court.

History: Enacted March 21, 1872; amended April 6, 1880, Code Amdts. 1880 (C. C. pt.), p. 5; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 341, held unconstitutional; see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXVII, p. 561.

I. In General.

- 1-3. Consent indispensable to valid contract.
4. Same—Necessary matter is of substance.
- 5-9. Same—Enlistment—United States statutes, etc.

II. Consent of Parents.

- 10-16. Consent of mother—Nature and effect of.
17. Same—Proved though not indorsed.
18. Same—Right of master under.
19. Same—Settlement conferred by.
- 20-23. Same—Public authorities—Nature.
- 24, 25. Same—Jurisdiction of court over.

I. IN GENERAL.

As to indorsement of consent on indenture, see post § 266 and note.

1. CONSENT.—Assent of father to deed of apprenticeship must be shown on deed.—*Charles vs. Matlock*, 3 Cr. C. C. 230, 5 Fed. Cas. 507.

See post § 266 and note.

2. Of parent, guardian, or next friend, indispensable to validity of indenture of apprenticeship.—*Harney vs. Owen*, 4 Blackf. (Ind.) 337, 30 Am. Dec. 662; *Brotzman vs. Bun-nell*, 5 Whart. (Pa.) 128, 34 Am. Dec. 537.

3. Contract to labor until of age, for board, clothing, and education, sanctioned by guardian, fully performed on both sides, valid when otherwise reasonable and fair.—*Stone vs. Den-nison*, 30 Mass. (13 Pick.) 1, 23 Am. Dec. 654.

4. Whatever necessary to validity of charac-

IV. EVIDENCE.

25. PAROL EVIDENCE ADMISSIBLE TO PROVE indenture of apprenticeship signed by father and son, not signed by them as such, to their knowledge.—*Harper vs. Gilbert*, 59 Mass. (5 Cush.) 417, 418.

26. Indenture of apprenticeship entered into by father without child's consent not admissible to prove apprenticeship, or contract of service, in action for enticing away such child as servant.—*Pierce vs. Massenburg*, 4 Leigh (Va.) 493, 26 Am. Dec. 333.

ter of contract is matter of substance.—*Charles vs. Matlock*, 3 Cr. C. C. 230, 5 Fed. Cas. 507.

5. Enlistment.—Contract by infant, even if voidable at common law, would not be rendered binding by consent of parents.—*United States vs. Bainbridge*, 1 Mas. C. C. 71, 24 Fed. Cas. 946, 951.

6. Contract made by minors without consent of their parents when fairly made with an infant of reasonable discretion deemed beneficial and binding to all intents and purposes.—*United States vs. Bainbridge*, 1 Mas. C. C. 71, 24 Fed. Cas. 946, 951.

7. Contract for public services made, pursuant to statute, for benefit of infant bona fide, neither void nor voidable.—*United States vs. Bainbridge*, 1 Mas. C. C. 71, 24 Fed. Cas. 946, 951.

8. Contract for public service authorized by statute, deemed in law to be for his benefit, and for the public benefit.—*United States vs. Bainbridge*, 1 Mas. C. C. 71, 24 Fed. Cas. 946, 951.

9. Contract with United States statute for enlistment of minors in navy without consent of fathers, does not contravene constitution.—*United States vs. Bainbridge*, 1 Mas. C. C. 71, 24 Fed. Cas. 946, 951. See *Rex vs. Reynolds*, 6 Durnf. & E. (6 T. R.) 497; *Rex vs. Edwards*, 7 Durnf. & E. (7 T. R.) 745; *Ex parte Softly*, 1 East 466, 6 Rev. Rep. 329; *Ex parte Brocke*, 6 East 238, 2 Smith 235.

II. CONSENT OF PARENTS.

Father—Consent of.—See par. 1 this note.

Guardian—Consent of.—See para. 2, 3 this note.

10. CONSENT OF MOTHER.—Mother not natural guardian or entitled to services of children; no authority to apprentice or prohibit apprenticeship.—*Clark & Co. vs. Goddard*, 19 Ala. 164, 84 Am. Dec. 777; *Ballard vs. Edmonston*, 2 Cr. C. C. 419, 2 Fed. Cas. 558.

11. APPRENTICESHIP BY MOTHER binding infant for five years and extending over his majority, void.—*Baker vs. Lauterbach*, 68 Md. 64, 11 Atl. Rep. 703.

12. By mother and infant, voidable at instance of father.—*Overseers Town of Owasco vs. Overseers Town of Oswegatchie*, 5 Cow. (N. Y.) 527, 528; *Overseers of Hudson vs. Overseers of Taghkanac*, 13 John (N. Y.) 245.

13. By mother, valid without production of certificate of justice of peace as to death of father.—*People ex rel. Barbour vs. Gates*, 43 N. Y. 40, 48.

14. By mother, where father dead, surrendering custody of infant under agreement to provide for, and teach him a trade, does not constitute valid claim to control discretion of court in appointing, with assent of mother, another person guardian where mother was herself an infant at time of execution of contract.—*Gloucester vs. Page*, 106 Mass. 231, 232.

15. Assignment of apprenticeship with consent of mother with approbation of mayor of town will not pass right to apprentice's services, as contract is personal and not susceptible of alienation.—*Versailles vs. Hall*, 5 La. 281, 25 Am. Dec. 178. See *Nickerson vs. Howard*, 16 John. (N. Y.) 113, 114; *King vs. Stockland*, Doug. 70; *Baxter vs. Burfield*, 2 Stra. 1266.

16. Enforceability—Void contract entered into by mother of infant, not enforceable by employer as against infant.—*Baker vs. Lauterbach*, 68 Md. 64, 11 Atl. Rep. 703.

17. Evidence.—Consent of mother proved, although not indorsed within time required.—*Charles vs. Matlock*, 3 Cr. C. C. 230, 5 Fed. Cas. 507.

18. Right of action by master against stranger, denied where minor was apprenticed by mother, deed by her only signed.—*Ballard vs. Edmonston*, 2 Cr. C. C. 419, 2 Fed. Cas. 558; *Charles vs. Matlock*, 3 Cr. C. C. 230, 5 Fed. Cas. 507.

19. Settlement, conferred upon child, by indenture of apprenticeship signed by child and mother and not dissented to by father, under which child serves.—*Overseers Town of Owasco vs. Overseers Town of Oswegatchie*, 5 Cow. (N. Y.) 527, 528.

Next friend—Consent of.—See par. 2 this note.

20. PUBLIC AUTHORITIES.—Authority of county court to bind minors as apprentices or servants not placed in same category as granting or revoking letters of guardianship and directing and controlling conduct and settling of guardian's accounts (Alaska).—*Ex parte Emma*, 48 Fed. Rep. 211, 214 (construing the provisions of the Oregon Code as applicable to Alaska).

21. POWER TO BIND MINORS AS APPRENTICES OR SERVANTS, if not exercisable by court of probate is exercisable alone by county judge and county commissioners jointly (Alaska).—*Ex parte Emma*, 48 Fed. Rep. 214 (construing the provisions of the Oregon Code as applicable to Alaska).

22. Consent by justice of peace must be signed by requisite number of justices.—*Charles vs. Matlock*, 3 Cr. C. C. 230, 5 Fed. Cas. 507.

23. Signature of party standing in loco parentis, who by law has power and authority of parent, renders deed valid as against parent.—*People ex rel. Wehle vs. Weissenbach*, 60 N. Y. 386, 392. See *In re McDowle*, 8 John. (N. Y.) 328.

24. Jurisdiction of justice denied where child was not brought before them at time he was bound and apprenticed.—*Smith vs. Ellwood*, 4 Cr. C. C. 670, 22 Fed. Cas. 532.

25. Minor ordered bound by court having jurisdiction, where he is discharged from an apprenticeship under which he was illegally bound.—*Smith vs. Ellwood*, 4 Cr. C. C. 670, 22 Fed. Cas. 532.

§ 266. INDENTURE OF APPRENTICESHIP, HOW TO BE EXECUTED AND WHAT TO CONTAIN. Every indenture of apprenticeship [1] must be executed in duplicate, [2] must state the age of the minor, and, except as hereinafter provided, [3] must show that he consented thereto, [4] must be signed by him and the person binding and the master, and when made with the approval of the superior court, [5] a certified copy of the order of approval must be attached to the indenture. One copy of the indenture [6] must be delivered to the master and [7] the other kept for the use of the minor by his parent or guardian when executed by him, or, when made with the approval of the court, [8] it must be filed and deposited with the clerk for safekeeping for the use of the minor. **No indenture binds the minor after the death of the master**, but thereafter the minor may be bound anew. Every indenture entered into otherwise than as herein provided is, as against the apprentice, absolutely void.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 341, held unconstitutional; see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXVII, p. 561.

I. Contents of Deed.

- 1, 2. Necessity of deed, etc.
3. Statement of age—Necessity of.
4. Same—No estoppel of minor.
- 5, 6. Same—Master and stranger estopped by.
- 7, 8. Signature of master—Effect and sufficiency of.
9. Evidence to prove deed.

II. Indorsement.

- 10, 11. Indorsement of consent.
- 12-16. Sufficiency of indorsement.

III. Duplicate Deed.

17. Master need not sign counterpart.
18. Statute—Complied with strictly.
19. Same—Necessity of as to other parties than minor.
- 20, 21. Same—Necessity of as to minor.
22. Same—No ground of avoidance by others.
23. Same—Sufficient avoidance by minor.

As to necessity of inserting age of minor in deed, see 2 Am. & Eng. Encyc. L. (2d ed.) 496, 3 Cyc. 550.

As to form and validity of indenture of apprenticeship, see 3 Cyc. 543.

As to validity of instrument not fully complying with statute, see 2 Am. & Eng. Encyc. L. (2d ed.) 497.

As to consent in general, see ante § 265 and note.

As to evidence of consent, see 2 Am. & Eng. Encyc. L. (2d ed.) 492, 3 Cyc. 548.

As to signature, see ante § 265 note par. 23.

I. CONTENTS OF DEED.

1. **INDENTURE OR OTHER DEED NECESSARY** to acquisition of settlement under apprenticeship.—Overseers Poor etc. vs. Overseers etc., 2 Cow. (N. Y.) 537. See *Rex vs. Inhabitants of Abington*, Burr. Sett. Cas. 292.

2. **Failure to bind by deed or other instrument in writing will entitle father to custody on habeas corpus proceedings.**—State ex rel. Mayne vs. Baldwin, 5 N. J. Eq. (1 Halst.) 454, 45 Am. Dec. 399; *In re Goodenough*, 19 Wis. 274.

3. **STATEMENT OF AGE.**—Deed of apprenticeship binding infant must state his age.—Charles vs. Matlock, 3 Cr. C. C. 230, 5 Fed. Cas. 507.

4. **Infant not estopped by statement of age made in indenture by statutory provisions that same shall be taken as his correct age.**—In the matter of Brennan, 1 Sandf. (N. Y.) 711.

5. **Master cannot contradict statement of age in deed in order to show that time has not expired.**—McCutchin vs. Jamieson, 1 Cr. C. C. 348, 16 Fed. Cas. 13.

6. **Non-insertion of age of minor is no ground of objection to validity of deed by stranger.**—Heinecke vs. Rawlings, 4 Cr. C. C. 499, 11 Fed. Cas. 1037.

7. **Signature of master—Contract of apprenticeship not signed by employers, but only by mother of infant, not enforceable against employers as void under statute of frauds.**—Baker vs. Lauterbach, 68 Md. 64, 11 Atl. Rep. 703.

8. **Contract of apprenticeship signed by one as superintendent under printed word, "wit-**

ness," before same was signed by parent or infant, sufficiently signed by employer; intention being clearly shown that signature of superintendent not intended as witness.—Dwyer vs. Rathbone, Sard & Co., 5 N. Y. Supp. 505.

9. **Parol evidence admissible to prove that contract was in usual form of indenture of apprenticeship, and that apprentice was bound for a number of years, where valid indenture of apprenticeship was shown to have been given.**—Overseers of Town of Owasco vs. Overseers Town of Oswegatchie, 5 Cow. (N. Y.) 527, 528.

II. INDORSEMENT.

10. **Indorsement of consent.**—Indorsement of consent as required by § 266 of the old code does not seem to be necessary under the amendments of March 21, 1905, but inasmuch as these amendments are not retroactive the notes may be found useful.

11. **DEED OF APPRENTICESHIP** must show approbation of the father, the mother, or the court indorsed on the contract.—Charles vs. Matlock, 3 Cr. C. C. 230, 5 Fed. Cas. 507.

12. **SUFFICIENCY OF INDORSEMENT.**—Consent of father expressed in body of indenture and manifested by signing instrument not sufficient.—People ex rel. North vs. Livingston, 2 Hill (N. Y.) 596, 597.

13. **Consent must be added or indorsed in form prescribed by statute.**—People ex rel. North vs. Livingston, 2 Hill (N. Y.) 596, 597.

14. **Shown by certificate in writing at end of instrument.**—People ex rel. North vs. Livingston, 2 Hill (N. Y.) 596, 597.

15. **Shown by express covenant by father at end of deed, after declaring his consent in body.**—People ex rel. North vs. Livingston, 2 Hill (N. Y.) 596, 598.

16. **Words "I consent" not absolutely necessary, provided words used are fully equivalent.**—People ex rel. North vs. Livingston, 2 Hill (N. Y.) 596, 598.

III. DUPLICATE DEED.

17. **COUNTERPART.**—Not necessary that master should sign counterpart of deed of apprenticeship at common law.—Rex vs. Inhabitants of Fleet, Cald. 31; *Millership vs. Brooks*, 5 H. & N. 797, 29 L. J. Ex. 369.

See par. 3 this note.

18. **Statute requiring indenture to be in two parts in order to bind infant must be strictly complied with.**—Campbell vs. Cooper, 34 N. H. 49, 62.

19. **Does not require duplicate in order to render contract binding on other parties.**—Page vs. Marsh, 36 N. H. 305, 307.

See par. 4 this note.

20. **Infant not bound by deed unless executed in duplicate under statute.**—Campbell vs. Cooper, 34 N. H. 49, 62; Page vs. Marsh, 36 N. H. 305, 307.

21. **Makes deed voidable at infant's election in absence of statute making it absolutely void as to minor.**—Page vs. Marsh, 36 N. H. 305, 307; Brown vs. Whittemore, 44 N. H. 369, 370.

22. Other parties cannot avoid contract on that ground.—*Page vs. Marsh*, 36 N. H. 305, 307. sufficient avoidance.—*State vs. Plaisted*, 43 N. H. 413; *Brown vs. Whittemore*, 44 N. H. 369, 370.
23. Act of engaging in service elsewhere

§ 267. JURY TRIAL AS TO FACTS OF INCAPACITY, ETC., OF PARENT.

Facts of incapacity, desertion, habitual intemperance, and vagrancy must be decided in said court by a jury, before the indenture can take effect, and an indorsement on the indenture, under seal of the court, that the charge or charges are, proved, is sufficient evidence of the mother's power to give such consent; but if the jury does not find the charge or charges to be true, the person at whose instance such proceedings may have been had must pay all costs attending the same.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 341, held unconstitutional; see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXVII, p. 561.

As to power of mother to consent to bind minor, see ante; § 365 note para. 10-14.

§ 268. APPRENTICING OF POOR AND HOMELESS MINOR.

When a minor is poor, homeless, chargeable to the county or state, or an outcast, who has no visible means of obtaining an honest livelihood, the superior court may, with his consent, bind him as an apprentice during his minority. Proceedings therefor may be instituted by any citizen, and no fee must be charged by any officer for any act in connection therewith. In all indentures by the court for binding out an orphan or homeless minor as an apprentice there must be inserted, among other things, [1] a clause to the following effect: that the master to whom such minor is bound must cause him to be taught to read and write and the ground rules of arithmetic, ratio and proportion, and must give him the requisite instruction in the different branches of his trade or calling, and, [2] at the expiration of his term of service, must give him or her fifty dollars in gold, and [3] two whole new suits of clothes, to be worth in the aggregate at least sixty dollars gold.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 342, held unconstitutional; see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXVII, pp. 561, 562.

I. Power of Authority.

- 1-5. Circumstances necessary to authority.
6. Justification for acts.
- 7-9. Nature of authority.
10. Presumption not allowed.
- 11, 12. Statutory power—Nature and extent of.
- 13, 14. Same—Consent—Notification.
15. Same—Town's objection to deed.

II. Right of Action by Father.

16. Right to recover services.
17. Right to deny signature of minor.
- 18, 19. Same—Habeas corpus.

III. Instruction of Minor.

- 20, 21. Contract must comply with statute.
- 22-24. Statute—Terms of, when complied with.

I. POWER OF AUTHORITIES.

As to binding by overseers of poor, etc., see 2 Am. & Eng. Encyc. L. (2d ed.) 492.

As to consent, execution, and approval of apprenticeship deed, see 3 Cyc. 548.

As to the mode of binding apprentices, see 2 Am. & Eng. Encyc. L. (2d ed.) 489.

As to proceedings for apprenticing, see 3 Cyc. 546.

As to presence of infant in court, see 3 Cyc. 546.

1. CIRCUMSTANCES NECESSARY TO AUTHORITY.—Parent cannot be deprived of guardianship, society, and services of children except by the clear provisions of the law and legal exercise of undeniable authority.—*Reidell vs. Morse*, 36 Mass. (19 Pick.) 358, 359.

2. Fact that one of parents previously assisted by public authorities, not sufficient to justify binding of infant.—*Reidell vs. Morse*, 36 Mass. (19 Pick.) 358, 360.

3. Minor must be chargeable at time bound by public authorities, to make act legal.—*Reidell vs. Morse*, 36 Mass. (19 Pick.) 358, 360.

4. Power vests when father asks and receives alms for himself and children.—*Schermerhorn vs. Hull*, 13 John. (N. Y.) 270, 271.

5. When father places infant in their care under agreement which he failed to keep and leaves state.—*People ex rel. Wehle vs. Weisenbach*, 60 N. Y. 385.

6. JUSTIFICATION.—Acts of public authorities justified where mother was woman of bad character and not fit person to have custody of child, who was without father.—*Ashby vs. Page*, 108 N. C. 6, 13 S. E. Rep. 90.

7. NATURE OF AUTHORITY.—Power to take children from their parents, families, and homes and bind them to strangers as servants is high and arbitrary, if not dangerous, power.—*Reidell vs. Morse*, 36 Mass. (19 Pick.) 358, 359. See *Owens vs. Frager*, 119 Ind. 532, 21 N. E. Rep. 1115.

8. Exercisable only in cases of clear necessity where all circumstances concur and justify some extraordinary interposition in domestic relation of private families.—*Reidell vs. Morse*, 36 Mass. (19 Pick.) 358, 360.

9. Exercisable only in strict conformity to powers given and rules prescribed.—*Reidell vs. Morse*, 36 Mass. (19 Pick.) 358, 359.

10. PRESUMPTION NOT ALLOWED to aid, but everything required for its support must be affirmatively shown.—*Reidell vs. Morse*, 36 Mass. (19 Pick.) 358, 360.

11. STATUTORY POWER imposed upon public officials being in derogation of natural right must be strictly construed.—*Reidell vs. Morse*, 36 Mass. (19 Pick.) 358, 359.

See 3 Cyc. 548.

12. Overseers of the poor have no authority to bind minors as servants, although objects of public charity, under statute requiring children to be put out as apprentices.—*Respublica vs. Keppeler*, 2 U. S. (2 Dall.) 197, 199, bk. 1 L. ed. 347.

13. Consent.—Superintendent of poor may bind infant sent to county poorhouse and chargeable, or whose parents may become chargeable, as clerk, apprentice, or servant, without consent of parent or father.—*People ex rel. Bentley vs. Hanna*, 3 How. Pr. (N. Y.) 39, 43.

14. Notification of parents with an opportunity to be heard on question would seem to be proper (dictum).—*Reidell vs. Morse*, 36 Mass. (19 Pick.) 358, 361. See *Commonwealth vs. Cambridge*, 4 Mass. 627, 3 Am. Dec. 246; *Chase vs. Hathaway*, 14 Mass. 222; *Hathaway vs. Clark*, 22 Mass. (5 Pick.) 490; *In re Central Turnpike Corporation*, 24 Mass. (7 Pick.) 13; *Moore vs. Allen*, 72 Miss. 273, 16 So. Rep. 600.

As to notification, see 3 Cyc. 546.

15. Town's objection to deed.—Right of town to object to validity of indenture binding infant, denied, under apprenticeship for two years, infant gaining settlement in town.—*Overseers Town of Oswego vs. Overseers Town of Oswegatchie*, 5 Cow. (N. Y.) 527, 528; *Overseers of Hudson vs. Overseers of Taghkanac*, 13 John. (N. Y.) 245.

II. RIGHT OF ACTION BY FATHER.

16. RIGHT OF ACTION BY FATHER.—Father cannot recover services of child under apprenticeship where he asked and received

aims for himself and children at time child bound.—*Schermerhorn vs. Hull*, 13 John. (N. Y.) 270, 271.

17. Father cannot take objection that minor did not sign deed where he leaves child for board with public charities, under agreement to pay therefor, breaks agreement, leaves state, and child is afterwards apprenticed by public authorities.—*People ex rel. Wehle vs. Weissenbach*, 60 N. Y. 385.

18. Habeas corpus.—Child bound out by public authorities where father failed to keep contract made for support, and left state, will not be delivered over to father upon proceedings of habeas corpus merely because apprenticeship deed not binding upon child.—*People ex rel. Wehle vs. Weissenbach*, 60 N. Y. 385.

19. Inclination of child ascertained before handing over to father under apprenticeship deed not binding upon infant, where such infant apprenticed by public authorities owing to father's violation of contract for child's support.—*People ex rel. Wehle vs. Weissenbach*, 60 N. Y. 385.

III. INSTRUCTION OF MINOR.

As to duty to furnish medical aid to apprentice, see monographic note by H. P. Farnham, 28 L. R. A. 546, 555.

As to necessity of providing for education of child, see 2 Am. & Eng. Encyc. of L. (2d ed.) 496, 513.

As to necessity of providing for instruction in some trade or business, see 3 Cyc. 549.

As to necessity of signature of master, see 11 Am. & Eng. Encyc. of L. (2d ed.) 495.

20. INSTRUCTION OF MINOR—CONTRACT MUST CARRY OUT and comply with the express provisions of statute.—*In re Goodenough*, 19 Wis. 274, 276.

21. Contract of apprenticeship by which infant disposes of his personal labor without any stipulation for instruction is not obligatory upon him.—*Moses vs. Stevens*, 19 Mass. (2 Pick.) 332, 335.

22. STATUTE.—Deed not following terms of statute as to instructing minors "to read, write, and cipher" void.—*Mass. Butler vs. Hubbard*, 22 Mass. (5 Pick.) 250, 254. See *Me. Burnham vs. Chapman*, 17 Me. 385. *N. Y. People vs. Hoster*, 14 Abb. Pr. N. S. 414. *N. C. Dowd vs. Davis*, 15 N. C. 61.

23. Provisions calling for minors to be bound out, and instructed "to read, write, and cipher" are imperative and peremptory and must be strictly followed.—*Butler vs. Hubbard*, 22 Mass. (5 Pick.) 250, 254.

24. Calling for infant to be taught to "read, write, and cipher" and "for such other instruction, benefit, and allowance, either within or at end of term, as to overseers may seem fit and reasonable," not complied with by provision giving him "the privilege of all the town school taught," etc.—*Reidell vs. Congdon*, 33 Mass. (16 Pick.) 44.

§ 269. MASTER TO KEEP APPRENTICE WITHIN THE STATE, TO DELIVER HIM MONEY AND OTHER PROPERTY THEREIN. A master must not remove his apprentice out of the state, and must pay and deliver to him the money.

clothes, and other property to which he is entitled under the indenture of apprenticeship, to be held by him as his sole property.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 342, held unconstitutional; see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXVII, p. 562.

1, 2. Apprenticeship—How far binding in another state.

3. Refusal to work in another state—Effect of.

As to removal of master from state or jurisdiction, see 3 Cyc. 562, 2 Am. & Eng. Encyc. of L. (2d ed.) 502.

See post § 276 note.

1. Indenture of apprenticeship taken under authority in another state not obligatory in state to which infant removed.—Commonwealth vs. Edwards, 6 Binn. (Pa.) 202; Com-

monwealth vs. Deacon, 6 Serg. & R. (Pa.) 526. See Commonwealth vs. Hamilton, 6 Mass. 273; Coventry vs. Woodhall, 1 Brownl. 67, 1 Ves. 305.

2. Indenture of apprenticeship void by reason of master's bringing apprentice from another state.—United States vs. Scholfield, 1 Cr. C. C. 255, 27 Fed. Cas. 975. See Coffin vs. Bassett, 19 Mass. (2 Pick.) 357.

3. Refusal to accompany master to another state no breach of covenant.—Vickere vs. Pierce, 12 Me. 315.

§ 270. DUTY TO INQUIRE INTO THE TREATMENT OF MINOR APPRENTICES. Parents and guardians and such court must, from time to time, inquire into the treatment of children bound by them respectively, or with their approval, and the judges of such courts are responsible for the charge of apprentices bound by a court or with its approval, and must defend them from all cruelty, neglect, breach of contract, or misconduct on the part of their masters.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 342, held unconstitutional; see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXVII, p. 562.

§ 271. HEARING OF COMPLAINTS OF APPRENTICES. The superior court must hear the complaints of apprentices who reside within the county against their masters, alleging [1] undeserved or immoderate correction, [2] insufficient allowance of food, raiment, or lodging, [3] want of instruction in the different branches of their trade or calling, or [4] that they are in danger of being removed out of the state, or [5] any violation of the indenture of apprenticeship, and the court must hear and determine such case and make such order therein as will relieve the party in the future.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 342, held unconstitutional; see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXVII, p. 562.

See post § 273 and note.

§ 272. POWER OF COURT TO DISCHARGE APPRENTICE FROM APPRENTICESHIP. The superior court has power, where circumstances require it, [1] to discharge an apprentice from his apprenticeship, and, in case any money or other thing has been paid or contracted to be paid by either party in relation to the apprenticeship, the court must [2] make such order concerning the same as seems just and reasonable. If the apprentice so discharged was originally bound by the superior court, it must, if found necessary, again bind such minor, if under age.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 343, held unconstitutional; see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXVII, p. 562.

See post § 273 and note.

§ 273. **LIABILITY OF MASTER FOR BREACH OF HIS COVENANT.** Every master is liable to an action on the indenture for a breach of any covenant thereof on his part. All damages recovered in such action, after deducting necessary charges in its prosecution, belong to the minor, and must be applied and appropriated to his use by the person recovering it in his behalf, and must be paid to the minor, if a male, at the age of twenty-one years, and if a female, at the age of eighteen years. If no action is brought during the minority of the apprentice, it may be commenced by him in his own name at any time within two years after his coming of age.

History: Enacted March 21, 1872; amended April 6, 1880, Code Amdts. 1880 (C. C. pt.), p. 6; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 343, held unconstitutional; see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXVII, p. 562.

I. In General.

1. Infant not bound by contract to serve.
2. Same—Gross misbehavior—Effect of.

II. Discharge—When Ordered.

- 3, 4. When contract voidable.
- 5-7. When cruelty exists.
8. Effect of cruelty.

III. Proceedings to Discharge.

- 9-11. Habeas corpus by father.
12. Mandamus by father.

IV. Recovery of Services.

- 13-17. Right to compensation enforced.
- 18-20. Same—Not enforced.

I. IN GENERAL.

As to actions for breach of contract, see 3 Cyc. 558.

As to dissolution of the contract of apprenticeship, see 2 Am. & Eng. Encyc. of L. (2d. ed.) 500.

As to termination of contract by reason of acts of parties, see 3 Cyc. 561.

As to termination of the contract and grounds of relief, see 3 Cyc. 563.

As to effect of death on contract of apprenticeship, see monographic note by Irvin Taylor, 23 L. R. A. 707-713.

1. CONTRACT BINDING INFANT TO SERVE and not to learn any trade, occupation, or labor cannot be supported upon principles of common law.—*Respublica vs. Keppeler*, 2 U. S. (2 Dall.) 197, 199, bk. 1 L. ed. 347.

2. GROSS MISBEHAVIOR ON PART OF SERVANT will entitle master to discharge from contract.—*Day vs. Everett*, 7 Mass. 145, 148.

II. DISCHARGE—WHEN ORDERED.

3. WHEN DISCHARGE ORDERED—CONTRACT VOIDABLE.—Apprentice will be ordered discharged where the jurisdiction of court and of judge in making order apprenticing him have been exceeded; orders as well as contract of apprenticeship are void.—*Ex parte Emma*, 48 Fed. Rep. 211, 214.

4. Contract made by overseer of the poor on application of mother of infant binding him as apprentice, where father not dead, not executed as required by statute, entitles mother to release of infant on habeas corpus.—*People*

ex rel. Bentley vs. Hanna, 3 How. Pr. (N. Y.) 39, 43.

As to habeas corpus, see pars. 9, 10 this note.

5. Cruelty.—Ill-treatment by master will discharge minor from the contract.—*Day vs. Everett*, 7 Mass. 145, 148.

6. Court has power to order minor discharged from apprenticeship for cruelty of master.—*Cannon vs. Davis*, 1 Cr. C. C. 457, 5 Fed. Cas. 18.

7. Court may order minor rebound to another master on release for cruelty.—*Cannon vs. Davis*, 1 Cr. C. C. 457, 5 Fed. Cas. 18.

8. Cruelty or ill-usage of infant does not affect the nature of the service prior to the occurrence of the acts complained of.—*Schermerhorn vs. Hull*, 13 John. (N. Y.) 270.

III. PROCEEDINGS TO DISCHARGE.

9. PROCEEDINGS BY FATHER—HABEAS CORPUS.—Infant discharged from contract upon habeas corpus proceedings by father where contract is not carried out as required by law.—*Respublica vs. Keppeler*, 2 U. S. (2 Dall.) 197, 199, bk. 1 L. ed. 347.

See par. 4 this note.

10. Same—Not ordered delivered up to father on habeas corpus proceedings brought by father signing apprenticeship deed, in absence of evidence showing that infant was restrained against his will.—*In re McDowle*, 8 John. (N. Y.) 328, 331; *People ex rel. Barbour vs. Gates*, 43 N. Y. 40, 48.

11. Infant of sufficient age allowed to choose for himself where he is claimed by father under habeas corpus proceedings under voidable contract of apprenticeship.—*In re Goodenough*, 19 Wis. 274, 278. See *Mass. Commonwealth vs. Hamilton*, 6 Mass. 273; *Worcester vs. Marchant*, 31 Mass. (14 Pick.) 510. N. H. State vs. Scott, 10 Foster 1074.

12. Mandamus.—Right of a father to services and custody of the child as against party holding child under void contract enforceable on mandamus proceedings.—*Wis.* *In re Goodenough*, 19 Wis. 274, 276. See *N. H. State vs. Richardson*, 40 N. H. 372. *Eng.* *Queen vs. Clarke*, 7 El. & B. 186, 90 Eng. C. L. 185; *King vs. Greenhill*, 4 Ad. & El. 624, 31 Eng. C. L. 153.

IV. RECOVERY OF SERVICES.

13. RIGHT TO COMPENSATION.—Infant entitled to recover wages for personal services.

—*Moses vs. Stevens*, 19 Mass. (2 Pick.) 332, 336.

14. Infant entitled to compensation under voidable contract ratified by him by continuing work until after attaining majority according to provisions of contract.—*Baker vs. Lauterbach*, 68 Md. 64, 11 Atl. Rep. 703.

15. Infant held to terms of contract for services where same is apparently fair and reasonable under the circumstances.—*Spicer vs. Earl*, 41 Mich. 191, 32 Am. Rep. 152, 1 N. W. Rep. 923.

16. Minor may recover under special contract avoided by him by leaving before time expired or an action on a quantum meruit.—*Moses vs. Stevens*, 19 Mass. (2 Pick.) 332, 336.

17. Recovery only had upon terms of contract entered into by father along with child under which child is to receive compensation and which amounts to mere partial emancipation.—*Tennessee Manufg. Co. vs. James*, 91

Tenn. 154, 30 Am. St. Rep. 865, 13 S. W. Rep. 262, 15 L. R. A. 211.

18. Recovery on quantum meruit denied where contract entered into by father and child; child to receive the compensation for services; where it amounted to an emancipation.—*Tennessee Manufg. Co. vs. James*, 91 Tenn. 154, 30 Am. St. Rep. 865, 13 S. W. Rep. 262, 15 L. R. A. 211.

19. Same—Denied under contract entered into by himself and sanctioned by his guardian whereby he was to labor for his board, clothing, and education, where fair and reasonable and fully executed on both sides.—*Stone vs. Dennison*, 30 Mass. (13 Pick.) 1, 23 Am. Dec. 654.

20. Infant attempting to refute executed contract after attaining majority, for services and apparently fair and reasonable, cannot recover value of his services.—*Spicer vs. Earl*, 41 Mich. 191, 32 Am. Rep. 152, 1 N. W. Rep. 923. See *Squier vs. Hydliff*, 9 Mich. 274.

§ 274. **LIABILITY OF, AND PROCEEDINGS AGAINST, APPRENTICES GUILTY OF GROSS MISBEHAVIOR.** An apprentice who is guilty of [1] any gross misbehavior, or [2] refusal to do his duty, or [3] wilful neglect thereof, is liable to the complaint of his master in the superior court of the county wherein the apprentice resides. Such complaint must [4] set forth the circumstances of the case, and [5] have attached thereto a citation, signed by the clerk of the court, requiring him and all persons who have covenanted in his behalf to appear and answer the complaint within ten days after the service thereof. The complaint and citation must be served in the manner required for serving civil process. When the parties have answered, or when, though they have not answered, the time therefor allowed after the service of the complaint has expired, the court must proceed to hear and determine the cause, and, if the evidence warrants it, may render judgment that the master be discharged from the contract of apprenticeship and for costs of suit. Such costs may be recovered from the parent or guardian of the minor, if there is any who signed the indenture, and execution therefor may issue accordingly. If there is no parent or guardian liable for such cost, execution may be issued therefor against the minor, or the amount thereof may be recovered in an action against him after he arrives at full age. He is also liable to the master in an action on the indenture for the breach of any covenant on the part of the apprentice contained therein, committed before the master was discharged from the indenture.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 343, held unconstitutional; see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXVII, pp. 562-563.

1. Covenants independent.
2. Discharge of master under statute.
3. Statute subjects minor to correction.
- 4-9. What acts do or do not work a discharge.

As to acts of apprentice sufficient to cause release of master, see 3 Cyc. 563, 3 Am. & Eng. Encyc. of L. (2d ed.) 502.

1. Covenants in deed are independent so that acts of misconduct on apprentice's part no answer to action on employer's covenant to

instruct and maintain.—*Winstone vs. Linn*, 1 Barn. & C. 460, 3 Eng. C. L. 196.

2. Master may be discharged from indenture under statutory provision to that effect.—*Winstone vs. Linn*, 1 Barn. & C. 460, 3 Eng. C. L. 196; *Hawkesworth & Hillary's Case*, 1 Saund. 314, 1 Mod. 2, 2 Keb. 541, 592; *Watkins vs. Edwards*, 1 Vent. 174.

3. Statute binding servant to obedience subjects him to reasonable personal correction for his faults, and if he absconds a com-

pulsory return to his master.—*Day vs. Everett*, 7 Mass. 145, 148.

4. Gross misbehavior on part of servant will entitle master to discharge from contract.—*Day vs. Everett*, 7 Mass. 145, 148. See *Walton vs. Atchison, T. & S. F. R. Co.* (Iowa, Nov. 22, 1904), 101 N. W. Rep. 506.

5. Marriage of female infant may annul apprenticeship under statute, although it will not justify dismissal by master.—*King vs. Snedeker*, 137 Ind. 508, 27 N. E. Rep. 396.

6. Refusal to work on a Lord's day is sufficient defense to action by master to compel performance of indenture of apprenticeship.—*Warner vs. Smith*, 8 Conn. 14, 18.

7. Sickness of an incurable nature does not entitle master to rescind contract.—*Powers vs. Ware*, 19 Mass. (2 Pick.) 451.

8. Theft by apprentice does not empower master to put an end to contract without resorting to legal proceedings in court of competent jurisdiction.—*Powers vs. Ware*, 19 Mass. (2 Pick.) 451.

9. Guardian of infant cannot release master from indenture of apprenticeship on ground of deceit so as to preclude minor recovering payment of money due under deed.—*Dunten vs. Richards*, Quincy (Mass.) 67. (Guardian cannot avoid beneficial contract of infant.—*Oliver vs. Handley*, 13 Mass. 237.)

§ 275. **ENTICING AWAY APPRENTICES AND LIABILITY FOR.** It is unlawful for any person [1] to entice, counsel, or persuade to run away any apprentice, or [2] to harbor or conceal him, knowing him to be a runaway. Any party so offending is guilty of a misdemeanor, and may be fined not more than one hundred dollars, to be recovered by the master in any court having jurisdiction.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 343, held unconstitutional; see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXVII, p. 563.

1-3. When action lies by master for enticing away.

4, 5. Same—Under statute.

6. Tortious acts—When waived.

7. Injunction—When granted.

As to enticing away and harboring apprentices, see 3 Cyc. 556, 2 Am. & Eng. Encyc. of L. (2d ed.) 507.

1. Master has no right to action against party enticing away apprentice where the agreement is merely by parol.—*Peters vs. Lord*, 18 Conn. 337, 341; *Nickerson vs. Easton*, 29 Mass. (12 Pick.) 110, 112.

2. Third party liable in assumpsit even though he had no knowledge of apprenticeship till after services rendered.—*Conant vs. Raymond*, 2 Aik. (Vt.) 243.

3. For knowingly employing apprentices without consent.—*Munsey vs. Goodwin*, 3 N. H. 272, 273. See *Eades vs. Vandeput*, 5 East 39.

4. Under statute making offense to "coun-

sel who shall persuade, entice, aid, or assist" any apprentice to run away or absent himself, no matter whether the apprentice acted under such advice or not.—*Holliday vs. Gamble*, 18 Ill. 35.

5. Third party not liable for enticing away in absence of evidence showing knowledge.—*Conant vs. Raymond*, 2 Aik. (Vt.) 243.

6. Tortious act waived by master by bringing assumpsit where fact of apprenticeship was known by third party.—*Conant vs. Raymond*, 2 Aik. (Vt.) 243.

7. Master entitled to injunction against members of a labor union endeavoring to entice away apprentices.—*Flaccus vs. Smith*, 199 Pa. 128, 35 Am. St. Rep. 779, 48 Atl. Rep. 894, 54 L. R. A. 640.

As to liability of third party in damages for inducing breach of contract, see monographic note by Ernest Watts, 21 L. R. A. 232, 233, 239, and monographic note by Robert Desty, 11 L. R. A. 545-548, 549.

§ 276. **RELEASE OF MASTER MOVING OUT OF STATE OR QUITTING BUSINESS.** Whenever any master wishes [1] to remove out of the state, or [2] to quit his trade or business, he must appear with his apprentice before the superior court of the county in which the latter resides, and if the court is satisfied that the master has done justice to the apprentice for the time he has had charge of him, the court has power to discharge the master from the indenture and to again bind the apprentice, if necessary.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 344, held unconstitutional; see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXVII, p. 563.

See ante § 269 and note.

Minor ordered discharged from apprentice-

ship and rebound by court in new jurisdiction. *Gusty vs. Diggs*, 2 Cr. C. C. 210, 11 Fed. Cas. 128.

PART IV. CORPORATIONS.

- TITLE I. GENERAL PROVISIONS APPLICABLE TO ALL CORPORATIONS, §§ 283-403.**
- II. INSURANCE CORPORATIONS, §§ 414-453*p*.
 - III. RAILROAD CORPORATIONS, §§ 454-494.
 - IV. STREET RAILROAD CORPORATIONS, §§ 497-511.
 - V. WAGON ROAD CORPORATIONS, §§ 512-524.
 - VI. BRIDGE, FERRY, WHARF, CHUTE, AND PIER CORPORATIONS, §§ 528-531.
 - VII. TELEGRAPH CORPORATIONS, §§ 536-540.
 - VIII. WATER AND CANAL CORPORATIONS, §§ 548-552.
 - IX. HOMESTEAD CORPORATIONS, §§ 557-566.
 - X. SAVINGS AND LOAN CORPORATIONS, §§ 571-583*b*.
 - XI. MINING CORPORATIONS, §§ 586-590.
 - XI*a*. CORPORATIONS FOR THE FORMATION OF CHAMBERS OF COMMERCE, MECHANICS' INSTITUTES, AND KINDRED ASSOCIATIONS, §§ 591-592*e*.
 - XII. RELIGIOUS, SOCIAL, AND BENEVOLENT CORPORATIONS, §§ 593-605.
 - XII*a*. SOCIETIES FOR THE PREVENTION OF CRUELTY TO CHILDREN AND ANIMALS, §§ 607-607*g*.
 - XIII. CEMETERY CORPORATIONS, §§ 608-616.
 - XIV. AGRICULTURAL FAIR CORPORATIONS, §§ 620-622.
 - XV. GAS CORPORATIONS, §§ 629-632.
 - XVI. LAND AND BUILDING CORPORATIONS, §§ 639-648½.
 - XVII. COLLEGES AND SEMINARIES OF LEARNING, §§ 649-651.
 - XVIII. CONSOLIDATION OF COLLEGES AND INSTITUTIONS OF HIGHER EDUCATION, §§ 652-653.
 - XIX. CO-OPERATIVE BUSINESS CORPORATIONS, § 653*a*.
 - XX. CO-OPERATIVE BUSINESS ASSOCIATIONS, §§ 653*b*-653*e*.

TITLE I.

GENERAL PROVISIONS APPLICABLE TO ALL CORPORATIONS.

- CHAPTER I. FORMATION OF CORPORATIONS, §§ 283-321*b*.**
- II. CORPORATE STOCK, §§ 322-349.
 - III. CORPORATE POWERS, §§ 354-393.
 - IV. EXTENSION AND DISSOLUTION OF CORPORATIONS, §§ 399-403.
 - V. GENERAL PROVISIONS AFFECTING CORPORATIONS, §§ 403[*a*], 404.
 - VI. FOREIGN CORPORATIONS, §§ 405-410.

CHAPTER I.

FORMATION OF CORPORATIONS.

- Article I. Corporations Defined and How Organized, §§ 283-300*a*.**
- II. By-Laws, Directors, Elections, and Meetings, §§ 301-321*b*.

ARTICLE I.

CORPORATIONS DEFINED AND HOW ORGANIZED.

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| § 283. Corporation defined. | § 290. Articles of incorporation—What they must set forth—Number of directors may be increased or diminished. |
| § 284. [Kinds of]—What are public and what private corporations. | § 290½. "Trust" and "trustee," when may be part of corporate name. |
| § 285. Private, how formed. | § 291. Certain corporations to state further facts in articles. |
| § 286. [Same]—For what purpose. | § 292. How executed—[Subscription and acknowledgment]. |
| § 287. Existence, how construed [under code]. | |
| § 288. Existence of corporations not affected. | |
| § 289. Name of instrument creating corporation. | |

- § 293. Prerequisites to filing articles—Amounts to be subscribed to be affixed.
- § 294. Prerequisites to filing articles of incorporation for profit.
- § 295. Oath of officer to subscription of stock and payment of ten per cent.
- § 296. Articles of incorporation—Corporate name must not be duplicated or closely imitated.
- § 297. Copy of articles prima facie evidence.

- § 298. Who are members and who stockholders of a corporation.
- § 299. When members die successors to be elected (repealed).
- § 299[a]. Copies of articles must be filed in every county where the corporation acquires property, etc.
- § 300. Capital stock of banking corporations.
- § 300a. Copy of decree to be filed with secretary of state.

§ 283. CORPORATION DEFINED. A corporation is a creature of the law, having certain powers and duties of a natural person. Being created by the law, it may continue for any length of time which the law prescribes.

History: Enacted March 21, 1872.

- 1. Applied, cited, construed, referred to, etc.
- 2-8. General definitions.
- 9-11. Same—Aggregate corporations.
- 12. Same—Ecclesiastical corporations.
- 13. Same—Eleemosynary corporations.
- 14. Same—Lay corporations.
- 15, 16. Same—Municipal corporations.
- 17, 18. Same—Sole corporations.
- 19. Same—Same—Are of two kinds.
- 20. Same—De facto corporation.
- 21, 22. A person—Corporation is.
- 23. Assimilation to joint stock company, etc.
- 24. Banking associations as corporations.
- 25. Essence of corporation—Its capacities.
- 26. Levy districts as corporations.
- 27. Trading companies as corporations.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Dean vs. Davis*, 51 Cal. 406, 410 (applied to levy districts); *San Luis Water Co. vs. Estrada*, 117 Cal. 168, 177, 48 Pac. Rep. 1075 (quoted in opinion).

2. GENERAL DEFINITIONS.—Under our system of incorporating through general laws, corporation is an artificial body created by operation of law upon execution, filing, and certification of certain written instruments by persons desirous of incorporating, with certain public officers, in accordance with general incorporation laws.—*Martin vs. Deetz*, 102 Cal. 65, 64, 41 Am. St. Rep. 151, 36 Pac. Rep. 368.

3. "CORPORATION."—As used in section, means an artificial person created and existing under laws of this or some other state.—*Johnson vs. Goodyear Min. Co.*, 127 Cal. 4, 8, 78 Am. St. Rep. 17, 59 Pac. Rep. 304, 47 L. R. A. 338.

4. Corporation is a body consisting of one or more natural persons established by law usually for some specific purpose and continued by succession of members.—*Bouv. L. Dict. (Raw. Rev.)* 443.

5. Corporation body created by law, consisting of one or more individuals, and possessed of a franchise, by virtue of which it subsists as body politic, under special designation, with capacity of succession, either perpetual or for limited period, and which in many respects is regarded and acts as an individual.—1 Bl. Com. 123.

6. Corporation is an artificial being, invisible, intangible, and existing only in contemplation of law.—*Marshall, C. J., in Dart-*

mouth College vs. Woodward, 17 U. S. (4 Wheat.) 518, 536, 667, bk. 4 L. ed. 629.

7. Corporations are but associations of individuals united for some common purpose and permitted by law to use common name, and to change its members without dissolution of association.—*Baltimore & P. R. Co. vs. Fifth Baptist Church*, 108 U. S. 317, 322, bk. 27 L. ed. 739, 744, 2 Sup. Ct. Rep. 719.

8. Corporation a franchise, as defined by Kent, possessed by one or more individuals who subsist as body politic under special denomination, and are vested by policy of law with capacity of perpetual succession, and acting in several respects, however numerous association may be, as single individual.—2 Kent's Com. 267.

9. SAME—AGGREGATE CORPORATIONS are those which are composed of two or more members at same time.—*Bouv. L. Dict. (Raw. Rev.)* 443.

10. Aggregate corporation "is an artificial body of men composed of diverse constituent members ad instar corporis humani, the ligaments of which body politic or artificial body are the franchises and liberties thereof which bind and unite all its members together; and in which the whole frame and essence of the corporation consists."—*Wayne, J., in Louisville C. & C. R. Co. vs. Letson*, 43 U. S. (3 How.) 497, 552, bk. 11 L. ed. 353.

11. "AGGREGATE CORPORATION, AT COMMON LAW, is collection of individuals united into one collective body under special name and possessing certain immunities, privileges, and capacities in its collective character which do not belong to natural persons composing it. Among other things it possesses capacity of perpetual succession, and of acting by collective vote or will of its component members, and of suing and being sued in all things touching its corporate rights and duties. It is, in short, an artificial person, existing in contemplation of the law, and endowed with certain powers and franchises which, though they must be exercised through medium of its natural members, are yet considered as subsisting in the corporation itself, as distinctly as if it were a real personage."—*Story, J., in Dartmouth College vs. Woodward*, 17 U. S. (4 Wheat.) 518, 667, bk. 4 L. ed. 629.

May sue and be sued.—*Ibid.*

12. SAME—ECCLESIASTICAL CORPORA-

TIONS are those which are created to secure public worship of God.—*Dartmouth College vs. Woodward*, 17 U. S. (4 Wheat.) 518, 667, bk. 4 L. ed. 629.

13. SAME—ELEEMOSYNARY CORPORATIONS are such as are constituted for perpetual distribution of free alms and bounty of founder in such manner as he has directed, and in this class are ranked hospitals for relief of poor and impotent persons, and colleges for the promotion of learning and piety, and the support of persons engaged in literary pursuits.—*Story, J., in Dartmouth College vs. Woodward*, 17 U. S. (4 Wheat.) 518, 668, bk. 4 L. ed. 629.

14. SAME—LAY CORPORATIONS are those which exist for secular purposes.—*Bouv. L. Dict. (Raw. Rev.)* 443. See *Dartmouth College vs. Woodward*, 17 U. S. (4 Wheat.) 518, 668, bk. 4 L. ed. 629.

15. SAME—MUNICIPAL CORPORATIONS are those created for purpose of administering some portion of the government in a political subdivision of the state; e. g. a city, county, town, parish, etc.—*Dartmouth College vs. Woodward*, 17 U. S. (4 Wheat.) 518, 578, 668, bk. 4 L. ed. 629.

16. Municipal corporations are, from nature of ends to be obtained by their creation, compound beings, acting in different capacities. They are mere governmental instruments for purpose of internal administration. They are in fact part of the state government, exercising subordinate governmental powers over certain community within defined district. They possess capacity to receive and dispose of their property like private individuals. They are for many purposes but a department of state organized for the more convenient administration of certain powers belonging to the state. Outside of their governmental capacity they are in many respects to be regarded as private corporations.—*Touchard vs. Touchard*, 5 Cal. 306; *Holland vs. San Francisco*, 7 Cal. 361, 377; *San Francisco Gas Light Co. vs. San Francisco*, 9 Cal. 453, 466; *Payne vs. Treadwell*, 16 Cal. 221, 233; *San Francisco vs. Canavan*, 42 Cal. 541, 558; *Winbigler vs. Los Angeles*, 45 Cal. 36, 38.

17. SAME—SOLE CORPORATIONS ARE THOSE WHICH, by law, consist of one member at any one time.—*Bouv. L. Dict. (Raw. Rev.)* 443.

As to how formed in California, see post § 285 pars. 19, 20.

18. As its name implies, a sole corporation consists only of one person, to whom and his successors belongs that legal perpetuity enjoyment of which is denied to all natural persons. Applied to bank president authorized to hold property to himself and his successors.—*Thomas vs. Dakin*, 22 Wend. (N. Y.) 9, 101, 1 Bl. Com. 469.

19. Kinds of corporations sole are two: one when the person has corporate capacity

for his own benefit; the other when he acts only as trustee for benefit of others.—*Jansen vs. Ostrander*, 1 Cow. (N. Y.) 670, 685.

20. SAME—DE FACTO CORPORATION "EXISTS where a number of persons have organized and acted as a corporation; have put on habiliments of a corporation; have assumed form and features of a corporation; have conducted their affairs to some extent, at least, by methods and through officers usually employed by corporations; and have assumed appearance, at least, of counterfeit presentment of a legal corporate body."—*Martin vs. Deetz*, 102 Cal. 55, 65, 41 Am. St. Rep. 151, 36 Pac. Rep. 368.

21. A "PERSON," a corporation is, within legal signification of that word, which is a generic term, and includes artificial as well as natural persons.—*Douglass vs. Pacific Mail S. S. Co.*, 4 Cal. 304, 306; *People ex rel. Beltner vs. Riverside*, 66 Cal. 288, 5 Pac. Rep. 350; *Pasadena vs. Stimson*, 91 Cal. 238, 248, 27 Pac. Rep. 604; *Johnson vs. Goodyear Min. Co.*, 127 Cal. 4, 8, 78 Am. St. Rep. 17, 59 Pac. Rep. 304, 47 L. R. A. 338; *San Mateo County vs. Southern Pac. R. Co. (Railroad Tax Cases)*, 13 Fed. Rep. 722, 760, 8 Sawy. C. C. 285.

See ante § 14 note par. 3.

22. Person within federal constitution, amendment fourteen.—*Johnson vs. Goodyear Min. Co.*, 127 Cal. 4, 8, 78 Am. St. Rep. 17, 59 Pac. Rep. 304, 47 L. R. A. 338.

See ante § 14 note par. 34.

23. ASSIMILATION TO JOINT STOCK COMPANY AND A LIMITED PARTNERSHIP.—"Corporation is little more, under our laws, than a joint stock company under English laws; indeed, in its true nature more nearly resembling a limited partnership under special articles than a corporation at common law."—*Chater vs. San Francisco S. R. Co.*, 19 Cal. 219, 246; *Robinson vs. Bidwell*, 22 Cal. 379, 389.

24. BANKING ASSOCIATIONS—Associations formed under the general banking law are corporations.—*Thomas vs. Dakin*, 22 Wend. (N. Y.) 9; *Warner vs. Beers*, 23 Wend. (N. Y.) 103; *People vs. Assessors of Watertown*, 1 Hill (N. Y.) 616, 617.

25. ESSENCE OF CORPORATION consists in a capacity: (1) To have perpetual succession under special name and in artificial form; (2) To take and grant property, contract obligations, sue and be sued by its corporate name as an individual; and (3) To receive and enjoy in common grants of privileges and immunities.—*Thomas vs. Dakin*, 22 Wend. (N. Y.) 9, 71.

26. Levy districts—Under this definition levy district has attributes of a corporation.—*Dean vs. Davis*, 51 Cal. 406, 410.

27. Trading companies are corporations.—*Warner vs. Beers*, 23 Wend. (N. Y.) 103; *Bolander vs. Stevens*, 23 Wend. (N. Y.) 103, 124 (but not bodies politic and corporate).

§ 284. [KINDS OF]—WHAT ARE PUBLIC AND WHAT PRIVATE CORPORATIONS. Corporations are either public or private. Public corporations are

formed or organized for the government of a portion of the state; all other corporations are private.

History: Enacted March 21, 1872; amended March 30, 1874, Code *Amended*, 1873-4, p. 197.

1. Applied, cited, construed, referred to, etc.
- 2-4. Kinds of corporations.
- 5, 6. Private corporations.
7. Same—Banks.
8. Same—Bridge companies.
9. Same—Canal companies.
10. Same—Hospitals.
11. Same—Insurance companies.
12. Same—Turnpike companies.
- 13-17. Public corporations.
- 18, 19. Same—Illustrations—Banks.
20. Same—Canal companies.
21. Same—Hospitals.
22. Same—Levy districts.
- 23-26. Same—Reclamation districts.
27. Same—Swamp land district.
28. Quasi-public corporations.
29. Quasi-corporate associations.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Dean vs. Davis*, 51 Cal. 406, 409 (applied to levy districts); *People vs. Reclamation Dist.*, 117 Cal. 114, 121, 48 Pac. Rep. 1016 (applied to reclamation districts); *Reclamation Dist. vs. County of Sacramento*, 134 Cal. 477, 478, 66 Pac. Rep. 668 (applied to reclamation districts).

2. KINDS OF CORPORATIONS—Divided as to character, into (1) private, (2) public, (3) quasi-public, and (4) quasi-corporate.—See para. 5, 13, 28, 29 this note.

3. Corporations otherwise divided into (1) aggregate and sole, (2) ecclesiastical and lay, (3) civil and eleemosynary, (4) public and private.—*Dartmouth College vs. Woodward*, 17 U. S. (4 Wheat.) 518, 668-669, bk. 4 L. ed. 629. See 7 Am. & Eng. Encyc. of L. (2d ed.) 635-637.

4. Corporations are sometimes divided into (1) public municipal corporations, the leading object of which is to promote the public interests; (2) corporations technically private, but yet of a quasi-public character, having in view some great public enterprise in which public interests are directly involved to an extent to justify conferring upon them governmental powers, such as an exercise of right of eminent domain,—of this class are railroads, turnpike and canal companies; and (3) corporations strictly private, the direct object of which is to promote private interests, and in which public has no concern except indirect benefits resulting from promotion of trade, and development of general resources of the country. They derive nothing from government except right to be a corporation, and to exercise powers granted. In all other respects, to extent of their powers, they stand upon footing of natural persons, having such property as they may regularly acquire, and holding and using it ultimately for exclusive benefit of the stockholders. In this last class, stockholders and those dealing with the corporation are only parties directly and immediately interested in their acts, so long as the corpora-

tion confines itself within general scope of its powers. The rights of the corporation, the incorporators and strangers dealing with the corporation, may, in some respects, vary according to circumstances surrounding given transaction.—*Miners' Ditch Co. vs. Zellerbach*, 37 Cal. 543, 577-578, 99 Am. Dec. 300.

5. PRIVATE CORPORATIONS are those which are created wholly or in part for private emolument.—*Bouv. L. Dict. (Raw. Rev.)* 403.

6. Private corporations are those in which direct object is to promote private interests, and in which the public has no concern. They derive nothing from government except right to be a corporation and exercise powers granted to them.—*Miners' Ditch Co. vs. Zellerbach*, 37 Cal. 543, 577, 578, 99 Am. Dec. 300.

7. Bank is a private corporation, where its stock is owned by private persons.—*Dartmouth College vs. Woodward*, 17 U. S. (4 Wheat.) 518, 669, bk. 4 L. ed. 629.

8. Bridge companies are private corporations.—*Dartmouth College vs. Woodward*, supra.

9. Canal companies are private corporations.—*Ten Eyck vs. Delaware etc. Canal Co.*, 18 N. J. L. (3 Har.) 200, 37 Am. Dec. 233, 236; *Dartmouth College vs. Woodward*, 17 U. S. (4 Wheat.) 518, 669, bk. 4 L. ed. 629.

10. Hospital founded by private benefactor is private corporation, although dedicated by its charter to general charity.—*Dartmouth College vs. Woodward*, supra.

11. Insurance companies are private corporations.—*Dartmouth College vs. Woodward*, 17 U. S. (4 Wheat.) 518, 669, bk. 4 L. ed. 629.

12. Turnpike company is private corporation.—*Ten Eyck vs. Delaware etc. Canal Co.*, 18 N. J. L. (3 Har.) 200, 37 Am. Dec. 233, 236; *Dartmouth College vs. Woodward*, supra.

13. PUBLIC CORPORATIONS are those which are exclusively instruments of public interests.—*Bouv. L. Dict. (Raw. Rev.)* 403.

14. Created for political purpose with political power to be exercised for purposes with public good in administration of civil government.—*Regents of University vs. Williams*, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72.

15. Generally such as exist for public political purposes only; e. g. towns, cities, parishes, and counties, and in many respects they are so, although they involve some private interests; but strictly speaking, public corporations are such only as are founded by the government for public purposes, where the whole interests belong also to the government. If foundation be private, though under charter of government, the corporation is private, however extensive uses may be to which it is devoted, either by bounty of founder, or nature and object of the institution.—*Dartmouth College vs. Woodward*, 17 U. S. (4 Wheat.) 518, 668, 669, bk. 4 L. ed. 629.

16. Public corporations are political corporations, or such as are founded wholly for public purposes, and whole interest in which is in the public.—Ten Eyck vs. Delaware etc. Canal Co., 18 N. J. L. (3 Har.) 200, 37 Am. Dec. 233, 236.

17. PUBLIC INTEREST IN WORKS, property, or objects of corporation, does not make it a public corporation.—Ten Eyck vs. Delaware etc. Canal Co., 18 N. J. L. (3 Har.) 200, 37 Am. Dec. 233, 236.

18. Illustrations—Bank created by government for its own uses, whose stock is exclusively owned by the government, is public corporation.—Dartmouth College vs. Woodward, 17 U. S. (4 Wheat.) 518, 669, bk. 4 L. ed. 629.

19. Bank whose stock is owned by private persons is private corporation, although it is erected by government and its object and operations partake of public nature.—Dartmouth College vs. Woodward, supra.

20. Canal company organized under laws of California for purpose of diverting water from a river, and conveying it to owners of adjacent lands for irrigation, domestic uses, etc., is an agent of state in administration of public use.—Crescent Canal Co. vs. Montgomery, 143 Cal. 243, 252, 76 Pac. Rep. 1032. See Fresno St. R. Co. vs. Southern Pac. R. Co., 135 Cal. 202, 67 Pac. Rep. 773; Southern Cal. R. Co. vs. Slauson, 138 Cal. 342, 94 Am. St. Rep. 58, 71 Pac. Rep. 352.

21. Hospital created and endowed by government for public charity, is public corporation.—Dartmouth College vs. Woodward, 17 U. S. (4 Wheat.) 518, 669, bk. 4 L. ed. 629.

22. Levy districts are public corporations.—Dean vs. Davis, 51 Cal. 406, 409-410.

23. Reclamation districts are public corporations for municipal purposes.—People vs. Reclamation Dist., 53 Cal. 346, 348; People vs. Williams, 56 Cal. 647; In re Estate of Bulmer,

59 Cal. 131; People vs. La Rue, 67 Cal. 526, 523, 3 Pac. Rep. 84; Turlock Irr. Dist. vs. Williams, 76 Cal. 360, 368, 13 Pac. Rep. 379; Central Irr. Dist. vs. De Lappe, 79 Cal. 351, 353, 21 Pac. Rep. 325; People vs. Reclam. Dist., 117 Cal. 114, 119, 43 Pac. Rep. 1016 (merely quasi-public); Board Directors Alfalfa Irr. Dist. vs. Collins, 46 Neb. 411, 423, 64 N. W. Rep. 1036; Vincent vs. Lincoln Co., 30 Fed. Rep. 749, 750; Blair vs. West Point Precinct, 5 Fed. Rep. 265, 267, 3 McC. C. C. 462.

24. Not municipal corporations, nor do they belong to any class of corporations defined by this section.—People vs. Reclamation Dist., 117 Cal. 114, 131, 43 Pac. Rep. 1016.

25. Are public agencies, and no action can be entertained against them.—Hensley vs. Reclamation Dist., 121 Cal. 96, 97, 53 Pac. Rep. 401.

26. And their property is exempt from taxation.—Reclamation Dist. vs. County Sacramento, 134 Cal. 477, 479, 66 Pac. Rep. 663.

27. Swamp land district, organized on petition of land-owners by board of supervisors, under Act March 25, 1863 (Laws 1867-8, p. 316), becomes public corporation, and validity of its corporate existence cannot be attacked.—Hoke vs. Perdue, 62 Cal. 545, 546-547. See Central Irr. Dist. vs. De Lappe, 79 Cal. 351, 353, 21 Pac. Rep. 325.

28. QUASI-PUBLIC CORPORATIONS are such as have in view some great public enterprise in which public interests are directly involved to such extent as to justify conferring upon them important governmental powers, such as exercise of right of eminent domain. Of this class are railroad, turnpike, and canal companies.—Miners' Ditch Co. vs. Zellerbach, 37 Cal. 543, 577, 99 Am. Dec. 300.

29. QUASI-CORPORATE ASSOCIATIONS are associations and government institutions possessing only portion of attributes and powers of a corporation.—See 7 Am. & Eng. Encyc. of L. (2d ed.) 639.

§ 285. PRIVATE, HOW FORMED. Private corporations may be formed by the voluntary association of any three or more persons in the manner prescribed in this article. A majority of such persons must be residents of this state.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 198; March 20, 1905, Stats. and Amdts. 1905, c. CCCXCII, p. 502.

1. Applied, cited, construed, referred to, etc.
- 2, 3. Construction of constitution.
4. Mode of formation—Aggregate corporation no precise words necessary.
5. Same—Same—Bona fide claim to be a corporation.
- 6, 7. Same—Same—Compliance with statute necessary.
- 8-10. Same—Same—Mere irregularities in formation harmless.
- 11-14. Same—Same—By prescription.
15. Same—Same—Strict compliance with statute not necessary.
- 16-17. Same—Same—Substantial compliance with statute sufficient.
- 18, 19. Same—Same—Under general law.
- 20, 21. Same—Sole corporations.

- 22, 23. Promoters—Defined.
24. Same—As agent.
25. Same—Fiduciary nature of relation.
- 26, 27. Same—Liability for fraud or suppression.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: People ex rel. Weatherly vs. Golden Gate Lodge of Elks, 128 Cal. 257, 260, 60 Pac. Rep. 365 (referred to in construing other sections).

2. CONSTRUCTION—Constitution 1849, Art. IV, § 31, providing that "corporation may be formed under general laws, but shall not be created by special act," "applies to formation or creation of corporations, and to powers directly conferred upon them by legislative enactment, and cannot be construed as pro-

hibiting assignment of franchise to legally organized corporation by persons having lawful right to exercise and transfer same."—*People vs. Stanford*, 77 Cal. 360, 371, 18 Pac. Rep. 85, 19 Id. 693, 3 L. R. A. 92 (followed in *Santa Ana Water Co. vs. San Buenaventura*, 56 Fed. Rep. 329, 351); *San Luis Water Co. vs. Estrada*, 117 Cal. 168, 48 Pac. Rep. 1075; *Los Angeles vs. Los Angeles City Water Co.*, 177 U. S. 558, 575, bk. 44 L. ed. 886, 20 Sup. Ct. Rep. 736.

2. **CONSTITUTIONAL PROHIBITION** against creating corporations by special law, except for municipal purposes, does not prevent grant of privileges by special law to corporations created under general law.—*Los Angeles vs. Los Angeles City Water Co.*, 177 U. S. 558, 575, bk. 44 L. ed. 886, 20 Sup. Ct. Rep. 736.

4. **MODE OF FORMATION—AGGREGATE CORPORATIONS**—No precise form of words is necessary to the creation of corporations.—*People vs. Kelly*, 76 N. Y. 475; *Proprietors of Enfield vs. Permit*, 5 N. H. 280, 20 Am. Dec. 580, 582; *Bow vs. Allentown*, 34 N. H. 351, 69 Am. Dec. 489. See *Sutton's Hospital*, 10 C. Rep. 30; 2 Kent's Com. 27.

5. **Bona fide claim to be corporation, and doing business as such, are necessary.**—*Oroville & V. R. Co. vs. Plumas County*, 37 Cal. 354, 361.

6. **Compliance with prescribed statutory conditions is necessary, otherwise incorporation is defective.**—*People vs. Selfridge*, 52 Cal. 331, 333; *McCallion vs. Hibernia Sav. & L. Soc.*, 70 Cal. 163, 168, 12 Pac. Rep. 114. See *Mokelumne Hill C. & Min. Co. vs. Woodbury*, 14 Cal. 425, 73 Am. Dec. 658; *Harris vs. McGregor*, 29 Cal. 124, 127; *Bates vs. Wilson*, 14 Colo. 140, 157, 24 Pac. Rep. 99.

See post § 290 and note para. 3-5.

7. **As to defective formation of corporation by reason of failure to comply with statute, see post § 290 note par. 33 et seq.**

See monographic note, 33 Am. St. Rep. 176-186.

8. **SAME—MERE IRREGULARITIES OR DEFECTS IN FORMATION** cannot defeat the incorporation on collateral attack.—*Rondell vs. Fay*, 32 Cal. 354; *Oroville & V. R. Co. vs. Plumas County*, 37 Cal. 354, 361; *Bakersfield Town Hall Assoc. vs. Chester*, 55 Cal. 98, 101; *Lakeside Ditch Co. vs. Crane*, 80 Cal. 181, 186, 22 Pac. Rep. 16. See *McLennan vs. Hopkins*, 3 Kan. App. 260, 268, 41 Pac. Rep. 1061; *Miller vs. Ferris Irr. Dist.*, 35 Fed. Rep. 693, 698.

See post § 290 note para. 33-38.

As to corporations de facto, see note 19 Am. Dec. 67; 33 Am. St. Rep. 181.

9. **Failure to describe place of business of corporation as "principal place of business" is mere technical error not affecting the validity of corporation.**—*Ex parte Spring Valley Water Works*, 17 Cal. 132, 136; *Spring Valley Water Works vs. San Francisco*, 22 Cal. 434, 440; *People vs. Stockton & V. R. Co.*, 45 Cal. 306, 313, 13 Am. Rep. 178; *People vs. Montecito Water Co.*, 97 Cal. 276, 278, 33 Am. St. Rep. 172, 32 Pac. Rep. 236. See *State vs. Inhab. of Pocatello*, 2 Idaho 908, 913, 28 Pac. Rep. 411.

See post § 290 note para. 16-20.

10. **There is broad distinction between such acts as are declared to be necessary steps in the process of incorporation and such as are required of individual seeking to become incorporated but which are not prerequisite to assumption of corporate powers.** Respecting former any material omission is fatal to existence of corporation and may be taken advantage of collaterally. In respect to latter corporation is only subject to attack in direct proceeding by government to forfeit charter.—*Mokelumne Hill C. & Min. Co. vs. Woodbury*, 14 Cal. 425, 427, 73 Am. Dec. 658.

As to requisites for valid incorporation de jure, see post § 290 note para. 6-32.

11. **BY PRESCRIPTION—CORPORATION DE FACTO CANNOT BE CREATED.**—The continued exercise of franchise without right is continuously renewed usurpation on which new cause of action arises each day.—*People ex rel. Attorney General vs. Stanford*, 77 Cal. 360, 372, 18 Pac. Rep. 85, 19 Id. 693, 2 L. R. A. 92; *People vs. Reclamation Dist. No. 136*, 121 Cal. 522, 529, 50 Pac. Rep. 1068, 53 Id. 1085.

12. **But grant of corporate charter may be presumed from long exercise of corporate powers.**—*Greene vs. Dennis*, 6 Conn. 293, 16 Am. Dec. 58.

13. **Charter presumed to exist from long exercise of corporate powers and from other circumstances.**—*Selma & T. R. Co. vs. Tipton*, 5 Ala. 787, 39 Am. Dec. 344; *Bow vs. Allentown*, 34 N. H. 351, 69 Am. Dec. 489.

14. **Where corporation has gone into operation and rights have been acquired under it every presumption should be made in favor of legality of its existence.**—*Hagerstown Tr. Co. vs. Creeger*, 5 Har. & J. (Md.) 122, 9 Am. Dec. 495.

15. **SAME—STRICT LITERAL COMPLIANCE WITH STATUTE IS NOT ESSENTIAL** to formation of corporation, and proceedings will not be invalidated for slight defects or omissions.—*Mokelumne Hill C. & Min. Co. vs. Woodbury*, 14 Cal. 425, 427, 73 Am. Dec. 658; *Spring Valley Water Works vs. San Francisco*, 22 Cal. 434, 440; *People vs. Frank*, 28 Cal. 507, 519; *Oroville & V. R. Co. vs. Plumas County*, 37 Cal. 354, 361; *People vs. Stockton & V. R. Co.*, 45 Cal. 306, 313, 13 Am. Rep. 178.

16. **SAME—SUBSTANTIAL COMPLIANCE**, at least, with requirements of statute must be shown to prove existence of corporation under general law.—*Mokelumne Hill C. & Min. Co. vs. Woodbury*, 14 Cal. 425, 427, 73 Am. Dec. 658; *Oroville & V. R. Co. vs. Plumas County*, 37 Cal. 354, 361; *Harris vs. McGregor*, 29 Cal. 124, 127; *People vs. Stockton & V. R. Co.*, 45 Cal. 306, 313, 13 Am. Rep. 178; *People vs. Montecito Water Co.*, 97 Cal. 276, 278, 33 Am. St. Rep. 172, 32 Pac. Rep. 236; *People ex rel. Weatherly vs. Golden Gate Lodge of Elks*, 128 Cal. 257, 263, 60 Pac. Rep. 865.

17. **As to substantial compliance being sufficient to form de facto corporation, see post § 290 note para. 4, 5.**

18. **SAME—UNDER GENERAL LAW**—Private corporations, except for municipal purposes, must be formed under the general law; they cannot be created by special act.—*Low*

vs. City of Marysville, 5 Cal. 214, 216; San Francisco vs. Spring Valley Water Works, 48 Cal. 493, 510 (overruling California St. Telegraph Co. vs. Alta Telegraph Co., 22 Cal. 395); Oroville & V. R. Co. vs. Plumas County, 37 Cal. 354, 362; Omnibus R. Co. vs. Baldwin, 57 Cal. 160, 166; Spring Valley Water Works vs. San Francisco, 61 Cal. 18, 30; People vs. Central Pac. R. Co., 83 Cal. 393, 412, 23 Pac. Rep. 303; Home for Inebriates vs. Reis, 95 Cal. 142, 150, 30 Pac. Rep. 205; San Luis Co. vs. Estrada, 117 Cal. 168, 175, 43 Pac. Rep. 1075. See Ames vs. Lake Superior & M. R. Co., 21 Minn. 241, 259; Cook vs. Port of Portland, 20 Oreg. 580, 587, 27 Pac. Rep. 263, 13 L. R. A. 533.

19. Corporation cannot be created by special act except for municipal purposes.—Spring Valley Water Works vs. Bryant, 52 Cal. 132, 141, 142.

20. SAME—SOLE CORPORATION HAS NO NEED OF CORPORATE NAME and requires no particular seal, secretary, or treasurer, and by-laws are unnecessary.—Archbishop vs. Shipman, 79 Cal. 288, 296, 21 Pac. Rep. 830.

21. Corporation sole can be created in this state only by compliance with provisions of § 602 post.—Blakeslee vs. Hall, 94 Cal. 159, 29 Pac. Rep. 623.

22. PROMOTERS are persons who by their active endeavors assist in organizing corporations.—Bouv. L. Dict. (Raw. Rev.) 778. Ex-Mission L. & W. Co. vs. Flash, 97 Cal. 610, 626, 32 Pac. Rep. 600.

23. Cook's definition of a promoter is "one who brings about the incorporation and organization of a corporation. He brings together persons who become interested in the enterprise, aids in procuring subscriptions and sets in motion machinery which looks to formation of a corporation."—Cook on Stock & Stockh. § 651, quoted with approval in Ex-Mission L. & W. Co. vs. Flash, 97 Cal. 610, 626, 32 Pac. Rep. 600, and Burbank vs. Dennis, 101 Cal. 90, 97, 35 Pac. Rep. 444.

24. Morawetz's definition of a promoter is "a person who, by his active endeavors, assists

in procuring formation of a company, and the subscription of its shares. . . . The word 'promoter' has no technical legal meaning, and applies to any person who takes an active part in inducing the formation of a company, whether he afterwards becomes connected with the company or not."—Morawetz on Corp. § 545, quoted with approval in Ex-Mission L. & W. Co. vs. Flash, 97 Cal. 610, 625-626, 32 Pac. Rep. 600.

25. Promoter is agent of subscribers until formation of corporation, when he becomes agent of corporation.—San Joaquin L. & W. Co. vs. West, 94 Cal. 399, 403, sub nom. San Joaquin L. & W. Co. vs. Beecher, 29 Pac. Rep. 785.

26. Promoters are considered in law as occupying fiduciary relation toward corporation.—Ex-Mission L. & W. Co. vs. Flash, 97 Cal. 610, 625, 626, 32 Pac. Rep. 600, quoting from Cook on Stock & Stockh. § 650; Burbank vs. Dennis, 101 Cal. 90, 97, 35 Pac. Rep. 444.

27. Liability for fraud or suppression.—Persons starting company, and inducing others to subscribe for shares for purpose of selling property to company when organized, they must faithfully disclose all facts relating to the property which would influence those who form company in deciding upon judiciousness of purchase."—Morawetz on Corp. § 546, quoted and approved in Ex-Mission L. & W. Co. vs. Flash, 97 Cal. 610, 626, 32 Pac. Rep. 600.

28. Promoters "guilty of any misrepresentation of facts or suppression of truth in relation to character and value of property, or their personal interest in the proposed sale, company will be entitled to set aside transaction, or recover compensation for any loss which it has suffered."—Morawetz on Corp. § 546, quoted and approved in Ex-Mission L. & W. Co. vs. Flash, supra. See Burbank vs. Dennis, 101 Cal. 90, 102, 35 Pac. Rep. 444; Buena Vista F. & V. Co. vs. Tuohy, 107 Cal. 243, 254-255, 40 Pac. Rep. 336; Blood vs. La Serena L. & Water Co., 113 Cal. 221, 236, 41 Pac. Rep. 1017, 45 Id. 252.

§ 286. [SAME]—FOR WHAT PURPOSE. Private corporations may be formed for any purpose for which individuals may lawfully associate themselves.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 198.

The original section enumerated seventeen purposes for which corporations might be formed, and prohibited all other purposes.

Bonds may be given by private corporations, where required by law (Stats. 1885, p. 114; 1893, p. 476), see HENNING'S GENERAL LAWS, tit. Bonds Required by Law, and note; also tit. Libel and Slander.

See also Pol. Code § 955 subd. 6; and Code Civ. Proc. §§ 1056, 1057.

Boards of trade, chambers of commerce, mechanics' institutes, and other kindred protective associations, act providing for formation of, former statutes governing have been codified under tit. XIa post, being §§ 591-592e, including all acts governed by Murphy vs. Pacific Bank, 119 Cal. 334, 51 Pac. Rep. 317.

Building and loan associations, act creating board of commissioners of, see HEN-

NING'S GENERAL LAWS, tit. Building and Loan Associations.

Cemetery associations, act authorizing incorporation of rural, see HENNING'S GENERAL LAWS, tit. Cemeteries.

Chambers of commerce (see Boards of Trade, supra).

Co-operative associations, act providing for incorporation and management of (Stats. 1895), see HENNING'S GENERAL LAWS, tit. Corporations.

Corporations, acts protecting stockholders and persons dealing with company, see HENNING'S GENERAL LAWS, tit. Corporations.

Deed by corporation, manner of executing,

see HENNING'S GENERAL LAWS (Stats. 1895, p. 75), tit. Cemeteries.

Fire insurance companies, organization and management, see HENNING'S GENERAL LAWS (Stats. 1865-6, p. 743), tit. Corporations; for county fire insurance companies (Stats. 1897, p. 439), see tit. Corporations.

Foreign corporations, acts relating to, see HENNING'S GENERAL LAWS, tit. Corporations.

Same—Certified copy of certificate to be filed with secretary of state (Stats. 1901, p. 108), see HENNING'S GENERAL LAWS, tit. Corporations.

Surety corporations, for statutes providing that corporations may act as surety where bond is required by law, see HENNING'S GENERAL LAWS, tit. Corporations.

Homestead corporations, act authorizing formation of, see HENNING'S GENERAL LAWS, note to tit. Corporations.

Insurance in assessment plan, act relating

to, and regulating conduct of business (Stats. 1873-4, p. 745; Stats. 1891, p. 126), see HENNING'S GENERAL LAWS, tit. Corporations.

Irrigation, as to act relating, see HENNING'S GENERAL LAWS, tit. Irrigation.

Mutual insurance companies, as to (Stats. 1873-4, p. 745), see HENNING'S GENERAL LAWS, tit. Corporations.

Acts April 2, 1866, p. 752; 1868, p. 330, 661; 1280, p. 239, incorporated in Civil Code.

Railroads, for acts requiring safeguarding, sale of franchise, management and operation (other than "special" acts), see HENNING'S GENERAL LAWS, tits. Commissioner of Transportation; Railroads.

Telegraph Companies, as to granting franchise, etc. (Stats. 1862, p. 288), see HENNING'S GENERAL LAWS, tit. Telegraph.

This statute was thoroughly codified except as to §§ 11, 14, 15, which may possibly have some vitality; but see HENNING'S GENERAL LAWS, note.

§ 287. **EXISTENCE, HOW CONTINUED [UNDER CODE].** Any corporation existing on the first day of January, one thousand eight hundred and seventy-three, formed under the laws of this state, and still existing, which has not already elected to continue its existence, under the provisions of this code applicable thereto, may, at any time hereafter, make such election [1] by the unanimous vote of all its directors, or such election may be made [2] at any annual meeting of the stockholders, or members, or [3] at any meeting called by the directors expressly for considering the subject, if voted by stockholders representing a majority of the capital stock, or by a majority of the members, or [4] may be made by the directors upon the written consent of that number of such stockholders or members.

[Certificate to be filed.] A certificate of the action of the directors, signed by them and their secretary, when the election is made by their unanimous vote, or upon the written consent of the stockholders or members, or a certificate of the proceedings of the meeting of the stockholders or members, when such election is made at any such meeting, signed by the chairman and secretary of the meeting and a majority of the directors, must be filed in the office of the clerk of the county where the original articles of corporation are filed, and a certified copy thereof must be filed in the office of the secretary of state; and thereafter the corporation shall continue its existence under the provisions of this code which are applicable thereto, and shall possess all the rights and powers, and be subject to all the obligations, restrictions, and limitations prescribed thereby.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, pp. 198-199.

1. Applied, cited, construed, referred to, etc.
2. Building and loan associations—Election to continue in business.
3. Effect of compliance with statute.
4. Turnpike company is within statute.
5. Ultra vires previously committed immaterial.

1. Applied, cited, construed, referred to, etc., in: *People vs. Pfister*, 57 Cal. 532, 533 (construed and applied); *Robinson vs. Southern Pac. R. Co.*, 105 Cal. 526, 552, 33 Pac. Rep. 94, 109, 722, 28 L. R. A. 773 (referred to); *Market St. R. Co. vs. Hellman*, 109 Cal. 571, 579, 42

Pac. Rep. 225 (referred to); *McGowan vs. McDonald*, 111 Cal. 57, 65, 52 Am. St. Rep. 149, 43 Pac. Rep. 418 (referred to); *Murphy vs. Pacific Bank*, 119 Cal. 334, 342, 51 Pac. Rep. 317 (referred to); *People ex rel. Waugh vs. Auburn & Y. J. T. Co.*, 122 Cal. 335, 336, 337, 55 Pac. Rep. 10 (cited).

As to validating act, passed before Code (April 1, 1864, Stats. 1863-4, p. 303), as to corporations theretofore deficiently incorporated, see *People vs. Perrin*, 56 Cal. 345, 348.

2. Building and loan associations—Election

Amendment of 1874 did not require statement in articles of number of shares subscribed, or by whom; but amendment of 1876 did (see *People vs. Leonard*, 106 Cal. 302, 309, 39 Pac. Rep. 617); so did amendments of 1880 and 1891.

Code Commissioner has needlessly bungled and confused by incorporating in paragraph 5 what is provided in better shape in § 305 post.

1. Applied, cited, construed, referred to, etc.
2. Construction—As to application.
- 3-5. Compliance with statute—Substantial—Technical error.
- 6-9. Contents of articles of incorporation—
 1. Name.
10. Same—Same—Appropriate name in heading.
- 11, 12. Same—Same—Change of name.
13. Same—2. Purpose for which formed.
14. Same—Same—Business must be lawful.
15. Same—Same—Methods of carrying on.
- 16-20. Same—3. Place of principal business.
21. Same—4. Term for which to exist.
- 22-24. Same—5. Number of directors.
25. Same—6. Amount of capital stock.
- 26, 27. Same—7. Same—By whom subscribed.
28. Same—Articles of insurance company.
29. Same—Articles of lumber and sawmill company.
30. Same—Articles of social corporation.
31. Same—Subscription requisite.
32. Same—Surplusage—Disregarded.
- 33, 34. Defective incorporation—Collateral attack.
- 35, 36. Same—Curative acts—Effect.
37. Same—Omissions from articles.
38. Signing articles—Stockholder bound without.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Monterey & S. V. R. Co. vs. Hildreth*, 53 Cal. 123, 128 (applied to railroads); *People ex rel. Schindler vs. Flint*, 64 Cal. 49, 52, 28 Pac. Rep. 495 (construed with § 419 and applied to insurance companies); *Thomas vs. Placerville G. Q. Min. Co.*, 65 Cal. 600, 601, 4 Pac. Rep. 641 (construed and applied); *Chapman vs. Doray*, 89 Cal. 52, 54, 26 Pac. Rep. 605 (construed with other sections); *Martin vs. Deetz*, 102 Cal. 55, 64, 41 Am. St. Rep. 151, 36 Pac. Rep. 368 (construed and applied); *People vs. Leonard*, 106 Cal. 302, 309, 39 Pac. Rep. 617 (giving history of section); *Porter vs. Lassen County*, 127 Cal. 261, 267, 268 (construed and applied), 269 (construed with § 305), 59 Pac. Rep. 563; *People ex rel. Weatherly vs. Golden Gate Lodge of Elks*, 128 Cal. 257, 260 (construed), 261, 262 (applied to social corporations), 60 Pac. Rep. 865; *Wall vs. Mines*, 130 Cal. 27, 39, 62 Pac. Rep. 386 (referred to with other sections).

2. **CONSTRUCTION**.—This provision applies to all corporations incorporated in this state, unless otherwise provided for by special act.—*People ex rel. Weatherly vs. Golden Gate Lodge of Elks*, 128 Cal. 257, 260, 60 Pac. Rep. 865.

3. **COMPLIANCE WITH STATUTE**.—Articles of incorporation failing to comply with the statute are insufficient to constitute a corporation.—*People ex rel. Fraser vs. Selfridge*, 52 Cal. 331, 333; *McCallion vs. Hibernia Sav. & L. Soc.*, 70 Cal. 163, 167, 168, 12 Pac. Rep. 114 (benevolent association); *People vs. Montecito Water Co.*, 97 Cal. 276, 278, 33 Am.

St. Rep. 172, 32 Pac. Rep. 236 (insufficient acknowledgment); *Bates vs. Wilson*, 14 Colo. 140, 157, 24 Pac. Rep. 99 (failure to provide for board of directors or trustees).

As to defective formation of corporations, see monographic note, 33 Am. St. Rep. 176-186.

As to acknowledgment prerequisite to valid incorporation, see post § 292 and note.

4. **Substantial compliance with statute all that is required**.—*People vs. Stockton & V. R. Co.*, 45 Cal. 306, 313, 13 Am. Rep. 178; *People vs. Montecito Water Co.*, 97 Cal. 276, 278, 33 Am. St. Rep. 172, 32 Pac. Rep. 236; *People ex rel. Weatherly vs. Golden Gate Lodge of Elks*, 128 Cal. 257, 263, 60 Pac. Rep. 865. See *Mokelumne Hill Gold Min. Co. vs. Woodbury*, 14 Cal. 424, 425, 73 Am. Dec. 653; *Ex parte Spring Valley Water Works*, 17 Cal. 132, 136; *Spring Valley Water Works vs. San Francisco*, 22 Cal. 434, 440, 441; *Harris vs. McGregor*, 29 Cal. 124, 125; *McCallion vs. Hibernia Sav. & L. Soc.*, 70 Cal. 163, 12 Pac. Rep. 114. *Cole. People ex rel. Bernard vs. Cheeseman*, 7 Colo. 376, 3 Pac. Rep. 716; *Bates vs. Wilson*, 14 Colo. 140, 24 Pac. Rep. 99. *D. C. Baptist Church vs. Baltimore etc. R. Co.*, 4 Mack. (D. C.) 45. *Ind. Eakright vs. Logansport & N. I. R. Co.*, 13 Ind. 404. *Iowa. Clegg vs. Hamilton & W. Co. Gr. Co.*, 61 Iowa 121, 15 N. W. Rep. 865. *La. Fields vs. Cooks*, 16 La. Ann. 153. *Mich. Attorney-General vs. Hanchett*, 42 Mich. 436, 4 N. W. Rep. 182. *N. Y. Thompson vs. People*, 23 Wend. (N. Y.) 537.

5. **Mere technical error will not invalidate incorporation**.—*Ex parte Spring Valley Water Works*, 17 Cal. 132, 136; *Spring Valley Water Works vs. San Francisco*, 22 Cal. 434, 440, 441; *State vs. Inhabitants Pocatello*, 3 Idaho 908, 913, 28 Pac. Rep. 411.

6. **CONTENTS OF ARTICLES OF INCORPORATION** are prescribed, and these requirements must be complied with. Thus, the articles of incorporation must contain:

7. **SAME—1. Name of corporation**; its omission is fatal to act of incorporation.—*Ind. Piper vs. Rhodes*, 30 Ind. 309; *Rhodes vs. Piper*, 40 Ind. 369. See *Mo. State vs. McGrath*, 92 Mo. 355, 357, 5 S. W. Rep. 29. *Fed. Investor Pub. Co. vs. Dobinson*, 72 Fed. Rep. 603, 606.

8. **Name an essential part of its being, and courts, independent of statutory provisions, will protect corporation in use of its name, upon same principle that persons are protected in use of trade-marks**.—*Investor Pub. Co. vs. Dobinson*, 72 Fed. Rep. 603, 606. *Conn. Holmes, Booth & Haydens vs. Holmes, Booth & Atwood*, 37 Conn. 273, 291. *Mass. American Order Scottish Clans vs. Merrill*, 151 Mass. 558, 562, 24 N. E. Rep. 918, 3 L. R. A. 320. *Mo. State vs. McGrath*, 92 Mo. 355, 357, 5 S. W. Rep. 29. *N. Y. Farmers' L. & T. Co. vs. Farmers' L. & T. Co. of Kansas*, 1 N. Y. Supp. 44. *Pa. Ft. Building & L. Assoc. vs. Model Plan Bldg. & L. Assoc.*, 159 Pa. St. 308, 311, 28 Atl. Rep. 215. *Tenn. Ex parte Walker*, 1 Tenn. Ch. 97.

Fed. Newly vs. Oregon Cent. R. Co., Deady D. C. 609, 18 Fed. Cas. 38; William Rogers Mfg. Co. vs. Rogers & Spurr Mfg. Co., 11 Fed. Rep. 496; Celluloid Mfg. Co. vs. Cellonite Mfg. Co., 32 Fed. Rep. 94.

See post § 298.

9. "The name of our society is 'The Roman Catholic Orphan Asylum'" is sufficient compliance with clause of section.—Roman Catholic Orphan Asy. vs. Abrams, 49 Cal. 455, 462.

10. Appropriate name in heading preceding articles of incorporation will not cure defect.—Piper vs. Rhodes, 30 Ind. 309; Rhodes vs. Piper, 40 Ind. 369.

11. Change of name.—Corporators who have selected name of corporation may be authorized by general law to have such name changed by application to superior court.—Matter of Application of La Société Française, etc., 123 Cal. 525, 535, 56 Pac. Rep. 458.

12. Or by special act.—Pacific Bank vs. De Ro, 37 Cal. 538, 540, 541.

As to duty of corporation after changing name, see post § 300a and note.

13. SAME—2. PURPOSE FOR WHICH FORMED must be distinctly set out in articles of incorporation; it will not be sufficient that name selected indicates nature of business to be transacted.—Ind. State ex rel. Collings vs. Beck, 81 Ind. 500. Ohio. State ex rel. Attorney-General vs. Central O. M. R. Assoc., 29 Ohio St. 399. Eng. In re Crown Bank, L. R. 44 Ch. Div. 634.

14. Business must be lawful and not against public policy.—See ante § 286 note par. 7; also ante § 286 note par. 11.

15. Methods of carrying out.—Articles of corporation organized to manufacture ice need not state means or method of manufacture.—Attorney-General vs. Lorman, 59 Mich. 157, 66 Am. Rep. 287, 26 N. W. Rep. 311.

16. SAME—3. PLACE WHERE PRINCIPAL BUSINESS IS TO BE TRANSACTED must be given in articles of incorporation.—Clegg vs. Hamilton & W. Co. Gr. Co., 61 Iowa 121, 15 N. W. Rep. 865. See Busenback vs. Attica & B. G. Road Co., 43 Ind. 265; Heinig vs. Adams etc. Mfg. Co., 81 Ky. 300.

17. Articles of incorporation failing to state place of business of company, not admissible to establish existence of corporation.—Harris vs. McGregor, 29 Cal. 124, 128.

18. Failure to describe place of business as "principal place of business" will not invalidate act of incorporation.—Ex parte Spring Valley Water Works, 17 Cal. 132, 136; Spring Valley Water Works vs. San Francisco, 22 Cal. 444, 440, 441; People vs. Montecito Water Co., 37 Cal. 276, 278, 33 Am. St. Rep. 172, 32 Pac. Rep. 236. See Clegg vs. Hamilton & Wright Co. Gr. Co., 61 Iowa 121, 15 N. W. Rep. 865.

19. Principal place of business is principal office of the corporation at which the books of corporation are kept and its officers usually and ordinarily meet for the purpose of managing affairs and transacting business of the corporation. The city or town at which such office is located must be stated in certificate.—Harris vs. McGregor, 29 Cal. 124, 128.

20. Statement that certain place is place of business implies that it is not only principal but the only place of business.—Ex parte Spring Valley Water Works, 17 Cal. 132, 136.

21. SAME—4. TERM FOR WHICH TO EXIST being in excess of number of years allowed by statute, is compliance with requirement of the statute that term shall be designated, and it may exercise its rights and franchises for period allowed by statute.—People ex rel. Bernard vs. Cheeseman, 7 Colo. 376, 3 Pac. Rep. 716.

22. SAME—5. NUMBER OF DIRECTORS OR TRUSTEES, and (1) names and (2) residence of those who will control corporate affairs first year, must be stated in articles of incorporation.—Busenback vs. Attica & B. G. Road Co., 43 Ind. 265 (residence); Reed vs. Richmond St. R. Co., 50 Ind. 342 (names); Heinig vs. Adams etc. Mfg. Co., 81 Ky. 300.

23. Provision of § 305, in declaring that corporate powers must be exercised by board of not less than five nor more than eleven directors, adds nothing to effect of that clause of this section requiring articles to state number of directors.—Porter vs. Lassen County L. & C. Co., 127 Cal. 261, 269, 59 Pac. Rep. 563.

24. No board of directors being provided for, as required by statute, but articles providing that corporate affairs shall be managed by its president, vice-president, and attorney, articles or certificate of incorporation is insufficient to create corporation de jure.—Bates vs. Wilson, 14 Colo. 140, 157, 24 Pac. Rep. 99.

25. SAME—6. AMOUNT OF CAPITAL STOCK must be stated in articles of incorporation.—State ex rel. Howe vs. Shelbyville & C. Turnp. Co., 41 Ind. 151; Heinig vs. Adams etc. Mfg. Co., 81 Ky. 300.

26. SAME—7. SAME—AMOUNT ACTUALLY SUBSCRIBED AND BY WHOM must be fully set forth in articles of incorporation of railroad.—Monterey & S. V. R. Co. vs. Hildreth, 53 Cal. 123, 129.

27. Statute in force in 1875 did not require statement of number of shares subscribed or by whom in articles of incorporation.—People vs. Leonard, 106 Cal. 302, 309, 39 Pac. Rep. 617.

28. Articles of insurance companies.—This section, construed with § 419, requires that articles of incorporation filed by insurance companies state amount of stock actually subscribed, and that it equals \$100,000. Where articles omit statement, no corporation is formed.—People ex rel. Schindler vs. Flint, 64 Cal. 49, 52, 28 Pac. Rep. 495.

29. Articles of lumber and sawmill company.—Articles of incorporation of company formed for purpose of running sawmill may include power of construction and operating railroads, etc., as necessarily incident to its business.—People ex rel. Loy vs. Mount Shasta Mfg. Co., 107 Cal. 256, 258, 40 Pac. Rep. 391.

30. Articles of social corporations.—Requirements of this section, so far as applied to social corporations, are by § 594 expressly required to be set forth in articles of such association.—People ex rel. Weatherly vs. Golden Gate Lodge of Elks, 128 Cal. 257, 261, 60 Pac. Rep. 865.

Acknowledgment and verification are essential.—*Wall vs. Mines*, 130 Cal. 27, 40, 62 Pac. Rep. 386.

As to articles of railroads, wagon-road, and telegraph companies, see post § 291 and note.

31. Same—Subscription, proper, requisite to a valid incorporation.—See post § 292 and note.

32. Same—Surplusage.—A mention of unnecessary facts in articles cannot vitiate incorporation.—*People ex rel. Loy vs. Mount Shasta Mfg. Co.*, 107 Cal. 256, 258, 40 Pac. Rep. 391.

See ante § 286 note para. 9, 10.

33. DEFECTIVE INCORPORATION—Collateral attack for upon corporation claiming in good faith to be a corporation, and doing business as such, is prohibited by code.—See post § 358 and note.

34. Statutizing well-established rule of law, is the only force or effect of that section of the code; it adds nothing to pre-existing law. Proceeding in nature of quo warranto has ever been only method by which right of de facto corporation to do business could be challenged.—See *Spring Valley Water Works vs. San Francisco*, 22 Cal. 434, 440. Ill. *Goodrich vs. Reynolds*, 31 Ill. 490, 83 Am. Dec. 240. Mass. *Chester Glass Co. vs. Dewey*, 16 Mass. 94, 8 Am. Dec. 128; *Worcester Med. Inst. vs. Harding*, 65 Mass. (11 Cush.) 285. Mich. *Merchants & Mfrs.' Bank vs. Stone*, 33 Mich. 779, 782. Mo. *Finch vs. Ullman*, 105 Mo. 255, 24 Am. St. Rep. 383, 16 S. W. Rep. 863. N. J. *Stout vs. Zulick*, 48 N. J. L. (19 Vr.) 602. N. Y. *Union Turnp. Co. vs. Jenkins*, 1 Cal. 381; *McFarlan vs. Triton Ins. Co.*, 4 Den. 392, 397 (holding upon plea of nul tiel corporation defendant could not show irregularity in incorporation); *Dutchess Cotton Mfry. vs. Davis*, 14 John. 238, 245, 7 Am. Dec. 459 (cannot deny due incorporation); *Eaton vs. Aspinwall*, 19 N. Y. 119, 121 (defendant cannot set up failure of organizers to perform duty initiatory to its legal existence). *Eaton vs.*

Aspinwall, B. & A. R. Co., 26 N. Y. 78; *Whitford vs. Laidler*, 94 N. Y. 145, 46 Am. Rep. 131 (defendant cannot raise any question as to corporate character of company). Pa. *Cochran vs. Arnold*, 58 Pa. St. 399. Vt. *Searsburgh Turnp. Co. vs. Cutler*, 6 Vt. 315. Fed. *Chubb vs. Upton*, 95 U. S. 665, bk. 24 L. ed. 523 (defendant cannot set up as defense irregularity in organization).

As to collateral attack, see note 19 Am. Dec. 67.

35. SAME—CURATIVE ACTS passed after unwarranted assumption of corporate rights and powers is an express ratification by sovereign state, and is equivalent to express grant of authority. See *Larrabee vs. Baldwin*, 35 Cal. 155, 169 (Crockett, J., dissenting on another point). Ala. *Central Agric. & M. Assoc. vs. Alabama Gold L. Ins. Co.*, 70 Ala. 120. Ill. *Grand Trunk R. Co. vs. Cook*, 29 Ill. 237; *Goodrich vs. Reynolds*, 31 Ill. 490, 83 Am. Dec. 240; *Mitchell vs. Deeds*, 49 Ill. 416, 95 Am. Dec. 621. Md. *Basshor vs. Dressel*, 34 Md. 508; *Koch vs. North Ave. R. Co.*, 75 Md. 222, 226, 23 Atl. Rep. 463, 15 L. R. A. 377. Minn. *State vs. Steele*, 37 Minn. 428, 34 N. W. Rep. 903. N. Y. *White vs. Ross*, 4 Abb. App. 589. Fed. *Kanawha Coal Co. vs. Kanawha & O. Coal Co.*, 7 Blackf. C. C. 391, 14 Fed. Cas. 108.

36. Act April 1, 1864 (Laws 1864, p. 303), defects in certificates of incorporation.—*Larrabee vs. Baldwin*, 35 Cal. 155, 169.

37. Omissions from articles.—Failure to state that majority of members of association voted in favor of its incorporation is fatal.—*People ex rel. Fraser vs. Selfridge*, 52 Cal. 321, 323.

38. SIGNING ARTICLES.—Stockholder is bound by articles of incorporation whether he has signed them or not.—*McFadden vs. Board of Superv. Los Angeles County*, 74 Cal. 571, 574, 16 Pac. Rep. 397.

§ 290½. "TRUST" AND "TRUSTEE," WHEN MAY BE PART OF CORPORATE NAME. No corporation hereafter formed shall use the word "trust" or "trustee" as a part of its corporate name unless it shall be authorized by its articles of incorporation to act as executor, administrator, guardian, assignee, receiver, depository or trustee, nor shall any corporation hereafter formed accept or execute any trust unless it shall have complied with all the provisions of "An act authorizing certain corporations to act as executor, and in other capacities, and to provide for and regulate the administration of trusts by such corporation," approved April sixth, eighteen hundred and ninety-one, and the amendment thereto approved April first, eighteen hundred and ninety-seven.

History: Enacted March 18, 1905, Stats. and Amdts. 1905, c. CCLXXIX, p. 251.

§ 291. CERTAIN CORPORATIONS TO STATE FURTHER FACTS IN ARTICLES. The articles of incorporation of any railroad, wagon-road, or telegraph organization must also state:

1. The kind of road or telegraph intended to be constructed;
2. The place from and to which it is intended to be run, and all the intermediate branches;
3. The estimated length of the road or telegraph line;

4. That at least ten per cent of the capital stock subscribed has been paid in to the treasurer of the intended corporation.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Railroads—Affidavit as to amount paid in.
3. Same—Amount subscribed and by whom.

1. Applied, cited, construed, referred to, etc., in: *San Francisco & S. M. Elec. R. Co. vs. Scott*, 142 Cal. 222, 227, 75 Pac. Rep. 575 (cited in discussion).

2. Railroads—Affidavit as to ten per cent paid in.—“In good faith,” omitted from an affidavit stating that the ten per cent “in cash has been paid in,” is an immaterial omission, where in body of certificate it is stated that

more than ten per cent of amount subscribed “has been actually, in good faith, paid in” in cash; certificate and affidavit together being substantial compliance with statute.—*People ex rel. Love vs. Stockton & V. R. Co.*, 45 Cal. 306, 313, 13 Am. Rep. 178.

See ante § 290 note para. 4, 5, 25-27.

3. Same—Amount of subscription, and by whom made, must be set forth in articles of incorporation.—*Monterey & S. V. R. Co. vs. Hildreth*, 53 Cal. 123, 129.

See ante § 29 note para. 25-27.

§ 292. HOW EXECUTED—[SUBSCRIPTION AND ACKNOWLEDGMENT].

The articles of incorporation must be subscribed by three or more persons, a majority of whom must be residents of this state, and acknowledged by each before some officer authorized to take and certify acknowledgments or conveyances of real property.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 199; March 20, 1905, Stats. and Amdts. 1905, c. CCCXCII, p. 503.

1. Applied, cited, construed, referred to, etc.
- 2, 3. Construction—Effect to be given section.
- 4, 5. Same—Benevolent associations.
6. Same—Social corporations.
7. Compliance with requirements—Prerequisite to valid incorporation.
- 8, 9. Same—Subscription to articles.
- 10, 11. Same—Acknowledgment—Less than required number.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Hall vs. Arnott*, 30 Cal. 348, 353, 22 Pac. Rep. 200 (misquoted for § 2927 post); *People vs. Montecito Water Co.*, 97 Cal. 276, 278, 33 Am. St. Rep. 172, 32 Pac. Rep. 236 (construed and applied); *People ex rel. Weatherly vs. Golden Gate Lodge of Elks*, 128 Cal. 257, 260, 261, 263, 60 Pac. Rep. 865 (construed and applied to benevolent and social organizations); *Wall vs. Mines*, 130 Cal. 27, 39, 62 Pac. Rep. 386 (construed and applied to benevolent associations).

2. CONSTRUCTION—Provisions of section apply to all corporations in state, unless provision is otherwise made by special statute.—*People ex rel. Weatherly vs. Golden Gate Lodge of Elks*, 128 Cal. 257, 260, 60 Pac. Rep. 865.

3. This section must be reconciled and read together with other sections of Part IV of the Civil Code, and, if possible, effect be given to it.—*People ex rel. Weatherly vs. Golden Gate Lodge of Elks*, 128 Cal. 257, 261, 60 Pac. Rep. 865.

4. Benevolent associations.—This section refers to all private corporations formed under provisions of code, but in case of benevolent corporations still further authentication is required.—*Wall vs. Mines*, 130 Cal. 27, 39, 62 Pac. Rep. 386.

5. Provisions of this section are not dispensed with by §§ 593 and 594 post, relating to articles of incorporation of benevolent or so-

cial associations.—*People ex rel. Weatherly vs. Golden Gate Lodge of Elks*, 128 Cal. 257, 260, 60 Pac. Rep. 865.

6. Social corporations.—Requirements of this section, so far as they apply to social corporations, are by § 594 expressly required to be set forth in article of incorporation of such association.—*People ex rel. Weatherly vs. Golden Gate Lodge of Elks*, 128 Cal. 257, 261, 60 Pac. Rep. 865.

7. Compliance with requirements of this section is a condition precedent to valid incorporation.—*People vs. Montecito Water Co.*, 97 Cal. 276, 278, 280, 33 Am. St. Rep. 172, 32 Pac. Rep. 236; *People ex rel. Weatherly vs. Golden Gate Lodge of Elks*, 128 Cal. 257, 263, 60 Pac. Rep. 865.

8. Subscription to articles, and acknowledgment, must be by number of persons designated in code, less number will not be sufficient compliance with code prerequisites.—*People vs. Montecito Water Co.*, 97 Cal. 276, 278, 280, 33 Am. St. Rep. 172, 32 Pac. Rep. 236; *State ex rel. Attorney-General vs. Critchett*, 37 Minn. 12, 32 N. W. Rep. 787; *Carey vs. Morrill*, 61 Vt. 598, 17 Atl. Rep. 840.

9. AMENDED ARTICLES properly filed cannot make valid incorporation invalid by reason of failure to comply with prescribed prerequisites.—*State ex rel. Attorney-General vs. Critchett*, supra.

10. Acknowledgment of articles is prerequisite under this section of code to valid incorporation.—*People ex rel. Weatherly vs. Golden Gate Lodge of Elks*, 128 Cal. 257, 260, 60 Pac. Rep. 865. See *Wall vs. Mines*, 130 Cal. 27, 40, 62 Pac. Rep. 386.

11. Articles acknowledged by only four incorporators are fatally defective, though requisite number subscribed.—*People vs. Montecito Water Co.*, 97 Cal. 276, 278, 280, 33 Am. St. Rep. 172, 32 Pac. Rep. 236.

§ 293. PREREQUISITE TO FILING ARTICLES—AMOUNTS TO BE SUBSCRIBED TO BE FIXED. Each intended corporation named in section two hundred and ninety-one, before filing articles of incorporation, must have actually subscribed to its capital stock, for each mile of the contemplated work, the following amounts, to wit:

1. One thousand dollars per mile of railroads;
2. One hundred dollars per mile of telegraph lines;
3. Three hundred dollars per mile of wagon roads.

History: Enacted March 21, 1872.

1. Amount subscribed, and by whom.
2. Incorrect statement—Effect.

1. Amount subscribed and by whom must be fully set forth in articles of incorporation of railroads.—*Monterey & S. V. R. Co. vs. Hildreth*, 53 Cal. 123, 128, 129.

See ante § 290 note para. 26, 27.

2. Incorrect statement—Effect.—“If the statement contained in articles, as to amount

subscribed, and by whom, is incorrect, one of two results must follow—either the attempt to give existence to corporation is abortive, or corporation which comes into life is estopped from claiming that any other person than those named as subscribers, became a member, when articles were filed, or that any person therein named was subscriber for larger sum than that mentioned in articles.”—*Monterey & S. V. R. Co. vs. Hildreth*, supra.

§ 294. PREREQUISITE TO FILING ARTICLES OF INCORPORATIONS FOR PROFIT. Before the articles of incorporation of any corporation referred to in the preceding section are filed, there must be paid for the benefit of the corporation, to a treasurer elected by the subscribers, ten per cent of the amount subscribed.

History: Enacted March 21, 1872.

- 1, 2. Payment of the ten per cent—Condition precedent.
- 3, 4. Check as payment “in cash”—Funds in bank.
5. Same—No funds in bank.

1. PAYMENT OF TEN PER CENT.—Condition precedent to valid incorporation.—*People ex rel. Plumas County vs. Chambers*, 42 Cal. 201, 209; *Commonwealth vs. Westchester R. Co.*, 3 Grant (Pa.) 200.

2. Without at least a substantial compliance with this provision, no jurisdiction is acquired to organize into body corporate.—*People ex rel. Plumas County vs. Chambers*, 42 Cal. 201, 209, citing *Md. Taggart vs. Western Md. R. Co.*, 24 Md. 538, 39 Am. Dec. 760. *N. Y. Eaton vs. Aspinwall*, 19 N. Y. 119; *People vs. Rensselaer Ins. Co.*, 38 Barb. 323; *Haviland vs. Chase*, 29 Barb. 283; *People vs. Troy House*

Co., 44 Barb. 634. *Pa. Paterson vs. Arnold*, 45 Pa. St. 410, 415.

See ante § 290 note para. 3-5.

2. CHECK AS PAYMENT “IN CASH”—Funds in bank.—Payment of the per cent of amount subscribed as required by this section, made in good faith, by check payable in present, drawn against sufficient fund and which will be paid on presentation, is payment “in cash” within requirement of statute.—*People ex rel. Love vs. Stockton & V. R. Co.*, 45 Cal. 306, 312, 313, 13 Am. Rep. 178.

4. But it is not “actual cash.”—*Durant vs. Abendroth*, 69 N. Y. 148, 25 Am. Rep. 153 and notes 161-162.

5. No funds in bank with which to pay check, or not sufficient funds for that purpose, even though it appears check would have been paid on presentation.—*People ex rel. Plumas County vs. Chambers*, 42 Cal. 201, 208, 209.

§ 295. OATH OF OFFICER TO SUBSCRIPTION OF STOCK AND PAYMENT OF TEN PER CENT. Before the secretary of state issues to any such corporation a certificate of the filing of articles of incorporation, there must be filed in his office an affidavit of the president, secretary, or treasurer named in the articles, that the required amount of the capital stock thereof has been actually subscribed, and ten per cent thereof actually paid to a treasurer for the benefit of the corporation.

History: Enacted March 21, 1872.

1. Affidavit of officer—Necessity for.
2. Same—Contents—Substantial compliance.
3. Same—Same—“In good faith” omitted.

1. Affidavit of officer—Required in this section is absolutely necessary to certificate

from secretary of state.—See *Wall vs. Mines*, 130 Cal. 27, 37-39, 62 Pac. Rep. 386.

2. Contents—Substantial compliance of affidavit with statutory provisions as to contents in reference to amount of capital stock

actually paid in, is all that is required.—*People ex rel. Love vs. Stockton & S. V. R. Co.*, 45 Cal. 306, 312, 313, 13 Am. Rep. 173.

See ante § 290 note para. 4, 5.

3. "In good" faith omitted from affidavit that ten per cent has been paid in, but appearing in body of certificate, is sufficient compliance.—See ante § 291 note par. 2.

§ 296. ARTICLES OF INCORPORATION—CORPORATE NAMES MUST NOT BE DUPLICATED NOR CLOSELY IMITATED. Upon filing [1] the articles of incorporation in the office of the county clerk of the county in which the principal business of the company is to be transacted, and [2] a copy thereof certified by the county clerk with the secretary of state, and [3] the affidavit mentioned in the last section where such affidavit is required, the secretary of state must issue to the corporation, over the great seal of the state, a certificate that a copy of the articles containing the required statement of facts has been filed in his office, and thereupon the persons signing the articles and their associates and successors shall be a body politic and corporate by the name stated in the certificate, and for the term of fifty years, unless it is, in the articles of incorporation, otherwise stated, or in this code otherwise specially provided;

[When certificate not to issue—Resemblance in name.] Provided, however, that the secretary of state shall not file any copy of the copy of any articles, or issue any certificate of incorporation to any corporation, which articles set forth the corporate name of any corporation heretofore organized in this state, or file any copy of any articles, or issue any certificate of incorporation to any corporation existing at the time of filing said articles, which articles set forth a name so closely resembling the name of such corporation as will tend to deceive.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, pp. 199-200; March 23, 1901, Stats. and Amdts. 1900-1, p. 629. In effect March 23, 1901.

1. Applied, cited, construed, referred to, etc.
- 2-4. Beginning of existence—From when dated.
5. Certificate of county clerk—A prerequisite.
6. Compliance with sections—Condition precedent.
- 7, 8. Filing—Indispensable—State only can complain.
9. Same—Certified copy with secretary of state.
10. Same—Place of filing articles.
11. Name—Duplication prohibited.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Fresno C. & I. Co. vs. Warner*, 72 Cal. 379, 382, 14 Pac. Rep. 37 (referred to in construing § 297); *Wickersham vs. Brittan*, 93 Cal. 34, 39, 23 Pac. Rep. 792, 15 L. R. A. 106 (referred to with other sections); *Martin vs. Deetz*, 102 Cal. 55, 62, 41 Am. St. Rep. 151, 36 Pac. Rep. 368 (construed); *California S. & L. Co. vs. Harris*, 111 Cal. 133, 135, 136, 43 Pac. Rep. 525 (construed); *Wall vs. Mines*, 130 Cal. 27, 33, 62 Pac. Rep. 386 (construed); *Bank of Cal. vs. San Francisco*, 142 Cal. 276, 281, 100 Am. St. Rep. 130, 75 Pac. Rep. 332 (referred to in discussion).

2. **BEGINNING OF EXISTENCE OF CORPORATION** is from date of filing of certificate of incorporation in county clerk's office.—*Mokelumne Hill C. & M. Co. vs. Woodbury*, 14 Cal. 424, 427, 73 Am. Dec. 658.

3. **CORPORATION HAS NO DE JURE EXISTENCE** until secretary of state has issued certificate that articles are filed.—*Wall vs. Mines*, 130 Cal. 27, 33, 62 Pac. Rep. 386.

4. "Thereupon," as used in this section, has effect to make issuance of certificate by secretary of state necessary prerequisites to corporate life.—*Wall vs. Mines*, 130 Cal. 27, 33, 62 Pac. Rep. 386. See *First Baptist Society vs. Repalee*, 16 Wend. (N. Y.) 605, 606 (construing statute regulating incorporating churches).

5. **CERTIFICATE OF COUNTY CLERK—PREREQUISITE FOR CERTIFICATE OF INCORPORATION.** Secretary of state cannot issue certificate of incorporation without first receiving copy of articles certified by county clerk showing prerequisite steps have been complied with.—*Wall vs. Mines*, 130 Cal. 27, 37-40, 62 Pac. Rep. 386.

6. **COMPLIANCE WITH PROVISIONS OF SECTION** condition precedent to formation of corporation.—*Martin vs. Deetz*, 102 Cal. 55, 62, 41 Am. St. Rep. 151, 36 Pac. Rep. 368; *Wall vs. Mines*, 130 Cal. 27, 37-40, 62 Pac. Rep. 386.

7. **FILING—INDISPENSABLE.**—Filing of articles of incorporation, as required by section, is prerequisite to issuance of certificate of incorporation.—*Mokelumne Hill C. & Min. Co. vs. Woodbury*, 14 Cal. 424, 73 Am. Dec. 658. See *Ark. Garnett vs. Richardson*, 35 Ark. 144. *Ind. McIntire vs. Assoc.*, 40 Ind. 104; *Indianapolis F. & M. Co. vs. Herkimer*, 46 Ind. 142. *Iowa. First Nat. Bank vs. Davies*, 43 Iowa 424. *La. Field vs. Cooks*, 16 La. Ann. 153. *Mich. Doyle vs. Mizner*, 41 Mich. 549, 50 N. W. Rep. 392. *Neb. Abbott vs. Omaha Smelt. Co.*, 4 Neb. 416. *N. Y. Ralsbeck vs. Oesterricher*, 4

Abb. N. C. (N. Y.) 444. W. Va. Childs vs. Hurd, 32 W. Va. 66, 9 S. E. Rep. 362.

See note 33 Am. St. Rep. 179.

As to fees for filing, see Pol. Code § 416.

8. Duplicate certificate should be filed in office of secretary of state, but whether it is or not is matter exclusively between corporation and state. "The rights and privileges conferred by statute, vest in corporation upon filing of certificate, and can be divested only by direct proceeding for that purpose. If duplicate had not been filed, assumption of corporate powers amounts simply to usurpation of sovereign rights of the state, remedy for which rests with state alone."—Mokelumne Hill C. & Min. Co. vs. Woodbury, supra; Childs vs. Hurd, 32 W. Va. 66, 9 S. E. Rep. 362.

9. Certified copy of articles must be filed

with secretary of state, under this section, before corporation can in fact become body politic and incorporate.—People ex rel. Weatherly vs. Golden Gate Lodge of Elks, 128 Cal. 257, 262, 60 Pac. Rep. 865.

10. Place of filing articles of incorporation is county designated in such articles as one in which principal office or place of business is to be; if they are filed in another county statute is not complied with and no corporation de jure is formed.—Martin vs. Deetz, 102 Cal. 55, 41 Am. St. Rep. 151, 36 Pac. Rep. 368.

11. NAME—Duplications of prohibited by this section as amended in 1901. Without statutory inhibition infringement of name will be prohibited by a court of equity.—See ante § 290 note par. 2.

§ 297. COPY OF ARTICLES PRIMA FACIE EVIDENCE. A copy of any articles of incorporation filed in pursuance of this chapter, and certified by the secretary of state, or by the county clerk of the county where the original articles shall have been filed, must be received in all the courts of this state, and other places, as prima facie evidence of the facts therein stated.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 200; March 8, 1895, Stats. and Amdts. 1895, p. 30. In force March 8, 1895.

1. Applied, cited, construed, referred to, etc.
2. Articles of incorporation as evidence.
3. Same—Filed in wrong office.
4. Same—Defectively executed articles.
5. Same—Certified copy of certified copy.
6. Same—Certificate that he issued certificate.
7. Collateral attack—Not allowed.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Boston Tunnel Co. vs. McKenzie, 67 Cal. 485, 488, 8 Pac. Rep. 22 (construed and applied); Fresno C. & Irr. Co. vs. Warner, 72 Cal. 379, 382, 14 Pac. Rep. 37 (construed and applied).

2. ARTICLES OF INCORPORATION AS EVIDENCE.—Existence of corporation, formed under general laws of this state, is proved by its articles, executed and filed in accordance with statute.—Spring Valley Water Works vs. San Francisco, 22 Cal. 434, 440. See People vs. Frank, 28 Cal. 507, 519; Oroville & V. R. Co. vs. Plumas County, 37 Cal. 354, 361; People ex rel. Love vs. Stockton & V. R. Co., 45 Cal. 206, 213, 18 Am. Rep. 178; State vs. Inhab. Pocatello, 2 Idaho 908, 913, 28 Pac. Rep. 411; Miller vs. Perris Irr. Dist., 85 Fed. Rep. 692, 698.

3. Filed in wrong office.—Fact that copy of articles of incorporation are filed in office of county clerk, where it had no need to be filed, will not affect its admissibility as evidence.—Boston Tunnel Co. vs. McKenzie, 67 Cal. 485, 488, 8 Pac. Rep. 22.

4. Defectively executed articles of incorporation being defective by reason of insufficient certificate, because of its failure to conform to requirements of statute under which purporting to have been made, is not

proof of corporation in esse where it is sought to establish corporate rights thereunder.—McCallion vs. Hibernia Sav. & L. Soc., 70 Cal. 163, 167, 168, 12 Pac. Rep. 114. See Mokelumne Hill Canal & Min. Co. vs. Woodbury, 14 Cal. 425, 73 Am. Dec. 658; Harris vs. McGregor, 29 Cal. 124, 127; People ex rel. Hamilton vs. Selfridge, 52 Cal. 331.

5. Certified copy by secretary of state of certified copy of articles of incorporation on file in his office is admissible to prove organization of corporation.—Boston Tunnel Co. vs. McKenzie, 67 Cal. 485, 488, 8 Pac. Rep. 22; Fresno C. & Irr. Co. vs. Warner, 72 Cal. 379, 382, 14 Pac. Rep. 37; Wall vs. Mines, 130 Cal. 27, 33, 39, 62 Pac. Rep. 286.

6. Certificate that he issued certificate, made by secretary of state, is not admissible to show corporate organization.—Wall vs. Mines, 130 Cal. 27, 33, 39, 62 Pac. Rep. 286.

7. Company in good faith doing business as a corporation, and claiming to be corporation, its character as corporation can be proved by its certificate of incorporation, question of legality of its incorporation cannot be raised collaterally.—Spring Valley Water Works vs. San Francisco, 22 Cal. 434; Dannebroge G. Q. Min. Co. vs. Allment, 26 Cal. 286, 283; People vs. Frank, 28 Cal. 507, 519; Oroville & V. R. Co. vs. Plumas County, 37 Cal. 354, 361; Bakersfield Town Hall Assoc. vs. Chester, 55 Cal. 98, 101; United States vs. Amedy, 24 U. S. (11 Wheat.) 392, bk. 6 L. ed. 502; Miller vs. Perris Irr. Dist., 85 Fed. Rep. 692, 698.

See ante § 290 note para. 33, 34; post § 288 and note.

§ 298. WHO ARE MEMBERS AND WHO STOCKHOLDERS OF A CORPORATION. The owners of shares in a corporation which has a capital stock are

called stockholders. If a corporation has no capital stock, the corporators and their successors are called members.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
- 2-4. Bona fide stockholder—Need not own stock.
5. Same—1. May have been registered as such.
- 6-9. Same—2. May have pledged stock.
10. Same—3. May place stock in name of another in trust.
11. Same—4. Stock may be property of estate in name of executor.
12. Transfer in good faith in these cases.
13. Same—Dummy holder not stockholder.
14. Corporators exist before stockholders.
15. "Members" and "stockholders" synonymous.
16. "Shareholder"—Who is.
- 17, 18. "Stockholders"—Owners of shares of stock.
19. "Subscribers"—Who are.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: Market St. R. Co. vs. Hellman, 109 Cal. 571, 590, 42 Pac. Rep. 225 (referred to with other sections); Smith vs. San Francisco & N. P. R. Co., 115 Cal. 584, 593, 56 Am. St. Rep. 119, 47 Pac. Rep. 582, 35 L. R. A. 309 (construed and applied).

2. **BONA FIDE STOCKHOLDER**, person may be without being owner of stock.—Smith vs. San Francisco & N. P. R. Co., 115 Cal. 584, 593, 56 Am. St. Rep. 119, 47 Pac. Rep. 582, 35 L. R. A. 309 (see dissent by Beatty, C. J., p. 609).

3. In trading and joint stock corporations any person who owns stock therein, either by original subscription or by conveyance, is in general entitled to, and cannot be refused, rights and privileges of a member.—In re Philadelphia Sav. Inst., 1 Whart. (Pa.) 461, 30 Am. Dec. 226. See Gray vs. Portland Bank, 3 Mass. 364, 3 Am. Dec. 156; King vs. Bank of England, Doug. 524.

4. Subscribing another's name without authority to subscription for stock of corporation does not make such other person stockholder in such corporation.—Salem Mill-dam Corp. vs. Ropes, 26 Mass. (9 Pick.) 187, 19 Am. Dec. 363.

As to becoming stockholders by subscription, see Palmetto Lodge vs. Hubbell, 2 Strobb. (S. C.) L. 457, 49 Am. Dec. 604.

See note 26 Am. St. Rep. 558.

5. **SAME—1. HE MAY HAVE CAUSED HIMSELF TO BE REGISTERED** as stockholder in utmost good faith, both toward corporation and also toward his fellow stockholders, and yet he may not be the owner of stock.—Smith vs. San Francisco & N. P. R. Co., 115 Cal. 584, 593, 56 Am. St. Rep. 119, 47 Pac. Rep. 582, 35 L. R. A. 309.

6. **SAME—2. HE MAY HAVE PLEDGED HIS STOCK** as security for his indebtedness, and creditor may have caused it to be transferred to his own name upon books of corporation without changing its ownership.—Smith vs. San Francisco & N. P. R. Co., supra.

7. Identity of shares is not affected by such transfer.—Hawley vs. Brumagim, 33 Cal. 394, 399. See Atkins vs. Gamble, 42 Cal. 86, 100, 10 Am. Rep. 282; Craig vs. Hesperia Land & W. Co., 113 Cal. 7, 12, 54 Am. St. Rep. 316, 45 Pac. Rep. 10, 35 L. R. A. 306; Smith vs. San Francisco & N. P. R. Co., supra.

8. The identity of certificate of shares, which simply evidences fact party is entitled to so many shares of capital stock, is changed, but not identity of shares themselves.—Craig vs. Hesperia Land & W. Co., 113 Cal. 7, 12, 54 Am. St. Rep. 316, 45 Pac. Rep. 10, 35 L. R. A. 306.

9. The provisions of § 322 post, by which liabilities of pledgees and trustees in whose names stock is registered are limited to that section, imply that such limitation does not exist in other relations which these persons sustain to corporation.—Smith vs. San Francisco & N. P. R. Co., supra.

10. **SAME—3. HE MAY PLACE STOCK IN NAME OF PERSON AS TRUSTEE** to hold under expressed trust, without any interest in stock, but for sole purpose of applying income, or disposing of proceeds of its sale, according to terms of trust.—Smith vs. San Francisco & N. P. R. Co., supra.

11. **SAME—4. STOCK MAY BE PROPERTY OF AN ESTATE**, and transferred to name of executor.—Smith vs. San Francisco & N. P. R. Co., supra.

12. **TRANSFER IN GOOD FAITH**, in such cases, person in whose name stock is registered would be bona fide stockholder, regardless of transfer of certificate of stock to another.—Smith vs. San Francisco & N. P. R. Co., supra. See In re Argus Printing Co. 1 N. D. 434, 26 Am. St. Rep. 639, 48 N. W. Rep. 347, 12 L. R. A. 781.

As to voting trust, see post §§ 307, 312 and notes.

13. **Dummy holder not stockholder**.—Person holding stock as dummy for real owner, without any interest in stock, is not bona fide holder.—Stewart vs. Mahoney Min. Co., 54 Cal. 149, 150; Smith vs. San Francisco & N. P. R. Co., 115 Cal. 584, 593, 594, 56 Am. St. Rep. 119, 47 Pac. Rep. 582, 35 L. R. A. 309 (Beatty, C. J., dissenting).

14. **CORPORATIONS EXISTENT BEFORE STOCKHOLDERS** and do not exist with them. When stockholders come in corporators cease to be.—Chase vs. Lord, 77 N. Y. 1, 11, 6 Abb. N. C. (N. Y.) 258.

15. "Members" and "stockholders" are synonymous terms. Every member is a stockholder and every stockholder is a member of an insurance company, the policy-holders are not "members."—People vs. Security Life Ins. & A. Co., 78 N. Y. 114, 123, 7 Abb. N. C. (N. Y.) 198, 34 Am. Rep. 522.

16. "Shareholder" in a corporation is one who has proportionate interest in assets of

corporation, and is entitled to take part in its control and receive its dividends.—*Beal vs. Essex Sav. Bank*, 67 Fed. Rep. 816, 817.

17. **STOCKHOLDERS.**—“This section does not purport to be definition of the term ‘stockholder,’ or to limit its extent, . . . but is consistent with holding that others may be stockholders than merely those who are owners of stock.”—*Smith vs. San Francisco & N. P. R.*

Co., 115 Cal. 584, 593, 56 Am. St. Rep. 119, 47 Pac. Rep. 582, 35 L. R. A. 309.

18. **Stockholders are owners of shares of stock in corporation.**—*Arthur vs. Clarke*, 46 Minn. 491, 49 N. W. Rep. 252.

19. **Subscribers are persons who enter into agreement to take original shares of stock to be thereafter issued.**—*Arthur vs. Clarke*, 46 Minn. 491, 49 N. W. Rep. 252.

§ 299. WHEN MEMBERS DIE SUCCESSORS TO BE ELECTED (repealed).

History: Enacted March 21, 1872; repealed March 30, 1874, Code Amdts. 1873-4, p. 200.

§ 299 [a]. COPIES OF ARTICLES MUST BE FILED IN EVERY COUNTY WHEREIN THE CORPORATION ACQUIRED PROPERTY, ETC. No corporation hereafter formed must purchase, locate, or hold property, in any county in this state, other than the county in which its original articles of incorporation are filed, without filing a copy of the copy of its articles of incorporation filed in the office of the secretary of state, duly certified by such secretary of state, in the office of the county clerk of the county in which such property is situated, within sixty days after such purchase or location is made. Every corporation now in existence, whether formed under the provisions of this code or not, must, within ninety days after the passage of this section, file such certified copy of the copy of its articles of incorporation in the office of the county clerk of every county in this state in which it holds any property, except the county where the original articles of incorporation are filed; and if any corporation hereafter acquires any property in a county other than that in which it now holds property, it must, within ninety days thereafter, file with the clerk of such county such certified copy of the copy of its articles of incorporation. The copies filed with the several county clerks, and certified copies thereof, have the same force and effect in evidence as the originals. Any corporation failing to comply with the provisions of this section cannot maintain or defend any action or proceeding in relation to such property, its rents, issues, or profits, until such articles of incorporation, and such certified copy of its articles of incorporation, and such certified copy of the copy of its articles of incorporation, are filed at the places directed by the general law and this section; provided, that all corporations are liable in damages for any and all loss that may arise by the failure of such corporation to perform any of the foregoing duties within the time mentioned in this section; and provided further, that the said damages may be recovered in an action brought in any court of this state of competent jurisdiction, by any party or parties suffering the same.

History: Enacted April 3, 1876, Code Amdts. 1875-6, p. 71; amended March 23, 1878, Code Amdts. 1877-8, p. 76; April 23, 1880, Code Amdts. 1880 (C. C. pt.), p. 13; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 344, held unconstitutional; see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXVI, pp. 556-557.

1. Applied, cited, construed, referred to, etc.
- 2-4. Compliance with statute—Filing copy of articles.
- 5, 6. Same—Same—Effect of failure to file.
7. Same—Same—Filing after suit—Effect.
8. Construction—In general.
9. Same—Strict construction.
10. Same—Eminent domain proceedings.
11. Same—“Every corporation now in existence.”

12. Same—Foreign corporations not included.
13. Same—Mortgage foreclosure.
14. Same—Religious corporations.
15. Same—“Secretary of state”—Who embrace.
16. Practice—Complaint—What to contain.
17. Same—Demurrer for failure to file copy.
- 18, 19. Same—Necessity for answer or plea.
20. Same—Plea in abatement not favored.
21. Same—Objection on appeal in first instance.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in:** Boston Tunnel Co. vs. McKenzie, 67 Cal. 485, 487, 488, 8 Pac. Rep. 22 (applied to admissibility of defense); Weeks vs. Garibaldi S. G. M. Co., 73 Cal. 599, 601, 602, 15 Pac. Rep. 302 (construed and applied); Southern Pac. R. Co. vs. Purcell, 77 Cal. 69, 72, 18 Pac. Rep. 886 (construed); Ontario State Bank vs. Tibbits, 80 Cal. 68, 69, 22 Pac. Rep. 66 (construed); South Yuba W. & M. Co. vs. Rosa, 80 Cal. 333, 335, 336, 22 Pac. Rep. 222 (applied); Mora vs. Murphy, 83 Cal. 12, 17, 23 Pac. Rep. 63 (applied to religious societies); Emigrant Ditch Co. vs. Webber, 108 Cal. 88, 90, 91, 40 Pac. Rep. 1061 (construed and applied); California S. & L. Soc. vs. Harris, 111 Cal. 133, 135, 136, 43 Pac. Rep. 525 (construed and applied); Savings & L. Soc. vs. McKoon, 120 Cal. 177-179, 52 Pac. Rep. 305 (construed and applied to foreclosure suit).

2. **COMPLIANCE WITH STATUTE—Filing copy of articles.**—This section is complied with by filing original articles of incorporation in county where property is situated, and where corporation is doing business.—Ontario State Bank vs. Tibbits, 80 Cal. 68, 71, 22 Pac. Rep. 66 (foreclosure).

3. By provisions of this section, as it stood at time this decision was rendered, every corporation was required to file "a copy of the copy of its articles of incorporation filed in the office of the secretary of state, duly certified by such secretary of state, in the office of the county clerk" of the county in which corporation desired to transact business, under penalty of inability to sue, as defined in states' constitutions. A failure to comply with this statute was merely matter in abatement.—See para. 7, 18 this note.

4. As to compliance with requirements of statute, see ante §290 and note para. 3-32.

5. **Effect of failure to file.**—Failure to file certified copy of articles does not impose upon corporation loss or forfeiture of its property, or impair or deprive it of any cause of action or defense it may have in reference to such property.—California S. & L. Soc. vs. Harris, 111 Cal. 133, 135, 136, 43 Pac. Rep. 525.

6. Nor is compliance with statute essential to a cause of action, or jurisdictional element in the suit.—California S. & L. Soc. vs. Harris, 111 Cal. 133, 136, 43 Pac. Rep. 525.

7. **Filing after suit brought and before filing of plea in abatement** on ground that it was not filed, is sufficient, and plea in abatement cannot prevent plaintiff from thereafter maintaining its action.—California S. & L. Soc. vs. Harris, 111 Cal. 133, 138, 43 Pac. Rep. 525.

8. **CONSTRUCTION—IN GENERAL.**—This section prohibits corporations from making defense to certain actions, unless they have previously filed their articles in office of clerk of county where they have property; but this prohibition only extends to such actions or proceedings as may be brought in relation to such property, its rents, issues, or profits. This section does not apply to action brought against corporation to recover for work and labor alleged to have been performed upon its property.—Weeks vs. Garibaldi S. G. M. Co., 73 Cal. 599, 601, 602, 15 Pac. Rep. 302.

9. A strict construction must be applied to this section, as it imposes a penalty.—Savings & L. Soc. vs. McKoon, 120 Cal. 177, 179, 25 Pac. Rep. 305.

10. **Eminent domain proceedings.**—This section does not forbid corporations failing to comply with its provisions from acquiring property, either by purchase or by condemnation, but does inhibit maintenance or defense by them of any action in relation to property which they have acquired.—Emigrant Ditch Co. vs. Webber, 108 Cal. 88, 90, 91, 40 Pac. Rep. 1061.

11. **"Every corporation now in existence"** embraces only corporations formed in this state.—South Yuba W. & M. Co. vs. Rosa, 80 Cal. 333, 336, 22 Pac. Rep. 222.

12. **Foreign corporations.**—Section does not apply to foreign corporations.—South Yuba W. & M. Co. vs. Rosa, 80 Cal. 333, 336, 22 Pac. Rep. 222.

13. **Mortgage foreclosure.**—The penalty imposed by this section does not apply to any action to foreclose mortgage.—Savings & L. Soc. vs. McKoon, 120 Cal. 177, 180, 25 Pac. Rep. 305.

14. **Religious corporations.**—This section has no application to religious corporations.—Mora vs. Murphy, 83 Cal. 12, 17, 23 Pac. Rep. 63.

15. **"Secretary of state,"** mentioned in this section, means the secretary of this state, and not the secretary of a foreign state.—South Yuba W. & M. Co. vs. Rosa, 80 Cal. 333, 336, 22 Pac. Rep. 222.

16. **PRACTICE—Complaint need not show compliance with section** in order to state cause of action by corporation in relation to its property.—Ontario State Bank vs. Tibbits, 80 Cal. 68, 69, 22 Pac. Rep. 66. See Phillips vs. Goldtree, 74 Cal. 151, 13 Pac. Rep. 313, 15 Id. 451.

17. **Demurrer—For failure to file copy.**—Failure of complaint to allege compliance with section is not ground for demurrer.—South Yuba W. & M. Co. vs. Rosa, 80 Cal. 333, 335, 336, 22 Pac. Rep. 222; California Sav. & L. Soc. vs. Harris, 111 Cal. 133, 136, 43 Pac. Rep. 525.

18. **Necessity for answer or plea.**—Failure of corporation to file articles is matter of abatement, which is waived by failure of defendants to plead it.—Sweeney vs. Stanford, 67 Cal. 635, 636, 8 Pac. Rep. 444; Phillips vs. Goldtree, 74 Cal. 151, 13 Pac. Rep. 313, 15 Id. 451; Southern Pac. R. Co. vs. Purcell, 77 Cal. 69, 72, 18 Pac. Rep. 886; Ontario State Bank vs. Tibbits, 80 Cal. 68, 69, 70, 22 Pac. Rep. 66; South Yuba W. & M. Co. vs. Rosa, 80 Cal. 333, 336, 22 Pac. Rep. 222; California Sav. & L. Soc. vs. Harris, 111 Cal. 133, 136, 43 Pac. Rep. 525.

19. **Same—Failure to file copy of articles must be pleaded** in defendant's answer in order to bar ejectment suit brought by corporation for its property.—Southern Pac. R. Co. vs. Purcell, 77 Cal. 69, 72, 18 Pac. Rep. 886.

20. **Pleas in abatement are not favored by law, and defect complained of must exist at time plea is filed; hence if copy of articles is filed after commencement of action, but before**

plea is entered, it will be unavailing.—California Sav. & L. Soc. *vs.* Harris, 111 Cal. 132, 133, 43 Pac. Rep. 525.

21. Objection on appeal cannot be raised for first time, that copy of articles have been

filed as required, and that corporation is for that reason not entitled to defend; objection must have been raised and exception saved in trial court.—Laborv *vs.* Los Angeles Orphan Asylum, 97 Cal. 270, 275, 32 Pac. Rep. 231.

§ 300. CAPITAL STOCK OF BANKING CORPORATIONS — DIVIDENDS.

Every corporation that has been or may be created under the general laws of this state, doing a banking business therein, and which has no capital stock, may elect to have a capital stock, and may issue certificates of stock therefor, in the same manner as corporations formed under the provisions of chapter one, article one, of the civil code, relating to the formation of corporations; provided, that no such corporation shall use or convert any moneys or funds theretofore belonging to it, or under its control, into capital stock; but such funds or moneys must be held and managed only for the purposes and in the manner for which they were created. Before such change is made, a majority of the members of such corporation present at a meeting called for the purpose of considering the proposition whether it is best to have a capital stock, its amount, and the number of shares into which it shall be divided, must [1] vote in favor of having a capital stock, [2] fix the amount thereof, and [3] the number of shares into which it shall be divided.

Notice [a] of the time and place of holding such meeting, and [b] its object, must be given by the president of such corporation, by publication in some newspaper printed and published in the county, or city and county, in which the principal place of business of the corporation is situated, at least once a week for three successive weeks prior to the holding of the meeting.

A copy of the proceedings of this meeting, giving the number of persons present, the votes taken, the notice calling the meeting, the proof of its publication, the amount of capital actually subscribed, and by whom, all duly certified by the president and secretary of the corporation, must be filed in the offices of the secretary of state and clerk of the county where the articles of incorporation are filed. Thereafter such corporation is possessed of all the rights and powers, and is subject to all the obligations, restrictions, and limitations, as if it had been originally created with a capital stock; and provided further, that no bank in this state shall ever pay any dividend upon so-called guaranty notes, nor upon any stock, except upon the amount actually paid in money into said capital upon such stock, and any payment made in violation of this provision shall render all officers and directors consenting to the same jointly and severally liable to the depositors to the extent thereof.

History: Enacted March 29, 1878, Code Amdts. 1877-8, pp. 77-78.

1. Applied, cited, construed, referred to, etc.
2. Entire subscription not necessary.
3. Validating Act of 1870—Bank without designated capital.

1. Applied, cited, construed, referred to, etc., in: *People vs. Perrin*, 56 Cal. 345, 349 (referred to); *Dallemand vs. Odd Fellows Sav. Bank*, 74 Cal. 598, 600, 602, 16 Pac. Rep. 497 (construed and applied).

2. Subscription for entire stock provided for

in articles of incorporation is not prerequisite to incorporation of bank, or of its right to commence business as such.—*Dallemand vs. Odd Fellows Sav. Bank*, 74 Cal. 598, 602, 16 Pac. Rep. 497.

3. Validating Act March 4, 1870 (stats. 1869-70, p. 132) recognized validity of savings bank without designated capital, and state thereafter estopped to question legal existence of such corporation.—*People vs. Perrin*, 56 Cal. 345, 349.

§ 300a. COPY OF DECREE TO BE FILED WITH SECRETARY OF STATE.

Every corporation which has changed its name under the provisions of sections one thousand two hundred and seventy-five, one thousand two hundred and seventy-

six, one thousand two hundred and seventy-seven, one thousand two hundred and seventy-eight, and one thousand two hundred and seventy-nine of the Code of Civil Procedure, must file in the office of the secretary of state, a certified copy of the decree of the court, changing such name.

History: Enacted March 20, 1903, Stats. and Amdts. 1903, p. 256. In force March 20, 1903.

1. Legislative power to change name of corporation, see ante § 290 par. 12.

ARTICLE II.

BY-LAWS, DIRECTORS, ELECTORS, AND MEETINGS.

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| § 301. By-laws—[Adoption of, when, how, and by whom]. | § 312[a]. [Same]—Corporations other than for profit. |
| § 302. Directors, election of, etc.—[Notice]. | § 313. Stock, how represented. |
| § 303. By-laws, for what may provide. | § 314. Election may be postponed. |
| § 304. By-laws recorded and how amended. | § 315. Complaints, quo warranto and proceedings thereon, regarding elections—[Notice]. |
| § 305. Corporate powers and business exercised by board of directors—Quorum. | § 316. Damages for false entries. |
| § 306. Election of directors and adoption of by-laws (repealed). | § 317. Meeting by consent to be valid. |
| § 307. Election of directors, how conducted—Cumulative voting not denied. | § 318. Proceedings at meeting to be binding. |
| § 308. Organization of board of directors, etc.—[Quorum]. | § 319. Meetings, where held. |
| § 309. Dividends from surplus profits—Penalty for violation of this section—Distribution of land, water, etc. | § 320. When no provision in by-laws for regular meetings, special meetings, how called—[Notice]. |
| § 310. Removal from office of directors, etc. | § 321. Certain books to be open for inspection. |
| § 311. Justice of peace may order meeting of corporation, when. | § 321[a]. Change of principal place of business, procedure. |
| § 312. Majority of stock must be represented at elections, and a majority vote together, otherwise voidable. | § 321[b]. Stockholders' meeting, who may vote at—Proxies, void when; maximum period of; revocable. |

§ 301. **BY-LAWS—[ADOPTION OF, WHEN, HOW, AND BY WHOM].** Every corporation formed under this title must, within one month after filing articles of incorporation, adopt a code of by-laws for its government not inconsistent with the constitution and laws of this state. The assent of stockholders representing a majority of all the subscribed capital stock, or of a majority of the members, if there be no capital stock, is necessary to adopt by-laws, if they are adopted at a meeting called for that purpose; and in the event of such meeting being called, two weeks' notice of the same by advertisement in some newspaper published in the county in which the principal place of business of the corporation is located, or if none is published therein, then in a paper published in an adjoining county, must be given by order of the acting president. The written assent of the holders of two thirds of the stock, or of two thirds of the members, if there be no capital stock, shall be effectual to adopt a code of by-laws without a meeting for that purpose.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, pp. 200-201; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 344, held unconstitutional; see history, § 4 ante.

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| 1. Applied, cited, construed, referred to, etc. | 18-22. Same—Municipal—Nature. |
| 2-7. By-law—Definitions. | 23-26. Same—Same—Resolution of council. |
| 8. Same—Adoption—Generally. | 27. Same—Nature and validity—Generally. |
| 9. Same—Same—By conduct. | 28, 29. Same—Same—Must be certain and reasonable. |
| 10. Same—Same—Sufficiency. | 30-33. Same—Same—Must affect all equally. |
| 11, 12. Same—Same—Signing proposed before incorporation. | 34. Same—Same—Must stand on own validity. |
| 13-15. Same—Form—Constitution and resolution. | 35. Same—Same—Of municipal by-law. |
| 16, 17. Same—Force and effect—As to members and non-members. | 36. Same—Office of. |
| | 37, 39. Same—Power to enact—At common law. |

- 39, 40. Same—Same—Limitation upon.
 41, 42. Same—Same—Vested in whom.
 43-45. Same—Signing—Effect and necessity.
 46. Same—Uniform operation.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *McFadden vs. Board of Superv. Los Angeles Co.*, 74 Cal. 571, 574, 16 Pac. Rep. 397 (construed and applied); *Market St. R. Co. vs. Hellman*, 109 Cal. 571, 588, 42 Pac. Rep. 225 (referred to with other sections); *Vercoutere vs. Golden State Land Co.*, 116 Cal. 410, 414, 415, 48 Pac. Rep. 375 (construed and applied); *Wells vs. Black*, 117 Cal. 157, 162, 59 Am. St. Rep. 162, 48 Pac. Rep. 1090, 37 L. R. A. 619 (construed and applied).

2. DEFINITION—By-law is rule or law of corporation for its government.—*Drake vs. Hudson R. Co.*, 7 Barb. (N. Y.) 529.

3. All regulations affecting its business, which do not operate upon third persons, nor in any way affect their rights, are properly denominated by-laws of the corporation.—*State vs. Overton*, 24 N. J. L. (4 Zab.) 435, 441, 61 Am. Dec. 671.

4. Any rule of permanent character which corporation is authorized to make is by-law.—*Gosling vs. Veley*, 19 L. J. N. S. Q. B. 135.

5. Rules or regulations of corporations which operate upon and affect rights of others are not, properly speaking, by-laws of the corporation.—See *Morris & E. R. Co. vs. Ayres*, 29 N. J. L. (5 Dutch.) 393, 80 Am. Dec. 215; *State vs. Overton*, 24 N. J. L. (4 Zab.) 435, 441, 61 Am. Dec. 671.

6. By-law is subordinate rule for the government of corporation or association.—*Kirkpatrick vs. United Presb. Church*, 63 Iowa 372, 19 N. W. Rep. 272.

7. "By-law proper is subordinate rule for government of body passing it. It may be a rule subordinate to charter or articles of incorporation, but it may well be rule subordinate to mere articles of association, such as mere unincorporate clubs and societies adopt for their government."—*Kirkpatrick vs. United Presb. Church*, supra.

By-law—Distinguished from ordinance.—See para. 18-22 this note.

8. ADOPTION OR PASSAGE OF BY-LAW is not an assumption of corporate powers.—*Kirkpatrick vs. United Presb. Church*, 63 Iowa 372, 19 N. W. Rep. 272.

As to power to adopt or make by-laws, see para. 37-42 this note.

9. May be adopted by company's conduct and acts and conduct of its officers as well as by an express vote or adoption in meeting.—*Bank of Holly Springs vs. Pinson*, 58 Miss. 421, 38 Am. Rep. 330, 335.

See post § 304 and note.

10. Sufficient adoption is established where it is shown that claimed constitution and by-laws of a church were written in record-book by then minister of church; that they had always been regarded by church as the constitution and by-laws thereof; and that church had always acted on them as such, although there is no record or evidence of direct vote of congregation adopting them.—*Baker vs. Duckert*, 79 Cal. 365, 372-374, 21 Pac. Rep. 764.

11. Signing proposed by-laws by large number of prospective stockholders of corporation to be formed is not adoption of such by-laws by corporation thereafter formed, within provisions of above section of code.—*Vercoutere vs. Golden State Land Co.*, 116 Cal. 410, 415, 48 Pac. Rep. 375.

12. But such signature constitutes agreement which may be enforced by corporation when formed against persons so signing.—*Vercoutere vs. Golden State Land Co.*, supra; *West vs. Crawford*, 80 Cal. 19, 24-33, 21 Pac. Rep. 1123.

13. FORM—Constitution of corporation is simply by-law under inappropriate name; it is in no sense a charter; charters are not created by act of corporation or association, but are granted by the sovereign power of the state.—*Supreme Lodge K. of P. vs. Knight*, 117 Ind. 439, 20 N. E. Rep. 479, 3 L. R. A. 409.

14. Need not be in writing or adopted by vote of society; they may be adopted by the company's conduct, and conduct of its officers.—*Bank of Holly Springs vs. Pinson*, 58 Miss. 421, 38 Am. Rep. 330, 335. See *State vs. Jersey City*, 27 N. J. L. (3 Dutch.) 493.

15. Resolution is legislative act as much as by-law formally adopted by vote of members of governing body.—See *San Francisco Gas Co. vs. San Francisco*, 6 Cal. 190; *State vs. Jersey City*, 27 N. J. L. (3 Dutch.) 493. *Sower vs. Philadelphia*, 35 Pa. St. 231.

16. FORCE AND EFFECT—As to members.—*Binding on members of corporation as legislative act.*—*Bank of Holly Springs vs. Pinson*, 58 Miss. 421, 38 Am. Rep. 330, 335. See *San Francisco Gas Co. vs. San Francisco*, 6 Cal. 190; *Sower vs. Philadelphia*, 35 Pa. St. 231.

See 5 Am. & Eng. Encyc. of L. (2d ed.) 100.

17. As to third parties.—By-laws of private corporations are not legislative enactments so far as third persons are concerned. They are mere regulations of corporations for control and management of their own affairs. They are self-imposed rules resulting from agreement between company and its members to conduct its business in a particular way.—*Bank of Holly Springs vs. Pinson*, 58 Miss. 421, 38 Am. Rep. 330, 335.

See post § 303 para. 27-29; also 5 Am. & Eng. Encyc. of L. (2d ed.) 101.

18. SAME—MUNICIPAL—By-law is an inappropriate name sometimes used to denote an ordinance of municipal corporation. When so improperly used it indicates an ordinance or regulation of municipal corporation which, as one of its legal incidents, it has power to make with respect to its own members, or its own concerns.—*Commonwealth vs. Turner*, 55 Mass. (1 Cush.) 493.

See note 34 Am. Dec. 631.

19. Is rule obligatory over particular district or territory.—*Gosling vs. Veley*, 19 L. J. N. S. Q. B. 135.

20. Is an order of permanent character, prescribing rule of conduct or government.—*Blanchard vs. Bissell*, 11 Ohio St. 96, 103.

21. By-law of municipal corporation is rule of conduct, not only for all the members, but for all persons while within jurisdiction of

municipality.—*San Francisco Gas Co. vs. San Francisco*, 6 Cal. 190. *Ala. Mayor of Mobile vs. Yuille*, 3 Ala. 137, 36 Am. Dec. 441. *Ga. Floyd vs. Eatonton*, 14 Ga. 354, 58 Am. Dec. 559. *Ill. Ashton vs. Ellsworth*, 48 Ill. 299. *N. Y. Tanner vs. Albion*, 5 Hill 121, 40 Am. Dec. 337. *Ohio. Blanchard vs. Bissell*, 11 Ohio St. 96.

22. **Municipal ordinances** are laws passed by governing body of municipal corporation for regulation of affairs of the corporation, but term "by-law" is often used interchangeably for and as synonymous with ordinance.—*Bills vs. City of Goshen*, 117 Ind. 221, 20 N. E. Rep. 115, 117, 3 L. R. A. 261.

As to mature and validity of municipal ordinance or by-law, see par. 35 this note.

23. **Same**—Resolution of council is an order of special and temporary character.—*Blanchard vs. Bissell*, 11 Ohio St. 96, 103.

24. **ORDER PRESCRIBING RULE OF CONDUCT** or government may be by resolution of council, and not by ordinance, in absence of any specific requirement in charter.—*State vs. Jersey City*, 27 N. J. L. (3 Dutch.) 493.

25. **RESOLUTION IS LEGISLATIVE** act and has same effect as an ordinance in all matters pertaining to government and control of municipal corporation, and in all matters decision of which is committed to municipal council.—*San Francisco Gas Co. vs. San Francisco*, 6 Cal. 190. *Ark. Arkadelphia Lumber Co. vs. Arkadelphia*, 56 Ark. 370, 372, 19 S. W. Rep. 1053, 1054. *Conn. State vs. Barbour*, 53 Conn. 76, 55 Am. Rep. 65, 22 Atl. Rep. 686. *Ind. Martindale vs. Palmer*, 52 Ind. 411, 414; *City of Crawfordsville vs. Braden*, 130 Ind. 149, 30 Am. St. Rep. 214, 28 N. E. Rep. 849, 14 L. R. A. 268. *Iowa. Merchants' Union Barb-Wire Co. vs. Chicago, B. & Q. Ry. Co.*, 70 Iowa 105, 108, 28 N. W. Rep. 494, 495. *Kan. Smalley vs. Yates*, 36 Kan. 519, 524, 13 Pac. Rep. 845, 848. *La. First Municipality vs. Cutting*, 4 La. Ann. 335. *Neb. McGavock vs. City of Omaha*, 40 Neb. 64, 82, 58 N. W. Rep. 543, 549. *N. Y. Nicoll vs. Sands*, 131 N. Y. 19, 23, 29 N. E. Rep. 818, 819; *N. J. State vs. Jersey City*, 27 N. J. L. (3 Dutch.) 493; *Green vs. City of Cape May*, 41 N. J. L. (12 Vr.) 45, 47, 48; *State ex rel. Butler vs. Passaic*, 44 N. J. L. (15 Vr.) 171; *Courter vs. Board Health Newark*, 54 N. J. L. (25 Vr.) 325, 329, 23 Atl. Rep. 949; *Brady vs. City of Bayonne*, 57 N. J. L. (28 Vr.) 379, 30 Atl. Rep. 968. *Ohio. State vs. Henderson*, 38 Ohio St. 644. *Pa. Sower vs. City of Philadelphia*, 35 Pa. St. 231. *Tex. City of Galveston vs. Morton*, 58 Tex. 415. *Wis. City of Green Bay vs. Brauns*, 50 Wis. 204, 207, 6 N. W. Rep. 503, 504. *Fed. Board Education of Atchison vs. De Kay*, 143 U. S. 591, 595, 598, 599, bk. 37 L. ed. 573, 13 Sup. Ct. Rep. 706; *Illinois Trust & Sav. Bank vs. Arkansas City*, 76 Fed. Rep. 271, 286, 34 L. R. A. 518.

26. "It is common learning that where a statute authorizes action by the legislative body of a city, and does not require such action to be taken by ordinance, it may be taken by a vote upon a motion, or by the passage of a resolution."—*Illinois Trust & Sav. Bank vs. Arkansas City*, 76 Fed. Rep. 271, 286, 34 L. R. A. 518.

27. **SAME—NATURE AND VALIDITY.**—A by-law is legislative act of governing body of

the corporation.—*San Francisco Gas Co. vs. San Francisco*, 6 Cal. 190; *Bank of Holly Springs vs. Pinson*, 58 Miss. 421, 38 Am. Rep. 330; *Sower vs. Philadelphia*, 35 Pa. St. 231, 235.

As to what by-law may provide, see post § 303 and note.

28. **Must be certain in its provisions.**—*Goddard vs. Merchants' Exch.*, 9 Mo. App. 290; *Budd vs. Multnomah St. R. Co.*, 15 Oreg. 432, 3 Am. St. Rep. 169, 15 Pac. Rep. 659.

29. **Must be reasonable in its provisions.**—*N. Y. Village of Buffalo vs. Webster*, 10 Wend. 99; *Stokes vs. New York*, 14 Wend. 87; *Mayor of Hudson vs. Thorne*, 7 Paige Ch. 261. *Oreg. Budd vs. Multnomah St. R. Co.*, 15 Oreg. 413, 432, 3 Am. St. Rep. 169, 15 Pac. Rep. 659. *Pa. Commissioners, etc. vs. North Liberties Gas Co.*, 12 Pa. St. 318.

See par. 34 this note.

30. **Must be directed to all and affect all within sphere of its operation.**—*Goddard vs. Merchants' Exch.*, 9 Mo. App. 290; *Budd vs. Multnomah St. R. Co.*, 15 Oreg. 413, 3 Am. St. Rep. 169, 15 Pac. Rep. 659.

31. **Must be for benefit of all.**—Resolution directed against single stockholder is not a by-law, as a by-law must be directed to all within sphere of its operation and must operate equally.—*Budd vs. Multnomah St. R. Co.*, 15 Oreg. 413, 3 Am. St. Rep. 169, 15 Pac. Rep. 659. See *Goddard vs. Merchants' Exch.*, 9 Mo. App. 290.

32. **Must operate equally upon all members of corporation.**—*Mich. People ex rel. Stewart vs. Young Men's Father Matthew T. A. B. Soc.*, 41 Mich. 67, 1 N. W. Rep. 931. *N. Y. People ex rel. Muir vs. Throop*, 12 Wend. 183, 186 (bank directors making by-law excluding one of their number from inspection of books). *Oreg. Budd vs. Multnomah St. R. Co.*, 15 Oreg. 413, 432, 3 Am. St. Rep. 169, 15 Pac. Rep. 659.

33. **Resolution especially directed against interests of single stockholder is not valid by-law.**—*People ex rel. Muir vs. Throop*, 12 Wend. (N. Y.) 183, 186; *Budd vs. Multnomah St. R. Co.*, 15 Oreg. 413, 432, 3 Am. St. Rep. 169, 174, 15 Pac. Rep. 659.

34. "All corporation by-laws must stand on their own validity, and not on any dispensation granted to members. They cannot be subjected to any conditions which do not apply to all alike, and cannot be compelled to receive as matter of grace anything which is matter of right. Neither, on the other hand, should there be personal exemptions of general nature from any valid regulations that bind the mass of corporators."—*People ex rel. Stewart vs. Young Men's Father Matthew T. A. B. Soc.*, 41 Mich. 67, 1 N. W. Rep. 931.

35. **SAME—SAME—MUNICIPAL.**—Must be reasonable, in harmony with general laws, clearly within authority of municipality, and adapted to purposes of corporation. — *Ark. Waters vs. Leech*, 3 Ark. 110. *Conn. Hayden vs. Noyes*, 5 Conn. 391; *Welch vs. Hotchkiss*, 39 Conn. 140, 12 Am. Rep. 383. *Ga. Home Ins. Co. vs. Augusta*, 50 Ga. 530. *Ill. Peoria vs. Calhoun*, 29 Ill. 817; *Tugman vs. Chicago*, 73 Ill. 405; *Cairo vs. Bross*, 101 Ill. 475. *Iowa. Burlington vs. Bumgardner*, 42 Iowa 673. *Mass.*

Commonwealth vs. Worcester, 20 Mass. (3 Pick.) 462; Boston vs. Shaw, 42 Mass. (1 Met.) 130; Pedrick vs. Bailey, 78 Mass. (12 Gray) 161. Minn. St. Paul vs. Colter, 12 Minn. 41, 90 Am. Dec. 278; St. Paul vs. Traeger, 25 Minn. 248, 33 Am. Rep. 462. N. H. State vs. Freeman, 38 N. H. 428. N. J. State, North Hudson Co. R. vs. Hoboken, 41 N. J. L. (12 Vr.) 71; Muhlenbrinck vs. Commissioners, 42 N. J. L. (13 Vr.) 364, 36 Am. Rep. 518. N. Y. Mayor etc. of New York vs. Second Ave. R. Co., 32 N. Y. 261; Polinsky vs. People, 73 N. Y. 65; People vs. Mulholland, 82 N. Y. 824, 37 Am. Rep. 568; Boom vs. City of Utica, 2 Barb. 104; Dunham vs. Rochester, 5 Cow. 462; Clintonville vs. Keeting, 4 Den. 341; Canajoharie vs. Buel, 43 How. Pr. 155; Bush vs. Seabury, 8 John. 418; Hudson vs. Thorne, 7 Paige Ch. 261; Stokes vs. New York, 14 Wend. 87. Ohio Marietta vs. Fearing, 4 Ohio St. 427; Collins vs. Hatch, 18 Ohio St. 523, 51 Am. Dec. 465. Pa. Commissioners etc. vs. North Liberties Gas Co., 12 Pa. St. 318; Johnson vs. Philadelphia, 60 Pa. St. 445. Tenn. Austin vs. Murray, 16 Pick. 121. Eng. Gosling vs. Veley, 19 L. J. N. S. Q. B. 135.

See par. 29 this note.

As to reasonableness and validity of municipal ordinances, see note 16 Am. Dec. 191-198; 34 Am. Dec. 627-643; 35 Am. Rep. 702-703; 69 Am. St. Rep. 304; note by Irving Browne to 32 N. Y. 261 (Ann. Ed. N. Y. Rep.); 21 Am. & Eng. Encyc. of L. (2d ed.) 976-995.

36. SAME—OFFICE OF BY-LAW is to regulate conduct and define duties of members toward corporation and between each other.—Flint vs. Pierce, 99 Mass. 68, 96 Am. Dec. 691.

37. SAME—POWER TO ENACT BY-LAWS is inherent in every corporation as an incident of its existence and is a continuous power.—Supreme Lodge K. of P. vs. Knight, 117 Ind. 489, 20 N. E. Rep. 479, 483, 3 L. R. A. 409; Leggett vs. New Jersey M. & B. Co., 1 N. J. Eq. (1 Sax.) 541, 23 Am. Dec. 728.

38. Power to make by-laws is possessed at common law, and when not conferred by charter, is power incident to every corporation aggregate conferred by the act creating it.—People ex rel. Muir vs. Throop, 13 Wend. (N. Y.) 183, 186.

39. Limitation upon power to make by-laws is limited by the nature of corporation and laws of country. They must not be contrary to law, good morals, or public policy.—People's Home Sav. Bank vs. Superior Court San Francisco,

104 Cal. 694, 651-653, 43 Am. St. Rep. 147, 38 Pac. Rep. 452, 29 L. R. A. 844; Sayre vs. Louisville U. B. Assoc., 1 Duv. (Ky.) 143, 85 Am. Dec. 613.

As to limitation upon power to enact by-laws, see monographic notes 69 Am. Dec. 671-678, 35 Am. Dec. 817-822, 43 Am. St. Rep. 152-158.

40. Power to enact by-law is limited to interests and objects enumerated in charter conferring upon corporation power to enact by-laws for certain specified purposes.—Ireland vs. Globe M. & R. Co., 19 R. I. 180, 61 Am. St. Rep. 756, 32 Atl. Rep. 921, 29 L. R. A. 429.

41. Vested in whom.—At common law power to make by-laws is incident to whole body of every corporation. See Ala. Supreme Commandery K. G. R. vs. Ainsworth, 71 Ala. 436, 46 Am. Rep. 332, 334. Conn. State vs. Tudor, 5 Day 329, 5 Am. Dec. 162. Md. Ancoasta Tribe No. 12 vs. Murbach, 18 Md. 91, 71 Am. Dec. 625, 626 (applied to beneficial societies). N. J. Taylor vs. Griswold, 14 N. J. L. (2 Gr.) 227, 27 Am. Dec. 33. Wis. State ex rel. Cappel vs. Chamber of Com. Milwaukee, 47 Wis. 670, 3 N. E. Rep. 760, 767, 768. Eng. King vs. Westwood, 4 Barn. & C. 781, 10 Eng. C. L. 453; King vs. Westwood, 7 Bing. 1, 20 Eng. C. L. 1; Dunstan vs. Imperial G. L. & C. Co., 3 Barn. & Ad. 125, 23 Eng. C. L. 42.

See authorities cited in note 5 Am. & Eng. Encyc. of L. (2d ed.) 88.

42. Under statute vested in the board of directors or other governing body, in some instances, and not in members of corporation.—Bank of Holly Springs vs. Pinson, 58 Miss. 421, 38 Am. Rep. 330, 335.

43. SAME—SIGNING proposed by-laws of a corporation to be formed,—effect of,—as to, see pars. 11, 12 this note.

44. Signing regularly adopted by-laws under this section is not necessary to bind stockholders.—McFadden vs. Board of Superv. Los Angeles Co., 74 Cal. 571, 574, 16 Pac. Rep. 397.

45. EVERY MEMBER OF A CORPORATION IS PRESUMED TO KNOW its by-laws, and is bound to obey them, unless they are illegal or require the performance of acts forbidden by law.—People ex rel. Burton vs. St. George's Soc., 28 Mich. 261; Mitchell vs. Lycoming Mut. Ins. Co., 51 Pa. St. 402.

46. Uniform operation—By-law must operate upon all alike.—People ex rel. Muir vs. Throop, 13 Wend. (N. Y.) 183, 186.

See pars. 30-33 this note.

§ 302. DIRECTORS, ELECTION OF, ETC.—[NOTICE]. The directors of a corporation must be elected annually by the stockholders or members, and if no provision is made in the by-laws for the time of election, the election must be held on the first Tuesday in June. Notice of such election must be given as prescribed in section three hundred and one.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 345, held unconstitutional; see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXVI, p. 557.

1. Applied, cited, construed, referred to, etc.
2. Construction of similar statute.
3. Notice of election.

4. Notice of meeting—Annual meeting.
5. Same—By-law as to.
6. Same—Same—Depriving stockholders of right by.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Wickersham vs. Brittan*, 91 Cal. 34, 36, 28 Pac. Rep. 792, 29 Id. 51, 15 L. R. A. 106 (referred to with other sections).

2. CONSTRUCTION OF SIMILAR STATUTE.—Statute providing for election of directors within sixty days after an appointed time, where for any reason election is not held on appointed day, is directory merely, and does not invalidate an election held after time stated; in other words, the corporation does not die because of failure to elect directors, nor is the omission an irreparable one.—*Beardsley vs. Johnson*, 1 N. Y. Supp. 608, 609; *Vandenberg vs. Broadway R. Co.*, 29 Hun (N. Y.) 348 (construing N. Y. Code Civ. Proc. § 431).

3. NOTICE OF ELECTION OF VESTRYMEN is requisite to its validity.—*Dahl vs. Palache*, 48 Cal. 248, 253, 9 Pac. Rep. 94.

4. NOTICE OF MEETINGS.—Annual meeting for election of trustees or directors of corporation cannot, unless all stockholders be actually present and consenting, in person or by proxy, be legally held until after notice of time and place thereof first be given in some authentic and legal mode.—*San Buenaventura Com. Min.*

& Mfg. Co. vs. Vassault, 50 Cal. 534, 537. See *Thompson vs. Williams*, 76 Cal. 153, 155, 9 Am. St. Rep. 187, 18 Pac. Rep. 153; *Smith vs. Dorn*, 96 Cal. 73, 82-83, 30 Pac. Rep. 1024; *Hill vs. Rich Hill Coal Min. Co.*, 119 Mo. 9, 26, 24 S. W. Rep. 228.

5. By-law providing for annual meeting of stockholders on certain day is insufficient as notice, unless it specify the hour of such day at which meeting is to be held.—*San Buenaventura Com. Min. & Mfg. Co. vs. Vassault*, 50 Cal. 534, 537. See *Smith vs. Dorn*, 96 Cal. 73, 82, 30 Pac. Rep. 1024.

6. Same—Defining rights by.—Statute gives stockholders of railroad corporations power to elect directors, and corporation cannot deprive them of this right through by-law or otherwise.—*Brewster vs. Hartley*, 37 Cal. 15, 24, 99 Am. Dec. 237.

As to validity, scope, effect, and construction of by-laws, see post § 304 note par. 2.

Mode of electing directors, and number of votes allowed each stockholder.—See post § 307 and note.

Postponing election.—See post §§ 312, 314 and notes.

§ 303. BY-LAWS, FOR WHAT MAY PROVIDE. A corporation may, by its by-laws, where no other provision is specially made, provide for:

1. The time, place, and manner of calling and conducting its meetings, and may dispense with notice of all regular meetings of stockholders or directors.
2. The number of stockholders or members constituting a quorum.
3. The mode of voting by proxy.
4. The qualifications and duties of directors, and also the time of their annual election, and the mode and manner of giving notice thereof.
5. The compensation and duties of officers.
6. The manner of election and tenure of office of all officers other than the directors; and,
7. Suitable penalties for violations of by-laws, not exceeding in any case one hundred dollars for any one offense.
8. The newspaper in which all notices of the meetings of stockholders or board of directors, notice of which is required, shall be published, which must be some newspaper published in the county where the principal place of business of the corporation is located, or if none is published therein, then in a newspaper published in an adjoining county; provided, that when the by-laws prescribe the newspaper in which said publication shall be made, if from any cause at the time any publication is desired to be made, the publication of such newspaper shall have ceased, the board of directors may, by an order entered on the records of the corporation, direct the publication to be made in some other newspaper published in the county, or if none is published therein, then in an adjoining county.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 201; March 19, 1889, Stats. and Amdts. 1889, p. 365; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 345, held unconstitutional; see history, § 4 ante.

I. In General.

1. Applied, cited, construed, referred to, etc.
2. Court's power to interfere with or overthrow by-laws.

3-5. Water company's by-law may limit right to use water to stockholders.

II. Requisites and Validity.

6. Requisites—Conformity to charter.

- 7-9. Same—Conformity to law.
- 10. Same—Need not be in writing.
- 11, 12. Same—Reasonableness.
- 13. Same—Same—Determined by court.
- 14. Same—Subordination to constitution and laws.
- 15. Validity of by-laws—Authorizing president to act as inspector.
- 16-18. Same—Creating lien on stock.
- 19. Same—Court determines.
- 20. Same—Providing for surrender or withdrawal of stock.
- 21. Same—Relieving stockholders from liability.
- 22. Same—Restraint of trade.
- III. Force and Effect.
- 23, 24. As law of corporation.
- 25, 26. As measure of stockholder's rights and liabilities.
- 27-29. As to third persons—Servants.
- 30, 31. Notice of by-laws.
- 32, 33. Same—Usage of bank—Agreement of stockholders.
- 34, 35. Retroactive operation.
- IV. Construction of Various Subdivisions of Section.
- 36. Subdivision three—At common law.
- 37, 38. Same—Under statute.
- 39, 40. Same—As to nature and extent of power granted.
- 41. Same—Same—Prohibiting or limiting right.
- 42. Subdivision four—Number of directors.
- 43. Subdivision five—Authority of officers.
- 44, 45. Subdivision six—Election of officers.

I. IN GENERAL.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Wickersham vs. Brittan*, 93 Cal. 34, 33, 28 Pac. Rep. 792, 29 Id. 51, 15 L. R. A. 106 (construed and applied to election of officers); *Smith vs. Dorn*, 96 Cal. 73, 82, 30 Pac. Rep. 1024 (construed and applied to directors' meetings); *People's Home Sav. Bank vs. Superior Court San Francisco*, 104 Cal. 649, 653, 654, 43 Am. St. Rep. 147, 38 Pac. Rep. 452, 29 L. R. A. 844 (construed and applied to voting by proxy); *Market St. R. Co. vs. Hellman*, 109 Cal. 371, 599, 42 Pac. Rep. 225 (construed and applied to vote by proxy); *Pacific Bank vs. Stone*, 121 Cal. 202, 208, 53 Pac. Rep. 634 (referred to with other sections); *Curtin vs. Salmon River H. G. M. & D. Co.*, 130 Cal. 345, 347, 80 Am. St. Rep. 132, 62 Pac. Rep. 552 (referred to with other sections).

2. **COURT'S POWER TO INTERFERE WITH OR OVERTHROW BY-LAWS** exists only when it is shown that there is an abuse of power or that the by-law is so unreasonable as to be void.—*Supreme Lodge K. of P. vs. Knight*, 117 Ind. 489, 20 N. E. Rep. 479, 3 L. R. A. 409.

As to validity, scope, effect, and construction of by-law, see monographic notes 35 Am. Dec. 617-622; 43 Am. St. Rep. 152-158.

3. **WATER COMPANY—Directors may fix rental when.**—Where waters are acquired and held to be used on lands of stockholders, and not for sale, distribution, and rental, the company may adopt by-laws limiting right to use water of corporation exclusively to stock-

holders of company and fix rental thereof.—*McFadden vs. Board of Superv. Los Angeles Co.*, 74 Cal. 571, 573, 16 Pac. Rep. 397.

4. Under such a condition provisions of constitution, Art. XIV, § 1, or Act March 12, 1885 (Stats. 1885, p. 95), do not authorize board of supervisors to fix and determine rate at which waters of the corporation may be sold, rented, and distributed.—*McFadden vs. Board of Superv. Los Angeles Co.*, supra. See *Loud vs. Pomona L. & W. Co.*, 153 U. S. 564, 583, bk. 38 L. ed. 822, 830, 14 Sup. Ct. Rep. 928; *Lanning vs. Osborne*, 76 Fed. Rep. 319, 338.

5. **Distinguished:** *Combs vs. Agricultural Ditch Co.*, 17 Colo. 146, 151, 31 Am. St. Rep. 275, 28 Pac. Rep. 966.

As to adoption of by-laws, see ante § 301 and note.

As to amendment of by-laws, see post § 304 and note.

As to by-laws of benevolent corporations, see post § 599 and note.

As to recording by-laws, see post § 304 and note.

As to repeal of by-laws, see post § 304 and note.

As to right to provide for issuing stock certificates prior to their full payment, see post § 323 and note.

As to right to provide for disposition of its own stock held by the corporation, see post § 344 and note.

II. REQUISITES AND VALIDITY.

6. **REQUISITES—CONFORMITY TO CHARTER.**—By-laws must be conformable to and subordinate to the corporate charter.—*St. Luke's Church vs. Mathews*, 4 Desau. (S. C.) L. 576, 6 Am. Dec. 619.

7. **Conformity to law.**—Any rule or regulation adopted under the form of by-law which contravenes provisions of an existing law is invalid, and has none of elements of a by-law.—*Vercoutere vs. Golden State Land Co.*, 116 Cal. 410, 414-415, 48 Pac. Rep. 375.

See par. 14 this note.

8. **Exercise of corporate power being regulated by statute, corporation cannot, by by-law, or otherwise, change mode of exercising that power.**—*Brewster vs. Hartley*, 37 Cal. 15, 24, 99 Am. Dec. 237 (e. g. take away from the stockholders the power to elect directors).

See par. 16 this note.

9. **By-laws to be valid must be reasonable and consistent with laws of state and promotive of interests of corporation; they must not be unequal, oppressive, or vexatious.**—*People ex rel. Muir vs. Throop*, 12 Wend. (N. Y.) 183, 186.

10. **SAME—NEED NOT BE IN WRITING;** may be by course of dealing or resolution of board.—*Bank of Holly Springs vs. Pinson*, 58 Miss. 421, 38 Am. Rep. 330, 335.

See ante § 301 note pars. 14, 15.

11. **SAME—REASONABLENESS OF.**—Corporations have no power to create by-laws that are unreasonable in practical application.—*People's Home Sav. Bank vs. Superior Court San Francisco*, 104 Cal. 649, 652, 654, 43 Am. St. Rep. 147, 38 Pac. Rep. 452, 29 L. R. A. 844

(a by-law providing there shall be no vote by proxy, when statute provides for making of proxies, is unreasonable and void).

As to reasonableness of amendatory or repealing by-law, see post § 304 note par. 29.

12. By-laws must be reasonable for corporate purpose, and always within charter limits.—*People ex rel. McIlhany vs. Chicago Live Stock Ex.*, 170 Ill. 556, 62 Am. St. Rep. 404, 48 N. E. Rep. 1062, 39 L. R. A. 373; *St. Luke's Church vs. Mathews*, 4 Desau. (S. C.) 576, 6 Am. Dec. 619.

13. Determination of reasonableness of by-laws and their consistency with law is question solely for court, and not for jury.—*State vs. Overton*, 24 N. J. L. (4 Zab.) 441, 61 Am. Dec. 671; *People ex rel. Muir vs. Throop*, 12 Wend. (N. Y.) 183, 186.

See par. 17 this note.

14. Subordination to constitution and laws.—By-laws must be in subordination of constitution and laws of state and not interfere with its policy nor be hostile to general welfare.—*People ex rel. McIlhany vs. Chicago Live Stock Ex.*, 170 Ill. 556, 62 Am. St. Rep. 404, 48 N. E. Rep. 1062, 39 L. R. A. 373.

See pars. 7-9 this note.

15. VALIDITY OF BY-LAWS.—Authorizing president to act as inspector.—Power to enact by-laws gives power to authorize president of corporation to act as inspector of election and to regulate ballots or tickets used in such election.—*Commonwealth vs. Woelper*, 3 Serg. & R. (Pa.) 29, 8 Am. Dec. 628.

16. Creating lien on stock.—Power to make by-laws does not confer power to create or declare lien upon stock by by-laws, nor refuse to permit transfer until indebtedness of stockholder to company be paid.—*Anglo-Cal. Bank vs. Grangers' Bank*, 63 Cal. 359, 365. See *Driscoll vs. West Bradley & C. M. Co.*, 59 N. Y. 96, 102, 103; *Bullard vs. National Eagle Bank*, 85 U. S. (18 Wall.) 539, 591, bk. 21 L. ed. 923.

See para. 7-9, 30 this note.

17. No lien at common law on stock in favor of corporation as against stockholder indebted to it.—*People ex rel. Bosqui vs. Crockett*, 9 Cal. 112, 115; *Anglo-Cal. Bank vs. Grangers' Bank*, 63 Cal. 359. *Ky. Dana vs. Brown*, 1 J. J. Marsh. 304. *Mass. Sargent vs. Franklin Ins. Co.*, 25 Mass. (8 Pick.) 90, 19 Am. Dec. 306; *Massachusetts Iron Co. vs. Hooper*, 61 Mass. (7 Cush.) 183. *N. Y. Driscoll vs. West Bradley & C. Mfg. Co.*, 59 N. Y. 96, 102. *N. C. Heart vs. State*, 2 Dev. Eq. 111. *Pa. Steamship Dock Co. vs. Heron*, 52 Pa. St. 280.

18. Lien by charter or by-law may exist.—See *Conn. Vansands vs. Middlesex Co. Bank*, 26 Conn. 144. *Del. McDowell vs. Bank*, 1 Harr. 27. *Ky. German Sav. Bank vs. Jefferson*, 1 Bush 326. *Md. Reese vs. Bank of Commerce*, 14 Md. 271, 74 Am. Dec. 536. *Mo. St. Louis Perpetual Ins. Co. vs. Goodfellow*, 9 Mo. 149; *Mechanics' Bank vs. Merchants' Bank*, 45 Mo. 513, 100 Am. Dec. 388. *N. Y. Arnold vs. Suffolk Bank*, 27 Barb. 424; *Leggett vs. Bank of Sing Sing*, 24 N. Y. 283 (Allen, J., dissenting, contingent liability as indorser is "debt due" within such a by-law). *Fed. Brent vs. Bank of Wash.*, 35 U. S. (10 Pet.) 596, bk. 9 L. ed. 547; *In re Dunkerson*, 4 Biss. C. C. 277, 8 Fed.

Cas. 54; Pendergast vs. Bank, 2 Sawy. C. C. 108, 116, 19 Fed. Cas. 135.

As to lien of corporation on stock, see notes 11 Am. Dec. 531; 40 Am. St. Rep. 405; 43 Am. St. Rep. 153; 57 Am. St. Rep. 388, 25 L. R. A. 48.

19. Court determines.—Validity of by-law is purely question of law.—*Morris & E. R. Co. vs. Ayres*, 29 N. J. L. (5 Dutch.) 393, 80 Am. Dec. 215, 217; *State vs. Overton*, 24 N. J. L. (4 Zab.) 441, 61 Am. Dec. 671.

See par. 13 this note.

20. Providing for surrender or withdrawal of stock.—By-law of corporation incorporated under general provision of title I, part IV of Civil Code, providing that stockholder may surrender his stock and withdraw from corporation, etc., is invalid, as such corporations are forbidden to withdraw any part of their capital stock.—*Vercoutere vs. Golden State Land Co.*, 116 Cal. 410, 414, 415, 48 Pac. Rep. 375.

21. Relieving stockholders from liability.—By-law of savings bank relieving stockholders from their constitutional liability, contravenes constitutional provision and has no binding force upon depositors.—*Wells vs. Black*, 117 Cal. 157, 162, 163, 59 Am. St. Rep. 162, 48 Pac. Rep. 1090, 37 L. R. A. 619.

22. Restraint of trade.—By-laws in restraint of trade are void. III. *People ex rel. McIlhany vs. Chicago Live Stock Ex.*, 170 Ill. 556, 62 Am. St. Rep. 404, 48 N. E. Rep. 1062, 39 L. R. A. 373. *Ky. Huston vs. Reutlinger*, 91 Ky. 333, 34 Am. St. Rep. 225, 15 S. W. Rep. 867. *N. Y. People ex rel. Gray vs. Medical Soc. of Erie*, 24 Barb. 570; *Stanton vs. Allen*, 5 Den. 434, 49 Am. Dec. 232; *People vs. Fisher*, 14 Wend. 9, 23 Am. Dec. 501. *Pa. Morris Run Coal Co. vs. Barclay Coal Co.*, 68 Pa. St. 173, 8 Am. Rep. 159. *Eng. Tailors of Ipswich*, 11 Co. Rep. 53; *Rex vs. Wardens*, 7 Durnf. & E. (7 T. R.) 540; *Gunsmiths' Soc. vs. Fell*, Willes 384.

III. FORCE AND EFFECT.

23. AS LAW OF CORPORATION.—By-law is binding on the company and its members as legislative act.—*Bank of Holly Springs vs. Pinson*, 58 Miss. 421, 33 Am. Rep. 330, 335.

See ante § 301 note pars. 15, 16.

24. By-law is as much law of corporation as though its provisions were part of the charter.—*Kent vs. Quicksilver Min. Co.*, 78 N. Y. 159, 179. See *Presbyterian Church vs. City of New York*, 5 Cow. (N. Y.) 538.

25. AS MEASURE OF STOCKHOLDERS' RIGHTS AND LIABILITIES.—Persons entering association must acquaint themselves with its by-laws, for they contribute to admeasurement of their rights, duties, and liabilities.—*Ind. Bauer vs. Samson Lodge*, 102 Ind. 262, 1 N. E. Rep. 571; *Supreme Lodge K. of P. vs. Knight*, 117 Ind. 439, 20 N. E. Rep. 479, 3 L. R. A. 409. *Iowa. Simeral vs. Dubuque M. F. Ins. Co.*, 18 Iowa 319; *Coles vs. Iowa S. M. Ins. Co.*, 18 Iowa 425. *Md. Osceola Tribe vs. Schmidt*, 57 Md. 98. *Mich. People ex rel. Burton vs. St. George's Soc.*, 23 Mich. 261. *Mo. Coleman vs. Knights of Honor*, 18 Mo. App. 189. *Pa. Mitchell vs. Locomot. Mut. Ins. Co.*, 51 Pa. St. 402; *Sperry's Appeal*, 116 Pa. St. 391, 9 Atl. Rep. 478. *Vt. Fugure vs. Mutual Soc. St. J.*, 46 Vt. 368.

36. It is not some by-law or one by-law of which member must take notice, but he must take notice of all which affect his rights or interests.—*Supreme Lodge K. of P. vs. Knight*, 117 Ind. 289, 20 N. E. Rep. 479, 8 L. R. A. 409; *Poultney vs. Buchanan*, 31 Hun (N. Y.) 49.

37. As to third persons.—By-laws of private corporation do not affect third persons.—*State vs. Overton*, 24 N. J. L. (4 Zab.) 441, 61 Am. Dec. 671.

See ante §301 note par. 17; see also monographic note of B. A. Rich in 25 L. R. A. 48.

38. By-laws of bank declaring that all mistakes must be corrected in bank cannot affect interest of third persons and defeat their just claims.—*Mechanics & F. Bank vs. Smith*, 19 John. (N. Y.) 115, 124. See *Manhattan Co. vs. Lydig*, 4 John. 377, 387, 4 Am. Dec. 289.

39. Same—Servants of corporation are strangers within the rule that a stranger is not bound to inquire into by-laws of corporation in order to ascertain whether officer or agent with whom he is dealing has authority to act.—*Moyer vs. East Shore Term. Co.*, 41 S. C. 300, 44 Am. St. Rep. 709, 19 S. E. Rep. 651, 25 L. R. A. 48. See *San Pedro Lumber Co. vs. Reynolds*, 121 Cal. 74, 79, 53 Pac. Rep. 410.

40. NOTICE OF BY-LAWS.—Mere existence of by-law is not sufficient to charge either persons or corporations with notice of it.—*Anglo-Cal. Bank vs. Grangers' Bank*, 63 Cal. 359, 363.

As to notice of by-laws to public generally, see monographic note by B. A. Rich, 25 L. R. A. 48.

41. Fact that person sought to be charged is corporation having similar by-law governing such transactions will not affect rule.—*Anglo-Cal. Bank vs. Grangers' Bank*, supra.

42. Usage of bank or by-law adopted not to transfer stock while holder is indebted to it is binding upon stockholder who has knowledge or notice of such usage.—*Morgan vs. Bank of North America*, 8 Serg. & R. (Pa.) 73, 11 Am. Dec. 575 (as to whether enforced against bona fide purchaser without notice, not considered or decided).

See para. 15-17 this note.

43. Agreement of stockholders to this effect equally binding on them and all who stand in their shoes. By-laws bind, because members of corporation, either individually or by those who represent them, are supposed to give their assent to them.—*Pa. Morgan vs. Bank of North America*, 8 Serg. & R. (Pa.) 73, 11 Am. Dec. 575. *Fed. Union Bank vs. Laird*, 15 U. S. (2 Wheat.) 390, bk. 4 L. ed. 269 (purchaser bound to know rules of bank, under its charter, as to transfer of its stock). *Eng. Child vs. Hudson Bay Co.*, 2 Pr. Wms. 207.

44. RETROSPECTIVE OPERATION.—By-law forbidding transfer of stock on books until all indebtedness of assignor has been liquidated, when corporation has no lien by express agreement, or by its charter, does not have retrospective operation, and does not affect transfers made previously to its adoption.—*People vs. Crockett*, 9 Cal. 112, 115.

45. Retrospective effect not implied, and by-law which does not undertake by its terms to disturb what has been done, will not be inter-

preted to be retrospective.—*Wist vs. Grand Lodge A. O. U. W.*, 22 Oreg. 271, 29 Am. St. Rep. 603, 29 Pac. Rep. 610.

IV. CONSTRUCTION OF VARIOUS SUBDIVISIONS OF SECTIONS.

36. SUBDIVISION THREE.—At common law a by-law providing for vote by proxy is void.—*N. J. Taylor vs. Griswold*, 14 N. J. L. (2 Gr.) 222, 27 Am. Dec. 33. *Pa. Commonwealth vs. Bringham*, 103 Pa. St. 134, 49 Am. Rep. 119; *Wilson vs. American Academy of Music*, 2 Pa. Co. Ct. 280, 43 Leg. Int. 86. *Eng. Harben vs. Phillips*, L. R. 23 Ch. Div. 14, 48 L. T. N. S. 334, 31 Week. Rep. 173.

37. Under statute by-law may be enacted by private corporation authorizing stockholders at their meetings to vote by proxy.—*State vs. Tudor*, 5 Day (Conn.) 329, 5 Am. Dec. 162, 165.

38. By-laws may provide that stockholders may vote by proxy at any meeting of stockholders and under such by-laws stockholders may be represented by proxy at stockholders' meeting at which bonded indebtedness is authorized.—*Market St. R. Co. vs. Hellman*, 109 Cal. 571, 599, 42 Pac. Rep. 225.

39. A PROVISION AUTHORIZING BY-LAWS PROVIDING FOR MODE OF VOTING BY PROXY refers to provision that proxy may be entitled to vote, and does not authorize curtailing of right of voting by proxy, but only authorizes regulation of exercise of such rights.—*People's Home Sav. Bank vs. Superior Court San Francisco*, 104 Cal. 649, 653, 654, 43 Am. St. Rep. 147, 38 Pac. Rep. 452, 29 L. R. A. 344.

40. "The statute gives to corporation power to regulate exercise of right, but no power to either qualify or limit right, and certainly no power to so shackle right as to result in its nullification."—*People's Home Sav. Bank vs. Superior Court*, supra.

41. Prohibiting or limiting right.—By-law of bank incorporation providing that no proxy shall be voted by any one not stockholder is void.—*People's Home Sav. Bank vs. Superior Court San Francisco*, 104 Cal. 649, 653, 654, 43 Am. St. Rep. 147, 38 Pac. Rep. 452, 29 L. R. A. 344.

As to proxies, their form, provision, as to validity, and the like, see monographic note by B. A. Rich in 29 L. R. A. 344-349.

As to voting by proxy, see post §312 and note.

42. SUBDIVISION FOUR.—Number of directors may be provided for by by-laws.—See post §305 and note.

As to duty of directors to perform acts enjoined on them by a by-law, see post §303 and note.

43. SUBDIVISION FIVE.—Authority of officers to employ an attorney may be given to president by by-laws of directors (dictum).—*Pacific Bank vs. Stone*, 121 Cal. 202, 203, 53 Pac. Rep. 634.

44. SUBDIVISION SIX.—Election of officers.—The clause authorizing provision for the manner of election of officers has reference, technically, to the appointment of such officers

rather than to an election of them in the mode provided for election of electors.—*Wickersham vs. Brittan*, 93 Cal. 34, 38, 28 Pac. Rep. 792, 29 Id. 51, 15 L. R. A. 106. See *Taylor vs. Griswold*, 14 N. J. L. (2 Gr.) 222, 27 Am. Dec. 33 (holding corporation by by-law may regulate mode of calling meetings for election of officers).

46. "Term 'election' as found in § 315 post

is applicable to such appointment as is made under the provisions of § 303."—*Wickersham vs. Brittan*, 93 Cal. 34, 39, 28 Pac. Rep. 792, 29 Id. 51, 15 L. R. A. 106.

As to mode of filling a vacancy in the board of directors, see post § 305 and note.

Newspaper for purpose of publishing notice of meeting to adopt by-laws, see ante § 301 and note.

§ 304. **BY-LAWS RECORDED AND HOW AMENDED.** All by-laws adopted must be [1] certified by a majority of the directors and secretary of the corporation, and [2] copied in a legible hand, in some book kept in the office of the corporation, to be known as the "book of by-laws," and [3] the book must then be open to the inspection of the public during office hours each day except holidays.

The by-laws may be repealed or amended, or new by-laws may be adopted, [1] at the annual meeting, or [2] at any other meeting of the stockholders or members, called for that purpose by the directors, by a vote representing two thirds of the subscribed stock, or by two thirds of the members. The written assent of the holders of two thirds of the stock, or two thirds of the members if there is no capital stock, is effectual to repeal or amend any by-law, or to adopt additional by-laws. The power to repeal and amend the by-laws, and adopt new by-laws, may, by a similar vote at any such meeting, or similar written assent, be delegated to the board of directors. The power, when delegated, may be revoked by a similar vote, at any regular meeting of the stockholders or members. Whenever any amendment or new by-law is adopted, it must be copied in the book of by-laws with the original by-laws, and immediately after them. If any by-law is repealed, the fact of repeal, with the date of the meeting at which the repeal was enacted, or written assent was filed, must be stated in said book. Until copied or stated as hereinbefore required, no by-law, nor any amendment or repeal thereof, can be enforced against any person, other than the corporation, not having actual notice thereof.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 201; March 14, 1885, Stats. and Amdts. 1885, pp. 130-131; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 345, held unconstitutional; see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXVI, p. 557.

I. In General.

1. Applied, cited, construed, referred to, etc.
2. Commissioners' note.

II. "Book of By-laws," etc.

3. Adoption of by-law—Sufficiency of entry to show.
4. Books of corporation as evidence.
5. Duties of directors—Arise from formation of corporation.
6. Same—Lack of information no excuse for neglect.
7. Erasures and interlineations.
8. Open for inspection.

III. Alteration, Amendment and Repeal of By-Laws.

9. "Amendment" defined.
10. Constitution of corporation may be repealed or altered.
11. Constitution, state or federal, must not be violated.
12. Directors may repeal by-law.
13. Discretionary power not controlled.
14. Enlargement of powers of directors.

15. Forfeiture cannot be worked.

16. Impairment of obligation of contract—Not permitted.

17. Same—Creation of preferred stock.

18. Same—Same—Injunction against.

19. Same—Same—Laches of stockholder.

20. Same—Reserved power in by-law and contract.

21. Same—Same—Alteration of by-law must be reasonable.

22, 23. Same—Statutory power to alter by-laws.

24. Same—Stockholders who are creditors protected.

25. Implied repeal by usage.

26. Inherent power to alter, amend, or repeal.

27. Laws must not be violated.

28. Presumption—None that by-laws remain unchanged.

29. Reasonableness required.

30. Repeal pro tanto by amendment.

31. Retroactive alteration not permitted.

32. Vested rights—Cannot be disturbed.

33. Same—Definition of vested right.

34. Validity of by-laws—Res judicata.

I. IN GENERAL.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in:** Chapman vs. Doray, 89 Cal. 52, 54, 26 Pac. Rep. 605 (referred to with other sections); Bank of National City vs. Johnston (Cal. March 24, 1900), 60 Pac. Rep. 776, 777 (referred to with other sections).

2. **COMMISSIONERS' NOTE** merely cites Hall vs. Crandall, 29 Cal. 567, 574, 39 Am. Dec. 64 (holding that under Act May 12, 1853, § 19, Stats. 1853, p. 173, directors of a turnpike company are not personally liable on contracts in violation of by-laws, unless such contracts were made after filing the by-laws with the county recorder).

II. BOOK OF BY-LAWS, ETC.

3. **ADOPTION OF BY-LAW SHOWN**, *prima facie*, by recital that same was "adopted," setting forth the by-law, and presumption will be, without proof to contrary, that by-law was adopted in manner required by law; and it is unnecessary that further particulars should be shown, such as number of votes for and against the proposition.—Heintzelman vs. Druids' Relief Assoc., 38 Minn. 138, 36 N. W. Rep. 100.

4. **BOOKS OF CORPORATION ARE EVIDENCE** of proceedings of corporation, but it must appear that they are corporation books; that they have been kept as such; and that entries were made by proper officer, or some other person in his necessary absence; and it is insufficient to show that book, introduced as being minutes of company, is in handwriting of one who appears from entries in book, but in no other way, to have been secretary to board of directors.—Highland Turnpike Co. vs. McKean, 10 John. (N. Y.) 154, 156, 6 Am. Dec. 324.

5. **DUTIES OF DIRECTORS**—Arise upon formation of corporation regardless of how affairs of corporation are conducted, or whether it exercises its franchise at all.—Francals vs. Soms, 92 Cal. 503, 506, 28 Pac. Rep. 592 (decided under Act March 30, 1874, requiring directors of mining corporations to post accounts, etc.).

6. **Lack of information** on part of directors is no defense; although under possible circumstances directors who have failed to comply strictly with the law should be held excused; e. g. in cases of sickness or death.—Schenck vs. Bandmann, 81 Cal. 231, 235, 22 Pac. Rep. 654 (decided under Act April 23, 1880, requiring directors of mining corporations to keep and post accounts, etc.).

7. **ERASURES AND INTERLINEATIONS** which materially vary the meaning of an entry will render it questionable as evidence.—See Shaver vs. Bear River & Auburn W. & Min. Co., 10 Cal. 396, 401.

8. **OPEN FOR INSPECTION**—The provision that by-laws shall be kept in office and open for inspection during office hours, cannot be evaded by failure to keep an office for transaction of business.—See Chapman vs. Doray, 89 Cal. 52, 54, 26 Pac. Rep. 605.

III. ALTERATION, AMENDMENT AND REPEAL OF BY-LAWS.

9. **AMENDMENT**—Defined to be making of

another by-law upon same subject.—Kent vs. Quicksilver Min. Co., 78 N. Y. 159, 182.

10. **Constitution of corporation** may be repealed or altered, constitution being nothing more than a by-law under inappropriate name, and altogether different from the charter.—Supreme Lodge K. P. vs. Knight, 117 Ind. 489, 20 N. E. Rep. 479, 3 L. R. A. 409.

11. **Constitution, state or federal, must not be violated** in altering, amending, or repealing by-laws.—Kent vs. Quicksilver Min. Co., 78 N. Y. 159, 182.

12. **Directors may repeal by-law** when power to make by-laws is vested by charter, not in shareholders, but in directorate.—Bank of Holly Springs vs. Pinson, 58 Miss. 421, 38 Am. Rep. 330.

13. **Discretionary power to amend or repeal** exercised by duly authorized representatives of corporation cannot be controlled by court; it is only when there is an abuse of discretion and unreasonable and arbitrary invasion of private rights, or of legal or constitutional principles that courts can interfere.—Supreme Lodge K. P. vs. Knight, 117 Ind. 489, 20 N. E. Rep. 479, 3 L. R. A. 409.

14. **Enlargement of powers of directors**.—Where by-law gives authority to board of directors to alter or amend any by-law, such board has no authority, in altering by-laws, to disregard or alter provision of by-laws which is intended to impose a limitation upon powers of such board.—Stevens vs. Davison, 18 Gratt. (Va.) 819, 98 Am. Dec. 692.

15. **FORFEITURE CANNOT BE WORKED** by new by-law as against party with whom corporation has made contract.—Becker vs. Farmers' Mut. F. Ins. Co., 48 Mich. 610, 12 N. W. Rep. 874.

16. **Impairment of obligation of contracts** by amendment of by-laws is not permitted.—See Stohr vs. San Francisco Musical Fund Soc., 82 Cal. 557, 560, 23 Pac. Rep. 1125. Ala. Supreme Commandery Knights Golden Rule vs. Ainsworth, 71 Ala. 436, 46 Am. Rep. 332. Ind. Supreme Lodge K. P. vs. Knight, 117 Ind. 489, 20 N. E. Rep. 479, 3 L. R. A. 409. Mich. Becker vs. Farmers' Mut. F. Ins. Co., 48 Mich. 610, 12 N. W. Rep. 874. N. Y. Slee vs. Bloom, 19 John. 456, 478, 10 Am. Dec. 273. Oreg. Wist vs. Grand Lodge A. O. U. W., 22 Oreg. 271, 29 Am. St. Rep. 603, 610, 29 Pac. Rep. 610. Pa. Becker vs. Berlin Beneficial Soc., 144 Pa. St. 232, 27 Am. St. Rep. 624, 22 Atl. Rep. 699.

See pars. 32, 33 this note.

17. **CREATION OF PREFERRED STOCK** cannot be effected by any alteration of by-laws of corporation which divides into classes stockholders who all became such on equal footing, because such alteration is unreasonable and unconstitutional in that it is an impairment of contract, and disturbs vested rights.—Kent vs. Quicksilver Min. Co., 78 N. Y. 159, 179-184.

As to preferred stock, see post § 323 note pars. 4-9.

18. **Same**—Injunction may be issued at suit of common stockholder to restrain privileged payment of preferred stockholder from profits of company, and he may in equity have con-

tract therefor declared invalid.—*Kent vs. Quicksilver Min. Co.*, 78 N. Y. 159, 188.

19. **Same**—Laches of stockholder will preclude him from obtaining relief against alteration of by-laws whereby his vested rights are interfered with, such alteration of by-laws being one which does not affect public, but merely stockholder whose rights are so interfered with.—*Kent vs. Quicksilver Min. Co.*, 78 N. Y. 159, 184-188.

20. **RESERVED POWER IN GENERAL LAW** to enact further by-laws is binding upon parties who contract with corporation and subsequent by-law, even though it has effect of changing terms of contract previously made, is not an impairment of obligation of such contract, where contract was expressly made with reference to such general law.—*Supreme Commandery Knights Golden Rule vs. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332; *Supreme Lodge K. P. vs. Knight*, 117 Ind. 439, 20 N. E. Rep. 479, 3 L. R. A. 409.

21. **Reasonable alterations must be made** and such as are agreeable to law, even when the power is reserved to alter, amend, or repeal that reservation enters into a contract.—*Kent vs. Quicksilver Min. Co.*, 78 N. Y. 159, 188; *Wist vs. Grand Lodge A. O. U. W.*, 22 Oreg. 271, 29 Am. St. Rep. 603, 29 Pac. Rep. 610.

22. **STATUTORY POWER TO ALTER BY-LAWS ENTERS INTO CONTRACTS**, and provision of statute allowing by-laws to be changed is as potent as an express provision in contract that by-laws may be changed; but nevertheless vested rights must not be impaired.—*Stohr vs. San Francisco Musical Fund Soc.*, 82 Cal. 557, 560, 22 Pac. Rep. 1125.

23. **Compare**: Ante § 301 and note para. 27-29, 34, 35.

24. **Same**—Stockholders who are creditors, and whose rights have previously attached, are within such rule.—*Becker vs. Berlin Beneficial Soc.*, 144 Pa. St. 232, 27 Am. St. Rep. 624, 22 Atl. Rep. 698.

25. **Implied repeal results from uniform course of corporation in ignoring the by-laws**, as to all persons who are not members of corporation and who deal with it.—*Bank of Holly Springs vs. Pinson*, 58 Miss. 421, 23 Am. Rep. 330.

26. **INHERENT POWER TO ALTER, AMEND, OR REPEAL BY-LAWS**, or to enact other by-laws, consistent with purpose for which corporation was organized, is essential to continued existence and well-being of corporation, and may be exercised except as restrained by fundamental law of its organiza-

tion.—*Underhill vs. Santa Barbara Land Bldg. & Impr. Co.*, 93 Cal. 300, 311, 23 Pac. Rep. 1049; *Supreme Lodge K. P. vs. Knight*, 117 Ind. 439, 20 N. E. Rep. 479, 3 L. R. A. 409; *Wist vs. Grand Lodge A. O. U. W.*, 22 Oreg. 271, 29 Am. St. Rep. 603, 29 Pac. Rep. 610.

27. **Laws must not be violated in altering, amending, or repealing by-laws**.—*Kent vs. Quicksilver Min. Co.*, 78 N. Y. 159, 182.

28. **PRESUMPTION IS NOT THAT BY-LAWS WILL REMAIN UNCHANGED**, and no member of mutual benefit society has right to presume that by-laws will remain unchanged when promotion of its interest and welfare may require change.—*Supreme Lodge K. P. vs. Knight*, 117 Ind. 439, 20 N. E. Rep. 479, 3 L. R. A. 409; *Wist vs. Grand Lodge A. O. U. W.*, 22 Oreg. 271, 29 Am. St. Rep. 603, 29 Pac. Rep. 610.

29. **Reasonableness is necessary to validity of amendatory or repealing by-law**.—*Kent vs. Quicksilver Min. Co.*, 78 N. Y. 159, 182; *Lynn vs. Freemansburg Building & L. Assoc.*, 117 Pa. St. 1, 2 Am. St. Rep. 639, 11 Atl. Rep. 537.

30. **Repeal pro tanto effected by alteration of by-law**.—*Kent vs. Quicksilver Min. Co.*, 78 N. Y. 159, 182.

31. **Retroactive alteration is not permitted**.—See *Stohr vs. San Francisco Musical Fund Soc.*, 82 Cal. 557, 561, 22 Pac. Rep. 1125.

32. **VESTED RIGHTS CANNOT BE DISTURBED BY amendment of by-laws**.—See *Stohr vs. San Francisco Musical Fund Soc.*, 82 Cal. 557, 560, 22 Pac. Rep. 1125; *Supreme Commandery Knights Golden Rule vs. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332; *Kent vs. Quicksilver Min. Co.*, 78 N. Y. 159, 182.

See para. 15-23 this note.

33. **"Vested right" defined to be in one sense every right which a person has**, but in sense that it cannot be impaired by the alteration of by-law, the term is used to designate a right which has become so fixed that it is not subject to be divested without consent of owner, as contradistinguished from rights which are subject to be divested without his consent.—*Stohr vs. San Francisco Musical Fund Soc.*, 82 Cal. 557, 560, 22 Pac. Rep. 1125.

34. **VALIDITY OF BY-LAW—Res judicata**.—Where in action to recover sick-benefits validity of amendatory by-law is ultimate point involved, and it is actually litigated, judgment is conclusive as to validity of by-law in an action for subsequent instalments between same parties.—*Wiese vs. San Francisco Musical Soc.*, 82 Cal. 645, 646, 647, 23 Pac. Rep. 212, 7 L. R. A. 577.

§ 305. CORPORATE POWERS AND BUSINESS EXERCISED BY BOARD OF DIRECTORS—QUORUM. The corporate powers, business, and property of all corporations formed under this title must be exercised, conducted, and controlled by a board of not less than three directors, to be elected from among the holders of stock; or where there is no capital stock, then from the members of such corporations; except that corporations formed or to be formed for the purpose of erecting and managing halls and buildings for the meetings and accommodation of several lodges or societies of any benevolent or charitable order or organization, and in

connection therewith, the leasing of stores and offices in such building or buildings for other purposes, the corporate powers, business, and property thereof may be conducted, exercised, and controlled by a board [of] not less than three or more than fifty directors, to be chosen from among the stockholders of such corporation or from among the members of such order or organization. A majority of the directors must be in all cases residents of this state. Directors of corporations for profit must be holders of stock therein to an amount to be fixed by the by-laws of the corporation. Directors of all other corporations must be members thereof.

Unless a quorum is present and acting no business performed or act done is valid as against the corporation. Whenever a vacancy occurs in the office of director, unless the by-laws of the corporation otherwise provide, such vacancy must be filled by an appointee of the board.

History: Enacted March 21, 1872; amended January 20, 1876, Code Amdts. 1875-6, p. 71; March 15, 1901, Stats. and Amdts. 1900-1, pp. 308-309; amended by Code Commission, Act March 20, 1905, Stats. and Amdts. 1905, c. CCCXCII, p. 503, by changing number of directors from five to three (and negligently omitting an "of").

Code Commission has needlessly bungled and confused by introducing in a very disjointed shape the main provisions in this section into par. 5, § 290 ante.

1. Applied, cited, construed, referred to, etc.
2. Construction—Articles of incorporation must state number of directors.
3. Directors must exercise corporate powers.
4. Discretion of directors.
5. Powers of directors.
6. Same—De facto directors.
7. Same—Employment of attorney.
8. Same—Employment of servants.
9. Same—Fixing salary of manager.
10. Same—Mortgages must be executed by directors.
11. Same—Same—President and secretary cannot mortgage property.
12. Qualifications of directors—Must be stockholder.
13. Same—Acquiring stock after election.
14. Same—Executor holding stock is eligible.
15. Quorum of directors—Is necessary.
16. Same—Interested directors not counted.
17. Vacancy in board does not suspend powers.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO,** etc., in: *Alta Silver Min. Co. vs. Alta Placer Min. Co.*, 78 Cal. 629, 632, 21 Pac. Rep. 373 (referred to with other sections); *Schenck vs. Bandmann*, 31 Cal. 231, 234, 22 Pac. Rep. 654 (referred to in discussion); *Wickersham vs. Brittan*, 93 Cal. 34, 36, 39, 28 Pac. Rep. 792, 29 Id. 51, 15 L. R. A. 106 (referred to with other sections); *Salfeld vs. Sutter County Land Impr. & R. Co.*, 94 Cal. 546, 549, 29 Pac. Rep. 1105 (construed and applied); *Rozecrans G. M. Co. vs. Morey*, 111 Cal. 114, 116, 43 Pac. Rep. 555 (construed and applied); *Granite G. M. Co. vs. Maginness*, 113 Cal. 131, 138, 50 Pac. Rep. 269 (referred to with other sections); *Pacific Bank vs. Stone*, 121 Cal. 202, 208, 53 Pac. Rep. 634 (construed and applied); *Savings Bank San Diego County vs. Barrett*, 126 Cal. 413, 417, 58 Pac. Rep. 914 (construed and applied); *Porter vs. Lassen County L. & C. Co.*, 127 Cal. 261, 267, 270, 59 Pac. Rep. 563 (construed and applied); *Brown vs. Valley View Min. Co.*, 127 Cal. 630, 636, 637, 60 Pac. Rep. 424 (construed and applied); *Curtin vs.*

Salmon River H. G. Min. & D. Co., 130 Cal. 345, 347, 80 Am. St. Rep. 132, 62 Pac. Rep. 552 (construed and applied); *Bassett vs. Fairchild*, 132 Cal. 637, 652, 61 Pac. Rep. 791, 64 Id. 1082, 52 L. R. A. 611 (construed and applied in dis. op.).

2. **CONSTRUCTION.**—This section adds nothing to effect of § 290 ante, which requires articles of incorporation to state number of directors of corporation.—*Porter vs. Lassen County L. & C. Co.*, 127 Cal. 261, 269, 270, 59 Pac. Rep. 563.

3. **DIRECTORS MUST EXERCISE CORPORATE POWERS.**—Corporate powers, business and property must be exercised and controlled by directors. They are bound to know at all times condition of the business and property under their control.—*Schenck vs. Bandmann*, 31 Cal. 231, 234, 22 Pac. Rep. 654. See *Briggs vs. Spaulding*, 141 U. S. 132, 147, 152, 165, bk. 35 L. ed. 662, 11 Sup. Ct. Rep. 924.

4. **DISCRETION OF DIRECTORS.**—Whether purchaser of particular note or mortgage by savings or loan company was such as purpose of corporation required is determinable by board of directors, and not open to investigation at instance of the mortgager.—*Savings Bank San Diego County vs. Barrett*, 126 Cal. 413, 417, 58 Pac. Rep. 914.

5. **POWERS OF DIRECTORS.**—Are derived from by-laws.—Directors have no power except that derived from the by-laws adopted by stockholders.—*Hall vs. Crandall*, 29 Cal. 567, 573, 39 Am. Dec. 64.

6. **De facto directors.**—Authority of de facto directors to act in behalf of corporation cannot be questioned in collateral suit without showing judgment of ouster against them.—*San Jose Sav. Bank vs. Sierra Lumber Co.*, 63 Cal. 179, 180. See *Mo. Ohio & M. R. Co. vs. McPherson*, 35 Mo. 13, 86 Am. Dec. 128. *Ind. John vs. Farmers' & M. Bank*, 2 Blackf. 367, 20 Am. Dec. 119. *N. Y. Trustees of Vernon Soc. vs. Hills*, 6 Cow. 23.

7. Employment of attorney.—Directors may orally, or without formal resolution, authorize president to employ attorney, or where he has already done so without authority, they may orally or by conduct ratify or sanction such employment.—*Pacific Bank vs. Stone*, 131 Cal. 202, 208, 52 Pac. Rep. 624.

8. Employment of servants.—Corporate powers must be exercised by directors and no action can be maintained against corporation by persons rendering services at request of stockholders of corporation personally, where such stockholders would be entitled to no compensation had they performed the services personally.—*Brown vs. Valley View Min. Co.*, 127 Cal. 630, 636, 637, 60 Pac. Rep. 424.

9. To fix salaries.—Stockholders have no authority to determine salary of manager, this authority being conferred upon the board of directors (dis. op.).—*Bassett vs. Fairchild*, 132 Cal. 637, 652, 61 Pac. Rep. 791, 64 Id. 1082, 53 L. R. A. 611.

10. To mortgage corporate property.—Corporate powers must be exercised by directors, and stockholders cannot, by their own acts, mortgage corporate property.—*Curtin vs. Salmon River H. G. Min. & D. Co.*, 130 Cal. 345, 351, 80 Am. St. Rep. 132, 62 Pac. Rep. 552.

11. President and secretary cannot mortgage property.—Corporate powers must be exercised and corporate property controlled by board of directors, and neither president nor secretary has authority to execute mortgage on corporate property, in absence of resolution passed by such board duly assembled.—*Alta Silver Min. Co. vs. Alta Placer Min. Co.*, 78 Cal. 629, 632, 21 Pac. Rep. 372.

12. QUALIFICATION OF DIRECTOR.—Where by-laws fix no amount of stock to qualify stockholder for election as director, he must nevertheless be a stockholder in order to become an elector.—*Rozecrans G. M. Co. vs. Morey*, 111 Cal. 114, 116, 43 Pac. Rep. 535.

13. Acquiring stock after election.—Where one not stockholder is elected director, he may subsequently qualify by acquiring a share of stock.—*Rozecrans G. M. Co. vs. Morey*, 111 Cal. 114, 116, 42 Pac. Rep. 535. See *Greenough vs. Alabama G. S. R. Co.*, 64 Fed. Rep. 22, 25.

14. Executor holding stock is eligible as director.—Executor having right to vote stock owned by testator is eligible to the office of director.—*Schmidt vs. Mitchell*, 101 Ky. 570, 72 Am. St. Rep. 427, 41 S. W. Rep. 929; *Harvey vs. Linville Imp. Co.*, 118 N. C. 693, 54 Am. St. Rep. 749, 24 S. E. Rep. 439, 32 L. R. A. 265.

15. QUORUM OF DIRECTORS—IS NECESSARY, otherwise their acts will not be valid.—*Curtin vs. Salmon River H. G. Min. & D. Co.*, 130 Cal. 345, 347, 80 Am. St. Rep. 132, 62 Pac. Rep. 552.

16. Directors personally interested in business before board cannot be counted in making up quorum.—*Smith vs. Los Angeles Immigr. & L. Co-op. Soc.*, 78 Cal. 289, 292, 12 Am. Rep. 53, 20 Pac. Rep. 677; *Curtin vs. Salmon River H. G. Min. & D. Co.*, 130 Cal. 345, 347, 80 Am. St. Rep. 132, 62 Pac. Rep. 552.

17. VACANCY IN BOARD OF DIRECTORS does not suspend authority of directors and votes of majority of full board may authorize corporate act, notwithstanding such vacancy.—*Porter vs. Lassen County L. & C. Co.*, 127 Cal. 261, 267, 270, 59 Pac. Rep. 563.

§ 306. ELECTION OF DIRECTORS AND ADOPTION OF BY-LAWS (repealed).

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 202; repealed March 19, 1889, Stats. and Amdts. 1889, p. 365.

§ 307. ELECTIONS OF DIRECTORS, HOW CONDUCTED—CUMULATIVE VOTING SHALL NOT BE DENIED. All elections must be by ballot, and every stockholder shall have the right to vote in person or by proxy the number of shares standing in his name, as provided in section three hundred and twelve of this code, for as many persons as there are directors to be elected, or to cumulate said shares and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock shall equal, or to distribute them on the same principle among as many candidates as he shall think fit. The provisions of this section, so far as it relates to cumulative voting, shall apply to all corporations and associations doing business in this state, having a capital stock or shares of stock, and electing directors by a meeting of stockholders held in this state, whether such corporations or associations are organized under the laws of this state or not, and no election for directors of any corporation or association, doing business in this state, and electing directors in this state, shall be valid, if the right of a stockholder to cumulate his shares as herein provided shall be denied.

In corporations having no capital stock, each member of the corporation may cast as many votes for one director as there are directors to be elected, or may

distribute the same among any or all the candidates. In any case the director receiving the highest number of votes shall be declared elected.

[Cumulative voting not applicable, when.] The provisions of this section, so far as it relates to cumulative voting, shall not apply to literary, religious, scientific, social or benevolent societies, having no capital stock or shares unless it shall be so provided in their by-laws or rules.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 202; Feb. 1, 1878, Code Amdts. 1877-8, p. 78; March 10, 1887, Stats. and Amdts. 1887, p. 95; March 20, 1903, Stats. and Amdts. 1903, p. 253.

1. Applied, cited, construed, referred to, etc.
2. Constitutional mode of holding election.
3. Cumulative voting allowed.
4. "Election" and "appointment" distinguished.
5. Equity has supervisory jurisdiction.
6. Illegal votes—Result not affected.
7. Inspectors—Are eligible as officers.
8. Proxy—When irrevocable.
9. Right to vote—Books of corporation must show.
10. Same—Pledgeor of stock.
11. Same—Registered stockholder.
12. Same—Statutory right.
13. Same—Trustee may vote.
14. Voting trust.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Wickersham vs. Brittan*, 93 Cal. 34, 37, 28 Pac. Rep. 792, 29 Id. 51, 15 L. R. A. 106 (construing term "election"); *Dulin vs. Pacific Wood & C. Co.*, 103 Cal. 357, 363, 35 Pac. Rep. 1045, 37 Id. 207 (construed and applied); *Market St. R. Co. vs. Hellman*, 109 Cal. 571, 589, 42 Pac. Rep. 225 (construed and applied); *Smith vs. San Francisco & N. P. R. Co.*, 115 Cal. 584, 590 (construed with § 312), 609 (construed in dissenting opinion), 56 Am. St. Rep. 119, 47 Pac. Rep. 582, 35 L. R. A. 309; *Krause vs. Durbrow*, 127 Cal. 681, 683, 60 Pac. Rep. 438 (construed with § 312).

2. **CONSTITUTIONAL MODE OF HOLDING ELECTION** must be followed and the corporation has no power, by resolution or otherwise, to adopt any other mode.—*Wright vs. Central Cal. C. Water Co.*, 67 Cal. 532, 535, 3 Pac. Rep. 70.

3. **CUMULATIVE VOTING**.—Stockholder may vote at one time any number of shares owned by him for the whole number of directors to be elected, or may cumulate his shares upon one candidate, or distribute them among as many candidates as he may see fit, and this right cannot be abridged or limited by the corporation.—*Wright vs. Central Cal. C. Water Co.*, 67 Cal. 532, 534, 536, 3 Pac. Rep. 70.

4. **"ELECTION" AND "APPOINTMENT" DISTINGUISHED**.—Term "election" carries with it the idea of choice in which all who are affected with the choice participate; whereas "appointment" is generally made by one person or by a limited number acting with delegated powers. An election is direct choice of all members of body from which choice can be made.—*Wickersham vs. Brittan*, 93 Cal. 34, 36, 37, 28 Pac. Rep. 792, 29 Id. 51, 15 L. R. A. 106.

5. **EQUITY HAS JURISDICTION OVER CORPORATE ELECTIONS** and may inquire into their validity, and set them aside if they

were not conducted in conformity to law.—*Wright vs. Central Cal. C. Water Co.*, 67 Cal. 532, 533, 3 Pac. Rep. 70.

6. **ILLEGAL VOTES**.—Election of directors will not be set aside for illegality of votes where they were not challenged, or where throwing them out would make no difference in result.—In *Matter Chenango Co. Mut. Ins. Co.*, 19 Wend. (N. Y.) 635, 638.

7. **INSPECTORS**.—Are eligible to be officers as their duties as inspectors are merely ministerial and are not judicial.—*Commonwealth vs. Woelper*, 3 Serg. & R. (Pa.) 29, 8 Am. Dec. 628. See In *Matter Chenango Co. Mut. Ins. Co.*, 19 Wend. (N. Y.) 635, 638.

8. **PROXY MAY BE GIVEN IN NATURE OF POWER** coupled with interest, which cannot be revoked at the pleasure of either of parties.—*Smith vs. San Francisco & N. P. R. Co.*, 115 Cal. 584, 585, 590, 56 Am. St. Rep. 119, 47 Pac. Rep. 582, 35 L. R. A. 309.

9. **RIGHT TO VOTE**.—Under this section, and § 312, only bona fide stockholders having stock in their own name on the books of the company at least 10 days prior to election of directors, are entitled to vote at such election.—*Smith vs. San Francisco & N. P. R. Co.*, 115 Cal. 584, 590, 56 Am. St. Rep. 119, 47 Pac. Rep. 582, 35 L. R. A. 309; *Krause vs. Durbrow*, 127 Cal. 681, 683, 60 Pac. Rep. 438.

10. **Pledgeor of stock** has right to vote it, unless this right be conferred upon pledgee by special agreement.—*Dulin vs. Pacific Wood & C. Co.*, 103 Cal. 357, 363, 364, 35 Pac. Rep. 1045, 37 Id. 207.

11. **Registered stockholder** must be allowed to vote, and chairman of stockholders' meeting has no power to refuse such right, upon the ground that he is not bona fide owner of stock standing in his name (dis. op.).—*Smith vs. San Francisco & N. P. R. Co.*, 115 Cal. 584, 609, 56 Am. St. Rep. 119, 47 Pac. Rep. 582, 35 L. R. A. 309.

12. **Statutory right**.—Power of stockholders to elect directors is created by statute, and corporation cannot by its by-laws, resolutions, or contracts either give or take it away.—*Brewster vs. Hartley*, 37 Cal. 15, 24, 99 Am. Dec. 237. See *Dulin vs. Pacific Wood & C. Co.*, 103 Cal. 357, 363, 364, 35 Pac. Rep. 1045, 37 Id. 207.

13. **Trustee is legal owner of stock** and as against corporation and all world, except cestui que trust, no inquiry may be had touching his actions in premises, and he may vote the stock for all purposes, including the purpose of consolidation of corporation.—*Market*

St. R. Co. vs. Hellman, 109 Cal. 571, 589, 42 Pac. Rep. 225.

14. Vetting trust.—See post § 313 and note par. 16.

§ 308. ORGANIZATION OF BOARD OF DIRECTORS, ETC. — [QUORUM.]

Immediately after their election, the directors must organize by the election of a president, who must be one of their number, a secretary, and treasurer. They must perform the duties enjoined on them by law and the by-laws of the corporation.

[**Quorum.**] A majority of the directors is a sufficient number to form a board for the transaction of business, and every decision of a majority of the directors forming such board, made when duly assembled, is valid as a corporate act.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Construction—"Election" signifies, what.
3. Authority of officers.
4. Disqualification of director by interest.
5. "Duly assembled"—Directors must be.
6. Same—Sale of land requires assembly of directors.
7. Same—Special meetings.
8. Quorum of directors.
9. Same—Sections construed together.
10. Same—Vacancy.
11. President—Nature of office.
12. Same—Directors only eligible.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc.**, in: *Smith vs. Los Angeles Immigration & L. C. Assoc.*, 78 Cal. 239, 292, 12 Am. St. Rep. 53, 20 Pac. Rep. 677 (construed and applied); *Alta Silver Min. Co. vs. Alta Placer Min. Co.*, 78 Cal. 629, 632, 21 Pac. Rep. 373 (construed); *Wickersham vs. Brittan*, 93 Cal. 34, 38 (construed), 39 (referred to with other sections), 28 Pac. Rep. 792, 29 Id. 51, 15 L. R. A. 106; *Salfeld vs. Sutter Co. L. I. & R. Co.*, 94 Cal. 546, 549, 29 Pac. Rep. 1105 (construed); *Smith vs. Dorn*, 96 Cal. 73, 82, 30 Pac. Rep. 1024 (construed); *Dulin vs. Pacific Wood & C. Co.*, 103 Cal. 357, 363, 35 Pac. Rep. 1045, 37 Id. 207 (referred to with other sections); *Pacific Bank vs. Stone*, 121 Cal. 302, 308, 53 Pac. Rep. 634 (construed and applied to president); *Porter vs. Lassen Co. L. & C. Co.*, 127 Cal. 261, 267, 268, 59 Pac. Rep. 563 (construed and applied); *Brown vs. Valley View Min. Co.*, 127 Cal. 630, 631, 637, 60 Pac. Rep. 424 (referred to with § 308); *Bank of National City vs. Johnston* (Cal. March 24, 1900), 60 Pac. Rep. 776, 778 (construed and applied); *Sims vs. Petaluma Gas Light Co.*, 131 Cal. 656, 659, 63 Pac. Rep. 1011 (referred to with other sections).

2. **CONSTRUCTION.—Word "election"** as used in the phrase "immediately after their election," refers to election by stockholders and is a proper term to signify choice by votes of entire body; word "election" as used in phrase "directors must organize by election of president" signifies only appointment by board of its own officers.—*Wickersham vs. Brittan*, 93 Cal. 34, 38, 29, 28 Pac. Rep. 792, 29 Id. 51, 15 L. R. A. 106.

3. **Authority of officers.**—See ante § 305 and note.

4. **DISQUALIFICATION OF DIRECTOR BY INTEREST.**—See ante § 305 and note.

5. **"DULY ASSEMBLED."**—To exercise power of corporations, directors must be duly assembled.—*Gashwiler vs. Willis*, 33 Cal. 11, 18, 91 Am. Dec. 607; *Alta Silver Min. Co. vs. Alta Placer Min. Co.*, 78 Cal. 629, 633, 21 Pac. Rep. 373; *Salfeld vs. Sutter Co. L. I. & R. Co.*, 94 Cal. 546, 549, 29 Pac. Rep. 1105; *Smith vs. Dorn*, 96 Cal. 73, 82, 30 Pac. Rep. 1024.

6. **Same—Sale of corporate lands.**—Corporations can only act by board of directors when duly assembled by resolution to be passed and recorded authorizing an agent to sell its land, or ratify agent's previous sale.—*Salfeld vs. Sutter County L. I. & R. Co.*, 94 Cal. 546, 549, 29 Pac. Rep. 1105.

7. **Special meetings.**—Where, in absence of by-laws fixing time of meetings of directors, all directors being duly assembled agree to adjourn to time named, meeting held by majority of directors at that time is legal meeting, though no personal notice of meeting is given to each director, and directors thus meeting are "duly assembled" within meaning of this section of the Civil Code.—*Bank of National City vs. Johnston* (Cal. March 24, 1900), 60 Pac. Rep. 776, 778.

8. **QUORUM OF DIRECTORS.**—See ante § 305 and note.

9. **Sections construed together.**—Provision that majority of directors is sufficient to transact business should be construed with § 305, providing that unless quorum of board be present and acting no business performed or act done is valid against corporation.—*Curtin vs. Salmon River H. G. Min. & D. Co.*, 130 Cal. 345, 348, 349, 80 Am. St. Rep. 132, 62 Pac. Rep. 552.

10. **Vacancy.**—Full board of directors may act for corporation, notwithstanding existence of vacancy in board.—*Porter vs. Lassen Co. L. & C. Co.*, 127 Cal. 261, 267, 268, 59 Pac. Rep. 563.

11. **PRESIDENT—Nature of office.**—President occupies a fiduciary relation to corporation and its stockholders, and cannot take part in any transaction in which he, or any one for whom he acts, has an interest, present or contingent, adverse to that of corporation.—*Sims vs. Petaluma Gas Light Co.*, 131 Cal. 656, 659, 63 Pac. Rep. 1011.

12. **Only director is eligible to office of president.**—*Dulin vs. Pacific Wood & C. Co.*, 103 Cal. 357, 364, 35 Pac. Rep. 1045, 37 Id. 207.

§ 309. **DIVIDENDS FROM SURPLUS PROFITS—PENALTY FOR VIOLATION OF THIS SECTION—DISTRIBUTION OF LAND, WATER, ETC.** The directors of corporations [1] must not make dividends, except from the surplus profits arising from the business thereof; [2] nor must they create any debts beyond their subscribed capital stock; [3] nor must they divide, withdraw, or pay to the stockholders, or any of them, any part of the capital stock, except as hereinafter provided, [4] nor reduce or increase the capital stock, except as herein specially provided.

For a violation of the provisions of this section, the directors under whose administration the same may have happened (except those who may have caused their dissent therefrom to be entered at large on the minutes of the directors at the time, or were not present when the same did happen) are, in their individual or private capacity, jointly and severally liable to the corporation, and to the creditors thereof, to the full amount of the capital stock so divided, withdrawn, paid out, or reduced, or debt contracted; and no statute of limitation is a bar to any suit against such directors for any sums for which they are liable by this section;

[Land and water companies.] Provided, however, that where a corporation has been heretofore or may hereafter be formed for the purpose, among other things, of acquiring, holding, and selling real estate, water, and water rights, the directors of such corporation may, with the consent of stockholders representing two thirds of the capital stock thereof, given at a meeting called for that purpose, divide among the stockholders the land, water, or water rights so by such corporation held, in the proportions to which their holdings of such stock at the time of such division entitle them. All conveyances made by the corporation in pursuance of this section must be made and received subject to the debts of such corporation existing at the date of the conveyance thereof. Nothing herein prohibits a division and distribution of the capital stock of any corporation which remains after the payment of all its debts, upon its dissolution, or the expiration of its term of existence.

History: Enacted March 21, 1872; amended March 31, 1891, Stats. and Amdts. 1891, p. 468; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 346, held unconstitutional; see history, § 4 ante; re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXVI, p. 558.

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| <ol style="list-style-type: none"> 1. Applied, cited, construed, referred to, etc. 2. "Capital stock"—Actual property of corporation. 3. Same—Double meaning of phrase. 4, 5. Same—Mining corporations. 6. Same—Undivided profits. 7. Construction. 8. Same—Limitation upon debts. 9-12. "Dividends"—Definition. 13. Same—Discretion of directors to declare. 14. Same—Equity may control abuse of discretion. 15. Same—Payment must be made in legal tender. 16. Same—Possession without ownership gives no right to dividends. 17. Same—Preferred stockholders—No preference over creditors. 18. Same—Profits must be source of dividends. 19. Same—Same—Insolvency precludes dividends. | <ol style="list-style-type: none"> 20. Division or withdrawal of capital stock—Not permitted. 21, 22. Same—Transfer to new company for stock. 23. Indebtedness in excess of capital—Contracts valid. 24. Same—Directors' power limited. 25. Same—Liabilities of consolidated corporation. 26. Net earnings consist of gross receipts. 27. Surplus profits—Current expenses deducted. <p>1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: <i>People ex rel. Burke vs. Badlam</i>, 57 Cal. 594, 602 (referred to with other sections); <i>Kohl vs. Lillenthal</i>, 81 Cal. 378, 384, 387, 396, 397 (construed), 389 (referred to), 390 (construed in dis op.), 20 Pac. Rep. 401, 22 Id. 689, 6 L. R. A. 520; <i>Excelsior W. & Min. Co. vs. Pierce</i>, 90 Cal. 181, 185, 186, 189, 140 (construed and applied to surplus), 141 (applied to mines), 27 Pac. Rep.</p> |
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44; *Underhill vs. Santa Barbara L. B. & I. Co.*, 93 Cal. 300, 309, 310, 28 Pac. Rep. 1049 (construed and applied); *Market St. R. Co. vs. Hellman*, 109 Cal. 571, 596, 42 Pac. Rep. 225 (construed and applied); *Vercoutere vs. Golden State L. Co.*, 116 Cal. 410, 415, 48 Pac. Rep. 375 (construed and applied); *Sacramento Bank vs. Pacific Bank*, 124 Cal. 147, 149, 71 Am. St. Rep. 36, 56 Pac. Rep. 787, 45 L. R. A. 863 (construed); *Santa Rosa Bank vs. Barnett*, 125 Cal. 407, 412, 58 Pac. Rep. 85 (construed with other sections); *Wells, Fargo & Co. vs. Enright*, 127 Cal. 669, 674, 60 Pac. Rep. 439, 49 L. R. A. 647 (referred to with other sections); *Schaake vs. Eagle A. C. Co.*, 135 Cal. 472, 482, 63 Pac. Rep. 1025, 67 Id. 759 (construed and applied).

2. "CAPITAL STOCK" is actual property of corporation contributed by shareholders of the nominal capital.—*Excelsior W. & Min. Co. vs. Pierce*, 90 Cal. 131, 140, 27 Pac. Rep. 44.

3. Double meaning of phrase.—The phrase "capital stock" has double meaning when applied to corporations. In one sense it is the sums mentioned in articles of incorporation as amount of capital stock. In other words it is a share capital or nominal capital and does not necessarily represent corresponding amount of actual capital.—*Excelsior W. & Min. Co. vs. Pierce*, 90 Cal. 131, 140, 27 Pac. Rep. 44.

4. In mining companies it is always arbitrary and generally extravagant in amount.—*Excelsior W. & Min. Co. vs. Pierce*, 90 Cal. 131, 140, 27 Pac. Rep. 44.

5. Net profits of mining corporation are not capital stock, within the meaning of this section.—*Excelsior W. & Min. Co. vs. Pierce*, 90 Cal. 131, 140, 27 Pac. Rep. 44.

6. Undivided profits.—Stock of corporation represents its undivided profits.—*Harris vs. San Francisco S. R. Co.*, 41 Cal. 392, 396, 408.

7. CONSTRUCTION.—There is no conflict between this section and § 359 of the Code of Civil Procedure.—*Santa Rosa Bank vs. Barnett*, 125 Cal. 407, 412, 58 Pac. Rep. 85.

See Code Civ. Proc. § 359 and note.

8. Limitation upon debts.—Construed with §§ 354 and 640 this section does not deprive corporations of the power to create debts beyond their subscribed capital stock, but merely to provide remedy in favor of corporation and its creditors against those members of the board of directors by whose improvident or fraudulent exercise of power debts are created disproportionately to subscribed capital stock and beyond ability of company to pay.—*Underhill vs. Santa Barbara L. B. & I. Co.*, 93 Cal. 300, 309, 310, 28 Pac. Rep. 1049.

See post §§ 354, 640 and notes.

9. "DIVIDEND"—Defined.—Dividend is money paid out of profits of corporation to its shareholders.—*Taft vs. Hartford R. Co.*, 8 R. I. 310, 323.

10. Sum which corporation sets apart from its profits to be divided among its members.—*Lockhart vs. Van Alstyne*, 31 Mich. 76.

11. An appropriation of profits of corporation, from whatever source, divided among stockholders.—*Van Dyck vs. McQuade*, 86 N. Y. 38, 47.

12. Dividend, in its technical as well as in its ordinary acceptation, means that portion of its profits which corporation, by its directors, sets apart for ratable division among its shareholders.—*Mobile & O. R. Co. vs. Tennessee*, 153 U. S. 486, 496, bk. 38 L. ed. 793, 14 Sup. Ct. Rep. 968.

13. Discretion of directors.—Payment of cash dividends is question of policy intrusted to discretion of directors.—*Zellerbach vs. Alленberg*, 99 Cal. 57, 71, 33 Pac. Rep. 786; *Excelsior W. & Min. Co. vs. Pierce*, 90 Cal. 131, 140, 145, 146, 27 Pac. Rep. 44. See *Luling vs. Atlantic Insurance Co.*, 45 Barb. (N. Y.) 510; *Williams vs. Western Union Tel. Co.*, 93 N. Y. 162, 191; *New York, L. E. & W. R. Co. vs. Nickals*, 119 U. S. 296, 307, bk. 30 L. ed. 363, 7 Sup. Ct. Rep. 209.

14. Courts may compel directors to declare dividend when they have abused their discretion, and right thereto is clear.—*N. Y. Boardman vs. Lake Shore & M. S. R. Co.*, 84 N. Y. 157, 174. *N. J. Park vs. Grant Locomotive Works*, 40 N. J. Eq. (13 Stew.) 114. *N. H. Marks vs. Eastern R. Co.*, 43 N. H. 515.

15. Medium of payment.—Dividends that are payable should be paid in legal tender, and directors have no authority to say that they be paid in depreciated bank notes.—*Ehle vs. Chittanooga Bank*, 24 N. Y. 548, 549.

16. Possession does not give right to.—Ownership, and not mere possession, or special property in stock, gives right to dividends.—*Dow vs. Gould & Curry S. Min. Co.*, 31 Cal. 629, 657. See *Brewster vs. Lathrop*, 15 Cal. 21, 22.

17. Preferred stockholders have no privilege or priority except over common stock, and no preferred claim over creditors under subsequently contracted debts.—*New York, L. E. & W. R. Co. vs. Nickals*, 119 U. S. 296, 308, bk. 30 L. ed. 363, 7 Sup. Ct. Rep. 209; *Warren vs. King*, 108 U. S. 389, 400, bk. 27 L. ed. 769, 2 Sup. Ct. Rep. 789. See *Boardman vs. Lake Shore & M. S. R. Co.*, 84 N. Y. 157, 174.

18. Profits must be source of dividends.—Dividends can be declared only upon net profits.—*Elkins vs. Camden & A. R. Co.*, 36 N. J. Eq. (9 Stew.) 233; *Hughes vs. Vermont C. Min. Co.*, 72 N. Y. 207; *Mobile & O. R. Co. vs. Tennessee*, 153 U. S. 486, 497, bk. 38 L. ed. 793, 14 Sup. Ct. Rep. 968.

19. Same.—Stockholder of insolvent corporation not permitted to share its dividends by subrogation, or otherwise.—*Sacramento Bank vs. Pacific Bank*, 124 Cal. 147, 149, 71 Am. St. Rep. 36, 56 Pac. Rep. 787, 45 L. R. A. 863.

20. DIVISION OR WITHDRAWAL OF CAPITAL STOCK.—Not permitted.—Any arrangement having effect to withdraw capital stock and turn it over to stockholders, except in manner provided by law, is violation of this section and void as to both prior and subsequent creditors having no notice of arrangement at time they were given credit.—*Martin vs. Zellerbach*, 38 Cal. 300, 306-310, 99 Am. Dec. 365. See *Kohl vs. Lillenthal*, 81 Cal. 373, 387, 20 Pac. Rep. 401, 22 Id. 689, 6 L. R. A. 520; *Vercoutere vs. Golden State L. Co.*, 116 Cal. 410, 415, 48 Pac. Rep. 375.

21. Transfer by mining company.—Where mining company transfers its mining ground to new company for stock to be issued by such new company, but retains title to mill for reduction of ores, and carries on corporate business without attempting or proposing to disincorporate, stock in new company is part of capital stock of old company, with which it is to carry on business, and cannot be divided among stockholders thereof until the old company ceases to exist, either by expiration of term of its corporate existence, or upon dissolution in manner provided by law.—*Kohl vs. Lillenthal*, 81 Cal. 373, 384, 387, 389, 390, 396, 397, 20 Pac. Rep. 401, 22 Id. 689, 6 L. R. A. 520. See *Schaake vs. Eagle Automatic Can Co.*, 135 Cal. 472, 482, 63 Pac. Rep. 1025, 67 Id. 759.

22. Compare: Excelsior W. & Min. Co. vs. Pierce, 90 Cal. 131, 140, 141, 27 Pac. Rep. 44 (holding that mining companies may distribute their net earnings although value of their mine is thereby diminished, but that they may not sell land, or any part of it, and distribute proceeds).

23. INDEBTEDNESS IN EXCESS OF CAPITAL.—Contracts valid.—Contracts by which debts are created in excess of capital stock are not void, and note and mortgage given to secure such debt is therefore valid.—*Underhill vs. Santa Barbara L. B. & I. Co.*, 93 Cal. 300, 309, 310, 28 Pac. Rep. 1049.

Definition of phrase "create debts," within meaning of this section, is discussed post § 579 and note.

24. Directors' power limited.—This provision does not limit the power of corporation, but only regulates and checks exercise of

power by directors.—*Underhill vs. Santa Barbara L. B. & I. Co.*, 93 Cal. 300, 310, 311, 28 Pac. Rep. 1049.

25. Liabilities of consolidated corporation.—Property of several corporations constituting consolidated corporation is still liable for debts contracted by them, and these several demands, while not primary liabilities of consolidated corporation, are charges upon its property, which will reduce it by so much, and hence come within rule of limiting indebtedness under this section.—*Market St. R. Co. vs. Hellman*, 109 Cal. 571, 596, 42 Pac. Rep. 225.

26. NET EARNINGS OR NET PROFITS from which dividends are payable consist in gross receipts of company after deducting its running expenses.—*Me. Belfast R. Co. vs. Belfast*, 77 Me. 445. *Mass. Phillips vs. Eastern R. Co.*, 138 Mass. 122. *N. J. Park vs. Grant Locomotive Works*, 40 N. J. Eq. (13 Stew.) 114, 121. *N. Y. Van Dyck vs. McQuade*, 86 N. Y. 38, 47; *Williams vs. Western Union Tel. Co.*, 98 N. Y. 162, 191. See *Warren vs. King*, 103 U. S. 398, bk. 27 L. ed. 769, 2 Sup. Ct. Rep. 789; *Mobile & O. R. Co. vs. Tennessee*, 153 U. S. 486, 497, bk. 38 L. ed. 793, 14 Sup. Ct. Rep. 968.

27. SURPLUS PROFITS.—Debts of a mining company incurred by acquiring property which was encumbered and by making improvements thereon need not be entirely paid off out of the gross earnings to constitute a surplus within the meaning of this section. Surplus profits, it seems, are the sums remaining in the hands of the company after defraying the current expenses.—*Excelsior Water & Min. Co. vs. Pierce*, 90 Cal. 131, 135, 136, 139-142, 27 Pac. Rep. 44.

§ 310. REMOVAL FROM OFFICE OF DIRECTORS, ETC. The board of directors may be removed from office by a vote of two thirds of the members, or of stockholders holding two thirds of the capital stock, at a general meeting held after previous notice of the time and place, and of the intention to propose such removal. Meetings of stockholders for this purpose may be called by the president, or by a majority of the directors, or by members or stockholders holding at least one half of the votes. Such calls must be in writing, and addressed to the secretary, who must thereupon give notice of the time, place, and object of the meeting, and by whose order it is called. If the secretary refuses to give the notice, or if there is none, the call may be addressed directly to the members or stockholders, and be served as a notice, in which case it must specify the time and place of meeting. The notice must be given in the manner provided in section three hundred and one of this title, unless other express provision has been made therefor in the by-laws. In case the board of directors is so removed, a new board may be elected at the same meeting.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 347, held unconstitutional; see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXVI, pp. 558, 559.

1. Applied, cited, construed, referred to, etc.
2. Construction—Mining companies included.
3. Corporation may remove.
4. Courts may remove.
5. Same—Special proceedings.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Ex-Mission L. & W. Co. vs. Flash*, 97 Cal. 610, 630, 32 Pac. Rep. 600 (cited in discussion).

2. CONSTRUCTION—Applicability to mining

companies.—This section applies to mining corporations.—In *Matter of Boston Min. & Mill. Co.*, 51 Cal. 624, 625.

3. POWER OF CORPORATION TO REMOVE.—Agents of corporation, having no interests coupled with their agency, may be removed at any time and other agents appointed in their place, or corporation itself may assume duties imposed on them.—*San Joaquin L. & W. Co. vs. West*, 94 Cal. 399, 403, sub nom. *San Joaquin L. & W. Co. vs. Beecher*, 29 Pac. Rep. 785.

4. POWER OF COURT.—It seems that courts have power to remove directors shown to have been unfaithful in execution of their trust.—*Wickersham vs. Crittenden*, 93 Cal. 17, 32, 28 Pac. Rep. 788. See *People vs. Albany & S. R. Co.*, 38 How. Pr. (N. Y.) 228.

5. Jurisdiction.—Proceedings for removal of officers are special, and to invest superior court with jurisdiction, requirements of statute must be complied with.—*Chollar Min. Co. vs. Wilson*, 66 Cal. 374, 376, 5 Pac. Rep. 670.

§ 311. JUSTICE OF PEACE MAY ORDER MEETING OF CORPORATION, WHEN. Whenever, from any cause, there is no person authorized to call or to preside at a meeting of a corporation, any justice of the peace of the county where such corporation is established may, on written application of three or more of the stockholders or of the members thereof, issue a warrant to one of the stockholders or members, directing him to call a meeting of the corporation, by giving the notice required, and the justice may, in the same warrant, direct such person to preside at such meeting until a clerk is chosen and qualified, if there is no other officer present legally authorized to preside thereat. The application of a number of stockholders less than three, but holding a majority of the capital stock, has the same effect as an application by three or more stockholders or members.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 347, held unconstitutional; see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXVI, p. 559.

§ 312. MAJORITY OF STOCK MUST BE REPRESENTED AT ELECTIONS, AND A MAJORITY VOTE TOGETHER, OTHERWISE VOIDABLE. At all elections or votes had for any purpose there must be a majority of the subscribed capital stock, or of the members, represented, either in person or by proxy in writing. Every person acting therein, in person or by proxy or representative, must be a member thereof, or a stockholder having stock in his own name on the stock books of the corporation at least ten days prior to the election. Any vote or election had other than in accordance with the provisions of this article is voidable at the instance of absent or any stockholders or members, and may be set aside by petition to the superior court of the county where the same is held. Any regular or called meeting of the stockholders or members may adjourn from day to day, or from time to time, if for any reason there is not present a majority of the subscribed stock or members, or no election had—such adjournment and the reasons therefor being recorded in the journal of proceedings of the board of directors.

History: Enacted March 21, 1872; amended April 1, 1878, Code Amdts. 1877-8, p. 79; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 347, held unconstitutional; see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXVI, p. 559. A further amendment by the Legislature of 1905, on following day (March 22), appears below.

1. Applied, cited, construed, referred to, etc.
2. Adjournment of meeting permissible.
- 3, 4. Bona fide stockholders—Who are.
5. Majority of shares—Must be issued.
6. Majority rules in voting.
7. Notice of meeting.
8. Pledgeor may vote.
9. Proxy may vote.
10. Registration of stockholders necessary.
11. Setting aside election—Action maintainable by stockholder.
12. Same—Jurisdiction of superior court.
13. Same—Mandamus is proper remedy.
14. Stock held by corporation cannot be voted.
15. Trustee may vote.
16. Voting trust is permissible.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Wright vs. Central Cal. C. W. Co., 67 Cal. 532, 534, 3 Pac. Rep. 70 (construed and applied); Wickersham vs. Brittan, 93 Cal. 34, 36, 39, 23 Pac. Rep. 792, 29 Id. 51, 15 L. R. A. 106 (construed and applied); Dulin vs. Pacific Wood & C. Co., 103 Cal. 357, 362, 35 Pac. Rep. 1045, 27 Id. 207 (referred to with other sections); People's H. S. Bank vs. Superior Court San Francisco, 104 Cal. 649, 652, 43 Am. St. Rep. 147, 33 Pac. Rep. 452, 29 L. R. A. 344 (construed and applied); Market St. R. Co. vs. Hellman, 109 Cal. 571, 583, 42 Pac. Rep. 225 (construed and applied); San Diego O. T. & P. B. R. Co. vs. Pacific Beach Co., 112 Cal. 53, 63, 44 Pac. Rep. 333, 33 L. R. A. 788 (construed and applied); Smith vs. San Francisco & N. P. R. Co., 115 Cal. 584, 589, 590, 594, 56 Am. St. Rep. 119, 47 Pac. Rep. 582, 35 L. R. A. 309 (construed and applied); Krause vs. Durbrow, 127 Cal. 681, 633, 60 Pac. Rep. 438 (construed with § 307); Neale vs. Head, 133 Cal. 42, 47, 65 Pac. Rep. 131, 576 (miscited).

As to adjournment of meetings, see post § 314.

2. ADJOURNMENT OF MEETING is permissible, and any business may be transacted at an adjourned meeting which could have been transacted at the original meeting.—Warner vs. Mower, 1st Vt. 385, 391. See Smith vs. Law, 21 N. Y. 296, 298; People ex rel. Loew vs. Hatchelor, 22 N. Y. 128, 133; Schoff vs. Bloomfield, 3 Vt. 472; Scadding vs. Lorant, 5 Eng. L. & Eq. 16.

3. BONA FIDE STOCKHOLDER.—One in whose name stock is registered upon the books of company, and who has no interest therein, is not owner of any stock, and has no right to vote; he is neither proxy nor registered owner of the stock, nor member of corporation, and therefore not bona fide stockholder.—Stewart vs. Mahoney Min. Co., 54 Cal. 149, 150; Smith vs. San Francisco & N. P. R. Co., 115 Cal. 584, 594, 56 Am. St. Rep. 119, 47 Pac. Rep. 582, 35 L. R. A. 309. See State vs. Hunton, 28 Vt. 594.

4. Compare: State ex rel. Rankin vs. Leete, 16 Nev. 242, 252.

5. MAJORITY OF SUBSCRIBED CAPITAL.—Majority of shares means majority of subscribed and issued or outstanding shares.—Market St. R. Co. vs. Hellman, 109 Cal. 571, 583, 42 Pac. Rep. 225.

6. MAJORITY RULES.—The rule of stockholders' meetings is that majority governs, and every stockholder contracts that such be rule.—San Diego O. T. & P. B. R. Co. vs. Pacific Beach Co., 112 Cal. 53, 63, 44 Pac. Rep. 333, 33 L. R. A. 788.

7. NOTICE OF MEETING.—See ante § 302 and note.

8. PLEDGEOR MAY VOTE.—See ante § 307 and note.

9. PROXY MAY VOTE.—See ante § 307 and note.

10. REGISTRATION OF STOCKHOLDERS NECESSARY.—Voters must be registered as stockholders at least ten days prior to election, to be bona fide stockholders at time of election.—Smith vs. San Francisco & N. P. R. Co., 115 Cal. 584, 589, 590, 56 Am. St. Rep. 119, 47 Pac. Rep. 582, 35 L. R. A. 309.

11. SETTING ASIDE ELECTION.—Action may be maintained by stockholder to set aside election of directors, although at time of election he had not held stock sufficiently long to entitle him to vote.—Wright vs. Central Cal. C. W. Co., 67 Cal. 532, 533, 3 Pac. Rep. 70.

12. Jurisdiction.—Superior court has jurisdiction to inquire into validity of such election and to set it aside, under provision conferring jurisdiction upon district court.—Wright vs. Central Cal. C. W. Co., 67 Cal. 532, 533, 3 Pac. Rep. 70. See Wickersham vs. Brittan, 93 Cal. 34, 39, 23 Pac. Rep. 792, 29 Id. 51, 15 L. R. A. 106.

13. Mandamus will be issued where minority of stockholders, by use of illegal votes, have usurped powers that do not belong to them, and have deprived majority of its power to govern, and usurping officers will be compelled to give up books and papers in their possession.—American R. Frog Co. vs. Haven, 101 Mass. 398, 403-408, 3 Am. Rep. 377.

14. STOCK BELONGING TO CORPORATION cannot be voted by any person, even if held in name of person as trustee.—Brewster vs. Hartley, 37 Cal. 15, 27, 99 Am. Dec. 237. See American R. Frog Co. vs. Haven, 101 Mass. 398, 402, 3 Am. Rep. 377.

15. TRUSTEE IS LEGAL OWNER OF STOCK and has right to vote it.—Market St. R. Co. vs. Hellman, 109 Cal. 571, 589, 42 Pac. Rep. 225.

16. VOTING TRUST.—As statute authorizes stockholder to vote by proxy, and as it is not against public policy for two or more stockholders to agree upon course of corporate action, or upon officers whom they will elect, and may do this either by themselves or through their proxies, they may unite in appointment of single proxy to effect this purpose, and such course of procedure is not illegal as being in violation of public policy.—Smith vs. San Francisco & N. P. R. Co., 115 Cal. 584, 598-608, 56 Am. St. Rep. 119, 47 Pac. Rep. 582, 35 L. R. A. 309. See Ala. Moses vs. Scott, 84 Ala. 608, 4 So. Rep. 742. Ill. Faulds vs. Yates, 57 Ill. 416, 11 Am. Rep. 24. Mass. Woodruff vs. Wentworth, 133 Mass. 309, 314. N. Y. Hey vs. Dolphin, 92 Hun 230, 36 N. Y. Supp. 627. Vt. State ex rel. Page vs. Smith, 43 Vt. 266. Fed. Woodruff vs. Dubuque & S. C. R. Co., 30 Fed. Rep. 91, 93.

§ 312 [a] [SAME]—CORPORATIONS OTHER THAN FOR PROFIT. At all elections or votes had for any purpose in corporations formed for profit there must be a majority of the subscribed capital stock or of the members represented, either in person or by proxy in writing; provided, that in all instances of corporations formed for purposes other than profit the by-laws shall provide the number of members or stockholders that shall constitute a quorum for the trans-

action of business. Every person acting therein (in person or by proxy or representative), must be a member thereof or a bona fide stockholder, having stock in his own name on the stock-books of the corporation at least ten days prior to the election. Any vote or election had other than in accordance with the provisions of this article is voidable at the instance of absent (or any) stockholders or members, and may be set aside by petition to the superior court of the county where the same was held. Any regular or called meeting of the stockholders or members may adjourn from day to day, or from time to time, if for any reason there is not present a majority of the subscribed stock or members, or no election had, such adjournment and the reasons therefor being recorded in the journal of proceedings of the board of directors.

History: Enactments and amendments recited in section above. This amendment, March 22, 1905, Stats. and Amdts. 1905, c. DLXXXIV, p. 787.

§ 313. STOCK, HOW REPRESENTED. The shares of stock of an estate of a minor, or insane person, may be represented by his guardian, and of a deceased person by his executor or administrator.

History: Enacted March 21, 1872; amended March 31, 1874, Code Amdts. 1873-4, p. 203.

1. Applied, cited, construed, referred to, etc.
2. Executors—Voting of stock by.

1. **Applied, cited, construed, referred to, etc.,** in: *Market St. R. Co. vs. Hellman*, 109 Cal. 571, 590, 42 Pac. Rep. 225 (construed and applied); *Smith vs. San Francisco & N. P. R. Co.*, 115 Cal. 584, 590, 591, 56 Am. St. Rep. 119, 47 Pac. Rep. 582, 35 L. R. A. 309 (construed and applied).

2. **Executors.**—No transfer of stock to executors is necessary to entitle them to vote.

—*Market St. R. Co. vs. Hellman*, 109 Cal. 571, 590, 42 Pac. Rep. 225; *Smith vs. San Francisco & N. P. R. Co.*, 115 Cal. 584, 590, 591, 56 Am. St. Rep. 119, 47 Pac. Rep. 582, 35 L. R. A. 309. See *Matter of Cape May & D. B. N. Co.*, 51 N. J. L. (22 Vr.) 78, 16 Atl. Rep. 191.

In case of the death of a stockholder, by operation of law, his administrator is vested with the legal title to the stock, and holding such title for the purposes of management and administration, may vote such stock at all meetings of stockholders.

§ 314. ELECTION MAY BE POSTPONED. If from any cause an election does not take place on the day appointed by law or the by-laws, or otherwise, it may be held on any day thereafter as is provided for in such by-laws, or to which such election may be adjourned or ordered by the directors. If an election has not been held at the appointed time, and no adjourned or other meeting for the purpose has been ordered by the directors, a meeting may be called by the stockholders as provided in section three hundred and ten.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 348, held unconstitutional; see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXVI, p. 559.

§ 315. COMPLAINTS, QUO WARRANTO AND PROCEEDINGS THEREON, REGARDING ELECTIONS—[NOTICE]. Upon the application of any person or body corporate aggrieved by any election held by any corporate body, the superior court of the county in which such election is held must proceed forthwith to hear the allegations and proofs of the parties, or otherwise inquire into the matters of complaint, and thereupon confirm the election, order a new one, or direct such other relief in the premises as accords with right and justice.

[Notice.] Upon filing the petition, and before any further proceedings are had under this section, five days' notice of the hearing must be given, under the direction of the court or the judge thereof, to the adverse party, or those to be affected thereby.

History: Enacted March 21, 1872; amended April 1, 1878, Code Amdts. 1877-8, p. 79; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 248, held unconstitutional; see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXVI, p. 560.

1. Applied, cited, construed, referred to, etc.
2. Construction—Applicable to elections and not appointments.
3. Same—Applies to person aggrieved by election.
4. Same—"Corporate body" means corporation.
5. Jurisdiction of superior court.
6. Parties—Estoppel of stockholder to ask relief.
7. Same—Stockholder disqualified to vote may sue.
8. Pleading—Jurisdictional facts must be alleged.
9. Same—Prohibition where sufficient facts not alleged.
- 10, 11. Supersedeas on appeal.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Wickersham vs. Brittan*, 93 Cal. 34, 36, 28 Pac. Rep. 792, 29 Id. 51, 15 L. R. A. 106 (construed and applied); *Wickersham vs. Murphy*, 93 Cal. 41, 42, 28 Pac. Rep. 793 (applied); *Dulin vs. Pacific Wood & C. Co.*, 98 Cal. 304, 305, 306, 33 Pac. Rep. 123 (applied); *Dulin vs. Pacific Wood & C. Co.*, 103 Cal. 357, 360, 364, 35 Pac. Rep. 1045, 37 Id. 207 (construed and applied); *Foster vs. Superior Court San Francisco*, 115 Cal. 279, 281, 47 Pac. Rep. 53 (referred to); *Smith vs. San Francisco & N. P. R. Co.*, 115 Cal. 584, 587 (referred to in statement of facts), 594 (referred to in discussion), 609 (referred to in dis. op.), 56 Am. St. Rep. 119, 47 Pac. Rep. 582, 35 L. R. A. 309; *Whitehead vs. Sweet*, 126 Cal. 67, 72, 58 Pac. Rep. 376 (construed).

2. **CONSTRUCTION**—Applicable to elections and not appointments.—This section has application only to elections which are by statute authorized to be made by stockholders, and does not include appointment by directors to fill vacancy in their number.—*Wickersham vs. Brittan*, 93 Cal. 34, 35, 36, 28 Pac. Rep. 792, 29 Id. 51, 15 L. R. A. 106.

3. **Applies to persons aggrieved by election.**—Proceeding provided for in this section does not apply to plaintiff who does not claim to be aggrieved by any election, but complains that after he was regularly appointed to fill vacancy in board of directors some of directors refused to acknowledge his rights, and had excluded him from participating in acts of board.—*Wickersham vs. Murphy*, 93 Cal. 41, 42, 28 Pac. Rep. 793.

4. **"Corporate body"** referred to in this section means corporation itself, and not board

of directors.—*Wickersham vs. Brittan*, 93 Cal. 34, 39, 28 Pac. Rep. 792, 29 Id. 51, 15 L. R. A. 106.

5. **JURISDICTION**—Superior court has jurisdiction conferred upon district court by this section.—*Whitehead vs. Sweet*, 126 Cal. 67, 72, 58 Pac. Rep. 376.

See *Wright vs. Central Cal. C. W. Co.*, 67 Cal. 532, 533, 3 Pac. Rep. 70.

6. **PARTIES**—Estoppel of stockholder to ask relief.—Where stockholder having sufficient stock to elect himself and another director by cumulating his shares, on account of verbal agreement among stockholders that he should be president, scatters his votes expecting that agreement to be performed, and as result of election is defeated as director, court has no power under this section to relieve him of his own error, or do that for him which he has power to do for himself, and can neither declare him elected nor order new election.—*Dulin vs. Pacific Wood & C. Co.*, 103 Cal. 357, 360, 364, 35 Pac. Rep. 1045, 37 Id. 207.

7. **Stockholder disqualified to vote may sue.**—Stockholder who, having acquired stock less than ten days prior to election, was not qualified to vote at such election, is not thereby disqualified from instituting proceedings to set aside election if voidable.—*Wright vs. Central Cal. C. W. Co.*, 67 Cal. 532, 533, 3 Pac. Rep. 70.

8. **PLEADING**—Jurisdictional facts must be alleged in proceedings to remove officer, because proceeding is special one provided by statute, not according to course of common law, and requirements of statute must be complied with and such compliance must appear on face of record.—*Chollar Min. Co. vs. Wilson*, 66 Cal. 374, 5 Pac. Rep. 670.

9. **Prohibition will be issued where record does not show such jurisdictional facts.**—*Chollar Min. Co. vs. Wilson*, 66 Cal. 374, 5 Pac. Rep. 670.

10. **SUPERSEDEAS WILL NOT BE GRANTED PENDING APPEAL** from judgment in proceeding under this section to restrain party in whose favor judgment is rendered from acting as director under recognition of his fellow-directors, where no proceedings had been had upon or attempt to enforce judgment.—*Dulin vs. Pacific Wood & C. Co.*, 98 Cal. 304, 305, 306, 33 Pac. Rep. 123.

11. **Compare:** *Foster vs. Superior Court San Francisco*, 115 Cal. 279, 281, 47 Pac. Rep. 53.

§ 316. DAMAGES FOR FALSE ENTRIES, ETC. Any officer of a corporation who wilfully gives [1] a certificate, or [2] wilfully makes an official report, [3] public notice, or [4] entry in any of the records or books of the corporation, concerning the corporation or its business, which is false in any material representation, shall be liable for all the damages resulting therefrom to any person injured thereby, and if two or more officers unite or participate in the commission of any of the acts herein designated, they shall be jointly and severally liable.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 203.

1. Commercial reports—Liability for fraud in making.
2. False certificates of stock.
3. False prospectus—Directors are liable for issuing.
4. Same—Exaggerations and misstatements distinguished.
5. Penal liability of officers.

1. **COMMERCIAL REPORTS.**—False and fraudulent statements to mercantile agency as to the amount of capital invested in firm subjects members making them to an action for deceit in favor of one deceived and injured thereby.—*Eaton C. & B. Co. vs. Avery*, 83 N. Y. 31, 32, 33, 38 Am. Rep. 389.

2. **FALSE CERTIFICATES OF STOCK.**—Officers issuing false certificates of stock are liable to an assignee in good faith.—*Bruff vs. Mall*, 36 N. Y. 200, 202, 203.

3. **FALSE PROSPECTUS.**—Directors authorizing or sanctioning issue of false prospectus tending to deceive and induce public to purchase stock in company, are liable to purchasers relying thereon.—*Morgan vs. Skiddy*, 61 N. Y. 319, 326. See *N. J. Vreeland vs. New Jersey Stone Co.*, 29 N. J. Eq. (2 Stew.) 188, 195 Ohio. *Bartholomew vs. Bentley*, 15 Ohio 659, 45 Am. Dec. 596. *Fed. Bank of Montreal vs. Thayer*, 2 McCrary 1, 7 Fed. Rep. 622.

4. Mere exaggerated statements of prospects of a new enterprise will not subject those making them to liability, but no material misstatement or concealment of a material fact is permitted.—*Morgan vs. Skiddy*, 62 N. Y. 319, 326.

5. **Penal liability of officers.**—See Penal Code §§ 558, 564 and notes.

§ 317. **MEETING BY CONSENT TO BE VALID.** When all the stockholders or members of a corporation are present at any meeting, however called or notified, and sign a written consent thereto on the record of such meeting, the doings of such meeting are as valid as if had at a meeting legally called and noticed.

History: Enacted March 21, 1872.

§ 318. **PROCEEDINGS AT MEETING TO BE BINDING.** The stockholders or members of such corporation, when so assembled, may elect officers to fill all vacancies then existing, and may act upon such other business as might lawfully be transacted at regular meetings of the corporation.

History: Enacted March 21, 1872.

§ 319. **MEETINGS, WHERE HELD.** The meetings of the stockholders and board of directors of a corporation must be held at its office or principal place of business.

History: Enacted March 21, 1872.

1. Change of place of business.
2. Domicile of corporation.
3. Same—Foreign corporation doing business within state.
4. Directors may meet in foreign state in absence of statute, etc.
5. Stockholders cannot meet outside of state.
6. Same—General stockholders' meeting must be in state.

1. **Change of place of business.**—See post § 321a and note.

2. **DOMICILE OF CORPORATION.**—Corporation is resident of state in which it is created. *Ruynan vs. Coster*, 39 U. S. (14 Pet.) 122, bk. 10 L. ed. 382.

3. **Foreign corporations doing business in state do not acquire domicile thereby.** Mere grant of privileges to foreign corporations does not make them domestic corporations.—*Graham vs. Boston H. & E. R. Co.*, 118 U. S. 161, 168, bk. 30 L. ed. 196, 6 Sup. Ct. Rep. 1009; *New York, L. E. & W. R. Co. vs. Estill*, 147 U. S. 591, 610, bk. 37 L. ed. 292, 13 Sup. Ct. Rep. 444; *Louisville, N. A. & C. R. Co. vs. Louisville Trust Co.*, 174 U. S. 552, 562, bk. 43 L. ed. 1081, 19 Sup. Ct. Rep. 317.

4. **DIRECTORS MAY HOLD THEIR MEET-**

INGS IN FOREIGN STATES unless contrary is expressly provided by charter, by-laws, or general laws of state of their organization.—*Ohio & M. R. Co. vs. McPherson*, 35 Mo. 13, 36 Am. Dec. 128; *Missouri L. M. & S. Co. vs. Reinhard*, 114 Mo. 218, 35 Am. St. Rep. 746, 750, 21 S. W. Rep. 488; *Thompson vs. Natches Water & S. Co.*, 68 Miss. 423, 9 So. Rep. 321.

5. **STOCKHOLDERS CANNOT MEET OUTSIDE OF STATE** in which corporation was created, and where laws of its corporate existence have no force, and in such foreign state transact business or ratify acts previously done.—*Harding vs. American Glucose Co.*, 182 Ill. 551, 614, 615, 74 Am. St. Rep. 189, 55 N. E. Rep. 577. See *Bastian vs. Modern Woodmen of America*, 166 Ill. 595, 46 N. E. Rep. 1090.

6. **Contra:** *Missouri L. M. & S. Co. vs. Reinhard*, 114 Mo. 218, 35 Am. St. Rep. 746, 21 S. W. Rep. 488.

7. **General stockholders' meeting for election of officers held out of state, all stockholders not consenting, and by-laws providing that it should be held at specified place in state, the election will be illegal and void.**—*Hodgson vs. Duluth H. & D. R. Co.*, 46 Minn. 454, 49 N. W. Rep. 197.

§ 320. WHEN NO PROVISION IN BY-LAWS FOR REGULAR MEETINGS, SPECIAL MEETINGS, HOW CALLED. When no provision is made in the by-laws for regular meetings of the directors and the mode of calling special meetings, all meetings must be called by special notice in writing, to be given to each director by the secretary, on the order of the president, or if there be none, on the order of two directors.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Adjourned meeting—Notice of must be given.
3. Directors' meetings—Must be called by president.
4. Effect of failure to give notice—Mortgage invalid.
5. Presumptions in favor of notice.
6. Requisites of notice—Personal notice necessary.
7. Same—Purpose of notice need not be stated.
8. Who may give notice.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Granger vs. Original E. M. & M. Co.*, 59 Cal. 678, 681, 682 (construed and applied); *Thompson vs. Williams*, 76 Cal. 153, 154, 9 Am. St. Rep. 187, 18 Pac. Rep. 153 (applied to adjourned meeting); *Smith vs. Dorn*, 96 Cal. 73, 79, 82, 30 Pac. Rep. 1024 (construed and applied); *Stockton C. H. & A. W. vs. Houser*, 109 Cal. 1, 9, 10, 41 Pac. Rep. 809 (construed and applied); *Curtin vs. Salmon River H. G. Min. & D. Co.*, 130 Cal. 345, 347, 30 Am. St. Rep. 132, 62 Pac. Rep. 552 (construed and applied); *Relley vs. Campbell*, 134 Cal. 175, 177, 66 Pac. Rep. 220 (construed and applied).

2. **ADJOURNED MEETING**.—When meeting from which some of members of board of directors are absent is adjourned for future date without specifying hour of meeting, adjourned meeting is special meeting, and notice must be given those who were absent at prior meeting.—*Thompson vs. Williams*, 76 Cal. 153, 154, 9 Am. St. Rep. 187, 18 Pac. Rep. 153.

3. **DIRECTORS' MEETINGS**.—Where by-law provides that special meetings of directors shall be called by special notice, and that such notice shall be given upon order of president, or if there be none, on order of two directors; meeting called by two directors while there is president competent to act, but who refuses

to call meeting, is illegal because exercise of such power by president is discretionary.—*Smith vs. Dorn*, 96 Cal. 73, 82, 30 Pac. Rep. 1024.

4. **EFFECT OF FAILURE TO GIVE NOTICE**.—Mortgage executed at meeting which is not called nor notice given as provided in this section, is invalid.—*Relley vs. Campbell*, 134 Cal. 175, 177, 66 Pac. Rep. 220.

5. **PRESUMPTION IN FAVOR OF NOTICE**.—In absence of proof to contrary, notice of directors' meeting will be presumed, and notices sent by mail will be presumed to have been received.—*Granger vs. Original E. M. & M. Co.*, 59 Cal. 678, 681, 682; *Stockton C. H. & A. W. vs. Houser*, 109 Cal. 1, 9, 10, 41 Pac. Rep. 809.

6. **REQUISITES OF NOTICE**—Personal notice necessary.—When there is no definite provision in charter or by-laws of a corporation, special meeting must be called by giving personal notice to each member of board of trustees.—*Harding vs. Vandewater*, 40 Cal. 77, 83. See *Bank of Little Rock vs. McCarthy*, 55 Ark. 473, 29 Am. St. Rep. 60, 18 S. W. Rep. 759.

7. **Purpose of meeting need not be stated in notice**; notice that meeting will be held is sufficient.—*Granger vs. Original E. M. & M. Co.*, 59 Cal. 678, 681, 682; *Bank of National City vs. Johnston* (Cal. Mar. 24, 1900), 60 Pac. Rep. 776, 778. See *In re Argus Co.*, 138 N. Y. 557, 34 N. E. Rep. 388.

8. **WHO MAY GIVE NOTICE**.—Where by-laws designate person authorized to call special meeting, but do not designate person by whom notice is to be given, notice must be given by secretary, as provided in this section.—*Curtin vs. Salmon River H. G. Min. & D. Co.*, 130 Cal. 345, 347, 30 Am. St. Rep. 132, 62 Pac. Rep. 552.

§ 321. CERTAIN BOOKS TO BE OPEN FOR INSPECTION. Every corporation doing a banking business in this state must keep in its office, in a place accessible to the stockholders, depositors, and creditors thereof, and for their use, a book containing a list of all stockholders in such corporation, and the number of shares of stock held by each, and every such corporation must keep posted in its office, in a conspicuous place, accessible to the public generally, a notice, signed by the president or secretary, showing:

1. The names of the directors of such corporation.
2. The number and value of shares of stock held by each director.

The entries on such book and such notice shall be made and posted within twenty-four hours after any transfer of stock, and shall be conclusive evidence against each director and stockholder of the number of shares of stock held by

each. The provisions of this section shall apply to all banking corporations formed or existing before twelve o'clock noon of the day on which this code took effect, as well as to those formed after such time.

History: Enacted Jan. 29, 1876, Code Amdts. 1875-6, p. 72.

1. Applied, cited, construed, referred to, etc.
2. Evasion of law—Failure to have office.
3. Pledgee of bank stock—Books must show nature of his holding.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Hurlburt vs. Arthur*, 140 Cal. 103, 105, 98 Am. St. Rep. 17, 73 Pac. Rep. 734 (construed and applied); *Chapman vs. Doray*, 89 Cal. 52, 54, 26 Pac. Rep. 605 (referred to).

2. EVASION OF LAW—Every corporation must have an office and place of business, and

directors of mining company cannot evade their liability for failure to post monthly reports of at office of company, or neglect to have an office for carrying on of corporation business.—*Chapman vs. Doray*, 89 Cal. 52, 54, 26 Pac. Rep. 605.

3. PLEDGEE OF BANK STOCK IS NOT EXEMPT FROM LIABILITY to creditors, unless it appears on face of company's books that he held stock only as pledgee.—*Hurlburt vs. Arthur*, 140 Cal. 103, 105, 98 Am. St. Rep. 17, 73 Pac. Rep. 734.

§ 321a. CHANGE OF PRINCIPAL PLACE OF BUSINESS, PROCEDURE.

Every corporation that has been or may be created under the general laws of this state may change its principal place of business from one place to another in the same county, or from one city or county to another city or county within this state. Before such change is made, the

Consent in writing, of the holders of two thirds of the capital stock of the corporation must be obtained and filed in its office. When such consent is obtained and filed, notice of the intended removal or change must be published, at least once a week, for three successive weeks, in some newspaper published in the county wherein said principal place of business is situated, if there is one published therein; if not, in a newspaper of an adjoining county, giving the name of the county or city where it is situated and that to which it is intended to remove it.

[Copy of resolution, etc., to be filed.] Whenever any such change is made, a copy of the resolution or action of the board of directors authorizing the same together with a copy of an affidavit of the publication above required, all duly certified by the president and secretary of the corporation with the corporate seal affixed shall be filed in each office where the original articles of incorporation are, or any copy thereof is required to be filed.

[Removal of location in same town.] This section shall not be construed to require such consent, notice or publication in the case of any such removal from one location to another in the same city, town or village.

History: Enacted April 3, 1876 (as § 321), Code Amdts. 1875-6, p. 73; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 348, held unconstitutional; see history, § 4 ante; re-enacted March 20, 1903, Stats. and Amdts. 1903, p. 254.

Applied, cited, construed, referred to, etc., in: *Chapman vs. Doray*, 89 Cal. 52, 54, 26 Pac. Rep. 605.

Residence cannot be changed.—Corporation

cannot change its residence or citizenship. Its legal home is where it was chartered.—*Ex parte Schollenberger*, 96 U. S. 378, bk. 24 L. ed. 852.

§ 321b. STOCKHOLDERS' MEETINGS, WHO MAY VOTE AT—PROXIES, VOID WHEN; MAXIMUM PERIOD OF, REVOCABLE. At all meetings of stockholders of corporations organized under the laws of this state, or in the case of corporations having no capital stock, then at all meetings of the members of such corporation, only the stockholders or members actually present shall be entitled to vote on any proposition, including the election of directors and other officers of

the corporation, unless proxies from absent or non-attending stockholders or members shall be held by some person or persons present at such meeting and shall be executed in accordance with the provisions of this section.

[Essentials to validity of proxy.] Every such proxy must be executed in writing by the member or stockholder himself, or by his duly authorized attorney. No proxy heretofore given or made shall be valid after the expiration of eleven months from the passage of this act, unless the member or stockholder executing it shall have specified therein the length of time for which such proxy is to continue in force, which must be for some limited period, and in no case to exceed seven years from the date of the execution of such proxy. No proxy hereafter to be given or made shall be valid after the expiration of eleven months from the date of its execution, unless the member or stockholder executing it shall have specified therein the length of time for which such proxy is to continue in force, which must be for some limited period, and in no case to exceed seven years from the date of the execution of such proxy.

Every proxy shall be revocable at the pleasure of the person executing it; but a corporation having no capital stock may prescribe in its by-laws the persons who may act as proxies for members, and the length of time for which such proxies may be executed.

History: Enacted Feb. 27, 1905, Stats. and Amdts. 1905, c. XXVIII, p. 22.

CHAPTER II.

CORPORATE STOCK.

Article I. Stock and Stockholders, §§ 322-328.

II. Assessment of Stock, §§ 331-349.

ARTICLE I.

STOCK AND STOCKHOLDERS.

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| <p>§ 322. Liability of stockholders; released when; how determined; trust fund not liable; stock held as collateral.</p> <p>§ 323. Certificates, how and when issued.</p> <p>§ 324. Shares of stock, personal property—How transferred—Irrigation stock appurtenant to lands.</p> | <p>§ 325. Married woman may transfer stock; dividends paid to her; her proxy.</p> <p>§ 326. Affidavit or bond may be required before transfer.</p> <p>§ 327. Contracts to relieve directors from liabilities fixed by constitution void.</p> <p>§ 328. Lost, etc., certificate; action for new certificate; parties; procedure.</p> |
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§ 322. LIABILITY OF STOCKHOLDERS; RELEASED WHEN; HOW DETERMINED; TRUST FUND NOT LIABLE; STOCK HELD AS COLLATERAL.

Each stockholder of a corporation is individually and personally liable for such proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation.

Any creditor of the corporation may institute joint or several actions against any of its stockholders, for the proportion of his claim payable by each, and in such action the court must [1] ascertain the proportion of the claim or debt for which each defendant is liable, and [2] a several judgment must be rendered against each, in conformity therewith.

If any stockholder pays his proportion of any debt due from the corporation, incurred while he was such stockholder, he is relieved from any further personal liability for such debt, and if an action has been brought against him upon such debt, it must be dismissed, as to him, upon his paying the costs, or such proportion thereof as may be properly chargeable against him.

The liability of each stockholder is determined by the amount of stock or shares owned by him at the time the debt or liability was incurred; and such liability is not released by any subsequent transfer of stock.

The term stockholder, as used in this section, applies not only to such persons as appear by the books of the corporation to be such, but also to every equitable owner of stock, although the same appears on the books in the name of another; and also to every person who has advanced the instalments or purchase money of stock in the name of a minor, so long as the latter remains a minor; and also to every guardian, or other trustee, who voluntarily invests any trust funds in the stock.

Trust funds in the hands of a guardian, or trustee, are not liable under the provisions of this section, by reason of any such investment; nor must the person for whose benefit the investment is made be responsible in respect to the stock until he becomes competent and able to control the same; but the responsibility of the guardian or trustee making the investment continues until that period.

Stock held as collateral security, or by a trustee, or in any other representative capacity, does not make the holder thereof a stockholder within the meaning of this section, except in the cases above mentioned, so as to charge him with any proportion of the debts or liabilities of the corporation; but the pledgee, or person or estate represented, is to be deemed the stockholder, as respects such liability.

In a corporation having no capital stock, each member is individually and personally liable for an equal share of its debts and liabilities, and similar actions may be brought against him, either alone or jointly with other members, to enforce such liability as by this section may be brought against one or more stockholders, and similar judgments may be rendered.

[Foreign corporations—Liability of stockholders.] The liability of each stockholder of a corporation formed under the laws of any other state or territory of the United States, or of any foreign country, and doing business within this state, is the same as the liability of a stockholder of a corporation created under the constitution and laws of this state.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 203; March 15, 1876, Code Amdts. 1875-6, p. 73; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 349, held unconstitutional; see history, § 4 ante; amendment re-enacted March 20, 1905, Stats. and Amdts. 1905, c. CCCXXXIX, p. 396.

I. In General.

1. Applied, cited, construed, referred to, etc.
2. Agency of corporation to incur liability.
- 3, 4. All corporations within statute.
5. "All debts" defined.
6. Colorable ownership of stock.
7. Constitutional provision.
8. Debts contracted before capital stock is paid in.
9. Definition of stockholder.

10. Same—Certificate need not be issued.
11. Same—Name appearing on books.
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13. Implied contract of stockholder.
14. Legislation in furtherance of constitution.
15. Same—Constitution not self-executing.
16. Same—Power of legislature to fix liability.
17. Same—Uniform liability must be imposed.

18. Payment for stock—Not necessary to fix liability.
19. Provisions of other sections not in conflict.
20. Public policy of statute.
21. Retroaction—Application to corporations previously created.
22. Same—No impairment of obligation of contract.

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23. Absolute and unconditional liability.
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27. Ascertainment of extent of liability.
28. Common law imposes no liability.
29. Corporation holding stock in another corporation.
30. Contractual and statutory liability.
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32. Entire body of stockholders liable.
33. Interest—Liability of stockholder for.
34. Same—Presumption of interest.
35. Original indebtedness—Effect of judgment against corporation.
36. Same—Payment of debt with money borrowed.
37. Same—Renewal or extension of indebtedness.
38. Partnership liability.
39. Payment, release, or discharge of debt—Discharges stockholder.
40. Same—Creditor must be paid.
41. Same—Discharge in insolvency of corporation.
42. Same—Immaterial by whom payment made.
43. Same—Partial payment discharges pro tanto.
44. Same—Reduction of debt by account stated.
45. Same—Release of stockholder by creditor.
- 46, 47. Pledgee of stock—Is liable.
48. Same—Nature of transaction should appear on books.
49. Same—Reason why pledgee is liable.
50. Primary liability—Stockholders are principal debtors.
51. Proportional liability.
52. Several and not joint liability.
53. Subrogation—Paying stockholder not entitled to.
54. Suspension of remedy against corporation—Stockholder still liable.
55. Same—Note of corporation secured by mortgage.
56. Transfer of stock—Does not relieve from liability.
57. Same—Note maturing after transfer of stock.
58. Same—Payment by transferee not receivable back.
59. Waiver of liability permissible.

III. Remedies, Pleading, and Practice.

60. Action—May be in ordinary form.
61. Same—Account—Recovery may be on.
62. Same—Theory of case—Action on contract.
63. Attachment may be issued.
64. Complaint—Averment of account.

65. Same—Bill of particulars may be demanded.
66. Same—Contract of corporation alleged in usual mode.
- 67, 68. Same—Debt of corporation must be alleged.
69. Same—Defendants must be alleged to be stockholders.
70. Same—Existence of corporation.
71. Same—Form—Approved precedent.
72. Same—Note—Averment as to.
73. Same—Number of shares of stock must be alleged.
- 74, 75. Same—"Original indebtedness"—How alleged.
76. Same—Proportion of indebtedness for which defendant liable.
- 77-79. Same—Proportion of stock held by defendant—Demurrer.
80. Same—Tenancy in common of stock—Proof of sole ownership.
- 81-83. Same—Time when debt was incurred—Note—General demurrer.
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85. Equitable remedy of creditors continues.
86. Evidence—Acceptance of certificate.
- 87, 88. Same—Books of corporation—To show amount and ownership of stock.
89. Same—Judgment against corporation showing indebtedness.
90. Same—Nonsuit improper when some evidence.
91. Same—Parol evidence to contradict stock-book inadmissible.
92. Judgment—Against corporation not prerequisite.
93. Same—Default judgment against one stockholder.
94. Same—Effect of judgment against corporation—No merger.
95. Same—Several judgments may be rendered.
96. Jurisdiction—Courts of foreign states have.
97. Same—Frivolous amount—De minimis, etc., applied.
- 98-101. Same—Jurisdictional amount—Joinder of stockholders—Judgment.
102. Same—Justice of the peace has jurisdiction.
103. Limitation of actions.
104. Parties plaintiff—Creditors only.
- 105-108. Same—Assignee may sue—Consideration—Subrogation.
- 109, 110. Same—Stockholder may sue, if creditor, or his assignee.
111. Same—Surety may sue after payment.
- 112, 113. Parties defendant—Corporation proper, but not necessary, party.
- 114, 115. Same—Joinder of stockholder proper.
116. Same—Stockholders who are sureties sued as principals.
117. Pledge to creditor does not suspend remedy against stockholder.
118. Venue—Action where any defendant resides.

I. IN GENERAL.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Sonoma Valley Bank

va. Hill, 59 Cal. 107, 109, 110 (construed and applied); Faymonville vs. McCollough, 59 Cal. 285, 286 (construed and applied); Harmon vs. Page, 62 Cal. 448, 461 (construed and applied); Mitchell vs. Beckman, 64 Cal. 117, 121, 28 Pac. Rep. 110 (construed and applied); Derby vs. Stevens, 64 Cal. 287, 288, 289, 30 Pac. Rep. 820 (construed and applied); Santa Cruz R. Co. vs. Spreckles, 65 Cal. 193, 210, 3 Pac. Rep. 661, 802 (referred to); Bidwell vs. Babcock, 87 Cal. 31, 31 (cited), 32 (construed), 25 Pac. Rep. 752; Potter vs. Dear, 95 Cal. 578, 580, 30 Pac. Rep. 777 (construed); Baines vs. Babcock, 95 Cal. 581, 589, 29 Am. St. Rep. 153, 27 Pac. Rep. 674, 30 Id. 776 (construed and applied); Kennedy vs. Cal. Sav. Bank, 97 Cal. 93, 95, 33 Am. St. Rep. 163, 31 Pac. Rep. 846 (construed and applied); Borland vs. Nevada Bank, 99 Cal. 89, 92, 37 Am. St. Rep. 32, 33 Pac. Rep. 737 (construed and applied); Griffin & S. Co. vs. Magnolia & H. F. C. Co., 107 Cal. 378, 381, 40 Pac. Rep. 495 (construed); Brown vs. Merrill, 107 Cal. 446, 447, 48 Am. St. Rep. 145, 40 Pac. Rep. 537 (construed and applied); Winona Wagon Co. vs. Bull, 108 Cal. 1, 4, 5, 40 Pac. Rep. 1077 (construed and applied); Market Street R. Co. vs. Hellman, 109 Cal. 571, 588, 42 Pac. Rep. 225 (referred to); McGowan vs. McDonald, 111 Cal. 57, 63 (referred to), 66 (construed and applied), 52 Am. St. Rep. 149, 43 Pac. Rep. 418; Pelton vs. San Jacinto L. Co., 118 Cal. 31, 35, 45 Pac. Rep. 12 (referred); Case Flow Works vs. Montgomery, 115 Cal. 380, 381, 47 Pac. Rep. 108 (construed and applied); Smith vs. San Francisco & N. P. R. Co., 115 Cal. 584, 594, 56 Am. St. Rep. 119, 47 Pac. Rep. 582, 35 L. R. A. 309 (referred to with other sections); Danielson vs. Yoakum, 116 Cal. 382, 384, 43 Pac. Rep. 322 (quoted); Grimwood vs. Barry, 118 Cal. 274, 276, 50 Pac. Rep. 430 (construed and applied); Myers vs. Sierra Val. Stock & A. Assoc., 122 Cal. 669, 672, 673, 674, 55 Pac. Rep. 689 (construed and applied); Sacramento Bank vs. Pacific Bank, 124 Cal. 147, 150, 71 Am. St. Rep. 36, 56 Pac. Rep. 737, 45 L. R. A. 863 (construed and applied); Johnson vs. Bank of Lake, 125 Cal. 6, 8, 73 Am. St. Rep. 17, 57 Pac. Rep. 664 (construed and applied); Santa Rosa Nat. Bank vs. Barnett, 125 Cal. 407, 412, 58 Pac. Rep. 85 (construed); Welch vs. Sargent, 127 Cal. 72, 82, 59 Pac. Rep. 319 (construed); Wells, Fargo & Co. vs. Enright, 127 Cal. 669, 675, 60 Pac. Rep. 439, 49 L. R. A. 647 (construed and applied); Duke vs. Huntington, 130 Cal. 272, 274, 62 Pac. Rep. 510 (applied); Greenleaf vs. Jacks, 133 Cal. 506, 507, 65 Pac. Rep. 1039 (applied); Abbott vs. Jack, 136 Cal. 510, 513, 69 Pac. Rep. 257 (applied); Hurlburt vs. Arthur, 140 Cal. 103, 105-107, 98 Am. St. Rep. 17, 73 Pac. Rep. 134 (construed and applied to pledgees).

2. AGENCY OF CORPORATION.—Necessary legal effect of conditions prescribed is that corporation when created becomes agent of its stockholders to make such contracts and incur such liabilities as are authorized by law and by its articles of incorporation, and that contracts which it thus makes bind stockholders to extent named.—Kennedy vs. California Sav. Bank, 97 Cal. 93, 96, 33 Am. St. Rep. 163, 31 Pac. Rep. 846. See Brown vs. Hitchcock, 36 Ohio St. 667, 678.

3. ALL CORPORATIONS WITHIN STAT-

UTE, and stockholders of all corporations are liable, without regard to character of business to be transacted.—McGowan vs. McDonald, 111 Cal. 57, 67, 52 Am. St. Rep. 149, 43 Pac. Rep. 418. See Mitchell vs. Beckman, 64 Cal. 117, 122, 38 Pac. Rep. 110.

4. Stockholders of bank are liable.—McGowan vs. McDonald, 111 Cal. 57, 67, 52 Am. St. Rep. 149, 43 Pac. Rep. 418. See Mitchell vs. Beckman, 64 Cal. 117, 122, 38 Pac. Rep. 110.

5. "ALL THE DEBTS" means every debt of company.—Morrow vs. Superior Court, 64 Cal. 383, 385, 386, 1 Pac. Rep. 354.

6. COLORABLE OWNERSHIP OF STOCK; e. g. where shares are put in name of person to qualify him to act as director, transfer being made upon books of company, subjects him to statutory liability.—See Moore vs. Boyd, 74 Cal. 167, 174, 15 Pac. Rep. 670.

7. CONSTITUTIONAL PROVISION.—Provision of Const., art. XII § 3, and the provision of this section, have substantially same meaning and effect.—Bidwell vs. Babcock, 87 Cal. 29, 32, 25 Pac. Rep. 752; McGowan vs. McDonald, 111 Cal. 57, 66, 52 Am. St. Rep. 149, 43 Pac. Rep. 418. See Santa Rosa Nat. Bank vs. Barnett, 125 Cal. 407, 412, 58 Pac. Rep. 85.

8. DEBTS CONTRACTED BEFORE CAPITAL STOCK IS PAID IN are not forbidden by such statute, but it allows it to be done on condition that those who are stockholders at time shall become severally and individually liable.—First Nat. Bank Plymouth vs. Price, 33 Md. 487, 3 Am. Rep. 204.

9. DEFINITION OF STOCKHOLDER within meaning of this section is found in terms of statute.—See Abbott vs. Jack, 136 Cal. 510, 513, 69 Pac. Rep. 257.

10. Certificate need not be issued to make stock purchaser stockholder, they being only evidence of property which may exist without them.—Mitchell vs. Beckman, 64 Cal. 117, 121, 28 Pac. Rep. 110.

11. Fact that person's name appears as stockholder on books of company, in absence of any facts to the contrary, is sufficient to hold him liable.—Abbott vs. Jack, 136 Cal. 510, 513, 69 Pac. Rep. 257.

12. EXEMPTION OF STOCKHOLDERS OF CERTAIN CORPORATIONS is not within power of legislature and statute which exempts stockholders of banking corporations is unconstitutional.—McGowan vs. McDonald, 111 Cal. 57, 64-68, 52 Am. St. Rep. 149, 43 Pac. Rep. 418. See French vs. Teschemaker, 24 Cal. 518, 545; Mitchell vs. Beckman, 64 Cal. 117, 122, 28 Pac. Rep. 110; Kennedy vs. California Sav. Bank, 101 Cal. 495, 500, 40 Am. St. Rep. 69, 35 Pac. Rep. 1039.

13. IMPLIED CONTRACT OF STOCKHOLDER.—By becoming member of corporation while such statute is in force stockholder impliedly contracts to pay all debts which corporation may incur.—Winona Wagon Co. vs. Bull, 108 Cal. 1, 6, 40 Pac. Rep. 1077. See Trippe vs. Hunccheon, 82 Ind. 307.

14. LEGISLATION IN FURTHERANCE OF CONSTITUTION may consist of general law making such provision as will subserve all purposes required, and it is not necessary that

every act providing for formation of corporations shall also provide for liability of their stockholders.—*McGowan vs. McDonald*, 111 Cal. 57, 65, 52 Am. St. Rep. 149, 43 Pac. Rep. 418.

15. **Constitution not self-executing.**—Section 36 of article 4 of the constitution, relating to stockholder's liability, is not self-executing, and without legislative aid is inoperative.—*French vs. Teschemaker*, 24 Cal. 518, 540, 541, 543.

16. **Power of legislature to fix liability.**—Legislature has power to fix liability of stockholder and to say what his portion of liability shall be.—*French vs. Teschemaker*, 24 Cal. 518, 544.

17. **Same rate of liability on all stockholders** must be imposed and law must operate alike upon all corporations.—*French vs. Teschemaker*, 24 Cal. 518, 544. *Larrabee vs. Baldwin*, 35 Cal. 155, 166.

18. **PAYMENT FOR STOCK.**—To become stockholder it is not necessary to pay for stock. Corporation may give credit for its stock as well as for any other property sold by it.—*Mitchell vs. Beckman*, 64 Cal. 117, 121, 23 Pac. Rep. 110.

19. **PROVISIONS OF OTHER SECTIONS NOT IN CONFLICT.**—There is no conflict between this section and § 309 ante and §§ 348, 359 of the Code of Civil Procedure.—*Santa Rosa Nat. Bank vs. Barnett*, 125 Cal. 407, 412, 53 Pac. Rep. 35.

20. **PUBLIC POLICY** suggests such legislation and fundamental idea inspiring it is to afford greatest protection to creditors of corporation and to highest extent secure them against loss.—*Hurlburt vs. Arthur*, 140 Cal. 103, 107, 98 Am. St. Rep. 17, 73 Pac. Rep. 734.

21. **RETROACTIVE STATUTE.**—Section applies to stockholders of corporations formed or doing business in state before adoption of codes.—*McGowan vs. McDonald*, 111 Cal. 57, 66, 52 Am. St. Rep. 149, 43 Pac. Rep. 418.

22. **Impairment of obligation of contract** does not result from this construction, because Const. 1849, art. IV § 31, contained a saving clause providing that statutes relative to formation of corporations might be altered from time to time or repealed.—*McGowan vs. McDonald*, 111 Cal. 57, 65, 52 Am. St. Rep. 149, 43 Pac. Rep. 418. See *Matter of Empire City Bank*, 18 N. Y. 199.

II. NATURE AND EXTENT OF STOCKHOLDER'S LIABILITY.

23. **ABSOLUTE AND UNCONDITIONAL LIABILITY.**—Liability of stockholders under this section is not contingent, but is absolute and unconditional, and responsibility of stockholders commences with that of corporation and continues during existence of indebtedness.—*Mokelumne Hill C. & Min. Co. vs. Woodbury*, 14 Cal. 265, 266; *Davidson vs. Rankin*, 34 Cal. 503, 505.

24. **ACCRUAL AND DURATION OF LIABILITY.**—Stockholder's responsibility commences with that of corporation and continues during existence of indebtedness.—*Mokelumne Hill C. & Min. Co. vs. Woodbury*, 14 Cal. 265, 267; *Davidson vs. Rankin*, 34 Cal. 503, 505;

Young vs. Rosenbaum, 39 Cal. 646, 654; *Sonoma Valley Bank vs. Hill*, 59 Cal. 107, 109, 110.

Limitation of action to enforce stockholder's liability.—See Code of Civ. Proc. § 338 subd. 1, § 359.

25. **Services not performed.**—Liability of stockholder for attorney's services is not created until services are performed.—*Johnson vs. Bank of Lake*, 125 Cal. 6, 8, 73 Am. St. Rep. 17, 57 Pac. Rep. 664.

26. **Simultaneous accrual of corporation's and stockholder's liability.**—Right of action against corporation and stockholder accrues simultaneously.—*Mitchell vs. Beckman*, 64 Cal. 117, 122, 23 Pac. Rep. 110; *Hyman vs. Coleman*, 32 Cal. 650, 653, 16 Am. St. Rep. 178, 23 Pac. Rep. 62.

27. **ASCERTAINMENT OF EXTENT OF LIABILITY** requires nothing more than to ascertain whole amount of capital stock, amount owned by stockholder sued, and amount of indebtedness of corporation to plaintiff, and this can be done in an action at law without resorting to equity.—*Larrabee vs. Baldwin*, 35 Cal. 155, 166; *Morrow vs. Superior Court*, 64 Cal. 383, 385, 1 Pac. Rep. 354; *Bidwell vs. Babcock*, 37 Cal. 29, 32, 25 Pac. Rep. 752; *Knowles vs. Sandercock*, 107 Cal. 629, 635, 40 Pac. Rep. 1047.

28. **COMMON LAW IMPOSES NO LIABILITY ON STOCKHOLDER** for debts contracted by corporation, and such liability is created and exists solely by statute.—*Moore vs. Boyd*, 74 Cal. 167, 171, 15 Pac. Rep. 670; *Redington vs. Cornwell*, 90 Cal. 49, 63, 27 Pac. Rep. 40; *Hunt vs. Ward*, 99 Cal. 612, 616, 37 Am. St. Rep. 37, 24 Pac. Rep. 335; *Case Plow Works vs. Montgomery*, 115 Cal. 380, 381, 47 Pac. Rep. 108. See Ill. *Diversey vs. Smith*, 103 Ill. 378, 42 Am. Rep. 14. Md. *First Nat. Bank Plymouth vs. Price*, 33 Md. 487, 3 Am. Rep. 204. Minn. *Johnson vs. Fischer*, 30 Minn. 173, 14 N. W. Rep. 799; *Mohr vs. Minnesota El. Co.*, 40 Minn. 343, 41 N. W. Rep. 1074.

29. **CORPORATION WHICH IS STOCKHOLDER IN ANOTHER CORPORATION** is not liable under statute as stockholder where its ownership of stock was ultra vires and void.—*Knowles vs. Sandercock*, 107 Cal. 629, 642-644, 40 Pac. Rep. 1047.

30. **CONTRACTUAL AND STATUTORY LIABILITY.**—Such liability is contractual and statutory liability.—*Kennedy vs. California Sav. Bank*, 97 Cal. 93, 95, 33 Am. St. Rep. 163, 31 Pac. Rep. 846. See *Dennis vs. Superior Court*, 91 Cal. 548, 549, 27 Pac. Rep. 1031; *Knowles vs. Sandercock*, 107 Cal. 629, 638, 40 Pac. Rep. 1047; *Bliss vs. Sneath*, 119 Cal. 526, 530, 51 Pac. Rep. 848; *Norris vs. Wrenschall*, 34 Md. 492.

31. **DISTINCT FROM LIABILITY OF CORPORATION.**—Stockholder's liability is distinct from that of corporation.—*Brown vs. Merrill*, 107 Cal. 446, 447, 48 Am. St. Rep. 145, 40 Pac. Rep. 557.

32. **ENTIRE BODY OF STOCKHOLDERS IS PERSONALLY LIABLE** for entire debt contracted, and entire set of stockholders is liable for every debt.—*Larrabee vs. Baldwin*, 35 Cal. 155, 166.

33. INTEREST—Stockholder is liable for as part of debt, in like manner as corporation is liable.—Wells, Fargo & Co. vs. Enright, 127 Cal. 669, 675, 60 Pac. Rep. 439, 49 L. R. A. 647. See Knowles vs. Sandercock, 107 Cal. 629, 638, 40 Pac. Rep. 1047.

34. Interest presumed where money is loaned unless it is otherwise expressly stipulated at time in writing, under § 1914.—Wells, Fargo & Co. vs. Enright, 127 Cal. 669, 675, 60 Pac. Rep. 439, 49 L. R. A. 647.

See post § 1914 and note.

35. "ORIGINAL INDEBTEDNESS."—JUDGMENT AGAINST CORPORATION—Does not create new liability, but debt for which stockholder is liable continues to be original indebtedness.—Hyman vs. Coleman, 82 Cal. 650, 653, 16 Am. St. Rep. 178, 23 Pac. Rep. 62.

36. Payment of debt with money borrowed.—Where corporation gives its note in consideration of money loaned by bank, but bank, instead of paying money over to the corporation, pays note which corporation has assumed, note constitutes an original indebtedness for which stockholders are liable.—Herman vs. Hecht, 116 Cal. 553, 558, 48 Pac. Rep. 611. See Hamilton vs. Starkweather, 28 Conn. 138.

37. Renewal note, or extension of indebtedness of the corporation, is not renewal or extension of stockholders' liability.—Santa Rosa Nat. Bank vs. Barnett, 125 Cal. 407, 411, 53 Pac. Rep. 85. See Hyman vs. Coleman, 82 Cal. 650, 653, 16 Am. St. Rep. 178, 23 Pac. Rep. 62.

38. PARTNERSHIP LIABILITY.—The members of corporation, who are answerable personally for corporate debts and liabilities, stand in the same position in relation to creditors of corporation as if they were conducting their business as common partnership.—Mokelumne Hill Can. & Min. Co. vs. Woodbury, 14 Cal. 265, 266. See Marcy vs. Clark, 17 Mass. 330; Allen vs. Sewall, 2 Wend. (N. Y.) 327, 338; Moss vs. Oakley, 2 Hill (N. Y.) 268, 269; Harger vs. McCullough, 2 Den. (N. Y.) 119, 122, 123.

39. PAYMENT, RELEASE, OR DISCHARGE OF DEBT has the effect of releasing stockholders from such statutory liability, because creditor can claim only one satisfaction of debt.—Young vs. Rosenbaum, 39 Cal. 646, 654; San Jose Sav. Bank vs. Pharis, 58 Cal. 380, 381, 382; Mitchell vs. Beckman, 64 Cal. 117, 122, 28 Pac. Rep. 110; Brown vs. Merrill, 107 Cal. 446, 447, 48 Am. St. Rep. 145, 40 Pac. Rep. 557; Partridge vs. Butler, 113 Cal. 326, 329, 45 Pac. Rep. 678.

40. Creditor must be paid, and payment by stockholders to president of corporation, there being no assessment or call in pursuance of which such payment was made, is not a payment to corporation, and money so paid is not in the corporation's possession; and if such money were applied to payment of debt to extent of proportionate shares of stockholders who put up such money, such payment would constitute no defense in an action to enforce statutory liability of stockholders.—Knowles vs. Sandercock, 107 Cal. 629, 638, 639, 40 Pac. Rep. 1047.

41. Discharge in insolvency of corporation releases and discharges stockholders from per-

sonal liability imposed by statute.—Mohr vs. Minnesota El. Co., 40 Minn. 343, 41 N. W. Rep. 1074.

42. Immaterial by whom payment made provided payment is such as to release corporation and it may be made by stockholder or by corporation.—Brown vs. Merrill, 107 Cal. 446, 447, 48 Am. St. Rep. 145, 40 Pac. Rep. 557 (payment by stockholder); Partridge vs. Butler, 113 Cal. 326, 329, 45 Pac. Rep. 678 (payment by corporation); Welch vs. Sargent, 127 Cal. 72, 82, 59 Pac. Rep. 319 (payment by stockholder).

43. Partial payment results in pro tanto discharge of liability of stockholder.—San Jose Sav. Bank vs. Pharis, 58 Cal. 380, 381, 382. See Brown vs. Merrill, 107 Cal. 446, 447, 48 Am. St. Rep. 145, 40 Pac. Rep. 557.

44. Reduction of indebtedness by account stated entitles stockholder to benefit of such account stated, and he is liable only for amount of debt as reduced by such account stated.—Partridge vs. Butler, 113 Cal. 326, 328, 329, 45 Pac. Rep. 678.

45. Release of stockholder by creditor discharges corporation and other stockholders as well as stockholder released.—Prince vs. Lynch, 38 Cal. 528, 533, 99 Am. Dec. 427.

46. PLEDGEE OF STOCK—IS LIABLE whenever he appears to be stockholder on face of corporation's books.—Hurlburt vs. Arthur, 140 Cal. 103, 107, 98 Am. St. Rep. 17, 73 Pac. Rep. 734.

47. Compare: Borland vs. Nevada Bank, 99 Cal. 89, 92, 37 Am. St. Rep. 32, 33 Pac. Rep. 737.

48. Proper course for pledgee to pursue, if he desires to avoid responsibility under statute, is to have books of corporation show real nature of transaction, and that he holds it merely as collateral security.—Hurlburt vs. Arthur, 140 Cal. 103, 107, 98 Am. St. Rep. 17, 73 Pac. Rep. 734. See Spreckels vs. Nevada Bank, 113 Cal. 272, 277, 54 Am. St. Rep. 348, 45 Pac. Rep. 329, 33 L. R. A. 459.

49. Reason why pledgee is liable "is that he is estopped from denying his liability by voluntarily holding himself out to public as owner of stock, and his denial of ownership is inconsistent with representations he has made; another is, that by taking legal title he has released former owner; and third is, that after having taken apparent ownership and thus become entitled to receive dividends, vote at elections, and enjoy all privileges of ownership, it would be inequitable to allow him to refuse responsibilities of stockholder."—Germania Nat. Bank vs. Case, 99 U. S. 628, bk. 25 L. ed. 448. See Ill. Wheelock vs. Kost, 77 Ill. 296. Iowa. Hale vs. Walker, 31 Iowa 344, 7 Am. Rep. 137. Md. Magruder vs. Colston, 44 Md. 349, 22 Am. Rep. 47. Mass. Crease vs. Babcock, 51 Mass. (10 Met.) 525, 545; Holyoke Bank vs. Burnham, 65 Mass. (11 Cush.) 183. N. Y. Roosevelt vs. Brown, 11 N. Y. 148, 155, 156; In re Empire City Bank, 18 N. Y. 199, 225; Adderly vs. Storm, 6 Hill 624, 627.

50. PRIMARY LIABILITY.—The stockholders of corporation are not, as regards creditors of such corporation, sureties, but principal debtors, and are primarily liable.—Prince vs. Lynch, 38 Cal. 528, 532, 99 Am. Dec. 427; Young

vs. Rosenbaum, 39 Cal. 646, 654; Sonoma Valley Bank vs. Hill, 59 Cal. 107, 109, 110; Faymonville vs. McCollough, 59 Cal. 285, 286; Mitchell vs. Beckman, 64 Cal. 117, 122, 23 Pac. Rep. 110; Morrow vs. Superior Court, 64 Cal. 383, 386, 1 Pac. Rep. 354; Hyman vs. Coleman, 82 Cal. 650, 653, 16 Am. St. Rep. 178, 23 Pac. Rep. 62; Knowles vs. Sandercock, 107 Cal. 629, 642, 40 Pac. Rep. 1047; Winona Wagon Co. vs. Bull, 108 Cal. 1, 4, 5, 40 Pac. Rep. 1077; Partridge vs. Butler, 113 Cal. 326, 328, 45 Pac. Rep. 678; Myers vs. Sierra Valley S. & A. Assoc., 122 Cal. 669, 673, 55 Pac. Rep. 689; Santa Rosa Nat. Bank vs. Barnett, 125 Cal. 407, 410, 58 Pac. Rep. 85. See Mokelumne Hill Can. & Min. Co. vs. Woodbury, 14 Cal. 265, 267; Davidson vs. Rankin, 34 Cal. 503, 505, 506; Redington vs. Cornwell, 90 Cal. 49, 63, 27 Pac. Rep. 40; Hunt vs. Ward, 99 Cal. 612, 616, 37 Am. St. Rep. 87, 34 Pac. Rep. 335; Herman vs. Hecht, 116 Cal. 553, 556, 43 Pac. Rep. 611. *Ind.* Trippe vs. Huncheson, 82 Ind. 307. *Mass.* Marcy vs. Clark, 17 Mass. 330. *N. Y.* Allen vs. Sewall, 2 Wend. 327, 342, 343. *Oreg.* Aldrich vs. Anchor Coal & D. Co., 24 Oreg. 32, 37, 41 Am. St. Rep. 331, 33 Pac. Rep. 756.

51. PROPORTIONAL LIABILITY.—As number of individual stockholders' shares is to whole number of subscribed shares, so is proportion of each stockholder to total amount of debt.—San Jose Sav. Bank vs. Pharis, 58 Cal. 380, 381; Harmon vs. Page, 62 Cal. 448, 463; Bidwell vs. Babcock, 87 Cal. 29, 32, 25 Pac. Rep. 752; Brown vs. Merrill, 107 Cal. 446, 447, 48 Am. St. Rep. 145, 40 Pac. Rep. 557; Winona Wagon Co. vs. Bull, 108 Cal. 1, 5, 40 Pac. Rep. 1077; Roebbling's Sons Co. vs. Butler, 112 Cal. 677, 678, 45 Pac. Rep. 6; Wells, Fargo & Co. vs. Enright, 127 Cal. 669, 675, 60 Pac. Rep. 439, 49 L. R. A. 647; Duke vs. Huntington, 130 Cal. 272, 274, 62 Pac. Rep. 510. See Pelton vs. San Jacinto Lumber Co., 118 Cal. 21, 25, 45 Pac. Rep. 12.

52. SEVERAL LIABILITY.—Liability of stockholders under statute is not joint, but each owes share of each debt.—Brown vs. Merrill, 107 Cal. 446, 447, 48 Am. St. Rep. 145, 40 Pac. Rep. 557; Knowles vs. Sandercock, 107 Cal. 629, 639, 40 Pac. Rep. 1047.

53. SUBROGATION BECAUSE OF PAYMENT OF STATUTORY LIABILITY.—Whatever stockholder pays, either directly to corporation in way of assessments, or on account of his personal liability as stockholder, directly to a creditor, he is bound to pay under law and he can recover no portion of sum back, either by subrogation or otherwise.—Sacramento Bank vs. Pacific Bank, 124 Cal. 147, 150, 71 Am. St. Rep. 36, 56 Pac. Rep. 787, 45 L. R. A. 863.

54. SUSPENSION OF REMEDY AGAINST CORPORATION does not extinguish debt, and therefore liability of stockholders is unaffected and not suspended.—Young vs. Rosenbaum, 39 Cal. 646, 654; Hyman vs. Coleman, 82 Cal. 650, 653, 16 Am. St. Rep. 178, 23 Pac. Rep. 62.

55. Note of corporation secured by mortgage, an action may be brought on note against stockholder when note becomes due, although mortgage has not been foreclosed, liability of stockholders not being affected by fact that

because of mortgage only action to foreclose can be brought against the corporation.—Knowles vs. Sandercock, 107 Cal. 629, 641, 642, 40 Pac. Rep. 1047.

56. TRANSFER OF STOCK—Does not relieve stockholder from liability under statute.—Mokelumne Hill Can. & Min. Co. vs. Woodbury, 14 Cal. 265, 268; Danielson vs. Yoakum, 116 Cal. 382, 384, 48 Pac. Rep. 322.

57. Note maturing after transfer.—If, before maturity of corporation's note, stockholder transfers his stock to third person, who holds it when note matures, assignor of stock is liable and not third person.—Hunt vs. Ward, 99 Cal. 612, 615, 37 Am. St. Rep. 87, 34 Pac. Rep. 335.

58. Payment by transferee of debts which had been incurred by corporation before transfer is purely voluntary, and does not give transferee right of action against transferor.—Danielson vs. Yoakum, 116 Cal. 382, 383, 384, 48 Pac. Rep. 322.

59. WAIVER OF LIABILITY.—Stockholder's liability may be waived by express contract without violation of any principle of public policy or constitutional law.—French vs. Tschemaker, 24 Cal. 518, 560.

III. REMEDIES, PLEADING, AND PRACTICE.

60. ACTION—MAY BE IN ORDINARY FORM, form of action being determined by nature of case, and resort to equity is unnecessary.—Morrow vs. Superior Court, 64 Cal. 383, 385, 386, 1 Pac. Rep. 354; Myers vs. Sierra Valley S. & A. Assoc., 122 Cal. 669, 673, 55 Pac. Rep. 689.

61. Account.—An action can be brought for daily balances, as shown by an account.—Santa Rosa Nat. Bank vs. Barnett, 125 Cal. 407, 410, 58 Pac. Rep. 85.

62. Theory of case—Action on contract.—An action against stockholder to recover his proportion of amount due upon contract made by corporation is essentially an action founded upon contract.—Kennedy vs. California Sav. Bank, 97 Cal. 93, 96, 33 Am. St. Rep. 163, 31 Pac. Rep. 846. See Dennis vs. Superior Court, 91 Cal. 548, 549, 27 Pac. Rep. 1031. *Md.* Norris vs. Wrenschall, 34 Md. 496. *N. Y.* Corning vs. McCullough, 1 N. Y. 47, 54, 49 Am. Dec. 287; Allen vs. Sewall, 2 Wend. 327, 340; *Ex parte* Van Riper, 20 Wend. 614, 617. *Fed.* Hathorn vs. Calef, 69 U. S. (2 Wall.) 10, bk. 17 L. ed. 776.

63. ATTACHMENT MAY BE ISSUED, action being upon contract within meaning of Code Civil Procedure, § 537.—Kennedy vs. California Sav. Bank, 97 Cal. 93, 95, 33 Am. St. Rep. 163, 31 Pac. Rep. 846.

See Code Civ. Proc. § 537 and note.

64. COMPLAINT—Account must be alleged in an action for balance of account, in like manner as in ordinary actions, and complaint should specify nature of items composing it.—Knowles vs. Sandercock, 107 Cal. 629, 641, 40 Pac. Rep. 1047.

65. Bill of particulars can be demanded by defendant as in ordinary actions if cause of action is not set out in complaint with sufficient fulness.—Knowles vs. Sandercock, 107 Cal. 629, 641, 40 Pac. Rep. 1047.

65. Contract of corporation must be pleaded in the usual mode; e. g. where note is evidence of corporation's indebtedness, note should be set forth as in ordinary actions upon notes.—*Knowles vs. Sandercock*, 107 Cal. 629, 637, 638, 40 Pac. Rep. 1047.

67. Debt of corporation must be alleged, and although it is true that stockholder's liability is not that of surety, but that of an original debtor, statute makes stockholder liable for debts of corporation, and hence it would not be good pleading to aver that defendant stockholder borrowed money or bought goods for which indebtedness arose.—*Knowles vs. Sandercock*, 107 Cal. 629, 637, 638, 40 Pac. Rep. 1047.

68. Ordinary form of averment is sufficient, and averment that corporation became indebted in certain amount, etc., is sufficient allegation of creation of indebtedness upon day alleged, as against general demurrer, and subsequent statement in complaint, "being balance due for certain work," only creates an uncertainty or ambiguity as to character of mode in which indebtedness was incurred, but any objection to complaint on this score is waived unless demurrer specifically points it out.—*Whitehurst vs. Stuart*, 129 Cal. 194, 195, 61 Pac. Rep. 963.

69. Defendant a stockholder.—Defendants must be alleged to have been stockholders.—*See Pelton vs. San Jacinto Lumber Co.*, 113 Cal. 31, 25, 45 Pac. Rep. 13.

70. Existence of corporation must be alleged.—*Bidwell vs. Babcock*, 37 Cal. 29, 33, 25 Pac. Rep. 752.

71. Form of complaint.—As to in an action to recover money had and received, which was held sufficient, see *Mitchell vs. Beckman*, 64 Cal. 117, 119, 120, 23 Pac. Rep. 110.

72. Note—Averment of execution of.—Proper averment is that on certain day corporation became indebted to plaintiff and that on that day it executed its note, etc.—*Case Plow Works vs. Montgomery*, 115 Cal. 380, 381, 47 Pac. Rep. 108.

73. Number of shares of stock.—Specifying number of shares subscribed for and owned during specified period within which debts or some of them may have been incurred, is not sufficient, but complaint should aver in substance, if fact was so, that there were specified number of shares of subscribed stock and no more at time that each debt was incurred.—*Bidwell vs. Babcock*, 37 Cal. 29, 32, 33, 25 Pac. Rep. 752.

74. "Original indebtedness"—Averment of.—In action on note, copy of note being set forth, and it being alleged that corporation in its corporate name, and for uses and purposes of its business, borrowed sum named in such note upon terms and conditions and according to tenor and effect of said note, such allegations show that inception of debt, obligation or liability, and execution of note, were coincident, and therefore, so far as question of pleading is concerned, objection that action is not upon "original indebtedness" is without merit.—*See Knowles vs. Sandercock*, 107 Cal. 629, 637, 638, 40 Pac. Rep. 1047.

75. Same—Account stated.—Without considering question whether account stated, as

soon as it constitutes new contract giving rise to new cause of action, may not in itself be treated as new or original liability for which stockholders would be liable, at all events, cause of action against stockholders is stated where in addition to alleging an account stated, original contract and indebtedness is specifically alleged.—*Partridge vs. Butler*, 113 Cal. 326, 328, 45 Pac. Rep. 678.

76. Proportion of indebtedness for which defendant is liable.—In action on note complaint which sets forth note and then contains the subsequent averment that "the proportion of said indebtedness for which defendant is liable to plaintiff" indicates that pleader was seeking to establish liability of defendant for his proportion of indebtedness of corporation represented by note, and not recovery upon promissory note.—*Whitehurst vs. Stuart*, 129 Cal. 194, 195, 61 Pac. Rep. 963.

77. Proportion of stock held by defendant must be averred, and it is insufficient to aver merely amount of capital stock and number of shares into which it was divided.—*Roebling's Sons Co. vs. Butler*, 112 Cal. 677, 678, 45 Pac. Rep. 6. See *Bidwell vs. Babcock*, 37 Cal. 29, 31, 25 Pac. Rep. 752.

78. Same—Three essential elements are whole number of subscribed shares, number of shares held by defendant, and total amount of debt, from which court can determine liability of stockholder.—*Roebling's Sons Co. vs. Butler*, 112 Cal. 677, 678, 679, 45 Pac. Rep. 6. See *Bidwell vs. Babcock*, 37 Cal. 29, 31, 25 Pac. Rep. 752.

79. Same—General demurrer is sufficient to reach objection that complaint does not contain such essential allegations, and special demurrer is not necessary.—*Roebling's Sons Co. vs. Butler*, 112 Cal. 677, 678, 679, 45 Pac. Rep. 6. See *Bidwell vs. Babcock*, 37 Cal. 29, 31, 25 Pac. Rep. 752.

80. Tenancy in common of stock.—Allegation in complaint that stock was held in common by defendant and others, will authorize admission of evidence and a finding that it was owned only by him.—*Duke vs. Huntington*, 130 Cal. 372, 274, 62 Pac. Rep. 518.

81. Time when debt was incurred must be alleged and complaint must show that indebtedness was incurred while defendant was stockholder.—*Winona Wagon Co. vs. Bull*, 103 Cal. 1, 4, 40 Pac. Rep. 1077; *Case Plow Works vs. Montgomery*, 115 Cal. 380, 381, 47 Pac. Rep. 108; *Whitehurst vs. Stuart*, 129 Cal. 194, 195, 61 Pac. Rep. 963.

82. Averment of execution of note at given time and that defendant was stockholder at such time is insufficient, because although indebtedness might have been incurred at that time or by giving of note, such fact must not be left to inference but must be specifically alleged.—*Hunt vs. Ward*, 99 Cal. 612, 614, 37 Am. St. Rep. 87, 34 Pac. Rep. 335; *Bank of San Luis Obispo vs. Pacific Coast S. S. Co.*, 103 Cal. 594, 596, 37 Pac. Rep. 499; *Winona Wagon Co. vs. Bull*, 103 Cal. 1, 4, 5, 40 Pac. Rep. 1077; *Case Plow Works vs. Montgomery*, 115 Cal. 380, 381, 47 Pac. Rep. 108.

83. Inferential allegation in action on note

that at times said debts and liabilities were contracted and incurred defendant was stockholder in said corporation is sufficient to show that debts and liabilities of corporation represented by note were contracted and incurred while defendant was stockholder, and although allegation is defective and is subject to special demurrer objection is not one which can be taken by general demurrer.—*Whitehurst vs. Stuart*, 129 Cal. 194, 195, 196, 61 Pac. Rep. 963. See *Duke vs. Huntington*, 130 Cal. 272, 274, 62 Pac. Rep. 510.

84. **CONTRIBUTION.**—Stockholder who has paid more than his share of corporate debt is entitled to contribution from his co-stockholders.—*Larrabee vs. Baldwin*, 35 Cal. 155, 169.

85. **EQUITABLE REMEDY OF CREDITORS AGAINST STOCKHOLDERS NOT ABROGATED** by provisions of constitution and of statute.—*Harmon vs. Page*, 62 Cal. 448, 461; *Baines vs. Babcock*, 95 Cal. 581, 589, 29 Am. St. Rep. 158, 27 Pac. Rep. 674, 30 Id. 776. See *Ky. Bank of U. S. vs. Dallam*, 4 Dana 575. *Md. Matthews vs. Murray*, 24 Md. 527; *Morris vs. Johnson*, 34 Md. 489. *Mass. Harris vs. First Parish in Dorchester*, 40 Mass. (23 Pick.) 112, 113-115. *Fed. Pollard vs. Bailey*, 87 U. S. (20 Wall.) 520, bk. 22 L. ed. 376; *Hatch vs. Dana*, 101 U. S. 205, bk. 25 L. ed. 885.

86. **EVIDENCE—ACCEPTANCE OF CERTIFICATE** for shares of stock may be shown by defendant's written assignment of it to another.—*Abbott vs. Jack*, 136 Cal. 510, 513, 69 Pac. Rep. 257.

87. **Books of corporation.**—Amount of stock outstanding may be proven by books of corporation, to wit, stock certificate book, stock ledger and stock journal.—*Knowles vs. Sandercock*, 107 Cal. 629, 635, 636, 40 Pac. Rep. 1047. See *Evans vs. Bailey*, 66 Cal. 112, 113, 4 Pac. Rep. 1089.

88. **Same**—To show that defendant was a stockholder and that stock stood in his name at time when debt was contracted, books of corporation are admissible.—*Abbott vs. Jack*, 136 Cal. 510, 513, 69 Pac. Rep. 257.

89. **Judgment against corporation.**—On trial by court without jury admission in evidence of judgment against corporation is not reversible error where there is other evidence from books of corporation to show indebtedness.—*Mitchell vs. Beckman*, 64 Cal. 117, 123, 28 Pac. Rep. 110.

90. **Nonsuit is improper** where there is some evidence tending to show that defendant was stockholder, and cause of action is otherwise made out by evidence.—*Young vs. Rosenbaum*, 39 Cal. 646, 654.

91. **Parol evidence to contradict stock book inadmissible.**—Ownership of corporate stock is shown by corporation's books and defendant who has had stock placed in his name on books of corporation, as owner, is liable to corporation as though he were absolute owner, and cannot show that stock was issued to him as matter of convenience and to enable him to negotiate a loan for true owner.—*Baines vs. Babcock*, 95 Cal. 581, 593, 29 Am. St. Rep. 158, 27 Pac. Rep. 674, 30 Id. 776. See *Thompson vs. Reno Sav. Bank*, 19 Nev. 103, 3 Am. St. Rep. 797, 7 Pac. Rep. 68; *Germania Nat. Bank of*

New Orleans vs. Case, 99 U. S. 638, 631, bk. 25 L. ed. 448.

92. **JUDGMENT—AGAINST CORPORATION UNNECESSARY** and creditor need not first attempt to collect debt from corporation.—*Davidson vs. Rankin*, 34 Cal. 503, 505.

93. **Default judgment against one stockholder** where several are joined as defendants does not oust court of jurisdiction, or operate as dismissal in favor of defendants who have appeared.—*Grimwood vs. Barry*, 118 Cal. 274, 276, 50 Pac. Rep. 430.

94. **Effect of judgment against corporation** is not to extinguish or suspend liability of stockholders, and their liability is not merged in such judgment.—*Young vs. Rosenbaum*, 39 Cal. 646, 654.

95. **Several judgments may be rendered** and it is possible under statute that there may be as many diverse issues and diverse judgments as there are defendants.—*Grimwood vs. Barry*, 118 Cal. 274, 276, 50 Pac. Rep. 430.

96. **JURISDICTION**—Courts of foreign state have jurisdiction to entertain an action at law to enforce stockholders' liability because their liability is primary and original.—*Aldrich vs. Anchor Coal & D. Co.*, 24 Oreg. 32, 37, 38, 41 Am. St. Rep. 831, 32 Pac. Rep. 756. See *Russell vs. Pacific R. Co.*, 113 Cal. 258, 261, 45 Pac. Rep. 323, 34 L. R. A. 747. See *Fla. Flash vs. Conn.*, 16 Fla. 428, 26 Am. Rep. 721. *N. Y. Ex parte Van Riper*, 20 Wend. 614, 617. *W. Va. Nimick vs. Mingo Iron Works*, 25 W. Va. 184. *Fed. Dennick vs. Central R. Co. of N. J.*, 103 U. S. 11, 18, bk. 26 L. ed. 439; *Flash vs. Conn.*, 109 U. S. 371, bk. 27 L. ed. 966, 3 Sup. Ct. Rep. 263.

97. **De minimis, etc.**—Where number of shares owned by stockholder is so small that he would be liable only for trifling sum, to wit, seventy cents, or, with interest, about \$1.40, maxim "de minimis non curat lex" is applicable, and court will not take cognizance of case.—*Moore vs. Boyd*, 74 Cal. 167, 174, 175, 15 Pac. Rep. 670.

98. **Jurisdictional amount** is governed by rule applicable to ordinary actions, and superior court has no jurisdiction where amount demanded is less than three hundred dollars.—*Derby vs. Stevens*, 64 Cal. 287, 289, 30 Pac. Rep. 820; *Myers vs. Sierra Valley S. & A. Assoc.*, 123 Cal. 669, 672, 55 Pac. Rep. 689.

99. **Same**—Amount of judgment demanded governs, and where creditor sues stockholder for his proportion, and such proportion is less than three hundred dollars, court has not jurisdiction, even though amount of debt is more than that sum.—*Derby vs. Stevens*, 64 Cal. 287, 289, 30 Pac. Rep. 820.

100. **Same—Joinder of stockholders as defendants.**—If creditor unites as defendant several stockholders, proportion of each of whom is less than three hundred dollars, plaintiff does not demand judgment of three hundred dollars or more against defendants severally, nor does he demand judgment for that amount or more against defendants jointly, but he demands several judgment against each of defendants in sum less than that amount, and court is without jurisdiction.

—Derby vs. Stevens, 64 Cal. 237, 239, 30 Pac. Rep. 320.

101. Same—Judgment for less amount may be rendered where plaintiff demands jurisdictional amount or more against any one defendant.—Derby vs. Stevens, 64 Cal. 237, 239, 30 Pac. Rep. 320. See Jackson vs. Whartenby, 5 Cal. 94, 95; Bailey vs. Sloan, 65 Cal. 337, 338, 4 Pac. Rep. 349; Lord vs. Thomas (Cal. Aug. 1, 1891), 27 Pac. Rep. 410; Griswold vs. Pieratt, 110 Cal. 259, 265, 42 Pac. Rep. 820.

As to amount claimed determining jurisdiction, see 1 Encyc. Pl. & Prac. 703, tit. "Amount in controversy."

102. Justice of the peace has jurisdiction under Code Civil Procedure, § 112, such action being one on obligation arising upon contract within meaning of that statute.—Dennis vs. Superior Court, 91 Cal. 543, 549, 27 Pac. Rep. 1031; Grimwood vs. Barry, 118 Cal. 274, 276, 50 Pac. Rep. 430. See Code Civ. Proc. § 112.

103. LIMITATION OF ACTIONS.—See Code Civil Procedure, § 338 subd. 1, § 359 and notes.

104. PARTIES PLAINTIFF.—CREDITORS ONLY are entitled to maintain action under statute.—Mohr vs. Minnesota El. Co., 40 Minn. 343, 41 N. W. Rep. 1074.

105. Assignee of creditor is proper party to maintain action.—Hunt vs. Ward, 99 Cal. 612, 616, 27 Am. St. Rep. 87, 34 Pac. Rep. 335. See Knowles vs. Sandercock, 107 Cal. 629, 638, 40 Pac. Rep. 1047.

106. Same—Assignee of note may maintain action as such assignment transfers to assignee indebtedness of corporation.—Herman vs. Hecht, 116 Cal. 553, 560, 48 Pac. Rep. 611.

107. Same—Consideration paid for assignment.—Fact that no consideration was paid and that assignor is to participate in the fruits, if any, of action against stockholders is no defense.—Herman vs. Hecht, 116 Cal. 553, 560, 48 Pac. Rep. 611.

108. Same—Equitable assignment and subrogation will entitle assignee to enforce liability of stockholder.—Hunt vs. Ward, 99 Cal. 612, 616, 27 Am. St. Rep. 87, 34 Pac. Rep. 335.

109. Stockholders who are creditors may maintain action against other stockholders.—Brown vs. Merrill, 107 Cal. 446, 447, 48 Am. St. Rep. 145, 40 Pac. Rep. 557; Knowles vs. Sandercock, 107 Cal. 629, 640, 40 Pac. Rep. 1047; Herman vs. Hecht, 116 Cal. 553, 560, 48 Pac. Rep. 611; Myers vs. Sierra Valley S. & A. Assoc., 122 Cal. 669, 672, 673, 55 Pac. Rep. 639.

110. Same—Assignee of stockholder may

maintain action.—Herman vs. Hecht, 116 Cal. 553, 560, 48 Pac. Rep. 611.

111. Sureties who pay note of corporation become its creditors in such sense that they may maintain action against stockholders under statute, and it is not necessary for them to go into equity for contribution from stockholders or, in order to establish their rights, to be subrogated to maker of such note.—Myers vs. Sierra Valley S. & A. Assoc., 122 Cal. 669, 673, 55 Pac. Rep. 639.

112. PARTIES DEFENDANT.—Corporation—May be joined as party defendant and action will be allowed to proceed as joint action against corporation and stockholders.—See Kennedy vs. California Sav. Bank, 97 Cal. 93, 98, 23 Am. St. Rep. 163, 31 Pac. Rep. 846.

113. Same—Need not be joined as party defendant but action may be brought against such stockholders as plaintiff may see fit to sue.—Greenleaf vs. Jacks, 133 Cal. 506-508, 65 Pac. Rep. 1039. See Sayward vs. Houghton, 82 Cal. 628, 630, 23 Pac. Rep. 120.

114. Joinder of defendants.—Plaintiff may join as defendants as many stockholders as he may see fit.—Herman vs. Hecht, 116 Cal. 553, 560, 48 Pac. Rep. 611; Myers vs. Sierra Valley S. & A. Assoc., 122 Cal. 669, 674, 55 Pac. Rep. 639; Greenleaf vs. Jacks, 133 Cal. 506, 507, 65 Pac. Rep. 1039. See Kennedy vs. California Sav. Bank, 97 Cal. 93, 98, 23 Am. St. Rep. 163, 31 Pac. Rep. 846.

115. Same—General demurrer insufficient to raise objection that there was misjoinder of parties defendant or that causes of action were improperly united.—Faymonville vs. McCollough, 59 Cal. 285, 286.

116. Stockholders who are sureties upon non-payment by corporation may be sued under statute as principals.—Myers vs. Sierra Valley S. & A. Assoc., 122 Cal. 669, 674, 55 Pac. Rep. 639.

117. PLEDGE OF PROPERTY TO CREDITOR by corporation does not suspend right of pledgee to proceed against stockholder because liability of stockholder is that of principal debtor, and creditor before bringing action against stockholder need not first exhaust pledged property.—Sonoma Valley Bank vs. Hill, 59 Cal. 107, 110, 111.

118. VENUE.—Action may be brought under Code Civil Procedure § 395 in any county in which any of defendant stockholders resides.—Greenleaf vs. Jacks, 133 Cal. 506, 507, 65 Pac. Rep. 1039. See Greenleaf vs. Jacks, 135 Cal. 154, 155, 67 Pac. Rep. 17. See Code Civ. Proc. § 395 and notes.

§ 323. CERTIFICATES OF STOCK, HOW ISSUED. All corporations for profit must issue certificates for stock when fully paid up, signed by the president and secretary, and may provide, in their by-laws, for issuing certificates prior to full payment, under such restrictions and for such purposes as their by-laws may provide, but any certificate issued prior to full payment must show on its face what amount has been paid thereon.

History: Enacted 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 350, held unconstitutional; see history, § 4 ante; amendment re-enacted March 20, 1905, Stats. and Amdts. 1905, c. CCCXXXIX, p. 397.

1. Applied, cited, construed, referred to, etc.
2. Before full payment—Corporation may issue certificate.
3. Same—Not bound to issue certificate.
4. Bona fide purchaser protected—Fraud of corporation.
5. Certificate is mere proof of property.
6. Credit may be given to subscriber.
7. Form of certificate—May be receipt.
8. Not necessary to issue certificate to make subscriber stockholder.
- 9, 10. Ratification of unauthorized issuance—Laches.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in:** Lankershim Ranch L. & W. Co. vs. Herberger, 82 Cal. 600, 602, 603, 23 Pac. Rep. 134 (construed and applied); Green vs. Abletine Medical Co., 96 Cal. 322, 329, 330, 31 Pac. Rep. 100 (construed and applied); San Joaquin L. & W. Co. vs. Beecher, 101 Cal. 70, 79, 35 Pac. Rep. 349 (construed and applied); Vermont Marble Co. vs. Decies Granite Co., 135 Cal. 579, 588, 87 Am. St. Rep. 143, 67 Pac. Rep. 1057, 56 L. R. A. 723 (cited in discussion).

2. **BEFORE FULL PAYMENT—May issue certificate.**—This section does not prohibit issuing of certificates before stock is fully paid up, but authorized enactment of by-laws in accordance with which corporations may issue certificates before full payment.—Green vs. Abletine Medical Co., 96 Cal. 322, 329, 330, 31 Pac. Rep. 100.

3. **Not bound to issue certificate**—Corporation is not bound to issue certificates until subscription price is fully paid.—California S. H. Co. vs. Callender, 94 Cal. 120, 127, 28 Am. St. Rep. 99, 29 Pac. Rep. 859.

4. **BONA FIDE PURCHASER OF STOCK IMPROPERLY ISSUED** will be protected, and corporation will be estopped to claim the invalidity of issue where it through its directors falsely represented that stock was fully paid up when in fact it was not.—Smith vs. Martin, 135 Cal. 247, 251, 67 Pac. Rep. 779. See Smith

vs. Ferries & C. H. R. Co. (Cal. Dec. 28, 1897), 51 Pac. Rep. 710, 723.

5. **CERTIFICATES CONSTITUTE** proof of property which may exist without them.—Mitchell vs. Beckman, 64 Cal. 117, 121, 23 Pac. Rep. 110. See Lankershim Ranch L. & W. Co. vs. Herberger, 82 Cal. 600, 603, 23 Pac. Rep. 134.

6. **CREDIT TO SUBSCRIBERS.**—Corporation for profit may give credit to subscribers of its capital stock for stock.—Mitchell vs. Beckman, 64 Cal. 117, 121, 23 Pac. Rep. 110; Lankershim Ranch L. & W. Co. vs. Herberger, 82 Cal. 600, 602, 603, 23 Pac. Rep. 134.

7. **FORM OF CERTIFICATE**—Certificate in form of receipt showing subscription to and payment of all instalments due on stated number of shares gives holder as complete possession of shares evidenced by it as though it were certificate in ordinary form issued for paid up stock.—Lankershim Ranch L. & W. Co. vs. Herberger, 82 Cal. 600, 23 Pac. Rep. 134.

8. **NECESSITY FOR ISSUING CERTIFICATE.**—To constitute subscribers stockholders it is not necessary that certificates should be issued to them.—Mitchell vs. Beckman, 64 Cal. 117, 121, 23 Pac. Rep. 110; Lankershim Ranch L. & W. Co. vs. Herberger, 82 Cal. 600, 603, 23 Pac. Rep. 134; California S. H. Co. vs. Callender, 94 Cal. 120, 127, 28 Am. St. Rep. 99, 29 Pac. Rep. 859; San Joaquin L. & W. Co. vs. Beecher, 101 Cal. 70, 79, 35 Pac. Rep. 349.

9. **RATIFICATION OF UNAUTHORIZED ISSUANCE OF STOCK** may be by unanimous consent, where rights of creditors are not involved, and will estop stockholders inter sese. Green vs. Abletine Med. Co., 96 Cal. 322, 329, 330, 31 Pac. Rep. 100. See Smith vs. Martin, 135 Cal. 247, 250, 67 Pac. Rep. 779.

10. **Lapse of time;** e. g. three years, without objection to issuance of stock, considered in determining that stockholders have been guilty of laches, and are estopped.—Green vs. Abletine Med. Co., 96 Cal. 322, 330, 31 Pac. Rep. 100. See Sayre vs. Citizens' Gas L. & H. Co., 69 Cal. 207, 213, 7 Pac. Rep. 437, 10 Id. 408.

§ 324. SHARES OF STOCK, PERSONAL PROPERTY — HOW TRANSFERRED — IRRIGATION STOCK APPURTENANT TO CERTAIN LANDS.

Whenever the capital stock of any corporation is divided into shares, and certificates therefor are issued, such shares of stock, except as hereinafter provided, are personal property, and may be transferred by indorsement by the signature of the proprietor, his agent, attorney, or legal representative, and the delivery of the certificate; but such transfer is not valid, except as to the parties thereto, until the same is so entered upon the books of the corporation as to show the names of the parties by whom and to whom transferred, the number of the certificate, the number or designation of the shares, and the date of transfer; provided, however, that

[Water companies.] Any corporation organized for, or engaged in the business of selling, distributing, supplying, or delivering water for irrigation purposes or for domestic use, may in its by-laws provide that water shall only be so sold, distributed, supplied, or delivered to owners of its capital stock, and that such stock shall be appurtenant to certain lands when the same are described in the certificate issued therefor; and when such certificate shall be so issued, and a certi-

fied copy of such by-law recorded in the office of the county recorder in the county where such lands are situated, the shares of stock so located on any land shall only be transferred with said lands, and shall pass as an appurtenance thereto.

History: Enacted March 21, 1872; amended March 26, 1895, Stats. and Amdts. 1895, p. 118.

This section traceable to Act April 22, 1850, § 12 (Weston vs. Bear River & Auburn W. & M. Co., 5 Cal. 186, 187, 63 Am. Dec. 117; Winter vs. Belmont Min. Co., 53 Cal. 428, 431); the Act of 1853 did not substantially alter § 12 (Weston vs. Bear River & Auburn W. & M. Co., 6 Cal. 425, 429); as to effect of amendatory act of 1854 (p. 84) see People vs. Crockett, 9 Cal. 112, 114.

Wisconsin adopted their statute from this section of the code.—See In re Application of Murphy, 51 Wis. 519, 8 N. W. Rep. 419, 420, 421.

TRANSFER OF SHARES OF STOCK.

L. In General.

1. Applied, cited, construed, referred to, etc.
2. Agents and attorneys—Authority of.
3. Foreign executor or administrator may transfer.
4. Gift of stock—Retention of dividends.
- 5, 6. Intention of statute—Prevention of fraud on public—Protection of corporation.
7. Right to transfer stock—Incident of property.
8. Title transferred is full legal title.
9. "Transfer" includes all transfers.

II. Personal Property.

10. In general.
11. Certificate mere evidence of property.
12. Chattel mortgage may be given—Delivery.
13. Execution may be levied.
14. Owner is holder of certificate.

III. Indorsement.

15. Is necessary to valid transfer.
16. Delivery and mere possession insufficient.
17. Same—No power to sell from mere possession.
18. Entry of transfer without indorsement—Conversion by corporation.
19. Same—Ratification of wrongful entry.
20. Signature of agent.
21. Special indorsement.

IV. Delivery of Certificate.

22. As between parties delivery unnecessary.
23. Pledge requires delivery.

V. Necessity for, and Right to Entry on Books of Corporation.

24. Entry necessary as against third persons.—Statute mandatory.
- 25, 26. As against corporation unnecessary—Idem of corporation.
27. Creditors—Are not affected until entry.
28. Same—Attachment may be levied.
29. Same—Same—Excuse for failure to procure entry.
30. Same—Same—Judgment for defendant dissolves attachment.
31. Same—Corporation's creditors not affected.
32. Same—Execution against transferrer may be levied.
33. Same—Same—Levy of execution after attachment.
34. Same—Same—Notice to purchaser protects transferee.
35. Directors guilty of fraud not entitled to entry.
36. Knowledge or notice of transfer dispenses with entry.

37. Same—Judgment creditor acquires no rights.

38. Same—Pledge valid against persons having notice.

39. Same—Purchaser at execution sale with notice takes nothing.

40. Same—Sale under execution affects subsequent purchasers with notice.

41. Parties to transfer bound without entry.

42. Same—Irregularity in transferee's certificate immaterial.

43. Same—Pledge not entered is valid between parties.

44. Same—Whole title passes to transferee.

45. Pledgee—Has right to entry of transfer.

46. Same—Must procure entry to protect himself.

47. Purchaser at judicial sale entitled to entry.

48. Statutory requirement—Entry ordinarily unnecessary.

VI. Duty of Corporation to Enter Transfer on Books—Enforcement of Right.

49. Corporation must enter transfer on demand.

50. Same—Bond may be required of non-resident.

51. Same—Decree of distribution reversed furnishes no authority.

- 52, 53. Same—Indebtedness of transferrer to corporation—By-laws.

54. Same—Presentation of indorsed certificate necessary.

55. Remedies against corporation—Election of.

56. Same—Equity will compel transfer.

- 57, 58. Same—Mandamus does not lie.

59. Same—Trover lies.

60. Complaint—Conversion must be alleged.

61. Same—Damages must be alleged.

62. Parties defendant—Corporation is proper.

63. Same—Officers not necessary.

64. Same—Purchaser from corporation not proper.

65. Same—Transferrer not ordinarily necessary.

66. Evidence—Unpaid assessments on question of damages.

67. Damages—Dividends.

VII. Stock-Book—Mode of Making Entry.

68. "Enter" defined.

69. Common mode of entry described.

70. Copy of transfer unnecessary.

71. Nature and effect of stock-book.

72. Non-compliance with by-laws—Corporation estopped.

VIII. Contracts to Transfer Stock—Rights and Remedies of Parties.

73. Corporation as purchaser of its own stock.
74. Same—Construction of contract.
75. Escrow is valid.
76. Damages for breach by transferee.
77. Order on "president" before formation of corporation.
78. Rescission of contract and compelling re-transfer.
79. Same—Corporation is not proper party.
80. Same—Demand unnecessary.
81. Same—Misjoinder of causes of action.
82. Same—Tender unnecessary.
83. Severance of contract by transferrer not permitted.
84. Specific performance—Not ordinarily decreed.
- 85, 86. Same—Exceptions—Mining stock—Transfer of entire stock.
87. Same—Pledgeor's remedy.
88. Same—Parties—Corporation not necessary.
89. Same—Particular stock need not be decreed.

IX. Certificates as Negotiable Instruments—Wrongful Transfers.

90. Certificates not negotiable instruments.
91. Effect of statute—Quasi negotiability.
92. Equities in favor of corporation.
93. Lost certificate—Finder cannot transfer.
94. Stolen certificate—Thief cannot transfer.
95. Same—Stockholders liable for conversion.
96. Transfer by holder having apparent authority—Excess of authority.
97. Same—Pledge binding although unauthorized.
98. Same—Secret trust—Innocent purchaser protected—Notice.

I. IN GENERAL.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Winter vs. Belmont Min. Co.*, 53 Cal. 428, 431, 432 (applied and construed); *Brown vs. San Francisco G. L. Co.*, 53 Cal. 426, 428 (construed and applied); *Anglo-Cal. Bank vs. Grangers' Bank of Cal.*, 63 Cal. 359, 364 (construed and applied); *Oakland Pav. Co. vs. Tompkins*, 72 Cal. 5, 9, 1 Am. St. Rep. 17, 12 Pac. Rep. 801 (cited in discussion); *Jennings vs. Bank of Cal.*, 79 Cal. 323, 331, 12 Am. St. Rep. 145, 21 Pac. Rep. 852, 5 L. R. A. 233 (construed and applied); *Lankershim Ranch L. & W. Co. vs. Herberger*, 82 Cal. 600, 603, 23 Pac. Rep. 134 (referred to in discussion); *Taft vs. Presidio & F. R. Co.*, 84 Cal. 131, 137, 18 Am. St. Rep. 166, 24 Pac. Rep. 436, 11 L. R. A. 125 (applied and construed); *San Bernardino Investment Co. vs. Merrill*, 108 Cal. 490, 493, 41 Pac. Rep. 487 (erroneously referred to instead of § 334); *Nicholls vs. Reid*, 109 Cal. 630, 632, 42 Pac. Rep. 298 (applied); *Spreckels vs. Nevada Bank of San Francisco*, 113 Cal. 272, 273, 277, 278, 54 Am. St. Rep. 343, 45 Pac. Rep. 319, 38 L. R. A. 459 (construed and applied); *Calkins vs. Equitable B. & L. Assoc.*, 126 Cal. 531, 534, 59 Pac. Rep. 30 (construed and applied); *Ashton vs. Zella Min. Co.*, 134 Cal. 408, 410, 411, 66 Pac. Rep. 494 (construed and applied); *Abbott vs. Jack*, 136 Cal. 510, 513, 69 Pac. Rep. 257 (referred to with other sections).

2. AGENTS AND ATTORNEYS—Authority of, is determinable by ordinary rules. Thus where power of attorney is very general, but does not authorize attorney to do anything except for and in name of his principal, exchange of principal's shares for equal number of shares to be issued to the attorney is not directly nor indirectly authorized.—*Taft vs. Presidio & F. R. Co.*, 84 Cal. 131, 137, 18 Am. St. Rep. 166, 24 Pac. Rep. 436, 11 L. R. A. 125.

3. FOREIGN EXECUTOR OR ADMINISTRATOR with power to sell, and having shares of stock of decedent in his possession, may transfer same and vest title in purchaser so as to entitle him to transfer on books of corporation, and administration in this state is unnecessary.—*Brown vs. San Francisco G. L. Co.*, 53 Cal. 426, 428.

4. GIFT OF STOCK MAY BE EFFECTED BY INDORSEMENT of certificate and delivery thereof to indorsee with intent to make present transfer, although donor retains right to dividends during his life.—*Calkins vs. Equitable B. & L. Assoc.*, 126 Cal. 531, 534, 59 Pac. Rep. 30.

Gift of corporate stock.—See post § 1146 and note.

5. INTENTION OF STATUTE—Prevention of fraud.—"The legislature intended to protect public from frauds which might be perpetrated by sale or hypothecation of certificates passing legal or equitable title, while the books of the company induced credit to vendor, by holding him out to the world as owner of such stock."—*Weston vs. Bear River & A. W. & M. Co.*, 5 Cal. 186, 189, 63 Am. Dec. 117. See *Strout vs. Natoma Water & Min. Co.*, 9 Cal. 73, 80.

6. Protection of corporation is also intended.—*Strout vs. Natoma Water & Min. Co.*, 9 Cal. 73, 80.

7. Right to transfer stock resides in stockholder as incident of property; law places no restriction on such right.—*Anglo-Cal. Bank vs. Grangers' Bank of Cal.*, 63 Cal. 359, 364. See *Welch vs. Sargent*, 127 Cal. 72, 78, 59 Pac. Rep. 319; *Bank of Atchison Co. vs. Durfee*, 118 Mo. 431, 40 Am. St. Rep. 396, 24 S. W. Rep. 123.

8. Title transferred is full, absolute, legal title in cases where all is done that law requires.—See *Brewster vs. Hartley*, 37 Cal. 15, 25, 26, 99 Am. Dec. 237; *Hirsh vs. Norton*, 115 Ind. 341, 17 N. E. Rep. 612. See par. 44 this note.

9. "Transfer" includes not merely sales of stock, but all transfers thereof; it embraces transfers by way of pledge as fully as transfers by which absolute title is parted with.—*Spreckels vs. Nevada Bank*, 113 Cal. 272, 277, 54 Am. St. Rep. 343, 45 Pac. Rep. 319, 38 L. R. A. 459.

II. PERSONAL PROPERTY.

10. IN GENERAL.—Shares of stock are personal property.—*Atkins vs. Gamble*, 43 Cal. 86, 99, 10 Am. Rep. 282; *Anglo-California Bank vs. Grangers' Bank of Cal.*, 63 Cal. 359, 364; *Tregear vs. Etiwanda Water Co.*, 76 Cal. 537, 540, 9 Am. St. Rep. 245, 13 Pac. Rep. 553.

11. CERTIFICATE—Nature of.—Although shares of stock are denominated personal prop-

erty, certificate which represents such stock is but evidence that holder of it is entitled to undivided share in assets and business of corporation.—*Atkins vs. Gamble*, 42 Cal. 86, 99, 10 Am. Rep. 282.

12. CHATTEL MORTGAGE MAY BE GIVEN on shares of stock, and, as between parties thereto, mortgage thereon is binding without delivery of possession; § 3440, requiring delivery of possession in order to make transfer valid as against creditors, etc., being inapplicable.—*Tregear vs. Etiwanda Water Co.*, 76 Cal. 537, 540, 541, 9 Am. St. Rep. 245, 18 Pac. Rep. 658. See post § 3440 and note.

13. Execution may be levied upon stock in corporations.—See *Atkins vs. Gamble*, 42 Cal. 86, 99, 10 Am. Rep. 282.

See Code Civ. Proc. § 688 and note.

14. OWNER IS HOLDER OF CERTIFICATE.—The statute in declaring that shares of stock are personal property means that they are personal property of him who holds certificate.—*Anglo-Californian Bank vs. Grangers' Bank of Cal.*, 63 Cal. 359, 364.

III. INDORSEMENT.

15. IS NECESSARY in order to constitute valid transfer of shares of stock.—*Nicholls vs. Reid*, 109 Cal. 630, 632, 633, 42 Pac. Rep. 298.

16. DELIVERY WITHOUT INDORSEMENT, and possession, are insufficient to establish transmission of title to certificate.—*Nicholls vs. Reid*, 109 Cal. 630, 632, 42 Pac. Rep. 298. See *Quay vs. Presidio & F. R. Co.*, 82 Cal. 1, 5, 22 Pac. Rep. 925; *Taft vs. Presidio & F. R. Co.*, 84 Cal. 131, 138, 18 Am. St. Rep. 166, 24 Pac. Rep. 436, 11 L. R. A. 125; *Borland vs. Nevada Bank*, 99 Cal. 89, 94, 37 Am. St. Rep. 32, 33 Pac. Rep. 737.

17. Contract to sell by one having mere possession of stock which has not been indorsed will not enable him to maintain action to recover contract price, because he is not able to perform by transferring stock to buyer.—*Nicholls vs. Reid*, 109 Cal. 630, 632, 633, 42 Pac. Rep. 298. See *Hare vs. Warren*, 3 Mees. & W. 362 (decided under a similar statute).

18. DUTY OF CORPORATION TO REQUIRE INDORSEMENT BEFORE ENTERING TRANSFER.—Corporation is liable as for conversion when it transfers stock on its books without proper indorsement by owner, or some agent duly authorized, and such transfer results in owner being divested of his stock.—*Quay vs. Presidio & F. R. Co.*, 82 Cal. 1, 5, 22 Pac. Rep. 925; *Taft vs. Presidio & F. R. Co.*, 84 Cal. 131, 139, 140, 18 Am. St. Rep. 166, 24 Pac. Rep. 436, 11 L. R. A. 125. See *Selover vs. American-Russ. Com. Co.*, 7 Cal. 266, 274; *Nicholls vs. Reid*, 109 Cal. 630, 632, 42 Pac. Rep. 298.

19. Ratification of unauthorized transfer by corporation on part of owner of stock does not result from conversation in which no reference was made to act of corporation in transferring the stock, and all that owner said was that he would not hold his attorney in fact liable for having transgressed his authority.—*Quay vs. Presidio & F. R. Co.*, 82 Cal. 1, 6, 22 Pac. Rep. 925.

20. SIGNATURE OF AGENT without stating name of principal, on whose behalf he gave

his signature, does not authorize corporation to cancel certificate of stock and enter transfer to another.—*Taft vs. Presidio & F. R. Co.*, 84 Cal. 131, 138, 18 Am. St. Rep. 166, 24 Pac. Rep. 436, 11 L. R. A. 125.

21. SPECIAL INDORSEMENT.—Where only authority which indorsement gives to corporation is to cancel certificate and issue one or more new ones representing same number of shares to K, it is not properly indorsed to authorize transfer of stock on books of corporation to any other person.—*Quay vs. Presidio & F. R. Co.*, 82 Cal. 1, 5, 22 Pac. Rep. 925.

IV. DELIVERY OF CERTIFICATE.

22. AS BETWEEN PARTIES DELIVERY IS UNNECESSARY, and transferrer may retain possession without vitiating transfer.—*Tregear vs. Etiwanda Water Co.*, 76 Cal. 537, 540, 9 Am. St. Rep. 245, 18 Pac. Rep. 658.

23. PLEDGE REQUIRES DELIVERY and continued change of possession in order to be valid against other creditors, in accordance with general rules which govern pledging of property.—*McFall vs. Buckeye Grangers' Warehouse Assoc.*, 122 Cal. 468, 470, 68 Am. St. Rep. 47, 55 Pac. Rep. 253. See post §§ 2988, 3440 and notes.

V. NECESSITY FOR, AND RIGHT TO ENTRY ON BOOKS OF CORPORATION.

24. ENTRY IS NECESSARY in order to render transfer of corporate stock valid, as against persons other than parties thereto; it being held that statute is mandatory and not directory, and that provision is not mere rule for guidance of corporation and stockholders.—*Weston vs. Bear River & Auburn W. & M. Co.*, 5 Cal. 186, 187-189, 63 Am. Dec. 117; *Strout vs. Natoma W. & M. Co.*, 9 Cal. 78, 80; *Naglee vs. Pacific Wharf Co.*, 20 Cal. 529, 532, 533; *Spreckels vs. Nevada Bank of San Francisco*, 113 Cal. 272, 276, 277, 54 Am. St. Rep. 348, 45 Pac. Rep. 329, 33 L. R. A. 459; *McFall vs. Buckeye Grangers' Warehouse Assoc.*, 122 Cal. 468, 470, 68 Am. St. Rep. 47, 55 Pac. Rep. 253; *West Coast Safety Faucet Co. vs. Wulff*, 133 Cal. 315, 316, 317, 85 Am. St. Rep. 171, 65 Pac. Rep. 622. See *Ala. Berney Nat. Bank vs. Pinckard*, 37 Ala. 577, 6 So. Rep. 364. *Colo. First Nat. Bank of Longmont vs. Hastings*, 7 Colo. App. 129, 42 Pac. Rep. 691; *Conway vs. John*, 14 Colo. 80, 33, 23 Pac. Rep. 170. *Kan. Plumb vs. Bank of Enterprise*, 48 Kan. 484, 29 Pac. Rep. 699; *Pine vs. Western Nat. Bank*, 63 Kan. 462, 65 Pac. Rep. 690. *Mass. Fisher vs. Essex Bank*, 71 Mass. (5 Gray) 373. *N. Mex. Lyndonville Nat. Bank vs. Folsom*, 7 N. Mex. 611, 615, 38 Pac. Rep. 253. *N. D. In re Argus Print. Co.*, 1 N. D. 434, 26 Am. St. Rep. 639, 48 N. W. Rep. 347, 12 L. R. A. 781. *R. I. Lippitt vs. American Wood Paper Co.*, 15 R. I. 141, 145, 2 Am. St. Rep. 886, 23 Atl. Rep. 111. *Vt. Sabin vs. Bank of Woodstock*, 21 Vt. 353. *Wis. In re Application of Murphy*, 51 Wis. 519, 525.

25. As against corporation transfer of corporate stock is valid even though it is not entered on books of corporation.—*People vs. Crockett*, 9 Cal. 112, 114. See *Brown vs. San Francisco Gas L. Co.*, 53 Cal. 426, 427, 428.

26. **Compare:** *Jennings vs. Bank of Cal.*, 79 Cal. 323, 331, 12 Am. St. Rep. 145, 21 Pac. Rep. 852, 5 L. R. A. 333 (holding that as against corporation transfer is not valid until it has been entered upon books, and that assignee takes mere equity which must yield to superior equity of corporation where latter has lien upon stock which is not transferable until such lien has been discharged).

27. **CREDITORS—Are not affected by transfer of corporate stock unless it is entered on books of corporation in accordance with statute.**—*Weston vs. Bear River & A. W. & M. Co.*, 5 Cal. 186, 187-189, 63 Am. Dec. 117; *Naglee vs. Pacific Wharf Co.*, 20 Cal. 529, 533; *Farmers' Nat. Gold Bank vs. Wilson*, 58 Cal. 600, 604; *McFall vs. Buckeye Grangers' Warehouse Assoc.*, 122 Cal. 468, 471, 68 Am. St. Rep. 47, 55 Pac. Rep. 253; *West Coast Safety Faucet Co. vs. Wulff*, 133 Cal. 315, 316, 85 Am. St. Rep. 171, 65 Pac. Rep. 622. See *Ala. Berney Nat. Bank vs. Pinckard*, 87 Ala. 577, 6 So. Rep. 364. *Colo. First Nat. Bank of Longmont vs. Hastings*, 7 Colo. App. 129, 42 Pac. Rep. 691; *Conway vs. John*, 14 Colo. 30, 33, 23 Pac. Rep. 170. *Iowa. Ft. Madison Lumber Co. vs. Batavian Bank*, 71 Iowa 270, 60 Am. Rep. 789, 32 N. W. Rep. 336. *Kan. Plumb vs. Bank of Enterprise*, 48 Kan. 484, 29 Pac. Rep. 699. *Mass. Fisher vs. Essex Bank*, 71 Mass. (5 Gray) 373, 380, 381. *N. M. Lyndonville Nat. Bank vs. Folsom*, 7 N. Mex. 611, 38 Pac. Rep. 253. *N. D. In re Argus Print. Co.*, 1 N. D. 434, 26 Am. St. Rep. 639, 48 N. W. Rep. 347, 12 L. R. A. 781. *R. L. Lippitt vs. American Wood Paper Co.*, 15 R. I. 141, 145, 2 Am. St. Rep. 886, 23 Atl. Rep. 111. *Fed. Union Bank of Georgetown vs. Laird*, 15 U. S. (2 Wheat.) 390, bk. 4 L. ed. 269.

28. **Attachment may be levied after transfer upon transferred shares as property of transferor, unless transfer is entered on books of corporation.**—*Weston vs. Bear River & A. W. & M. Co.*, 5 Cal. 186, 187-189, 63 Am. Dec. 117; *Naglee vs. Pacific Wharf Co.*, 20 Cal. 529, 533; *Farmers' Nat. Gold Bank vs. Wilson*, 58 Cal. 600, 604; *McFall vs. Buckeye Grangers' Warehouse Assoc.*, 122 Cal. 468, 471, 68 Am. St. Rep. 47, 55 Pac. Rep. 253. See *Ala. Berney Nat. Bank vs. Pinckard*, 87 Ala. 577, 6 So. Rep. 364. *Colo. First Nat. Bank vs. Hastings*, 7 Colo. App. 129, 42 Pac. Rep. 691; *Conway vs. John*, 14 Colo. 30, 33, 23 Pac. Rep. 170. *Iowa. Ft. Madison Lumber Co. vs. Batavian Bank*, 71 Iowa 270, 60 Am. Rep. 789, 32 N. W. Rep. 336. *Mass. Fisher vs. Essex Bank*, 71 Mass. (5 Gray) 373, 380, 381. *N. M. Lyndonville Nat. Bank vs. Folsom*, 7 N. Mex. 611, 38 Pac. Rep. 253. *N. D. In re Argus Print. Co.*, 1 N. D. 434, 26 Am. St. Rep. 639, 48 N. W. Rep. 347, 12 L. R. A. 781. *Fed. Union Bank vs. Laird*, 15 U. S. (2 Wheat.) 390, bk. 4 L. ed. 269.

29. **Same—Excuse for failure to procure entry may be shown, and equity will not permit stock to be attached as belonging to transferor where transferee has been diligent in his efforts to comply with statute and failure to have entry made is due to no fault of his, but to refusal or failure of corporation to comply with his demands that entry be made.**—*Weber vs. Bullock*, 19 Colo. 314, 35 Pac. Rep. 133. See *Hastings vs. First Nat. Bank*, 7 Colo. App. 419,

sub nom. *First Nat. Bank vs. Dickson*, 36 Pac. Rep. 618; *Colt vs. Ives*, 31 Conn. 25, 31 Am. Dec. 161.

30. **Same—Judgment for defendant dissolves attachment.**—Where shares of stock are attached in action brought in justice's court, and judgment is rendered in favor of defendant, attachment is dissolved under Code Civil Procedure § 553, and pending appeal to superior court and before any judgment has been rendered by that court, defendant may transfer stock and have transfer entered on books of corporation so as to give title to his transferee as against execution purchaser who subsequently purchases stock at an execution sale pursuant to execution issued upon judgment rendered against defendant by superior court. —*Loveland vs. Alvord Con. Min. Co.*, 76 Cal. 562, 564, 565, 18 Pac. Rep. 682. See Code Civ. Proc. § 553 and note.

31. **Creditors of corporation are not affected, and transfer of shares of stock to become effectual between transferor and creditors of corporation must be entered on corporate books.**—*Plumb vs. Bank of Enterprise*, 48 Kan. 484, 29 Pac. Rep. 699; *Pine vs. Western Nat. Bank*, 63 Kan. 462, 65 Pac. Rep. 690.

32. **Execution against transferor may be levied upon stock notwithstanding transfer, where it was entered upon books of corporation in compliance with statute, and purchaser at execution sale of stock so standing on books of corporation in name of judgment debtor will acquire title, notwithstanding transfer, if at time of purchase he acts in good faith and without notice of transfer.**—*Farmers' Nat. Gold Bank vs. Wilson*, 58 Cal. 600, 604; *West Coast Safety Faucet Co. vs. Wulff*, 133 Cal. 315, 85 Am. St. Rep. 171, 65 Pac. Rep. 622. See *McFall vs. Buckeye Grangers' Warehouse Assoc.*, 122 Cal. 468, 471, 68 Am. St. Rep. 47, 55 Pac. Rep. 253.

33. **Levy of execution after attachment.**—Where attachment is levied upon stock, transfer of which has not been properly entered, and judgment is rendered against transferor, and execution issued, it is doubtful whether, under Code Civil Procedure § 550, any levy of execution upon stock is necessary beyond giving notice of the execution sale.—*McFall vs. Buckeye Grangers' Warehouse Assoc.*, 122 Cal. 468, 471, 68 Am. St. Rep. 47, 55 Pac. Rep. 253. See *Lenhardt vs. Jennings*, 119 Cal. 192, 196, 48 Pac. Rep. 56. See Code Civ. Proc. § 550 and note.

34. **Notice may be given to purchaser at execution sale, and transferee will thus protect himself from his failure to have transfer entered, by precluding purchaser from becoming purchaser in good faith and without notice (dictum).**—*Farmers' Nat. Gold Bank vs. Wilson*, 58 Cal. 600, 605.

35. **DIRECTORS ARE NOT PROTECTED, and where they are wasting corporate property and converting it to their own use transferee whose transfer is not so entered may maintain action against them.**—*Parrott vs. Byers*, 40 Cal. 614, 625, 626.

36. **KNOWLEDGE OR NOTICE OF TRANSFER, even though transfer be not entered on books of corporation, will preclude party hav-**

ing such knowledge or notice from taking advantage of statute, and as to him transfer will be valid though not entered.—*Weston vs. Bear River & A. W. & M. Co.*, 6 Cal. 425, 429; *Naglee vs. Pacific Wharf Co.*, 30 Cal. 529, 533; *People vs. Elmore*, 35 Cal. 653, 655; *Spreckels vs. Nevada Bank*, 113 Cal. 272, 276, 54 Am. St. Rep. 348, 45 Pac. Rep. 329, 33 L. R. A. 459. See *Blakeman vs. Puget Sound Iron Co.*, 72 Cal. 321, 322, 13 Pac. Rep. 872; *George R. Barse L. S. Com. Co. vs. Range Valley Cattle Co.*, 16 Utah 59, 50 Pac. Rep. 630.

37. Judgment creditor within rule, and acquires no rights as against transferee, if he had knowledge or notice of transfer, even though it was not entered upon books of corporation.—*George R. Barse L. S. Com. Co. vs. Range Valley Cattle Co.*, 16 Utah 59, 50 Pac. Rep. 630.

38. Pledgee is protected, and although transfer to him was not entered on books of corporation, his possession and rights cannot be disturbed by subsequent purchaser or transferee who took with knowledge or notice of pledge.—*Weston vs. Bear River & A. W. & M. Co.*, 6 Cal. 425, 429; *People vs. Elmore*, 35 Cal. 653, 655.

39. Purchaser at execution sale with notice of unentered transfer, within rule, and takes no title as against transferee.—*Weston vs. Bear River & A. W. & M. Co.*, 6 Cal. 425, 429; *Blakeman vs. Puget Sound Iron Co.*, 72 Cal. 321, 322, 13 Pac. Rep. 872. See *Spreckels vs. Nevada Bank*, 113 Cal. 272, 276, 54 Am. St. Rep. 348, 45 Pac. Rep. 329, 33 L. R. A. 459; *George R. Barse L. S. Com. Co. vs. Range Valley Cattle Co.*, 16 Utah 59, 69, 50 Pac. Rep. 630.

40. Sale under execution is valid, although transfer is not entered on books of corporation, as against subsequent purchaser who has notice of such execution sale.—*People vs. Elmore*, 35 Cal. 653, 655.

41. PARTIES TO TRANSFER ARE BOUND without entry on books of corporation; rule being that mere indorsement and delivery are sufficient, except as against creditors and innocent purchasers, and transferees in good faith, for value and without notice.—*Graves vs. Mono Lake Hydraulic Min. Co.*, 31 Cal. 303, 325, 22 Pac. Rep. 665; *Spreckels vs. Nevada Bank of San Francisco*, 113 Cal. 272, 276, 54 Am. St. Rep. 348, 45 Pac. Rep. 329, 33 L. R. A. 459; *McFall vs. Buckeye Grangers' Warehouse Assoc.*, 122 Cal. 468, 470, 68 Am. St. Rep. 47, 55 Pac. Rep. 253; *Ashton vs. Zeila Min. Co.*, 134 Cal. 408, 410, 66 Pac. Rep. 494. See *Lankershim Ranch L. & W. Co. vs. Herberger*, 82 Cal. 600, 603, 23 Pac. Rep. 134. *Md. Gemmell vs. Davis*, 75 Md. 546, 32 Am. St. Rep. 412, 23 Atl. Rep. 1032. *New State vs. Leete*, 16 Nev. 243, 250. *Fed. Cecil Nat. Bank vs. Watsontown Bank*, 105 U. S. 217, bk. 26 L. ed. 1039.

42. Irregularity in certificate issued to transferee does not affect his ownership if transfer was otherwise valid.—*O'Rourke vs. Schultz*, 23 Mont. 285, 58 Pac. Rep. 712 (decided under similar statute).

43. Pledge is valid as between parties without entry of transfer on books of corporation, such entry not being requisite to validity of contract of pledge.—*Spreckels vs. Nevada*

Bank, 113 Cal. 272, 278, 54 Am. St. Rep. 348, 45 Pac. Rep. 329, 33 L. R. A. 459; *McFall vs. Buckeye Grangers' Warehouse Assoc.*, 122 Cal. 468, 470, 68 Am. St. Rep. 47, 55 Pac. Rep. 253. See *Graves vs. Mono Lake Hydraulic Min. Co.*, 31 Cal. 303, 325, 22 Pac. Rep. 665; *Cecil Nat. Bank vs. Watsontown Bank*, 105 U. S. 217, bk. 26 L. ed. 1039.

44. Whole title passes to transferee, so far as transferor is concerned, by mere indorsement and delivery.—*State vs. Leete*, 16 Nev. 242, 250 (decided under similar statute).

See par. 8 this note.

45. PLEDGEE—HAS RIGHT TO ENTRY ON BOOKS OF CORPORATION, but such right consists of right to cause transaction and nature of it so to be entered upon books of corporation as to show names of pledgeor and pledgee, number or designation of shares, and date of transfer, and he has no right to surrender certificates and have them canceled and new ones issued to him.—*Spreckels vs. Nevada Bank*, 113 Cal. 272, 277, 54 Am. St. Rep. 348, 45 Pac. Rep. 329, 33 L. R. A. 459. See *Moore vs. Marshalltown Opera House Co.*, 31 Iowa 45, 46 N. W. Rep. 750.

46. Must have transfer entered to protect himself against subsequent transferees and creditors in good faith and without notice.—*Strout vs. Natoma Water & M. Co.*, 9 Cal. 78, 80; *Spreckels vs. Nevada Bank*, 113 Cal. 272, 276, 277, 54 Am. St. Rep. 348, 45 Pac. Rep. 329, 33 L. R. A. 459; *West Coast Safety Faucet Co. vs. Wulff*, 133 Cal. 315, 316, 317, 85 Am. St. Rep. 171, 65 Pac. Rep. 622. See *McFall vs. Buckeye Grangers' Warehouse Assoc.*, 122 Cal. 468, 470, 68 Am. St. Rep. 47, 55 Pac. Rep. 253; *In re Argus Print. Co.*, 1 N. D. 434, 26 Am. St. Rep. 639, 48 N. W. Rep. 347, 12 L. R. A. 781.

47. PURCHASER OF STOCK AT FORECLOSURE SALE under decree foreclosing mortgage of stock is entitled to demand transfer of stock on books of company, as against mortgagor and corporation.—*Tregear vs. Etiwanda Water Co.*, 76 Cal. 537, 542, 9 Am. St. Rep. 245, 18 Pac. Rep. 658.

48. STATUTORY REQUIREMENT.—Rule requiring entry of transfer on books of corporation is purely statutory, and in absence of statute, indorsement and delivery alone are sufficient as against all persons (dictum).—*Weston vs. Bear River & A. W. & M. Co.*, 5 Cal. 186, 189, 63 Am. Dec. 117.

VI. DUTY OF CORPORATION TO ENTER TRANSFER ON BOOKS—ENFORCEMENT OF RIGHT.

49. CORPORATION MUST ENTER TRANSFER ON DEMAND.—Duty of corporation to enter transfer on its books arises when transferee presents certificate of stock, duly indorsed, and demands that such entry be made.—*Kimball vs. Union Water Co.*, 44 Cal. 173, 175, 13 Am. Rep. 157; *Brown vs. San Francisco Gas L. Co.*, 53 Cal. 426, 428; *Edwards vs. Sonoma Valley Bank*, 59 Cal. 136, 137; *Anglo-Cal. Bank vs. Grangers' Bank of Cal.*, 63 Cal. 359, 364; *Johnson vs. Kirby*, 65 Cal. 482, 486, 4 Pac. Rep. 458; *Tregear vs. Etiwanda Water Co.*, 76 Cal. 537, 539, 542, 9 Am. St. Rep. 245, 18 Pac. Rep. 658; *Jennings vs. Bank of Cal.*,

79 Cal. 323, 327, 12 Am. St. Rep. 145, 21 Pac. Rep. 852, 5 L. R. A. 233; *Ralston vs. Bank of Cal.*, 112 Cal. 208, 213, 44 Pac. Rep. 476; *Craig vs. Hesperia L. & W. Co.*, 113 Cal. 7, 13, 54 Am. St. Rep. 316, 45 Pac. Rep. 10, 35 L. R. A. 306; *Ashton vs. Zella Min. Co.*, 134 Cal. 408, 411, 66 Pac. Rep. 494. See *People vs. Crockett*, 9 Cal. 112, 114, 115. *Nev. State vs. Guerrero*, 12 Nev. 105, 107. *N. Y. Ex parte Fireman's Ins. Co.*, 6 Hill 243. *N. D. In re Argus Print. Co.*, 1 N. D. 434, 26 Am. St. Rep. 639, 48 N. W. Rep. 347, 12 L. R. A. 781. *Utah. George R. Barse L. S. Com. Co. vs. Range Valley Cattle Co.*, 16 Utah 59, 50 Pac. Rep. 630. *Wash. Huggins vs. Milwaukee Brew. Co.*, 10 Wash. 579, 39 Pac. Rep. 152. *Eng. Norris vs. Irish Land Co.*, 8 El. & Bl. 512, 92 Eng. C. L. 511.

50. Bond may be required of non-resident stockholder by corporation before entering transfer of shares on its books.—See post § 326 and note.

51. Decree of distribution.—Reversal of decree.—Where an executor indorses and delivers stock to testator's widow, pursuant to decree of distribution, and such decree is reversed on appeal, matter stands as though no decree had been made, and corporation is not authorized to make transfer on its books to transferee.—*Ashton vs. Zella Min. Co.*, 134 Cal. 408, 411, 66 Pac. Rep. 494.

52. Indebtedness of transferor to corporation gives corporation no lien and affords it no excuse for failure to enter transfer of stock.—*People vs. Crockett*, 9 Cal. 112, 114, 115.

53. Same.—By-laws providing for lien upon stock.—See post § 354 and note.

54. Presentation of certificate to corporation is prerequisite to right of transferee to demand entry of transfer on books of corporation, as corporation is entitled to evidence that certificate was indorsed and delivered to transferee.—*Edwards vs. Sonoma Valley Bank*, 59 Cal. 136, 137.

55. REMEDIES AGAINST CORPORATION.—ELECTION OF.—Transferee may either elect to sue in equity, and have corporation compelled to enter transfer upon its books, or he may bring an action in nature of common-law action of trover to recover damages.—*Ralston vs. Bank of Cal.*, 112 Cal. 208, 213, 44 Pac. Rep. 476.

56. Equitable action to compel entry of transfer on books of corporation may be brought against corporation by transferee in case of wrongful refusal to make such entry.—*Brown vs. San Francisco Gas L. Co.*, 58 Cal. 426, 427, 428; *Johnson vs. Kirby*, 65 Cal. 482, 486, 4 Pac. Rep. 458; *Tregear vs. Etiwanda Water Co.*, 76 Cal. 537, 541, 9 Am. St. Rep. 245, 18 Pac. Rep. 658; *Ralston vs. Bank of Cal.*, 112 Cal. 208, 213, 44 Pac. Rep. 476. See *In re Argus Print. Co.*, 1 N. D. 434, 26 Am. St. Rep. 639, 48 N. W. Rep. 347, 12 L. R. A. 781; *George R. Barse L. S. Com. Co. vs. Range Valley Cattle Co.*, 16 Utah 59, 50 Pac. Rep. 630.

57. Mandamus does not lie to compel corporation to enter transfer of stock on its books when it wrongfully refuses so to do at demand of transferee to whom stock has been indorsed and delivered.—*Kimball vs. Union Water Co.*, 44 Cal. 173, 175, 176, 18 Am. Rep. 157. See

Nev. State vs. Guerrero, 12 Nev. 105, 107. *N. Y. Ex parte Fireman's Ins. Co.*, 6 Hill 243. *Ohio. Freon vs. Carriage Co.*, 43 Ohio St. 30, 51 Am. Rep. 794.

58. *Contra*: *People vs. Crockett*, 9 Cal. 112, 114, 115 (wherein writ was issued upon holding that relator was entitled to transfer, without passing upon appropriateness of the writ); *Norris vs. Irish Land Co.*, 8 El. & Bl. 512, 92 Eng. C. L. 511.

59. *Trover lies*.—Where corporation wrongfully refuses to enter transfer on its books it is deemed guilty of conversion, and action for damages in nature of trover lies; it being held that there is no difficulty in applying remedy which was afforded by common-law action of trover, even though transferee's possession of certificate evidencing his title has not been disputed.—*Kimball vs. Union Water Co.*, 44 Cal. 173, 175, 18 Am. Rep. 157; *Brown vs. San Francisco Gas L. Co.*, 58 Cal. 426, 427, 428; *Edwards vs. Sonoma Valley Bank*, 59 Cal. 136, 137; *Anglo-Cal. Bank vs. Grangers' Bank of Cal.*, 63 Cal. 359, 364; *Jennings vs. Bank of Cal.*, 79 Cal. 323, 327, 12 Am. St. Rep. 145, 21 Pac. Rep. 852, 5 L. R. A. 233; *Ralston vs. Bank of Cal.*, 112 Cal. 208, 213, 44 Pac. Rep. 476 (to which case particular reference is made as explaining appropriateness of this remedy); *Craig vs. Hesperia L. & W. Co.*, 113 Cal. 7, 13, 54 Am. St. Rep. 316, 45 Pac. Rep. 10, 35 L. R. A. 306. See *Nev. State vs. Guerrero*, 12 Nev. 105, 107. *N. D. In re Argus Print. Co.*, 1 N. D. 434, 26 Am. St. Rep. 639, 48 N. W. Rep. 347, 12 L. R. A. 781. *Wash. Huggins vs. Milwaukee Brew. Co.*, 10 Wash. 579, 39 Pac. Rep. 152.

60. COMPLAINT—CONVERSION BY CORPORATION MUST BE ALLEGED; and complaint alleging that plaintiff transferee demanded that corporation enter transfer of stock on its books to plaintiff, that such demand was refused, and that stock was sold under execution against transferor to one H., "but as plaintiff charges and avers, for uses and benefit of defendant," at most indicates purpose on H.'s part to hold stock for benefit of defendant corporation, and is insufficient as averment of conversion by corporation.—*Edwards vs. Sonoma Valley Bank*, 59 Cal. 136, 137.

61. Damages must be alleged in action against corporation for refusing to enter transfer of stock on its books, and mere allegation of demand of such entry and refusal thereof, and that stock was sold under execution against transferor is insufficient.—*Edwards vs. Sonoma Valley Bank*, 59 Cal. 136, 137.

62. PARTIES DEFENDANT.—Corporation is proper party defendant in action to compel entry of transfer on its books.—*Johnson vs. Kirby*, 65 Cal. 482, 486, 4 Pac. Rep. 458.

63. President and secretary of corporation are not necessary parties defendant in such action.—*Tregear vs. Etiwanda Water Co.*, 76 Cal. 537, 539, 542, 9 Am. St. Rep. 245, 18 Pac. Rep. 658.

64. Purchasers to whom corporation has sold stock under illegal assessments are not proper parties defendant, in an action to compel corporation to make entry, and if they

are joined with corporation there is misjoinder.—*Johnson vs. Kirby*, 65 Cal. 482, 486, 4 Pac. Rep. 458.

65. **Transferrer of stock** is not necessary party defendant in such action; and, transfer being apparently valid, invalidity thereof is matter of defense to be set up by way of answer, and if such defense is set up and it appears that transferrer is proper party defendant, court may order him to be brought in.—*Tregear vs. Etiwanda Water Co.*, 76 Cal. 537, 541, 542, 9 Am. St. Rep. 245, 18 Pac. Rep. 655.

66. **EVIDENCE AS TO UNPAID ASSESSMENTS**, in action for conversion, is admissible as affecting value of stock, although non-payment of such assessments is not full defense to action.—*Craig vs. Hesperia L. & W. Co.*, 113 Cal. 7, 13, 54 Am. St. Rep. 316, 45 Pac. Rep. 10, 35 L. R. A. 306.

67. **DAMAGES—Measure of.**—In action in nature of trover against corporation for refusing to enter transfer on its books, measure of damages is value of stock at time of conversion, with legal interest thereon since that date; and dividends that have been since declared are not recoverable, unless, perhaps, plaintiff declares for dividends as separate cause of action.—*Ralston vs. Bank of Cal.*, 112 Cal. 208, 214, 315, 44 Pac. Rep. 476.

VII. STOCK-BOOK—MODE OF MAKING ENTRY.

68. **"ENTER" MEANS**, as used in this section, making of "a simple identifying reference," as distinguished from copying or entering at large or in full.—*Oakland Pav. Co. vs. Tompkins*, 72 Cal. 5, 6-9, 1 Am. St. Rep. 17, 12 Pac. Rep. 801.

69. **COMMON AND PROPER MODE OF KEEPING** register of stockholders, where statute does not provide nature of book to be kept, is to keep book of stock certificates, with record on stub of certificates showing date of issue, number of certificate, number of shares included, and name of person to whom issued, and, in case of sale of stock, to note transfer upon stub of old certificate and take up old and issue new certificate to transferee, number of new certificate being specially referred to on stub of old one.—*Plumb vs. Bank of Enterprise*, 48 Kan. 484, 29 Pac. Rep. 699. See *Fisher vs. Jones*, 82 Ala. 117, 3 So. Rep. 13.

70. **COPY OF TRANSFER** in hæc verba is not necessary in order to record or register transfer.—*Fisher vs. Jones*, 82 Ala. 117, 3 So. Rep. 13.

71. **NATURE AND EFFECT OF STOCK-BOOK.**—The keeping of stock-book in which original issue and all subsequent transfers must be entered enables holder or purchaser of stock to trace it back to original issue by numbers of different certificates and thus to identify shares.—*Craig vs. Hesperia L. & W. Co.*, 113 Cal. 7, 13, 54 Am. St. Rep. 316, 45 Pac. Rep. 10, 35 L. R. A. 306.

72. **NON-COMPLIANCE WITH BY-LAWS** which require such entries to be made upon stock ledger is irregularity of which corporation cannot complain because fault is its own.—*Stewart vs. Walla Walla Print. & Pub. Co.*, 1 Wash. 521, 20 Pac. Rep. 605.

VIII. CONTRACTS TO TRANSFER STOCK—RIGHTS OF TRANSFERRER AND TRANSFEREE.

73. **CORPORATION AS PURCHASER OF ITS OWN STOCK.**—Power of corporation to purchase its own stock, which has been sold and is outstanding in hands of individual stockholders, without special authorization, is doubtful.—*Galvin vs. Mac Min. & M. Co.*, 14 Mont. 508, 37 Pac. Rep. 366.

74. **Construction of contract.**—Unless there are particular circumstances to stamp it as such, fact that stockholder in company transfers his stock to individual cannot be construed as transfer for benefit of company, and whatever knowledge company may have respecting it is immaterial.—*Mays vs. Foster*, 13 Oreg. 214, 10 Pac. Rep. 17.

75. **ESCROW.**—Certificates of stock may be subject of escrow agreement.—*Clark vs. Campbell*, 23 Utah 569, 65 Pac. Rep. 496, 54 L. R. A. 508.

76. **DAMAGES FOR BREACH OF CONTRACT BY TRANSFEREE.**—One who contracts to purchase stock on given date, must take it at time indicated in his contract cum onere, and if he fails to do so he is liable, not only for the purchase price and interest, but for all assessments levied upon stock after his breach of contract which transferrer has been compelled to pay thereon.—*Gay vs. Dare*, 103 Cal. 454, 460, 37 Pac. Rep. 466.

77. **ORDER ON "PRESIDENT."**—BEFORE FORMATION OF CORPORATION, if contract be made consisting of order upon "president" of corporation to be formed to transfer shares of stock to be issued to the person making such order, contract is not enforceable against corporation.—*Morrison vs. Gold Mountain G. M. Co.*, 52 Cal. 306, 309.

78. **RESCISSION OF TRANSFER AND COMPELLING RETRANSFER.**—Where stock is transferred to agent and put in name of such agent for purpose of enabling him better to make sale for his principal, and agent abuses trust and holds stock in fraud of principal, latter can maintain suit in equity for retransfer of the stock, and for full accounting.—*Wooster vs. Nevills*, 73 Cal. 58, 59, 60, 14 Pac. Rep. 390. See *Behlow vs. Fischer*, 102 Cal. 308, 214, 36 Pac. Rep. 509.

79. **Corporation is not proper party** in action to rescind transfer of portion of its capital stock.—*Behlow vs. Fischer*, 102 Cal. 308, 214, 36 Pac. Rep. 509.

80. **Demand for return of stock** is not necessary prior to instituting such action.—*Wooster vs. Nevills*, 73 Cal. 58, 59, 14 Pac. Rep. 390.

81. **Misjoinder of causes of action.**—Causes of action in favor of two partners to rescind transfers of stock, cannot be joined where stock before its transfer was individual property of each, and transfers were separate and distinct transactions.—*Behlow vs. Fischer*, 102 Cal. 208, 214, 36 Pac. Rep. 509.

82. **Tender to agent of money** which principal has received from agent need not be made prior to institution of action to compel retransfer by agent because of his fraud, because there was no contract of sale and no

rescission is asked.—*Wooster vs. Nevills*, 73 Cal. 58, 60, 14 Pac. Rep. 390.

82. SEVERANCE OF CONTRACT.—A contract to transfer stock is not severable, and if transferrer has title to some of stock but not to all of it he cannot maintain action for price.—*Nicholls vs. Reid*, 109 Cal. 630, 633, 42 Pac. Rep. 298. See *Polhemus vs. Helman*, 45 Cal. 573, 577, 578.

84. SPECIFIC PERFORMANCE.—Equity has not jurisdiction to decree specific performance of contract to transfer stock such as is commonly bought and sold in market and ordinarily such relief will not be granted because there is adequate remedy at law.—See *Treasurer vs. Commercial Gold Min. Co.*, 23 Cal. 390, 392; *Megibben vs. Perin*, 49 Fed. Rep. 183, 188.

85. Exception as to mining stock, and as to it, specific performance will be decreed, because such stock is often of fluctuating and uncertain value.—*Treasurer vs. Commercial Gold Min. Co.*, 23 Cal. 390, 393.

86. Exception where all stock of corporation transferred and devise is evidently as expedient to transfer real estate belonging to corporation.—*Megibben vs. Perin*, 49 Fed. Rep. 183, 188.

87. Pledgee of stock may maintain action in nature of specific performance to compel pledgee to return stock when it is of uncertain value and has no known or fixed market value.—*Krouse vs. Woodward*, 110 Cal. 638, 643, 42 Pac. Rep. 1084.

88. Parties.—Corporation is not necessary party defendant in action against stockholder to specifically enforce contract to transfer stock to plaintiff and to compel him to account for and pay over dividends, although it is not improper to make corporation defendant.—*Sayward vs. Houghton*, 82 Cal. 628, 630, 23 Pac. Rep. 120.

89. Particular stock involved in contract need not be delivered up, but specified number of shares in same corporation are sufficient, for there is no difference in shares.—*Krouse vs. Woodward*, 110 Cal. 638, 643, 42 Pac. Rep. 1084. See *Senter vs. Davis*, 38 Cal. 450, 455; *Atkins vs. Gamble*, 42 Cal. 86, 104, 105, 10 Am. Rep. 282; *Cushman vs. Thayer Mfg. J. Co.*, 76 N. Y. 365, 32 Am. Rep. 315.

IX. CERTIFICATES AS NEGOTIABLE INSTRUMENTS—WRONGFUL TRANSFERS.

90. CERTIFICATES ARE NOT NEGOTIABLE INSTRUMENTS, in commercial sense, although, when indorsed in blank, they pass by mere delivery without further indorsement and, as between parties, without entry of transfer on books of corporation.—*Atkins vs. Gamble*, 42 Cal. 86, 99, 10 Am. Rep. 282; *Sherwood vs. Meadow Valley Min. Co.*, 50 Cal. 412, 414; *Barstow vs. Savage Min. Co.*, 64 Cal. 383, 391, 49 Am. Rep. 705, 1 Pac. Rep. 349; *Graves vs. Mono Lake Hydraulic Min. Co.*, 81 Cal. 303, 325, 22 Pac. Rep. 665; *Craig vs. Hesperia L. & W. Co.*, 113 Cal. 7, 13, 54 Am. St. Rep. 316, 45 Pac. Rep. 10, 35 L. R. A. 306. See *Ala. East Birmingham Land Co. vs. Dennis*, 85 Ala. 565, 568, 7 Am. St. Rep. 73, 5 So. Rep. 177, 2 L. R. A. 836. *Nev. Gass vs. Hampton*,

16 Nev. 185, 190. *N. Y. Mechanics' Bank vs. New York & N. H. R. Co.*, 13 N. Y. 599 (wherein will be found masterly exposition of principles of law and citation and comparison of judicial decisions applicable to question); *Knox vs. Eden Musee Amer. Co.*, 145 N. Y. 441, 51 Am. St. Rep. 700, 42 N. E. Rep. 988.

91. EFFECT OF STATUTE is to place certificates on footing of negotiable instruments to extent that purchaser in good faith without notice acquires valid title as against transferee, unless transfer is entered on books of corporation.—*Winter vs. Belmont Min. Co.*, 53 Cal. 428, 431, 432 (explaining *Sherwood vs. Meadow Valley Min. Co.*, 50 Cal. 412, 414, where attention of court was not called to statute, and sole proposition discussed was whether certificate of stock, on general principles of commercial law, is negotiable, and it was held that it was not).

92. EQUITIES IN FAVOR OF CORPORATION.—In analogy to other non-negotiable instruments purchaser takes subject to all equities in favor of the corporation.—*Craig vs. Hesperia L. & W. Co.*, 113 Cal. 7, 13, 54 Am. St. Rep. 316, 45 Pac. Rep. 10, 35 L. R. A. 306.

93. LOST CERTIFICATE INDORSED IN BLANK confers no right upon bona fide purchaser for value from one who has found it, where in mean time true owner has secured new certificate from corporation.—*Sherwood vs. Meadow Valley Min. Co.*, 50 Cal. 412, 414, 415. See *Craig vs. Hesperia L. & W. Co.*, 113 Cal. 7, 14, 54 Am. St. Rep. 316, 45 Pac. Rep. 10, 35 L. R. A. 306.

As to lost certificate and procedure to secure issuance of a new one, see post § 328.

94. STOLEN CERTIFICATES—Purchaser takes no title.—Where stock of corporation stands on books in name of A., and stock is owned by B., and certificate (though properly indorsed) is stolen from B. without his fault, thief can pass no title even to bona fide purchaser, and B. may pursue his property.—*Barstow vs. Savage Min. Co.*, 64 Cal. 383, 393, 49 Am. Rep. 705, 1 Pac. Rep. 349 (citing *Sherwood vs. Meadow Valley Min. Co.*, 50 Cal. 412, 414, 415, and disapproving *Winter vs. Belmont Min. Co.*, 53 Cal. 428, 432). See *Swim vs. Wilson*, 90 Cal. 126, 127-131, 25 Am. St. Rep. 110, 27 Pac. Rep. 33, 13 L. R. A. 605; *East Birmingham Land Co. vs. Dennis*, 85 Ala. 565, 568, 7 Am. St. Rep. 73, 5 So. Rep. 317, 2 L. R. A. 836; *Knox vs. Eden Musee Amer. Co.*, 145 N. Y. 441, 51 Am. St. Rep. 700, 42 N. E. Rep. 988.

95. Stockbroker is liable for conversion where he innocently acts as agent of one who has stolen stock indorsed in blank and sells same and hands over proceeds to thief.—*Swim vs. Wilson*, 90 Cal. 126, 127-131, 25 Am. St. Rep. 110, 27 Pac. Rep. 33, 13 L. R. A. 605. See *Rogers vs. Huie*, 1 Cal. 429, 433, 54 Am. Dec. 300; *Cerkel vs. Waterman*, 63 Cal. 34, 35; *Kimball vs. Billings*, 55 Me. 147, 92 Am. Dec. 581; *Bereich vs. Marye*, 9 Nev. 312, 316, 317.

96. TRANSFER BY HOLDER HAVING APPARENT OWNERSHIP.—Where shares of stock indorsed in blank are placed by owner in hands of another, bona fide purchasers who deal with such other are protected as against owner, even though agent or trustee exceeds

his authority.—*Brewster vs. Sime*, 42 Cal. 139, 143-145; *Thompson vs. Toland*, 48 Cal. 99, 113, 117; *Arnold vs. Johnson*, 66 Cal. 402, 403, 5 Pac. Rep. 796; *Brittan vs. Oakland Bank of Sav.*, 124 Cal. 282, 288, 289, 71 Am. St. Rep. 58, 57 Pac. Rep. 84; *Dover vs. Pittsburg Oil Co.*, 143 Cal. 501, 505, 77 Pac. Rep. 405. See *Woodsum vs. Cole*, 69 Cal. 142, 144, 145, 10 Pac. Rep. 331. *Mo. International Bank vs. German Bank*, 71 Mo. 183, 196, 36 Am. Rep. 463. *Nev. Gass vs. Hampton*, 16 Nev. 185, 190. *N. Y. Gerard vs. McCormick*, 130 N. Y. 261, 268, 29 N. E. Rep. 115. *Fed. Continental Bank vs. Elliot Nat. Bank*, 7 Fed. Rep. 369, 372.

97. Pledge without authority by apparent owner to whom owner of stock has delivered indorsed certificate, transfers title as against real owner, although such pledge was without authority or in excess of authority.—*Arnold vs. Johnson*, 66 Cal. 402, 403, 5 Pac. Rep. 796 (distinguishing *Barstow vs. Savage Min. Co.*, 64 Cal. 388, 393, 49 Am. Rep. 705, 1 Pac. Rep. 349, in which case indorsed certificates were stolen from owner); *Brittan vs. Oakland Bank of Sav.*, 124 Cal. 282, 288, 289, 71 Am. St. Rep. 58, 57 Pac. Rep. 84.

Real owner cannot defeat pledge of prop-

erty transferred to apparent owner for purpose of pledge.—See post § 2991 and note.

98. Secret trust.—If owner of stock places it, or knowingly allows it to remain in hands of another, on some secret trust between them, he, and not innocent purchaser or pledgee, must bear loss resulting from breach of trust.—*Brewster vs. Sime*, 42 Cal. 139, 147; *Thompson vs. Toland*, 48 Cal. 99, 113, 117.

99. Addition of "trustee" to transferee's name.—Where stock is transferred to person as "trustee," and nothing more appears on books of corporation to indicate trust and its nature than mere addition to name of the word "trustee," such addition does not operate as constructive notice of any secret equities, as against persons who, in good faith, purchase or advance money on stock without notice.—*Brewster vs. Sime*, 42 Cal. 139, 143-145.

100. OFFICERS OF CORPORATION ARE CHARGEABLE WITH NOTICE that stock was transferred to transferee as agent or trustee of transferor, where corporation was one of parties to contract, and in certificate-book of corporation transferee is described as agent or trustee.—*Brewster vs. Hartley*, 37 Cal. 15, 27, 99 Am. Dec. 237.

§ 325. **MARRIED WOMAN MAY TRANSFER STOCK; DIVIDENDS PAID TO HER; HER PROXY.** Shares of stock in corporations standing on the books of the corporation in the name of a married woman may be transferred by her, her agent or attorney, without the signature of her husband, and in the same manner as if such married woman were a feme sole. All dividends payable upon any of such shares of stock may be paid to her, her agent or attorney, in the same manner as if she were unmarried; and any proxy or power given by her, touching any of such shares, is valid and binding, and neither it nor any receipt for dividends need be signed by her husband.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 350, held unconstitutional; see history, § 4 ante; amendment re-enacted March 20, 1905, Stats. and Amdts. 1905, c. CCCXXXIX, p. 397.

Duress of husband.—Under Rev. Stats. Idaho, § 2612, providing substantially same as this section, transfer of stock by married woman, although procured by duress and coercion on part of her husband, is good where transferee is bona fide holder for value, with-

out notice or knowledge of such duress or coercion.—*Bryan vs. Montandon*, 6 Idaho 352, 55 Pac. Rep. 650.

As to contracts by married woman, see ante § 158 and notes.

§ 326. **AFFIDAVIT OR BOND MAY BE REQUIRED BEFORE TRANSFER.** When the shares of stock in a corporation are owned by parties residing out of the state, the president, secretary, or directors of the corporation, before entering any transfer of the shares on its books, or issuing a certificate therefor to the transferee, may require from the attorney or agent of the non-resident owner, or from the person claiming under the transfer, [1] an affidavit or other evidence that the non-resident owner was alive at the date of the transfer, and if such affidavit or other satisfactory evidence be not furnished, may require from the attorney, agent, or claimant, [2] a bond of indemnity, with two sureties, satisfactory to the officers of the corporation; or, if not so satisfactory, then [3] one approved by a judge of the superior court of the county in which the principal office of the corporation is situated, conditioned to protect the corporation against any liability to the legal

representatives of the owner of the shares, in case of his or her death before the transfer; and if such

Affidavit or other evidence or bond be not furnished when required as herein provided, neither the corporation nor any officer thereof shall be liable for refusing to enter the transfer on the books of the corporation.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdt. 1873-4, p. 205; Feb. 16, 1883, Stats. and Amdt. 1883, p. 4. In force Feb. 16, 1883.

1. Applied, cited, construed, referred to, etc., in: *Brown vs. San Francisco G. L. Co.*, 58 Cal. 426, 428 (referred to).

2. Bond must be demanded, it seems; otherwise it need not be given (dictum).—*Brown vs. San Francisco G. L. Co.*, 58 Cal. 426, 428.

§ 327. CONTRACTS TO RELIEVE DIRECTORS FROM LIABILITIES FIXED BY CONSTITUTION VOID. Any contract or contracts, verbal or written, hereafter made, whereby it is sought directly or indirectly to relieve any director or trustee of any corporation or joint stock association from any liability imposed by section three, of article twelve, of the constitution of California, are hereby declared to be and shall be null and void.

History: Enacted April 12, 1880, Code Amdt. 1880, p. 9. In force April 12, 1880.

Applied, cited, construed, referred to, etc., in: *Silva vs. Campbell*, 84 Cal. 420, 422, 24 Pac. Rep. 316 (miscited for § 3275 post; properly cited in 24 Pac. Rep.).

§ 328. LOST, ETC., CERTIFICATE; ACTION FOR NEW CERTIFICATE; PARTIES; PROCEDURE. Whenever a certificate of stock or of shares in a corporation organized under the laws of this state has been lost, destroyed or wrongfully withheld, the owner thereof may bring an action against such corporation in the superior court of the county in which is located its principal place of business, for the purpose of obtaining a new or duplicate certificate. If by the books of the corporation the stock stands in the name of a person other than the plaintiff, or if by such books it appears that some other person claims or has some right, title, or interest in, or lien upon, such stock, all such persons must be made parties defendant with the corporation.

[Summons and notice.] Summons must be issued and served as in other civil actions, and in addition thereto, the court must direct its clerk to issue and cause to be published, at least once a week for four successive weeks, in some newspaper published in the county, a notice setting forth the pendency of the action, the names of the parties thereto, the court in which it is pending, the name of the corporation issuing the stock, the number of the certificate and the number of the shares, the name of the person mentioned as stockholder in the certificate, and notifying all persons claiming said shares, or any of them, or any interest or lien therein or thereupon, to be and appear before the court at a time and place to be designated in the notice not less than thirty days from the first publication thereof, then and there to show cause why a new certificate should not be directed to be issued to the plaintiff, and to set forth their rights in or claim to such shares.

[Proceeding on answer—Judgment.] If any one appears and answers or intervenes in the action, it must proceed to trial as in other civil cases, and the court must enter judgment as from the facts established may be proper; but if no one appears within the time designated in such notice, nor within the time allowed by law after the service of such summons, the court must hear such evidence as

may be offered in support of the allegations of the complaint, and make and file its decision thereon, and thereupon may enter its judgment canceling the lost, destroyed or wrongfully withheld certificate and directing the corporation, upon payment to it of all costs incurred by it in the premises and without costs against the corporation, to issue to the plaintiff a new or duplicate certificate.

After the issuing of a new certificate by the corporation pursuant to any judgment in such action, no action can ever be maintained by any person against the corporation in reference to said lost or destroyed certificate or the shares represented thereby, and thereafter any such action is forever barred as against the corporation.

History: Enacted March 20, 1905, Stats. and Amdts. 1905, c. CCCXCI, pp. 500, 501.

ARTICLE II.

ASSESSMENT OF STOCK.

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| § 331. Assessments, how levied. | § 342. Highest bidder to be purchaser. |
| § 332. Limitation—How levied. | § 343. In default of bidders. |
| § 333. Levy of assessment—Old assessment remaining unpaid. | § 344. Disposition of stock purchased by corporation. |
| § 334. What order shall contain. | § 345. Extension of time of delinquent sale. |
| § 335. Notice of assessment—Form. | § 346. Assessments shall not be invalidated. |
| § 336. Publication and service of notice. | § 347. Action for recovery of stock and limitation thereof. |
| § 337. Delinquent notice—Form. | § 348. Proofs of publication and sale. |
| § 338. Contents of notice. | § 349. Waiver of sale—Action to recover assessment. |
| § 339. How published. | |
| § 340. Jurisdiction acquired, how. | |
| § 341. Sale to be by public auction. | |

§ 331. **ASSESSMENTS, HOW LEVIED.** The directors of any corporation formed or existing under the laws of this state, after one fourth of its capital stock has been subscribed, may, for the purpose [1] of paying expenses, [2] conducting business, or [3] paying debts, levy and collect assessments upon the subscribed capital stock thereof, in the manner and form and to the extent provided herein.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 206.

I. In General.

1. Applied, cited, construed, referred to, etc.
- 2-4. Acts repealed and amended.
- 5-9. Construed as to language, authority.
10. Same—Distinction code and constitution.
11. Same—As giving lien.
12. Same—As to stock assessable.
- 13-16. Same—As to meaning and modification of law.
- 17, 18. Same—As not confined or intended, etc.
19. Same—As restraining right.
- 20, 21. Same—With reference to limitation and purpose.
- 22-25. Same—With §§ 332, 333.
- 26, 27. Defined—As claim to raise money.
28. Discrimination not allowed.
29. Uniformity required.
- 30, 31. Word "non-assessable"; meaning and effect of.

II. Power to Assess—1. Fully Paid-up Stock.

- 32-34. Power under code—At common law.
- 35, 36. When it does or does not exist.

III. Same—2. Stock not Fully Paid-up.

37. As to fraud in levy.

38, 39. Extent and prerequisite to rights.

- 40-42. When it exists.
43. Necessity, how determined.

IV. Purposes of Assessment.

- 44-48. Purposes to which power extends.
- 49-51. What constitute debts, etc.

V. Party Assessable.

- 52-55. Party chargeable—Stockholders' list.
- 56-60. Same—Position of assignor and purchasers respectively.

VI. Same—Liability of—On What Dependent.

- 61, 62. Liability—When it attaches.
- 63-65. Same—On what dependent.

VII. Power to Collect.

66. After insolvency.
- 67-70. Lien—When it exists.
- 71-73. Same—When it does not exist.

I. IN GENERAL.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: Santa Cruz R. Co. vs. Spreckles, 65 Cal. 193, 194 (construed), 195, 196 (construed with §§ 332, 333), 200 (applied), 209 (referred to in dep. op.), 210 (construed

in dep. op.), 3 Pac. Rep. 661, 802; Younglove vs. Steinman, 80 Cal. 375, 377, 22 Pac. Rep. 189 (construed and applied); Lankershim Ranch L. & W. Co. vs. Herberger, 82 Cal. 600, 603, 23 Pac. Rep. 184 (construed and applied); Arroyo D. & W. Co. vs. Superior Court Los Angeles, 92 Cal. 47, 50, 27 Am. St. Rep. 91, 23 Pac. Rep. 54 (construed with § 5 art. 6 constitution); San Joaquin L. & W. Co. vs. Beecher, 101 Cal. 70, 80, 35 Pac. Rep. 349 (construed); San Bernardino Inv. Co. vs. Merrill, 108 Cal. 490, 492, 41 Pac. Rep. 487 (construed and applied); Market St. R. Co. vs. Hellman, 109 Cal. 571, 588, 42 Pac. Rep. 225 (construed with other sections); Ventura & O. V. R. Co. vs. Hartman, 116 Cal. 260, 263, 48 Pac. Rep. 65 (construed and applied); Walter vs. Merced Academy Assoc., 126 Cal. 582, 586, 59 Pac. Rep. 186 (applied); Welch vs. Sargent, 127 Cal. 72, 82, 59 Pac. Rep. 319 (referred to); Shively vs. Eureka T. G. M. Co., 129 Cal. 293, 296, 61 Pac. Rep. 939 (referred to in discussion); Herbert K. Co. Bank vs. Bank of Orland, 133 Cal. 64, 66, 65 Pac. Rep. 143 (construed); Union S. B. of S. J. vs. Dunlap, 135 Cal. 628, 632, 67 Pac. Rep. 1034 (applied).

As to assessments on paid-up stock, see 26 Am. & Eng. Encyc. of L. (2d ed.) 923; also monographic note by Ernest Watts, 45 L. R. A. 647; and also 76 Am. St. Rep. 132-135.

As to assessment of stock issued as paid up, see monographic note 76 Am. St. Rep. 134-136.

As to assessments to pay instalments on subscription to corporation stock, see note 31 Am. Dec. 393-395.

As to assessments under statute on paid-up stock and the construction of such statutes, see 26 Am. & Eng. Encyc. of L. (2d ed.) 923.

As to definition of assessment of stock, see monographic note 76 Am. St. Rep. 126.

As to difference between assessments of stock and calls upon stock, see monographic note 76 Am. St. Rep. 127.

As to effect of assessment on stockholders made under order of the court in another state, see monographic note by Burdett A. Rich, 34 L. R. A. 694.

As to effect of nominal payment for shares on bonus stock, see monographic note by Burdett A. Rich, 33 L. R. A. 490.

As to enforcement of assessment by action against stockholder, see post § 349 and note.

As to enforcement of assessment by means of sale, see post § 334 and note.

As to existence of lien as restraint upon alienation, see monographic note 57 Am. St. Rep. 393-396.

As to liability of stockholders to assessments, see 4 L. R. A. 232.

As to power of corporations to assess their stockholders, see monographic note 76 Am. St. Rep. 126-136.

As to power of courts to compel levy of assessments for payment of subscriptions, see monographic note 100 Am. Dec. 552-557.

As to sole right of director to make assessments of stock, see monographic note 76 Am. St. Rep. 127, 128.

As to validity of agreement not to levy for assessment of unpaid subscription, see monographic note 57 Am. St. Rep. 67.

2. ACT OF 1864, RELATING TO ASSESSMENTS, REPEALED ACT OF 1861, and applies to all corporations "formed under the general laws of this state."—Sullivan vs. The Triunfo Gold & Silver Min. Co., 39 Cal. 459, 465.

3. ACT OF 1866 REPEALS and takes place of act of 1864.—Sullivan vs. The Triunfo Gold & Silver Min. Co., 39 Cal. 459, 466.

4. CHANGE MADE IN CODE BY AMENDMENT of July 1, 1874, does not affect right to assess for paid-up stock.—Santa Cruz R. Co. vs. Spreckles, 65 Cal. 193, 199, 3 Pac. Rep. 661, 802.

5. CONSTRUED—As adopting language of acts 1864-1866 which the courts had previously construed as authorizing assessments upon stock which has been fully paid up.—Santa Cruz R. Co. vs. Spreckles, 65 Cal. 193, 198, 3 Pac. Rep. 661, 802.

6. As authorizing assessments upon stock fully paid for as well as assessments for amount unpaid thereon.—Santa Cruz R. Co. vs. Spreckles, 65 Cal. 193, 199, 3 Pac. Rep. 661, 802.

7. As authorizing corporations to levy assessments only when one fourth capital stock has been subscribed.—Ventura & O. V. R. Co. vs. Hartman, 116 Cal. 260, 263, 48 Pac. Rep. 65.

8. As authorizing directors of insolvent banks to levy assessments.—Union Sav. Bank of San Jose vs. Dunlap, 135 Cal. 628, 632, 67 Pac. Rep. 1034.

9. As authorizing other assessments when assessment which by first subdivision of § 332 is authorized to be levied when full amount of capital stock subscribed is insufficient to satisfy claims of creditors of corporation.—Santa Cruz R. Co. vs. Spreckles, 65 Cal. 193, 196, 3 Pac. Rep. 661, 802.

10. As drawing distinction between term "assessment," used in Article 6, § 5 of the constitution, which gives the superior court original jurisdiction in cases involving legality of taxation, assessments, etc., and "instalments" or "calls," sometimes termed assessments, made under the provisions of the section of the code by private corporations upon stockholders.—Arroyo D. & W. Co. vs. Superior Court of Los Angeles Co., 92 Cal. 47, 50, 27 Am. St. Rep. 91, 95, 23 Pac. Rep. 54.

11. As giving lien to corporation for profit upon their subscribed capital stock without possession of certificate of stock to secure payment of assessments levied for purpose of paying expenses, conducting business, and paying debts.—Lankershim Ranch L. & W. Co. vs. Herberger, 82 Cal. 600, 603, 23 Pac. Rep. 184.

As to lien, see para. 67-73 this note.

12. As holding assessments to be levied and collected upon subscribed capital stock.—Market St. R. Co. vs. Hellman, 109 Cal. 571, 582, 42 Pac. Rep. 225; Welch vs. Sargent, 127 Cal. 72, 82, 59 Pac. Rep. 319.

13. As meaning that the assessment authorized to be levied shall be levied only upon subscribed capital stock.—Santa Cruz R. Co. vs. Spreckles, 65 Cal. 193, 194, 3 Pac. Rep. 661, 802.

14. As meaning that assessments may be levied in the manner and form and to extent

provided by statute for purpose of paying expenses, conducting business, or paying debts of corporation.—*Santa Cruz R. Co. vs. Spreckles*, 65 Cal. 193, 194, 3 Pac. Rep. 661, 802.

15. As meaning that no assessment for any purpose can be levied until at least one fourth of capital stock of corporation has been subscribed.—*Santa Cruz R. Co. vs. Spreckles*, 65 Cal. 193, 194, 3 Pac. Rep. 661, 802.

16. As modifying rule of law, that in absence of any provision to contrary, corporation cannot levy assessments upon its capital stock until after whole amount thereof has been subscribed.—*San Bernardino Investment Co. vs. Merrill*, 108 Cal. 490, 492, 41 Pac. Rep. 467.

17. As not confined to assessments only for amount unpaid upon capital stock.—*Santa Cruz R. Co. vs. Spreckles*, 65 Cal. 193, 198, 3 Pac. Rep. 661, 802.

18. As not intended to authorize assessments only to extent of par value of stock subscribed for, or, in other words, to provide for calling in of sums subscribed.—*Santa Cruz R. Co. vs. Spreckles*, 65 Cal. 193, 196, 3 Pac. Rep. 661, 802.

19. As restraining the right to assess for any purpose until over one fourth capital stock has been subscribed and as restraining levy of assessment to subscribe capital stock and as leaving other limitations and provisions of code as before.—*Santa Cruz R. Co. vs. Spreckles*, 65 Cal. 193, 199, 3 Pac. Rep. 661, 802.

20. With reference to limitation imposed by § 333 prohibiting the levying of assessment where any portion of previous one remains unpaid, and as allowing assessments where previous assessment falls within exceptions mentioned in § 332, even though previous assessment remains unpaid.—*Santa Cruz R. Co. vs. Spreckles*, 65 Cal. 193, 195, 3 Pac. Rep. 661, 802.

21. With reference to purpose for which directors were authorized to levy an assessment and for conducting of business of corporation and as authorizing another assessment when full amount of capital stock is required to meet liability.—*Santa Cruz R. Co. vs. Spreckles*, 65 Cal. 193, 196, 3 Pac. Rep. 661, 802.

22. With § 332 as limiting power to assess to unpaid amount due on capital stock subscribed for, even though amount which may be thus realized is insufficient to discharge debt or liability of corporation (opinion of Mr. Justice Thornton in department).—*Santa Cruz R. Co. vs. Spreckles*, 65 Cal. 193, 199, 3 Pac. Rep. 661, 802.

23. With §§ 332, 333 as limiting power to make assessments to extent that no new assessments must be levied while any portion of previous one remains unpaid.—*Santa Cruz R. Co. vs. Spreckles*, 65 Cal. 193, 195, 3 Pac. Rep. 661, 802.

24. With §§ 332, 333 with respect to limitations of its power to limit assessment, amount not exceeding ten per cent of amount of capital stock named in articles of association.—*Santa Cruz R. Co. vs. Spreckles*, 65 Cal. 193, 195, 3 Pac. Rep. 661, 802.

25. With §§ 332, 335 with reference to ex-

ceptions of limitations placed upon power to make assessments and as giving power to call assessment where whole capital of corporation has not been paid up and corporation is unable to meet its liabilities or to satisfy claims of its creditors, as authorizing assessment for full amount unpaid upon capital stock, even though it exceed ten per cent mentioned in § 332, of capital stock named in articles, or if less amount is sufficient, as authorizing assessment for such percentage as will raise that amount.—*Santa Cruz R. Co. vs. Spreckles*, 65 Cal. 193, 195, 3 Pac. Rep. 661, 802.

26. DEFINITION.—Assessment is a claim made upon the stockholders for purpose of raising money in excess of amount of stock subscribed for, for purpose of sustaining corporation and enabling it to carry on its business for purpose for which it was incorporated, according to its corporate powers and duties.—*Santa Cruz R. Co. vs. Spreckles*, 65 Cal. 193, 196, 3 Pac. Rep. 661, 802.

27. "Assessment" is term often used to designate same thing as 'call,' but sometimes refers to payment sought to be recovered from stockholders above and in addition to par value of their stock.—*Omo vs. Bernart*, 108 Mich. 43, 65 N. W. Rep. 622.

28. DISCRIMINATION.—Assessment upon certain stockholders, and not upon others, is invalid.—*Kohler vs. Agassiz*, 99 Cal. 9, 15, 33 Pac. Rep. 741; *Herbert Kraft Co. Bank vs. Bank of Orland*, 133 Cal. 64, 67, 65 Pac. Rep. 143.

29. UNIFORMITY.—Assessments must be uniform, and under laws of state must be levied upon all capital stock.—*Kohler vs. Agassiz*, 99 Cal. 9, 15, 33 Pac. Rep. 741.

30. WORD "NON-ASSESSABLE," WAIVER OF OBLIGATION CREATED by acceptance and holding of certificate to pay amount due upon shares where legal effect of instrument is to make the remaining per cent payable upon demand, promise to take shares, importing promise to pay for them.—*Upton vs. Tribilcock*, 91 U. S. 45, bk. 23 L. ed. 203.

31. WORD "NON-ASSESSABLE" susceptible of construction which includes liability over and above subscription price.—*Omo vs. Bernart*, 108 Mich. 43, 65 N. W. Rep. 622.

II. POWER TO ASSESS.—1. FULLY PAID-UP STOCK.

32. POWER TO ASSESS—PAID-UP STOCK.—Code gives power to make assessment of fully paid-up stock in private corporation.—*Santa Cruz R. Co. vs. Spreckles*, 65 Cal. 193, 198, 199, 3 Pac. Rep. 661, 802; *Sayre vs. Citizens' Gas L. & H. Co.*, 69 Cal. 207, 208, 7 Pac. Rep. 437, 10 Id. 408; *Green vs. Abietine Med Co.*, 96 Cal. 323, 328, 31 Pac. Rep. 100.

33. Assessment on fully paid-up stock invalid (dis. op. Thornton, J.).—*Santa Cruz R. Co. vs. Spreckles*, 65 Cal. 193, 201, 3 Pac. Rep. 661, 802.

34. Common law gave no right to assess paid-up stock in absence of agreement.—*Min. Duluth Club vs. MacDonald*, 74 Minn. 254, 73 Am. St. Rep. 344, 76 N. W. Rep. 1128. Utah.

Gary vs. York Min. Co., 9 Utah 464, 35 Pac. Rep. 494. Wis. Wells vs. Green Bay & M. Canal Co., 90 Wis. 442, 64 N. W. Rep. 69.

35. Directors cannot levy assessment upon fully paid-up stock by enacting by-law or enforce such assessment by sale or practical forfeiture of stock.—Neb. Williams vs. Lowe, 4 Neb. 382; Omaha Library Assoc. vs. Connell, 55 Neb. 396, 75 N. W. Rep. 837. N. J. State vs. Morristown Fire Assoc., 23 N. J. L. (3 Zab.) 195. N. Y. In re Long Island R. Co., 19 Wend. 37, 32 Am. Dec. 429; Rosenback vs. Salt Springs Nat. Bank, 53 Barb. 495. R. I. Atlantic De Laine Co. vs. Mason, 5 R. I. 463.

36. Power to assess does not exist in absence of express power conferred either by statute or articles of incorporation.—Neb. Williams vs. Lowe, 4 Neb. 382; Omaha Library Assoc. vs. Connell, 55 Neb. 396, 75 N. W. Rep. 837; Enterprise Ditch Co. vs. Moffit, 58 Neb. 642, 76 Am. St. Rep. 122, 79 N. W. Rep. 560, 45 L. R. A. 647. N. J. State vs. Morristown Fire Assoc., 23 N. J. L. (3 Zab.) 195. N. Y. Rosenback vs. Salt Springs Nat. Bank, 53 Barb. 495; In re Long Island R. Co., 19 Wend. 37, 32 Am. Dec. 429. R. I. Atlantic De Laine Co. vs. Mason, 5 R. I. 463.

III. POWER TO ASSESS.—2. STOCK NOT FULLY PAID-UP.

37. AS TO FRAUD IN LEVYING ASSESSMENTS.—“We cannot say or hold that levying assessment to pay debt which corporation did not owe, and selling stock for that purpose, especially when it does not appear that money was so used, is a fraud.”—Johnson vs. Kirby, 65 Cal. 482, 487, 4 Pac. Rep. 458.

As a proposition of law, the above is clearly unsound; it is to be taken only in connection with circumstances of that particular case, in which action was brought against defendant for transfer of shares of stock in corporation, claimed to have been sold under invalid assessment; and that defendant purchased the stock with full knowledge of facts in relation to levying of assessment under which it was sold and purchased by corporation; and also facts that assessment was levied for purpose of paying one of such defendant's costs and expenses incurred by him in doing work on corporation premises, for which nothing was due him; but it did not appear that this purpose of paying such defendant was carried out, and it was not averred that any money realized on sale or purchase was paid to him, and it might have been used for legitimate purpose of working mine or paying debts of company.—Johnson vs. Kirby, 65 Cal. 482, 487, 4 Pac. Rep. 458.

38. POWER TO ASSESS — STOCK NOT FULLY PAID.—Subscribed capital stock may be assessed “to the extent” provided in sections of code.—Santa Cruz R. Co. vs. Spreckles, 65 Cal. 193, 200, 3 Pac. Rep. 661, 802.

39. Stock subscription of one fourth must exist, and is condition precedent to exercise of power given by statute.—San Bernardino Inv. Co. vs. Merrill, 108 Cal. 490, 492, 41 Pac. Rep. 437; Ventura & O. V. R. Co. vs. Hartman, 116 Cal. 260, 263, 48 Pac. Rep. 65; Walter vs. Merced Acad. Assoc., 126 Cal. 582, 586, 59 Pac. Rep.

136; Herbert Kraft Co. Bank vs. Bank of Orlando, 133 Cal. 64, 67, 65 Pac. Rep. 143.

40. Exists equally as against stockholders receiving paid-up share either by purchase or exchange where no stock subscribed for, but all purchased from corporation, all certificates being in same form, stating all fully paid.—Green vs. Abietine Medical Co., 96 Cal. 322, 328, 31 Pac. Rep. 100.

41. Exists where minutes show directors elected by ballot, which, if not legal, showed at least a nominal election, and organized as board of directors, and acted as such and de facto officers.—San Joaquin L. & W. Co. vs. Beecher, 101 Cal. 70, 80, 35 Pac. Rep. 349.

42. Right of corporation to assess its shareholders where stock certificates bore word “unassessable” conceded for purposes of opinion, but not judicially determined.—Symmes vs. Union T. Co., 60 Fed. Rep. 830, 854.

43. Necessity—Determination of necessity of assessment is question for board of directors.—Budd vs. Multnomah St. R. Co., 15 Oreg. 413, 3 Am. St. Rep. 169, 15 Pac. Rep. 659. See par. 8 this note.

IV. PURPOSES OF ASSESSMENT.

44. POWER TO LEVY ASSESSMENTS for “proper and legal expenses” of corporation includes debts of corporation.—Sullivan vs. Triunfo G. & S. Min. Co., 39 Cal. 459, 466.

45. For express purpose of providing fund to meet outstanding obligations.—Visalia & T. R. Co. vs. Hyde, 110 Cal. 632, 636, 52 Am. St. Rep. 136, 43 Pac. Rep. 10.

46. For legally incurred debts and liabilities.—Sparks vs. Lower Payette Ditch Co., 2 Idaho 1030, 29 Pac. Rep. 134.

47. For raising money necessary for repairs of engine and machinery for purpose of carrying on business of electric lighting company, without which company would be unable to answer demand made upon it for supply of lights.—Younglove vs. Steinman, 80 Cal. 375, 377, 22 Pac. Rep. 189.

48. To pay money borrowed from stockholder to pay expenses incurred in reorganizing, where there is no fraud, even though expenses might be incidental to act, which was ultra vires.—Taylor vs. North Star Gold Min. Co., 79 Cal. 285, 287, 21 Pac. Rep. 753; Bradley vs. Ballard, 55 Ill. 413, 3 Am. Rep. 656. See Holmes & G. Manufg. Co. vs. Holmes & W. M. Co., 127 N. Y. 252, 259, 24 Am. St. Rep. 448, 27 N. E. Rep. 831.

49. WHAT IS A DEBT.—Money advanced to and received by corporation by one of its directors at time when it was out of money and in debt and unable to obtain money from any other source constitutes legal debt for which assessment can be levied.—Santa Cruz R. Co. vs. Spreckles, 65 Cal. 193, 199, 3 Pac. Rep. 661, 802. See Seeley vs. San Jose Independent Mill & L. Co., 59 Cal. 22; Twin Lick Oil Co. vs. Marbury, 91 U. S. 587, bk. 23 L. ed. 323.

50. Expenses include debts which have accrued as well as costs and charges of contemplated business and operations of corporation.—Sullivan vs. Triunfo G. & S. Min. Co., 39 Cal. 459, 467.

51. "Expenses" signifies not only cost of contemplated services, materials, etc., but also charges for such as have been performed or furnished.—*Sullivan vs. Triunfo G. & S. M. Min. Co.*, 39 Cal 459, 467.

V. PARTY ASSESSABLE.

52. **PARTY CHARGEABLE.**—Issuance of certificate of stock is not necessary to charge party with assessment of stock.—*Ill. Sherwood vs. Illinois T. & Sav. Bank*, 195 Ill. 112, 38 Am. St. Rep. 183, 62 N. E. Rep. 335, 337. *Nev. Thompson vs. Reno Sav. Bank*, 19 Nev. 103, 3 Am. St. Rep. 797, 7 Pac. Rep. 63. *Tenn. Cartwright vs. Dickinson*, 38 Tenn. 476, 17 Am. St. Rep. 910, 12 S. W. Rep. 1030, 7 L. R. A. 706.

53. **Party liable to assessment ascertained alone from list of stockholders as their names are registered upon books.**—*Visalia & Tulare R. Co. vs. Hyde*, 110 Cal. 632, 636, 52 Am. St. Rep. 136, 43 Pac. Rep. 10. See *Sherwood vs. Illinois T. & Sav. Bank*, 195 Ill. 112, 38 Am. St. Rep. 183, 62 N. E. Rep. 335, 337; *Holland vs. Duluth Iron Min. Dev. Co.*, 65 Minn. 324, 60 Am. St. Rep. 480, 68 N. W. Rep. 50.

54. **Party whose name appears on books of corporation as stockholder liable to assessment.**—*Sherwood vs. Illinois T. & Sav. Bank*, 195 Ill. 112, 38 Am. St. Rep. 183, 62 N. E. Rep. 335, 337; *Holland vs. Duluth Iron Min. & Dev. Co.*, 65 Minn. 324, 60 Am. St. Rep. 480, 68 N. W. Rep. 50.

55. **Party agreeing to subscribe to certain number of shares to corporation to be organized cannot be held liable to pay assessments on his subscription until whole stock is taken (dictum).**—*West vs. Crawford*, 80 Cal. 19, 31, 21 Pac. Rep. 1123. *Me. Oldtown & Lincoln R. Co. vs. Veazie*, 39 Me. 571; *Steamboat Co. vs. Seawell*, 78 Me. 167. *Md. Hughes vs. Antietam Manufg. Co.*, 34 Md. 316. *Mass. Atlantic Cotton Mills vs. Abbott*, 63 Mass. (9 Cush.) 423; *Stoneham Branch R. Co. vs. Gould*, 68 Mass. (2 Gray) 277.

56. **Assignor, assigning stock certificate to another subsequent to levying of assessment, liable, where assignee has not procured transfer to himself upon books of company.**—*Visalia & Tulare R. Co. vs. Hyde*, 110 Cal. 632, 636, 52 Am. St. Rep. 136, 43 Pac. Rep. 10.

57. **Purchaser of stock, causing transfer thereof to himself to be entered upon books of company, constitutes him stockholder in place of his vendor so as to render him liable for assessments.**—*Visalia & T. R. Co. vs. Hyde*, 110 Cal. 632, 636, 52 Am. St. Rep. 136, 43 Pac. Rep. 10. See *Conn. Hartford etc. R. Co. vs. Boorman*, 12 Conn. 530. *Md. Hall vs. United States Ins. Co.*, 5 Gill 484. *Mich. Merrimac Min. Co. vs. Bagley*, 14 Mich. 501. *Fed. Upton vs. Hansbrough*, 3 Biss. 417, 28 Fed. Cas. 839.

58. **Purchaser presumed to receive same subject to same conditions and liabilities that it would have been subject to if he had been original subscriber for it, or had purchased it from original subscriber.**—*Stockton Comb. H. & A. W. vs. Houser*, 109 Cal. 1, 7, 41 Pac. Rep. 809. *Mass. Holyoke Bank vs. Burnham*, 45 Mass. (11 Cush.) 183. *N. Y. Adderly vs. Storm*, 6 Hill 624; *United States T. Co. vs. United States Fire Ins. Co.*, 18 N. Y. 199. *Fed.*

Webster vs. Upton, 91 U. S. 65, bk. 23 L. ed. 384; *Pullman vs. Upton*, 96 U. S. 328, bk. 24 L. ed. 318; *Clark vs. Bever*, 139 U. S. 96, bk. 35 L. ed. 38, 11 Sup. Ct. Rep. 468.

59. **Purchaser takes the legal title subject to all assessments and equities in same way that grantee of land takes subject to valid recorded liens.**—*Craig vs. Hesperia L. & W. Co.*, 113 Cal. 7, 12, 54 Am. St. Rep. 316, 45 Pac. Rep. 10, 35 L. R. A. 306. See *Barstow vs. Savage Min. Co.*, 64 Cal. 388, 49 Am. Rep. 705, 1 Pac. Rep. 349; *Graves vs. Mono Lake H. Min. Co.*, 31 Cal. 303, 304, 22 Pac. Rep. 665; *Swim vs. Wilson*, 90 Cal. 126, 129, 25 Am. St. Rep. 110, 27 Pac. Rep. 33, 13 L. R. A. 605.

60. **Purchasers of stock at discount are liable to assessment upon remainder of par value where certificate was in usual form, accepted and receipted in usual manner, without any indorsement thereon that it was for fully paid or non-assessable stock and there is no evidence of agreement at time of issuance or subsequently that it should be non-assessable.**—*Stockton C. H. & A. Works vs. Houser*, 109 Cal. 1, 6, 7, 41 Pac. Rep. 809. See *Upton vs. Tribilcock*, 91 U. S. 45, bk. 23 L. ed. 203.

VI. SAME—LIABILITY—ON WHAT DEPENDENT.

61. **LIABILITY ATTACHES** to subscriber for stock although certificate has not been issued to him.—*Mitchell vs. Beckman*, 64 Cal. 117, 121, 28 Pac. Rep. 110; *California S. H. Co. vs. Callender*, 94 Cal. 120, 127, 28 Am. St. Rep. 99, 29 Pac. Rep. 859; *Pacific Fruit Co. vs. Coon*, 107 Cal. 447, 452, 40 Pac. Rep. 542; *Craig vs. Hesperia L. & W. Co.*, 113 Cal. 7, 13, 54 Am. St. Rep. 316, 45 Pac. Rep. 10, 35 L. R. A. 306.

62. **Under contract of subscription to pay upon call of board of directors, viz., "at such time and in such manner as may be determined by board of directors of said corporation, to be hereafter chosen."**—*California S. H. Co. vs. Callender*, 94 Cal. 120, 127, 28 Am. St. Rep. 99, 29 Pac. Rep. 859. See *West vs. Crawford*, 80 Cal. 19, 27, 21 Pac. Rep. 1123; *Lankershim Ranch L. & W. Co. vs. Herberger*, 82 Cal. 600, 603, 23 Pac. Rep. 134.

63. **LIABILITY does not depend upon them all signing articles of incorporation.**—*San Joaquin L. & W. Co. vs. Beecher*, 101 Cal. 70, 79, 35 Pac. Rep. 349.

64. **Does not depend upon issuance of stock certificates.**—*San Joaquin L. & W. Co. vs. Beecher*, 101 Cal. 70, 79, 35 Pac. Rep. 349.

65. **Issuance of stock certificate not necessary to liability, as corporation not bound to issue such certificate until subscription price fully paid.**—*California S. H. Co. vs. Callender*, 94 Cal. 120, 127, 28 Am. St. Rep. 99, 29 Pac. Rep. 859.

VII. POWER TO COLLECT.

As to power to sell stock to procure payment of assessment, see post § 334 and note.

As to right of action to enforce collection of assessment, see post § 349 and note.

66. **POWER TO COLLECT.**—**Directors have no authority to enforce assessment after adjudication in insolvency.**—*Bank of National*

City vs. Johnston, 123 Cal. 155, 157, 65 Pac. Rep. 823.

67. Lien not dependent upon possession of certificate of stock may, by contract between corporation and its stockholders, be created in favor of corporation to secure stockholders' indebtedness.—Lankershim Ranch L. & W. Co. vs. Herberger, 82 Cal. 600, 603, 23 Pac. Rep. 134; Jennings vs. Bank of Cal., 79 Cal. 323, 12 Am. St. Rep. 145, 21 Pac. Rep. 852, 5 L. R. A. 232.

68. Lien exists in favor of corporation for profit to secure payment of assessment levied for purposes of paying expenses, conducting business and paying debts.—Lankershim Ranch L. & W. Co. vs. Herberger, 82 Cal. 600, 603, 23 Pac. Rep. 134; Craig vs. Hesperia L. & W. Co., 113 Cal. 7, 12, 54 Am. St. Rep. 316, 45 Pac. Rep. 10, 35 L. R. A. 306.

69. Same.—After surrender of old and issuance of new certificate.—Craig vs. Hesperia L. & W. Co., 113 Cal. 7, 12, 54 Am. St. Rep. 316, 45 Pac. Rep. 10, 35 L. R. A. 306. See Hawley vs. Brumagim, 33 Cal. 394, 399; Hardenbergh vs. Bacon, 33 Cal. 356; Atkins vs. Gamble, 42 Cal. 86, 99, 100, 10 Am. Rep. 232; Mechanics' Bank vs. New York

Bank vs. New York & New Haven R. Co., 13 N. Y. 599, 626.

70. Same.—As against holder of new certificate.—Craig vs. Hesperia L. & W. Co., 113 Cal. 7, 12, 54 Am. St. Rep. 316, 45 Pac. Rep. 10, 35 L. R. A. 306. See Hawley vs. Brumagim, 33 Cal. 394, 399; Hardenbergh vs. Bacon, 33 Cal. 356; Atkins vs. Gamble, 42 Cal. 86, 99, 100, 10 Am. Rep. 232; Mechanics' Bank vs. New York & N. H. R. Co., 13 N. Y. 599, 626.

71. Lien does not exist upon share certificate for assessments on shares in corporation.—Craig vs. Hesperia L. & W. Co., 113 Cal. 7, 12, 54 Am. St. Rep. 316, 45 Pac. Rep. 10, 35 L. R. A. 306.

72. And is not implied upon shares of stockholder in the absence of contract and provisions of charter or by-laws of corporation to secure indebtedness.—Farmers & Mechanics' Bank vs. Wasson, 48 Iowa 336, 30 Am. Rep. 398; Sargent vs. Franklin Ins. Co., 25 Mass. (3 Pick.) 90, 19 Am. Dec. 306; Massachusetts Iron Co. vs. Hooper, 61 Mass. (7 Cush.) 183.

73. Right to create lien on stock by by-law doubted.—Lankershim Ranch L. & W. Co. vs. Herberger, 82 Cal. 600, 603, 23 Pac. Rep. 134.

§ 332. **LIMITATION—HOW LEVIED.** No one assessment must exceed ten per cent of the amount of the capital stock named in the articles of incorporation, except in the cases in this section otherwise provided for, as follows:

1. If the whole capital of a corporation has not been paid up, and the corporation is unable to meet its liabilities or to satisfy the claims of its creditors, the assessment may be for the full amount unpaid upon the capital stock; or if a less amount is sufficient, then it may be for such a percentage as will raise that amount;

2. The directors of railroad corporations may assess the capital stock in instalments of not more than ten per cent per month, unless in the articles of incorporation it is otherwise provided;

3. The directors of fire or marine insurance corporations may assess such a percentage of the capital stock as they deem proper.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
- 2-4. Construed as to authority and extent of assessment.
- 5, 6. Same—As to limitation of assessment.
- 7, 8. Same—As not applying—Special contract.
9. Same—With other sections—Allegations.
10. Effect upon stock.
- 11, 12. Excessive assessment—Nature of.
- 13-16. Special agreements—Effect upon code.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO,** etc., in: Santa Cruz R. Co. vs. Spreckles, 65 Cal. 193, 194, 195, 196 (construed with § 331), 199 (referred to in discussion), 200 (construed in dis. op.), 201 (construed with § 323 in dis. op.), 202, 209, 210 (referred to in dis. op.), 3 Pac. Rep. 661, 802; Marysville E. L. & P. Co. vs. Johnson, 93 Cal. 538, 549, 550, 27 Am. St. Rep. 215, 29 Pac. Rep. 126 (construed as not applying); Kohler vs. Agassiz, 99 Cal. 9, 14, 33 Pac. Rep. 741 (construed); Pacific Fruit Co. vs. Coon, 107 Cal. 447, 450, 40 Pac. Rep. 542 (applied); Shively vs. Eureka T. G.

Min. Co., 129 Cal. 293, 296, 61 Pac. Rep. 929 (construed and applied with §§ 331-349).

As to purposes for which assessments are allowed, see 26 Am. & Eng. Encyc. of L. (2d ed.) 924, 10 Cyc. 484, and ante § 331 part IV.

2. **CONSTRUED AS ALLOWING ASSESSMENT,** where assessment for which first subdivision of section was authorized to be levied, is insufficient to satisfy the claims of creditors of corporation.—Santa Cruz R. Co. vs. Spreckles, 65 Cal. 193, 196, 3 Pac. Rep. 661, 802.

3. **As authorizing an assessment** upon any stockholder to extent of ten per cent of par value of his stock, except where whole capital is not paid up, in which case he may be required, if liabilities of company demand it, to pay by way of assessment full amount unpaid on capital stock.—Kohler vs. Agassiz, 99 Cal. 9, 14, 33 Pac. Rep. 741.

4. **As empowering another assessment** to be levied where previous one remains unpaid when such previous assessment falls within

provisions of either first, second, or third subdivision of section.—*Santa Cruz R. Co. vs. Spreckles*, 65 Cal. 193, 195, 3 Pac. Rep. 661, 802.

5. As containing limitations upon powers conferred by § 331.—*Santa Cruz R. Co. vs. Spreckles*, 65 Cal. 193, 200, 3 Pac. Rep. 661, 802.

6. As limiting the authority conferred upon directors by § 331 as to levying and collecting assessments.—*Santa Cruz R. Co. vs. Spreckles*, 65 Cal. 193, 194, 3 Pac. Rep. 661, 802.

7. As not applying where special contract is entered into with respect to payment of stock due and payable upon formation of company and issuance thereof.—*Marysville E. L. & P. Co. vs. Johnson*, 93 Cal. 538, 549, 27 Am. St. Rep. 215, 29 Pac. Rep. 126.

8. As not presenting further assessments for purposes mentioned in § 333.—*Santa Cruz R. Co. vs. Spreckles*, 65 Cal. 193, 195, 3 Pac. Rep. 661, 802.

9. With other sections of chapter as showing necessity of an allegation or finding of facts necessary to create personal liability on stockholder.—*Shively vs. Eureka T. G. Min. Co.*, 129 Cal. 293, 296, 61 Pac. Rep. 939.

As to its construction with § 331, see ante § 331 para. 22-25.

10. EFFECT UPON STOCK.—Assessment collected for the purposes mentioned in above section makes stock upon which it is levied fully paid up.—*Santa Cruz R. Co. vs. Spreckles*, 65 Cal. 193, 195, 3 Pac. Rep. 661, 802.

11. Assessments exceeding ten per cent of whole capital named in articles of corporation declared valid.—*Pacific Fruit Co. vs. Coon*, 107 Cal. 447, 451, 40 Pac. Rep. 542.

§ 333. LEVY OF ASSESSMENT—OLD ASSESSMENT REMAINING UNPAID. No assessment must be levied while any portion of a previous one remains unpaid, unless:

1. The power of the corporation has been exercised in accordance with the provisions of this article for the purpose of collecting such previous assessment;
2. The collection of the previous assessment has been enjoined; or
3. The assessment falls within the provisions of either the first, second, or third subdivision of section 332.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.

2-6. Construed as to further assessment—Limitations.

7. Same—With other sections.

8-10. Second assessment—Effect of.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Santa Cruz R. Co. vs. Spreckles*, 65 Cal. 193, 195 (construed as limiting § 332), 201 (construed with § 332 in dis. op.), 3 Pac. Rep. 661, 802; *Shively vs. Eureka T. G. Min. Co.*, 129 Cal. 293, 296, 61 Pac. Rep. 939 (construed with other sections); *Strouse vs. Sylvester* (Cal. Nov. 8, 1901), 66 Pac. Rep. 660, 662 (construed and applied).

2. CONSTRUED AS ALLOWING A SECOND ASSESSMENT when such assessment is legal for reason that it and previous assessment did not amount in aggregate to "amount of capital

12. Same—Assessment over ten per cent invalid and not enforceable in absence of evidence to prove that stock had not been paid up.—*Pacific Fruit Co. vs. Coon*, 107 Cal. 447, 451, 40 Pac. Rep. 542.

13. EXPRESS AGREEMENTS.—Agreement made by stockholder to pay amount of his subscription upon formation of company and issuance of its stock, and not as same might be called for under above section of code, is valid and enforceable, defendant's liability being fixed by its terms.—*Marysville E. L. & P. Co. vs. Johnson*, 93 Cal. 538, 550, 27 Am. St. Rep. 215, 29 Pac. Rep. 126. See *California Sugar Mfg. Co. vs. Schafer*, 57 Cal. 396, 398.

14. To pay upon call of board of directors, namely, "at such time and in such manner as may be determined by board of directors of said corporation to be hereafter chosen."—*California South. Hotel Co. vs. Callender*, 94 Cal. 130, 127, 28 Am. St. Rep. 99, 29 Pac. Rep. 859. See *West vs. Crawford*, 80 Cal. 19, 27, 21 Pac. Rep. 1123; *Lankershim Ranch L. & W. Co. vs. Herberger*, 82 Cal. 600, 602, 23 Pac. Rep. 134.

15. Stockholder may agree to pay amount of subscription immediately or at stated times, and thus relieve corporation of duty of making calls under sections of code.—*Kohler vs. Agassiz*, 99 Cal. 9, 15, 33 Pac. Rep. 741.

16. Stockholder will be liable to pay upon express contract to pay his subscription immediately or at stated times.—*Kohler vs. Agassiz*, 99 Cal. 9, 15, 33 Pac. Rep. 741; *Phoenix Warehousing Co. vs. Badger*, 67 N. Y. 294, 300. See *Herbert Kraft Co. Bank vs. Bank*, 133 Cal. 64, 65 Pac. Rep. 143.

stock named in articles of incorporation."—*Santa Cruz R. Co. vs. Spreckles*, 65 Cal. 193, 200, 3 Pac. Rep. 661, 802.

3. As authorizing further assessments, for reason that had legislature intended to authorize assessments only to extent of par value of stock subscribed for, it would have expressed that intention in appropriate language.—*Santa Cruz R. Co. vs. Spreckles*, 65 Cal. 193, 196, 3 Pac. Rep. 661, 802.

4. As placing two limitations upon powers conferred by § 331.—*Santa Cruz R. Co. vs. Spreckles*, 65 Cal. 193, 195, 3 Pac. Rep. 661, 802.

5. As not changing the limitations contained in first subdivision of § 332 (dis. op.).—*Santa Cruz R. Co. vs. Spreckles*, 65 Cal. 193, 201, 3 Pac. Rep. 661, 802.

6. As not enlarging in any way the provi-

sions of § 332 any further than was specifically pointed out (dis. op.).—*Santa Cruz R. Co. vs. Spreckles*, 65 Cal. 193, 201, 3 Pac. Rep. 661, 802.

7. With other sections with respect to necessity of allegations or findings of facts to create personal liability.—*Shively vs. Eureka T. G. Min. Co.*, 129 Cal. 293, 296, 61 Pac. Rep. 939.

8. **SECOND ASSESSMENT.**—Fact that all former assessments had not been paid, is not valid objection to second assessment.—*Sullivan vs. Triunfo Gold & Silver Min. Co.*, 39 Cal. 459, 465.

9. Right to levy second assessment does not exist until power of corporation has been

exercised for collection of previous assessment.—*Strouse vs. Sylvester* (Cal. Nov. 8, 1901), 66 Pac. Rep. 660, 662.

10. Second assessment not levied in good faith, and while assessment on shares owned by defendant and on shares bid in by him remain unpaid, and where, if such shares had been paid by him, there would have been more in treasury than was received from first assessment, and where salaries were fraudulently offset against assessment of stock, and where, as between himself and corporation, his assessment and bid were unpaid, second assessment on such stock is invalid.—*Strouse vs. Sylvester* (Cal. Nov. 8, 1901), 66 Pac. Rep. 660, 662.

§ 334. **WHAT ORDER SHALL CONTAIN.** Every order levying an assessment must [1] specify the amount thereof, when, to whom, and where payable; [2] fix a day, subsequent to the full term of publication of the assessment notice, on which the unpaid assessments shall be delinquent, not less than thirty nor more than sixty days from the time of making the order levying the assessment; and [3] a day for the sale of delinquent stock, not less than fifteen nor more than sixty days from the day the stock is declared delinquent.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Construed as to necessity of allegations.
- 3-6. Power to forfeit—Nature and creation of.
- 7-9. Same—Necessity of statutory authority.
10. Same—Directors of insolvent corporation.
- 11-13. Notice—Necessity and sufficiency of.
- 14-16. Right to restrain sale.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Shively vs. Eureka T. G. Min. Co.*, 129 Cal. 293, 296, 61 Pac. Rep. 939 (construed with other sections); *San Bernardino Inv. Co. vs. Merrill*, 108 Cal. 490, 493, 41 Pac. Rep. 487 (construed and applied, erroneously cited as § 324).

As to construction of this section along with § 331, see § 331 and note.

As to effect of forfeiture of stock and non-payment of assessments, see 26 Am. & Eng. Encyc. of L. (2d ed.) 930; 10 Cyc. 503.

As to forfeiture of stock, see 26 Am. & Eng. Encyc. of L. (2d ed.) 927-929; 10 Cyc. 499, and note 68 Am. Dec. 83; and monographic note by Burdett A. Rich, 27 L. R. A. 305-321, and note 45 L. R. A. 365.

As to payment and time and place of payment of assessments, see 26 Am. & Eng. Encyc. of L. (2d ed.) 925; 10 Cyc. 486.

2. **CONSTRUED WITH OTHER SECTIONS OF CODE** as to necessity of allegations or findings of facts necessary to create personal liability on stockholders.—*Shively vs. Eureka T. G. Min. Co.*, 129 Cal. 293, 296, 61 Pac. Rep. 939.

3. **POWER TO FORFEIT STOCK**—Penalties and forfeitures are not to be favored.—*Occidental Building & L. Assoc. vs. Sullivan*, 62 Cal. 394, 398.

4. Common law gives no right to forfeit or sell the stock of subscriber for amount of assessment levied for unpaid portion of sub-

scription price.—*Santa Cruz R. Co. vs. Spreckles*, 65 Cal. 193, 196, 3 Pac. Rep. 661, 802; *Westcott vs. Minnesota Min. Co.*, 23 Mich. 145; *Budd vs. Multnomah St. R. Co.*, 15 Oreg. 413, 3 Am. St. Rep. 169, 15 Pac. Rep. 659.

5. **MUST BE CREATED** by unambiguous language.—*Occidental B. & L. Assoc. vs. Sullivan*, 62 Cal. 394, 398.

6. **NOT INHERENT** to forfeit or sell shares of stock owned by delinquent stockholders.—*Budd vs. Multnomah St. R. Co.*, 15 Oreg. 413, 3 Am. St. Rep. 169, 15 Pac. Rep. 659.

7. **STATUTORY AUTHORITY NECESSARY** to authorize sale of stock for amount of assessment levied upon unpaid portion of stock.—*Santa Cruz R. Co. vs. Spreckles*, 65 Cal. 193, 196, 3 Pac. Rep. 661, 802.

8. **SAME**—Or sell shares of stock of delinquent stockholders must be expressly conferred by statute.—*Budd vs. Multnomah St. R. Co.*, 15 Oreg. 413, 3 Am. St. Rep. 169, 15 Pac. Rep. 659.

9. **TERMS AND PROVISIONS OF STATUTE IMPOSING** forfeiture of stock on non-payment of assessments must be strictly complied with.—*Occidental B. & L. Assoc. vs. Sullivan*, 62 Cal. 394, 398; *Budd vs. Multnomah St. R. Co.*, 15 Oreg. 413, 3 Am. St. Rep. 169, 15 Pac. Rep. 659.

10. **DIRECTORS OF INSOLVENT BANK HAVE NO** powers to sell stock for unpaid assessments, as there is no stock for sale, and as going concern corporation is ended.—*Bank of National City vs. Johnston*, 133 Cal. 185, 187, 65 Pac. Rep. 383.

11. **NOTICE.**—Strict compliance with statute as to notice necessary.—*San Bernardino Inv. Co. vs. Merrill*, 108 Cal. 490, 495, 41 Pac. Rep. 487.

See post § 335 pars. 4-6.

12. Publication of notice of delinquent sale not made as required, forfeits jurisdiction to sell for delinquent assessments.—*San Bernardino Inv. Co. vs. Merrill*, 108 Cal. 490, 495, 41 Pac. Rep. 487.

13. Publication of notice not made as required renders fresh beginning of all previous proceedings and publication necessary subsequent to levy of assessment, as authorized by section 346, without such publication is void.—*San Bernardino Inv. Co. vs. Merrill*, 108 Cal. 490, 495, 41 Pac. Rep. 487.

14. RIGHT TO INJUNCTION TO RESTRAIN. —Injunction refused to restrain sale of stock for delinquent assessment, where plaintiff's complaint merely avers that company had no reputation or good will of any value, but was worthless concern as it stood, and that real

object of assessment was to procure plaintiff's stock.—*Burham vs. San Francisco Fuse Mfg. Co.*, 76 Cal. 24, 25, 17 Pac. Rep. 939.

As to action to recover stock, see post § 347 and note.

15. Will not lie against directors of corporation to restrain their action in collecting assessments for legally incurred debts and liabilities.—*Sparks vs. Lower Payette Ditch Co.*, 2 Idaho 1035, 29 Pac. Rep. 134.

16. Whether stockholder, who alleges that his stock is about to be sold for satisfaction of assessment, which he alleges is illegal and void, would suffer such injury by sale of his stock as would entitle him to injunction restraining sale was raised, but not decided, in *Sullivan vs. The Triunfo Gold & S. Min. Co.*, 39 Cal. 459, 469.

§ 335. NOTICE OF ASSESSMENT—FORM. Upon the making of the order, the secretary shall cause to be published a notice thereof, in the following form:

(Name of corporation in full. Location of principal place of business.) Notice is hereby given, that at a meeting of the directors, held on the (date), an assessment of (amount) per share was levied upon the capital stock of the corporation, payable (when, to whom, and where). Any stock upon which this assessment shall remain unpaid on the (day fixed) will be delinquent and advertised for sale at public auction, and, unless payment is made before, will be sold on the (day appointed), to pay the delinquent assessment, together with costs of advertising and expenses of sale.

(Signature of secretary, with location of office.)

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Construed as to legislative power over notice.
3. Same—With other sections as to allegations.
- 4-6. Notice—Necessity and sufficiency of.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *San Joaquin L. & W. Co. vs. Beecher*, 101 Cal. 70, 81, 35 Pac. Rep. 349 (construed and applied); *Shively vs. Eureka T. G. Min. Co.*, 129 Cal. 293, 296, 61 Pac. Rep. 939 (construed with other sections).

As to notice not being a prerequisite to section, see note 81 Am. Dec. 394.

2. CONSTRUED AS INVESTING LEGISLATURE with authority to designate form of notice to be given stockholders of levying of assessment.—*San Joaquin L. & W. Co. vs. Beecher*, 101 Cal. 70, 81, 35 Pac. Rep. 349.

3. With other sections with reference to allegation or findings of facts necessary to

create personal liability.—*Shively vs. Eureka T. G. Min. Co.*, 129 Cal. 293, 296, 61 Pac. Rep. 939.

4. NOTICE NOT REQUIRED in absence of express provision in charter or articles of association, or of law under which they are formed.—*San Joaquin L. & W. Co. vs. Beecher*, 101 Cal. 70, 81, 35 Pac. Rep. 349.

See ante § 334 pars. 11-13.

5. Required to be given to stockholder must be such as charter requires or which is same thing as statute prescribes.—*San Joaquin L. & W. Co. vs. Beecher*, 101 Cal. 70, 81, 35 Pac. Rep. 349.

6. Subscribed as being "levied upon capital stock of corporation" instead of upon subscribed capital stock, sufficient as being form provided by legislature.—*San Joaquin L. & W. Co. vs. Beecher*, 101 Cal. 70, 81, 35 Pac. Rep. 349.

§ 336. PUBLICATION AND SERVICE OF NOTICE. The notice must [1] be personally served upon each stockholder, or, in lieu of personal service, must [2] be sent through the mail, [a] addressed to each stockholder at his place of residence, if known, and if not known, at the place where the principal office of the corporation is situated, and [b] be published once a week, for four successive weeks, in [c] some newspaper of general circulation and devoted to the publication of general news, published at the place designated in the articles of incor-

poration as the principal place of business, and also [d] in some newspaper published in the county in which the works of the corporation are situated, if a paper be published therein. If the works of the corporation are not within a state or territory of the United States, publication in a paper of the place where they are situated is not necessary. If there be no newspaper published at the place designated as the principal place of business of the corporation, then the publication must be made in some other newspaper of the county, if there be one, and if there be none, then in a newspaper published in an adjoining county.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 206.

1. Applied, cited, construed, referred to, etc.
2. Construed as to allegations, etc.

As to notice of assessment, see ante §§ 332, 334 and notes; also post § 337 and note.

1. Applied, cited, construed, referred to, etc., in: *Shively vs. Eureka T. G. Min. Co.*, 129 Cal. 293, 296, 61 Pac. Rep. 939 (construed with other sections).

2. Construed—With other sections with reference to the allegations and findings of facts necessary to create personal liability.—*Shively vs. Eureka T. G. Min. Co.*, 129 Cal. 293, 296, 61 Pac. Rep. 939.

§ 337. **DELINQUENT NOTICE—FORM.** If any portion of the assessment mentioned in the notice remains unpaid on the day specified therein for declaring the stock delinquent, the secretary must, unless otherwise ordered by the board of directors, cause to be published in the same papers in which the notice hereinbefore provided for shall have been published, a notice substantially in the following form:

(Name in full. Location of the principal place of business.) Notice.—There is delinquent upon the following described stock, on account of assessment levied on the (date), (and assessments levied previous thereto, if any), the several amounts set opposite the names of the respective shareholders, as follows: (Names, number of certificate, number of shares, amount.) And in accordance with law (and an order of the board of directors, made on the [date], if any such order shall have been made), so many shares of each parcel of such stock as may be necessary, will be sold, at the (particular place), on the (date), at (the hour) of such day, to pay delinquent assessments thereon, together with costs of advertising and expenses of the sale.

(Name of the secretary, with location of office.)

History: Enacted March 21, 1872, founded upon § 2 Act April 4, 1864, Stats. 1863-4, pp. 492-493.

1. Applied, cited, construed, referred to, etc.
- 2, 3. Construed as to publication of notice.
4. Same—With other sections as to allegations.
- 5-7. Notice—Sufficiency of.

3. As giving board of directors power to order notices to be published in different papers, and if notices are regularly so published, requirements of statute are complied with.—*Stockton C. H. & A. Works vs. Houser*, 109 Cal. 1, 8, 41 Pac. Rep. 809.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *San Joaquin L. & W. Co. vs. Beecher*, 101 Cal. 70, 76, 35 Pac. Rep. 349 (construed with other sections); *San Bernardino Inv. Co. vs. Merrill*, 108 Cal. 490, 493, 41 Pac. Rep. 487 (construed with other sections); *Stockton C. H. & A. Works vs. Houser*, 109 Cal. 1, 8, 41 Pac. Rep. 809 (construed and applied); *Shively vs. Eureka T. G. Min. Co.*, 129 Cal. 293, 296, 61 Pac. Rep. 939 (construed with other sections).

4. With other sections with reference to allegations and findings of facts necessary to create personal liability.—*Shively vs. Eureka T. G. Min. Co.*, 129 Cal. 293, 296, 61 Pac. Rep. 939.

5. NOTICE—Of levy of assessment, stating that levy is made upon capital stock of corporation instead of upon subscribed capital stock being form authorized by legislature, is sufficient.—*San Joaquin L. & W. Co. vs. Beecher*, 101 Cal. 70, 76, 35 Pac. Rep. 349.

2. CONSTRUED—As meaning that notice of sale must be published in same paper as notice of assessment, unless otherwise directed by board.—*Stockton C. H. & A. Works vs. Houser*, 109 Cal. 1, 8, 41 Pac. Rep. 809.

6. Failure to make publication of delinquent sale as provided in section entails loss of all jurisdiction to sell stock for delinquent assessment, unless all previous proceedings and publications subsequent to levying of assessment,

as authorized by § 346, are begun anew.—San Bernardino Inv. Co. vs. Merrill, 108 Cal. 490, 495, 41 Pac. Rep. 487.

7. Strict observance of statutory mode and

provision with respect to notice as required by sections of the code is essential.—San Bernardino Inv. Co. vs. Merrill, 108 Cal. 490, 495, 41 Pac. Rep. 487.

§ 338. CONTENTS OF NOTICE. The notice must specify [1] every certificate of stock, [2] the number of shares it represents, and [3] the amount due thereon, except where certificates may not have been issued to parties entitled thereto, in which case [1] the number of shares and [2] amount due thereon, together with [3] the fact that the certificates for such shares have not been issued, must be stated.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Construed as to allegations, etc.

1. Applied, cited, construed, referred to, etc., in: San Joaquin L. & W. Co. vs. Beecher, 101 Cal. 70, 76, 35 Pac. Rep. 349 (construed with other sections); Shively vs. Eureka T. G. Min. Co., 129 Cal. 293, 296, 61 Pac. Rep. 939 (referred to with other sections).

2. Construed with other sections with reference to allegations and findings of facts necessary to create personal liability.—Shively vs. Eureka T. G. Min. Co., 129 Cal. 293, 296, 61 Pac. Rep. 939. See Pacific Fruit Co. vs. Coon, 107 Cal. 447, 40 Pac. Rep. 542; San Bernardino Inv. Co. vs. Merrill, 108 Cal. 490, 41 Pac. Rep. 487. See ante § 337 and note.

§ 339. HOW PUBLISHED. The notice, when published in a daily paper, must be published for ten days, excluding Sundays and holidays, previous to the day of sale. When published in a weekly paper, it must be published in each issue for two weeks previous to the day of sale. The first publication of all delinquent sales must be at least fifteen days prior to the day of sale.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Construed as to allegations, etc.
3. Notice of sale—Requisites.
- 4, 5. Same—Effect of failure to make.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: San Joaquin L. & W. Co. vs. Beecher, 101 Cal. 70, 76, 35 Pac. Rep. 349 (construed with other sections); San Bernardino Inv. Co. vs. Merrill, 108 Cal. 490, 493, 41 Pac. Rep. 487 (construed with other sections); Shively vs. Eureka T. G. Min. Co., 129 Cal. 293, 296, 61 Pac. Rep. 939 (referred to with other sections).

2. CONSTRUED WITH OTHER SECTIONS with respect to allegations and findings of facts necessary to create personal liability.—

Shively vs. Eureka T. G. Min. Co., 129 Cal. 293, 296, 61 Pac. Rep. 939.

3. NOTICE OF DELINQUENT SALE—First publication of all delinquent sales must be at least fifteen days prior to day of sale.—San Bernardino Inv. Co. vs. Merrill, 108 Cal. 490, 493, 41 Pac. Rep. 487.

4. Failure to make publication of delinquent sale as required by section, involves loss of jurisdiction to sell.—San Bernardino Inv. Co. vs. Merrill, 108 Cal. 490, 495, 41 Pac. Rep. 487.

5. Previous proceedings and publication subsequent to levy of assessment must begin anew, in case of failure to make publication of delinquent sale as required.—San Bernardino Inv. Co. vs. Merrill, 108 Cal. 490, 495, 41 Pac. Rep. 487.

§ 340. JURISDICTION ACQUIRED, HOW. By the publication of the notice, the corporation acquires jurisdiction to sell and convey a perfect title to all of the stock described in the notice of sale upon which any portion of the assessment or costs of advertising remains unpaid at the hour appointed for the sale, but must sell no more of such stock than is necessary to pay the assessments due and costs of sale.

History: Enacted March 21, 1872.

§ 341. SALE TO BE BY PUBLIC AUCTION. On the day, at the place, and at the time appointed in the notice of sale, the secretary must, unless otherwise ordered by the directors, sell or cause to be sold at public auction, to the highest bidder for cash, so many shares of each parcel of the described stock as may be

necessary to pay the assessment and charges thereon, according to the terms of sale; if payment is made before the time fixed for sale, the party paying is only required to pay the actual cost of advertising, in addition to the assessment.

History: Enacted March 21, 1872.

§ 342. HIGHEST BIDDER TO BE THE PURCHASER. The person offering at such sale to pay the assessment and costs for the smallest number of shares or fraction of a share is the highest bidder, and the stock purchased must be transferred to him on the stock-books of the corporation, on payment of the assessment and costs.

History: Enacted March 21, 1872.

§ 343. IN DEFAULT OF BIDDERS, CORPORATION MAY PURCHASE. If, at the sale of stock, no bidder offers the amount of the assessments and costs and charges due, the same may be [1] bid in and purchased by the corporation, through the secretary, president, or any director thereof, [2] at the amount of the assessments, costs, and charges due; and [3] the amount of the assessments, costs, and charges must be credited as paid in full on the books of the corporation, and [4] entry of the transfer of the stock to the corporation must be made on the books thereof. While the stock remains the property of the corporation it is not assessable, nor must any dividends be declared thereon; but all assessments and dividends must be apportioned upon the stock held by the stockholders of the corporation.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc., in: California Sugar Mfg. Co. vs. Schafer, 57 Cal. 396, 398 (cited in holding that neither allegations nor evidence proved ownership of stock, or that disposition thereof by sale was authorized by by-laws, or by vote of stockholders).

§ 344. DISPOSITION OF STOCK PURCHASED BY CORPORATION. All purchases of its own stock made by any corporation vest the legal title to the same in the corporation; and the stock so purchased is held subject to the control of the stockholders, who may make such disposition of the same as they deem fit, in accordance with the by-laws of the corporation or vote of a majority of all the remaining shares. Whenever any portion of the capital stock of a corporation is held by the corporation by purchase, a majority of the remaining shares is a majority of the stock for all purposes of election or voting on any question at a stockholders' meeting.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Construed as to its application.
- 3-6. Corporation interest in stocks purchased.
- 7-9. Stock in treasury—Majority.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: California Sugar Mfg. Co. vs. Schafer, 57 Cal. 396, 398 (cited); Robinson vs. Spaulding G. & S. Min. Co., 72 Cal. 32, 33, 34, 13. Pac. Rep. 65 (construed and applied); Market St. R. Co. vs. Hellman, 109 Cal. 571, 588, 42 Pac. Rep. 225 (construed and applied with other sections).

2. CONSTRUED—As applying to case of execution levied under judgment against company and sale of shares of capital stock there-

under for which company refuse to give stock certificate to purchaser on ground said shares were purchased by them for non-payment of assessments.—Robinson vs. Spaulding G. & S. Min. Co., 72 Cal. 32, 34, 13 Pac. Rep. 65.

3. CORPORATION INTEREST IN STOCK SOLD AND PURCHASED FOR ASSESSMENTS.—Corporation has no interest which it can sell and dispose of in stock sold for assessments and purchased by the company.—Robinson vs. Spaulding G. & S. Min. Co., 72 Cal. 32, 34, 13 Pac. Rep. 65.

4. Corporation has no interest which creditor can dispose of by forced sale in stock sold for assessments and purchased by it.—Robin-

son vs. Spaulding G. & S. Min. Co., 72 Cal. 32, 34, 13 Pac. Rep. 65.

5. Not subject to resale on execution issued against corporation in satisfaction of its debts.—Robinson vs. Spaulding G. & S. Min. Co., 72 Cal. 32, 34, 13 Pac. Rep. 65.

6. Thenceforth held subject to control of stockholders.—Robinson vs. Spaulding G. & S. Min. Co., 72 Cal. 32, 34, 13 Pac. Rep. 65.

7. STOCK IN TREASURY—MAJORITY.—Given proportion of stock construed to mean the shares of the stock which have passed from corporation and which may be voted.—

Market St. R. Co. vs. Hellman, 109 Cal. 571, 588, 42 Pac. Rep. 225.

8. Stock or shares which have never passed to ownership of stockholders, or having so passed have again been purchased by corporation, cannot be voted or represented in either corporation or by stockholders' meetings.—Market St. R. Co. vs. Hellman, 109 Cal. 571, 588, 42 Pac. Rep. 225.

9. Not taken into consideration in determining majority, where action in corporate meetings or assent of stockholders is involved.—Market St. R. Co. vs. Hellman, 109 Cal. 571, 588, 42 Pac. Rep. 225.

§ 345. EXTENSION OF TIME OF DELINQUENT SALE — [NOTICE]. The dates fixed in any notice of assessment or notice of delinquent sale, published according to the provisions hereof, may be [1] extended from time to time for not more than thirty days, by order of the directors, entered on the records of the corporation; but no order extending the time for the performance of any act specified in any notice is effectual unless [2] notice of such extension or postponement is appended to and published with the notice to which the order relates.

History: Enacted March 21, 1872.

§ 346. ASSESSMENTS SHALL NOT BE INVALIDATED. No assessment is invalidated by a failure to make publication of the notices hereinbefore provided for, nor by the non-performance of any act required in order to enforce the payment of the same; but in the case of any substantial error or omission in the course of proceedings for collection, all previous proceedings, except the levying of the assessment, are void, and publication must be begun anew.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.

2. Construed as to sufficiency of notice.

3-5. Assessments, when valid or invalid.

6. Equitable relief.

7. Language—Meaning of "void."

8. New proceedings—When necessary.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Burham vs. San Francisco F. M. Co., 76 Cal. 26, 28, 17 Pac. Rep. 939 (construed and applied); San Bernardino Inv. Co. vs. Merrill, 108 Cal. 490, 495, 41 Pac. Rep. 487 (construed and applied with § 349); Stockton C. H. & A. Works vs. Houser, 109 Cal. 1, 8, 41 Pac. Rep. 809 (construed and applied).

2. CONSTRUED—With § 337 with reference to power of board to order notice of sale to be published in different papers.—Stockton C. H. & A. Works vs. Houser, 109 Cal. 1, 8, 41 Pac. Rep. 809.

3. ASSESSMENT—Levied but not collected and not due at time of adjudication of insolvency, set aside by adjudication.—Bank of National City vs. Johnston, 133 Cal. 185, 188, 65 Pac. Rep. 383.

Statute in nature of special insolvency act.—Ibid.

4. Valid under section, although that notice of sale was published in different papers from notice of assessment, by order of board.—

Stockton C. H. & A. Works vs. Houser, 109 Cal. 1, 8, 41 Pac. Rep. 809.

5. Valid, although full notice as required by code was not given for sufficient length of time.—Burham vs. San Francisco Fuse Mfg. Co., 76 Cal. 26, 28, 17 Pac. Rep. 939.

6. EQUITY—Relief not granted in equity against assessment upon ground of invalidity by failure to make requisite publication of notices in absence of allegation that petitioner has done or has offered to do equity.—Burham vs. San Francisco Fuse Mfg. Co., 76 Cal. 26, 28, 17 Pac. Rep. 939.

7. LANGUAGE—Word "void" employed as intended to declare that irregular proceeding shall be inoperative to confer an indefeasible title to stock as against owner tendering assessment and bringing suit within time prescribed in § 347.—Burham vs. San Francisco Fuse Mfg. Co., 76 Cal. 26, 28, 17 Pac. Rep. 939.

8. NEW PROCEEDINGS—Failure to make publication of delinquent sale "at least fifteen days prior to day that they had fixed for such sale," entails loss of jurisdiction to sell stock for delinquent assessment, unless previous proceedings and publications subsequent to levy of assessment, as authorized by the section, are begun anew.—San Bernardino Inv. Co. vs. Merrill, 108 Cal. 490, 495, 41 Pac. Rep. 487.

§ 347. ACTION FOR RECOVERY OF STOCK, AND LIMITATION THEREOF. No action must be sustained to recover stock sold for delinquent assessments, upon the ground of [1] irregularity in the assessment, [2] irregularity or [3] defect of the notice of sale, or [4] defect or irregularity in the sale, unless the party seeking to maintain such action first pays or tenders to the corporation, or the party holding the stock sold, [1] the sum for which the same was sold, together with [2] all subsequent assessments which may have been paid thereon and [3] interest on such sums from the time they were paid; and no such action must be sustained unless the same is [4] commenced by the filing of a complaint and the issuing of a summons thereon within six months after such sale was made.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
- 2, 3. Construed with reference to its application.
- 4-9. Right of action—Nature of remedies—Diligence.
- 10-12. Jurisdiction—Effect of constitution—Justices' courts.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Burham vs. San Francisco F. M. Co.*, 76 Cal. 26, 28, 17 Pac. Rep. 929 (construed and applied); *Herbert Kraft Co. Bank vs. Bank of Orland*, 133 Cal. 64, 66, 65 Pac. Rep. 143 (construed and applied).

2. **CONSTRUED**—As applying only where action is for recovery upon ground of irregularity in assessment, irregularity or defect in notice of sale, or defect or irregularity in sale.—*Herbert Kraft Co. Bank vs. Bank of Orland*, 133 Cal. 64, 66, 65 Pac. Rep. 143.

3. As not applying to cases where assessment is void and not merely irregular.—*Herbert Kraft Co. Bank vs. Bank of Orland*, 133 Cal. 64, 67, 65 Pac. Rep. 143.

4. **RIGHT OF ACTION**—To recover stock—Stockholder may bring suit for damages for conversion of stock sold under void assessments.—*Herbert Kraft Co. Bank vs. Bank of Orland*, 133 Cal. 64, 68, 65 Pac. Rep. 143.

5. To have sale of his stock vacated.—*Herbert Kraft Co. Bank vs. Bank of Orland*, 133 Cal. 64, 68, 65 Pac. Rep. 143; *Dewing vs. Perdicaries*, 96 U. S. 193, bk. 24 L. ed. 654.

6. Party having right to repudiate sale of stock upon ground that it is non-assessable, or for any other cause, must act with diligence.—*Sayre vs. Citizens' Gas Light & Heat Co.*, 69 Cal. 207, 213, 7 Pac. Rep. 437, 10 Id. 408; *Green vs. Abietine Medical Co.*, 96 Cal. 322, 330, 31 Pac. Rep. 100. See *Iowa. Des Moines Gas Co. vs. West*, 60 Iowa 25; *Goff vs. Hawkeye Pump & Windmill Co.*, 62 Iowa 691, 18 N. W. Rep. 307. *Kam. Walburn vs. Chenault*, 43 Kan. 352, 23 Pac. Rep. 657. *Minn. St. Croix Lumber Co. vs. Mittlestadt*, 43 Minn. 91, 44 N. W. Rep. 1079.

7. Cannot acquiesce in sale of stock for assessments as long as stock of little value,

and, upon consolidation with rival corporation, which increases its value, claim equivalent of stock in such corporation upon ground that sale was illegal.—*Sayre vs. Citizens' Gas L. & H. Co.*, 69 Cal. 207, 210, 213, 7 Pac. Rep. 437, 10 Id. 408. See *Twin Lick Oil Co. vs. Marbury*, 91 U. S. 587, bk. 23 L. ed. 328; *Hayward vs. Elliot Nat. Bank*, 96 U. S. 611, bk. 24 L. ed. 855.

8. **Mandamus** to corporation to compel it to open its books and allow registry or to pay damages if impossible.—*Herbert Kraft Co. Bank vs. Bank of Orland*, 133 Cal. 64, 68, 65 Pac. Rep. 143.

9. Relief granted in equity in favor of stockholder wrongfully deprived of his stock by invalid assessment.—*Herbert Kraft Co. Bank vs. Bank of Orland*, 133 Cal. 64, 68, 65 Pac. Rep. 143. *Ga. Moses vs. Watson*, 65 Ga. 198. *Mass. Pratt vs. Taunton C. Mfg. Co.*, 123 Mass. 110, 35 Am. Rep. 37. *N. Y. Pollock vs. Nat. Bank*, 7 N. Y. 274, 57 Am. Dec. 520. *Tex. Baker vs. Wasson*, 53 Tex. 125. *Fed. Western U. Tel. Co. vs. Davenport*, 97 U. S. 369, bk. 24 L. ed. 1047.

10. **JURISDICTION**—Article 6, § 5 of the state constitution, giving superior court original jurisdiction in all cases at law involving legality of any tax, impost, assessment, toll, or municipal fine, does not apply to assessments made under civil code by private corporations.—*Arroyo Ditch & Water Co. vs. Superior Court Los Angeles*, 92 Cal. 47, 50, 27 Am. St. Rep. 91, 95, 28 Pac. Rep. 54.

11. **Justices' courts** have full jurisdiction to determine all questions relating to assessments under section 331 of Civil Code.—*Arroyo Ditch & Water Co. vs. Superior Court Los Angeles*, 92 Cal. 47, 50, 27 Am. St. Rep. 91, 95, 28 Pac. Rep. 54.

12. **Justices' courts** have no authority to certify pleadings to superior court in actions relating to legality of assessments under code.—*Arroyo Ditch & Water Co. vs. Superior Court of Los Angeles*, 92 Cal. 47, 50, 27 Am. St. Rep. 91, 95, 28 Pac. Rep. 54.

§ 348. PROOFS OF PUBLICATION AND SALE. The publication of notice required by this article may be proved by the affidavit of [1] the printer, [2] foreman, or [3] principal clerk of the newspaper in which the same was published;

and the affidavit of the secretary or auctioneer is prima facie evidence of [1] the time and place of sale, or [2] the quantity and particular description of the stock sold, and [3] to whom, and [4] for what price, and [5] of the fact of the purchase money being paid.

The affidavits must be filed in the office of the corporation, and copies of the same, certified by the secretary thereof, are prima facie evidence of the facts therein stated. Certificates, signed by the secretary and under the seal of the corporation, are prima facie evidence of the contents thereof.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 207.

§ 349. **WAIVER OF SALE. ACTION TO RECOVER ASSESSMENT.** On the day specified for declaring the stock delinquent, or at any time subsequent thereto and before the sale of the delinquent stock, the board of directors may elect to waive further proceedings under this chapter for the collection of delinquent assessments, or any part or portion thereof, and may elect to proceed by action to recover the amount of the assessment and the costs and expenses already incurred, or any part or portion thereof.

History: Enacted March 21, 1872.

I. In General.

1. Applied, cited, construed, referred to, etc.
- 2-4. Construed as to its application, enactment, etc.
- 5, 6. Distinction as to mining corporations.
- II. Right of Action to Recover.
- 7-9. Allegations of fact—Necessity of, etc.
10. Attachment—Right to.
11. Compliance with code—Necessity of.
12. Cumulative right exists.
- 13, 14. Defense—What not sufficient.
- 15, 16. Directors—Right to action, extent of.
- 17, 18. Levy—Necessity of.
19. Maintainable — When — Agreement to form, etc.
20. Massachusetts doctrine repudiated.
21. Not affected by assessment issued on day of certificate.
22. Right implied.

III. Right to Elect Remedy.

23. Conditions in section—Right to exercise.
- 24, 25. Directors—Power to elect at meeting.
26. Power—When to be exercised.
- 27, 28. Waiver—Defined.
- 29-31. Same—Existence of.

IV. Evidence.

32. Burden of proof on plaintiff.
33. Name on books prima facie.
- 34, 35. Nature—Presumptions.
36. Same—Means of estimating assessable stock.

I. IN GENERAL.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO,** etc., in: *San Joaquin L. & W. Co. vs. Beecher*, 101 Cal. 70, 76, 77, 35 Pac. Rep. 349 (construed and applied); *San Bernardino Inv. Co. vs. Merrill*, 108 Cal. 490, 493, 495, 41 Pac. Rep. 437 (construed and applied); *Stockton C. H. & A. Works vs. Houser*, 109 Cal. 1, 5, 41 Pac. Rep. 309 (cited in discussion); *Visalia & T. R. Co. vs. Hyde*, 110 Cal. 632, 635, 52 Am.

St. Rep. 136, 43 Pac. Rep. 10 (construed and applied); *Bank of National City vs. Johnston* (Cal. March 24, 1900), 60 Pac. Rep. 776, 773 (applied and construed); *Shively vs. Eureka T. G. Min. Co.*, 129 Cal. 293, 296, 61 Pac. Rep. 939 (referred to in other sections).

As to actions and remedies for amounts due on assessments, see 26 Am. & Eng. Encyc. of L. (2d ed.) 926; 10 Cyc. 510.

As to power of court to compel payment of calls of assessments, see 100 Am. Dec. 552.

As to prerequisites of action for assessments of stock, see 26 Am. & Eng. Encyc. of L. (2d ed.) 926; 10 Cyc. 511.

As to right to proceed in equity to compel payment, see note 100 Am. Dec. 553.

As to right to sue upon contract for subscription before issuing certificate, see note 31 Am. Dec. 394.

2. **CONSTRUED**—As applying where resolution adopted by board of directors waiving further proceedings in collection of assessment by sale and electing to proceed by action at law to recover amount of assessment.—*Stockton C. H. & A. Works vs. Houser*, 109 Cal. 1, 5, 41 Pac. Rep. 309.

3. **PASSED IN ORDER TO SETTLE DISPUTED QUESTION** as to liability of stockholder of corporation to assessments for subscribed shares of stock when there is no express agreement to pay such assessment.—*San Joaquin L. & W. Co. vs. Beecher*, 101 Cal. 70, 77, 35 Pac. Rep. 349.

4. **WITH OTHER SECTIONS** with reference to allegations or findings of facts necessary to create personal liability.—*Shively vs. Eureka T. G. Min. Co.*, 129 Cal. 293, 296, 61 Pac. Rep. 939.

5. **DISTINCTION.**—Distinction drawn between mining corporations and other corporations with respect to levying of assessments on stockholders for payment of corporate debts enforceable by action in personam against de

inquent shareholders.—In re South Mountain Consol. Min. Co., 14 Fed. Rep. 347, 3 Sawy. C. C. 266.

6. Distinction drawn between mining corporations and ordinary corporations, holding them in many particulars *sui generis* and denying right of assignee in bankruptcy of mining corporation to order levying assessment for payment of corporate debts to be enforced by action in personam against delinquent shareholders, confined strictly to that class of corporations.—Harmon vs. Page, 62 Cal. 448, 459, 460; Baines vs. Babcock, 95 Cal. 581, 583, 29 Am. St. Rep. 158, 27 Pac. Rep. 674, 30 Id. 776.

II. RIGHT OF ACTION TO RECOVER.

7. RIGHT OF ACTION—ALLEGATIONS—COMPLAINT.—Allegation of facts necessary to create personal liability on stockholders necessary to recovery.—San Bernardino Inv. Co. vs. Merrill, 108 Cal. 490, 495, 41 Pac. Rep. 487; Pacific Fruit Co. vs. Coon, 107 Cal. 447, 451, 40 Pac. Rep. 542; Shively vs. Eureka T. G. Min. Co., 129 Cal. 293, 296, 61 Pac. Rep. 939.

8. Same.—Complaint must allege fact that one fourth capital stock has been subscribed, in order to recover.—San Bernardino Inv. Co. vs. Merrill, 108 Cal. 490, 492, 41 Pac. Rep. 487.

9. Same.—Counterclaim by an assignee of directors must allege and show facts sufficient to prove levying of assessment, and personal liability of stockholders.—Pacific Fruit Co. vs. Coon, 107 Cal. 447, 451, 40 Pac. Rep. 542; San Bernardino Inv. Co. vs. Merrill, 108 Cal. 490, 495, 41 Pac. Rep. 487; Shively vs. Eureka T. G. Min. Co., 129 Cal. 293, 296, 61 Pac. Rep. 939.

10. Attachment will lie without assessment upon agreement to pay for shares of stock in instalments at such times as they might, under laws of the state, be lawfully called for by corporation.—Kohler vs. Agassiz, 99 Cal. 9, 15, 33 Pac. Rep. 741.

11. Compliance of strict nature is necessary in order to recover assessment levied upon corporate stock.—San Bernardino Inv. Co. vs. Merrill, 108 Cal. 490, 494, 41 Pac. Rep. 487.

12. Cumulative right to forfeit shares of stock on non-payment under statute.—San Joaquin L. & W. Co. vs. Beecher, 101 Cal. 70, 77, 35 Pac. Rep. 349. See Buffalo & N. Y. City R. Co. vs. Dudley, 14 N. Y. 336; Lake Ontario, A. & N. Y. R. Co. vs. Mason, 16 N. Y. 451 (holding right of action arises on implied promise to pay arising from subscription to stock).

13. SAME—DEFENSE.—Fact that corporation has sufficient property with which to meet its obligations is no defense to action to recover amount of assessments, as liability rests upon contract of subscription, and question of propriety or necessity of requiring him to pay for purpose of meeting liabilities rather than resorting to property in the hands of corporation, is a matter of discretion with directors.—Visalia & T. R. Co. vs. Hyde, 110 Cal. 632, 637, 52 Am. St. Rep. 136, 43 Pac. Rep. 10.

14. Fact that defendant was not stockholder at time obligation was contracted or liability incurred for which assessment was

made, is no defense to action to recover amount of assessment.—Visalia & T. R. Co. vs. Hyde, 110 Cal. 632, 637, 52 Am. St. Rep. 136, 43 Pac. Rep. 10.

15. Directors may enforce assessment by sale of stock or by action at law against stockholder.—Harmon vs. Page, 62 Cal. 448, 459; Santa Cruz R. Co. vs. Spreckles, 65 Cal. 193, 210, 3 Pac. Rep. 661, 802; California South. Hotel Co. vs. Callender, 94 Cal. 120, 127, 23 Am. St. Rep. 99, 29 Pac. Rep. 859; Baines vs. Babcock, 95 Cal. 581, 583, 29 Am. St. Rep. 158, 26 Pac. Rep. 674, 30 Id. 776; San Joaquin L. & W. Co. vs. Beecher, 101 Cal. 70, 79, 35 Pac. Rep. 349.

16. Directors of insolvent bank, against shareholders for delinquent assessments, as assets belong to corporation, which, although not a going concern for all purposes, is one for purposes of liquidation.—Union Sav. Bank San Jose vs. Dunlap, 135 Cal. 623, 632, 67 Pac. Rep. 1034.

17. Levy—Of assessments in the manner pointed out by code not necessary to enable directors to recover on subscription contract.—California South. Hotel Co. vs. Callender, 94 Cal. 120, 127, 23 Am. St. Rep. 99, 29 Pac. Rep. 859.

18. Same.—Not necessary under contracts to pay "at such times and in such manner as may be determined by board of directors of said corporation to be hereafter chosen."—California South. Hotel Co. vs. Callender, 94 Cal. 120, 127, 23 Am. St. Rep. 99, 29 Pac. Rep. 859; Kohler vs. Agassiz, 99 Cal. 9, 17, 33 Pac. Rep. 741.

19. Maintainable against stockholder in corporation organized under general laws of state under an agreement to form corporation for purpose of procuring water rights, etc., declaring capital stock and amount and number of shares, and setting forth number of shares each subscriber agrees to take, and amount to be paid thereon after articles of incorporation were filed, and appointing and nominating agents to negotiate for purchase of rights, their acts to be binding upon others and corporation to be formed.—San Joaquin L. & W. Co. vs. Beecher, 101 Cal. 70, 73, 79, 35 Pac. Rep. 349. See Santa Cruz Co. vs. Spreckles, 65 Cal. 193, 3 Pac. Rep. 661, 802; California South. Hotel Co. vs. Callender, 94 Cal. 120, 28 Am. St. Rep. 99, 29 Pac. Rep. 859; Red Wing Hotel Co. vs. Friedrich, 26 Minn. 112, 1 N. W. Rep. 827; Lake Ontario, A. & N. Y. R. Co. vs. Mason, 16 N. Y. 451, 452.

20. Massachusetts doctrine that no implied promise to pay assessment arises from mere subscription for shares in corporation, in absence of express promise to pay therefor or to pay assessments thereon, and only remedy of corporation is by sale of delinquent shares under statute, said to be contrary to great weight of authority.—San Joaquin L. & W. Co. vs. Beecher, 101 Cal. 70, 77, 35 Pac. Rep. 349. See Mass. Andover T. Corp. vs. Gould, 6 Mass. 40, 4 Am. Dec. 80; New Bedford T. Corp. vs. Adams, 3 Mass. 138, 5 Am. Dec. 81; Atlantic Cotton Mills vs. Abbott, 63 Mass. (9 Cush.) 423.

N. Y. Buffalo & N. Y. C. R. Co. vs. Dudley, 14 N. Y. 356; *Lake Ontario, A. & N. Y. R. Co. vs. Mason*, 16 N. Y. 451. Fed. In re South Mountain Consol. Min. Co., 14 Fed. Rep. 247, 3 Sawy. C. C. 366.

21. Not affected by fact that assessment was made on day certificate of stock was issued, although it is not shown that purchase of stock preceded assessment.—*San Gabriel Valley L. & W. Co. vs. Dennis* (Cal. Oct. 9, 1893), 34 Pac. Rep. 441.

22. Right to resort to either remedy is implied from right to exercise election, and both must exist at time of election.—*San Bernardino Inv. Co. vs. Merrill*, 108 Cal. 490, 494, 41 Pac. Rep. 487.

III. RIGHT TO ELECT REMEDY.

23. RIGHT TO ELECT.—Condition maintained in section as giving directors right to elect to waive further proceedings for enforcement of payment of delinquent stock by action to recover, cannot be exercised where company has failed to make publication of delinquent sale as required by § 346.—*San Bernardino Inv. Co. vs. Merrill*, 108 Cal. 490, 495, 41 Pac. Rep. 487.

24. Directors may transact any business at adjournment of meeting where there is no limitation upon business which board was authorized to transact at such special meeting, whether such business was partly considered at original meeting or whether opportunity or occasion for its consideration has arisen since adjournment.—*Bank of National City vs. Johnston* (Cal. March 24, 1900), 60 Pac. Rep. 776, 778.

25. Directors at legal meeting have right to pass any resolution and take any action which does not violate law of their organization, or exceed powers with which, as a corporate body, they are invested.—*Bank of National City vs. Johnston* (Cal. March 24, 1900), 60 Pac. Rep. 776, 778; *Western Imp. Co. vs. Des Moines Nat. Bank*, 103 Iowa 455, 72 N. W. Rep. 657; *Smith vs. Law*, 21 N. Y. 296.

26. Power or right of election between two remedies which is conferred upon condition to relinquish one by some possible act must be exercised while both remedies are open, as unless there is a remedy to relinquish, there is no place for election.—*San Bernardino Inv. Co. vs. Merrill*, 108 Cal. 490, 494, 41 Pac. Rep. 487.

27. Waiver is a voluntary act implying election to dispense with something of value or forego an advantage which might be demanded or insisted upon.—*San Bernardino Inv. Co. vs. Merrill*, 108 Cal. 490, 494, 41 Pac. Rep. 487; *Warren vs. Crane*, 50 Mich. 301. See

Me. Stewart vs. Crosby, 50 Me. 134. *Mass. Shaw vs. Spencer*, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115. *Minn. Dawson vs. Shillock*, 29 Minn. 191, 12 N. W. Rep. 526.

28. "Waiver" or "to waive" imports abandonment of right which may be enforced or privilege which can be exercised.—*San Bernardino Inv. Co. vs. Merrill*, 108 Cal. 490, 494, 41 Pac. Rep. 487.

29. Does not exist unless at time of its exercise the right or privilege waived is in existence.—*San Bernardino Inv. Co. vs. Merrill*, 108 Cal. 490, 494, 41 Pac. Rep. 487.

30. Does not exist where right has been lost.—*San Bernardino Inv. Co. vs. Merrill*, 108 Cal. 490, 494, 41 Pac. Rep. 487.

31. Resolution of directors authorizing president and secretary to commence suit immediately to enforce collection of assessment of delinquent stock, a waiver of further proceedings under the chapter for collection of delinquent assessment, and confines remedy to action.—*San Gabriel Valley L. & W. Co. vs. Dennis* (Cal. Oct. 9, 1893), 34 Pac. Rep. 441.

IV. EVIDENCE.

As to the books of corporation being prima facie evidence of ownership of stock, and as to evidence generally to prove ownership of shares, see note 60 Am. St. Rep. 486.

32. EVIDENCE—Burden of proving valid assessment is on plaintiff.—*Pacific Fruit Co. vs. Coon*, 107 Cal. 447, 451, 40 Pac. Rep. 542.

33. Party's name appears on corporation books as stockholder, prima facie evidence that he is owner of stock, and liable to assessment.—*Sherwood vs. Illinois T. & Sav. Bank*, 195 Ill. 112, 38 Am. St. Rep. 183, 62 N. E. Rep. 835, 837; *Holland vs. Duluth Iron Min. & Dev. Co.*, 65 Minn. 324, 60 Am. St. Rep. 480, 68 N. W. Rep. 50.

34. Plaintiff must prove that stock has been fully paid up to recover an assessment.—*Pacific Fruit Co. vs. Coon*, 107 Cal. 447, 451, 40 Pac. Rep. 542.

35. Presumption will not be indulged in that assessment was made fraction of day prior to purchase of stock, especially where it was shown that stockholder has paid portion of assessment and requested time to pay balance.—*San Gabriel Valley L. & W. Co. vs. Dennis* (Cal. Oct. 9, 1893), 34 Pac. Rep. 441.

36. Secretary committing an error in estimating or determining amount of assessable stock, either in estimating that subscribed stock is not assessable, or that subscription shares have been canceled, being an error in law, may be properly corrected by the court.—*Pacific Fruit Co. vs. Coon*, 107 Cal. 447, 452, 40 Pac. Rep. 542.

CHAPTER III.

CORPORATE POWERS.

- Article I.** General Powers, §§ 354-364.
II. Records, §§ 377-378.
III. Examination of Corporations, §§ 382-384.
IV. Judgment Against Corporations, §§ 388-392.

ARTICLE I.

GENERAL POWERS.

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| <p>§ 354. Powers of corporations.
 § 355. Limitation of powers.
 § 356. Banking expressly prohibited.
 § 357. Misnomer does not invalidate instrument.
 § 358. Corporations, time in which must be organized and continuance of business.
 § 359. Increasing and diminishing capital stock, notice—Increasing or diminishing bonded indebtedness, notice, certificates of.
 § 360. Corporations may acquire real property, and how much.
 § 361. Consolidation of mining companies owning adjoining claims (repealed).</p> | <p>§ 361a. Transfer of franchise of corporation not valid without consent of the stockholders.
 § 362. Amendment of articles or certificate of incorporation—Filing, penalty.
 § 363. Corporations to own their own lots and buildings (repealed).
 § 363[a]. Correction of erroneous filing of incorporation—Petition, nature of—Action of court.
 § 364. Corporation may transfer foreign concessions.</p> |
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- § 354. POWERS OF CORPORATIONS.** Every corporation, as such, has power:
1. Of succession, by its corporate name, for the period limited; and when no period is limited, perpetually;
 2. To sue and be sued, in any court;
 3. To make and use a common seal, and alter the same at pleasure;
 4. To purchase, hold, and convey such real and personal estate as the purposes of the corporation may require, not exceeding the amount limited in this part;
 5. To appoint such subordinate officers or agents as the business of the corporation may require, and to allow them suitable compensation;
 6. To make by-laws, not inconsistent with any existing law, for the management of its property, the regulation of its affairs, and for the transfer of its stock;
 7. To admit stockholders or members, and to sell their stock or shares for the payment of assessments or instalments;
 8. To enter into any obligations or contracts essential to the transaction of its ordinary affairs, or for the purposes of the corporation.

History: Enacted March 21, 1872.

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| <p>I. In General.</p> <ol style="list-style-type: none"> 1. Applied, cited, construed, referred to, etc. 2. Construction—Not retroactive. 3, 4. Express and implied powers. 5. Nature and object of corporation considered. 6. Particular statute may enlarge powers. <p>II. Right to Sue and Be Sued.</p> <ol style="list-style-type: none"> 7. Constitution confers right. 8. Incidental right. 9. Contract payable to agent—Action by corporation. | <ol style="list-style-type: none"> 10. Name of corporation—Action must be in. 11. Same—Misappropriation by director. 12. Stockholders—Cannot interfere with right of corporation to sue. 13. Same—May sue corporation. 14. Same—Suit by stockholder in behalf of corporation. 15. Same—Same—Claims enforceable. 16. Same—Same—Disqualification of others to act. 17-19. Same—Same—Refusal of others to act—Demand—Complaint. |
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III. Corporate Seal.

- 20, 21. Adoption of seal—User—Private seal of individual.
- 22. Alteration is permissible.
- 23-26. Form and sufficiency—Scroll—Wax.
- 27. Necessity to use seal—As in case of natural persons.
- 28. Same—Contracts between corporations do not require.
- 29. Same—Deeds to land, etc., require.
- 30. Same—Same—Agent's seal insufficient.
- 31. Same—Failure to use seal—Authority of officers must be proved.
- 32. Presumption from seal.
- 33. Question for court as to what is seal.

IV. Purchase, Ownership, and Sale of Property.

- 34. Acceptance of deed must be by directors.
- 35. Conveyances—Corporation has *jus disponendi*.
- 36. Entire property may be conveyed.
- 37. Equitable title cannot be taken, when.
- 38. Evidence—Burden of proof as to incapacity to acquire.
- 39. Same—Presumption as to capacity to acquire land.
- 40. Grantee of corporation may be anyone.
- 41. Holding in name of third person—*Ultra vires*.
- 42. Insurance companies—Powers with respect to land.
- 43. Joint tenancy and tenancy in common.
- 44. Mining corporation may sell.
- 45. Same—Consent of stockholders.
- 46. Part or all of property may be conveyed.
- 47. Mortgages—How executed—Parol evidence.
- 48. Ownership of property—Corporation may exist without.
- 49. President's authority to convey—None *virtute officii*.
- 50. Same—Assignment of mortgage by.
- 51. Railroad companies—Acquisition of land by.
- 52. Resolution of directors prerequisite to conveyance.
- 53. Savings and loan companies may purchase mortgages.
- 54. Statute of frauds applies.
- 55, 56. Stock in other corporations—When may be acquired.
- 57. Same—National banks may acquire.
- 58. Same—Presumption not against power.
- 59. Same—*Ultra vires*—Purpose considered.
- 60. Stock of purchasing corporation cannot be acquired.
- 61. Trust cannot be created under power to sell.
- 62. Turnpike companies—Limited power to acquire land.
- 63. Same—Bond for unnecessary land void.
- 64. Validity of unauthorized deed—Attack by strangers not permitted.
- 65. Same—Intruder cannot question.
- 66. Same—Purchaser protected.
- 67. Water company may acquire franchises.

V. Agents and Officers.

- 68. Are necessary to exercise of powers.
- 69, 70. Appointment of agents—Ordinary rules apply.

- 71. Compensation—Directors not ordinarily entitled to.
- 72. Same—Secretary compensated for extra services.
- 73. Same—Superintendent not allowed, when.
- 74. Contracts by agents—Ordinary rules apply.
- 75. Same—Authority of officer to execute note.
- 76. Directors may delegate their powers.
- 77. Fiduciary capacity of officers.
- 78. Same—Directors common to two contracting corporations.
- 79. Same—May not deal with themselves.
- 80. Notice to agent—Ordinary rules apply.
- 81. Same—Notice to president concludes corporation.
- 82. Personal liability—None on corporation's contract.
- 83. Powers—Limited to scope of corporation's business.
- 84. Same—General manager may transact routine business.
- 85. Same—President's power limited—Dealings with property.
- 86. Same—Secretary cannot sign paper.
- 87. Same—Presumption in favor of regularity of acts.
- 88. Removal—Corporation has power of.
- 89. Same—Equity has not jurisdiction.
- 90. Suing by agent proper.

VI. By-Laws.

- 91. "Inconsistent with any existing law."
- 92. Recording, amending, and repeal of.
- 93. Sale of stock for non-payment of assessments.

VII. Obligations or Contracts.

- 94. Ancillary power to incur and make.
- 95, 96. All necessary contracts may be made.
- 97. Analogous power to that of natural persons.
- 98. Assignment may be made.
- 99. Borrowing and loaning money authorized.
- 100. Debts may be incurred.
- 101. Discretion of corporation as to what contracts to make.
- 102. Estoppel to question power—Corporation estopped.
- 103. Same—Others estopped.
- 104. Flume and water companies may contract.
- 105. Guaranty of bonds of another corporation authorized.
- 106. Incidental power to contract.
- 107. Notes—May be executed by corporations.
- 108. Same—Contract to pay.
- 109, 110. *Ultra vires*—Definition and nature of.
- 111-115. Same—Estoppel to make defense—Purchaser of note protected.
- 116. Same—Presumption that contracts are not.
- 117. Signature of corporation—Descriptive persons.
- 118. Void contracts—Public policy contravened.

I. IN GENERAL.

- 1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Low vs. Central Pac.*

R. Co., 52 Cal. 53, 59, 28 Am. Rep. 629 (referred to); McKiernan vs. Lenzen, 56 Cal. 61, 63 (construed and applied); Spring Valley Water Works vs. Schottler, 62 Cal. 69, 104 (referred to); Anglo-Calif. Bank vs. Grangers' Bank, 63 Cal. 359, 363, 364 (construed and applied); Underhill vs. Santa Barbara L. B. & I. Co., 93 Cal. 300, 309, 28 Pac. Rep. 1049 (construed with other sections); San Diego Water Co. vs. San Diego Flume Co., 108 Cal. 549, 558, 41 Pac. Rep. 495, 29 L. R. A. 839 (applied); Bates vs. Coronado Beach Co., 109 Cal. 160, 163, 41 Pac. Rep. 855 (construed and applied); Vercoutere vs. Golden St. Land Co., 116 Cal. 410, 414, 415, 18 Pac. Rep. 375 (construed with other sections); San Luis Water Co. vs. Estrada, 117 Cal. 168, 177, 43 Pac. Rep. 1075 (construed and applied); Granite G. Min. Co. vs. Maginness, 118 Cal. 131, 138, 50 Pac. Rep. 269 (construed and applied); Savings Bank vs. Barrett, 126 Cal. 413, 416, 417, 53 Pac. Rep. 914 (construed and applied).

2. CONSTRUCTION—Retroactive effect.—This section, it has been intimated, has no application to corporations organized before the adoption of the code.—Low vs. Central Pac. R. Co., 52 Cal. 53, 59, 28 Am. Rep. 629.

3. EXPRESS AND IMPLIED POWERS.—Corporations possess and can exercise such corporate powers only as are expressly given by statute, or by their charter, and such as shall be necessary to exercise of powers enumerated and given.—Dunbar vs. San Francisco, 1 Cal. 355, 356; Smith vs. Morse, 2 Cal. 524, 538; Union Water Co. vs. Murphy's Flat Flum. Co., 22 Cal. 620, 627; Vandall vs. South San Francisco Dock Co., 40 Cal. 83.

4. In determining whether given act is within power of corporation, it is necessary to consider whether it falls within power expressly enumerated, or whether it is necessary to exercise of one of enumerated powers.—Vandall vs. South San Francisco Dock Co., 40 Cal. 83, 88, 89.

5. NATURE AND OBJECT OF CORPORATION MUST BE CONSIDERED.—Powers of corporations are restricted by nature and object of their institution.—Dunbar vs. San Francisco, 1 Cal. 355, 356.

6. PARTICULAR STATUTE MAY ENLARGE POWERS.—Besides the powers given corporations under this section, they may be invested with further powers by particular act under which they are incorporated, or by title of code under which they are formed; e. g. a water company.—Spring Valley Water Works vs. Schottler, 62 Cal. 69, 104.

II. RIGHT TO SUE AND BE SUED.

7. CONSTITUTIONAL RIGHT.—This right is not only conferred by statute, but is preserved by constitutional provision (Const. 1879, art. XII, § 4).—Baines vs. Babcock, 95 Cal. 581, 592, 29 Am. St. Rep. 158, 27 Pac. Rep. 674, 30 Id. 776.

8. INCIDENTAL RIGHT.—Right to maintain and defend actions concerning corporate rights and corporate liberty, is power incident to every corporation.—Curtiss vs. Murry, 26 Cal. 633, 634; Baines vs. Babcock, 95 Cal. 581,

592, 29 Am. St. Rep. 158, 27 Pac. Rep. 674, 30 Id. 776.

9. CONTRACT PAYABLE TO AGENT—Action by corporation.—Corporation may sue on contract or promissory note made with, or payable to, its agent when, according to its true import, contract is with corporation.—Commercial Bank vs. French, 38 Mass. (21 Pick.) 486, 32 Am. Dec. 280.

10. NAME OF CORPORATION MUST BE USED.—Corporation must sue and be sued by its corporate name.—Curtiss vs. Murry, 26 Cal. 633, 634. See Cogswell vs. Bull, 39 Cal. 320, 324; Waymire vs. San Francisco & S. M. R. Co., 113 Cal. 646, 649, 650, 44 Pac. Rep. 1086; Stewart vs. Thornton, 75 Va. 217.

11. Misappropriation by directors.—Action against directors of corporation for misappropriation of its funds must be brought in name of corporation.—Cogswell vs. Bull, 39 Cal. 320, 324.

12. STOCKHOLDERS—Cannot interfere with the right of corporation to maintain and defend actions, except when directors refuse to act or are guilty of fraud in the maintenance or defense of the action.—Baines vs. Babcock, 95 Cal. 581, 592, 29 Am. St. Rep. 158, 27 Pac. Rep. 674, 30 Id. 776. See Memphis vs. Dean, 75 U. S. (8 Wall.) 64, 73, bk. 19 L. ed. 326.

13. May sue corporation in like manner as other persons may.—Barnstead vs. Empire Min. Co., 5 Cal. 299.

14. Stockholder may sue in his own name when corporation, on proper demand from him, refuses to institute suit.—Cogswell vs. Bull, 39 Cal. 320, 324; Waymire vs. San Francisco & S. M. R. Co., 113 Cal. 646, 650, 651, 44 Pac. Rep. 1086.

15. Claims enforceable.—Suit on behalf of corporation brought by shareholder-plaintiff can be to enforce only such claims as corporation itself could enforce.—Chetwood vs. Cal. Nat. Bank, 113 Cal. 414, 425, 45 Pac. Rep. 854.

16. Disqualification of others to act.—Where legal agents of corporation refuse or are disqualified to act, stockholders may assert their rights through action in behalf of corporation.—Beach vs. Cooper, 72 Cal. 99, 103, 13 Pac. Rep. 161.

17. Refusal of others to act.—Demand upon corporation or its directors or officers before suit by the stockholder, is not necessary where such demand would be futile and useless, owing to fact that all of such persons are parties to unlawful and fraudulent action.—Parrott vs. Byers, 40 Cal. 614, 622, 623; Moyle vs. Landers, 83 Cal. 579, 582, 583, 23 Pac. Rep. 798; Ashton vs. Dashaway Assoc., 84 Cal. 61, 70, 22 Pac. Rep. 660, sub nom. Aston vs. Dashaway Assoc., 23 Id. 1091, 7 L. R. A. 809; Wickersham vs. Crittenden, 93 Cal. 17, 33, 28 Pac. Rep. 788; Smith vs. Dorn, 96 Cal. 73, 78, 79, 30 Pac. Rep. 1024. See Loftus vs. Farmers' Ship. Assoc., 8 So. Dak. 201, 205, 65 N. W. Rep. 1076.

18. Complaint must allege demand.—Stockholder must allege demand and refusal before he can maintain action in his own name.—Cogswell vs. Bull, 39 Cal. 320, 324.

19. **Simulated demand.**—Where request made by stockholders of corporation to bring suit is simulated one, they are denied right to maintain action.—*Bacon vs. Irvine*, 70 Cal. 221, 225, 11 Pac. Rep. 646; *Morrison vs. Stone*, 108 Cal. 94, 97, 37 Pac. Rep. 142; *Hawes vs. Oakland*, 104 U. S. 450, 460, 461, bk. 26 L. ed. 827. See *Loftus vs. Farmers' Ship. Assoc.*, 8 So. Dak. 201, 206, 65 N. W. Rep. 1076.

III. CORPORATE SEAL.

20. **ADOPTION OF SEAL.**—Seal may become common seal of corporation either by legal adoption or by habitual user as such.—*Blood vs. La Serena L. & W. Co.*, 113 Cal. 221, 225, 41 Pac. Rep. 1017, 45 Id. 252.

21. **Private seal.**—Corporation may adopt as its own a private seal of an individual if it chooses to do so, but when adopted it must be used as seal of corporation. If it be affixed as seal of an individual, it cannot be treated as that of corporation.—*Richardson vs. Scott River W. & M. Co.*, 22 Cal. 150, 157; *Gashwiler vs. Willis*, 33 Cal. 11, 13, 91 Am. Dec. 607.

22. **Alteration.**—Corporation may alter its seal at pleasure.—*Richardson vs. Scott River W. & M. Co.*, 22 Cal. 150, 157.

23. **FORM AND SUFFICIENCY OF SEAL.**—Seal is not necessarily of any particular form or figure.—*Jacksonville M. P. R. & N. Co. vs. Hooper*, 160 U. S. 514, 513, bk. 40 L. ed. 515, 513, 16 Sup. Ct. Rep. 379.

24. **Impression on paper.**—It is enough, in absence of positive law prescribing otherwise, that impress of seal be made upon paper itself in such manner as to be readily identified upon inspection. Use of wax or other adhesive substance is unnecessary.—*Pierce vs. Indseth*, 106 U. S. 546, 547, bk. 27 L. ed. 254, 255, 1 Sup. Ct. Rep. 418.

25. **Scroll or rectangle.**—In absence of evidence to contrary, scroll or rectangle containing word "seal" will be deemed proper and common seal of company.—*Jacksonville M. P. R. & N. Co. vs. Hooper*, 160 U. S. 514, 513, bk. 40 L. ed. 515, 513, 16 Sup. Ct. Rep. 379.

26. **Wax is not necessary to give validity to seal.**—*Jacksonville M. P. R. & N. Co. vs. Hooper*, 160 U. S. 514, 513, bk. 40 L. ed. 515, 513, 16 Sup. Ct. Rep. 379.

27. **NECESSITY FOR SEAL.**—Contracts of corporations rest upon same footing as those of natural persons, and are valid without seal where contracts of natural persons would be.—*Crowley vs. Genesee Min. Co.*, 55 Cal. 273, 275. See *San Francisco Gas Co. vs. San Francisco*, 9 Cal. 453, 470; *Ross vs. Madison*, 1 Ind. 281, 48 Am. Dec. 361; *Bank of Middlebury vs. Rutland & W. R. Co.*, 30 Vt. 159.

28. **Contracts between corporations.**—It seems that it is not necessary that contracts between two corporations should be under seal.—*Miners' Ditch Co. vs. Zellerbach*, 37 Cal. 543, 588, 99 Am. Dec. 300.

29. **Deeds to land, etc.**—Corporation can convey or incumber land only under their common seal.—*Richardson vs. Scott River W. & M. Co.*, 22 Cal. 150, 156, 157. See *Garrett vs. Belmont Land Co.*, 94 Tenn. 459, 468, 29 S. W.

Rep. 726; *In re St. Helen Mill Co.*, 3 Sawy. C. C. 38, 90, 31 Fed. Cas. 161.

30. **Same—Agent's seal.**—Seal of agent of corporation is not seal as regards corporation, and where seal is attached to conveyance as that of agent, conveyance is conveyance of agent and not of corporation. It is not necessary to state in conveyance that seal used is that of corporation if fact otherwise appear, either presumptively or from language of conveyance, or by evidence allunde.—*Richardson vs. Scott River W. & M. Co.*, 22 Cal. 150, 157.

31. **Failure to use seal.**—In absence of common seal or of proof of facts from which existence of resolution of authorization or of authority itself may be inferred, authority of officers to execute conveyance can only be established by resolution of directors, entered in proper book of corporation which should be in office of secretary.—*Southern California C. A. vs. Bustamente*, 52 Cal. 192, 196; *Miners' Ditch Co. vs. Zellerbach*, 37 Cal. 543, 597, 99 Am. Dec. 300. See *Underhill vs. Santa Barbara L. B. & I. Co.*, 93 Cal. 300, 314, 28 Pac. Rep. 1049; *Hawley vs. Gray Bros. A. S. P. Co.*, 106 Cal. 337, 341, 39 Pac. Rep. 609; *Purser vs. Eagle Lake L. & I. Co.*, 111 Cal. 139, 142, 43 Pac. Rep. 523.

32. **PRESUMPTION FROM SEAL.**—When common seal of corporation appears to be affixed on instrument and signatures of proper officers are proved, courts presumed that officers did not exceed their authority and seal itself is prima facie evidence that it was affixed by proper authority.—*Southern Cal. C. A. vs. Bustamente*, 52 Cal. 192, 196; *Schallard vs. Eel River S. N. Co.*, 70 Cal. 144, 146, 11 Pac. Rep. 590; *Crescent City W. & L. Co. vs. Simpson*, 77 Cal. 286, 290, 19 Pac. Rep. 426.

33. **QUESTION FOR COURT.**—Determination of existence of seal is question for court upon inspection. Whether mark or character shall be held to be seal depends upon intention of executant, as shown by the paper.—*Jacksonville M. P. R. & N. Co. vs. Hooper*, 160 U. S. 514, 519, bk. 40 L. ed. 515, 518, 16 Sup. Ct. Rep. 379.

IV. PURCHASE, OWNERSHIP, AND SALE OF PROPERTY.

34. **ACCEPTANCE OF DEED TO CORPORATION.**—Deed to corporation in settlement of default of one of its officers must be accepted by board of directors and cannot be accepted by president or any individual director or executive officer.—*Bank of Healdsburg vs. Bailhache*, 65 Cal. 327, 331, 4 Pac. Rep. 106. See *Bank of Commerce vs. Hart*, 37 Neb. 197, 200, 201, 40 Am. St. Rep. 479, 55 N. W. Rep. 631, 20 L. R. A. 780; *Humphreys vs. Richmond & M. R. Co.*, 38 Va. 431, 451, 13 S. E. Rep. 985.

35. **CONVEYANCES.**—Corporation has *jus disponendi*.—All corporations capable of taking and holding property have *jus disponendi* as fully as natural persons except in so far as they are restrained by statute.—*Miners' Ditch Co. vs. Zellerbach*, 37 Cal. 543, 588, 99 Am. Dec. 300; *People vs. California College*, 33 Cal. 166, 171.

36. ENTIRE PROPERTY MAY BE CONVEYED.—Corporation, when it becomes evident that enterprise for which it was formed will be unprofitable, may sell all of its property.—*Miners' Ditch Co. vs. Zellerbach*, 37 Cal. 543, 589, 99 Am. Dec. 300. See *People vs. California College*, 38 Cal. 166, 171.

37. EQUITABLE TITLE CANNOT BE TAKEN, WHEN.—Whenever corporation cannot take legal title to tract of land it cannot take beneficial interest in it.—*Coleman vs. San Rafael T. R. Co.*, 49 Cal. 517, 522.

38. EVIDENCE—Burden of proof.—Person objecting to validity of conveyance to corporation must show that acts come within exception to rule that corporations can acquire, sell, and convey property or it will be deemed valid.—*Granite G. M. Co. vs. Maginness*, 118 Cal. 131, 138, 139, 50 Pac. Rep. 269.

39. Presumption.—It is presumed, when there is no evidence of purposes of organization of corporation, that it has power to purchase and hold real estate.—*Natoma Water & Min. Co. vs. Clarkin*, 14 Cal. 544, 552; *Hager vs. Yolo Co.*, 47 Cal. 222, 227; *Evans vs. Bailey*, 66 Cal. 112, 113, 4 Pac. Rep. 1089; *People vs. La Rue*, 67 Cal. 526, 531, 8 Pac. Rep. 34; *Stockton S. B. vs. Staples*, 98 Cal. 189, 192, 32 Pac. Rep. 936; *Granite G. M. Co. vs. Maginness*, 118 Cal. 131, 138, 50 Pac. Rep. 269.

40. GRANTEE MAY BE ANY ONE CAPABLE OF TAKING.—When corporation has power to convey at all it can convey to any person, natural or artificial, capable of taking.—*Miners' Ditch Co. vs. Zellerbach*, 37 Cal. 543, 595, 99 Am. Dec. 300.

41. HOLDING IN NAME OF THIRD PERSON.—Land which corporation cannot hold in its own name it cannot hold in the name of another.—*Coleman vs. San Rafael T. R. Co.*, 49 Cal. 517, 522.

42. INSURANCE COMPANIES—POWER TO PURCHASE AND CONVEY REAL ESTATE.—See post § 415 and note.

43. JOINT TENANCY AND TENANCY IN COMMON.—Two corporations cannot hold as joint tenants, nor can corporation hold land as joint tenant with natural person, but one corporation may hold land as tenant in common with another.—*De Witt vs. San Francisco*, 3 Cal. 289, 297. See *Hackett vs. Multnomah R. Co.*, 12 Oreg. 124, 53 Am. Rep. 327, 6 Pac. Rep. 659.

44. MINING CORPORATION MAY SELL.—Sale of real property by mining corporation is restricted by statute only to real property which forms part of its mining ground.—*Granite G. M. Co. vs. Maginness*, 118 Cal. 131, 139, 50 Pac. Rep. 269.

45. Consent of stockholders.—Directors of mining company have no power to convey mining lands without consent of holders of two thirds of stockholders given as prescribed by Act 1880 (Laws 1880, p. 131).—*McShane vs. Carter*, 80 Cal. 310, 312, 22 Pac. Rep. 178; *Pekin M. & M. Co. vs. Kennedy*, 81 Cal. 356, 363, 22 Pac. Rep. 679.

46. Part or all of property may be con-

veyed.—Corporations may sell and convey part or the whole of their property whenever exigencies of occasion require.—*Miners' Ditch Co. vs. Zellerbach*, 37 Cal. 543, 588, 99 Am. Dec. 300.

47. MORTGAGES.—Execution of mortgage purporting to be individual obligation of persons signing it, nowhere naming corporation as party either directly or by use of language tending to show that it was a corporate transaction, is not a corporate mortgage, but personal obligation of parties signing it, and extrinsic evidence is not admissible to change its character.—*Richardson vs. Scott River W. & M. Co.*, 22 Cal. 150, 156.

48. OWNERSHIP OF PROPERTY IS NOT ESSENTIAL to existence of corporation.—*Sullivan vs. Triunfo G. & S. Min. Co.*, 39 Cal. 459, 468. See *Gans vs. Switzer*, 9 Mont. 408, 417, 24 Pac. Rep. 18.

49. PRESIDENT'S AUTHORITY.—President has no power by authority of his office to mortgage property of corporation.—*Alta S. M. Co. vs. Alta P. M. Co.*, 78 Cal. 629, 632, 21 Pac. Rep. 373.

50. Assignment of mortgage by president in name of corporation, and under its seal, is sufficient to vest in assignee title to mortgage, and enable him to bring suit thereon in his own name.—*Burnett vs. Lyford*, 93 Cal. 114, 117, 28 Pac. Rep. 855.

51. Railroad companies—Power to acquire real estate.—See post § 465 subds. 2, 3, 7, §§ 474, 477.

52. Resolution of board of directors passes when board is duly assembled is necessary prerequisite to execution of valid corporate mortgage.—*Alta S. M. Co. vs. Alta P. M. Co.*, 78 Cal. 629, 632, 21 Pac. Rep. 373.

As to business being conducted by board of directors, see ante § 305 and note.

53. SAVINGS AND LOAN COMPANIES have power under subd. 4 of this section and subd. 5 of section 574 to purchase mortgages on real estate and obligation secured thereby.—*Savings Bank of S. D. Co. vs. Barrett*, 126 Cal. 413, 416, 417, 58 Pac. Rep. 914. See post § 574 and note.

54. STATUTE OF FRAUDS is applicable to conveyances by corporation which would be governed thereby if made by natural person.—*Smith vs. Morse*, 2 Cal. 524, 540, 541, 542.

55. STOCK IN OTHER COMPANIES.—Corporations may purchase, sell, and deal in all kinds of public and private stock, bonds, and securities when they are organized for that purpose.—*Market St. R. Co. vs. Hellman*, 109 Cal. 571, 590, 42 Pac. Rep. 225.

56. Corporations cannot permanently invest in stock of other corporations unless authorized by their articles.—*Knowles vs. Sandercock*, 107 Cal. 629, 643, 40 Pac. Rep. 1047.

57. National banks are not expressly prohibited by statute from becoming shareholders in other corporations. A national bank may take shares in another corporation as security for loan made by it; if loan is not paid it may become owner of those shares and have

them registered in its own name upon the books of corporation.—Kennedy vs. Cal. Sav. Bank, 101 Cal. 495, 498, 40 Am. St. Rep. 69, 35 Pac. Rep. 1039; Knowles vs. Sandercock, 107 Cal. 629, 643, 40 Pac. Rep. 1047.

58. Presumption not against power.—Where it does not appear for what purpose stock was acquired or held it will not be presumed that it was not within scope or powers of corporation to acquire or hold stock in other companies.—Evans vs. Bailey, 66 Cal. 112, 113, 4 Pac. Rep. 1089. See Stockton Sav. Bank vs. Staples, 93 Cal. 189, 192, 32 Pac. Rep. 936; Kennedy vs. Cal. Sav. Bank, 101 Cal. 495, 497, 40 Am. St. Rep. 69, 35 Pac. Rep. 1039.

59. Ultra vires.—Whether purchase by corporation of shares of another company is ultra vires or not depends upon the purpose for which it was made, and whether under circumstances it is reasonable or necessary means of carrying out corporate objects.—Market St. R. Co. vs. Hellman, 109 Cal. 571, 589, 42 Pac. Rep. 225.

60. STOCK OF PURCHASING CORPORATION CANNOT BE ACQUIRED.—Purchase by bank of shares of its own stock is illegal withdrawal of its capital actually paid in, ultra vires.—Bank of San Luis Obispo vs. Wickersham, 99 Cal. 655, 661, 34 Pac. Rep. 444. See Ralston vs. Bank of California, 113 Cal. 308, 214, 44 Pac. Rep. 476.

61. TRUST CANNOT BE CREATED UNDER POWER TO SELL.—Power to sell does not include power to make deed of trust or place the property committed to custody of corporation in charge of others for term of years with power to sell as they may deem advisable.—Smith vs. Morse, 2 Cal. 524, 539.

62. TURNPIKE COMPANIES CAN ONLY HOLD SUCH REAL ESTATE as purposes of corporation may require; that is to say, such as may be necessary for construction and maintenance of turnpike road.—Coleman vs. San Rafael T. R. Co., 49 Cal. 517, 522.

63. Bond for deed to turnpike company for land not necessary for construction and maintenance of turnpike road, is void.—Coleman vs. San Rafael T. R. Co., 49 Cal. 517, 522.

64. VALIDITY OF UNAUTHORIZED DEED.—Corporation deed unauthorized by stockholders is void only as to stockholders and those connected with corporation.—Galbraith vs. Shasta Iron Co., 143 Cal. 94, 99, 76 Pac. Rep. 901. See Ala. Alabama Iron & S. Co. vs. McKeever, 112 Ala. 134, 20 So. Rep. 84. Mich. Beecher vs. Marq. & Pac. R. M. Co., 45 Mich. 103, 7 N. W. Rep. 695. N. Y. Paulding vs. Chrome Steel Co., 94 N. Y. 335, 341. Pa. Manhattan Hardware Co. vs. Phalen, 128 Pa. St. 110, 18 Atl. Rep. 423. R. I. Bishop vs. Kent & S. Co., 20 R. I. 680, 41 Atl. Rep. 255. Fed. Wood vs. Corby Water W. Co., 44 Fed. Rep. 146, 12 L. R. A. 168.

65. Mere intruder upon property of corporation cannot inquire into right of corporation to hold it.—Stockton & L. G. R. Co. vs. Stockton & C. R. Co., 45 Cal. 680, 685. See Eberhard vs. Tuolumne Water Co., 4 Cal. 303; Mitchell vs. Hagood, 6 Cal. 148.

66. Purchaser protected.—If corporation conveys its property for purpose apparently lawful and within scope of its powers to bona fide purchaser transaction is lawful between corporation and purchaser even though purpose of corporation was unlawful.—People vs. California College, 38 Cal. 166, 171.

67. WATER COMPANIES.—Corporation duly formed to supply town and its inhabitants with water may purchase and become owner of franchise granted by legislature to other individuals.—San Luis Water Co. vs. Estrada, 117 Cal. 168, 176, 177, 48 Pac. Rep. 1075. See Los Angeles City W. Co. vs. Los Angeles, 38 Fed. Rep. 720, 738-740.

V. AGENTS AND OFFICERS.

68. AGENTS AND OFFICERS NECESSARY.—Powers of corporation can only be exercised through its proper officers.—Gashwiler vs. Willis, 33 Cal. 11, 20, 91 Am. Dec. 607. See ante § 305 and note.

69. Appointment of agent to make contract for work, labor, or services upon property of corporation need not be made under seal of corporation, or by resolution; it can be inferred from admitted relation of agent to corporation or from course of business of corporation itself.—Crowley vs. Genesee M. Co., 55 Cal. 273, 275, 276; Streeten vs. Robinson, 102 Cal. 542, 545, 546, 36 Pac. Rep. 946; Bates vs. Coronado Beach Co., 109 Cal. 160, 162, 163, 41 Pac. Rep. 855. See Ark. City Elec. St. R. Co. vs. First Nat. Ex. Bank, 62 Ark. 33, 38, 54 Am. St. Rep. 252, 34 S. W. Rep. 89, 31 L. R. A. 535. Minn. Gillis vs. Duluth N. S. & S. W. R. Co., 34 Minn. 301, 303, 25 N. W. Rep. 603. Fed. Merchants' Nat. Bank vs. State Nat. Bank, 77 U. S. (10 Wall.) 604, 644, bk. 19 L. ed. 1008; American Ex. Nat. Bank vs. Oregon Pottery Co., 55 Fed. Rep. 265, 266; Cox vs. Robinson, 32 Fed. Rep. 377, 283-288.

70. Corporations, with regard to appointment of agents, are placed upon the same footing as natural persons, unless limited to some particular mode by their charter. Unless so limited they are not compelled to appoint their agents by deed or resolution.—Carey vs. Philadelphia & C. P. Co., 33 Cal. 694, 696. See Bergholdt vs. Porter Bros. Co., 114 Cal. 681, 688, 46 Pac. Rep. 738; Carpy vs. Dowdell, 115 Cal. 677, 683, 47 Pac. Rep. 695.

71. COMPENSATION.—Director is not entitled to compensation for his services in absence of agreement in advance that he shall receive it. If, in course of his office, he renders unusual services, that may be basis of quantum meruit, but directors have no authority to vote salaries to themselves after their election, nor can they vote salary to any one of their number as president when he takes part in proceeding, or his vote is essential to adoption of resolution.—Wickersham vs. Crittenden, 93 Cal. 17, 32, 28 Pac. Rep. 788.

As to compensation of directors, see ante § 305 and note.

72. Secretary performing extra services is entitled to reasonable and just compensation therefor.—Zellerbach vs. Allenberg, 99 Cal. 67, 70, 33 Pac. Rep. 786.

72. Superintendent cannot recover for extra services rendered during time of his employment without special agreement therefor.—*Bee vs. San Francisco & H. B. R. Co.*, 46 Cal. 248, 254, 255.

74. CONTRACTS BY AGENTS.—Corporation may make contracts by agents, and doctrine *qui facit per alium facit per se* is as applicable to a corporation as to a natural person.—*McKiernan vs. Lenzen*, 56 Cal. 61, 63. See *Andres vs. Fry*, 113 Cal. 124, 128, 45 Pac. Rep. 534.

75. Authority of officer to execute note is sufficiently shown by resolution of the board of directors empowering him to incur indebtedness, negotiate loans and otherwise act as agent of corporation.—*McCormick vs. Stockton & T. C. R. Co.*, 130 Cal. 100, 102, 103, 62 Pac. Rep. 267.

76. DELEGATION OF POWER.—Board of directors may delegate authority to committee of their own number to alienate or mortgage real estate.—*Andres vs. Fry*, 113 Cal. 124, 128, 45 Pac. Rep. 534.

77. FIDUCIARY NATURE OF RELATION.—Officers and directors of corporation are bound to act towards it in highest good faith and are not at liberty to obtain any advantages over corporation by concealment from its directors of true condition of its affairs or otherwise.—*San Francisco Water Co. vs. Pattee*, 86 Cal. 623, 629, 25 Pac. Rep. 135; *Wickersham vs. Crittenden*, 93 Cal. 17, 29, 28 Pac. Rep. 788; *Capital Gas Co. vs. Young*, 109 Cal. 140, 143, 41 Pac. Rep. 869, 29 L. R. A. 463.

78. Directors common to two contracting corporations.—Where two corporations, through their boards of directors, make contract with each other, the directors who are common to both corporations are not within the rigid rule of cases which hold that one who acts in fiduciary capacity cannot deal with himself in his individual capacity, and that any contract thus made will be declared void without any examination into its fairness or benefits derived from it to cestui que trust.—*San Diego O. T. & P. B. R. Co. vs. Pacific Beach Co.*, 112 Cal. 53, 58, 44 Pac. Rep. 333, 33 L. R. A. 788. See *Colorado Fuel & I. Co. vs. Western Hardware Co.*, 16 Utah 4, 11, 50 Pac. Rep. 628.

79. May not deal with themselves.—President and secretary of corporation act in fiduciary capacity, and may not deal with themselves in their individual capacity in purchasing debts against corporation.—*Davis vs. Rock Creek L. F. & M. Co.*, 55 Cal. 359, 364, 36 Am. Rep. 40. See *Wickersham vs. Crittenden*, 93 Cal. 17, 29, 28 Pac. Rep. 788; *Blood vs. La Serena Land & W. Co.*, 113 Cal. 221, 226, 41 Pac. Rep. 1017, 45 Id. 252.

80. NOTICE TO AGENT of facts arising from or connected with subject matter of agency is constructive notice to corporation in accordance with general law of agency.—*Bierce vs. Red Bluff Hotel Co.*, 81 Cal. 160, 165; *Jefferson vs. Hewitt*, 103 Cal. 624, 629, 37 Pac. Rep. 638.

81. Notice to president is notice to corpora-

tion.—*Phelps vs. Maxwell's Creek G. M. Co.*, 49 Cal. 336, 338, 339.

82. PERSONAL LIABILITY.—Manager of corporation is not personally liable on note executed by him in behalf of company, although he had no authority to execute it.—*Bean vs. Pioneer Min. Co.*, 66 Cal. 451, 453, 454, 56 Am. Rep. 106, 6 Pac. Rep. 86.

83. POWERS.—Officers have no power to authorize execution of note as surety for another in respect to matter having no relation to corporate business, and in which corporation has no interest. Such transaction is not within scope of its business, and party receiving such note with notice of circumstances under which it was given, cannot recover on it.—*Hall vs. Auburn T. Co.*, 27 Cal. 255, 257, 87 Am. Dec. 75. See *Chamberlain vs. Pacific Wool Co.*, 54 Cal. 103, 106; *National Park Bank vs. German-Am. Mut. Warehouse & S. Co.*, 116 N. Y. 281, 292, 22 N. E. Rep. 567, 5 L. R. A. 673; *Park Hotel Co. vs. Fourth Nat. Bank of St. Louis*, 86 Fed. Rep. 742, 747.

84. General manager is representative of corporation and may do in transaction of its ordinary affairs what corporation itself could do within scope of its powers.—*Greig vs. Rioridan*, 99 Cal. 316, 322, 33 Pac. Rep. 913. See *Cox vs. Robinson*, 32 Fed. Rep. 277, 283-286.

85. Power of president extends only to matters arising in ordinary course of business of corporation. Outside of these matters he has no power to bind corporation.—*Blen vs. Bear River & A. W. & M. Co.*, 20 Cal. 602, 613, 81 Am. Dec. 132. See *Bank of Healdsburg vs. Bailhache*, 65 Cal. 327, 331, 332, 4 Pac. Rep. 106; *Templin vs. Chicago, B. & P. R. Co.*, 73 Iowa 548, 552, 35 N. W. Rep. 634.

President has no power to purchase or sell property of corporation without authority of directors.—*Bliss vs. Kaweah C. & I. Co.*, 65 Cal. 502, 504, 4 Pac. Rep. 507. See *Alta Silver Min. Co. vs. Alta Placer Min. Co.*, 78 Cal. 629, 632, 21 Pac. Rep. 373; *City Elec. St. R. Co. vs. First Nat. Ex. Bank*, 62 Ark. 33, 38, 54 Am. St. Rep. 282, 34 S. W. Rep. 89, 31 L. R. A. 535; *Hadden vs. Linville*, 36 Md. 210, 232, 38 Atl. Rep. 27, 900.

86. Secretary of a corporation is not vested with power to sign negotiable instruments of company.—*Gashwiler vs. Willis*, 33 Cal. 11, 16, 91 Am. Dec. 607; *Blood vs. Marcuse*, 38 Cal. 590, 594, 99 Am. Dec. 435.

87. Presumption as to.—Officers who transact ordinary business of a corporation are presumed to have authority to do all acts which are usual and incidental thereto.—*McKiernan vs. Lenzen*, 56 Cal. 61, 63, 64; *Jennings vs. Bank of Cal.*, 79 Cal. 323, 328, 12 Am. St. Rep. 145, 21 Pac. Rep. 852, 5 L. R. A. 233.

88. REMOVAL.—Corporation may at any time remove agents having no interests coupled with their agency, and appoint other agents in their place, in accordance with general law of agency.—*San Joaquin L. & W. Co. vs. West*, 94 Cal. 399, 402, 29 Pac. Rep. 735.

89. Power of courts.—Power of annulment is incident to every corporation, and removal

of mere private and ministerial officers of corporation is right which belongs to corporation alone. Assistance of courts can only be invoked against such officers as are intrusted by law with management of affairs of corporation, and as against those remedy is purely legal. There is no jurisdiction in equity with regard to removal of corporate officers of any description.—*Neall vs. Hill*, 16 Cal. 145, 149, 76 Am. Dec. 508.

90. **SUING BY AGENT.**—Where corporation can sue by itself it can sue by an agent.—*McKiernan vs. Lenzen*, 56 Cal. 61, 63.

VI. BY-LAWS.

91. **"INCONSISTENT WITH ANY EXISTING LAW."**—Any by-law which contravenes provisions of any existing law is invalid and has none of the elements of a by-law.—*Vercoutere vs. Golden State Land Co.*, 116 Cal. 410, 413, 414, 415, 48 Pac. Rep. 375.

As to provisions of by-laws, see ante § 203 and note.

92. **Recording, amending, and repeal of by-laws.**—See ante § 304 and note.

93. **Sale of stock for non-payment of assessments.**—See ante § 331 and note.

VII. OBLIGATIONS OR CONTRACTS.

94. **ANCILLARY POWER.**—Power to make contracts is power annexed by law to corporate existence.—*Union Water Co. vs. Murphy's F. F. Co.*, 22 Cal. 620, 628.

95. **All necessary contracts may be made.**—Every corporation has power to make all contracts that are necessary and usual in course of business it transacts as means to enable it to effect objects of its creation, unless expressly prohibited by law or provisions of its charter.—*Union Water Co. vs. Murphy's F. F. Co.*, 22 Cal. 620, 621, 628.

96. **Corporations are endowed with capacity to enter into any contract or obligation essential for their purposes and for transaction of ordinary affairs.**—*McKiernan vs. Lenzen*, 56 Cal. 61, 63.

97. **ANALOGOUS POWER TO THAT OF NATURAL PERSONS.**—Private corporations with regard to making contracts are on same footing as natural persons, unless limited to some particular mode by their charter.—*Carey vs. Philadelphia & C. P. Co.*, 33 Cal. 694, 696.

98. **ASSIGNMENTS.**—Corporation may make an assignment under power given it to enter into contracts.—*McKiernan vs. Lenzen*, 56 Cal. 61, 63.

99. **BORROWING OR LOANING MONEY.**—Corporations may borrow or loan money when necessary to enable them to attain the object for which they were created.—*Union Water Co. vs. Murphy's F. F. Co.*, 22 Cal. 620, 629, 630. See *North Hudson Mut. Bldg. & L. Assoc. vs. First Nat. Bank of Hudson*, 79 Wis. 31, 36, 45, 47 N. W. Rep. 300, 11 L. R. A. 845.

100. **DEBTS MAY BE INCURRED.**—Power to incur indebtedness is an incident to express power granted to corporations.—*Smith vs. Eureka Flour Mills Co.*, 6 Cal. 1, 7.

101. **DISCRETION OF CORPORATION AS**

TO PROPRIETY.—Whether contract is essential to transaction of ordinary affairs of company or for purposes of corporation is to be determined by corporation or those to whom management of its affairs is intrusted.—*Bates vs. Coronado Beach Co.*, 109 Cal. 160, 163, 41 Pac. Rep. 555.

102. **ESTOPPEL TO QUESTION POWER.**—*Corporation estopped.*—If it is within apparent scope of its organization fact that contract has been entered into by it or its representatives is determination on the part of corporation that it is essential, and corporation will not be permitted thereafter to question its effect.—*Bates vs. Coronado Beach Co.*, 109 Cal. 160, 165, 41 Pac. Rep. 555.

103. **Others estopped.**—Power of corporation to make contract cannot be attacked by parties sued thereon.—*Union Water Co. vs. Murphy's F. F. Co.*, 22 Cal. 620, 621.

104. **FLUME COMPANY HAS POWER BY CONTRACT TO BIND WATER COMPANY** as its exclusive agent for purpose of distributing and selling water subject to its approval within corporate limits of city.—*San Diego Water Co. vs. San Diego Flume Co.*, 108 Cal. 549, 558, 41 Pac. Rep. 495, 29 L. R. A. 839.

105. **GUARANTEE OF BONDS OF ANOTHER CORPORATION.**—Provision authorizing corporations to enter into all contracts essential to transaction of their business authorizes railroad company to guarantee payment of bonds of another railroad company.—*Low vs. Central Pac. R. Co.*, 52 Cal. 53, 59, 28 Am. Rep. 629.

106. **INCIDENTAL POWER.**—Power of corporation to create debts is incident to express powers, and not in itself one of expressed powers.—*Smith vs. Eureka Flour Mills Co.*, 6 Cal. 1, 7. See *Union Water Co. vs. Murphy's F. F. Co.*, 22 Cal. 620, 627.

107. **PROMISSORY NOTES.**—Corporations have power to make promissory notes.—*Smith vs. Eureka Flour Mills Co.*, 6 Cal. 1, 7, 8; *Union Water Co. vs. Murphy's F. F. Co.*, 22 Cal. 620, 627.

108. **Contract to pay.**—Corporation has power to contract for payment of notes outstanding against it.—*Seeley vs. San Jose I. M. & L. Co.*, 59 Cal. 22, 24.

109. **ULTRA VIRES.**—Definition and nature of.—"An act is said to be ultra vires when it is not within scope of powers of corporation to perform it under any circumstances or for any purpose. An act is also sometimes said to be ultra vires with reference to rights of certain parties, and corporation is not authorized to perform it without their consent; or with reference to some specific purpose when it is not authorized to perform it for that purpose, although fully within the scope of general powers of corporation, with the consent of parties interested, or for some other purpose. And rights of strangers dealing with corporations may vary according as act is ultra vires in one or other of these senses. All these distinctions must be constantly borne in mind when considering a question arising out of dealings with a corporation. When an act is

ultra vires in first sense mentioned, it is generally, if not always, void in toto, and corporation may avail itself of the plea. But when it is ultra vires in second sense, right of corporation to avail itself of plea will depend upon circumstances of case."—*Miners' Ditch Co. vs. Zellerbach*, 37 Cal. 543, 578, 99 Am. Dec. 300. See *Griffith vs. New York Life Ins. Co.*, 101 Cal. 627, 642, 40 Am. St. Rep. 96, 36 Pac. Rep. 113.

110. **Circumstances of case considered.**—Whether or not contract of corporation is ultra vires depends upon circumstances surrounding each transaction.—*Miners' Ditch Co. vs. Zellerbach*, 37 Cal. 543, 578-583, 99 Am. Dec. 300.

111. **Estoppel to make defense.**—Corporation entering into unauthorized contract cannot set up their illegality against other contracting party who knows nothing of unlawful purpose for which corporation entered into such contract.—*Miners' Ditch Co. vs. Zellerbach*, 37 Cal. 543, 579, 99 Am. Dec. 300.

112. Corporations cannot set up ultra vires as defense against party who proceeds in performance of contract, expending his money and his labor in production of value which corporation appropriates.—*Main vs. Casserly*, 67 Cal. 127, 129, 7 Pac. Rep. 426.

113. **Defense disfavored.**—Defense of ultra vires is looked upon by courts with disfavor whenever it is presented for purpose of avoiding an obligation which a corporation has assumed merely in excess of powers conferred upon it, and not in violation of some express prohibition of statute. Courts are inclined to treat corporation as estopped from setting up this defense in all cases where it has received and retained benefit of transaction, and seeks by this plea to avoid its correlative obligation.—*Kennedy vs. California Sav. Bank*, 101 Cal. 495, 497, 40 Am. St. Rep. 69, 35 Pac. Rep. 1039.

114. **Money borrowed.**—Corporation cannot refuse to pay money which it has borrowed on ground that it was borrowed for purpose of being used and was used for payment of expenses which were incidental to an ultra vires act.—*Taylor vs. North Star G. M. Co.*, 79 Cal. 285, 287, 21 Pac. Rep. 753.

115. **Purchaser of note protected.**—Nor can corporation set up defense of ultra vires against bona fide indorsee of negotiable promissory note provided corporation was authorized to give notes for any purpose.—*Miners' Ditch Co. vs. Zellerbach*, 37 Cal. 543, 579, 99 Am. Dec. 300.

116. **Presumption.**—Contracts of corporation which are not upon their face necessarily beyond scope of their authority will, in absence of proof, be presumed to be valid.—*Brown vs. Board of Education*, 103 Cal. 531, 534, 37 Pac. Rep. 503; *Deane vs. Gray Bros. A. S. P. Co.*, 109 Cal. 433, 435, 42 Pac. Rep. 443.

117. **SIGNATURE OF CORPORATION.**—**Descriptive persons.**—Where note is signed with name of president of corporation, followed by his description as such, and is also signed by him personally, an intention is shown that first signature is for the corporation and note is binding on corporation.—*McCormick vs. Stockton & T. C. R. Co.*, 130 Cal. 100, 102, 104, 105, 62 Pac. Rep. 267; **distinguishing** *Chamberlain vs. Pacific Wool-Grow. Co.*, 54 Cal. 103, 106; *Hobson vs. Hassett*, 76 Cal. 203, 205, 9 Am. St. Rep. 193, 18 Pac. Rep. 320 (where there was one signature only). See *Farmers & Mechanics' Bank of Sav. vs. Colby*, 64 Cal. 352, 353, 28 Pac. Rep. 118.

118. **VOID CONTRACTS.**—Where contract is not only ultra vires but void because against public policy, court will not give relief to either party.—*Vinalia G. & E. L. Co. vs. Sims*, 104 Cal. 326, 332, 43 Am. St. Rep. 105, 37 Pac. Rep. 1042.

§ 355. **LIMITATION OF POWERS.** In addition to the powers enumerated in the preceding section, and to those expressly given in that title of this part under which it is incorporated, no corporation shall possess or exercise any corporate powers, except such as are necessary to the exercise of the powers so enumerated and given.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Commissioners' note.
3. Common-law rule identical.
4. Enumeration of express and implied powers.

1. Applied, cited, construed, referred to, etc., in: *Spring Valley Water Works vs. Schottler*, 62 Cal. 69, 104 (referred to in connection with § 354).

2. **Commissioners' note** says: "Corporations, with their express powers, take, by implication, such powers as are necessary to exercise of those expressly conferred.—*New England F. & M. Ins. Co. vs. Robinson*, 35 Ind. 536; *Barry vs. Merchants' Exchange Co.*, 1 Sandf. Ch. (N. Y.) 280; *Madison W. & M. Pl. R. Co. vs. Watertown & P. Pl. R. Co.*, 5 Wis. 178; *Brady vs. Mayor of Brooklyn*, 1 Barb. (N. Y.) 584; *Jackson vs. Brown*, 5 Wend. (N. Y.) 590.

Many powers and capacities are tacitly annexed to corporation duly created, but they are such only as are necessary to carry into effect purposes for which it was formed. The specification of certain powers operates as restraint to such subjects only, and is implied prohibition of exercise of other and distinct powers.—*People vs. Utica Ins. Co.*, 15 John. (N. Y.) 358, 8 Am. Dec. 243; *Halstead vs. Mayor of N. Y.*, 3 N. Y. 430."

3. **Common-law rule** is that corporations "are bound to follow strictly letter of their charter; and can exercise no power, unless granted to them, or absolutely necessary to carry out the power so granted."—*Smith vs. Morse*, 2 Cal. 524, 528.

4. **Enumeration of express and implied powers.**—See ante § 354 and note.

§ 356. BANKING EXPRESSLY PROHIBITED. No corporation shall create or issue bills, notes, or other evidences of debt, upon loans or otherwise, for circulation as money.

History: Enacted March 21, 1872.

1. Commissioners' note.
2. Constitutional provision.
3. Object of restriction—Loaning credit prohibited.
4. Ordinary evidences of debt may be issued.

1. Commissioners' note says: "The power to issue notes and bills for circulation as money is expressly excluded. The right to issue them in all other proper cases must be inferred as an incident to the express powers or objects of the corporation.—*Smith vs. Eureka Flour Mills Co.*, 6 Cal. 1, 7. A corporation may bind itself by note and mortgage.—*Rowe vs. Table Mt. W. Co.*, 10 Cal. 441, 444; *Union Water Co. vs. Murphy's Flat Flum. Co.*, 22 Cal. 620, 628."

As to powers of corporation, see ante § 354 and note.

2. Constitutional provision.—Const. 1879, art. XII, § 5, provides as follows: "No corporation, association, or individual shall issue or

put in circulation, as money, anything but the lawful money of the United States."—See Const. 1879, art. XII, § 5 and note.

3. Object of restriction is to prevent corporation by any device from carrying on the business of banking; or in other words, to prevent formation of moneyed corporations. They are prohibited from lending their credit.—*Magee vs. Mokelumne H. C. & M. Co.*, 5 Cal. 258, 259; *Smith vs. Eureka Flour Mills Co.*, 6 Cal. 1, 7 (decided under similar provision contained in Act 1850, § 3).

4. Ordinary evidences of debt may be issued for money borrowed. To issue their bills upon loans implies, from meaning of language, that they are lenders; while to issue bills for money which they borrow places them in the opposite relation of borrowers.—*Magee vs. Mokelumne H. C. & Min. Co.*, 5 Cal. 258, 259 (decided under similar provision contained in Act 1850, § 3, Stats. 1850, p. 347. See *Seeley vs. San Jose I. Mill & L. Co.*, 59 Cal. 22, 25.

§ 357. MISNOMER DOES NOT INVALIDATE INSTRUMENT. The misnomer of a corporation in any written instrument does not invalidate the instrument, if it can be reasonably ascertained from it what corporation is intended.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Notice of garnishment—Immaterial misnomer.
3. Omission of part of name—Identification sufficient.

1. Applied, cited, construed, referred to, etc., in: *Underhill vs. Santa Barbara L. B. & I. Co.*, 93 Cal. 300, 314, 28 Pac. Rep. 1049 (applied); *Donohoe-Kelly Banking Co. vs. Southern Pacific Co.*, 138 Cal. 183, 194, 94 Am. St. Rep. 28, 71 Pac. Rep. 93 (applied).

2. Notice of garnishment addressed to *Donohoe-Kelly Co.* instead of *Donohoe-Kelly Banking Co.* is not void, when there is no

pretense that it was not served upon party owing debt, and no question is raised that corporation intended to be reached was the *Donohoe-Kelly Banking Co.*—*Donohoe-Kelly Banking Co. vs. Southern Pacific Co.*, 138 Cal. 183, 194, 94 Am. St. Rep. 28, 71 Pac. Rep. 93.

3. Omission of part of name of corporation, when name consists of several words, will not vitiate grant to or act by such corporation, when corporation intended can be identified.—*People vs. Sierra B. Q. M. Co.*, 39 Cal. 511, 514; *Underhill vs. Santa Barbara L. B. & I. Co.*, 93 Cal. 300, 314, 28 Pac. Rep. 1049.

§ 358. CORPORATIONS, TIME IN WHICH MUST BE ORGANIZED, AND CONTINUANCE OF BUSINESS. If a corporation does not organize and [1] commence the transaction of its business, or [2] the construction of its works within one year from the date of its incorporation, or if, after its organization and commencement of its business, it [3] shall lose or dispose of all its property, and [4] shall fail for a period of two years to elect officers and transact, in regular order, the business of said corporation, its corporate powers shall cease, and the said corporation may be dissolved at the instance of any creditor of the said corporation, at the suit of the state, on the information of the attorney-general, but the resumption of its business in good faith by such corporation prior to the commencement thereof shall be a bar to such suit.

[Collateral attack not allowed.] The due incorporation of any company claiming in good faith to be a corporation under this part, and doing business as such, or its right to exercise corporate powers, shall not be inquired into collaterally

in any private suit to which such de facto corporation may be a party; but such inquiry may be had at the suit of the state on information of the attorney-general; provided, however, as to any company claiming in good faith to be, and which has been doing business for ten consecutive years as a corporation, no such inquiry shall be made either by the state or by any person whatsoever.

History: Enacted March 21, 1872; amended March 23, 1901, Stats. and Amdts. 1900-1, p. 632.

1. Applied, cited, construed, referred to, etc.
- 2, 3. Collateral attack—Not permitted—Qualification of rule.
4. Same—Action by de facto corporation maintainable.
5. Same—Defects in formation of corporation.
6. Same—Embezzlement by officer of de facto corporation.
- 7, 8. Same—Intruders and trespassers cannot question.
9. Same—Proof of de facto existence sufficient.
10. Commencement of business—What constitutes.
11. Same—Interests of public and of relator considered.
12. Forfeiture—Results ipso facto.
13. Same—Title vests in state upon.
14. Quo warranto—Is proper remedy.
15. Same—Misuser or non-user grounds.
- 16, 17. Same—Parties—Corporation—Usurping individuals.
- 18-20. Same—Evidence—Minutes—Presumptions—Interest of stockholder.
21. "Such de facto corporation"—Phrase explained.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Weaverville & M. W. R. Co. vs. Trinity Co.*, 64 Cal. 69, 72, 28 Pac. Rep. 496 (applied); *People ex rel. Attorney General vs. Stanford*, 77 Cal. 360, 372, 18 Pac. Rep. 85, 19 Id. 693, 2 L. R. A. 92 (cited in discussion); *Lakeside Ditch Co. vs. Crane*, 80 Cal. 181, 186, 22 Pac. Rep. 76 (applied); *Golden Gate M. & M. Co. vs. Joshua Hendy Mach. Works*, 32 Cal. 184, 186, 23 Pac. Rep. 45 (applied); *People vs. Montecito Water Co.*, 97 Cal. 276, 277, 33 Am. St. Rep. 172, 32 Pac. Rep. 236 (applied); *Martin vs. Deetz*, 102 Cal. 55, 64, 65, 66 (construed and applied), 67 (cited), 41 Am. St. Rep. 151, 36 Pac. Rep. 368; *People vs. Leonard*, 106 Cal. 302, 310, 39 Pac. Rep. 617 (applied); *Market St. R. Co. vs. Hellman*, 109 Cal. 571, 601, 42 Pac. Rep. 225 (referred to in dis. op.); *Los Angeles Holiness Band vs. Spires*, 126 Cal. 541, 545, 53 Pac. Rep. 1049 (applied); *People vs. Rosenstein-Cohn Cigar Co.*, 131 Cal. 153, 154, 63 Pac. Rep. 163 (applied).

2. COLLATERAL ATTACK on right of corporation to exercise its franchises is not permitted.—*Weaverville W. R. Co. vs. Trinity Co.*, 64 Cal. 69, 72, 28 Pac. Rep. 496. See *Lakeside Ditch Co. vs. Crane*, 80 Cal. 181, 186, 22 Pac. Rep. 76; *Martin vs. Deetz*, 102 Cal. 55, 65, 66, 41 Am. St. Rep. 151, 36 Pac. Rep. 368; *Miller vs. Ferris Irr. Dist.*, 85 Fed. Rep. 693, 698.

3. Compare: *Oroville & V. R. Co. vs. Plumas Co.*, 37 Cal. 354, 360, wherein it is said:

"This provision does not go to extent of precluding private person from denying existence de jure or de facto of an alleged corporation. It cannot be true that mere allegation that a party is a corporation puts the question, whether it is such corporation, beyond reach of inquiry in suit with private person. It must be a corporation either de jure or de facto, or it has no legal capacity to sue or be sued, nor any capacity of any kind. It is an indispensable allegation in an action brought by a corporation, that plaintiff is a corporation; and it results from the logic of pleading that the opposite party may deny the allegation."

4. Action by de facto corporation.—De facto character of corporation entitles it to maintain an action and assert its corporate character as against all the world except the state in direct proceeding by attorney-general to test its right to a franchise.—*People's Ditch Co. vs. '76 Land & Water Co.* (Cal. Mar. 10, 1896), 44 Pac. Rep. 176, 177. See *People vs. La Rue*, 67 Cal. 526, 530, 3 Pac. Rep. 84.

5. Defects in formation of corporation cannot be inquired into in collateral proceeding.—*Spring Valley Water Works vs. San Francisco*, 22 Cal. 434, 441; *Bakersfield Town Hall Assoc. vs. Chester*, 55 Cal. 98, 101, 102; *Los Angeles Holiness Band vs. Spires*, 126 Cal. 541, 545, 53 Pac. Rep. 1049.

6. EMBEZZLEMENT BY OFFICER OF DE FACTO CORPORATION.—Proof that corporation exists as corporation de facto, claiming in good faith to be corporation organized under laws of state, and doing business as such, is sufficient to sustain conviction of one of its officers for embezzlement.—*People vs. Leonard*, 106 Cal. 302, 310, 39 Pac. Rep. 617.

7. Mere intruder on property of de facto corporation cannot inquire into its right as corporation to hold such property.—*Stockton & L. G. R. Co. vs. Stockton & S. C. R. Co.*, 45 Cal. 680, 685.

8. Trespassers cannot question.—De facto corporation's corporate existence cannot be questioned by mere trespasser in action against him to recover damages for injury to corporate property.—*Golden Gate M. & M. Co. vs. Joshua Hendy Mach. Wks.*, 32 Cal. 184, 186, 23 Pac. Rep. 45. See *Rondell vs. Fay*, 32 Cal. 354, 361; *Pacific Bank vs. De Ro*, 37 Cal. 538, 541; *Bakersfield T. H. Assoc. vs. Chester*, 55 Cal. 98, 102.

9. Proof of corporation's de facto existence dispenses with necessity of strict proof of corporate character, and precludes any inquiry into or disputing it. Such inquiry can only be had at suit of state on information by at-

torney-general.—*Rondell vs. Fay*, 32 Cal. 354, 360, 361.

10. **COMMENCEMENT OF TRANSACTION OF BUSINESS** by railroad company is sufficiently shown where it appears that it has purchased large quantity of railroad iron and expended within twelve months over thirty thousand dollars in prosecution of its enterprise.—*People vs. Stockton & V. R. Co.*, 45 Cal. 306, 316, 318, 12 Am. Rep. 178.

11. **Interests of public and of stockholders**, on whose relation quo warranto proceedings are instituted, will be considered, and fact that neither has been prejudiced will influence court in its decision to render a judgment in favor of corporation.—*People vs. Rosenstein-Cohn Cigar Co.*, 131 Cal. 153, 156, 157, 63 Pac. Rep. 163.

12. **FORFEITURE—Results ipso facto.**—It seems that failure of corporation to organize and commence the transaction of its business, or construction of its works within prescribed time ipso facto forfeits all of its rights, and no judicial proceeding is necessary to declare such forfeiture.—*Oakland R. Co. vs. Oakland, B. & F. V. R. Co.*, 45 Cal. 365, 372, 378, 13 Am. Rep. 181.

13. **Title to thing forfeited vests in state** immediately upon commission of offense or happening of event for which forfeiture is declared, or at such other time and upon such other condition as statute may name.—*United States vs. Grundy*, 7 U. S. (3 Cr.) 337, 351, bk. 2 L. ed. 463, per Marshall, C. J. See *Oakland R. Co. vs. Oakland, B. & F. V. R. Co.*, 45 Cal. 365, 373, 374, 13 Am. Rep. 181; *Upham vs. Hosking*, 62 Cal. 250, 258; *Arcata vs. Arcata & M. R. R. Co.*, 32 Cal. 639, 642, 28 Pac. Rep. 676; *Kennedy vs. Strong*, 14 John. (N. Y.) 128, 129.

14. **QUO WARRANTO—Is property remedy** to forfeit franchise of legally existing corporation for abuse thereof.—*People vs. Stanford*, 77 Cal. 360, 373, 18 Pac. Rep. 85, 19 Id. 693, 2 L. R. A. 92; *People vs. Montecito Water Co.*, 97 Cal. 276, 277, 33 Am. St. Rep. 172, 32 Pac. Rep. 236.

15. **Misuser or non-user.**—Private corporation created by legislature may lose its franchise by misuser or non-user, and it may be resumed by government under judgment upon

quo warranto to ascertain and enforce its forfeiture.—*People vs. Stanford*, 77 Cal. 360, 373, 18 Pac. Rep. 85, 19 Id. 693, 2 L. R. A. 92.

16. **Parties—Corporation de facto may be** defendant in quo warranto proceedings when it is distinctly alleged that it is not corporation de jure and that it is one merely de facto.—*People vs. Montecito W. Co.*, 97 Cal. 276, 277, 278, 33 Am. St. Rep. 172, 32 Pac. Rep. 236.

17. **Same—Individuals usurping franchise** must be made parties defendant, and corporation cannot be sued as such and brought into court and action maintained against it on the ground that it is not a corporation; although the corporation is proper, and only proper party, when its corporate existence is admitted and allegation is that it is usurping privileges and powers that do not belong to it.—*People ex rel. Attorney-General vs. Stanford*, 77 Cal. 360, 363, 364, 18 Pac. Rep. 85, 19 Id. 693, 2 L. R. A. 92. See *Mud Creek Draining Co. vs. State*, 43 Ind. 236.

18. **Evidence.—Minute-book of corporation is** admissible in evidence, on question whether corporation organized and commenced business within one year, where it tends to show the organization of corporation, its place of business, nature of business transacted, meetings of directors, and other matters as to good faith of the corporation.—*People vs. Rosenstein-Cohn Cigar Co.*, 131 Cal. 153, 158, 63 Pac. Rep. 163.

19. **Same—Presumptions in favor of corporation.**—When corporation has gone into operation acting under charter granted under condition precedent it will be presumed that condition has been performed.—*Spring Valley Water Works vs. San Francisco*, 22 Cal. 434, 441.

20. **Same—Stockholder's interest in property** of corporation cannot be shown, such evidence being irrelevant.—*People vs. Rosenstein-Cohn Cigar Co.*, 131 Cal. 153, 157, 63 Pac. Rep. 163.

21. **"Such de facto corporation"** evidently refers to corporation which has not failed to organize and which does exercise corporate powers and must become and is a de facto corporation.—*Martin vs. Deets*, 102 Cal. 55, 66, 41 Am. St. Rep. 151, 36 Pac. Rep. 368.

§ 359. **INCREASING AND DIMINISHING CAPITAL STOCK, NOTICE—INCREASING OR DIMINISHING BONDED INDEBTEDNESS, NOTICE, CERTIFICATES OF.** No corporation shall issue stocks or bonds except for money paid, labor done or property actually received, and all fictitious increase of stock or indebtedness is void. Every corporation [1] may increase or diminish its capital stock, and every corporation, or two or more corporations, [2] may create or increase its or their bonded indebtedness, subject to the following provisions:

1. The capital stock of a corporation may be increased or diminished [1] at a meeting of the stockholders by a vote representing at least two thirds of the subscribed or issued capital stock, or [2] in the manner otherwise in this section provided; when by meeting as aforesaid, then [1] such meeting must be called by the board of directors or trustees, and [2] notice must be given by publication in

a newspaper published in the county or city and county where the principal place of business of such corporation is located, or if there be none published in said county or city and county, then in a newspaper published in an adjoining county, or city and county, [3] such paper to be designated by the board of directors or trustees in the order calling for the meeting.

2. The notice must specify [1] the object of the meeting and [2] the amount to which it is proposed to increase or diminish the capital stock, [3] the time and place of holding the meeting, which latter must be at the principal place of business of the corporation and at the building where the board of directors or trustees usually meet. The notice herein provided [4] must be published once a week for at least sixty days. The capital stock cannot be diminished to an amount less than the indebtedness of the corporation.

3. The bonded indebtedness of a corporation may be created or increased by [1] a vote of the stockholders representing at least two thirds of the subscribed or issued capital stock [2] at a meeting called by the board of directors or trustees, and [3] after notice of the time and place of the meeting [4] published in the same manner and for the time prescribed, which notice shall state [5] the amount of the bonded indebtedness which it is proposed to create, or the amount to which it is proposed to increase such indebtedness, and shall [6] in all other respects contain the same matters as are above provided and set forth in the notice of meeting to increase or diminish the capital stock; or such **original creation of bonded indebtedness** may be made as otherwise in this section provided.

4. In addition to the notice by publication, when proceedings are to be had hereunder at a meeting of stockholders, the secretary of the corporation shall also [1] address a notice to each of the stockholders whose names appear on the company's books as sufficiently addressed or identified, [2] at his place of residence, if known, and if not known, then at the place in which the principal place of business of the corporation is situate, which notice shall be so mailed to such stockholders [3] at least thirty days before the day appointed for such meeting.

5. In lieu of such call for meeting of stockholders and of such notice and publication of the same, and of a stockholders' meeting held in pursuance thereof and of said vote thereat representing at least two thirds of the subscribed capital stock, **any corporation may diminish its capital stock and also originally create its bonded indebtedness** by [1] a resolution adopted by the unanimous vote of its board of directors or trustees at a regular meeting or at a special meeting called for that purpose and approved [a] by the written assent or assents of the stockholders holding two thirds of the subscribed or issued capital stock, which assent or assents [b] must be filed with the secretary of the corporation; but the secretary of the corporation must [2] address by mail, postage fully prepaid, a copy of such resolution to each of the stockholders whose names appear upon the company's books as sufficiently addressed or identified, [a] at his place of residence, if known, and if not known, then [b] at the place in which the principal place of business of the corporation is situate, which notice shall be so [c] mailed to such stockholders at least thirty days before the certificate hereinafter provided is made and signed or filed, as hereinafter provided, and within that time **any stockholder may file with such secretary his dissent in writing.**

[Consent and no dissent.] But it is further provided that if at any time within said thirty days such written assent or assents of the stockholders holding all of

the subscribed or issued capital stock be so filed with said secretary, then and at once, and without further delay, the certificate hereinafter provided for may be so made, signed and filed as hereinafter provided, and with the same effect, but such capital stock cannot be diminished to an amount less than the indebtedness of the corporation, and no increase of capital stock or bonded indebtedness can be made, except at a meeting of stockholders as in this section provided.

6. Any two or more corporations may by a separate compliance by each corporation with the provisions of this section applicable in the premises in respect to creating or increasing bonded indebtedness, create or increase a consolidated bonded indebtedness of such corporations, [1] to be binding jointly and severally on such corporations, and which may [2] be secured by a consolidated mortgage or deed of trust executed by all such corporations, [3] mortgaging or conveying in trust all or any of the properties of all such corporations, acquired or to be acquired.

7. [Proceeding under subds. 1, 2, 3, and 4.] Upon such increase or diminution of the capital stock or creation or increase of the bonded indebtedness being made in accordance with the provisions of this section there shall be made, if proceedings are had under subdivisions first, second, third and fourth above, [1] a certificate under the corporate seal and signed by the president and secretary of the corporation or of each corporation acting in the premises and a majority of the directors or trustees of such corporation, or each corporation so acting, [2] showing a compliance by such corporation, or each corporation so acting, with the requirements of said last named subdivisions and the amount to which the capital stock has been increased or diminished or the amount of the bonded indebtedness created, or to which the bonded indebtedness may have been increased, and [3] the amount of stock represented at the meeting and [4] the total vote in the affirmative by which the same was accomplished and [5] the total vote in the negative;

[Proceedings under subd. 5.] Or if such proceedings be had and taken under subdivision fifth of this section as to diminution of capital stock or original creation of bonded indebtedness [1] a like certificate shall be made and sealed and signed, as aforesaid, showing [2] a compliance by such corporation, and by each corporation acting in the premises, with the requirements of said subdivision fifth, and [3] the amount to which the capital stock has been diminished or the amount of bonded indebtedness so originally created, and [4] the total amount of the stock represented by the said written assent or assents so filed with the secretary and [5] the total amount of stock represented by the said written dissent or dissents so filed. In case of a consolidated bonded indebtedness each corporation which is a party thereto shall cause to be made and sealed and signed and verified and filed, as in this section provided, a separate certificate.

8. In all cases the certificates shall state [1] the total number of subscribed or issued shares of the capital stock of the corporation, or of each corporation respectively acting in the premises, and [2] shall be verified by the oath of the said president and secretary, or of the said respective presidents and secretaries. Such consolidated bonded indebtedness may be created or increased to an amount equal to the par or face value of the aggregate amount of the subscribed or issued capital stocks of said two or more corporations, but shall not exceed such aggregate amount. In each and every case the certificate [3] must be filed in the

office of the clerk in the county or city and county where the original articles of incorporation of the corporation or corporations acting hereunder are filed and [4] a certified copy thereof, certified by such clerk, shall be filed in the office of the secretary of state; and thereupon the capital stock shall be so increased or diminished, or the bonded indebtedness or consolidated bonded indebtedness shall be created or increased accordingly, and such certificate or certificates so filed shall be, when said certified copy or copies are so filed, conclusive proof of such increase or diminution of capital stock or such creation or increase of bonded or consolidated bonded indebtedness and the validity of each thereof. When the by-laws of a corporation prescribe the paper in which notices of meetings of directors or trustees or stockholders are to be published, the notices of [by] publication herein provided for shall be published in such paper, unless publication thereof shall have ceased.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 207; March 3, 1883, Stats. and Amdts. 1883, p. 31; March 18, 1885, Stats. and Amdts. 1885, p. 141; March 19, 1889, Stats. and Amdts. 1889, p. 364; March 23, 1893, Stats. and Amdts. 1893, p. 191; March 21, 1903, Stats. and Amdts. 1903, p. 347. In effect March 21, 1903.

1. Applied, cited, construed, referred to, etc.
- 2, 3. Constitutionality denied.
4. Construction of constitution—Fictitious increase void.
5. Same—"Fictitious" defined.
6. First clause prohibitory.
7. Same—Second clause not self-executing.
8. Same—Same—General law may authorize increase of stock.
9. Same—Same—Meeting of stockholders required.
10. "Bonded indebtedness"—What constitutes.
11. Credit—Note given in payment for stock.
12. Fictitious indebtedness—In general.
13. Same—Actual need of money warrants sale of stock.
14. Same—Colorable purchase of property not permitted.
15. Increase of stock—Credit not permitted.
- 16, 17. Same—Directors not authorized.
18. Same—Effect of unauthorized increase—Ultra vires.
19. Same—Estoppel to question increase.
20. Same—Only state can question.
21. Same—Statute authorizing after charter granted.
22. Same—Stock issued to stockholders to equalize prices.
23. Same—Value of property "actually received."
24. Implied power to charge amount of stock.
25. Proxies may be resorted to.
26. Railroad companies—Statute applies to.
27. Reduction of capital stock—Purchase by corporation.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Ewing vs. Oroville Min. Co., 56 Cal. 649, 651, 653, 655 (held unconstitutional); Stein vs. Howard, 65 Cal. 616, 617, 4 Pac. Rep. 662 (applied); Harvey vs. Dale, 96 Cal. 160, 161, 31 Pac. Rep. 14 (referred to); Jefferson vs. Hewitt, 103 Cal. 624, 630, 37 Pac. Rep. 678 (construed); Market St. R. Co. vs. Hellman, 109 Cal. 571, 594 (construed); 597, 600 (referred to), 42 Pac. Rep. 225; Ralston

vs. Bank of Cal., 112 Cal. 208, 213, 44 Pac. Rep. 476 (referred to); Kellerman vs. Maier, 116 Cal. 416, 424, 48 Pac. Rep. 377 (construed and applied); Boyd vs. Heron, 125 Cal. 453, 454, 455, 58 Pac. Rep. 64 (construed and applied); Richardson vs. Chicago P. & P. Co., (Cal. Dec. 19, 1900) 63 Pac. Rep. 74, 77 (construed); Vermont Marble Co. vs. Declez Granite Co., 135 Cal. 579, 583, 37 Am. St. Rep. 143, 67 Pac. Rep. 1057, 56 L. R. A. 728 (referred to).

2. CONSTITUTIONALITY.—Provisions of this section as originally enacted were held to be inconsistent with Const. 1879, art. XII, §11, and were not in force after that constitution went into effect.—Ewing vs. Oroville Min. Co., 56 Cal. 649, 653, 655.

3. Compare: Union Loan & T. Co. vs. Southern Cal. Motor R. Co., 51 Fed. Rep. 840, 850 (holding that inhibition of last clause of constitution is against the "increase" of stock and bonded indebtedness, and that it does not include "first issue" of bonds or stock).

4. CONSTRUCTION OF CONSTITUTION.—Under Const. 1879, art. XII, §11, all fictitious increase of stock is void.—Ewing vs. Oroville Min. Co., 56 Cal. 649, 652.

5. "Fictitious," as used in the phrase of "fictitious increase of stock" in such provision of constitution, means fraud, imaginary, not real, counterfeit, false, not genuine.—Stein vs. Howard, 65 Cal. 616, 617.

6. First clause prohibitory.—Restrictions in first clause of such constitutional provision are absolutely prohibitory, and last clause must be controlled and limited by provisions of first.—Ewing vs. Oroville Min. Co., 56 Cal. 649, 652, 653.

7. Second clause not self-executing.—Second clause of provision is not self-executing.—Ewing vs. Oroville Min. Co., 56 Cal. 649, 652, 653. See Oakland Pav. Co. vs. Hilton, 69 Cal. 479, 484, 485, 11 Pac. Rep. 3.

8. General law may authorize increase of stock.—Second clause of provision plainly

recognizes power of legislature to enact general law to accomplish an increase of capital stock, restrained by other provisions of same section.—*Ewing vs. Oroville Min. Co.*, 56 Cal. 649, 655.

9. **Meeting for purpose of increasing stock.**—Law enacted to furnish mode of accomplishing object of second clause of such provision of constitution must provide for a meeting, and the meeting must be called for the purpose of increasing the stock, and 60 days' notice must be given as may be provided by law; i. e. in mode to be prescribed by legislature.—*Ewing vs. Oroville Min. Co.*, 56 Cal. 649, 653.

10. **"BONDED INDEBTEDNESS"** does not embrace non-negotiable notes and mortgages executed by private corporation to secure its indebtedness for money loaned, money paid, property purchased or labor performed in the ordinary course of its authorized business and actually received and used in such business.—*Underhill vs. Santa Barbara L. B. & I. Co.*, 93 Cal. 300, 308, 23 Pac. Rep. 1049.

11. **CREDIT SALE.**—Whether promissory note given in good faith by the solvent subscriber in payment of his subscription is "property actually received," not decided.—*Richardson vs. Chicago P. & P. Co.* (Cal. Dec. 19, 1900), 63 Pac. Rep. 74, 77.

12. **FICTITIOUS INDEBTEDNESS.**—Indebtedness for money loaned, money paid, property purchased or labor performed in ordinary course of corporation's authorized business, and actually received and used in such business, is not fictitious.—*Stein vs. Howard*, 65 Cal. 616, 618, 4 Pac. Rep. 662; *Underhill vs. Santa Barbara L. B. & I. Co.*, 93 Cal. 300, 308, 23 Pac. Rep. 1049.

See pars. 4, 5 this note.

13. **Actual need of money.**—Where corporation has actual need of money for purposes of its business, and stock is proposed to be sold at actual market value of stock of company, and to be sold only in such quantities as may produce requisite funds, increased issue is not fictitious.—*Stein vs. Howard*, 65 Cal. 616, 618, 4 Pac. Rep. 662. See *Elyton Land Co. vs. Birmingham Warehouse & El. Co.*, 92 Ala. 407, 420, 25 Am. St. Rep. 65, 9 So. Rep. 129, 12 L. R. A. 307; *Handley vs. Stutz*, 139 U. S. 417, 435, bk. 35 L. ed. 227, 11 Sup. Ct. Rep. 530; *Atlantic Trust Co. vs. Woodbridge Can. & Irr. Co.*, 79 Fed. Rep. 842, 846, 847.

14. **Colorable purchase of property.**—Corporation will not be allowed to effect, under guise of purchase of property, fictitious increase of stock.—*Ewing vs. Oroville Min. Co.*, 56 Cal. 649, 652.

15. **INCREASE OF STOCK.**—Certificate of stock issued on credit is void under this section.—*Jefferson vs. Hewitt*, 103 Cal. 624, 630, 27 Pac. Rep. 678.

See par. 11 this note.

16. **Directors have no power to increase capital stock unless so expressed in charter.**—*Chicago City R. Co. vs. Allerton*, 85 U. S. 233, bk. 21 L. ed. 902.

17. **Same—Charter providing that capital stock may be increased is an authority**

for stockholders to make such increase, and does not confer any power on directors to do so.—*Chicago City R. Co. vs. Allerton*, 85 U. S. 233, bk. 21 L. ed. 902.

18. **Effect of unauthorized increase.**—Attempt to increase stock of company beyond limit fixed by its charter is ultra vires and stock itself is void.—*Scovill vs. Thayer*, 105 U. S. 148, bk. 26 L. ed. 968.

19. **Estoppel to question validity of increase.**—Stockholders who assent to increase of stock and to its free distribution among themselves as fully paid stock cannot question its validity.—*Handley vs. Stutz*, 139 U. S. 417, 423, 426, 428, bk. 35 L. ed. 227, 11 Sup. Ct. Rep. 530; *Herhold vs. Upton*, 93 U. S. 233, bk. 23 L. ed. 892.

20. **Only state can question legality of increase.**—*Pullman vs. Upton*, 96 U. S. 328, 329, bk. 24 L. ed. 818.

21. **Statute authorizing after charter granted.**—Authority to increase capital stock may be conferred by statute passed subsequent to charter, but such law should be regularly accepted by stockholders.—*Chicago City R. Co. vs. Allerton*, 85 U. S. 233, bk. 21 L. ed. 902.

Limitations on power to increase capital stock.—See ante § 309 and note.

22. **Stock given to stockholders to equalize prices.**—Where certain stockholders purchased and paid for stock at fifty cents per share and price was reduced to twenty-five cents per share, and additional shares were to be issued to those who had purchased at fifty cents in order to equalize prices so that their stock should cost no more than that to be purchased at reduced price, the issue is in violation of provision that no corporation shall issue stock except for money paid, labor done, or property actually received.—*Kellerman vs. Maier*, 116 Cal. 416, 424, 48 Pac. Rep. 377.

23. **Value of property "actually received."**—It seems that a corporation cannot increase its stock to unreasonable amount beyond value of property "actually received."—*Ewing vs. Oroville Min. Co.*, 56 Cal. 649, 652.

24. **IMPLIED POWER TO CHANGE AMOUNT OF CAPITAL STOCK** as prescribed in its charter does not reside in corporation, and all attempts to do so are void.—*Scovill vs. Thayer*, 105 U. S. 143, 148, bk. 26 L. ed. 968.

25. **PROXIES.**—Stockholders may be represented by proxies at meetings to increase stock or create bonded indebtedness.—*Market St. R. Co. vs. Hellman*, 109 Cal. 571, 597, 42 Pac. Rep. 225.

See ante § 312 and note.

26. **RAILROAD CORPORATIONS.**—This section applies to railroad corporations and its restriction on provisions of § 456.—*Boyd vs. Heron*, 125 Cal. 453, 454, 455, 58 Pac. Rep. 64; *Market St. R. Co. vs. Hellman*, 109 Cal. 571, 594, 42 Pac. Rep. 225.

See post § 456 and note.

27. **REDUCTION OF CAPITAL STOCK.**—Corporation's purchase of its own stock will not reduce number of shares which it was authorized to issue by its articles of incorpora-

tion.—Bank of San Luis Obispo vs. Wickersham, 99 Cal. 655, 661, 34 Pac. Rep. 444.

Limitations on power to reduce capital stock, see also ante § 309 and note.

§ 360. CORPORATIONS MAY ACQUIRE REAL PROPERTY, AND HOW MUCH. No corporation shall acquire or hold any more real property than may be reasonably necessary [1] for the transaction of its business, or [2] the construction of its works, [3] except as otherwise specially provided. A corporation may acquire real property, as provided in title seven, part three, of the Code of Civil Procedure, when needed for any of the uses and purposes mentioned in said title. By a unanimous vote of all the directors at any regular meeting, any corporation existing, or hereafter to be formed under the laws of this state, may [1] acquire and hold the land and building on and in which its business is carried on, and may [2] improve the same to any extent required for the convenient transaction of its business.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 208; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 351, held unconstitutional, see history, § 4 ante; amendment re-enacted March 22, 1905, Stats. and Amdts. 1905, c. DLXXXVI, p. 774.

1. Acquisition of property in collecting debts.
2. Banking corporation—Land for protection against fire.
3. Common law limits capacity to acquire land.
4. Conversion of land into money—Evasion of rule.
5. Distinction between power to take and power to hold.
6. Equitable interest cannot be acquired.
7. Estate which corporation may take is fee.
8. Executory contract voidable.
9. Foreign corporations—Are governed by statute.
10. Same—Law of state where land located governs.
11. Heirs may attack devise where corporation incompetent to take.
12. Insurance companies—Power to hold land.
13. Mining corporation may acquire land.
14. Mortmain—Statute of, not in force.
15. Pleading—Ultra vires must be alleged.
16. Presumption as to power to hold land.
17. Quieting title—Decree regardless of quantity.
18. Record on appeal—Ultra vires not apparent.
19. Rescission not decreed in favor of grantor of corporation.
20. Specific performance decreed regardless of quantity.
21. State alone can object to corporation holding land.
22. Same—In action by corporation for price question not considered.
23. Same—In action to declare trust rule applied.
24. Same—In ejectment rule applied.
25. Same—Foreign corporation within rule.
26. Same—Pre-emptor of land within rule.
27. Same—Purchaser from corporation within rule.
28. Same—United States cannot object.
- 29, 30. Stockholder entitled to relief.
31. Trespasser not protected.
32. Turnpike company—Power to hold land.

1. ACQUISITION OF PROPERTY IN COLLECTION OR ENFORCEMENT OF OBLIGA-

TION.—Corporation organized for special purposes, specified in articles of incorporation, may, in transacting such business, necessarily come into ownership of property of a class not within objects for which it was incorporated. Collection or enforcement of obligations due corporation may necessarily, in course of transaction of its business, bring it into ownership of property the acquirement of which is not within special object and purpose for which the corporation was organized, as expressed in its articles of incorporation. But in such event title of corporation, as to such property, is not void, in favor of stranger, who undertakes unlawfully to assume and hold the property in question.—Butte Hardware Co. vs. Schwab, 13 Mont. 351, 34 Pac. Rep. 24, 28.

2. BANKING CORPORATION is authorized to purchase such land as may be requisite for its immediate accommodation in relation to convenient transaction of its business, and in determining what its convenient accommodation may require it is proper to look to those circumstances which may be necessary to guard against loss or destruction by fire; and consequently it would seem that it is permissible for such corporation to own reasonable quantity of vacant land around its banking house, and to locate such house on an acre lot.—Banks vs. Poltiaux, 3 Rand. (Va.) 136, 15 Am. Dec. 706.

3. COMMON LAW IMPOSES SIMILAR LIMITATIONS and will not permit corporation to hold real property for purposes wholly outside of and foreign to objects of its creation.—Page vs. Heineberg, 40 Vt. 81, 94 Am. Dec. 378.

4. CONVERSION OF LAND INTO MONEY.—Where corporation is prohibited from taking land by devise it is not prohibited from taking under will proceeds of land after it has been sold pursuant to directions in the will.—Downing vs. Marshall, 23 N. Y. 366, 391, 393, 80 Am. Dec. 290. See Anstice vs. Brown, 6 Paige Ch. (N. Y.) 448; Craig vs. Leslie, 16 U. S. (3 Wheat.) 562, bk. 4 L. ed. 460.

5. DISTINCTION BETWEEN POWER TO

TAKE AND POWER TO HOLD.—Where statute expressly prohibits corporations from holding real estate, the distinction has been drawn between power to take and power to hold, and while the prohibited persons cannot hold real estate, they may, by deed of conveyance, take and enjoy it until the sovereign power, by proper proceeding, enforces the law.—*Water-Supply & Storage Co. vs. Tenney*, 24 Colo. 344, 51 Pac. Rep. 505, 508, 509.

6. EQUITABLE INTEREST CANNOT BE ACQUIRED by corporation when it cannot hold in its own name.—See ante § 354 and note par. 37.

7. ESTATE WHICH CORPORATION MAY TAKE IS ENTIRE ESTATE as respects land which is necessary for its purposes; e. g. where railroad company acquires land it does not take determinable or shifting fee, dependent upon discontinuance or abandonment of the road, or change of its location.—*Page vs. Heineberg*, 40 Vt. 81, 94 Am. Dec. 378.

8. EXECUTORY CONTRACT TO CONVEY LAND TO CORPORATION, which land the corporation is without capacity to take, is voidable, and grantor is not estopped to set up want of corporate capacity (dictum).—*Long vs. Georgia P. R. Co.*, 91 Ala. 519, 24 Am. St. Rep. 931, 933, 8 So. Rep. 706.

9. FOREIGN CORPORATIONS—Are governed by statute.—“The spirit of act would seem to extend to all corporations; and probably courts of this state would, in proper case, hold that no corporation could legally acquire or hold more land than necessary for business and purposes of the corporation.”—*Whitman G. & S. Min. Co. vs. Baker*, 3 Nev. 386, 390.

10. Law of state in which land is acquired governs.—Power and right of foreign corporation to hold and convey property is not to be determined under laws of home government under which they are organized, but it is to be determined by laws of government in which they are doing business, and in which they acquire the property.—*Tarpey vs. Deseret Salt Co.*, 5 Utah 494, 17 Pac. Rep. 631, 634.

11. HEIRS MAY ATTACK DEVISE to corporation on ground that it is not competent to take property devised.—*Downing vs. Marshall*, 23 N. Y. 366, 382, 383, 80 Am. Dec. 290.

12. INSURANCE COMPANIES—POWER TO HOLD LAND.—See post § 415 and note.

13. MINING CORPORATION REQUIRES LAND, and consequently a deed to a mining corporation is not void on its face.—*Whitman G. & S. Min. Co. vs. Baker*, 3 Nev. 386, 391.

14. MORTMAIN—STATUTE OF NOT IN FORCE unless it has been expressly adopted.—*Downing vs. Marshall*, 23 N. Y. 366, 392, 80 Am. Dec. 290; *In re McGraw's Estate*, 111 N. Y. 66, 19 N. E. Rep. 283, 2 L. R. A. 387; *Page vs. Heineberg*, 40 Vt. 81, 94 Am. Dec. 378.

15. PLEADING—Ultra vires must be alleged.—In action by corporation to recover purchase money for land which it has sold, even if plea of ultra vires be available to defendant, it is incumbent upon the latter to

aver that the land was not such as the plaintiff could legally hold and control.—*Missouri Valley Land Co. vs. Bushnell*, 11 Neb. 192, 8 N. W. Rep. 389.

16. PRESUMPTION AS TO POWER TO HOLD LAND.—See ante § 354 and note par. 39.

17. QUIETING TITLE.—Decree in favor of corporation will be granted quieting its title to land, where it is otherwise entitled to such decree, without permitting defendant to assert that it is ultra vires for the corporation to acquire and hold land in question.—*Butte Hardware Co. vs. Schwab*, 13 Mont. 351, 34 Pac. Rep. 24.

18. RECORD ON APPEAL.—Where on appeal record does not show that there was anything in corporation's charter or business in which it was engaged or in law under which it was organized abridging its right to hold land, an objection that it had no right to purchase and hold land will not be considered.—*People vs. La Rue*, 67 Cal. 526, 531, 8 Pac. Rep. 84; *Stockton Sav. Bank vs. Staples*, 98 Cal. 189, 192, 32 Pac. Rep. 936.

19. RESCISSION WILL NOT BE DECREED IN FAVOR OF GRANTOR after contract has been fully executed on ground that corporation was without capacity to take the land.—*Long vs. Georgia P. R. Co.*, 91 Ala. 519, 24 Am. St. Rep. 931, 933, 8 So. Rep. 706.

20. SPECIFIC PERFORMANCE MAY BE DECREED IN FAVOR OF CORPORATION on contract to convey, and in action for such relief it is no defense that the land is not owned by the corporation, or that it is in excess of its needs.—*Banks vs. Poitiaux*, 3 Rand. (Va.) 136, 15 Am. Dec. 706.

21. STATE ALONE CAN OBJECT TO CORPORATION HOLDING LAND.—Question whether corporation, having capacity to purchase and hold real estate for certain defined purposes, or in certain quantities, has taken title to real estate for purposes not authorized by law, or in excess of quantity permitted by its charter, concerns only the state within whose limits the property is situated, and it cannot be raised collaterally by private persons, unless there be something in statute expressly or by necessary implication authorizing them to do so.—*Natoma W. & Min. Co. vs. Clarkin*, 14 Cal. 544, 552. See *California St. Tel. Co. vs. Alta Tel. Co.*, 22 Cal. 398, 430. *Ala. Long vs. Georgia P. R. Co.*, 91 Ala. 519, 522, 24 Am. St. Rep. 931, 933, 8 So. Rep. 706. *Colo. Water-Supply & Storage Co. vs. Tenney*, 24 Colo. 344, 355, 51 Pac. Rep. 505. *Mont. Butte Hardware Co. vs. Cobban*, 13 Mont. 351, 361, sub nom. *Butte Hardware Co. vs. Schwab*, 34 Pac. Rep. 24. *Neb. Missouri Valley Land Co. vs. Bushnell*, 11 Neb. 192, 195, 8 N. W. Rep. 389, 390. *Nev. Whitman G. & S. Min. Co. vs. Baker*, 3 Nev. 386, 391. *N. Y. In re McGraw's Estate*, 111 N. Y. 66, 103, 19 N. E. Rep. 283, 2 L. R. A. 387; *Lancaster vs. Amsterdam Imp. Co.*, 140 N. Y. 576, 586, 35 N. E. Rep. 964, 24 L. R. A. 322. *Utah. Tarpey vs. Deseret Salt Co.*, 5 Utah 494, 502, 17 Pac. Rep. 631. *Va. Banks vs. Poitiaux*, 3 Rand. 136, 15 Am. Dec. 706. *Fed. Union Nat. Bank of St. Louis vs. Matthews*, 98

U. S. 621, 628, bk. 25 L. ed. 188; *Cowell vs. Colorado Springs Co.*, 100 U. S. 55, bk. 25 L. ed. 547; *Jones vs. Habersham*, 107 U. S. 174, 188, bk. 27 L. ed. 401, 2 Sup. Ct. Rep. 236; *Fritts vs. Palmer*, 132 U. S. 282, 293, bk. 33 L. ed. 317, 10 Sup. Ct. Rep. 93; *Hughes vs. Northern Pac. R. Co.*, 18 Fed. Rep. 106, 118, 9 Sawy. C. C. 318; *Southern Pac. R. Co. vs. Orton*, 32 Fed. Rep. 457, 470, 471, 6 Sawy. C. C. 157 (case arising in California); *Reorganized Church L. D. S. vs. Church of Christ*, 60 Fed. Rep. 937, 942, 943; *Oregon & C. R. Co. vs. United States*, 67 Fed. Rep. 650, 658; *Rogers vs. Nashville C. & St. L. R. Co.*, 91 Fed. Rep. 299, 316, 317.

22. In action by corporation for price of land which it has sold, defendant cannot set up plaintiff's want of authority to take land which it has sold to defendant.—*Missouri Valley Land Co. vs. Bushnell*, 11 Neb. 192, 3 N. W. Rep. 389.

23. In action to declare trust question cannot be collaterally raised. — *Reorganized Church L. D. S. vs. Church of Christ*, 60 Fed. Rep. 937, 942, 943.

24. In ejectment by corporation no inquiry will be permitted as to necessity of property for purposes of plaintiff's incorporation, and its title does not rest upon existence of such necessity.—*Natoma Water & Min. Co. vs. Clarkin*, 14 Cal. 544, 552. See *Utah. Tarpey vs. Deseret Salt Co.*, 5 Utah 494, 17 Pac. Rep. 631. *Vt. Page vs. Heineberg*, 40 Vt. 81, 94 Am. Dec. 378. *Va. Banks vs. Poltiaux*, 3 Rand. 136, 15 Am. Dec. 706. *Fed. Cowell vs. Colorado Springs Co.*, 100 U. S. 55, bk. 25 L. ed. 547; *Southern Pac. R. Co. vs. Orton*, 32 Fed. Rep. 457, 470, 471, 6 Sawy. C. C. 157 (case arising in California).

25. Foreign corporations within rule, and where by statute they are authorized to acquire such real property within state as may be necessary for their corporate purposes the state, as to which such corporation is a foreign corporation, alone can raise question whether corporation has acquired more land than is

necessary.—*Lancaster vs. Amsterdam Imp. Co.*, 140 N. Y. 576, 35 N. E. Rep. 964, 24 L. R. A. 322; *Tarpey vs. Deseret Salt Co.*, 5 Utah 494, 17 Pac. Rep. 631.

26. Pre-emptor of land as public land, when sued in ejectment by corporation, cannot set up defense that the land is not needed by the corporation.—*Southern Pac. R. Co. vs. Orton*, 32 Fed. Rep. 457, 470, 471, 6 Sawy. C. C. 157 (case arising in California).

27. Purchaser of land from corporation cannot raise question how far it may have exceeded its authority in acquiring land.—*Lancaster vs. Amsterdam Imp. Co.*, 140 N. Y. 576, 35 N. E. Rep. 964, 24 L. R. A. 322.

28. United States cannot raise question in suit to enjoin corporation from asserting title to land, where question is one which merely concerns state.—See *Oregon & C. R. Co. vs. United States*, 67 Fed. Rep. 650, 658.

29. STOCKHOLDER MAY CONTROL ACTS OF CORPORATION it would seem; and upon proper proceedings instituted for that purpose may obtain such relief as facts and his legal rights as stockholder may warrant.—*Page vs. Heineberg*, 40 Vt. 81, 94 Am. Dec. 378.

30. Compare: *Rogers vs. Nashville C. & St. L. R. Co.*, 91 Fed. Rep. 299, 316, 317 (holding that general power to purchase the railroads of other companies is conferred on a railroad company, and where railroad company has purchased a railroad at judicial sale, and title has actually vested in purchaser, a stockholder of purchasing railroad cannot maintain bill in equity, and title is good until the state shall institute proceedings).

31. Trespasser is not protected in entering on any part of realty held by a corporation, by reason of fact that it holds more than is reasonably necessary for transaction of its business.—*Whitman G. & S. Min. Co. vs. Baker*, 3 Nev. 386, 392.

32. Turnpike companies—Power to hold land.—See ante § 354 and note para. 62, 63.

§ 361. CONSOLIDATION OF MINING COMPANIES OWNING ADJOINING CLAIMS (repealed).

History: Enacted March 21, 1872; amended March 20, 1876, Code Amdts. 1875-6, p. 75; repealed by Code Commission, Act March 18, 1901, Stats. and Amdts. 1900-1, p. 351, held unconstitutional, see history, § 4 ante; re-repealed March 22, 1905, Stats. and Amdts. 1905, c. DLXXVI, p. 775.

§ 361a. TRANSFER OF FRANCHISE OF CORPORATION NOT VALID WITHOUT CONSENT OF STOCKHOLDERS. No sale, lease, assignment, transfer or conveyance of the business, franchise and property, as a whole, of any corporation now existing, or hereafter to be formed in this state, shall be valid without the consent of stockholders thereof, holding of record at least two thirds of the issued capital stock of such corporation; such consent to be either expressed in [1] writing, executed and acknowledged by such stockholders, and attached to such sale, lease, assignment, transfer or conveyance, or [2] by a vote at a stockholders' meeting of such corporation called for that purpose; but with such assent, so expressed, such sale, lease, assignment, transfer or conveyance shall be valid; provided, however, that nothing herein contained shall be construed to limit

the power of the directors of such corporation to make sales, leases, assignments, transfers or conveyances of corporate property other than those hereinabove set forth.

History: Enacted March 24, 1903, Stats. and Amdts. 1903, p. 396.

§ 362. AMENDMENT OF ARTICLES OR CERTIFICATE OF INCORPORATION—FILING, PENALTY. Any corporation may amend its articles of incorporation [1] by a majority vote of its board of directors or trustees, and [2] by a vote or written assent of the stockholders representing at least two thirds of the subscribed capital stock of such corporation, or [3] the written assent of the majority of the members if there is no capital stock; and a copy of the said articles of incorporation, as thus amended, duly certified to be correct by the president and secretary of the board of directors or trustees of such corporation, [4] shall be filed in the office where the original articles of incorporation are filed, and [5] a certified copy thereof, duly certified by such county clerk, [shall be filed] in the office of the secretary of state.

A copy of such articles of incorporation, so amended, duly certified by the secretary of state, must be filed in the office of the county clerk of every county in which such corporation has or holds property, except only the county in which the original amended articles of incorporation have been filed. Any corporation which shall amend its articles of incorporation and shall fail to file copies of its amended articles, as required by the preceding sentence, shall be subject to the penalties and liabilities provided in section two hundred and ninety-nine for a failure of corporations to file copies of their articles of incorporation in the offices of the county clerks of the counties in which they shall purchase, hold, or locate property, and from the time of so filing such copy of the amended articles of incorporation, such corporation shall have the same powers, and the stockholders thereof shall thereafter be subject to the same liabilities, as if such amendment had been embraced in the original articles of incorporation.

Such original and amended articles of incorporation shall together contain all the matters and things required by the laws under which the original articles of incorporation were executed and filed. Nothing contained in this section must be construed to cure or amend any defect existing in the original articles of incorporation heretofore filed, in that such articles did not set forth the matters required to make the same valid at the time of filing.

If the assent of two thirds of said stockholders, or of the majority of members where there is no capital stock, to such amendment has not been obtained, a notice of the intention to make such amendment must first be advertised for thirty days in some newspaper published in the town, city, county, or city and county in which the principal place of business of the corporation is located, before the filing of the proposed amendment. Nothing in this section shall be construed to authorize any corporation to increase or diminish its capital stock, change its name, extend its corporate existence, or increase or diminish the number of its directors, without complying with the special provisions of this code applicable thereto.

History: Enacted March 21, 1872; amended March 12, 1885, Stats. and Amdts. 1885, p. 91; March 11, 1893, Stats. and Amdts. 1893, p. 131; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 351, held unconstitutional, see history, § 4 ante; March 25, 1903, Stats. and Amdts. 1903, p. 411; March 22, 1905, c. DLXXVI, p. 775.

1. Applied, cited, construed, referred to, etc.
2. Change in constitution or by-laws not amended.
3. Pleading non-compliance with section.

1. **Applied, cited, construed, referred to, etc., in:** *Bowie vs. Grand Lodge, L. O. L. W.*, 99 Cal. 392, 396, 34 Pac. Rep. 103 (construed); *McDermont vs. Anaheim U. W. Co.*, 124 Cal. 112, 115, 56 Pac. Rep. 779 (applied).

2. **Change in constitution or by-laws is not amendment of certificate of incorporation or**

articles of association within meaning of this section.—*Bowie vs. Grand Lodge, L. O. L. W.*, 99 Cal. 392, 396, 34 Pac. Rep. 103.

3. **Pleading.**—Complaint following the language of this section, and showing that statute was not complied with, is sufficient on general demurrer in action by stockholder to enjoin corporation from proceeding under amendment which was not properly adopted.—*McDermont vs. Anaheim U. W. Co.*, 124 Cal. 112, 115, 56 Pac. Rep. 779.

§ 363. CORPORATIONS TO OWN THEIR OWN LOTS AND BUILDINGS (repealed).

History: Enacted March 5, 1889, Stats. and Amdts. 1889, p. 67. At the same session another section numbered § 363 was enacted by the same legislature on March 19 (Stats. and Amdts. 1889, p. 332). The Act of March 5 was repealed by Code Commission, Act of March 16, 1901, Stats. and Amdts. 1900-1, p. 352, held unconstitutional, see history, § 4 ante, and the act was re-repealed March 22, 1905, Stats. and Amdts. 1905, c. DLXXVI, p. 776.

See ante § 360 and note.

§ 363 [a]. CORRECTION OF ERRONEOUS FILING OF INCORPORATION—PETITION, NATURE OF—ACTION OF COURT. When articles of incorporation have been prepared, subscribed, and executed in accordance with the provisions of sections two hundred and ninety and two hundred and ninety-two of the civil code, and such original articles filed by error or inadvertence with the clerk of a county other than that named in the articles of incorporation as the county in which the principal place of business is to be transacted, and the secretary of state shall have issued a certificate of incorporation based on a certified copy of such original articles of incorporation, any stockholder or director of such corporation may petition the superior court of the county in which said original articles of incorporation were filed for an order to withdraw such original articles of incorporation, and file in place thereof a certified copy of the copy thereof on file in the office of the secretary of state. Such petition must [1] be verified, and must [2] state clearly the facts, showing that such articles of incorporation were filed by inadvertence and mistake; and [3] notice of the hearing of said petition must be given for at least ten days before the day of hearing, [4] by publication in a newspaper published in the county where such petition is filed.

[Hearing and proceedings on order.] Upon the day set for hearing the petition the superior court may [1] grant an order allowing such original articles of incorporation to be withdrawn, and [2] a certified copy of the copy in the office of the secretary of state in the place thereof filed; and [3] the original articles of incorporation must be filed within ten days thereafter in the county in which the principal place of [where] business is to be transacted, as stated in such articles of incorporation, and [4] a certified copy of the order allowing such action must be filed with the certified copy in the office of the secretary of state, after which said corporation shall be entitled to all rights and privileges of a private corporation, and the title to any property it may have previously acquired shall not be affected by reason of the failure to file the original articles of incorporation in the first instance.

History: Enacted March 19, 1889, Stats. and Amdts. 1889, p. 332. In force March 19, 1889.

§ 364. CORPORATIONS MAY TRANSFER FOREIGN CONCESSIONS. Any corporation of this state owning grants, concessions, franchises, and properties, or any thereof, in any foreign country, may sell and convey the same to the government of such foreign country, or to any person or persons, or any corporation or corporations, or association or associations, created by or existing under the laws of this or any other state or the United States, or any foreign government; provided, however, that the powers hereby granted shall only be exercised by a majority of the entire board of directors of such corporation of this state, with the concurrence in writing of the holders of two thirds in amount of the capital stock thereof.

History: Became law, under unconstitutional provision, without governor's approval, March 13, 1899.

ARTICLE II.

RECORDS.

- § 377. Records—Of what, and how kept. [Record must embrace what.] § 378. Other records to be kept by corporations for profit, and others.

§ 377. RECORDS—OF WHAT, AND HOW KEPT. All corporations for profit are required to keep a record of all their business transactions; a journal of all meetings of their directors, members, or stockholders, with the [1] time and place of holding the same, [2] whether regular or special, and if special, [3] its object, [4] how authorized, and [5] the notice thereof given. The record must embrace [1] every act done or ordered to be done; [2] who were present, and [3] who absent; and, if requested by any director, member, or stockholder, [4] the time shall be noted when he entered the meeting or obtained leave of absence therefrom. On a similar request, [5] the ayes and noes must be taken on any proposition, and a record thereof made. On similar request, [6] the protest of any director, member, or stockholder, to any action or proposed action, must be entered in full—all such records to be open to the inspection of any director, member, stockholder, or creditor of the corporation.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
- 2, 3. All transactions must be recorded—Resolutions.
4. Evidence—Books of corporation admissible.
- 5-7. Same—Parol evidence—Non-entry—Mistakes.
- 8-12. Inspection of books—Motives immaterial—Theory of statute.
13. Same—Remedies—Corporation not dissolved.
- 14, 15. Same—Mandamus—Complaint.
16. Stock-book—Name immaterial.
17. Subscription-book not required.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Wolford vs. Lyon G. G. M. Co.*, 63 Cal. 488, 484 (miscited); *Burham vs. San Francisco F. M. Co.*, 76 Cal. 24, 25, 26, 17 Pac. Rep. 989 (applied); *Alta S. M. Co. vs. Alta P. M. Co.*, 78 Cal. 629, 632, 21 Pac. Rep. 373 (referred to); *Salfield vs. Sutter Co. L. I. & R. Co.*, 94 Cal. 546, 549, 29 Pac. Rep. 1105

(applied); *Johnson vs. Langdon*, 135 Cal. 623, 625, 87 Am. St. Rep. 156, 67 Pac. Rep. 1050 (construed and applied); *Middleton vs. Arastaville Min. Co.*, 146 Cal. —, 79 Pac. Rep. 889, 890 (construed).

2. ALL CORPORATE TRANSACTIONS should be recorded.—*Alta S. M. Co. vs. Alta P. M. Co.*, 78 Cal. 629, 632, 633, 21 Pac. Rep. 373.

3. Resolutions passed by board of directors must be recorded.—*Salfield vs. Sutter Co. L. I. & R. Co.*, 94 Cal. 546, 549, 29 Pac. Rep. 1105.

4.—EVIDENCE.—Books of corporation competent evidence to prove number of shares which had been subscribed for and issued at time an alleged indebtedness arose, and who were stockholders.—*Evans vs. Bailey*, 66 Cal. 112, 118, 4 Pac. Rep. 1089; *Knowles vs. Sandercock*, 107 Cal. 629, 636, 40 Pac. Rep. 1047.

5. Parol evidence.—If directors of corporation for any reason deemed sufficient by them postpone formal entry on record of acts done by them, such acts may be proved by extrinsic

evidence.—*Bay View H. Assoc. vs. Williams*, 50 Cal. 353, 357.

6. *Same*—*Erroneous entry*.—Parol evidence admissible to show that resolution of board of directors spread upon minutes of its proceedings does not correctly express proposition voted on by such directors.—*Gilson Q. M. Co. vs. Gilson*, 51 Cal. 341, 344.

7. *Same*—*Mistake of secretary*, or his oversight in neglecting to enter an order of directors, will render parol evidence admissible.—*Bay View H. Assoc.*, 50 Cal. 353, 357.

8. **INSPECTION OF BOOKS BY STOCKHOLDER.**—It is right of stockholder to inspect books and records of corporation, and it is duty of secretary of corporation to allow inspection.—*Johnson vs. Langdon*, 135 Cal. 624, 625, 87 Am. St. Rep. 156, 67 Pac. Rep. 1050.

9. Common law gives stockholders right to examine, at reasonable times, books and records of corporation.—*Johnson vs. Langdon*, 135 Cal. 624, 626, 87 Am. St. Rep. 156, 67 Pac. Rep. 1050.

10. *Damages inadequate*.—Law does not contemplate that stockholder's right to inspect records of corporation may be defeated by showing that he could maintain an action for damages.—*Johnson vs. Langdon*, 135 Cal. 624, 626, 87 Am. St. Rep. 156, 67 Pac. Rep. 1050.

11. **PRINCIPLE UPON WHICH RIGHT FOUNDED.**—Statute founded upon principle that stockholders have right to be fully informed as to conditions of corporation, manner in which its affairs are conducted, and how capital to which they have contributed is employed and managed.—*Johnson vs. Langdon*, 135 Cal. 624, 627, 87 Am. St. Rep. 156, 67 Pac. Rep. 1050.

§ 378. **OTHER RECORDS TO BE KEPT BY CORPORATIONS FOR PROFIT, AND OTHERS.** In addition to the records required to be kept by the preceding section, corporations for profit must keep a book, to be known as the "Stock and Transfer Book," in which must be kept [1] a record of all stock; [2] the names of the stockholders or members, alphabetically arranged; [3] instalments paid or unpaid; [4] assessments levied and paid or unpaid; [5] a statement of every alienation, sale, or transfer of stock made, the date thereof, and by and to whom; and [6] all such other records as the by-laws prescribe. Corporations for religious and benevolent purposes must provide in their by-laws for such records to be kept as may be necessary. Such stock and transfer book must be kept open to the inspection of any stockholder, member, or creditor.

History: Enacted March 21, 1872.

1. *Applied, cited, construed, referred to*, etc., in: *Pacific Fruit Co. vs. Coon*, 107 Cal. 447, 453, 40 Pac. Rep. 542 (referred to); *Knowles vs. Sandercock*, 107 Cal. 629, 636, 40 Pac. Rep. 1047 (construed and applied); *Middleton vs. Arastraville Min. Co.*, 146 Cal. —, 79 Pac. Rep. 889, 890 (referred to).

12. *Motives of stockholder immaterial*.—It is no defense to suit to enforce stockholder's right to inspect books and records to allege that object and purposes of such inspection are improper, and that petitioner desires to injure business of corporation.—*Johnson vs. Langdon*, 135 Cal. 624, 626, 87 Am. St. Rep. 156, 67 Pac. Rep. 1050.

See 26 Am. & Eng. Encyc. of Law (2d ed.) 951, 952.

13. **Remedies—Corporation not dissolved.**—Refusal of secretary of corporation to show stockholder vouchers and bills paid or payable, so that he might learn and know financial condition of company, is no ground for dissolving corporation.—*Burham vs. San Francisco F. M. Co.*, 76 Cal. 24, 25, 26, 17 Pac. Rep. 939.

14. *Mandamus is appropriate remedy* of stockholder in case of refusal of statutory right to inspect corporate books and records.—*Johnson vs. Langdon*, 135 Cal. 624, 626, 87 Am. St. Rep. 156, 67 Pac. Rep. 1050.

15. *Petition for mandamus to compel inspection need not aver or show purposes or object of inspection*.—*Johnson vs. Langdon*, 135 Cal. 624, 626, 87 Am. St. Rep. 156, 67 Pac. Rep. 1050.

16. **STOCK AND TRANSFER BOOK.**—Book designed for stock and transfer book, corresponding generally with the requirements of the code, is sufficient, although book is not named as code requires.—*Evans vs. Bailey*, 66 Cal. 112, 113, 4 Pac. Rep. 1089.

17. **SUBSCRIPTION-BOOK.**—Code does not require that there shall be a subscription-book.—*Evans vs. Bailey*, 66 Cal. 112, 113, 4 Pac. Rep. 1089.

2. *Stock outstanding is ascertainable from "stock and transfer book" which corporation is required to keep*.—*Middleton vs. Arastraville Min. Co.*, 146 Cal. —, 79 Pac. Rep. 889, 890.

3. *Stockholders' names and the amount of stock held by each*.—*Middleton vs. Arastraville Min. Co.* supra.

ARTICLE III.

EXAMINATION OF CORPORATIONS, ETC.

§ 382. Examination into affairs of corporation,
how made by officers of state.

§ 383. Examination made by legislature.
§ 384. Chapter and article may be repealed.

[This article was taken from the Statutes of 1850, §§ 29, 30, p. 350.]

§ 382. EXAMINATION INTO AFFAIRS OF CORPORATION, HOW MADE BY OFFICERS OF STATE. The attorney-general or district attorney, whenever and as often as required by the governor, must examine into the affairs and condition of any corporation in this state, and report such examination, in writing, together with a detailed statement of facts, to the governor, who must lay the same before the legislature; and for that purpose the attorney-general or district attorney may administer all necessary oaths to the directors and officers of any corporation, and may examine them on oath in relation to the affairs and condition thereof, and may examine the books, papers, and documents belonging to such corporation, or appertaining to its affairs and condition.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Attorney-general must obtain order of court.
3. Legislature has power of visitation.
4. Visitation—Inherent power of state.
5. Writs—Injunction, mandamus, quo warranto.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc.,** in: *People vs. Hibernia S. & L. Soc.*, 72 Cal. 21, 23, 13 Pac. Rep. 43 (referred to in discussion).

2. **ATTORNEY-GENERAL MUST OBTAIN ORDER OF COURT.**—For examination of corporate books and papers for purpose of discovering property which has escheated, or should escheat, to state, see Pol. Code § 474, which does not authorize attorney-general to examine books and papers of corporation, except under order and supervision of court.—*People vs. Hibernia S. & L. Soc.*, 72 Cal. 21, 23, 13 Pac. Rep. 43; *People vs. German S. & L. Soc.*, 72 Cal. 23, 13 Pac. Rep. 51.

3. **LEGISLATURE HAS POWER OF VISITATION.**—In this country legislature is visitor of all corporations founded by it for public purposes.—*Trustees of Dartmouth College vs. Woodworth*, 17 U. S. (4 Wheat.) 518, bk. 4 L. ed. 629.

4. **VISITATION IN GENERAL.**—Sovereign power has at all times right to inquire into matter of user of a franchise or title by which it is held.—*People vs. Stanford*, 77 Cal. 360, 373, 18 Pac. Rep. 85, 19 Id. 693, 2 L. R. A. 92. See *State vs. Georgia Medical Soc.*, 38 Ga. 608, 95 Am. Dec. 408. See also 7 Am. & Eng. Encyc. of L. (2d ed.) 855-859.

5. **WRITS—Injunction, mandamus, and quo warranto.**—Visitorial power of state over corporations created by legislature, will always be exercised in proper cases through the medium of courts as to corporations within limits of their lawful powers and to correct and punish abuses of their franchises. To this end court will issue writs of mandamus, quo warranto, or injunction, as exigencies of particular case may require; or inquire into grievance on complaint, and if same be found to exist, will apply such remedy as law prescribes. Every corporation in state, private or public, civil or municipal, is subject to this superintending control, although, in its exercise, different rules may be applied to different classes of corporations.—*State ex rel. Cuppel vs. Chamber of Commerce Milwaukee*, 47 Wis. 670, 3 N. W. Rep. 760.

§ 383. EXAMINATION MADE BY THE LEGISLATURE. The legislature, or either branch thereof, may examine into the affairs and condition of any corporation in this state at all times; and, for that purpose, any committee appointed by the legislature, or either branch thereof, may administer all necessary oaths to the directors, officers, and stockholders of such corporation, and may examine them on oath in relation to the affairs and condition thereof; and may examine the safes, books, papers, and documents belonging to such corporation, or pertaining to its affairs and condition, and compel the production of all keys, books, papers, and documents by summary process, to be issued on application to any

court of record or any judge thereof, under such rules and regulations as the court may prescribe.

History: Enacted March 21, 1872.

§ 384. CHAPTER AND ARTICLE MAY BE REPEALED. The legislature may at any time amend or repeal this part, or any title, chapter, article, or section thereof, and dissolve all corporations created thereunder; but such amendment or repeal does not, nor does the dissolution of any such corporation, take away or impair any remedy given against any such corporation, its stockholders or officers, for any liability which has been previously incurred.

History: Enacted March 21, 1872; repealed by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 352, held unconstitutional, see history, § 4 ante.

1. Consolidation may be authorized.
2. Constitution authorizes amendment and repeal of charters.
3. Contracts are not impaired.
4. Effect of repeal—All rights abrogated.

1. Consolidation may be authorized.—Legislature may amend statutes so as to authorize corporations, without consent of all stockholders, to consolidate.—Market St. R. Co. vs. Hellman, 109 Cal. 571, 585, 42 Pac. Rep. 225.

2. Constitution authorizes amendment and repeal.—Under Const. 1879, art. XII, § 1, legislature may by general laws provide for organization of corporations, and may repeal and amend and change such general laws at will.—Market St. R. Co. vs. Hellman, 109 Cal. 571, 584, 42 Pac. Rep. 225.

3. Implied assent of corporations.—Contracts of stockholders are made in view of existence of our constitutional provisions which enter into and form part of charter as effectually as do the statutes under which corporations are organized.—Market St. R. Co. vs. Hellman, 109 Cal. 571, 585, 42 Pac. Rep. 225.

4. Effect of repeal of charter.—Whatever force law may give to transactions into which corporation entered, and which were authorized by charter while in force, it can originate

no new transactions, dependent on power conferred by charter, after its repeal. If corporation be a bank, with power to loan money and to issue circulating notes, it can make no new loan nor issue any new notes designed to circulate as money. If essence of grant of charter be to operate a railroad, and to use streets of city for that purpose, it can no longer use streets of city, and no longer exercise franchise of running railroad in city. In short, whatever power is dependent solely upon grant of charter, and which could not be exercised by unincorporated private persons under general laws of state, is abrogated by repeal of law which granted these special rights. Personal and real property acquired by corporation during its lawful existence, rights of contract, or choses in action so acquired, and which do not, in their nature, depend upon general power conferred by charter, are not destroyed by such repeal, and courts may, if legislature does not provide some special remedy, enforce such rights by means within their power. The rights of shareholders of such corporation, to their interest in its property, are not annihilated by such repeal, and there must remain in courts power to protect such rights.—Greenwood vs. Union Freight R. Co., 105 U.S. 13, 19, 21, bk. 26 L. ed. 961.

ARTICLE IV.

JUDGMENT AGAINST AND SALE OF CORPORATE PROPERTY.

- § 388. Franchise sold under execution.
- § 389. Purchaser to transact business of corporation.
- § 390. Purchaser may recover penalties, etc.

- § 391. Liabilities same as before sale.
- § 392. Redemption.
- § 393. Sale, when made.

§ 388. FRANCHISE SOLD UNDER EXECUTION. For the satisfaction of any judgment against any person, company, or corporation having any franchise other than the franchise of being a corporation, such franchise, and all the rights and privileges thereof, may be levied upon and sold under execution, in the same manner, and with the same effect, as any other property.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 208; Feb. 23, 1897, Stats. and Amdts. 1897, p. 16; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 352, held unconstitutional, see history, § 4 ante; amendment re-enacted March 20, 1905, Stats. and Amdts. 1905, c. CCCXLVII, p. 409.

1. Applied, cited, construed, referred to, etc.
2. Character of franchise—Estate in land.
3. 4. Common law excludes franchises from execution sale.
5. Corporate and individual franchises distinguished.
6. Franchises—Personal property not.
7. Road is not franchise.
8. Wagon road may be sold under execution.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc.**, in: *Welsh vs. Plumas Co.*, 80 Cal. 338, 341, 22 Pac. Rep. 254 (applied); *Southern Pac. Co. vs. Burr*, 86 Cal. 279, 283, 24 Pac. Rep. 1032 (referred to); *Gregory vs. Blanchard*, 98 Cal. 311, 313, 33 Pac. Rep. 199 (construed and applied).

2. **CHARACTER OF FRANCHISE**.—A franchise has the legal character of an estate or property. An estate in a franchise and an estate in land rest upon the same principles.—*Oakland R. Co. vs. Oakland, B. & F. V. R. Co.*, 45 Cal. 365, 373, 13 Am. Rep. 181. See *Spring Valley Water Works vs. Schottler*, 62 Cal. 69, 110; 3 Kent's Com. 453.

3. **COMMON LAW DOES NOT PERMIT** sale of franchises under execution.—*Munroe vs. Thomas*, 5 Cal. 470, 471; *Thomas vs. Armstrong*, 7 Cal. 236, 237; *Hart vs. Burnett*, 15 Cal. 530, 591, 592; *Wood vs. Truckee Turnpike Co.*, 24 Cal. 474, 486, 487; *Gregory vs. Blanchard*, 98 Cal. 311, 313, 33 Pac. Rep. 199; *Risdon I. & L. Works vs. Citizens' Traction Co.*,

122 Cal. 94, 97, 68 Am. St. Rep. 25, 54 Pac. Rep. 529. See *Ammanck vs. New Alexandria & Pittsburg Trans. Co.*, 13 S. & R. (Pa.) 210, 15 Am. Dec. 593.

4. **Turnpike franchises** are not subject to levy and sale under execution.—*Hart vs. Burnett*, 15 Cal. 530, 591. See *Wood vs. Truckee Turnpike Co.*, 24 Cal. 474, 486, 487.

5. **CORPORATE AND INDIVIDUAL FRANCHISES DISTINGUISHED**.—This section, before it was amended, limited the power to sell franchises under execution to those owned by corporations, and did not authorize the sale of a franchise held by an individual.—*Gregory vs. Blanchard*, 98 Cal. 311, 313, 33 Pac. Rep. 199.

6. **FRANCHISES—What are**.—Cars, trucks, iron safes, and other movables belonging to street railroad corporation, are not franchises, and are subject to attachment.—*Risdon I. & L. Works vs. Citizens' Traction Co.*, 122 Cal. 94, 97, 68 Am. St. Rep. 25, 54 Pac. Rep. 529.

7. **"Road" does not include franchises**, and where road of turnpike company is sold under execution purchaser does not acquire the franchises of the corporation, "for franchises are principal things, and lie in grant as such."—*Wood vs. Truckee Turnpike Co.*, 24 Cal. 474, 487.

8. **Wagon road may be sold under execution with franchise appurtenant thereto**.—*Welsh vs. Plumas Co.*, 80 Cal. 338, 341, 22 Pac. Rep. 254.

§ 389. PURCHASER TO TRANSACT BUSINESS OF CORPORATION. The purchaser at the sale must receive a certificate of purchase of the franchise, and be immediately let into the possession of all property necessary for the exercise of the powers and the receipt of the proceeds thereof, and must thereafter conduct the business of such corporation, with all its powers and privileges, and subject to all its liabilities, until the redemption of the same, as hereinafter provided.

History: Enacted March 21, 1872.

§ 390. PURCHASER MAY RECOVER PENALTIES, ETC. The purchaser or his assignee is entitled to recover any penalties imposed by law and recoverable by the corporation for an injury to the franchise or property thereof, or for any damages or other cause, occurring during the time he holds the same, and may use the name of the corporation for the purpose of any action necessary to recover the same. A recovery for damages or any penalties thus had is a bar to any subsequent action by or on behalf of the corporation for the same.

History: Enacted March 21, 1872.

§ 391. LIABILITIES SAME AS BEFORE SALE. The person, company, or corporation whose franchise is sold, as in this article provided, in all other respects retains the same powers, is bound to the discharge of the same duties, and is liable to the same penalties and forfeitures, as before such sale.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 352, held unconstitutional, see history, § 4 ante; amendment re-enacted March 20, 1905, Stats. and Amdts. 1905, c. CCCXLVII, p. 409.

§ 392. REDEMPTION. Redemption from any such sale may be had as provided in the Code of Civil Procedure in the case of redemptions from sales of real estate on execution.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 352, held unconstitutional, see history, § 4 ante; amendment re-enacted March 20, 1905, Stats. and Amdts. 1905, c. CCCXLVII, p. 409.

§ 393. SALE, WHERE MADE. The sale of any franchise under execution must be made in the county in which the corporation has its principal place of business, or in which the property, or some portion thereof, is situated.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 209; by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900 1, p. 352, held unconstitutional, see history, § 4 ante; amendment re-enacted March 20, 1905, Stats. and Amdts. 1905, c. CCCXLVII, p. 409.

CHAPTER IV.

EXTENSION AND DISSOLUTION OF CORPORATIONS.

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| <p>§ 399. Proceedings on disincorporation (repealed).</p> <p>§ 400. Corporations, directors are trustees of creditors, when dissolved, except.</p> <p>§ 401. Extension of corporate existence, how made—Certificate and certified copy, filing of.</p> | <p>§ 402. How corporations may continue their existence (repealed).</p> <p>§ 403. Title I to apply to all corporations, with certain exceptions (repealed).</p> |
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§ 399. PROCEEDINGS ON DISINCORPORATION (repealed).

History: Enacted March 21, 1872; repealed by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 352, held unconstitutional, see history, § 4 ante; repeal re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXVIII, p. 563.

1. Applied, cited, construed, referred to, etc.
2. Cessation of business does not result in dissolution.
3. Procedure—Code Civil Procedure silent.
4. Statutory mode exclusive.
5. Surrender of franchise—Common law allows.
6. Voluntary dissolution permissible.

1. Applied, cited, construed, referred to, etc., in: *Havemeyer vs. Superior Court*, 84 Cal. 327, 365, 366, 367, 18 Am. St. Rep. 192, 24 Pac. Rep. 121, 10 L. R. A. 627 (referred to); *Yore vs. Superior Court of San Francisco*, 108 Cal. 431, 436, 41 Pac. Rep. 477 (referred to).

2. Cessation of business does not result in dissolution.—Corporation once formed and organized according to law, does not become dissolved and cease to exist merely because of failure to transact business. Its term of life is prescribed by law and only at instance of state can its existence in mean time be questioned.—*San Diego Gas Co. vs. Frame*, 137 Cal. 441, 445, 70 Pac. Rep. 295.

3. Procedure—Statute silent.—“It is rather singular that in turning to §§ 802 to 810 of the Code of Civ. Proc. we find no express provision about the dissolution of corporation or any mention of a corporation at all. However, it is provided that person usurping any fran-

chise may, in an action brought by attorney-general, be excluded from such franchise by judgment of the court; and it has been held that under this provision a corporation may be dissolved; but evidently it could be dissolved only by judgment excluding it from exercising franchise of being a corporation, and, in order to reach that result, there must be an averment of usurpation of franchise of being a corporation, and judgment excluding defendant from exercising said franchise, that is, from assuming to be a corporation.”—*Yore vs. Superior Court San Francisco*, 108 Cal. 431, 436, 41 Pac. Rep. 477.

4. Statutory mode exclusive.—Where statute prescribes particular mode for dissolving corporation, that mode must be pursued.—*People vs. President & Trustees College of Cal.*, 38 Cal. 166, 172, 173.

5. Surrender of franchise—Common law allows.—At common law both municipal and private corporations may dissolve by surrender of their franchise.—*People vs. President & Trustees College of Cal.*, 38 Cal. 166, 172.

6. Voluntary dissolution.—In this country private corporation may dissolve itself by its own assent.—*People vs. President and Trustees College of Cal.*, 38 Cal. 166, 172.

§ 400. CORPORATIONS, DIRECTORS TRUSTEES OF CREDITORS, WHEN DISSOLVED, EXCEPT. Unless other persons are appointed by the court, the directors or managers of the affairs of a corporation at the time of its dissolution are trustees of the creditors and stockholders or members of the corporation dissolved, and have full power to settle the affairs of the corporation.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 352, held unconstitutional, see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXVIII, p. 563.

1. **Applied**, cited, construed, referred to, etc.
- 2-4. **Property**—How disposed of on dissolution—Does not revert.
- 5, 6. **Receiver**—Court cannot appoint.
7. **Voluntary dissolution** provided for.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Havemeyer vs. Superior Court San Francisco*, 84 Cal. 327, 358 (referred to), 365 (cited), 366, 367 (construed), 369, 370 (referred to), 374 (construed with section 564 Code Civ. Proc.), 380 (referred to), 18 Am. St. Rep. 192, 24 Pac. Rep. 121, 10 L. R. A. 627; *People vs. Superior Court San Francisco*, 100 Cal. 105, 119, 34 Pac. Rep. 492 (referred to); *State I. & I. Co. vs. Superior Court San Francisco*, 101 Cal. 135, 147, 148, 35 Pac. Rep. 549 (construed and applied).

2. **PROPERTY**—How disposed of on dissolution.—When corporation ceases to exist for whatever cause, whether from lapse of time, voluntary dissolution, or judgment of forfeiture for neglect or abuse of powers, it necessarily results that the property is left to be disposed of according to law.—*Havemeyer vs. Superior Court San Francisco*, 84 Cal. 327, 362, 18 Am. St. Rep. 192, 24 Pac. Rep. 121, 10 L. R. A. 627.

3. **Common-law rule**.—When doctrine prevailed that such of corporate property as did not revert to its grantors was forfeited or escheated to crown, some officer exercising his general authority under common law or statutes, or invested with special authority for the purpose, was charged with duty of collecting assessment for benefit of king or his donee.—*Havemeyer vs. Superior Court San Francisco*, 84 Cal. 327, 362, 18 Am. St. Rep. 192;

24 Pac. Rep. 121, 10 L. R. A. 627. And see *Clark vs. San Francisco*, 53 Cal. 306, 311, 312.

4. **Modern rule** seems to be that upon dissolution of trading corporation its property neither reverts to its grantors nor escheats to state, but belongs, after payment of its debts, to those who were stockholders at date of dissolution, appointment of some officer with same or more minutely defined authority is recognized necessity.—*Havemeyer vs. Superior Court San Francisco*, 84 Cal. 327, 362, 18 Am. St. Rep. 192, 24 Pac. Rep. 121, 10 L. R. A. 627.

5. **RECEIVER MAY BE APPOINTED**.—In absence of statute regulating the matter a court of equity would have undoubted right, in proper proceeding instituted by creditor of stockholder, to appoint receiver to administer the property.—*Havemeyer vs. Superior Court San Francisco*, 84 Cal. 327, 362, 18 Am. St. Rep. 192, 24 Pac. Rep. 121, 10 L. R. A. 627.

See Code Civ. Proc. § 808 and note.

6. **Power not implied**.—Power of court to appoint other persons which is implied in this section does not authorize court to take upon itself power to settle corporation's affairs, or to appoint receiver for that purpose.—*State I. & I. Co. vs. Superior Court San Francisco*, 101 Cal. 135, 147, 35 Pac. Rep. 549.

7. **VOLUNTARY DISSOLUTION PROVIDED FOR**.—This section applies to voluntary as well as involuntary dissolution.—*Havemeyer vs. Superior Court San Francisco*, 84 Cal. 327, 366, 367, 18 Am. St. Rep. 192, 24 Pac. Rep. 121, 10 L. R. A. 627; *State I. & I. Co. vs. Superior Court San Francisco*, 101 Cal. 135, 148, 35 Pac. Rep. 549.

§ 401. EXTENSION OF CORPORATE EXISTENCE, HOW MADE — CERTIFICATE AND CERTIFIED COPY, FILING OF. Every corporation formed for a period less than fifty years, may, at any time prior to the expiration of the term of its corporate existence, extend such term to a period not exceeding fifty years from its formation. Such extension may be made [1] at any meeting of the stockholders or members called by the directors expressly for considering the subject if voted by stockholders representing two thirds of the capital stock; or [2] by two thirds of the members; or [3] may be made upon the written assent of two thirds of the members or of stockholders representing two thirds of the capital stock.

A certificate of the proceedings of the meeting upon such vote, or upon such assent, must [1] be signed by the chairman and secretary of the meeting and [2] a majority of the directors, and [3] be filed in the office of the county clerk

where the original articles of incorporation were filed, and [4] a certified copy thereof in the office of the secretary of state, and thereupon the term of the corporation is extended for the specified period.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 209; by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 353, held unconstitutional, see history, § 4 ante; amendments re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXVIII, p. 564.

1. Applied, cited, construed, referred to, etc.
2. Existing corporations are within statute.

Y. J. T. Co., 122 Cal. 335, 339, 55 Pac. Rep. 10 (referred to).

1. Applied, cited, construed, referred to, etc., in: Market St. R. Co. vs. Hellman, 109 Cal. 571, 582, 42 Pac. Rep. 225 (construed and applied); People ex rel. Waugh vs. Auburn &

2. Existing corporations are within the statute.—This section was intended to apply to existing corporations.—Market St. R. Co. vs. Hellman, 109 Cal. 571, 582, 42 Pac. Rep. 225.

§ 402. HOW CORPORATIONS MAY CONTINUE THEIR EXISTENCE (repealed).

History: Enacted March 21, 1872; repealed March 30, 1874, Code Amdts. 1873-4, p. 209.

1. Applied, cited, construed, referred to, etc.
2. Toll-road company may collect tolls.

1. Applied, cited, construed, referred to, etc., in: People ex rel. Waugh vs. Auburn & Y. J. T. Co., 122 Cal. 335, 336, 339, 55 Pac. Rep. 10 (construed).

2. Toll-road company may collect tolls.—

Toll-road company continuing its existence under §§ 287, 402, and 506 has a right to collect such tolls as board of supervisors may authorize it to collect, but has no longer right to make its own toll.—People ex rel. Waugh vs. Auburn & Y. J. T. Co., 122 Cal. 335, 336, 339, 55 Pac. Rep. 10.

§ 403. TITLE I TO APPLY TO ALL CORPORATIONS, WITH CERTAIN EXCEPTIONS (repealed).

History: Enacted March 21, 1872; repealed March 20, 1905, Stats. and Amdts. 1905, c. CCCXLIII, p. 410.

1. Applied, cited, construed, referred to, etc.
2. Literary corporations—Statute does not apply to.
3. Public corporations—Statute applies to.

1. Applied, cited, construed, referred to, etc., in: Market St. R. Co. vs. Hellman, 109 Cal. 571, 582, 42 Pac. Rep. 225 (referred to); People ex rel. Waugh vs. Auburn & Y. J. T. Co., 122 Cal. 335, 339, 55 Pac. Rep. 10 (applied).

2. Literary corporations.—Code provisions prescribing mode for dissolving trade corpora-

tions have no application to corporations for literary purposes having no stockholder, and there seems to be no statutory provision in this state for the dissolution of corporations of this character.—People vs. President & Trustees College of Cal., 33 Cal. 166, 172.

3. Public corporations.—Provisions of this title apply as well to public corporations as to private corporations.—People ex rel. Waugh vs. Auburn & Y. J. T. Co., 122 Cal. 335, 339, 55 Pac. Rep. 10.

CHAPTER V.

GENERAL PROVISIONS AFFECTING CORPORATIONS.

§ 403[a]. Title one to apply to all corporations, with certain exceptions.

§ 404. Power of the legislature to amend or repeal this part, or any title, chapter,

article, or section thereof, and to dissolve all corporations created thereunder. [Liability for obligations previously incurred.]

§ 403[a]. GENERAL PROVISIONS APPLY, WHEN—SPECIAL PROVISIONS APPLY, WHEN. The provisions of this title are applicable to every corporation, unless such corporation is excepted from its operation, or unless a special provision is made in relation thereto inconsistent with some provision in this title, in which case the special provision prevails.

History: Enacted March 21, 1905, Stats. and Amdts. 1905, c. CCCCXLVIII, p. 410.

§ 404. LEGISLATURE MAY AMEND, ETC., CORPORATION LAWS AND DISSOLVE CORPORATIONS. The legislature may at any time amend or repeal this part, or any title, chapter, article, or section thereof, and dissolve all corporations created thereunder; but such amendment or repeal does not, nor does the dissolution of any such corporation, take away or impair any remedy given against any such corporation, its stockholders or officers, for any liability which has been previously incurred.

History: Enacted by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 353, held unconstitutional, see history, § 4 ante; re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CCCXLVIII, p. 410.

- 1-4. Legislative power to amend or repeal—Effect.
- 5-7. Dissolution—Effect upon property.
- 8-11. Same—Effects upon remedies—Attachment.
- 12-14. Judgments—How affected.
- 15. Obligation of contracts—Whether impaired by.

As to dissolution of corporation, see monographic note by Robert Desty, 2 L. R. A. 549, 3 L. R. A. 358, 9 L. R. A. 33, 34; and notes 13 Am. Dec. 239-243, 40 Am. Dec. 737-740.

As to effect of dissolution of corporation, whether by repeal of its charter or otherwise, see monographic note 7 Am. St. Rep. 717-726.

As to effect of proceedings, by dissolution, upon rights of action, see monographic note by H. P. Farnham, 15 L. R. A. 627-629.

As to equitable jurisdiction, see monographic note 9 L. R. A. 650.

As to restraining exercise of corporate franchise, see monographic note by Robert Desty, 9 L. R. A. 273.

1. LEGISLATIVE POWER TO AMEND OR REPEAL.—Rights acquired and vested under charter cannot be taken away by amendment or alteration.—Commonwealth vs. Essex Co., 79 Mass. (18 Gray) 239; Albany N. R. Co. vs. Brownell, 24 N. Y. 345.

2. Reservation of right to alter or amend confers power to pass all needful laws for regulation and control of domestic affairs of corporation freed from restrictions imposed by federal constitution upon legislation impairing obligation of contracts.—People vs. O'Brien, 111 N. Y. 1, 7 Am. St. Rep. 684, 18 N. E. Rep. 692, 2 L. R. A. 255. See Munn vs. Illinois, 94 U. S. 113, 123, bk. 24 L. ed. 77.

3. Reservation of right to repeal enables legislature to effect destruction of corporate life and disable corporation from continuing its corporate business.—People vs. O'Brien, 111 N. Y. 1, 7 Am. St. Rep. 684, 18 N. E. Rep. 692, 2 L. R. A. 255; People ex rel. Kimball vs. Boston & A. R. Co., 70 N. Y. 569; Phillips vs. Wickham, 1 Paige Ch. (N. Y.) 590.

4. State has right to repeal charter granted to corporation, provided no rights of property are involved or destroyed.—People vs. O'Brien, 111 N. Y. 1, 7 Am. St. Rep. 684, 18 N. E. Rep. 692, 2 L. R. A. 255.

5. DISSOLUTION OF CORPORATION—Effect on property at common law.—Grant of land to corporation is only during its life.—

State Bank vs. State, 1 Blackf. (Ind.) 267, 12 Am. Dec. 234; Colchester vs. Seaber, 3 Burr. 1866.

6. Lands and tenements of corporation revert to grantor or his heirs upon dissolution.—State Bank vs. State, 1 Blackf. (Ind.) 267, 12 Am. Dec. 234; Colchester vs. Seaber, 3 Burr. 1866.

7. Personal estate reverts or vests in state, or crown, upon dissolution.—State Bank vs. State, 1 Blackf. (Ind.) 267, 12 Am. Dec. 234; Colchester vs. Seaber, 3 Burr. 1866.

8. EFFECT UPON REMEDY.—Dissolution of corporation does not affect, or confer power to take away or destroy property, or annul contracts.—People vs. O'Brien, 111 N. Y. 1, 7 Am. St. Rep. 684, 18 N. E. Rep. 692, 2 L. R. A. 255.

9. Debts of corporation, owing either to or from it, are totally extinguished, at common law, by its dissolution; so that members cannot recover or be charged with same in their natural capacities.—State Bank vs. State, 1 Blackf. (Ind.) 267, 284, 12 Am. Dec. 234. See Salt Marsh vs. P. & M. Bank, 14 Ala. 668, 17 Id. 761; Bank of La. vs. Wilson, 19 La. Ann. 1; Colchester vs. Seaber, 3 Burr. 1866; Rex vs. Pasmore, 3 Durnf. & E. (3 T. R.) 199; Mayor etc. of Scarborough vs. Butler, 2 Lev. 237.

10. Corporation cannot, after its dissolution, institute proceedings asserting its non-existence, in order to be relieved from decree.—Muscantine Turn Verein vs. Funck, 18 Iowa 469, 472.

11. CORPORATION CEASING TO EXIST cannot sue or be sued, although obligation of its contracts survive, and may be enforced against any property that belongs to it which has not passed into hands of bona fide purchaser.—City Ins. Co. vs. Commercial Bank, 68 Ill. 348, 350; Mumma vs. Potomac Co., 33 U. S. (8 Pet.) 281, bk. 3 L. ed. 945.

12. Attachment against corporation dissolved by its civil death before judgment upon order of judicial tribunal.—Farmers & Mechanics' Bank vs. Little, 3 Watts & S. (Pa.) 207, 42 Am. Dec. 293. See Ludlow vs. Bingham, 4 Dall. (Pa.) 47, 60; Fitch vs. Ross, 4 Serg. & R. (Pa.) 557.

13. JUDGMENT CANNOT BE RENDERED against it in suit previously commenced, as existence as legal entity of corporation is ended by dissolution.—First Nat. Bank of Selma vs. Colby, 83 U. S. (21 Wall.) 609, bk. 22 L.

ed. 637. See *Greeley vs. Smith*, 3 Story C. C. 657, 10 Fed. Cas. 1075; *Mumma vs. Potomac Co.*, 33 U. S. (8 Pet.) 281, bk. 3 L. ed. 945.

14. Judgment rendered against corporation subsequent to its dissolution, void.—*Thornton vs. Marginal Freight R. Co.*, 123 Mass. 32, 34. See *Sturges vs. Vanderbilt*, 73 N. Y. 384.

15. IMPAIRING OBLIGATION OF CONTRACTS.—Repeal of charter by legislature acting within constitutional limits, although dissolving corporation, does not impair obligation of contracts made by corporation during its existence, or prevent creditors or stockholders from asserting rights against its property in equity, in accordance with reasonable regulations of legislature, or with

general principles and practices in equity.—*Thornton vs. Marginal Freight R. Co.*, 123 Mass. 32, 34. See *Ga. Hightower vs. Thornton*, 3 Ga. 486, 493, 52 Am. Dec. 412. *Ill. City Ins. Co. vs. Commercial Bank*, 68 Ill. 348. *La. Muscatine Turn Verein vs. Funck*, 18 Iowa 469, 472. *Me. Read vs. Frankfort Bank*, 23 Me. 318; *Merrill vs. Suffolk Bank*, 31 Me. 57, 50 Am. Dec. 649. *Mass. Foster vs. Essex Bank*, 16 Mass. 245, 8 Am. Dec. 135. *Fed. Mumma vs. Potomac Co.*, 33 U. S. (8 Pet.) 281, bk. 3 L. ed. 945; *Curran vs. Arkansas*, 56 U. S. (15 How.) 304, bk. 14 L. ed. 705; *Bacon vs. Robertson*, 59 U. S. (18 How.) 480, bk. 15 L. ed. 499; *Lum vs. Robertson*, 73 U. S. (6 Wall.) 277, bk. 18 L. ed. 743.

CHAPTER VI.

FOREIGN CORPORATIONS.

- § 405. Designation of person on whom process may be served—Service on the secretary of state, when valid.
- § 406. Foreign corporations, statute of limitations in favor of—Proof of corporate existence—Change of designation.
- § 407. Foreign railway corporations, rights of in this state.

- § 408. Foreign corporations to file certified copies of articles of incorporation.
- § 409. Foreign corporations, fees to be paid by, on filing certified copies of articles of incorporation.
- § 410. Foreign corporations, penalty for failure to file certified copies of articles of incorporation.

[This chapter is a codification, Act April 3, 1880 (Stats. 1880, p. 21), and Act March 17, 1899 (Stats. and Amdts. 1899, p. 111), amending Act April 1, 1872, Stats. 1871-2, p. 826. See *Pierce vs. Southern Pac. Co.*, 120 Cal. 156, 47 Pac. Rep. 874, 52 Id. 302, 40 L. R. A. 350.]

§ 405. DESIGNATION OF PERSON ON WHOM PROCESS MAY BE SERVED—SERVICE ON SECRETARY OF STATE, WHEN VALID. Every corporation other than those created by or under the laws of this state must, within forty days from the time it commences to do business therein, file in the office of the secretary of state a designation of some person residing within the state upon whom process issued by authority of or under any law of this state may be served. A copy of such designation, duly certified by the secretary of state, is sufficient evidence of such appointment. Such process may be served on the person so designated, or, in the event that no such person is designated, then on the secretary of state, and the service is a valid service on such corporation.

History: Added by Code Commission, Act March 21, 1901, Stats. and Amdts. 1900-1, p. 353, held unconstitutional; see history, § 4 ante; re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDLXXI, p. 630. A codification of § 1 Act March 17, 1899; see introductory note to this chapter.

- 1. Agents and officers in general—Cannot be served if agent designated.
- 2. Same—Otherwise if none designated.
- 3. Same—Temporary presence of officer or agent.
- 4. Auditor of state cannot be served.
- 5. Business—What constitutes.
- 6. Common-law rules—Corporation may do business unless prohibited.
- 7. Same—Process cannot be served on foreign corporation.
- 8. Conditions and terms may be imposed by state.
- 9. Consent of corporation to be sued by entering state.
- 10. Constituti

nte.

- 11. Construction—Intention of statute.
- 12. Same—Strict construction.
- 13. Costs against foreign corporation plaintiff.
- 14. Estoppel of corporation to assert non-compliance with statute.
- 15. Interstate commerce—Interference with not permitted.
- 16. Managing agent may be served with process.
- 17. Process defined.
- 18. Public policy—Statute not in derogation of.
- 19. Receivership—Service on agent good notwithstanding.
- 20. Return—Form and sufficiency.
- 21. United States courts given jurisdiction by statute.

1. AGENTS AND OFFICERS IN GENERAL—Cannot be served if agent designated.—Where corporation in compliance with statute designates agent upon whom service may be made, service upon another agent is not good.—*Liblong vs. Kansas Fire Ins. Co.*, 82 Pa. St. 413, 416.

See note to 67 Am. St. Rep. 327.

2. None designated.—Where corporation fails to comply with statute, and does not designate agent upon whom service may be made, but does business within state, service may be made upon general agent found within state.—*Hagerman vs. Empire Slate Co.*, 97 Pa. St. 534, 536. See *Cal. Lawrence vs. Ballou*, 50 Cal. 258, 264. *N. Y. Tuchband vs. Chicago & A. R. Co.*, 115 N. Y. 437, 22 N. E. Rep. 360. *S. D. Foster vs. Betcher Lumber Co.*, 5 S. D. 57, 49 Am. St. Rep. 859, 58 N. W. Rep. 9, 23 L. R. A. 490.

3. Temporary presence of officer or agent.—Although decisions upon question are not uniform, weight of authority is in favor of proposition that so long as corporation confines its operations to state in which it was created, it cannot be sued in state where it has no office, or transacts no business, by serving process on its president or other officer, when temporarily present within such state.—*Crook vs. Girard Iron & M. Co.*, 87 Md. 138, 67 Am. St. Rep. 325, 39 Atl. Rep. 94. See *Me. Latimer vs. Union Pac. R.*, 43 Mo. 105, 97 Am. Dec. 378. *Oreg. Aldrich vs. Anchor Coal & D. Co.*, 24 Oreg. 32, 41 Am. St. Rep. 831, 32 Pac. Rep. 756. *Pa. Phillips vs. Burlington Library Co.*, 141 Pa. St. 462, 23 Am. St. Rep. 304, 21 Atl. Rep. 640.

See note 67 Am. St. Rep. 327.

4. AUDITOR OF STATE CANNOT BE SERVED.—Where foreign corporation fails to comply with statute, service on auditor of state in which it entered to do business is unauthorized, and judgment based on such service is void, and in action on such judgment in state in which corporation is domiciled want of service may be set up as defense.—*Rothrock vs. Dwelling-House Ins. Co.*, 161 Mass. 423, 42 Am. St. Rep. 418, 37 N. E. Rep. 206, 23 L. R. A. 363 (distinguishing *Ehrman vs. Teutonia Ins. Co.*, 1 Fed. Rep. 471, 1 McC. C. C. 123, wherein defendant had notice of action and appeared).

5. BUSINESS—What constitutes.—Statute, when reasonably construed, is intended to prohibit foreign corporations coming into state for the purpose of transacting their ordinary corporate business, without first appointing some resident agent upon whom service of summons could be had in case of litigation between them and citizens of the state, and is not designed or intended to prohibit the doing of one single isolated act of business by such a corporation, with no intention apparent to do any other act or engage in business generally.—*Cooper Mfg. Co. vs. Ferguson*, 113 U. S. 727, bk. 28 L. ed. 1137. See *Florsheim Bros. D. G. Co. vs. Lester*, 60 Ark. 120, 46 Am. St. Rep. 162, 29 S. W. Rep. 34, 27 L. R. A. 505; *Commercial Bank vs. Sherman*, 28 Oreg. 573, 52 Am. St. Rep. 811, 43 Pac. Rep. 653.

6. COMMON-LAW RULES ARE—Corporation may do business unless prohibited.—In absence of statute limiting right of foreign corporation to do so, it may, unless contrary to public policy of state, hold property and do business without, as well as within, the state by which it was created.—*Toledo T. & L. Co. vs. Thomas*, 33 W. Va. 566, 25 Am. St. Rep. 925, 927, 11 S. E. Rep. 37. See *Ex parte Schollenberger*, 96 U. S. 369, bk. 24 L. ed. 853.

7. Process cannot be served on foreign corporation.—Common-law rule is that foreign corporation cannot be sued, and in action against corporation it is necessary to allege that it is a domestic corporation, or that it has attachable property within state; and no writ can be legally served against foreign corporation.—*Peckham vs. Northern Parish in Haverhill*, 33 Mass. (16 Pick.) 274, 286. See *Md. Crook vs. Girard Iron & M. Co.*, 87 Md. 138, 67 Am. St. Rep. 325, 39 Atl. Rep. 94. *N. Y. McQueen vs. Middletown Mfg. Co.*, 16 John. 5. *Oreg. Aldrich vs. Anchor Coal & D. Co.*, 24 Oreg. 32, 41 Am. St. Rep. 831, 32 Pac. Rep. 757. *Tenn. Pioneer S. & L. Co. vs. Cannon*, 96 Tenn. 599, 54 Am. St. Rep. 858, 36 S. W. Rep. 386, 33 L. R. A. 112. *Fed. Baltimore & O. R. Co. vs. Harris*, 79 U. S. (12 Wall.) 65, bk. 20 L. ed. 354.

8. CONDITIONS AND TERMS MAY BE IMPOSED BY STATE UPON FOREIGN CORPORATIONS.—Right of state to prescribe, by its constitution and laws, conditions or terms upon which foreign corporation shall be allowed to carry on its business, is well settled.—*Ark. State Mutual F. I. Assoc. vs. Brinkley S. & H. Co.*, 61 Ark. 1, 54 Am. St. Rep. 191, 31 S. W. Rep. 157, 29 L. R. A. 712. *Ind. Phoenix Ins. Co. vs. Burdett*, 112 Ind. 204, 18 N. E. Rep. 705. *Iowa. Scottish Union & N. Ins. Co. vs. Herriott*, 109 Iowa 606, 77 Am. St. Rep. 548, 80 N. W. Rep. 665. *Kan. State vs. Phipps*, 50 Kan. 609, 34 Am. St. Rep. 152, 31 Pac. Rep. 1097, 18 L. R. A. 657. *Mo. Cravens vs. New York Life Ins. Co.*, 148 Mo. 583, 71 Am. St. Rep. 628, 50 S. W. Rep. 519, 53 L. R. A. 305. *N. Y. People vs. Fire Assoc. of Phila.*, 92 N. Y. 311, 44 Am. Rep. 380. *Fed. Paul vs. Virginia*, 75 U. S. (8 Wall.) 168, bk. 19 L. ed. 357; *Baltimore & O. R. Co. vs. Harris*, 79 U. S. (12 Wall.) 65, bk. 20 L. ed. 354; *Ex parte Schollenberger*, 96 U. S. 369, bk. 24 L. ed. 853; *Cooper Mfg. Co. vs. Ferguson*, 113 U. S. 727, bk. 28 L. ed. 1137; *Carstairs vs. Mechanics & Traders' Ins. Co.*, 13 Fed. Rep. 823, 826; *Diamond Glue Co. vs. United States Glue Co.*, 103 Fed. Rep. 838, 839.

See notes 40 Am. St. Rep. 916; 42 Id. 420, 421; 71 Id. 648.

9. CONSENT OF CORPORATION TO BE SUED BY ENTERING STATE.—Foreign corporation, by coming into state and doing business, submits itself to jurisdiction of courts, and is presumed to have consented to be sued.—*Lawrence vs. Ballou*, 50 Cal. 258, 264. See *Mass. Reyer vs. Odd Fellows F. A. Assoc.*, 157 Mass. 367, 34 Am. St. Rep. 288, 32 N. E. Rep. 469; *Rothrock vs. Dwelling-House Ins. Co.*, 161 Mass. 423, 42 Am. St. Rep. 418, 37 N. E. Rep. 206, 23 L. R. A. 363. *Neb. Klopp vs. Creston City G. W. Co.*, 34 Neb. 808, 33 Am.

St. Rep. 666, 32 N. W. Rep. 319. *N. J. Capen vs. Pacific Mut. Ins. Co.*, 35 N. J. L. (1 Dutch.) 67, 64 Am. Dec. 412. *Oreg. Aldrich vs. Anchor Coal & D. Co.*, 24 Oreg. 32, 41 Am. St. Rep. 321, 32 Pac. Rep. 756. *Pa. Hagerman vs. Empire Slate Co.*, 97 Pa. St. 534. *S. C. Pollock vs. Carolina Interstate B. & L. Assoc.*, 48 S. C. 65, 59 Am. St. Rep. 695, 25 S. E. Rep. 977. *S. D. Foster vs. Betcher Lumber Co.*, 5 S. D. 57, 49 Am. St. Rep. 559, 53 N. W. Rep. 9, 23 L. R. A. 490. *Fed. Baltimore & O. R. Co. vs. Harris*, 79 U. S. (12 Wall.) 65, bk. 20 L. ed. 354; *Ex parte Schollenberger*, 96 U. S. 369, bk. 24 L. ed. 853; *St. Clair vs. Cox*, 106 U. S. 350, bk. 27 L. ed. 222, 1 Sup. Ct. Rep. 354.

10. CONSTITUTIONALITY OF STATUTE.—Since state may impose terms and conditions upon foreign corporation, section is constitutional.—*Mo. Cravens vs. New York Life Ins. Co.*, 148 Mo. 583, 71 Am. St. Rep. 628, 50 S. W. Rep. 519, 53 L. R. A. 305. *N. Y. People vs. Fire Assoc. of Phila.*, 92 N. Y. 311, 44 Am. Rep. 380. *Fed. Carstairs vs. Mechanics & Traders' Ins. Co.*, 13 Fed. Rep. 323, 326.

11. CONSTRUCTION.—Intention of statute is to relieve citizens of state from necessity of going outside of state to seek judicial redress against foreign corporations which are doing business within state.—*Ex parte Schollenberger*, 96 U. S. 369, bk. 24 L. ed. 853.

12. Strict construction.—Since statute is in derogation of common law, and penal in its character, it must be construed strictly.—*Toledo T. & L. Co. vs. Thomas*, 33 W. Va. 566, 25 Am. St. Rep. 925, 11 S. E. Rep. 37.

13. COSTS AGAINST FOREIGN CORPORATION PLAINTIFF.—Corporation may sue in foreign state, by its attorneys there, and if it fails in the suit, be subject to judgment for costs.—*Lafayette Ins. Co. vs. French*, 59 U. S. (18 How.) 404, 407, bk. 15 L. ed. 451.

14. ESTOPPEL OF CORPORATION TO ASSERT NON-COMPLIANCE WITH STATUTE.—Corporation which comes into state and does business, without complying with statute, is estopped to set up such non-compliance as defense.—*Rothrock vs. Dwelling-House Ins. Co.*, 161 Mass. 423, 42 Am. St. Rep. 418, 37 N. E. Rep. 206, 23 L. R. A. 863; *Foster vs. Betcher Lumber Co.*, 5 S. D. 57, 49 Am. St. Rep. 559, 53 N. W. Rep. 9, 23 L. R. A. 490. See *Hagerman vs. Empire Slate Co.*, 97 Pa. St. 534.

And it is to be observed that section 406 expressly provides that foreign corporations cannot "defend any action or proceeding in any court of this state until the corporation has complied with the provisions of the preceding section"; so that it would seem that non-complying corporation cannot put in appearance or make any defense.

15. INTERSTATE COMMERCE—INTERFERENCE WITH NOT PERMITTED.—State cannot enforce such statute in manner which will interfere with interstate commerce, and

foreign corporation may advertise its goods, make contracts of sale respecting the same through its agent within the state, and ship its goods to customers in the state regardless of statute.—*Mearshon vs. Pottsville Lumber Co.*, 187 Pa. St. 12, 67 Am. St. Rep. 560, 40 Atl. Rep. 1019; *Cooper Mfg. Co. vs. Ferguson*, 113 U. S. 727, bk. 28 L. ed. 1137 (decided upon similar statute of Colorado).

16. MANAGING AGENT MAY BE SERVED WITH PROCESS, where corporation has one and has not complied with statute.—*Foster vs. Betcher Lumber Co.*, 5 S. D. 57, 49 Am. St. Rep. 559, 53 N. W. Rep. 9, 23 L. R. A. 490.

17. PROCESS DEFINED.—In similar statute of Arkansas (Sand. & Hill's Dig. § 3834) it is declared that "the term 'process' includes any writ, summons, subpoena, or order, whereby any action, suit or proceedings shall be commenced or which shall be issued in or upon any section, suit, or proceeding."—*Rothrock vs. Dwelling-House Ins. Co.*, 161 Mass. 423, 42 Am. St. Rep. 418, 37 N. E. Rep. 206, 23 L. R. A. 863 (action in Massachusetts on Arkansas judgment against foreign corporation).

As to distinction between words "writ" and "process," see Code Civil Procedure § 17 par. 6 and note.

18. PUBLIC POLICY.—Statute not in derogation of.—Although there may arise hardship from requiring corporation to submit to a condition which renders it liable to be sued at the caprice of a non-resident plaintiff in any of the United States in which an agent so empowered may be found, statute is not unreasonable or inconsistent with public policy, for every natural person who journeys through the United States subjects himself to the same liability.—*Carstairs vs. Mechanics & Traders' Ins. Co.*, 13 Fed. Rep. 323, 326.

19. RECEIVERSHIP.—Service on agent good notwithstanding.—Agent of corporation may be served notwithstanding appointment of temporary receiver in another state.—*Pollock vs. Carolina Interstate B. & L. Assoc.*, 48 S. C. 65, 59 Am. St. Rep. 695, 25 S. E. Rep. 977.

20. RETURN.—Form and sufficiency.—Return which omits to set forth character of agent served is not conclusive that he possesses necessary qualifications, but return that service was made on L. "agent for the E. S. Co., the within named defendant," is prima facie evidence of good service.—*Hagerman vs. Empire Slate Co.*, 97 Pa. St. 534, 537.

21. UNITED STATES COURTS GIVEN JURISDICTION BY STATUTE.—Where statute allows service upon agent of foreign corporation, circuit court of United States has jurisdiction when such service is made.—*Ex parte Schollenberger*, 96 U. S. 369, bk. 24 L. ed. 853. See *Carstairs vs. Mechanics & Traders' Ins. Co.*, 13 Fed. Rep. 323, 324-326; *Lung Chung vs. Northern Pac. R. Co.*, 19 Fed. Rep. 354.

§ 406. FOREIGN CORPORATION, STATUTE OF LIMITATIONS IN FAVOR OF—PROOF OF CORPORATE EXISTENCE—CHANGE OF DESIGNATION.

Every corporation which complies with the provisions of this chapter is thereafter

entitled to the benefit of the laws of this state limiting the time for the commencement of civil actions, but no corporation not created by or under the laws of this state is entitled to the benefit thereof, nor can any such corporation maintain or defend any action or proceeding in any court of this state until the corporation has complied with the provisions of the preceding section.

[Proof of foreign corporation.] In any action or proceeding instituted against any body styled as a corporation, but not created by nor under the laws of this state, evidence that such body has acted as a corporation, or employed methods usually employed by corporations, must be received by the court for the purpose of proving the existence of such corporation, the sufficiency of such evidence to be determined by the court with like effect as in other cases.

[Designation for service—Revocation, etc.—New designation.] Every corporation which has complied with the laws then in force, requiring it to make and file a designation of the person upon whom process against it may be served, need not make or file any further designation. Any designation heretofore or hereafter made may be revoked by the filing by the corporation with the secretary of state of a writing stating such revocation. Within forty days after the death or removal from the state of any person designated by the corporation, or after the revocation of the designation, the corporation must make a new designation, or be subject to the provisions and penalties of this chapter.

History: Enacted by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 353, held unconstitutional, see history, § 4 ante; re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDLXXI, pp. 630-631; see introductory note to this chapter.

1. Adverse possession by corporation.
2. Answer alleging non-compliance with statute is good.
3. Burden of proof where limitations pleaded.
4. Comity of United States courts.
5. Construction of statute is strict.
6. Interstate commerce—Interference with not permitted.
7. Limitations—How pleaded.
8. Non-compliance with statute—Who may make objection.
9. Retroactive operation—Statute does not have.
10. Revocation of authority—Secret revocation.
11. Time of filing articles, etc.

1. ADVERSE POSSESSION BY CORPORATION through its agent, for the statutory period, is good defense in action of ejectment.—Lawrence vs. Ballou, 50 Cal. 258, 264.

2. ANSWER ALLEGING NON-COMPLIANCE WITH STATUTE, in action by corporation on contract, states good defense.—Diamond Glue Co. vs. United States Glue Co., 103 Fed. Rep. 838, 839.

3. BURDEN OF PROOF WHERE LIMITATIONS PLEADED.—Where corporation pleads statute of limitations, burden of proof rests upon such corporation to show compliance with statute as a predicate to its right to avail itself of benefit of statute of limitations.—Pierce vs. Southern Pac. Co., 120 Cal. 156, 162, 163, 47 Pac. Rep. 874, 52 Id. 302, 40 L. R. A. 350.

4. COMITY OF UNITED STATES COURTS.—Where action is brought by foreign corporation in United States court sitting in state in which corporation engaged in business

without first complying with statute of such state, non-compliance with statute is good defense.—Diamond Glue Co. vs. United States Glue Co., 103 Fed. Rep. 838, 839.

5. CONSTRUCTION OF STATUTE IS STRICT.—See ante § 405 and note par. 12.

6. INTERSTATE COMMERCE—Interference with not permitted.—See ante § 405 and note par. 15.

7. LIMITATIONS—How pleaded.—See Code Civ. Proc. § 458 and note.

8. NON-COMPLIANCE WITH STATUTE.—Who may make objection.—Annotators of this section, when originally passed at instance of Code Commission, cited a line of authorities in support of the propositions (1) that the state in its sovereign capacity is the only party who can take advantage of the failure of a foreign corporation to comply with its laws, and (2) that a party contracting with such corporation is estopped from pleading its want of compliance, to wit: Ala. Sherwood vs. Alvis, 83 Ala. 115, 3 Am. St. Rep. 695, 3 So. Rep. 307. Pa. Watertown Fire Ins. Co. vs. Simons, 96 Pa. St. 520, 526. S. D. Foster vs. Betcher Lumber Co., 5 S. D. 57, 49 Am. St. Rep. 859, 58 N. W. Rep. 2, 23 L. R. A. 490. Wash. La France F. E. Co. vs. Mt. Vernon, 9 Wash. 142, 43 Am. St. Rep. 827, 37 Pac. Rep. 287, 38 Id. 80.

Obviously no such rule prevails in this state, because the section expressly provides, "nor can any such corporation maintain . . . any action or proceeding in any court of this state until the corporation has complied with the

provisions of the preceding section"; and the citation of the above authorities in support of the proposition, without pointing out the fact that they were decided under statutes which contain no such prohibitory clause, is misleading.—See *Rose vs. Kimberly*, 89 Wis. 545, 46 Am. St. Rep. 855, 62 N. W. Rep. 526, 27 L. R. A. 556 (holding that even where statute is not prohibitory, contract is void and not enforceable by corporation); *Semple vs. Bank of British Columbia*, 5 Sawy. C. C. 88, 21 Fed. Cas. 1063; *Diamond Glue Co. vs. United States Glue Co.*, 103 Fed. Rep. 833, 839, 840.

See post § 410, latter part.

9. **RETROACTIVE OPERATION.**—Statute does not have, and, notwithstanding statute, foreign corporation which has not complied with it may maintain action to enforce rights under contract previously executed.—*Pioneer*

S. & L. Co. vs. Cannon, 96 Tenn. 599, 602, 603, 54 Am. St. Rep. 858, 36 S. W. Rep. 386, 33 L. R. A. 112.

10. **REVOCATION OF AUTHORITY**—*Secret revocation.*—Where foreign corporation is doing business within state and has appointed agent, revocation of such agency without notice to public is immaterial, and service upon such agent while he is avowing authority is good.—*Capen vs. Pacific Mut. Ins. Co.*, 25 N. J. L. (1 Dutch.) 67, 64 Am. Dec. 412.

11. **TIME OF FILING ARTICLES, ETC.**—Filing articles of incorporation by foreign corporation, and appointment of agent after filing of lien notice, and before suit to foreclose same, is sufficient compliance with statute.—*La France F. E. Co. vs. Mt. Vernon*, 9 Wash. 142, 43 Am. St. Rep. 827, 37 Pac. Rep. 287, 38 Id. 80.

§ 407. **FOREIGN RAILROADS, RIGHTS IN THIS STATE.** Every railway or other corporation organized for the purpose of carrying freight or passengers under or by virtue of the laws of the United States, or of any state or territory thereof, may build railroads, exercise the right of eminent domain, and transact any other business which it might do if it were created and organized under or by virtue of the laws of this state, and has the same rights, privileges, and immunities, and is subject to the same laws, penalties, obligations, and burdens as if created or organized under and by virtue of the laws of this state. Nothing contained in this section shall be construed to exempt any corporation from any duty or liability imposed upon it by any of the provisions of this chapter.

History: Enacted by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 354, held unconstitutional, see history, § 4 ante; re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDLXXI, p. 631; see the introductory note to this chapter.

Constitutionality of statute.—There is nothing in the constitution that limits the legislature in exercise of eminent domain, and statute conferring such right upon foreign corporation is constitutional.—*New York, N. H. & H. R. Co. vs. Welsh*, 143 N. Y. 411, 42 Am.

St. Rep. 734, 38 N. E. Rep. 378. See *San Antonio & A. P. R. Co. vs. Southwestern T. & T. Co.*, 93 Tex. 313, 77 Am. St. Rep. 884, 55 S. W. Rep. 117, 49 L. R. A. 459.

See notes 42 Am. St. Rep. 733; 77 Am. St. Rep. 890.

§ 408. **FOREIGN CORPORATIONS MUST FILE CERTIFIED COPY OF ARTICLES OF INCORPORATION [IN OFFICE OF SECRETARY OF STATE].** Every corporation organized under the laws of another state, territory, or of a foreign country, which [1] is now doing business in this state, or is maintaining an office herein, or which [2] shall hereafter do business in this state or maintain an office herein, or [3] which shall enter this state for the purpose of doing business herein, must file in the office of the secretary of state of the state of California [1] a certified copy of its articles of incorporation, or [2] of its charter, or [3] of the statute or statutes, or legislative, or executive, or governmental act or acts creating it, in cases where it has been created by charter, or statute, or legislative, or executive, or governmental act, and [4] a certified copy thereof, duly certified by the secretary of state of this state, in the office of the county clerk of the county where its principal place of business is located, and also where such corporation owns property.

History: Enacted March 21, 1905, Stats. and Amdts. 1905, c. CDLXXI, p. 631.

1. Business—What constitutes doing.
2. Estoppel of corporation to assert non-compliance with statute.

1. Business—What constitutes doing.—See ante § 405 and note par. 5.

2. Estoppel of corporation to assert non-compliance with statute.—Although it is illegal for foreign corporation to transact business in

state without compliance with statute, it may be sued, if service can be had upon agent within state, and will not be heard to say that it did not comply with statute.—Foster vs. Eetcher Lumber Co., 5 S. D. 57, 49 Am. St. Rep. 359, 58 N. W. Rep. 9, 23 L. R. A. 490.

As to failure to designate agent, see ante § 405 and note para. 2, 3.

§ 409. FOREIGN CORPORATIONS, FEES TO BE PAID BY, ON FILING CERTIFIED COPIES OF ARTICLES OF INCORPORATION. For filing and issuing a certified copy as required in section four hundred and eight of this code, corporations formed under the laws of another state, or of a territory, or of a foreign country, must pay the same fees as are paid by corporations formed under the laws of this state.

History: Enacted March 21, 1905, Stats. and Amdts. 1905, c. CDLXXI, p. 631; see introductory note to this chapter.

Doing business—What constitutes.—See ante § 405 and note par. 5.

§ 410. FOREIGN CORPORATIONS, PENALTY FOR FAILURE TO FILE CERTIFIED COPIES OF ARTICLES OF INCORPORATION. Every corporation organized under the laws of another state, territory, or of a foreign country, which shall neglect or fail, within ninety days from the taking effect of this section, to comply with the conditions of sections four hundred and eight and four hundred and nine of this code, shall be subject to a fine of not less than five hundred dollars, to be recovered in any court of competent jurisdiction; and it is hereby made the duty of the secretary of state, as he may be advised that corporations are doing business in contravention of sections four hundred and eight and four hundred and nine of this code, to report the fact to the governor, who shall instruct [1] the district attorney of the county wherein such corporation has its principal place of business, or [2] the attorney-general of the state, or both, as soon as practicable, to institute proceedings to recover the fine provided for in this section, and the amount so recovered must be paid into the state treasury to the credit of the general fund of the state;

[Further penalty, inability to maintain suits.] In addition to which penalty, no foreign corporation which shall fail to comply with sections four hundred and eight and four hundred and nine of this code can maintain any suit or action in any of the courts of this state until it has complied with said sections; provided, that any such corporation which, prior to the eighth day of March, nineteen hundred and one, shall have complied with the provisions of the act entitled "An act to amend 'An act in relation to foreign corporations,' approved April first, eighteen hundred and seventy-two," approved March seventeenth, eighteen hundred and ninety-nine, is exempted from the provisions of this section and the two sections next preceding.

History: Enacted March 21, 1905, Stats. and Amdts. 1905, c. CDLXXI, pp. 631, 632; see introductory note to this chapter.

TITLE II.

INSURANCE CORPORATIONS.

CHAPTER I. GENERAL PROVISIONS, §§ 414-421[a].

II. FIRE AND MARINE INSURANCE CORPORATIONS, §§ 424-432.

III. MUTUAL LIFE, HEALTH, AND ACCIDENT INSURANCE CORPORATIONS, §§ 437-452.

IV. MUTUAL BENEFIT AND LIFE ASSOCIATIONS, §§ 452, 453.

V. CORPORATIONS TO DISCOVER FIRE AND SAVE PROPERTY AND HUMAN LIFE FROM DESTRUCTION THEREBY, §§ 453a-453c.

VI. LIFE, HEALTH, ACCIDENT, AND ANNUITY OR ENDOWMENT INSURANCE ON THE ASSESSMENT PLAN, §§ 453d-453p.

CHAPTER I.

GENERAL PROVISIONS.

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| <p>§ 414. Subscription to capital stock opened, and how collected.</p> <p>§ 415. Purchase and conveyance of real estate. [What property may be held; what must be sold within five years.]</p> <p>§ 416. Policies, how issued and by whom signed.</p> <p>§ 417. Dividends, of what and when declared.</p> <p>§ 418. Directors liable for loss on insurance in certain cases.</p> | <p>§ 419. Certain companies to have capital stock of two hundred thousand dollars.</p> <p>§ 420. Certain companies to have capital stock of one hundred thousand dollars.</p> <p>§ 421. Investment of capital and accumulations—Reports to officers.</p> <p>§ 421[a]. Same—Same.</p> |
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§ 414. SUBSCRIPTIONS TO CAPITAL STOCK OPENED, AND HOW COLLECTED. After the secretary of state issues the certificate of incorporation, as provided in article one, chapter one, title one, of this part, the directors named in the articles of incorporation must proceed in the manner specified, or in their by-laws, or if none, then in such manner as they may by order adopt, to open books of subscription to the capital stock then unsubscribed, and to secure subscriptions to the full amount of the fixed capital; to levy assessments and instalments thereon, and to collect the same, as in chapter two of title one provided.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 354, held unconstitutional, see history, § 4 ante.

As to insurance in general, see post §§ 2527-2766 and notes.

§ 415. PURCHASE AND CONVEYANCE OF REAL ESTATE. [WHAT PROPERTY MAY BE HELD; WHAT MUST BE SOLD WITHIN FIVE YEARS.]

No insurance corporation may purchase, hold or convey real estate, except as hereinafter set forth, to wit:

1. The building in which it has its principal office and the land upon which it stands.

2. Also, such as may be requisite for its accommodation in the convenient transaction of its business.

3. Also, such as may be conveyed to it, or to any person for it, by way of mortgage, or in trust or otherwise, to secure or provide for the payment of loans previously contracted or for moneys due.

4. Also such as may be purchased at sales upon deeds of trust, or judgments obtained or made for such loans or debts.

5. Also such as may be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

All such real estate, mentioned in subdivisions three, four and five, so acquired, which is not requisite for the accommodation of such corporation in the transaction of its business, must be sold and disposed of within five years after such corporation acquired title to the same.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 354, held unconstitutional, see history, § 4 ante; amendment re-enacted Feb. 24, 1905, Stats. and Amdts. 1905, c. XXVII, p. 21.

§ 416. **POLICIES, HOW ISSUED AND BY WHOM SIGNED.** All policies made by insurance corporations must be subscribed by [1] the president or vice president, or in case of the death, absence, or disability of those officers, by [2] any two of the directors, and [3] countersigned by the secretary of the corporation. All such policies are as binding and obligatory upon the corporation as if executed over the corporate seal.

History: Enacted March 21, 1872.

1. Agent's authority to make preliminary oral contract.
2. Conditional delivery of insurance policy.
3. Contract relates back to application.
4. Directory statute—Oral contract valid.
5. Estoppel to deny authority of agent.
6. Evidence of agent's authority—Assumption of authority is not.
7. Frauds, statute of, not applicable.
8. Negotiations preparatory to effecting insurance.
9. Parol evidence to vary policy not admissible.
10. Powers of agents in respect to assured.
11. Seal on policy not necessary.
12. Specific performance of oral contract.

1. **AGENT'S AUTHORITY TO MAKE PRELIMINARY ORAL CONTRACT.**—Agent who is authorized to agree on terms of insurance may make preliminary oral contract that insurance to be evidenced by policy shall commence from date of verbal contract.—*Laclede Fire-Brick Mfg. Co. vs. Hartford Steam-Boiler Inspection & Ins. Co.*, 60 Fed. Rep. 351, 359.

2. **CONDITIONAL DELIVERY OF INSURANCE POLICY.**—See note by Robert Desty, 2 L. R. A. 150.

3. **CONTRACT RELATES BACK TO APPLICATION.**—If an application is made for insurance, whether in writing or by parol, and the risk is accepted, contract is complete, and risk attaches from date of application or from time designated as commencement of risk, and company would be liable for loss, if it occurred after that and before contract was consummated by formal execution and delivery of policy.—*Hardwick vs. State Ins. Co.*, 20 Oreg. 547, 26 Pac. Rep. 840.

4. **DIRECTORY STATUTE.**—Statute which provides that insurance corporations can make valid policies of insurance only by having them signed by president and countersigned by secretary (Rev. Stats. Mass., c. 37, §§ 12, 13), merely directs the formal mode of signing policies, and has no application to agreements to make insurance; and, notwithstanding such statute, insurance can be effected by an oral contract.—*Sanborn vs. Fireman's Ins. Co.*, 82 Mass. (16 Gray) 448, 453, 454, 77 Am. Dec. 419. See *McCulloch vs. Eagle Ins. Co.*, 18 Mass. (1

Pick.) 278; *New England Marine Ins. Co. vs. De Wolf*, 25 Mass. (8 Pick.) 58, 63; *Thayer vs. Middlesex Mut. F. Ins. Co.*, 27 Mass. (10 Pick.) 325. *Ala. Commercial F. Ins. Co. vs. Morris*, 105 Ala. 498, 505, 18 So. Rep. 34, 36. *Ill. Firemen's Ins. Co. vs. Kuessner*, 164 Ill. 275, 280, 45 N. E. Rep. 540. *N. Y. Ellis vs. Albany City F. Ins. Co.*, 50 N. Y. 402, 405, 10 Am. Rep. 495. *Fed. Commercial Mut. M. Ins. Co. vs. Union Mut. Ins. Co.*, 60 U. S. (19 How.) 318, bk. 15 L. ed. 636 (construing Massachusetts statute).

5. **COMPARE: MO. HENNING vs. UNITED STATES INS. CO.**, 47 Mo. 425, 4 Am. Rep. 332. *N. Y. Dawes vs. North River Ins. Co.*, 7 Cow. 462, 465. *Fed. Head vs. Providence Ins. Co.*, 6 U. S. (2 Cr.) 127, 167, bk. 2 L. ed. 229 (per Marshall, C. J.).

As to validity of oral insurance contract, see monographic note by H. P. Farnham, 22 L. R. A. 763-773.

6. **ESTOPPEL TO DENY AUTHORITY OF AGENT.**—Insurance companies are governed by the ordinary rules of agency, and an insurance company which holds out one as its agent is bound by his acts, within scope of his apparent authority, and is estopped to assert that he exceeded scope of his authority even though, in fact, he did so, unless notice of limitations upon his authority was brought home to assured.—*Laclede Fire-Brick Mfg. Co. vs. Hartford Steam-Boiler Inspection & Ins. Co.*, 60 Fed. Rep. 351, 359.

7. **EVIDENCE OF AGENT'S AUTHORITY.**—Assumption of authority is not, the rule in such cases being the familiar one laid down by the law of agency.—*Laclede Fire-Brick Mfg. Co. vs. Hartford Steam-Boiler Inspection & Ins. Co.*, 60 Fed. Rep. 351, 359.

8. **FRAUDS, STATUTE OF.**—Is not applicable to insurance contracts, and such contracts may be made by parol in absence of any express provision requiring them to be in writing.—*Ala. Commercial Fire Ins. Co. vs. Morris*, 105 Ala. 498, 505, 18 So. Rep. 34, 36. *N. Y. First Baptist Church vs. Brooklyn Fire Ins. Co.*, 19 N. Y. 305, 308, 309. *Oreg. Hardwick vs. State Ins. Co.*, 20 Oreg. 547, 26 Pac. Rep. 840. *Fed. Commercial Mut. M. Ins. Co. vs. Union Mut. Ins. Co.*, 60 U. S. (19 How.) 318, bk. 15 L. ed. 636.

9. **Contract to be performed within year.**—Oral contract is within statute of frauds, of course, unless it is one which is to be performed within a year.—See *Sanborn vs. Fireman's Ins. Co.*, 32 Mass. (16 Gray) 448, 77 Am. Dec. 419.

10. **NEGOTIATIONS PREPARATORY TO EFFECTING INSURANCE.**—Where agents omit solemnities required in negotiating insurance such omission is conducive to opinion that acts of agents were manifestations of terms proposed rather than contract obligatory on both parties.—*Head vs. Providence Ins. Co.*, 6 U. S. (2 Cr.) 127, 166, bk. 2 L. ed. 229.

11. **PAROL EVIDENCE TO VARY CONTRACT NOT ADMISSIBLE.**—Rule, applicable to contracts generally, that parol evidence is not admissible to contradict or vary contract, governs policies of insurance; and all oral negotiations or agreements are merged in policy, and latter is evidence of the contract.—*Laclede*

Fire-Brick Mfg. Co. vs. Hartford Steam-Boller Inspection & Ins. Co., 60 Fed. Rep. 351, 358.

12. **POWERS OF INSURANCE AGENTS IN RESPECT TO ASSURED.**—See 16 Am. & Eng. Encyc. of L. (2d ed.) pp. 914-918.

13. **SEAL ON POLICY IS UNNECESSARY.**—Common seal of corporation need not be affixed to policy, unless charter of corporation requires such seal to be affixed.—*National Bank & Ins. Co. vs. Knaup*, 55 Mo. 154, 156.

As to power of corporations generally to contract without seal, see ante § 354, subd. 3 and note.

14. **SPECIFIC PERFORMANCE OF ORAL CONTRACT.**—It is well settled that oral contracts of insurance company to effect insurance by issuing policies are valid and will be enforced by compelling specific performance by company.—*Ellis vs. Albany City Fire Ins. Co.*, 50 N. Y. 402, 10 Am. Rep. 495.

§ 417. **DIVIDENDS, OF WHAT, AND WHEN DECLARED.** The directors of every insurance corporation, at such times as their by-laws provide, must make, declare, and pay to the stockholders dividends of so much of the net profits of the corporate business and interest on capital invested as to them appears advisable; but the moneys received and notes taken for premium on risks which are undetermined and outstanding at the time of making the dividend must not be treated as profits, nor divided, except as provided in chapter two of this title.

History: Enacted March 21, 1872, founded upon § 21 Act April 2, 1866, Stats. 1865-6, p. 748; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 355, held unconstitutional, see history, § 4 ante.

Dividends—When and from what declared,—as to, see ante § 309 and note.

§ 418. **DIRECTORS LIABLE FOR LOSS ON INSURANCE IN CERTAIN CASES.** If any insurance corporation is under liabilities for losses to an amount equal to its capital stock, and the president or directors, after knowing the same, make any new or further insurance, the estates of all who make such insurance, or assent thereto, are severally and jointly liable for the amount of any loss which takes place under such insurance.

History: Enacted March 21, 1872, founded upon Act April 2, 1866, Stats. 1865-6, p. 747; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 355, held unconstitutional, see history, § 4 ante.

§ 419. **CERTAIN INSURANCE COMPANIES TO HAVE A CAPITAL STOCK OF TWO HUNDRED THOUSAND DOLLARS.** Every company, corporation, or association hereafter formed or organized under the laws of this state for the transaction of business in fire, marine, inland navigation, or life insurance, must have a subscribed capital stock equal to at least two hundred thousand dollars, twenty-five per cent of which must be paid in previous to the issuance of any policy, and the residue within twelve months from the day of filing the certificate of incorporation.

[Foreign insurance companies.] No person, corporation, or association, organized or formed under the laws of any other state or country as a stock company, must transact any such insurance business in this state, unless such person, corporation, or association has a paid-up capital stock equal to at least two hundred

thousand dollars in available cash assets, over and above all liabilities for losses reported, expenses, taxes, and reinsurance of all outstanding risks, as provided in section six hundred and two of the Political Code of this state. Nor must any person, corporation, or association, organized or formed under the laws of any other state or country as a mutual insurance company, transact any such insurance business in this state unless such person, corporation, or association possesses available cash assets equal to at least two hundred thousand dollars over and above all liabilities for losses reported, expenses, taxes, and reinsurance of all outstanding risks, as provided in said section six hundred and two of the Political Code of this state.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 269; April 1, 1878, Code Amdts. 1877-8, p. 80; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 355, held unconstitutional, see history, § 4 ante.

1. Applied, cited, construed, referred to, etc.
2. Insurance companies—Requisite stock.

1. **Applied, cited, construed, referred to, etc., in:** *People ex rel. Schindler vs. Flint*, 64 Cal. 49, 52, 28 Pac. Rep. 495 (construed).

2. **Insurance companies—Requisite stock.—**

As this section read May 22, 1874, no corporation could be formed for insurance, except on live stock, without a subscribed capital of \$100,000.—*People ex rel. Schindler vs. Flint*, 64 Cal. 49, 52, 28 Pac. Rep. 495.

§ 420. CERTAIN INSURANCE COMPANIES TO HAVE CAPITAL STOCK OF ONE HUNDRED THOUSAND DOLLARS. Every company, corporation, or association, hereafter formed or organized under the laws of this state, for the transaction of business in any kind of insurance not enumerated in section four hundred and nineteen of the Civil Code, must have a subscribed capital stock equal to at least one hundred thousand dollars, which must be paid in at the times and in the maner prescribed for the payment of the capital stock of a corporation organized under section four hundred and nineteen of said Civil Code.

[Foreign insurance companies.] No company, corporation, or association, formed or organized under the laws of any other state or country as a stock company, must transact any such insurance business in this state without a paid-up capital stock of not less than one hundred thousand dollars, in available cash assets, over and above all liabilities for losses reported, expenses, taxes, and reinsurance of all outstanding risks, as provided in section six hundred and two of the Political Code of this state. Nor must any company, corporation, or association, formed or organized under the laws of any other state or country as a mutual insurance company, transact any such insurance business in this state, unless such company, corporation, or association possesses available cash assets equal to at least one hundred thousand dollars over and above all liabilities for losses reported, expenses, taxes, and reinsurance of all outstanding risks, as provided in said section six hundred and two of the Political Code of this state.

History: Enacted April 1, 1878, Code Amdts. 1877-8, p. 80.

§ 421. INVESTMENT OF CAPITAL AND ACCUMULATIONS OF CERTAIN CORPORATIONS—REPORTS OF OFFICERS. Corporations organized subsequent to April first, eighteen hundred and seventy-eight, under the laws of this state for the transaction of business in any kind of insurance, may invest their capital and accumulations in the following named securities:

1. **[Securities.]** In the purchase of, or loans upon interest-bearing bonds of the United States government.

2. In the purchase of, or loans upon interest-bearing bonds of any of the states of the United States, not in default for interest on such bonds.

3. In the purchase of, or loans upon interest-bearing bonds of any of the counties and incorporated cities and towns of any state or territory of the United States not in default for interest on such bonds.

4. In loans upon unencumbered real property, which shall be worth, at the time of the investment, at least forty per cent more than the sum loaned, or upon merchandise or cereals in warehouse, but in no instance shall such loan be made in excess of seventy-five per cent of the security taken.

5. [Title insurance companies.] Corporations engaged in the business of insuring titles to real estate may, after the investment of one hundred thousand dollars in the manner provided for in subdivisions one, two, three and four of this section, invest an amount not exceeding fifty per cent of their subscribed capital stock, in the preparation or purchase of the materials or plant necessary to enable them to engage in such business; and such material or plant shall be deemed an asset valued at the actual cost thereof, in all statements and proceedings required by law for the ascertainment and determination of the condition of such corporations.

6. [Fire, life, health, accident, and marine insurance companies.] Corporations organized for and engaged in the business of fire, life, health, accident and marine insurance, may, after the investment of two hundred thousand dollars, and corporations formed or organized for the transaction of business in any kind of insurance not enumerated in section four hundred and nineteen of the Civil Code may, after the investment of one hundred thousand dollars, in the manner provided in subdivisions one, two, three and four of this section, invest the balance of their capital and any accumulations in interest-bearing first mortgage bonds of any corporations (except mining companies), not in default of interest, organized and carrying on business under the laws of any state of the United States. **Provided**, that a two-thirds vote of all the directors of such corporations shall approve such investment.

[Same—Report of officers.] It shall be the duty of the officers of such corporation to report quarterly, on the first days of January, April, July and October of each year to the insurance commissioner a list of such investments so made by them, and the insurance commissioner may, if such investments, or any of them, seem injudicious to him, require the sale of the same. But no investment in the securities named in subdivisions one, two, three and six of this section must be made in an amount exceeding the market value of such securities, at the date of such investment.

7. [Life insurance companies may loan on own policies.] Life insurance companies, or corporations, no matter when organized, may loan upon their own policies, provided that the amount so loaned upon each policy shall not exceed the reserve against said policy at the time said loan is made; provided further, that no policy loans whatever shall ever be used as security which may be deposited with the insurance commissioner under section six hundred and thirty-four of the Political Code; and provided further, that whenever any such loan in any amount is made on a policy registered with the insurance commissioner under said section six hundred and thirty-four of the Political Code, such registration shall be forthwith canceled.

[8.] [Construction.] Nothing in this section contained shall be construed as in anywise affecting the provisions of section four hundred and forty-four of this code.

History: Added by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, pp. 355-357, held unconstitutional, see history, § 4 ante; re-enacted March 3, 1905, Stats. and Amdts. 1905, c. XXXIX, pp. 84-86. Also re-enacted on March 21, 1905, with slight variations, which latter enactment is given below as § 421[a].

§ 421 [a]. **SAME—SAME.** Corporations organized under the laws of this state for the transaction of business in any kind of insurance, may invest their capital and accumulations in the following named securities.

1. [Securities.] In the purchase of, or loans upon interest-bearing bonds of the United States government.

2. In the purchase of, or loans upon interest-bearing bonds of any of the states of the United States, not in default for interest on such bonds.

3. In the purchase of, or loans upon interest-bearing bonds of any of the counties and incorporated cities and towns of any state or territory of the United States not in default for interest on such bonds.

4. In loans upon unencumbered real property, which shall be worth, at the time of the investment, at least, forty per cent more than the sum loaned, or upon merchandise or cereals in warehouse, but in no instance shall such loan be made in excess of seventy-five per cent of the security taken.

5. [Title insurance companies.] Corporations engaged in the business of insuring titles to real estate may, after the investment of one hundred thousand dollars in the manner provided for in subdivisions one, two, three and four of this section, invest an amount not exceeding fifty per cent of their subscribed capital stock, in the preparation or purchase of the materials or plant necessary to enable them to engage in such business; and such material or plant shall be deemed an asset valued at the actual cost thereof, in all statements and proceedings required by law for the ascertainment and determination of the condition of such corporations.

6. [Fire, life, health, accident and marine insurance companies.] Corporations organized for and engaged in the business of fire, life, health, accident and marine insurance, may, after the investment of two hundred thousand dollars, and corporations formed or organized for the transaction of business in any kind of insurance not enumerated in section four hundred and nineteen of the Civil Code may, after the investment of one hundred thousand dollars, in the manner provided in subdivision[s] one, two, three and four of this section, invest the balance of their capital and any accumulations in the purchase of or loans upon the stock of any corporation (except mining companies) organized and carrying on business under the laws of the State of California which have at the time of investment a market value of not less than their paid-in value, and which are rated as first-class securities, or in interest-bearing first mortgage bonds of same not in default of interest; provided, that a two-thirds vote of all the directors of such corporations shall approve such investment.

[Same—Report of officers.] It shall be the duty of the officers of such corporation to report quarterly during the months of January, April, July and October of each year to the insurance commissioner a list of such investments so made by

them, and the insurance commissioner may, if such investments, or any of them, seem injudicious to him, require the sale of the same. But no investment in the securities named in subdivisions one, two, three and six of this section must be made in an amount exceeding the market value of such securities, at the date of such investment.

7. Life insurance corporations may loan upon their own policies provided that the amount so loaned upon each policy shall not exceed the reserve against said policy at the time said loan is made; provided further, that no policy loans whatever shall ever be used as security which may be deposited with the insurance commissioner under section six hundred and thirty-four of the Political Code; and provided further, that whenever any such loan in any amount is made on a policy registered with the insurance commissioner under said section six hundred and thirty-four of the Political Code, such registration shall be forthwith canceled.

8. [Construction.] Nothing in this section contained shall be construed as in anywise affecting the provisions of section four hundred and forty-four of this code.

History: Enacted by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, pp. 355-357, held unconstitutional, see history, § 4 ante; re-enacted March 21, 1905, c. CDLXX, pp. 628-629. Also re-enacted March 3, 1905, c. XXXIX, see ante § 421.

1. Conflict of statute.
2. Neither revision nor substitution.
3. Act of corporation—How construed.
4. Corporations—Powers, how restricted.
5. Same—Power to invest, why designed.
- 6-9. Same—Power to deal in shares of others.
10. Same—Power to loan.
- 11, 12. Same—Power to purchase own stock.
13. Same—Power to take mortgage.
- 14-19. Insurance companies—Investments, extent of, etc.

As to authority of corporations to hold shares in other corporations, see 10 Cyc. 1107.

As to authority of corporation to take and hold land, see note by Robert Desty, 2 L. R. A. 255; also 13 Am. & Eng. Encyc. of Law (2d ed.) 851.

As to power of corporation to deal in stock of other corporations or its own, see monographic note by A. P. Will, 18 L. R. A. 252.

As to power of corporation to lend out funds, see 10 Cyc. 1105.

As to right to acquire mortgages, see 13 Am. & Eng. Encyc. of Law (2d ed.) 854.

As to right of corporation to purchase its own stock, see monographic note, 61 L. R. A. 621-623.

1. CONFLICT OF STATUTE.—In so far as last two sections are in conflict or repugnant to each other the former must be regarded as repealed by latter.—See ante § 20 note pars. 11-18.

In so far as latter was intended to take place of former, and the terms are so inconsistent that they cannot both stand together, latter must prevail.—See ante § 20 note pars. 22-24.

2. NEITHER REVISION NOR SUBSTITUTION, but careless duplication of provision, is what above sections in reality are. The first act limits privileges conferred to corporations organized subsequent to April 1, 1878; latter extends privilege to all corporations. In this the two acts are in conflict, and latter must

prevail. The privileges enumerated in paragraph six of each act are not the same; and as neither is mandatory, but permissive merely, the result is thought to extend privilege of investment to all the classes enumerated in each.

3. ACT OF INCORPORATION, like other statutes, construed in such manner as will best answer intention of legislature, and all its parts should be made subservient to, and in harmony with, leading purposes and objects intended to be accomplished.—Straus vs. Eagle Ins. Co. of Cincinnati, 5 Ohio St. 60. See People vs. Utica Ins. Co., 15 John. (N. Y.) 358, 380; White's Bank of Buffalo vs. Toledo Fire & M. Ins. Co., 12 Ohio St. 601, 605.

4. CORPORATIONS HAVE SUCH POWERS, and such only, as the act creating them confers, and are restricted or limited to the exercise of those expressly granted, and such incidental powers as are necessary to carry into effect those expressly conferred.—Straus vs. Eagle Ins. Co. of Cincinnati, 5 Ohio St. 60. See Me. Franklin vs. Lewiston Inst. for Sav., 68 Me. 42, 28 Am. Rep. 9. Ohio. Gallia Co. vs. Holcomb, 7 Ohio, pt. I, 232; Bank of Chillicothe vs. Chillicothe, 7 Ohio, pt. II, 31, 30 Am. Dec. 185; Bank of Chillicothe vs. Swayne, 8 Ohio 257, 32 Am. Dec. 707; Bartholomew vs. Bentley, 1 Ohio St. 41. Fed. Head vs. Providence Ins. Co., 6 U. S. (2 Cr.) 127, bk. 2 L. ed. 229; Dartmouth College vs. Woodward, 17 U. S. (4 Wheat.) 518, bk. 4 L. ed. 629; Beaty vs. Knowler, 29 U. S. (4 Pet.) 152, bk. 7 L. ed. 813; Perrine vs. Chesapeake & Del. Can. Co., 50 U. S. (9 How.) 172, bk. 13 L. ed. 92; Farnum vs. Blackstone Canal Co., 1 Sumn. C. C. 46, 8 Fed. Cas. 1059.

5. Power of investment designed to enable corporation to make profitable use of surplus funds by placing them at interest with view to their safety and the interest of stockholders.—Straus vs. Eagle Ins. Co. of Cincinnati, 5 Ohio St. 60, 65.

6. **CORPORATIONS GENERALLY**—Power to deal in shares of other companies.—Corporation cannot, in absence of statutory authority, subscribe for capital stock in another corporation.—Holmes & G. Mfg. Co. vs. Holmes & W. Met. Co., 127 N. Y. 252, 24 Am. St. Rep. 448, 27 N. E. Rep. 831; Valley R. Co. vs. Lake Erie L. Co., 46 Ohio St. 44, 18 N. E. Rep. 486, 1 L. R. A. 412.

7. Cannot purchase or hold or deal in stocks of other corporations, unless authorized so to do by law.—Franklin Co. vs. Lewiston Inst. for Sav., 68 Me. 43, 28 Am. Rep. 9.

8. Cannot control stock in similar institution for the purpose of creating monopoly.—People ex rel. Peabody vs. Chicago Gas Trust Co., 130 Ill. 268, 17 Am. St. Rep. 319, 22 N. E. Rep. 798, 3 L. R. A. 497.

9. Power to invest capital in stock of other corporations recognized.—Hodges vs. New England Screw Co., 1 R. I. 312, 347, 53 Am. Dec. 624.

10. Power to loan funds and money to persons and other public companies on security of real or personal estate, but not for purpose of engaging "in trade or business of exchange or money-brokers," gives power to purchase bills of exchange, if bona fide for investment or collection of debt.—White's Bank of Buffalo vs. Toledo F. & M. Co., 12 Ohio St. 601, 605.

11. Power to purchase own stock.—Corporations have power to purchase their own stock when their acts are bona fide.—Republic L. Ins. Co. vs. Swigert, 135 Ill. 150, 25 N. E. Rep. 680, 12 L. R. A. 328; Iowa Lumber Co. vs. Foster, 49 Iowa 25, 31 Am. Rep. 140; Rollins vs. Shaver, W. & C. Co., 80 Iowa 380, 20 Am. St. Rep. 427, 45 N. W. Rep. 1037.

12. Power to take stock to pay debts.—Corporations have, under certain circumstances, right to take stock in payment of debts or as security therefor and to convert same into cash.—First Nat. Bank of Charlotte vs. National Ex. Bank, 22 Me. 200, 23 U. S. 122, 128, 13 L. ed. 681. See Howe vs. Boston Carpet Co., 32 Mass. (16 Gray) 493, 495; Hodges vs. New England Screw Co., 1 R. I. 312, 53 Am. Dec. 624.

13. Power to take mortgage.—Foreign corporation has right to take mortgage upon real estate to secure debt, and to foreclose same.—American Mut. L. Ins. Co. vs. Owen, 31 Mass. (15 Gray) 491, 492. See Ky. Lathrop vs. Com-

mercial Bank, 3 Dana (Ky.) 114, 33 Am. Dec. 481. Mass. Portsmouth Livery Co. vs. Watson, 10 Mass. 91; British-Am. L. Co. vs. Ames, 47 Mass. (6 Met.) 391. N. H. Lumbard vs. Aldrich, 3 N. H. 31, 28 Am. Dec. 381. N. J. National Trust Co. vs. Murphy, 30 N. J. Eq. (3 Stew.) 408. N. Y. Silver Lake Bank vs. North, 4 John. ch. 370. Pa. Leasure vs. Union Mut. L. Ins. Co., 91 Pa. St. 491. Fed. New York Dry Dock Co. vs. Hicks, 5 McL. C. C. 111, 18 Fed. Cas. 151; Farmers L. & T. Co. vs. McKinney, 6 McL. C. C. 1, 8 Fed. Cas. 1048.

14. **INSURANCE CORPORATIONS**—Insurance companies have right to invest in stock of banks and railroads.—Hodges vs. New England Screw Co., 1 R. I. 312, 347, 53 Am. Dec. 624. See Pearson vs. Concord R. Co., 62 N. H. 537, 13 Am. St. Rep. 590.

15. Cannot employ credit, under power of investment, to purchase claims in a manner destructive of the purposes of their creation.—Straus vs. Eagle Ins. Co. of Cincinnati, 5 Ohio St. 60, 66. See Smith vs. Alabama L. Ins. & T. Co., 4 Ala. 558; Attorney-General vs. Life & Fire Ins. Co., 4 Paige Ch. (N. Y.) 224.

16. To purchase upon credit a promissory note of one of its insured so as to set out such note against the claim of the insured for insurance.—Straus vs. Eagle Ins. Co. of Cincinnati, 5 Ohio St. 60.

17. Cannot purchase stock and franchise of bank, in absence of express power by charter for legislative grants.—State vs. Butler, 86 Tenn. 614, 8 S. W. Rep. 586; Buckeye M. & F. S. Co. vs. Harvey, 92 Tenn. 115, 36 Am. St. Rep. 71, 20 S. W. Rep. 427, 18 L. R. A. 252.

18. Have no power to advance money or obligations to sustain another corporation in a similar or dissimilar business.—Franklin Co. vs. Lewiston Inst. for Sav., 68 Me. 43, 28 Am. Rep. 9; Berry vs. Yates, 24 Barb. (N. Y.) 199; Mutual Sav. Bank vs. Meriden Agency Co., 24 Conn. 159; Sumner vs. Marcy, 3 Woodb. & M. C. C. 105, 23 Fed. Cas. 384.

19. Purchase upon credit of promissory note of one entitled to indemnity from insurance company involving use of no such funds, is not fair execution of power of investment, but directly opposed to the leading objects of the power of investment and its charter.—Straus vs. Eagle Ins. Co. of Cincinnati, 5 Ohio St. 60, 65.

CHAPTER II.

FIRE, MARINE, AND TITLE INSURANCE COMPANIES.

§ 424. Payment of subscriptions—Capital to be all paid in twelve months.
 § 425. Certificate of capital stock paid up to be filed, and when.
 § 426. Property which may be insured.
 § 427. Funds may be invested how (repealed).
 § 428. Corporations, fire and marine; amount of risk to be taken.

§ 429. [Reserve before dividends]—Corporations formed subsequent to April 1, 1878.
 § 430. Amount to be reserved by companies with less than \$200,000.
 § 431. Amount to be reserved by life insurance companies (repealed).
 § 432. Accumulate surplus fund.

§ 424. PAYMENT OF SUBSCRIPTIONS—CAPITAL TO BE ALL PAID IN TWELVE MONTHS. The entire capital stock of every fire or marine insurance

corporation must be paid up in cash within twelve months from the filing of the articles of incorporation, and no policy of insurance must be issued or risk taken until twenty-five per cent of the whole capital stock is paid up.

History: Enacted March 21, 1872.

- 1, 2. Fire insurance.
3. Marine insurance.

1. Fire insurance,—as to, see post §§ 2752-2757 and notes.

2. Same—County fire insurance companies, as to act providing for, see HENNING'S GENERAL LAWS, tit. Corporations and Insurance.
3. Marine insurance,—as to, see post §§ 2655-2746 and notes.

§ 425. CERTIFICATE OF CAPITAL STOCK PAID UP TO BE FILED, AND WHEN. The president and a majority of the directors must, [1] within thirty days after the payment of the twenty-five per cent of the capital stock, and also [2] within thirty days after the payment of the last instalment or assessment of the capital stock limited and fixed, [3] prepare, subscribe, and swear to [4] a certificate setting forth the amount of the fixed capital and [5] the amount thereof paid up at the times respectively in this section named, and [6] file the same in the office of the county clerk of the county where the principal place of business of the corporation is located, and [7] a duplicate thereof, similarly executed, with the insurance commissioner.

History: Enacted March 21, 1872.

§ 426. PROPERTY WHICH MAY BE INSURED. Every corporation formed for fire or marine insurance, or both, may [1] make insurance on all insurable interests within the scope of its articles of incorporation, and [2] may cause itself to be reinsured.

History: Enacted March 21, 1872.

§ 427. FUNDS MAY BE INVESTED, HOW (repealed).

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 210; April 1, 1878, Code Amdts. 1877-8, p. 81; March 5, 1887, Stats. and Amdts. 1887, p. 22; March 6, 1899, Stats. and Amdts. 1899, pp. 66-68 (became law, under constitutional provision, without governor's approval); repealed March 8, 1905, Stats. and Amdts. 1905, c. XXXIX, p. 34; re-repealed March 21, 1905, Stats. and Amdts. 1905, c. CDLXX, p. 628.

1. Applied, cited, construed, referred to, etc.
2. Insurable interest.
3. Loan money and take mortgage.

1. Applied, cited, construed, referred to, etc., in: Sun Ins. Co. vs. White, 123 Cal. 196, 203, 55 Pac. Rep. 902 (referred to).

2. Insurable interest,—as to what is, see post § 2546.

3. Loan money and take mortgage where the money loaned is of its capital and accumulations.—Sun Ins. Co. vs. White, 123 Cal. 196, 203, 55 Pac. Rep. 902.

§ 428. CORPORATIONS, FIRE AND MARINE; AMOUNT OF RISK TO BE TAKEN. Fire and marine insurance corporations must never take, on any one risk, whether it is a marine insurance or an insurance against fire, a sum exceeding one tenth part of their capital actually paid in, and intact at the time of taking such risk, without at once reinsuring the excess above one tenth.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 210; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 357, held unconstitutional, see history, § 4 ante; re-amended March 21, 1905, c. CDXX, p. 570.

- 1, 2. Estoppel of corporation to assert over-insurance.
3. Power of state to regulate and limit insurance companies.

4. Reinsurance—General authority of corporation to make contract.
5. Same—Nature of reinsurance—Proceedings against reinsurer.

1. **ESTOPPEL OF CORPORATION TO ASSERT OVER-INSURANCE.**—By analogy to rule that where corporation insures property for proportionate amount in excess of that permitted by its charter, or by statute, it is estopped to set up such fact, it would seem that where corporation has violated this section it will not be heard to make defense that it has done so.—See *Mass. Fuller vs. Boston Mut. Fire Ins. Co.*, 45 *Mass. (4 Met.)* 206, 210. *Pa. Cumberland Valley Mut. Protection Co. vs. Schell*, 29 *Pa. St.* 31. *R. I. Hoxsie vs. Providence Mut. Fire Ins. Co.*, 6 *R. I.* 517, 527, 528.

As to waiver of condition against over-insurance, see note 27 *Am. Rep.* 597.

2. Compare: *Luthe vs. Farmers' Mut. Fire Ins. Co.*, 55 *Wis.* 543, 13 *N. W. Rep.* 490.

3. Power of state to regulate and limit insurance companies.—See 16 *Am. & Eng. Ency. of Law* (2d ed.) 884-886.

4. **REINSURANCE**—General authority of

corporation to make contract.—Reinsurance is valid contract at common law; and corporation formed by act authorizing it to make contracts of insurance against loss by fire has corporate capacity to make contract of reinsurance.—*Davenport Fire Ins. Co. vs. Moore*, 50 *Iowa* 619, 626, 627; *New York Bowery Fire Ins. Co. vs. New York Fire Ins. Co.*, 17 *Wend. (N. Y.)* 359, 362, 363.

5. **Nature of reinsurance**—Proceedings against reinsurer.—Reinsurance is a contract of indemnity, binding reinsurer to pay to reassured the whole loss sustained in respect of subject insured, to extent of reinsurance; but it is not necessary for reassured to pay loss to first assured before proceeding against reinsurer, nor is liability of latter, it seems, affected by insolvency of reassured, or his inability to fulfil his own contract with first assured.—*Eagle Ins. Co. vs. Lafayette Ins. Co.*, 9 *Ind.* 443, 446, 447.

§ 420. [RESERVE BEFORE DIVIDENDS.] CORPORATIONS FORMED SUBSEQUENT TO APRIL 1, 1878. No corporation formed subsequent to April first, eighteen hundred and seventy-eight, under the laws of this state, and transacting fire, marine, inland navigation insurance business, or insurance provided for by section four hundred and twenty (420) of this code, except insurance of the title to real property, must make any dividends except from profits remaining on hand after retaining unimpaired:

1. The entire subscribed capital stock.
2. All the premiums received or receivable on outstanding marine or inland risks, except marine time risks.
3. A fund equal to one half of the amount of all premiums on all other risks not terminated at the time of making such dividend.
4. A sum sufficient to pay all losses reported or in course of settlement, and all liabilities for expenses and taxes.

History: Enacted March 21, 1872; amended April 1, 1878, Code Amdts. 1877-8, p. 81; March 5, 1887, Stats. and Amdts. 1887, p. 23.

Declaring dividends—When and from what, and note and § 417 and note. See note 99 *Am. by insurance companies.*—As to, see ante § 309 Dec. 761.

§ 430. AMOUNT TO BE RESERVED BY COMPANIES WITH LESS THAN \$200,000. No fire or marine insurance corporation, with a subscribed capital of less than two hundred thousand dollars, must declare any dividends, except from profits remaining on hand after reserving:

1. A sum necessary to form, with the subscribed capital stock, the aggregate sum of two hundred thousand dollars;
2. All the premiums received or receivable on outstanding marine or inland risks, except marine time risks;
3. A fund equal to one half the amount of all premiums on fire risks and marine time risks not terminated at the time of making such dividend;
4. A sum sufficient to pay all losses reported or in course of settlement, and all liabilities for expenses and taxes.

History: Enacted March 21, 1872.

§ 431. AMOUNT TO BE RESERVED BY LIFE INSURANCE COMPANIES (repealed).

History: Enacted April 1, 1878, Code Amdts. 1877-8, p. 81; repealed by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 357, held unconstitutional; see history, § 4 ante; re-repealed March 21, 1905, Stats. and Amdts. 1905, c. CDXXI, p. 571.

As to life and health insurance corporations and insurance, see post § 2762 et seq.

§ 432. ACCUMULATE SURPLUS FUND. Corporations transacting business in insuring titles to real estate, shall annually set apart a sum equal to twenty-five per cent of their premiums collected during the year, which sum shall be allowed to accumulate until a fund shall have been created amounting to ten per cent of the subscribed capital stock. Such fund shall be maintained as a further security to policy holders, and shall be known as the surplus fund;

[Impairment of surplus fund—Restoration.] And if at any time such fund shall be impaired by reason of a loss, the amount by which it may be impaired shall be restored in the manner hereinabove provided for its accumulation. The reporting of a loss shall be deemed an impairment of such fund for the purposes of this section.

[Dividends—From what made—Reservations.] Such corporation must not make any dividends except from profits remaining on hand after retaining unimpaired:

1. The entire subscribed capital stock.
2. The amount owing to the surplus fund, under the provisions of this section.
3. A sum sufficient to pay all losses reported, or in course of settlement, which shall be in excess of the surplus fund, and all liabilities for expenses and taxes

History: Enacted March 5, 1887, Stats. and Amdts. 1887, p. 23. In effect March 5, 1887; repealed by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 357, held unconstitutional; see history, § 4 ante.

CHAPTER III.

MUTUAL LIFE, HEALTH, AND ACCIDENT INSURANCE CORPORATIONS.

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| § 437. Capital stock—Guarantee fund. | § 446. Premiums, how payable. |
| § 438. Of what guarantee fund shall consist. | § 447. Insurance companies to furnish data to insurance commissioner—Employment of actuary. |
| § 439. What constitutes, and deficiency in fixed capital. | § 448. No stamps required on accident insurance (repealed). |
| § 440. Declaration of fixed capital to be filed. | § 449. [Valuation of policies.] Retaliatory clause. |
| § 441. Guarantee notes and interest. [Commission and interest allowed.] | § 450. Policies issued within state. |
| § 442. Insured entitled to vote, when. | § 451. Certain orders not insurance companies. |
| § 443. Number of directors, how altered. | § 452. Corporations, life insurance—Dividends, how made. |
| § 444. Investment of capital stock. | |
| § 445. Limitation to the holding of stock, etc., may be provided for in by-laws. | |

§ 437. CAPITAL STOCK—GUARANTEE FUND. Every corporation formed for the purpose of mutual insurance on the lives or health of persons, or against accidents to persons for life or any fixed period of time, or to purchase and sell annuities, must have a capital stock of not less than two hundred thousand dollars. It must not make any insurance upon any risk or transact any other business as a corporation until its capital stock is fully paid up in cash, nor until it

has also obtained a fund, to be known as a "guarantee fund," of not less than two hundred and fifty thousand dollars, as is hereinafter provided. If more than the requisite amount is subscribed, the stock must be distributed pro rata among the subscribers. Any subscription may be rejected by the board of directors or the committee thereof, either as to the whole or any part thereof, and must be, so far as rejected, without effect, nothing in this section shall be deemed to contravene any of the provisions of section four hundred and fifty-one.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 357, held unconstitutional, see history, § 4 ante; re-amended March 18, 1905, Stats. and Amdts. 1905, c. CLXXXVIII, pp. 183-184.

1. Applied, cited, construed, referred to, etc.
2. Assessment insurance companies.

1. Applied, cited, construed, referred to, etc., in: Perkins vs. Fish, 121 Cal. 317, 320, 321, 324, 53 Pac. Rep. 901 (construed).

2. Assessment insurance companies.—An insurance company organized to associate to-

gether persons for purpose of equalizing risk of death, and to pay nominees of such members as may die stipulated sums to be collected from survivors on assessment or co-operative plan, need have no capital or capital stock, except deposit required by Act 1891.—Perkins vs. Fish, 121 Cal. 317, 320, 324, 325, 53 Pac. Rep. 901.

§ 438. OF WHAT GUARANTEE FUND SHALL CONSIST (repealed).

History: Enacted March 21, 1872; repealed March 21, 1905, Stats. and Amdts. 1905, c. CDXXI, p. 571.

As to debts for which guarantee fund liable, California Mutual L. Ina. Co., 31 Cal. 364, 22 under former section, see In matter of the Pac. Rep. 369.

§ 439. WHAT CONSTITUTES, AND DEFICIENCY IN FIXED CAPITAL.

The sum accumulated as provided in the preceding section, together with the capital stock, shall become and remain the fixed capital of the corporation, not subject to division among the stockholders or parties dealing with it, or to be expended in any manner otherwise than [as] may be required in payment of the corporation's debts and actual expenses, until the business of the corporation is closed, its debts paid, and its outstanding policies and obligations of every kind canceled or provided for; and if from any cause a deficiency at any time occurs in such fixed capital, no further division of profits must take place until such deficiency has been made up.

History: Enacted March 21, 1872.

§ 440. DECLARATION OF FIXED CAPITAL TO BE FILED. Whenever the fixed capital of the corporation is obtained as hereinbefore provided, [1] the president of the corporation and its actuary, or its secretary, if there is no actuary, must [2] make a declaration in writing, [3] sworn to before some notary public, of the amount of such fixed capital, and of [4] the particular kinds of property composing the same, with [5] the nature and amount of each kind, which [6] must be filed with the original articles of incorporation, and [7] a copy, certified by the county clerk, must be published for at least four successive weeks, in a newspaper published in the county where the principal business of the corporation is situated. Upon the filing of such declaration the guarantee fund is discharged of its obligations, and all notes of the fund remaining in the control of the corporation, and not affected by any lien thereon, or claim of that nature, must be surrendered by it to the makers thereof, respectively, or other parties entitled to receive the same.

History: Enacted March 21, 1872.

§ 441. GUARANTEE NOTES AND INTEREST. [COMMISSION AND INTEREST ALLOWED.] Until the guarantee fund is discharged from its obligations, as provided in the preceding section, no note must be withdrawn from the fund, unless another note of equal solvency is substituted therefor, with the approval of the board of directors. The corporation must allow [1] a commission, not exceeding five per cent per annum, on all such guarantee notes while outstanding, and also [2] interest on all moneys paid on such notes by the parties liable thereon, at the rate of twelve per cent per annum, payable half yearly until repaid by the corporation, unless the current rate of interest is different from this amount, in which case the rate payable may, from time to time, at intervals of not less than one year, be increased or reduced by the board of directors, so as to conform to the current rate.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 210.

§ 442. INSURED TO BE ENTITLED TO VOTE, WHEN. After the filing of the declaration of the fixed capital, as in this article provided, the holders of policies of life insurance for the term of life, on which the premiums are not in default, may vote at the election of directors, and have one vote for each one thousand dollars insured by their policies, respectively.

History: Enacted March 21, 1872.

§ 443. NUMBER OF DIRECTORS, HOW ALTERED. The number of directors specified in the articles of incorporation may be altered from time to time during the existence of the corporation by resolution, at the annual meeting of a majority of those entitled to vote at the election of directors, but the number must never be reduced below five.

History: Enacted March 21, 1872.

§ 444. INVESTMENT OF CAPITAL STOCK. Life, health, and accident insurance corporations may invest their capital stock as follows:

1. In loans upon unencumbered and improved real property within the state of California, which shall be worth at the time of the investment at least forty per cent more than the sum loaned.

2. In the purchase of or loans upon interest-bearing bonds, and other securities of the United States and of the state of California.

3. In the purchase of or loans upon interest-bearing bonds of any of the other states of the Union, or of any county, or incorporated city, or city and county, in the state of California.

4. In the purchase of loans upon any stocks of corporations formed under the laws of this state, except of mining corporations, which shall [1] have, at the time of the investment, a value, in the city and county of San Francisco, of not less than sixty per cent of their par value, and shall [2] be rated as first-class securities; [Extent to which loans may be made] but no loans shall be made on any securities specified in subdivisions three and four of this section, in any amount beyond sixty per cent of the market value of the securities, nor shall any loan be made on the stock of the corporation, or notes or other obligations of its corporations.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 211; repealed by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 357, held unconstitutional; see history, § 4 ante.

§ 445. **LIMITATIONS TO THE HOLDING OF STOCK, ETC., MAY BE PROVIDED FOR IN BY-LAWS.** The corporation may, by its by-laws, limit the number of shares which may be held by any one person, and make such other provisions for the protection of the stockholders and the better security of those dealing with it as to a majority of the stockholders may seem proper, not inconsistent with the provisions of this title or part.

History: Enacted March 21, 1872.

§ 446. **PREMIUMS, HOW PAYABLE.** All premiums must be payable wholly in cash, or one half or a greater proportion in cash, and the remainder in promissory notes bearing interest, as may be provided for by the by-laws. Agreements and policies of insurance made by the corporation may be upon the basis of full or partial participation in the profits, or without any participation therein, as may be provided by the by-laws and agreed between the parties.

History: Enacted March 21, 1872.

§ 447. **INSURANCE CORPORATIONS TO FURNISH DATA TO INSURANCE COMMISSIONER. EMPLOYMENT OF ACTUARY.** Every life insurance corporation organized under the laws of this state must, on or before the first day of February of each year, furnish the insurance commissioner the necessary data for determining the valuation of all its policies outstanding on the thirty-first day of December, then next preceding. And every life insurance company organized under the laws of any other state or country, and doing business in this state, must, upon the written requisition of the commissioner, furnish him, [1] at such time as he may designate, [2] the requisite data for determining the valuation of all its policies then outstanding; such valuations must be based [1] upon the rate of mortality established by the American experienced life table, and [2] interest at four and one half per cent per annum; provided, that [3] from and after the thirty-first day of December, A. D. one thousand eight hundred and ninety-one, such valuations must be based upon the rate of mortality established by the combined experience or actuaries' table of mortality, with [4] interest at the rate of four per cent per annum.

[Valuation of policies of foreign companies, how ascertained.] When the laws of any other state or territory require of a life insurance company organized under the laws of this state a valuation of its outstanding policies by any standard of valuation different from that named in this section, the insurance commissioner is hereby authorized to make such valuation for use in such other state or territory, and to issue his certificate in accordance therewith. For the purpose of making the valuations, the insurance commissioner is authorized to employ a competent actuary, whose compensation for such valuations shall be three cents for each thousand dollars of insurance, to be paid by the respective companies whose policies are thus valued.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 211; Feb. 25, 1889, Stats. and Amdts. 1889, p. 36; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 357, held unconstitutional, see history, § 4 ante.

§ 448. **NO STAMPS REQUIRED ON ACCIDENT INSURANCE CONTRACT.** (repealed).

History: Enacted March 21, 1872; repealed by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 358, held unconstitutional, see history, § 4 ante; re-repealed March 21, 1905, Stats. and Amdts. 1905, c. CDXXI, p. 571.

§ 449. [VALUATION OF POLICIES.] RETALIATORY CLAUSE. When the certificate of the insurance commissioner of this state, of the valuation of the policies of a life insurance company, as provided in section four hundred and forty-seven of the Civil Code of this state, issued to any company organized under the laws of this state, shall not be accepted by the insurance authorities of any other state, in lieu of a valuation of the same, by the insurance officer of such other state, then every company organized under the laws of such other state, doing business in this state, shall be required to have a separate valuation of its policies made under the authority of the insurance commissioner of this state, as provided in section four hundred and forty-seven of the Civil Code.

History: Enacted March 30, 1874, Code Amdts. 1873-4, p. 271; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 358, held unconstitutional, see history, § 4 ante.

§ 450. POLICIES ISSUED WITHIN STATE. Every contract or policy of insurance hereafter made by any person or corporation organized [1] under the laws of this state, or [2] under those of any other state or country, with and upon the life of a resident of this state, and delivered within this state, shall contain, unless specifically contracted between the insurer and the insured for tontine insurance, or for other term or paid-up insurance, a stipulation that when, after three full annual premiums shall have been paid on such policy, it shall cease or become void solely by the non-payment of any premium when due, its entire net reserve, by the American experience mortality, and interest at four and one half per cent yearly, less any indebtedness to the company on such policy, shall be applied by such company as a single premium, at such company's published rates in force at the date of original policy, but at the age of the insured at time of lapse, either to the purchase of non-participating term insurance for the full amount insured by such policy, or upon the written application by the owner of such policy, and the surrender thereof to such company within three months from such non-payment of premium, to the purchase of a non-participating paid-up policy, payable at the time the original policy would be payable if continued in force; both kinds of insurance to be subject to the same conditions, except as to payment of premiums, as those of the original policy.

[Proof of death within year.] It may be provided, however, in such stipulation, that no part of such term insurance shall [shall] be due or payable, unless satisfactory proofs of death be furnished to the insuring company within one year after death, and that, if death shall occur within three years after such non-payment of premium, and during such term of insurance, there shall be deducted from the amount payable the sum of all the premiums that would have become due on the original policy if it had continued in force.

If the reserve on endowment policies be more than enough to purchase temporary insurance, as aforesaid, to the end of the endowment term, the excess shall be applied to the purchase of pure endowment insurance, payable at the end of the term, if the insured be then living.

[Penalty for failure to comply with above provisions.] If any life insurance corporation or company shall deliver to any person in this state a policy of insurance upon the life of any person residing in this state, not in conformity with the provisions of this section, the right of such corporation or company to transact business in this state shall thereupon and thereby cease and terminate, and the

insurance commissioner shall immediately revoke the certificate of such corporation or company authorizing it to do business in this state, and publish such revocation, daily, for the period of two weeks, in two daily newspapers, one published in the city of San Francisco, and the other in the city of Sacramento.

History: Enacted March 30, 1874, Code Amdts. 1873-4, p. 271; amended April 1, 1878, Code Amdts. 1877-8, p. 82; April 26, 1880, Code Amdts. 1880 (Pol. Code pt.), pp. 91-92; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 358, held unconstitutional, see history, § 4 ante.

1. Applied, cited, construed, referred to, etc.
2. Omission of non-forfeitable clause—Effect on policy.
3. Provisions of section no part of contract.
4. Same—Courts cannot insert into.
5. Validity of contract avoiding policy for non-payment of premium.
6. Waiver of statute.

1. Applied, cited, construed, referred to, etc., in: *Straube vs. Pacific Mut. L. Ins. Co.*, 123 Cal. 677, 679, 680, 56 Pac. Rep. 546 (construed and applied); *Rife vs. Union Cent. L. Ins. Co.*, 129 Cal. 455, 459, 460, 62 Pac. Rep. 48 (construed and applied).

2. Omission of a non-forfeitable stipulation in policy does not render contract of insurance void as violation of an express declaration of law.—*Straube vs. Pacific Mut. L. Ins. Co.*, 123 Cal. 677, 679, 680, 56 Pac. Rep. 546.

3. Provisions of this section not part of contract of insurance, by operation of law.—

Straube vs. Pacific Mut. L. Ins. Co., 123 Cal. 677, 680, 681, 56 Pac. Rep. 546.

4. This section does not authorize courts to insert its stipulations into policy as matter of law. Statute is no part of contract of insurance, and cannot be read into policy when omitted therefrom.—*Straube vs. Pacific Mut. L. Ins. Co.*, 123 Cal. 677, 680, 681, 56 Pac. Rep. 546.

5. Validity of contract avoiding policy for non-payment of premium.—Agreement that provisions of policy providing for issue of paid-up term-policy should become null and void if premiums were not paid as they became due, is valid.—*Rife vs. Union Cent. L. Ins. Co.*, 129 Cal. 455, 459, 460, 62 Pac. Rep. 48.

6. Waiver of statute.—Provision regarding application of excess net reserve to purchase of term or paid-up policy may be waived by parties in the contract.—*Rife vs. Union Central L. Ins. Co.*, 129 Cal. 455, 459, 460, 62 Pac. Rep. 48.

§ 451. CERTAIN ORDERS NOT INSURANCE COMPANIES. All associations or secret orders, and other benevolent or fraternal co-operative societies incorporated or organized for the purpose of mutual protection and relief of its members, and for the payment of stipulated sums of money to its members, or to the family of deceased members, and not for profit, are declared not to be insurance companies in the sense and meaning of the insurance laws of this state, and are exempt from the provisions of all existing insurance laws of this state.

History: Enacted March 30, 1874, Code Amdts. 1873-4, p. 271; amended April 7, 1878, Code Amdts. 1877-8, p. 82; repealed April 26, 1880, Code Amdts. 1880 (Pol. Code pt.), p. 92; re-enacted March 23, 1885, Stats. and Amdts. 1885, p. 221.

1. Applied, cited, construed, referred to, etc.
2. Fraternal and secret societies—What constitute.
3. Special rules applicable to mutual or membership life or accident insurance.

1. Applied, cited, construed, referred to, etc., in: *Perkins vs. Fish*, 121 Cal. 317, 321, 53 Pac. Rep. 901 (referred to); *Marshall vs. Grand Lodge A. O. U. W.*, 133 Cal. 656, 690, 66 Pac. Rep. 25 (referred to).

2. Fraternal and secret societies—What constitute.—See post § 453p and note.

See 3 Am. & Eng. Encyc. of Law (2d. ed.) 1041; 14 Id. 11.

3. Special rules applicable to mutual or membership life or accident insurance.—See monographic note 52 Am. St. Rep. 543-578.

As to statutory provisions governing mutual benefit and life associations, see §§ 452a, 453, 453d-453p and notes.

§ 452. CORPORATIONS, LIFE INSURANCE — DIVIDENDS, HOW MADE. No corporation formed under the laws of this state, and transacting life insurance business, must make any dividends, except from profits remaining on hand after retaining unimpaired:

1. The entire capital stock;
2. A sum sufficient to pay all losses reported or in course of settlement, and all liabilities for expenses and taxes;

3. A sum sufficient to reinsure all outstanding policies, as ascertained and determined upon the basis of the American experience table of mortality, and interest at the rate of four and one half per cent per annum.

History: New section added by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 859, held unconstitutional, see history, § 4 ante; re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXI, p. 571. Original section 452, regulating determination of net valuation of policy at expiration of term, was enacted April 1, 1878 (Code Amdts. 1877-8, p. 83), and repealed April 26, 1880, Code Amdts. 1880 (Pol. Code pt.), p. 92.

CHAPTER IV.

MUTUAL BENEFIT AND LIFE ASSOCIATIONS.

§ 452a. Formation of the association. [Mutual benefit and life.] § 453. Levying of assessments—By-laws which may be made.

[This chapter was added by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 860, held unconstitutional, see history, § 4 ante; re-enacted March 20, 1905.]

§ 452a. **FORMATION OF THE ASSOCIATION — [MUTUAL BENEFIT AND LIFE].** Associations of not exceeding one thousand persons may be formed for the purpose of paying to the nominee of any member a sum, upon the death of the member, not exceeding three dollars for each member of the association. Such association may be formed by

Filing articles of incorporation in the office of the clerk of the county in which the principal place of business is situated and a certified copy of such articles of incorporation, duly certified by the county clerk, in the office of the secretary of state.

[What articles must show.] Such articles must state the name of the corporation, its general purposes, its principal place of business, its term of existence, not exceeding fifty years, the names and residences of the directors selected or appointed to serve for the first year, and must be signed and verified as required by sections two hundred and ninety-two and five hundred and ninety-four.

History: Enacted March 20, 1905, Stats. and Amdts. 1905, c. CCCXLIX, pp. 410-411; see introductory note to this chapter.

I. Character of Benefit Associations.

- 1, 2. Essentially life insurance companies.
3. Act through members, etc.—Records bind.
- 4-6. Creatures of contract—Partners.
- 7, 8. Extent of benefits—Sick, not purely benevolent.
9. Not destroyed by calls in advance.
10. Provisions as to beneficiary fund—How affected by general laws.
- 11, 12. Provisions of statute complied with.
13. When not secret society, etc.

II. Character of Articles of Association.

- 14-16. Contractual—Supreme, fundamental law.
- 17, 18. Construed as contract—Liberal.
19. Same—With reference to objects.

III. Nature of Relationship with Members.

20. Contractual without regard to status.
- 21-24. How determined, etc.
25. Nature endowed on policy—Effect of.
26. Party chargeable with knowledge of.

I. CHARACTER OF BENEFIT ASSOCIATIONS.

As to definitions and distinctions between benevolent and beneficial associations, see 3 Am. & Eng. Encyc. of Law (2d ed.) 1043.

As to features of law specially applicable, see monographic note 52 Am. St. Rep. 543.

As to mutual benefit associations, see monographic notes 14 Am. St. Rep. 526; 19 Am. St. Rep. 781-791. See also 3 Am. & Eng. Encyc. of Law (2d ed.) 1045.

As to what are benevolent associations and their purposes and position as insurance companies, see monographic note by Robert Desty, 2 L. R. A. 420.

1. **ASSOCIATION ORGANIZED UNDER GENERAL INCORPORATION LAWS** of state, whose principal object is securing to member, payment on death to his beneficiary or representative, of certain amount, subject to fulfillment of conditions imposed by charter and by-laws, is essentially a life insurance company.—*Masonic Aid Assoc. vs. Taylor*, 2 S. D. 324, 30

N. W. Rep. 93. See III. Illinois M. B. Soc. vs. Winthrop, 85 Ill. 537. Iowa. State ex rel. Graham vs. Miller, 66 Iowa 26, 23 N. W. Rep. 341. Kan. State ex rel. vs. Bankers & M. Mut. Ben. Assoc., 23 Kan. 499; State ex rel. vs. Vigilant Ins. Co., 20 Kan. 585, 2 Pac. Rep. 840. Me. Bolton vs. Bolton, 73 Me. 299. Mass. Commonwealth vs. Wetherbee, 105 Mass. 149. Mo. State ex rel. Attorney-General vs. Merchants' Ex. Mut. B. Soc., 72 Mo. 146. Neb. State vs. Farmers' Ben. Assoc., 18 Neb. 276, 25 N. W. Rep. 81. N. J. Holland vs. Supreme Council O. C. F., 54 N. J. L. (25 Vr.) 490, 25 Atl. Rep. 357. Tex. Farmer vs. State, 69 Tex. 561, 7 S. W. Rep. 220; McCorkle vs. Texas Ben. Assoc., 71 Tex. 149, 3 S. W. Rep. 516; Supreme Council of Am. L. of H. vs. Larmour, 81 Tex. 71, 16 S. W. Rep. 633. Utah. Danher vs. Grand Lodge A. O. U. W., 10 Utah 110, 37 Pac. Rep. 245. Wis. Erdmann vs. Mutual Ins. Co., 44 Wis. 376; Dietrich vs. Madison Relief Assoc., 45 Wis. 79. Fed. Wall vs. Equitable L. Ass. Soc., 32 Fed. Rep. 273; Berry vs. Knights T. & M. Indem. Co., 46 Fed. Rep. 439.

2. **MUTUAL BENEFIT ASSOCIATIONS** considered merely as mutual life insurance companies proceeding on assessment plan.—Lake vs. Minnesota M. R. Assoc., 61 Minn. 96, 52 Am. St. Rep. 538, 63 N. W. Rep. 261.

3. **ACT THROUGH THEIR MEMBERS** or officers or agents, and record of corporation written by authorized officers bind corporation without name of corporation being subscribed to record or memorial of acts.—Dearborn vs. Grand Lodge A. O. U. W., 138 Cal. 658, 663, 72 Pac. Rep. 154. See Gashwiler vs. Willis, 33 Cal. 11, 20, 91 Am. Dec. 607; In re La Solidarite Mut. Ben. Assoc., 68 Cal. 392, 394, 9 Pac. Rep. 453; Auzeais vs. Naglee, 74 Cal. 60, 63, 18 Pac. Rep. 371.

4. **CREATURES OF CONTRACT**, governed by the laws of contract.—Hogan vs. Pacific Endow. L., 99 Cal. 248, 256, 33 Pac. Rep. 924. See also cases cited pars. 14, 15 this note.

5. **CONTRACTS CONSTRUED** according to rules of other insurance companies.—Lake vs. Minnesota M. R. Assoc., 61 Minn. 96, 52 Am. St. Rep. 538, 63 N. W. Rep. 261.

6. **RELATION TO THIRD PERSONS** considered as partners in same manner as individuals associated for banking purposes.—Gorman vs. Russell, 14 Cal. 531, 536. See Hess vs. Werts, 4 Serg. & R. (Pa.) 356.

7. **ASSOCIATIONS FOR RELIEF OF DISTRESS** of widows and orphans may extend benefits to other persons by proper provisions in its constitution and by-laws.—Sheehan vs. Journeymen B. P. & B. Assoc., 143 Cal. 439, 495, 76 Pac. Rep. 233.

8. **CORPORATION PROMISING** to pay certain sum as benefits during sickness, in consideration of dues, not purely benevolent organization.—Bauer vs. Samson Lodge K. of P., 103 Ind. 362, 1 N. E. Rep. 571.

9. **FACT THAT BENEFIT ASSOCIATION** authorized to receive calls or premiums in advance does not destroy its character as insurance association.—State ex rel. Covenant Mut. Ben. Assoc. vs. Root, 83 Wis. 667, 54 N. W. Rep. 32, 19 L. R. A. 371.

10. **PROVISIONS RELATING TO BENEFICIARY FUND** do not subject association to operations of general insurance laws of state, or constitute an insurance company, as contemplated by such laws.—Marshall vs. Grand Lodge A. O. U. W., 133 Cal. 686, 691, 66 Pac. Rep. 25.

11. **PROVISIONS OF STATUTE** must be substantially complied with.—People ex rel. Weatherly vs. Golden Gate Lodge of Elks, 128 Cal. 257, 263, 60 Pac. Rep. 865. See People vs. Stockton & V. R. Co., 45 Cal. 806, 313, 14 Am. Rep. 178; People vs. Selfridge, 52 Cal. 331.

12. **QUESTIONS ARE TO BE DETERMINED** by provisions of constitution and laws of association.—McDonald vs. Supreme Council O. C. F., 73 Cal. 49, 54, 20 Pac. Rep. 41.

13. **SOCIETY IS NOT A SECRET** benevolent or fraternal society by reason that it restricts its membership to persons belonging to, and in good standing in society terming itself "Free and Accepted Masons" and restricting its members to those under fifty years of age.—Masonic Aid Assoc. vs. Taylor, 2 S. D. 324, 50 N. W. Rep. 93.

II. CHARACTER OF ARTICLES OF ASSOCIATION.

14. **ARTICLES OF ASSOCIATION OR CONSTITUTION AND BY-LAWS** of benevolent or social organization, are in nature of terms of contract which members thereof have entered into, and for violation of any of terms articles themselves ordinarily provide penalty and mode of enforcement as well as tribunal to determine whether penalty shall be incurred.—Grand Grove A. O. of D. vs. Garibaldi Grove A. O. of D., 105 Cal. 219, 224, 38 Pac. Rep. 947 (cited in running headline official volume Grand Grove A. O. of D. vs. Duchéin).

15. **ARE SUPREME LAW** of every contract between mutual benefit associations and their members, and their provisions, as well as those of the by-laws, not inconsistent with articles, enter into and form part of every contract and give them their full effect.—Lake vs. Minnesota M. R. Assoc., 61 Minn. 96, 52 Am. St. Rep. 538, 63 N. W. Rep. 261.

16. **BEAR TO IT SAME RELATION AS CHARTER** does to incorporated society and constitute its fundamental law in accordance with which subsequent by-laws, regulations, and amendments must be made.—Hogan vs. Pacific Endow. L., 99 Cal. 248, 256, 33 Pac. Rep. 924. See Otto vs. Journeymen T. P. & B. U., 75 Cal. 208, 209, 7 Am. St. Rep. 156, 17 Pac. Rep. 217; Austin vs. Searing, 16 N. Y. 112, 69 Am. Rec. 665.

17. **CONSTRUED**—As contract, by which duties of officers and duties and obligations of members among themselves, in scope of business, defined and regulated.—Hogan vs. Pacific Endow. L., 99 Cal. 248, 256, 33 Pac. Rep. 924.

18. **CONSTRUED LIBERALLY** rather than strictly, as strict rule applies to exercise of corporate power by those corporations whose dealings are with strangers having interest adverse to those of its members.—Sheehan vs. Journeymen B. P. & B. Assoc., 143 Cal. 439, 493, 76 Pac. Rep. 233.

19. CERTIFICATE OF INCORPORATION OF ASSOCIATION formed "to relieve the distress of widows and orphans" construed as not confining its objects merely to relieving widows and orphans.—*Sheehan vs. Journeymen B. P. & B. Assoc.*, 142 Cal. 459, 495, 76 Pac. Rep. 238. See *Ill. Bloomington Mut. Ben. Assoc. vs. Blue*, 120 Ill. 121, 58 Am. Rep. 852n, 11 N. E. Rep. 331. *N. Y. Massey vs. Mutual R. Soc.*, 102 N. Y. 523, 7 N. E. Rep. 619. *Pa. Maneely vs. Knights of Birmingham*, 115 Pa. 305, 9 Atl. Rep. 41. *Wis. Ballou vs. Gile*, 50 Wis. 614, 7 N. W. Rep. 561.

III. NATURE OF RELATIONSHIP.

20. RELATION BETWEEN ASSOCIATION AND MEMBERS becoming beneficiary members under relief fund scheme is contractual, no matter what status of an association of this character in its social, charitable, and purely beneficial features may be.—*Holland vs. Supreme Council O. C. F.*, 54 N. J. L. (25 Vr.) 490, 25 Atl. Rep. 367.

See ante para. 1, 14, 15 this note.

21. DETERMINED BY CONSIDERATION OF entire society, of rules governing association, and not limited to those existing at time individual became member.—*Lawson vs. Hewell*, 118 Cal. 613, 621, 50 Pac. Rep. 763, 49 L. R. A. 400.

22. EXISTS BY VIRTUE OF RULES OF association, and so long as association acts in

accordance therewith there is no violation of contract.—*Lawson vs. Hewell*, 118 Cal. 613, 620, 50 Pac. Rep. 763, 49 L. R. A. 400. See *Supreme Lodge K. P. vs. Knight*, 117 Ind. 489, 20 N. E. Rep. 479, 3 L. R. A. 409.

23. MADE UP OF (1) application for membership, (2) certificate issued, which is acceptance of application, (3) charter, (4) constitution, and (5) by-laws of society.—*Holland vs. Supreme Council O. C. F.*, 54 N. J. L. (25 Vr.) 490, 25 Atl. Rep. 367.

24. UNDERSTOOD OR CONSTRUED BY LANGUAGE employed therein, not according to views of its meaning entertained by those drawing it.—*Congower vs. Equitable Mut. L. & Endow. Assoc.*, 94 Iowa 499, 63 N. W. Rep. 192.

25. Indorsement on policy merely showing the nature, no part thereof.—*Congower vs. Equitable Mut. L. & Endow. Assoc.*, 94 Iowa 499, 63 N. W. Rep. 192.

26. PARTY BECOMING MEMBER CHARGEABLE WITH KNOWLEDGE of laws and rules, and bound by them.—*Bauer vs. Samson Lodge K. P.*, 102 Ind. 262, 1 N. E. Rep. 571. See *Iowa. Simeral vs. Dubuque Mut. F. Ins. Co.*, 18 Iowa 319, 322; *Coles vs. Iowa State Mut. Ins. Co.*, 18 Iowa 425, 431. *Pa. Mitchell vs. Lycoming Mut. Ins. Co.*, 51 Pa. St. 402. *Vt. Fugure vs. Mutual Soc.*, 46 Vt. 362.

§ 453. LEVYING OF ASSESSMENTS—BY—LAWS WHICH MAY BE MADE.

Each association provided for in this chapter may, on the death of a member, levy an assessment on the surviving members of not exceeding three dollars for each member, and collect and pay the same to the nominee of such decedent, and may also provide for the payment of such annual payments by members as may be deemed just, but no member must be subject to any annual assessment in excess of that established when he joined the association. The association may make such by-laws not inconsistent with the laws of the state as may be necessary for its government and the transaction of its business; may, by its name, sue and be sued;

[Loaning funds and purchasing real estate.] Loan such funds as it may have on hand; and own sufficient real estate for its business purposes and such as it may be necessary to purchase on foreclosure of its mortgages.

History: Enacted March 20, 1905, Stats. and Amdts. 1905, c. CCCXLIX, pp. 410-411.

I. Assessments—Right to Levy.

1-4 Nature of assessments and levy—Extent.

5, 6. Presumed legal—When illegal—Special.

7, 8. Enforcement of assessment by action, etc.

9. Same—Beneficiary.

10. Non-assessment no defense to recovery.

II. By-Laws—1. Power to Make and Amend.

11. Not repugnant to common law.

12-17. Forfeiture—Investments—Removal—Suspensions, etc.

18-24. Power to amend—Extent of.

25-27. Same—Consent of members.

28. Same—Part of every contract.

29. Same—Power of successor to affect contracts by.

III. Same—2. Nature and Effect of.

30-33. By-laws part of contract, and binding.

34, 35. Same—Member has notice of, and bound by.

36-40. Amendments—Effect and nature of.

41-43. Same—Terms—Time—Payments, etc.

44. Same—Parties contract with reference to.

45. Same—Unreasonable may be valid as contract.

IV. Members—1. Expulsion and Reinstatement.

46. Assessment—Failure to pay does not ipso facto suspend.

- 47-50. Power to expel—Extent of—Justification.
 51-53. Same—Hearing—Character of.
 54-58. Same—Power of courts to interfere.
 59. Suspension—Effect of.
 60, 61. Same—Waiver and effect of.
 62. Reinstatement—When entitled to.
 63, 64. Same—Effect of death upon.
 V. Same—2. Remedy of.
 65, 66. Right of action at common law—When exists, etc.
 67-78. Same—How affected by agreement or by-laws, etc.
 79-85. Jurisdiction of courts—When assumed, etc.—Equity.
 86-88. Defenses—Agreement—Non-exhaustion of laws, etc.
 VI. Beneficiaries—1. Rights of.
 89-94. Beneficiaries—Who are—Nature of interest, etc.
 95, 96. Same—Extent and enforcement of claim.
 97-101. Same—Effect of decision of board—Regulations, etc.
 102-104. Same—Rights of inter se—Interpleader.
 VII. Same—2. Change of.
 105. By-laws affecting part of contract.
 106. Consent of beneficiary—Not necessary.
 107, 108. What sufficient change.
 109-111. Effect of contract not to change.
 VIII. Evidence and Burden of Proof.
 112-114. Burden of proof—Upon whom cast.
 115. Proof of death—Necessity of.

I. ASSESSMENTS—RIGHT TO LEVY.

1. ASSESSMENTS, in nature premiums, non-payment of which works forfeiture of insurance.—*Daniher vs. Grand Lodge A. O. U. W.*, 10 Utah 110, 37 Pac. Rep. 248.

2. Levy of by directors is ministerial and not judicial act.—*Hogan vs. Pacific Endow. L.*, 99 Cal. 248, 258, 33 Pac. Rep. 924. See *Crossman vs. Massachusetts Ben. Assoc.*, 143 Mass. 435, 9 N. E. Rep. 753; *Rosenberger vs. Washington Mut. F. Ins. Co.*, 87 Pa. St. 207.

3. Implied, if not express, obligation imposed upon benevolent association, upon proof of death, to make an assessment, to full extent authorized by by-laws, to raise funds to pay benefit.—*Lake vs. Minnesota M. R. Assoc.*, 61 Minn. 96, 52 Am. St. Rep. 538, 63 N. W. Rep. 261.

4. Not allowed for anticipated losses, unless provision therefor is made in articles of association.—*Hogan vs. Pacific Endow. L.*, 99 Cal. 248, 253, 33 Pac. Rep. 924. See *Crossman vs. Massachusetts Ben. Assoc.*, 143 Mass. 435, 9 N. E. Rep. 753; *Rosenberger vs. Washington Mut. F. Ins. Co.*, 87 Pa. St. 207.

5. Presumption in favor of legality or regularity of assessments does not arise.—*Hogan vs. Pacific Endow. L.*, 99 Cal. 248, 258, 33 Pac. Rep. 924. See *Crossman vs. Massachusetts Ben. Assoc.*, 143 Mass. 435, 9 N. E. Rep. 753; *Rosenberger vs. Washington Mut. F. Ins. Co.*, 87 Pa. St. 207.

6. Special assessment levied without legal necessity, invalid.—*Hogan vs. Pacific Endow.*

L., 99 Cal. 248, 258, 33 Pac. Rep. 924. See *Pacific Mut. Ins. Co. vs. Guse*, 49 Mo. 329, 332, 8 Am. Rep. 132; *Thomas vs. Whallon*, 31 Barb. (N. Y.) 172.

7. ENFORCEMENT.—Action may be in nature of assumpsit declaring (1) on the contract, leaving it to company to plead as well as to prove facts reducing recovery below amount, or (2) may be in nature of one for damages for breach of contract in failing to make assessments.—*Lake vs. Minnesota M. R. Assoc.*, 61 Minn. 96, 52 Am. St. Rep. 538, 63 N. W. Rep. 261. See *Conn. Curtis vs. Mutual Ben. etc. Co.*, 48 Conn. 98. *Ind. Elkhart Mut. Aid Ben. & R. Assoc. vs. Houghton*, 103 Ind. 286, 53 Am. Rep. 514, 2 N. E. Rep. 763. *Md. Earnshaw vs. Sun Mut. Aid Soc.*, 68 Md. 465, 6 Am. St. Rep. 460, 12 Atl. Rep. 834. *N. Y. Freeman vs. National Ben. Soc.*, 42 Hun 252. *Fed. Lueders vs. Hartford etc. Ins. Co.*, 12 Fed. Rep. 465, 4 McC. C. C. 149.

8. Action at law on contract against company refusing or neglecting to make proper assessment.—*Lake vs. Minnesota M. R. Assoc.*, 61 Minn. 96, 52 Am. St. Rep. 538, 63 N. W. Rep. 261.

9. Beneficiary may compel corporation to levy assessment if it refuses after time limited for payment.—*Union Mut. Assoc. vs. Montgomery*, 70 Mich. 587, 14 Am. St. Rep. 519, 38 N. W. Rep. 538.

10. Company cannot defeat recovery by showing that it has not made any assessment.—*Lake vs. Minnesota M. R. Assoc.*, 61 Minn. 96, 52 Am. St. Rep. 538, 63 N. W. Rep. 261.

II. BY-LAWS—1. POWER TO MAKE OR AMEND.

As to enlarged powers conferred upon benevolent associations by statute, see monographic note by Robert Desty, 4 L. R. A. 332.

As to law of benevolent societies, determining rights of members, see monographic note by Robert Desty, 5 L. R. A. 96.

As to property rights in benevolent societies, see monographic note by Robert Desty, 2 L. R. A. 841.

As to power to make by-laws and amend and repeal same, see monographic note by Robert Desty, 3 L. R. A. 409.

11. POWER TO MAKE BY-LAWS FOR GOVERNMENT of corporate body, fixing and regulating its own duties and that of its members, not inconsistent with its charter, or purposes and objects of corporation, not repugnant to common law, or laws of state, constitutional and statutory, is an attribute of either corporation.—*Bauer vs. Samson Lodge K. P.*, 102 Ind. 262, 1 N. E. Rep. 571. See *Supreme Commandery K. G. R. vs. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332.

12. Declaring forfeiture in case of suicide, valid.—*Supreme Commandery K. G. R. vs. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332.

13. Investment order instructing trustee "to try and invest money in a bank" does not purport to authorize investment otherwise than in stocks, bonds, mortgages, or other securities, where by-law calls for such invest-

ment.—*Red Jacket Tribe vs. Gibson*, 70 Cal. 128, 131, 12 Pac. Rep. 127.

14. Member acquainted with by-law and nature of investment authorized thereby is chargeable therewith.—*Red Jacket Tribe vs. Gibson*, 70 Cal. 128, 131, 12 Pac. Rep. 127.

15. Requiring notice of removal from jurisdiction, as reasonable and proper, intended for mutual protection.—*Walsh vs. Cosumnes Tribe I. O. R. M.*, 108 Cal. 496, 500, 41 Pac. Rep. 418.

16. Suspending member for improper conduct valid.—*Peyre vs. Mutual Relief Soc.*, 90 Cal. 240, 243, 27 Pac. Rep. 191.

17. Waiving right to sue and agreeing to arbitrate, reasonable regulation.—*Robinson vs. Templar Lodge I. O. O. F.*, 117 Cal. 370, 378, 59 Am. St. Rep. 193, 195, 49 Pac. Rep. 170; *Van Poucke vs. Netherland St. Vincent de Paul Soc.*, 63 Mich. 378, 29 N. W. Rep. 863; *Canfield vs. Great Camp R. M.*, 87 Mich. 626, 24 Am. St. Rep. 186, 49 N. W. Rep. 375, 13 L. R. A. 625.

18. AMENDMENT.—By-laws cannot be amended by simple motion or resolution.—*Red Jacket Tribe vs. Gibson*, 70 Cal. 128, 131, 12 Pac. Rep. 127.

19. Authority to change or amend articles for purpose of "equalization of payments," or other burdens imposed by original compact, otherwise than authorized by original articles, not conferred from fact that articles of association construing contract do not operate equally upon individual members.—*Hogan vs. Pacific Endow. L.*, 99 Cal. 248, 257, 33 Pac. Rep. 924.

20. Cannot be exercised to amend or enact laws working repudiation of obligation.—*Wist vs. Grand Lodge A. O. U. W.*, 22 Oreg. 271, 29 Am. St. Rep. 603, 29 Pac. Rep. 610.

21. Does not amount to amendment of certificate of corporation or articles of association.—*Bowie vs. Grand Lodge L. of W.*, 99 Cal. 392, 396, 34 Pac. Rep. 103.

22. Extends to alteration, amendment, or repeal of laws or enacting others consistent with purposes of organization.—*Wist vs. Grand Lodge A. O. U. W.*, 22 Oreg. 271, 29 Am. St. Rep. 603, 29 Pac. Rep. 610.

23. Extends to enactment of by-law affecting period during which sick benefits payable when no prior mention of time made in former laws.—*Stohr vs. San Francisco M. F. Soc.*, 82 Cal. 557, 560-562, 22 Pac. Rep. 1125.

24. MODIFICATION OR VARIATION BY SUBSEQUENT LAW so as to bind party either through reserve power in society to amend or enact such law or by contract with reference to future enactment when it does not operate as repudiation or compel deprivation of rights.—*Wist vs. Grand Lodge A. O. U. W.*, 22 Oreg. 271, 29 Am. St. Rep. 603, 29 Pac. Rep. 610.

25. Consent of members.—By-laws constitute contract which cannot be changed without consent of all members unless contract itself otherwise provides.—*Stohr vs. San Francisco M. F. Soc.*, 82 Cal. 557, 560, 22 Pac. Rep. 1125; *Bowie vs. Grand Lodge L. W.*, 99 Cal. 392, 396, 34 Pac. Rep. 103.

26. Changing or amending articles for purpose of equalization of payments or burdens imposed by original compact can only be made by consent of all members to be affected thereby.—*Hogan vs. Pacific Endow. L.*, 99 Cal. 248, 257, 33 Pac. Rep. 924.

27. Changing or amending articles of association, so as to impair obligation of contracts, not implied in articles which confer upon board power "to enact laws for the government of the league," as such power limited by laws of land with reference to which articles must be construed.—*Hogan vs. Pacific Endow. L.*, 99 Cal. 248, 257, 33 Pac. Rep. 924.

28. Provision that by-law may be changed enters into and forms part of contract.—*Stohr vs. San Francisco M. F. Soc.*, 82 Cal. 557, 560, 22 Pac. Rep. 1125.

29. SUCCESSORS IN INTEREST OF OBLIGATIONS held by life insurance associations upon paid-up endowments cannot pass laws affecting their substance without consent of holder of such certificate to be governed by new company, where such laws materially alter position and would work forfeiture of member's certificate.—*Richter vs. Supreme Lodge K. P.*, 127 Cal. 8, 12, 69 Pac. Rep. 433.

III. SAME—2. NATURE AND EFFECT OF.

As to effect of changes of by-laws as against pre-existing members, see monographic note 83 Am. St. Rep. 706.

30. BY-LAWS, RULES, AND REGULATIONS ARE PART OF CONTRACT, whether referred to or not, and must be read together.—*Hass vs. Mutual R. Assoc.*, 118 Cal. 6, 9, 49 Pac. Rep. 1056.

31. By-laws form part of contract, and must be complied with in order to entitle member to benefits of society.—*Stohr vs. San Francisco M. F. Soc.*, 82 Cal. 557, 560, 22 Pac. Rep. 1125; *Bowie vs. Grand Lodge L. W.*, 99 Cal. 392, 396, 34 Pac. Rep. 103; *McLaughlin vs. McLaughlin*, 104 Cal. 171, 177, 43 Am. St. Rep. 33, 37 Pac. Rep. 865; *Levy vs. Magnolia Lodge I. O. O. F.*, 110 Cal. 297, 42 Pac. Rep. 857; *Hass vs. Mutual R. Assoc.*, 118 Cal. 6, 49 Pac. Rep. 1056; *Conway vs. Supreme Council C. K. of A.*, 131 Cal. 437, 439, 63 Pac. Rep. 727.

32. Elements of contracts determining the extent of duties, rights, and liabilities.—*Wist vs. Grand Lodge A. O. U. W.*, 22 Oreg. 271, 29 Am. St. Rep. 603, 29 Pac. Rep. 610.

33. Not in themselves illegal, and not requiring performance of acts contrary to law, deemed binding upon all persons who become members of such organizations.—*Bauer vs. Samson Lodge K. P.*, 102 Ind. 262, 1 N. E. Rep. 571.

34. Member bound to take notice of laws of association, especially those affecting his rights and interests.—*Wist vs. Grand Lodge A. O. U. W.*, 22 Oreg. 271, 29 Am. St. Rep. 603, 29 Pac. Rep. 610.

35. Party becoming member of association has knowledge of and assents to provisions of constitution and by-laws, and bound by them.—*Robinson vs. Irish-American Ben. Soc.*, 67 Cal. 135, 137, 7 Pac. Rep. 435. Ind. *Bauer vs. Samson Lodge K. P.*, 102 Ind. 262, 1 N. E. Rep.

571. See *Iowa. Simeral vs. Dubuque Mut. F. Ins. Co.*, 18 Iowa 319, 322; *Coles vs. Iowa St. Mut. Ins. Co.*, 18 Iowa 425, 531. Pa. *Mitchell vs. Lycoming Mut. Ins. Co.*, 51 Pa. St. 402. Vt. *Fugure vs. Mutual Soc.*, 46 Vt. 362.

36. **AMENDMENTS**—How far binding.—Amendments to laws have no retroactive effect unless same are especially given.—*Berlin vs. Eureka Lodge K. P.*, 132 Cal. 294, 295, 64 Pac. Rep. 254. See *Conn. Lane's Appeal*, 57 Conn. 182, 14 Am. St. Rep. 94, 17 Atl. Rep. 926, 4 L. R. A. 45. *Me. Oriental Bank vs. Freeze*, 18 Me. 109, 36 Am. Dec. 701. *Oreg. Wist vs. Grand Lodge A. O. U. W.*, 22 Oreg. 271, 29 Am. St. Rep. 603, 29 Pac. Rep. 610.

37. Adopted in accordance with mode provided by association are binding upon members, unless rules at time member admitted placed a limitation upon the power of association to make changes.—*Lawson vs. Hewell*, 118 Cal. 613, 621, 50 Pac. Rep. 763, 49 L. R. A. 400.

38. Adopted subsequent to issue of certificate, declaring forfeiture or avoidance thereof in event of member dying by his own hand, is not objectionable on the ground that it varies or implies existing contract when certificate issued subject to present and future by-laws.—*Supreme Commandery K. G. R. vs. Ainsworth*, 71 Ala. 436, 445, 46 Am. Rep. 332. See *Steiner L. & L. Co.*, 120 Ala. 140, 20 So. Rep. 494.

39. Made according to constitution and by-laws, control benefits acquired thereunder and bind party, although they may injuriously affect him.—*Stohr vs. San Francisco M. F. Soc.*, 82 Cal. 557, 22 Pac. Rep. 1125; *Robinson vs. Templar Lodge I. O. O. F.*, 117 Cal. 370, 373, 59 Am. St. Rep. 193, 49 Pac. Rep. 170.

40. Made according to by-laws permitting it, and in existence when party becomes member, cannot be said to be detrimental to him, although it may provide for payment out of reserve fund only in case of sufficient excess over certain amount, which was not provided for by original by-law.—*Hass vs. Mutual R. Assoc.*, 118 Cal. 6, 9, 49 Pac. Rep. 1056.

41. Made with assent of members adding new terms calculated to promote general good, are binding.—*Supreme Commandery K. G. R. vs. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332; *Korn vs. Mutual Assur. Soc.*, 10 U. S. (6 Cr.) 192, bk. 3 L. ed 195.

42. **CHANGING TIME** during which payments are to continue in case of sickness, where no specific time is mentioned in original, is valid and binding upon member as to future payments.—*Stohr vs. San Francisco M. F. Soc.*, 82 Cal. 557, 560, 562, 22 Pac. Rep. 1126.

43. **GRADUATING PAYMENTS THEREAFTER MADE** to members, no retroactive effect as to sick member who stands in same position as if taken sick upon day of adoption.—*Berlin vs. Eureka Lodge K. P.*, 132 Cal. 294, 295, 64 Pac. Rep. 254.

44. **PARTIES MAY CONTRACT WITH REFERENCE TO LAWS OF FUTURE ENACTMENT**, and agree to be bound and affected by them, and their voluntary agreement relieves application of such laws to their contracts from imputations of injustice.—*Bowie vs.*

Grand Lodge L. W., 99 Cal. 392, 396, 84 Pac. Rep. 103. See *Supreme Commandery K. G. R. vs. Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332.

45. **UNREASONABLE AND VOID** as such, may nevertheless be valid as contract, if signed or agreed to by all the members of the corporation; as a man may part with a common right voluntarily.—*Levy vs. Magnolia Lodge I. O. O. F.*, 110 Cal. 297, 310, 42 Pac. Rep. 887. See *Robinson vs. Templar Lodge I. O. O. F.*, 117 Cal. 370, 373, 59 Am. St. Rep. 193, 49 Pac. Rep. 170. *Ala. Cooper vs. Frederick*, 9 Ala. 738. *Mass. Davis vs. Proprietors of S. U. M. H.*, 49 Mass. (8 Met.) 321; *Amesbury vs. Bowditch Mut. F. Ins. Co.*, 72 Mass. (6 Gray) 596. *N. Y. Slee vs. Bloom*, 19 John. 456, 10 Am. Dec. 273.

IV. MEMBERS—1. EXPULSION AND REINSTATEMENT.

46. **FAILURE TO PAY DELINQUENT ASSESSMENT** does not ipso facto work suspension.—*Marshall vs. Grand Lodge A. O. U. W.*, 133 Cal. 686, 690, 66 Pac. Rep. 26.

47. Member cannot be expelled and deprived of share and property of association unless he violates some explicit provision of law of association creating offense with which charged, and prescribing expulsion as penalty.—*Otto vs. Journeymen T. P. & B. Union*, 75 Cal. 308, 314, 7 Am. St. Rep. 156, 17 Pac. Rep. 217; *Grand Grove U. A. O. D. vs. Garibaldi Grove U. A. O. D.*, 130 Cal. 116, 120, 80 Am. St. Rep. 80, 62 Pac. Rep. 486.
See par. 50 this note.

48. **ASSOCIATION SHOULD DETERMINE** whether rules violated or not, or whether conduct of member authorizes investigation or imposition of penalty.—*Lawson vs. Hewell*, 118 Cal. 613, 619, 50 Pac. Rep. 763, 49 L. R. A. 400. See *Conn. Mead vs. Stirling*, 62 Conn. 586, 27 Atl. Rep. 591. *Mo. State vs. Odd Fellows Grand Lodge*, 8 Mo. App. 148. *N. Y. White vs. Brownell*, 4 Abb. Pr. N. S. 126, 4 Daly 329.

49. **COMPLIANCE WITH CONDITIONS** is necessary in order to work complete suspension of member.—*McDonald vs. Supreme Council C. F.*, 78 Cal. 49, 54, 30 Pac. Rep. 41; *Marshall vs. Grand Lodge A. O. U. W.*, 133 Cal. 686, 690, 66 Pac. Rep. 25.

50. **EXPULSION JUSTIFIED ONLY UPON WRITTEN CHARGE** in nature of indictment or information (1) referring expressly or by implication to particular provision violated, and (2) describing some specific act or acts as constituting offense.—*Grand Grove U. A. O. D. vs. Garibaldi Grove U. A. O. D.*, 105 Cal. 219, 38 Pac. Rep. 947; *Grand Grove U. A. O. D. vs. Garibaldi Grove U. A. O. D.*, 130 Cal. 116, 120, 80 Am. St. Rep. 80, 62 Pac. Rep. 486.
See par. 47 this note.

51. **Expulsion of member without hearing, unreasonable and without effect**.—*Grand Grove U. A. O. D. vs. Garibaldi Grove U. A. O. D.*, 105 Cal. 219, 225, 38 Pac. Rep. 947.

52. **Member accused must have due notice of trial and an opportunity to be heard**.—*Grand Grove U. A. O. D. vs. Garibaldi Grove U. A. O. D.*, 105 Cal. 219, 225, 38 Pac. Rep. 947; *Grand Grove U. A. O. D. vs. Garibaldi Grove U. A. O. D.*, 130 Cal. 116, 120, 80 Am. St. Rep. 80, 62

Pac. Rep. 486. See *Fritz vs. Muck*, 62 How. Pr. (N. Y.) 69; *Wachtel vs. Noah Widows' etc. Soc.*, 84 N. Y. 28, 38 Am. Rep. 478; *People ex rel. Deverell vs. Musical Mut. P. Union*, 118 N. Y. 101, 108, 23 N. E. Rep. 129.

53. Society acts in quasi judicial character and must confine itself to powers vested in it and its jurisdiction must affirmatively appear.—*Grand Grove U. A. O. D. vs. Garibaldi Grove U. A. O. D.*, 130 Cal. 116, 120, 80 Am. St. Rep. 80, 62 Pac. Rep. 488.

54. **EXPULSION OF MEMBERS.**—Court will not interfere in expulsion of member upon ground of misconduct.—*Josich vs. Austrian Ben. Soc.*, 119 Cal. 74, 76, 51 Pac. Rep. 18. See *Ga. Savannah Cotton Ex. vs. State*, 54 Ga. 668. *Ill. Robinson vs. Yates City Lodge*, 86 Ill. 598. *Mich. Burt vs. Grand Lodge F. & A. M.*, 66 Mich. 85, 33 N. W. Rep. 13. *Pa. Commonwealth ex rel. Bryan vs. Pike Ben. Soc.*, 3 Watts & S. 247, 250. *Eng. Dawkins vs. Antrobus*, 44 L. T. Rep. 567; *Lambert vs. Addison*, 46 L. T. Rep. 20.

55. Unless want of due notice of charge, or want of fair trial, or unless the rules are against public policy, or contrary to law, or in contravention of natural justice, or decision against him is made mala fide or from malice.—*Josich vs. Austrian Ben. Soc.*, 119 Cal. 74, 77, 51 Pac. Rep. 18.

56. Where by-laws are not unreasonable and asserted rights of parties have been determined by society in accordance with such laws.—*Von Arx vs. San Francisco G. Verein*, 113 Cal. 377, 379, 45 Pac. Rep. 685; *Lawson vs. Hewell*, 118 Cal. 613, 50 Pac. Rep. 763, 49 L. R. A. 400; *Josich vs. Austrian Ben. Soc.*, 119 Cal. 74, 77, 51 Pac. Rep. 18.

57. **MEMBER EXCLUDED FOR REASON THAT HE REFUSES TO COMPLY WITH ORDER**, which order is unconstitutional, has right of action for dissolution.—*Gorman vs. Russell*, 14 Cal. 531, 536, 18 Id. 688. See *Fogg vs. Supreme Lodge U. O. G. I.*, 156 Mass. 431, 435, 31 N. E. Rep. 289; *Graham vs. Mut. Aid Soc.*, 161 Mass. 357, 367, 37 N. E. Rep. 447.

58. Dissolution will not be ordered where association retracts its steps and readmits member.—*Gorman vs. Russell*, 18 Cal. 688.

59. **Effect of—Member's interest in property** is merely incidental to membership and ceases with it, and if right forfeited by misconduct, property interest will not prevent expulsion, or give courts right to interfere.—*Von Arx vs. San Francisco etc. Verein*, 113 Cal. 377, 379, 45 Pac. Rep. 685; *Lawson vs. Hewell*, 118 Cal. 613, 50 Pac. Rep. 763, 49 L. R. A. 400; *Josich vs. Austrian Ben. Soc.*, 119 Cal. 74, 77, 51 Pac. Rep. 18.

60. **WAIVER OF POWER.**—Acceptance of money after knowledge of forfeiture is waiver, in absence of other condition imposed by convention of parties.—*McDonald vs. Supreme Council O. C. F.*, 78 Cal. 49, 53, 20 Pac. Rep. 41.

61. **Good standing of deceased member** immaterial in action to recover against society where forfeiture has been waived by levy of assessments, by receiving amounts thereof as well as amount of prior assessment remaining unpaid, and retaining moneys, placing them in

treasury and benefit fund.—*Millard vs. Supreme Council A. L. H.*, 81 Cal. 340, 345, 23 Pac. Rep. 864. See *McDonald vs. Supreme Council O. C. F.*, 78 Cal. 49, 20 Pac. Rep. 41. *Iowa. Tobin vs. Western Mut. Aid Soc.*, 72 Iowa 261, 33 N. W. Rep. 663. *Wis. Erdman vs. Mut. Ins. Co. of Order of H. S.*, 44 Wis. 376; *Osterloh vs. New Denmark Mut. H. F. Ins. Co.*, 60 Wis. 126, 13 N. W. Rep. 749; *Stylow vs. Wisconsin O. F. Mut. L. Ins. Co.*, 69 Wis. 224, 2 Am. St. Rep. 738, 34 N. W. Rep. 151.

62. **Reinstatement.**—Delinquent entitled to reinstatement only upon payment of all assessments and renewal of his certificate by majority vote of lodge declaring such renewal.—*Butler vs. Grand Lodge A. O. U. W.*, 146 Cal. —, 79 Pac. Rep. 861.

63. **Death, prior to formal declaration of reinstatement**, where certificate was in effect, reinstatement before death does not affect rights of beneficiaries.—*Butler vs. Grand Lodge A. O. U. W.*, 146 Cal. —, 79 Pac. Rep. 861, 864. See *Berlin vs. Eureka Lodge K. P.*, 132 Cal. 294, 64 Pac. Rep. 254. *Conn. Connelly vs. Masonic Mut. Ben. Assoc.*, 53 Conn. 552, 18 Am. St. Rep. 296, 20 Atl. Rep. 671, 9 L. R. A. 428. *Ill. Grand Lodge A. O. U. W. vs. Lachmann*, 199 Ill. 140, 64 N. E. Rep. 1022. *N. J. Van Houten vs. Pine*, 33 N. J. Eq. (11 Stew.) 72. *Wis. Jackson vs. North Western Mut. R. Assoc.*, 78 Wis. 463, 47 N. W. Rep. 733. *Fed. Marck vs. Supreme Lodge K. of H.*, 39 Fed. Rep. 396.

64. **Death of delinquent after payment of arrearages of assessments but before certificate of his reinstatement**, does not entitle his beneficiary to receive.—*Butler vs. Grand Lodge A. O. U. W.*, 146 Cal. —, 79 Pac. Rep. 861. See *McDonald vs. Supreme Council O. C. F.*, 78 Cal. 49, 54, 20 Pac. Rep. 41; *Carlson vs. Supreme Council A. L. H.*, 115 Cal. 466, 477, 47 Pac. Rep. 375, 35 L. R. A. 643; *Marshall vs. Grand Lodge A. O. U. W.*, 133 Cal. 686, 66 Pac. Rep. 25.

V. SAME—2. REMEDY OF.

As to remedies of members of benevolent associations, see monographic note 59 Am. St. Rep. 198.

As to conclusiveness and review of decisions of tribunals of benevolent societies, see monographic note by George H. Parmalee, 49 L. R. A. 353-401.

As to effect of decisions of tribunals of benevolent associations, see monographic note by Robert Desty, 13 L. R. A. 625.

65. **ACTION TO RECOVER.**—Member cannot maintain action to recover claim until opportunity to examine same has been given, under constitution providing for examination of claims before allowance.—*Robinson vs. Irish-American Ben. Soc.*, 67 Cal. 135, 137, 7 Pac. Rep. 435. See *Anacosta Tribe I. O. R. M. vs. Murbach*, 13 Md. 91, 71 Am. Dec. 625; *Black & White Smiths' Soc. vs. Van Dyke*, 3 Whart. (Pa.) 309, 30 Am. Dec. 263.

66. **Complaint in action against association** must state facts sufficient to constitute cause of action, and if it merely shows association consisting of number of persons to be paid given amount at certain periods until stipulated sum is paid, without showing any payment to claimant in endowments, or his right

to claim, or any payment of assessments to meet particular demand, without alleging that amount claimed has not been paid, show no cause of action.—*Rebut vs. Legion of West*, 96 Cal. 661, 662, 31 Pac. Rep. 1118.

67. By-laws and agreements affecting—Decisions as to what extent benevolent organizations may go in restricting actions for benefits promised to members, conflicting; some holding that they may prohibit such actions altogether and make their own decisions conclusive; others holding that they cannot materially restrict rights to sue.—See *Md. Anacosta Tribe I. O. R. M. vs. Murbach*, 13 Md. 91, 71 Am. Dec. 625; *Osceola Tribe I. O. R. M. vs. Schmidt*, 57 Md. 98. *Mass. Dolan vs. Court Good Samaritan*, 128 Mass. 437. *N. Y. La Fond vs. Deems*, 31 N. Y. 507. *Pa. Black & White Smiths' Soc. vs. Van Dyke*, 2 Whart. 209, 30 Am. Dec. 263; *Toram vs. Howard Ben. Assoc.*, 4 Pa. 519.

68. Corporation cannot create judicial tribunal for final and conclusive settling of controversies.—*Bauer vs. Samson Lodge K. P.*, 103 Ind. 262, 1 N. E. Rep. 571.

69. May provide methods for redressing grievances and deciding controversies, and may compel members to resort to prescribed methods of procedure before proceeding in courts, but cannot entirely prohibit members from suing to recover benefits accruing under by-laws.—*Bauer vs. Samson Lodge K. P.*, 103 Ind. 262, 1 N. E. Rep. 571.

70. By-law governing conditions of acquisition of membership and its continuance, and prescribing conduct and imposing penalties for violations, and tribunal and mode in which such offenses shall be determined and penalties enforced, constitute agreement, and are regarded in same light as other contracts, so long as they do not contravene any laws of land.—*Lawson vs. Hewell*, 118 Cal. 613, 618, 50 Pac. Rep. 763, 49 L. R. A. 400.

71. Stipulating that member will submit claim to lodge to consider and act upon, and if aggrieved may appeal to grand lodge and to sovereign grand lodge, and that conclusion reached shall be final and conclusive, is valid and binding, and must be observed by insured before taking action in court to enforce benefits.—*Robinson vs. Templar Lodge I. O. O. F.*, 117 Cal. 370, 374, 59 Am. St. Rep. 193, 49 Pac. Rep. 170. See *Levy vs. Magnolia Lodge I. O. O. F.*, 110 Cal. 297, 310, 42 Pac. Rep. 887.

72. Does not preclude parties from resorting to legal remedies; neither is submission to arbitration condition precedent to bringing of action.—*Daniher vs. Grand Lodge A. O. U. W.*, 10 Utah 110, 37 Pac. Rep. 245. See *Whitney vs. National M. A. Assoc.*, 52 Minn. 378, 54 N. W. Rep. 184; *Austin vs. Searing*, 16 N. Y. 112, 69 Am. Dec. 665; *Seward vs. City of Rochester*, 109 N. Y. 164, 16 N. E. Rep. 348; *Crossley vs. Connecticut F. Ins. Co.*, 27 Fed. Rep. 30.

73. Member claiming under benefit certificate in society, by-laws of which provide for arbitration and settlement of claim before board, must first exhaust remedies before resorting to action at law.—*Robinson vs. Irish-American Ben. Assoc.*, 67 Cal. 135, 7 Pac. Rep. 435; *Robinson vs. Templar Lodge I. O. O. F.*, 97

Cal. 62, 31 Pac. Rep. 609; *Levy vs. Magnolia Lodge I. O. O. F.*, 110 Cal. 297, 310, 42 Pac. Rep. 887; *Robinson vs. Templar Lodge I. O. O. F.*, 117 Cal. 370, 376, 59 Am. St. Rep. 193, 49 Pac. Rep. 170; *Berlin vs. Eureka Lodge K. P.*, 132 Cal. 294, 296, 64 Pac. Rep. 254.

74. Subscribing to by-laws may waive right to sue in courts of law for redress of grievances.—*Robinson vs. Templar Lodge*, 117 Cal. 370, 59 Am. St. Rep. 193, 49 Pac. Rep. 170; *Berlin vs. Eureka Lodge K. P.*, 132 Cal. 294, 296, 64 Pac. Rep. 254.

75. Voluntary submission of claim to decision of tribunals of the order under by-laws giving such tribunals power to "adjudge and determine" matter in dispute between adjudged and association, equally implies agreement on his part to be bound by judgment or award, in absence of fraud or mistake, or other ground for equitable relief.—*Robinson vs. Templar Lodge I. O. O. F.*, 97 Cal. 62, 65, 31 Pac. Rep. 609. See *Valentine vs. Valentine*, 2 Barb. Ch. (N. Y.) 430.

76. Submitting case to jurisdiction of judicial committee of society appointed under rules of conduct, and taking appeal under articles of constitution of society to whole body of members upon question of his suspension for improper conduct, cannot recover damages in action at law.—*Peyre vs. Mutual R. Soc.*, 90 Cal. 240, 244, 27 Pac. Rep. 191.

77. Sufficient to bind parties to decision and not necessary that there should be an express agreement to abide by award when made.—*Robinson vs. Templar Lodge I. O. O. F.*, 97 Cal. 62, 65, 31 Pac. Rep. 609.

78. Member has right to appeal to court where society has refused to decide his case upon merits, and has dismissed his appeal for unauthorized reasons, and he has exhausted all remedies furnished by law of the order.—*Berlin vs. Eureka Lodge K. P.*, 132 Cal. 294, 297, 64 Pac. Rep. 254.

79. JURISDICTION OF COURTS.—Court will compel adherence to charter and to purposes for which society was organized, but not more.—*Lawson vs. Hewell*, 118 Cal. 613, 620, 50 Pac. Rep. 763, 49 L. R. A. 400; *Supreme Lodge K. P. vs. Knight*, 117 Ind. 489, 20 N. E. Rep. 479, 3 L. R. A. 409.

80. Will only assume jurisdiction over societies and corporations where there is an abuse of discretion and clear, unreasonable, and arbitrary invasion of private rights.—*Lawson vs. Hewell*, 118 Cal. 613, 620, 50 Pac. Rep. 763, 49 L. R. A. 400; *Supreme Lodge K. P. vs. Knight*, 117 Ind. 489, 20 N. E. Rep. 479, 3 L. R. A. 409.

81. Cannot interfere with discretion of authorized and duly chosen representatives of members vested with power to determine what changes necessary in constitution and by-laws.—*Lawson vs. Hewell*, 118 Cal. 613, 620, 50 Pac. Rep. 763, 49 L. R. A. 400; *Supreme Lodge K. P. vs. Knight*, 117 Ind. 489, 20 N. E. Rep. 479, 3 L. R. A. 409.

82. Or with questions of policy, doctrine, or discipline in management of such society.—*Lawson vs. Hewell*, 118 Cal. 613, 620, 50 Pac. Rep. 763, 49 L. R. A. 400. See *Supreme Lodge*

K. P. vs. Knight, 117 Ind. 489, 20 N. E. Rep. 479, 3 L. R. A. 409.

83. Or take cognizance of matters of policy or internal economy of such organization.—Lawson vs. Howell, 118 Cal. 613, 619, 50 Pac. Rep. 763, 49 L. R. A. 400.

84. Equity will not interfere with voluntary benevolent associations so long as means of relief provided by society itself have not been availed of and exhausted.—Levy vs. Magnolia Lodge I. O. O. F., 110 Cal. 297, 307, 42 Pac. Rep. 887; Dolan vs. Court of Good Samaritan, 128 Mass. 437; Chamberlain vs. Lincoln, 129 Mass. 70; La Fond vs. Deema, 81 N. Y. 507.

85. Fraternal organizations not recognized as legal bodies, or as entitled to recognition in courts for enforcement of rules, unless there is also involved determination of some civil right or right to property, and in such cases courts are limited to inquiring whether rules prescribed by organization for determination of right have been followed.—Lawson vs. Hewell, 118 Cal. 613, 619, 50 Pac. Rep. 763, 49 L. R. A. 400.

86. DEFENSES.—Agreement by member to look solely to society for redress of grievances, is defense in action at law brought by member.—Robinson vs. Templar Lodge I. O. O. F., 117 Cal. 370, 59 Am. St. Rep. 193, 49 Pac. Rep. 170; Berlin vs. Eureka Lodge K. P., 132 Cal. 294, 296, 64 Pac. Rep. 254.

87. Fact that laws providing remedy for grievance, such as refusal to pay benefits, are not pursued and exhausted by member is perfect defense to his action in state court.—Levy vs. Magnolia Lodge I. O. O. F., 110 Cal. 297, 307, 42 Pac. Rep. 887. See Robinson vs. Irish-American Ben. Soc., 67 Cal. 135, 7 Pac. Rep. 435; Otto vs. Journeymen T. P. & B. Union, 75 Cal. 308, 7 Am. St. Rep. 156, 17 Pac. Rep. 217. Ill. Robinson vs. Yates City Lodge, 86 Ill. 598. Mich. People vs. St. George Soc., 28 Mich. 261. N. Y. White vs. Brownell, 4 Abb. Pr. N. S. 126, 4 Daly 329. Pa. German Reformed Church vs. Seibert, 3 Pa. St. 282. Tex. Sorewmen's Ben. Assoc. vs. Benson, 76 Tex. 552, 18 S. W. Rep. 379.

88. Judgment recovered in action for installment conclusive in suit for future installments, and bars society from pleading subsequent alteration of the laws respecting such installments.—Wiese vs. San Francisco M. Soc., 82 Cal. 645, 646, 28 Pac. Rep. 212. See Robinson vs. Howard, 5 Cal. 423; Love vs. Walts, 7 Cal. 250.

VI. BENEFICIARIES—1. RIGHTS OF.

As to assignment of interest of beneficiaries, see monographic note 87 Am. St. Rep. 541.

As to result of death of beneficiary before insured, see monographic note 11 Am. St. Rep. 721-724.

As to when insurance payable to heirs, see monographic note 44 Am. St. Rep. 404-409.

89. BENEFICIARY'S INTEREST.—Member's expectancy of an incomplete gift, revocable at will of insured, not vested until fixed by death.—Hoeft vs. Supreme Lodge K. H., 113 Cal. 91, 94, 45 Pac. Rep. 185, 33 L. R. A. 174. See Swift vs. San Francisco S. & Ex. Board, 67 Cal. 567, 8 Pac. Rep. 94; Order of Mut. Comp. vs. Griest,

76 Cal. 494, 13 Pac. Rep. 652; Bowman vs. Moore, 37 Cal. 306, 25 Pac. Rep. 409; McLaughlin vs. McLaughlin, 104 Cal. 171, 43 Am. St. Rep. 33, 37 Pac. Rep. 865; Jory vs. Supreme Council A. L. H., 105 Cal. 20, 30, 45 Am. St. Rep. 17, 38 Pac. Rep. 524, 26 L. R. A. 733; Supreme Council A. L. H. vs. Gehrenbeck, 124 Cal. 43, 44, 56 Pac. Rep. 640. Iowa. Brown vs. Grand Lodge A. O. U. W., 30 Iowa 287, 20 Am. St. Rep. 420, 45 N. W. Rep. 834. Ky. Schillinger vs. Boes, 85 Ky. 357, 3 S. W. Rep. 427. N. H. Knights of Honor vs. Watson, 64 N. H. 517, 15 Atl. Rep. 125. N. Y. Hellenberg vs. District No. 1 I. O. B. B., 94 N. Y. 580. Pa. Appeal of Beatty, 122 Pa. St. 428, 15 Atl. Rep. 861. Fed. Lamont vs. Grand Lodge, 81 Fed. Rep. 177; Supreme Conclave vs. Cappella, 41 Fed. Rep. 1; Robinson vs. United States Mut. Acc. Assoc., 68 Fed. Rep. 325.

90. Beneficiaries of members may be limited by articles, to classes less extensive than permitted by statute, although corporation will not be allowed, under rule of liberal construction, to exercise its power for benefit of those who are not within scope of statute under which incorporated.—Sheehan vs. Journeymen B. P. & B. Assoc., 142 Cal. 489, 493, 76 Pac. Rep. 238.

91. Child born after death of insured not included or entitled to take as beneficiary under certificate of association "to afford financial aid and benefit to widow, orphans and heirs or the devisees of deceased member."—Spry vs. Williams, 82 Iowa 61, 31 Am. St. Rep. 460, 47 N. W. Rep. 890, 10 L. R. A. 863.

As to unborn child's rights generally, see ante § 29 and note.

92. Mother properly named as beneficiary under by-laws of association, by which relative by blood, or party depending upon insured, may be named as beneficiary, and entitled to receive insurance, even though insured may have married subsequently, his mother's name not being changed in his lifetime as beneficiary.—Sheehan vs. Journeymen B. P. & B. Assoc., 142 Cal. 489, 496, 76 Pac. Rep. 238. See Courtois vs. Grand Lodge A. O. U. W., 135 Cal. 552, 87 Am. St. Rep. 137, 67 Pac. Rep. 970; Catholic Order Foresters vs. Callahan, 146 Mass. 391, 16 N. E. Rep. 14; Connecticut Mut. L. Ins. Co. vs. Schaefer, 94 U. S. 457, bk. 24 L. ed. 251.

93. Wife named as beneficiary, but subsequently divorced, not heir or member of family of deceased within clause providing beneficiary should be heir or member of decedent's family.—Courtois vs. Grand Lodge A. O. U. W., 135 Cal. 552, 87 Am. St. Rep. 137, 67 Pac. Rep. 970. See Tyler vs. Odd Fellows Mut. R. Assoc., 145 Mass. 134, 13 N. E. Rep. 360.

94. Association liable only to nominee or beneficiary designated, under constitution requiring members to designate, in writing, some person as nominee for benefits payable at death of such member.—Order of Mut. Com. vs. Griest, 76 Cal. 494, 496, 497, 13 Pac. Rep. 652.

95. Claim and enforcement of.—Beneficiaries or nominees only entitled to claim sum actually collected on assessments under by-laws for payment to beneficiary of amount collected, not exceeding given amount from each mem-

ber.—In re La Solidarite Mut. Ben. Assoc., 63 Cal. 392, 393, 9 Pac. Rep. 453.

96. May claim as against party holding certificate as surety, bringing no action for reimbursement, when sureties not properly made beneficiaries according to rules of society.—Conway vs. Supreme Council C. K. A., 137 Cal. 334, 336-339, 70 Pac. Rep. 232.

97. Beneficiary not bound by decision of the board, but may appeal to jurisdiction of the courts, and provisions of by-laws giving appeal to grand lodge do not bind him.—Grimbley vs. Harrold, 125 Cal. 24, 30, 73 Am. St. Rep. 19, 57 Pac. Rep. 553. See Robinson vs. Templar Lodge I. O. O. F., 117 Cal. 370, 59 Am. St. Rep. 193, 49 Pac. Rep. 170. Minn. Whitney vs. Association, 25 Minn. 373. Neb. Burlington Voluntary R. Dept. vs. White, 41 Neb. 547, 43 Am. St. Rep. 701, 59 N. W. Rep. 747. Utah. Danther vs. Grand Lodge A. O. U. W., 10 Utah 110, 37 Pac. Rep. 245.

98. Fact that beneficiary produces evidence before committee under rules of order for consideration of the demand, will not convert such hearing into an arbitration so as to preclude the right to appeal to courts.—Grimbley vs. Harrold, 125 Cal. 24, 30, 73 Am. St. Rep. 19, 57 Pac. Rep. 553.

99. Compare: Kumle vs. Grand Lodge A. O. U. W., 110 Cal. 204, 42 Pac. Rep. 634.

100. Representatives of deceased member may bring action at law where society has refused to grant proper relief in accordance with laws of order, and deceased has in his lifetime exhausted all known remedies.—Berlin vs. Eureka Lodge K. P., 132 Cal. 294, 297, 64 Pac. Rep. 254.

101. Regulations made are for protection of order and not for beneficiary, and may be waived by order.—McLaughlin vs. McLaughlin, 104 Cal. 171, 43 Am. St. Rep. 83, 37 Pac. Rep. 865; Adams vs. Grand Lodge A. O. U. W., 105 Cal. 321, 45 Am. St. Rep. 45, 38 Pac. Rep. 914; Hoeft vs. Supreme Lodge K. H., 113 Cal. 91, 94, 45 Pac. Rep. 185, 33 L. R. A. 174; Martin vs. Stubbings, 126 Ill. 387, 9 Am. St. Rep. 620, 18 N. E. Rep. 657; Thomas vs. Thomas, 131 N. Y. 205, 27 Am. St. Rep. 582, 30 N. E. Rep. 61.

102. Rights of beneficiaries inter se.—Determined as between parties themselves where money paid into court by society under interpleader.—Adams vs. Grand Lodge A. O. U. W., 105 Cal. 321, 324, 45 Am. St. Rep. 45, 38 Pac. Rep. 914.

103. Litigated in same way, and finally adjudicated and determined upon same general principles, as though common source of title to money came through bequest or gift rather than from association.—Adams vs. Grand Lodge A. O. U. W., 105 Cal. 321, 324, 45 Am. St. Rep. 45, 38 Pac. Rep. 914.

104. Not affected by offer of society to pay money into court.—McLaughlin vs. McLaughlin, 104 Cal. 171, 176, 177, 43 Am. St. Rep. 83, 37 Pac. Rep. 865.

VII. BENEFICIARIES—2. CHANGE OF.

As to change of names in benefit certificate otherwise than in prescribed method, see mon-

ographic note by H. P. Farnham, 15 L. R. A. 350-352.

105. BY-LAWS PROVIDING SPECIFIC MODE in compliance with which beneficiary named may be changed, are part of contract.—McLaughlin vs. McLaughlin, 104 Cal. 171, 43 Am. St. Rep. 83, 37 Pac. Rep. 865; Levy vs. Magnolia Lodge, 110 Cal. 297, 42 Pac. Rep. 837; Hass vs. Mutual R. Assoc., 113 Cal. 6, 49 Pac. Rep. 1056; Conway vs. Supreme Council C. K. A., 131 Cal. 437, 439, 63 Pac. Rep. 727.

106. CONSENT OF BENEFICIARY named not necessary to making of legal substitution.—Bowman vs. Moore, 37 Cal. 306, 311, 25 Pac. Rep. 409.

107. Request to secretary to make substitution desired by assured, appearing upon books of association, sufficient form of substitution.—Bowman vs. Moore, 37 Cal. 306, 311, 25 Pac. Rep. 409.

108. Under certificate authorizing change or substitution of another beneficiary by writing filed by association, letter written to association indorsed and filed by them is sufficient, as form of substitution is immaterial.—Bowman vs. Moore, 37 Cal. 306, 311, 25 Pac. Rep. 409.

109. CONTRACT BY MEMBER NOT TO CHANGE BENEFICIARY upon consideration of latter's paying dues, valid and not in conflict with lawful conditions upon which order grants insurance, and is effectual as against subsequent effort of member to violate or annul it.—Jory vs. Supreme Council A. L. H., 105 Cal. 20, 29, 45 Am. St. Rep. 17, 38 Pac. Rep. 524, 26 L. R. A. 733; Adams vs. Grand Lodge A. O. U. W., 105 Cal. 321, 325, 45 Am. St. Rep. 45, 38 Pac. Rep. 914; Hoeft vs. Supreme Lodge K. H., 113 Cal. 91, 45 Pac. Rep. 185, 33 L. R. A. 174; Grimbley vs. Harrold, 125 Cal. 24, 29, 73 Am. St. Rep. 19, 57 Pac. Rep. 553. Ky. Leaf vs. Leaf, 92 Ky. 166, 17 S. W. Rep. 354, 354. N. Y. Maynard vs. Vandewerker, 30 Abb. N. C. 134, 24 N. Y. Supp. 932; Smith vs. National Ben. Soc., 123 N. Y. 35, 25 N. E. Rep. 197, 9 L. R. A. 616.

110. The case of Maynard vs. Vandewerker, supra, was subsequently decided at special term and judgment reversed upon appeal upon question of fact, but opinion then delivered would seem to proceed on the assumption that law was correctly stated.—See 29 N. Y. Supp. 714, 76 Hun (N. Y.) 25.

111. May create equities in favor of latter which insurer stopped from defeating, so far as subsequently named beneficiary possession no equities, is concerned.—Jory vs. Supreme Council A. L. H., 105 Cal. 20, 28, 45 Am. St. Rep. 17, 38 Pac. Rep. 524, 26 L. R. A. 733; Adams vs. Grand Lodge A. O. U. W., 105 Cal. 321, 325, 45 Am. St. Rep. 45, 38 Pac. Rep. 914.

VIII. EVIDENCE AND BURDEN OF PROOF.

112. BURDEN OF PROOF UPON PARTY CLAIMING.—Hass vs. Mutual R. Assoc., 113 Cal. 6, 9, 49 Pac. Rep. 1056.

113. On plaintiff to show right of recovery of money or property, and that obligation exists on defendant's part to comply with demand.—Grand Grove U. A. O. D. vs. Garibaldi

K. P. vs. Knight, 1
479, 3 L. R. A. 409.

83. Or take cogni
or internal econom.
Lawson vs. Howell,
Rep. 763, 49 L. R. A.

84. Equity will no
benevolent associati
relief provided by so
availed of and exha
Lodge I. O. O. F., 110
887; Dolan vs. Court
Mass. 437; Chamberl
70; La Fond vs. Dea

85. Fraternal org
as legal bodies, or
in courts for enforce
is also involved de
right or right to pu
courts are limited to
prescribed by organ
of right have bee
Hewell, 118 Cal. 613,
L. R. A. 400.

86. DEFENSES.—
look solely to society
is defense in action
ber.—Robinson vs. T
117 Cal. 370, 59 Am.
170; Berlin vs. Eur
294, 296, 64 Pac. Rep.

87. Fact that lav
grievance, such as re
not pursued and ex
fect defense to his ac
vs. Magnolia Lodge I
42 Pac. Rep. 887.
American Ben. Soc.,
435; Otto vs. Journey
Cal. 308, 7 Am. St. Re
Ill. Robinson vs. Yate
Mich. People vs. St. G
N. Y. White vs. Brow
4 Daly 329. Pa. Germa
Seibert, 8 Pa. St. 282.
Assoc. vs. Benson, 76 Tex

88. Judgment recover
ment conclusive in suit fo
and bars society from
alteration of the laws re
ments.—Wiese vs. San Fr.
Cal. 645, 646, 23 Pac. Rep.
vs. Howard, 5 Cal. 428;
Cal. 250.

VI. BENEFICIARIES—1

As to assignment of interest
see monographic note 87 Am.

As to result of death of be
insured, see monographic note
721-724.

As to when insurance payable
monographic note 44 Am. St. P

89. BENEFICIARY'S
expectancy of an incor
will of insured, not v
—Hoeft vs. Suprem
94, 45 Pac. Rep. 180
vs. San Francisco
8 Pac. Rep. 94; (

may arise under this chapter, is *Shepard vs. Milwaukee Gas Light Co.*, 6 Wis. 539, 70 Am. Dec. 479. In that case a gas company reserved to itself the right at any time to cut off connection of the service pipe if it should find it necessary to do so to protect the works against abuse or fraud, and another rule provided that fittings should not be disconnected or opened, either for alteration or repairs, or extensions, without a permit from the company, and that violation of such regulation should be punishable in treble damages. The court in sweeping away such regulation said: "Here the company assume the whole power to decide upon the question of abuse or fraud, either in fact or in anticipation, without notice, without trial, of their own mere motion. This summary jurisdiction would not be given to

any of the judicial courts in any case but upon the most urgent emergency. . . . It is not to be allowed that the gas company can impose penalties in this way, or make the submission to such penalties a condition precedent to the right of the citizen to be furnished with gas. It is singular if the legislature has given to the gas company the right to inhibit the citizen from altering the arrangement of his gas apparatus in his dwelling without their assent first had and obtained, or from extending the same; and still more singular that the company should claim the sovereign right to inflict penalties upon him for doing so; and not him only, but upon any other person who should act in the matter without their consent. The statement of this proposition is its answer."

§ 453b. RIGHT OF WAY OF CORPORATION AND ITS OFFICERS WHEN RUNNING TO FIRES. Such corporation, with its officers and corps, when running to a fire with its horses, vehicles, and salvage apparatus, has the same right of way as is or may be bestowed by any ordinance of the municipality or law of this state upon the regular fire department of the municipality wherein such corporation is acting; but the rights of such fire department must always be paramount to the rights of such corporation.

[Certain laws and ordinances governing fire departments to govern.] All ordinances now existing or which may hereafter be passed by the municipal authorities of any city and county, or of any incorporated city or town wherein such a corporation may carry on business, and all laws of this state applicable to such city and county, or city or town, for the conviction or punishment of any person or persons wilfully or carelessly obstructing the progress of the apparatus of the fire department of such city and county, or city or town, while going to a fire, or of any person or persons wilfully or carelessly injuring any animal or property of said fire department, are equally applicable to any person or persons wilfully or carelessly obstructing the progress of the apparatus of such corporation while going to a fire, and to any person or persons who wilfully or carelessly injures any animal or property of such corporation; and said laws and ordinances, and their penalties, may be enforced in the same courts and in the same manner, and with equal force and effect, as in the case of the fire department.

History: Enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXII, p. 572; see introductory note to this chapter.

§ 453c. YEARLY MEETINGS OF CORPORATION, NOTICE THEREOF, PROCEEDINGS WHICH MAY BE AUTHORIZED THEREAT. [WHO MAY VOTE.] In the month of July, in every year, there must be held a meeting of all corporations created for the purposes specified in this chapter; of which ten days' previous notice must be inserted in at least one daily newspaper published in the municipality where said corporation is organized or established, at which meeting each insurance company, corporation, association, underwriter, agent, person, or persons doing a fire insurance business in said municipality, whether members of said corporation or not, shall have a right to be represented, and shall be entitled to one vote.

[Power of majority present—Fixing expenses.] A majority of the whole number so represented has power to decide upon the question of sustaining the fire

patrol organized by corporations heretofore created, or that may be hereafter created, and fixing the maximum amount of expenses which may be incurred therefor during the fiscal year next to ensue, which amount must in no case exceed two per centum of the aggregate premiums returned as received, as provided in this section, and the whole of such amount, or so much thereof as may be necessary, may be assessed upon all insurance companies, corporations, associations, underwriters, agents, person, or persons who assume risks and accept premiums for fire insurance in said municipality, as hereinbefore mentioned, in proportion to the several amounts of premiums returned, as received by each, as hereinafter provided, and

[Assessments, how collected.] Such assessment is collectable by and in the name of said corporation, in any court of law in the state of California having jurisdiction, in such manner and at such time or times as said corporation may determine.

[Payment of employees, etc., how provided for.] In order to provide for the payment of persons employed by said corporation, and to maintain suitable rooms, and apparatus for saving life and property contemplated, said corporation is empowered to require a statement to be furnished, semi-annually, by all insurance companies, corporations, associations, underwriters, agents, or persons, of the aggregate amount of premiums received for insuring property in the municipality where said corporation is organized or established, for and during the six months next preceding the first day of July and the first day of January of each year, which statement must be sworn to by the president or secretary of the corporation or association, or by the agent or person so acting or effecting such insurance in said municipality, and must be handed to the secretary of said corporation heretofore created or hereafter to be created under the provisions of this chapter within ten days after the first day of July and the first day of January of each year. Said secretary must, within the ten days aforesaid, by written or printed demand signed by him, require from every insurance company, corporation, association, underwriter, agent, or person engaged in the business of fire insurance in the municipality where said corporation is organized or established, the statement hereinbefore provided for. Such demand may be delivered personally at the office of such insurance company, corporation, association, underwriter, agent, or person within said municipality, and every officer of such insurance company, corporation, association, and every such underwriter, agent, or person, who, for fifteen days after said demand, neglects to render the statement herein provided for, forfeits fifty dollars for the use of said corporation, and also forfeits for its use twenty-five dollars in addition for every day he so neglects after the expiration of the said fifteen days, and such additional penalty may be computed and collected up to the time of the trial of any action brought for the recovery thereof. The penalty herein provided for may be sued for and collected, with costs, in any court of law within the state of California having jurisdiction, by and in the name of said corporation.

History: Enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXXII, pp. 572-574; see introductory note to this chapter.

CHAPTER VI.

LIFE, HEALTH, ACCIDENT, AND ANNUITY OR ENDOWMENT INSURANCE ON THE ASSESSMENT PLAN.

- § 453d. Contracts which may be made by, defined.
- § 453e. Formation of corporations; issuing of contracts; investments.
- § 453f. Pre-existing corporations, right of to reincorporate.
- § 453g. Contracts of insurance, contents and effect of.
- § 453h. Reserve and emergency fund.
- § 453i. Foreign corporations, conditions precedent to doing business in this state.
- § 453j. Limitations upon right to issue contracts of insurance.
- § 453k. Exemptions from attachment and execution.
- § 453l. Statements to be filed with the insurance commissioner; proceedings to be taken by him thereon.
- § 453m. Lapsing of policies, when forbidden.
- § 453n. Fees and penalties.
- § 453o. Insurance commissioner to present bills for certain expenses.
- § 453p. Exemption of fraternal societies from this chapter.

[This chapter was added at the recommendation of Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, pp. 359-366, held unconstitutional, see history, § 4 ante; re-enacted at instance Code Commissioner March 20, 1905, Stats. and Amdts. 905, c. CCCLIII, p. 418. A codification of Act March 19, 1891, Stats. and Amdts. 1891, p. 126. In connection with that Act see *San Francisco Sav. Union vs. Long*, 123 Cal. 107, 110, 55 Pac. Rep. 708; *Murray vs. Superior Court*, 129 Cal. 628, 633, 62 Pac. Rep. 191.]

§ 453d. **CONTRACTS WHICH MAY BE MADE BY, DEFINED.** Every contract whereby a benefit may accrue to a party or parties therein named upon the death or physical disability of a person insured thereunder, or for the payment of any sums of money dependent in any degree upon the collection of assessments or dues from persons holding similar contracts, is deemed a contract of mutual insurance upon the assessment plan. Such contracts must show that the liabilities of the insured thereunder are not limited to fixed premiums.

History: Enacted March 20, 1905, Stats. and Amdts. 1905, c. CCCLIII, p. 418. See introductory note to this chapter. A codification of § 1, Act March 19, 1891, Stats. and Amdts. 1891, p. 126.

- 1, 2. Assessable note system not essential.
3. Constitutionality of statute—Impairment of obligation of contracts.
4. Contract of insurance on assessment plan—How construed.
5. Same—When complete.
6. Essential elements of mutual insurance—Principle of mutuality.
7. Explanation of scheme of mutual insurance.
8. Same—Tontine system reversed.
9. Special features of law governing.

1. **ASSESSABLE NOTE SYSTEM NOT NECESSARY.**—Principle of mutuality has probably been more often recognized and enforced in these associations through assessable note system in some of its numerous forms; but it is perfectly consistent with payment of cash premiums.—*Spruance vs. Farmers & M. Ins. Co.*, 9 Colo. 73, 10 Pac. Rep. 285.

2. Compare: *Illinois F. Ins. Co. vs. Stanton*, 57 Ill. 354.

2. **CONSTITUTIONALITY OF STATUTE.**—Impairment of obligation of contracts.—See par. 3 this note.

4. **CONTRACT OF MUTUAL LIFE INSURANCE** company on assessment plan is to be construed according to same rules as those

of any other mutual life insurance company.—*Lake vs. Minnesota M. R. Assoc.*, 61 Minn. 96, 53 Am. St. Rep. 528, 63 N. W. Rep. 361.

5. When complete.—See monographic note 69 Am. St. Rep. 143-153.

6. **ESSENTIAL ELEMENTS OF MUTUAL INSURANCE.**—Principle of mutuality exists when persons constituting company contribute either cash or assessable premium notes, or both, as plan of transacting business may provide, to common fund, and out of which each is entitled to indemnity, in case of loss.—*Spruance vs. Farmers & M. Ins. Co.*, 9 Colo. 73, 10 Pac. Rep. 285. See *N. Y. White vs. Haight*, 16 N. Y. 310; *Mygatt vs. New York Protection Co.*, 21 N. Y. 52. *Ohio M. Ins. Co. vs. Marietta W. Factory*, 3 Ohio St. 348. *Fed. Union Ins. Co. vs. Hoge*, 62 U. S. (21 How.) 35, bk. 16 L. ed. 61.

7. **EXPLANATION OF SCHEME.**—Persons associated in mutual association "are said to be members of the company. They have, or may have, a voice in management of its affairs and are practically both insurers and insured. All are interested in what may be termed profits and losses of the association; for if assessable note system in any of its forms be adopted, demands upon each member to meet

assessments, during life of his policy or risk, are large or small, according to multiplication or diminution of losses; while, if cash premium plan prevail, each member has an interest in surplus premium fund remaining after payment of losses and expenses; and, of course, amount of such surplus is governed by extent of losses suffered. Policy-holder in joint-stock company is not thus situated. He pays certain definite sum as premium, and company agrees therefor to pay him certain specific amount in case of loss. He has no voice whatever in management of the business, and whether profits or losses are large or small does not concern him, provided the company remains able to liquidate any losses contemplated by his contract."—*Spruance vs. Farmers & M. Ins. Co.*, 9 Colo. 73, 10 Pac. Rep. 285, 288.

8. *Tontine system reversed.*—"The scheme is reverse of tontine system. The contract-holder first to die will have paid no death assessment. The one who survives to last will pay many assessments. If fund could be reached by first beneficiary, contract-holders will be forced to contribute contrary to terms of their contracts. Whether legislature could require creation of reserve fund to be available in case of insolvency, is a different question. But if it can be used to pay benefits due from corporation while solvent, instead of resorting to assessment, it impairs obligation of contracts between members and corporation. It is not to be presumed that legislature intended to do this."—*San Francisco Sav. Union vs. Long*, 123 Cal. 107, 116, 117, 55 Pac. Rep. 708.

9. *Special features of law applicable to.*—See monographic note 52 Am. St. Rep. 543-579.

§ 453c. **FORMATION OF CORPORATIONS; ISSUING CONTRACTS; INVESTMENTS.** Corporations may be formed to carry on the business of mutual insurance upon the assessment plan, and are subject only to the provisions of this chapter.

[**Membership before contracts issued.**] No such corporation must issue contracts of insurance until at least two hundred persons have applied, in writing, for membership or insurance therein, and have paid to the treasurer of such corporation the sum of five thousand dollars. **This sum must be invested in bonds or securities, approved by the insurance commissioner of this state, or deposited in some bank in this state where it will earn interest.**

[**Deposit with state treasurer.**] Said bonds or securities, or evidences of such deposit, must be placed, through the insurance commissioner of this state, with the state treasurer, and the principal sum must be held in trust for the contract-holders of such corporation, with the right in the corporation to exchange said bonds, securities, or evidence of bank deposit for others of like value. Such corporation must also, as a condition precedent to issuing any contracts of insurance, obtain the written certificate of the insurance commissioner that it has complied with the requirements of this chapter; and that the name of the corporation is not the same as that of any other corporation of this or other states, as indicated by the insurance department reports in his office; nor must the commissioner approve any name or title so closely resembling another as to mislead the public.

[**No legal existence for one year, unless, etc.**] No corporation formed hereunder has legal existence after one year from the date of its articles, unless its organization has been completed and business commenced; nor must any corporation or individual solicit, or cause to be solicited, any business, until such corporation has complied with the provisions of section six hundred and thirty-three of the Political Code.

[**Construction.**] Nothing contained in this chapter shall be construed to exempt any corporation from the provisions of sections two hundred and ninety-six and two hundred and ninety-nine of this code.

History: Enacted March 20, 1905, Stats. and Amdts. 1905, c. CCCLIII, pp. 418-419. See introductory note to this chapter. A codification of § 2 Act March 19, 1891, Stats. and Amdts. 1891, pp. 126-127.

1. Articles of association—Provisions as to principle of mutuality.

2. Capital required of insurance companies generally.

3. Division of reserve fund.
4. Emergency—Cessation of business.
5. General laws applicable—"Are subject only to provision of this chapter."
6. Insolvency and failure to make up capital—Procedure.
7. Mandatory provisions—Conditions precedent.
8. Protection of insured and not of stockholders.

1. **ARTICLES OF ASSOCIATION**—Provisions as to principle of mutuality.—Where method of taking risks in mutual associations is not declared by statute, it need not be stated in articles of incorporation, and its selection is left to company itself, and the only limitation affecting plan which may be chosen is that it shall include principle of mutuality.—*Spruance vs. Farmers & M. Ins. Co.*, 9 Colo. 73, 10 Pac. Rep. 285.

As to general requisites of articles of incorporation, see ante § 290 and note.

2. **Capital required of insurance companies generally.**—See ante § 419 and note.

3. **Division of reserve fund.**—See post § 453h and note pars. 2, 3.

4. **EMERGENCY**—Cessation of business.—See post § 453h and note par. 4.

5. **GENERAL LAWS APPLICABLE**—"Are

subject only to provisions of this chapter."—Act December 19, 1891 (Stats. 1891, p. 126, § 2), provided that such corporations "shall be subject only to the provisions of this act"; but it was held that it was not intent of legislature that corporation created under act should be exempt from all laws, rules, or decisions under general laws of state, and that clause quoted related to contracts of insurance, the deposit with the state treasurer, the reserve fund and the investment thereof, and other regulations as to management and business of such corporations.—*Murray vs. Superior Court*, 129 Cal. 628, 632, 63 Pac. Rep. 191.

6. **INSOLVENCY AND FAILURE TO MAKE UP CAPITAL**—Proceedings.—See Pol. Code §§ 600-602 and notes.

7. **MANDATORY PROVISIONS.**—Clauses of section which prescribe condition precedent to doing of business are mandatory.—See *People ex rel. Schindler vs. Flint*, 64 Cal. 49, 52, 23 Pac. Rep. 495 (decided under another statute).

8. **PROTECTION OF INSURED AND NOT OF STOCKHOLDERS** is intended by provisions of this section, which requires sum to be invested, etc.—In re *California Mut. L. Ins. Co.*, 81 Cal. 364, 368, 369, 22 Pac. Rep. 869 (decided under Stats. 1866, p. 752).

§ 453f. PRE-EXISTING CORPORATION, RIGHT OF TO REINCORPORATE.

Any existing corporation engaged in the business of life, health, accident, or endowment insurance on the assessment plan may reincorporate under the provisions of this code and chapter, but is not obliged to do so, and may, without such reincorporation, exercise the rights, powers, and privileges conferred by this chapter.

History: Enacted March 20, 1905, Stats. and Amdts. 1905, c. CCCLIII, p. 419. See introductory note to this chapter. A codification of § 3 Act March 19, 1891, Stats. and Amdts. 1891, p. 127.

Continuance of existence under provisions of code.—See ante § 287 and note.

§ 453g. CONTRACTS OF INSURANCE; CONTENTS AND EFFECTS OF.

Every contract of insurance issued by such corporation must specify the sum or sums to be paid upon the happening of the contingency insured against, and when such payments must be made. Unless the contract is invalidated by fraud or by breach of its conditions, the corporation is obligated [1] to pay the beneficiary the amount or amounts specified in its contract at the time or times therein named, and [2] such indebtedness is a lien upon all the property of such corporation, with priority over all indebtedness thereafter incurred, [3] except as hereinafter provided in case of insolvency.

[Forfeiture of right to do business by failure to pay.] Failure to make such payment, within thirty days after notice, at the home office, by mail, as provided by law, of a final judgment, unless waiver is made by the beneficiary, constitutes a forfeiture of the right to do business.

History: Enacted March 20, 1905, Stats. and Amdts. 1905, c. CCCLIII, p. 419. See introductory note to this chapter. A codification of § 4 Act March 19, 1891, Stats. and Amdts. 1891, p. 127.

1. **Insolvency**—Failure to make payment within thirty days.

2. **Lien**—None on emergency fund.

1. **INSOLVENCY**—Failure to make payment

within thirty days.—See post § 453i note par. 7.

2. **LIEN**—None on emergency fund.—See post § 453h and note par. 4.

§ 453h. RESERVATION AND EMERGENCY FUND. Every domestic corporation, organized to do or doing business of insurance on the assessment plan, must accumulate a reserve or emergency fund, which must, at all times, be not less than the largest benefit contracted to be paid by it to any one person. Every corporation organized under the provisions of this chapter must accumulate such fund within a year from the date of its certificate of incorporation.

[Investment of reserve or emergency fund.] Such fund, to the extent of the largest amount contracted to be paid by any such corporation to any one person, must be invested and deposited, as provided in section four hundred and fifty-three e, with the right in the corporation to exchange any such securities for others of equal value.

[Deposit part of fund.] The deposit required by section four hundred and fifty-three e constitutes a part of the reserve required by this section, at the option of such corporation. When any such corporation discontinues business, this fund must be returned to such corporation, or disposed of as may be determined by the superior court of the county in which is its principal place of business.

History: Enacted March 20, 1905, Stats. and Amdts. 1905, c. CCCLIII, p. 418. See introductory note to this chapter. A codification of § 5 Act March 19, 1891, Stats. and Amdts. 1891, pp. 127-128.

1. Capital required of insurance companies generally.
- 2, 3. Division of emergency fund—Policy-holders only entitled to—No priority.
4. Emergency—Cessation of business.
5. Investment of emergency fund.

1. Capital required of insurance companies generally.—See ante § 419 and note.

2. DIVISION OF EMERGENCY FUND.—Policy-holders only entitled to share, and general creditors cannot share in division.—San Francisco Sav. Union vs. Long, 123 Cal. 107, 117, 55 Pac. Rep. 708.

3. Priority of preference not given by creditor because statute makes no provision for such priority or preference, and there must be pro rata distribution of funds among creditors in proportion to their respective claims.—San Francisco Sav. Union vs. Long, 123 Cal. 107, 118, 55 Pac. Rep. 708. See Winchester vs. Mabury, 123 Cal. 522, 524, 55 Pac. Rep. 393; Cavin vs. Gleason, 105 N. Y. 256, 262, 11 N. E. Rep. 504.

4. EMERGENCY—Cessation of business.—This section of the code requires accumulation of reserve or emergency fund, which must be invested in manner provided by section 453e. The statute does not state for what emergency this fund is to be accumulated, but it is evident that the fund specified in section 453h, which includes that provided for in section 453e, is provided solely for emergency arising when corporation should cease to do business. This express provision as to mode in which it could be made available, negatives all claim that there is any other; and lien provided for in section 453g does not extend to such fund, notwithstanding the very general language of that section.—San Francisco Sav. Union vs. Long, 123 Cal. 107, 116, 55 Pac. Rep. 708.

5. INVESTMENT OF EMERGENCY FUND must be in accordance with section 453e.—San Francisco Sav. Union vs. Long, 123 Cal. 107, 116, 55 Pac. Rep. 708.

See ante § 453e and note.

§ 453i. FOREIGN CORPORATIONS. CONDITIONS PRECEDENT TO DO BUSINESS IN THIS STATE. Corporations organized under the laws of any other state or country to transact the business of mutual assessment insurance must, as a condition precedent to transacting business in this state, [1] comply with the provisions of sections four hundred and five and four hundred and eight of this code, and [2] deposit with the insurance commissioner of this state a certified copy of its charter or other instrument required by its home authorities; [3] a statement under oath, of [a] its president or [b] secretary, of its business for the preceding year, in such form as may be required by the insurance commissioner of this state; [4] an appointment of a general agent, service upon whom binds the corporation; [5] a certificate that for the next preceding twelve months it has paid in full the maximum amount named in its contract of insur-

ance; [6] a certificate from the proper officer of its state or government that like corporations of this state are legally entitled to do business in such state or country; [7] copies of its contracts of insurance and applications, which must show that the liabilities of its members are not limited to fixed premiums; and [8] evidence, satisfactory to the insurance commissioner, that the corporation has accumulated a fund equal to that required of like corporations in this state, constituting a reserve or surplus fund, held in trust for the benefit of its contract-holders, and so invested and held as required by the laws of the state or government under which such corporation was organized.

[License, issuance, renewal, and revocation.] The insurance commissioner must thereupon issue a license to such corporation to do business in this state. This license must be renewed annually, and may be revoked whenever it is ascertained that the statements required to be made by this section are not true. Upon such revocation, notice thereof must be given by the insurance commissioner by publication in some newspaper published in the city and county of San Francisco, for two weeks, daily, and no new contracts must be made by such company in this state.

[License, fees, taxes, and penalties.] When any other state or country imposes any additional license, fees, taxes, or penalties upon any corporation organized or doing business under this chapter, like license, fees, taxes, or penalties are imposed upon corporations of the same kind and their agents of such state or country doing business in this state.

History: Enacted March 20, 1905, Stats. and Amdts. 1905, c. CCCLIII, pp. 419-420. See introductory note to this chapter. A codification of § 6 Act March 19, 1891, Stats. and Amdts. 1891, p. 128. As to appointment of agent upon whom service may be made, see Act April 1, 1872, Stats. 1871-2, p. 826.

1. Agent upon whom process may be served.
2. Conditions prescribed upon foreign corporations.
3. Same—Company as well as agent disabled to do business.
4. Constitutionality of statute—Business of insurance may be regulated.
5. Same—Forbidding business in foreign state.
6. Same—Foreign company may employ adjuster.
7. Same—Reasonableness of terms immaterial.
8. Contract void unless statute complied with.
- 9, 10. Doing business—What constitutes.
11. Policy of statute—Protection of citizens.
12. Retaliatory provision—Becomes operative on enactment of foreign statutes.
13. Same—Is constitutional.
14. Same—Penal character—Strict construction.
15. Same—Securities required to be deposited.

1. Agent upon whom process may be served.—See Pol. Code § 616 and note.

2. CONDITIONS PRESCRIBED UPON FOREIGN COMPANIES.—See Pol. Code §§ 622-624 and notes.

3. Company as well as agent is disabled to do business within state until complying with statute, inasmuch as obligations and requirements are imposed upon the company.—See *Haverhill Ins. Co. vs. Prescott*, 42 N. H. 547, 30 Am. Dec. 123.

4. CONSTITUTIONALITY OF STATUTE—

Business of insurance may be regulated.—State has right to regulate business of insurance within its borders, not only with reference to those insurance companies that may be recognized locally, but especially with regard to foreign insurance companies.—*State vs. Phipps*, 50 Kan. 609, 34 Am. St. Rep. 152, 31 Pac. Rep. 1097, 18 L. R. A. 657. See *Ind. State ex rel. Baldwin vs. Insurance Co. of N. A.*, 115 Ind. 257, 17 N. E. Rep. 574. *Kan. Leavenworth vs. Booth*, 15 Kan. 627, 628; *In re Pinkney*, 47 Kan. 89, 27 Pac. Rep. 179. *Mich. Seamans vs. Temple Co.*, 105 Mich. 400, 55 Am. St. Rep. 457, 63 N. W. Rep. 408, 28 L. R. A. 430. *Miss. Cowan vs. London Assurance Corp.*, 73 Miss. 321, 55 Am. St. Rep. 535, 19 So. Rep. 298. *Mo. Daggs vs. Orient Ins. Co.*, 136 Mo. 382, 391, 58 Am. St. Rep. 638, 38 S. W. Rep. 85, 35 L. R. A. 227; *Cravens vs. New York Life Ins. Co.*, 143 Mo. 583, 71 Am. St. Rep. 628, 50 S. W. Rep. 519, 53 L. R. A. 305. *Fed. Liverpool & L. L. & F. Ins. Co. vs. Oliver*, 77 U. S. (10 Wall.) 566, bk. 19 L. ed. 1029.

5. Forbidding business in foreign state.—Statute forbidding citizen of state from doing business with foreign insurance company in foreign state where such contract is valid, unless foreign corporation has complied with certain provisions, is unconstitutional, being "in conflict with universal law."—*French vs. People*, 6 Colo. App. 311, 40 Pac. Rep. 463.

6. Foreign corporation may employ adjuster.—Adjuster may follow his calling, and

act in behalf of foreign company, when he does not represent such foreign company in particular, but any and all companies needing his services, regardless of requirements of this section; and were statute otherwise construed, and made to abridge or restrict his right to follow his calling as an adjuster, it would be unconstitutional.—*French vs. People*, 6 Colo. App. 311, 40 Pac. Rep. 463.

7. **Unreasonable terms.**—Terms imposed by state upon business within state may be reasonable or unreasonable.—*Daggs vs. Orient Ins. Co.*, 136 Mo. 382, 391, 58 Am. Rep. 638, 38 S. W. Rep. 85, 35 L. R. A. 227 (containing instructive review of authorities).

8. **CONTRACT VOID UNLESS STATUTE COMPLIED WITH.**—Statute prohibits foreign corporations from doing business until provisions have been complied with, and foreign insurance company cannot maintain any action within state upon contract which it has made, without first taking steps required.—*Seamans vs. Temple Co.*, 105 Mich. 400, 55 Am. St. Rep. 457, 63 N. W. Rep. 408, 28 L. R. A. 430. See *Iowa. Seamans vs. Zimmerman*, 91 Iowa 363, 59 N. W. Rep. 290. *Mich. Thompson vs. Waters*, 25 Mich. 314, 12 Am. Rep. 243. *Miss. Cowan vs. London Assurance Corp.*, 73 Miss. 321, 55 Am. St. Rep. 535, 19 So. Rep. 298. *Fed. American Christ. & F. Union vs. Yount*, 101 U. S. 352, 356, bk. 25 L. ed. 888.

9. **DOING BUSINESS—WHAT CONSTITUTES**—In general.—Issuing of policies, taking of premium notes, collecting or receiving cash premiums, and adjusting and paying losses, constitute principal business of insurance companies. Any or all of these acts, when they involve making of contract, import doing business within meaning of the clause of statute imposing conditions upon foreign corporations.—*Beneo vs. Yesler* (Oreg. Feb. 17, 1885), 7 Pac. Rep. 329, 332. See *Lamb vs. Lamb*, 4 Biss. C. C. 420, 14 Fed. Cas. 1016.

10. **Accepting premiums and paying losses.**—Insurance company is doing business within state when it is collecting premiums and paying losses on old policies, even though it has discontinued issuing policies.—*Smyth vs. International L. Assur. Co.*, 4 Abb. Pr. N. S. (N. Y.) 14, 35 How. Pr. (N. Y.) 126, 128, 129.

11. **POLICY OF STATUTE** undoubtedly is to protect citizens against irresponsible insurance companies.—See *Cowan vs. London Assur. Corp.*, 73 Miss. 321, 55 Am. St. Rep. 535, 19 So. Rep. 298; *Rose vs. Kimberly & C. Co.*, 89 Wis. 545, 46 Am. St. Rep. 555, 62 N. W. Rep. 526, 27 L. R. A. 556.

12. **RETALIATORY PROVISION**—Becomes operative upon enactment of statute in another state imposing terms and conditions upon corporations created in this state, which do business in such foreign state.—*Germania Ins. Co. vs. Swigert*, 128 Ill. 237, 21 N. E. Rep. 530, 4 L. R. A. 473.

13. **Constitutionality of provision.**—Clause of this section which makes laws of foreign states which impose conditions upon corporations of this state operative as respects foreign corporations doing business within this state, is constitutional, is a valid exercise of legislative will, and is not void for uncertainty.—*State ex rel. Baldwin vs. Insurance Co. of North Am.*, 115 Ind. 257, 17 N. E. Rep. 574.

14. **Penal character—Strict construction.**—Although object of statute is to secure reciprocity, it is penal in its character, as respects this provision, and should therefore be strictly construed, and it should not be applied to a case that does not fall within its letter.—*State vs. Insurance Co.*, 49 Ohio St. 440, 34 Am. St. Rep. 573, 31 N. E. Rep. 658, 16 L. R. A. 611 (distinguishing cases in other jurisdictions).

15. **Securities required to be deposited.**—See Pol. Code § 618 and note.

§ 453j. **LIMITATIONS UPON RIGHT TO ISSUE CONTRACTS OF INSURANCE.** No corporation doing business under this chapter, except accident or casualty corporations, must issue a contract of insurance upon the life of any person under fifteen nor over sixty-one years of age. Every such contract of insurance must be founded upon written application therefor, and, except where the application is for health, accident, or casualty insurance only, or for one hundred dollars life insurance or less, such application must be accompanied by the report of a reputable physician, containing a detailed statement of his examination of the applicant, showing the applicant to be in good health, and recommending the issuance of a contract of insurance.

[False or fraudulent statement by solicitor, etc.] Any solicitor, agent, employee, examining physician, or other person, making a false or fraudulent statement to any corporation doing business under this chapter, with reference to any application for insurance, or for the purpose of obtaining any money or benefit from such corporation, is guilty of a misdemeanor; and any person who makes a false statement of any material fact or thing in a sworn statement as to the death or disability of a contract-holder, in any such corporation for the purpose of procuring or

aiding the beneficiary or beneficiaries or contract-holder in procuring the payment of a benefit named in the contract, is guilty of perjury.

History: Enacted March 20, 1905, Stats. and Amdts. 1905, c. CCCLIII, pp. 420-421. See introductory note to this chapter. A codification of Act March 19, 1891, Stats. and Amdts. 1891, p. 128-129.

§ 453k. EXEMPTIONS FROM ATTACHMENT AND EXECUTION. The money, benefit, annuity, endowment, charity, relief, or aid to be paid as provided by the contracts issued by any corporation doing business under this chapter, is not liable to attachment or other process, nor to be seized, taken, appropriated, or applied by any legal or equitable process, nor by operation of law, to pay any debts or liability of the contract-holder or any beneficiary named thereunder.

History: Enacted March 20, 1905, Stats. and Amdts. 1905, c. CCCLIII, p. 421. See introductory note to this chapter. A codification of § 8 Act March 19, 1891, Stats. and Amdts. 1891, p. 129.

1. Assignment of policy—Fruits of assignment not exempt.
2. Trustee in bankruptcy does not take policy.

1. Assignment of policy, where it is by its term assignable, proceeds of assignment are not exempt.—*Friedlander vs. Mahoney*, 81 Iowa 811, 813.

Same—Property acquired by assignment of policy, or with proceeds, is not exempt.—*Ibid.*

2. Trustee in bankruptcy does not take policy as an asset of bankrupt's estate.—*Morris vs. Dodd*, 110 Ga. 606, 608, 78 Am. St. Rep. 129, 36 S. E. Rep. 88, 50 L. R. A. 33; *In re Buelow*, 98 Fed. Rep. 86.

§ 453l. STATEMENT TO BE FILED WITH THE INSURANCE COMMISSIONER; PROCEEDINGS TO BE TAKEN BY HIM THEREON. Every corporation, whether domestic or foreign, doing the business of effecting insurance on the assessment plan must, annually, on or before the first day of February, file with the insurance commissioner, in such form as he may prescribe, a statement of its affairs for the year ending on the preceding thirty-first day of December. The insurance commissioner, in person or by duly authorized deputy, has the power of examination into the affairs of any domestic corporation doing business or claiming to do business under this chapter, at any time, in his discretion, and must make such examination at least once a year.

[Revoking authority to do business; procedure.] If he, after an examination of the affairs of a corporation, finds that it is not doing its business in conformity to this chapter, or that it is doing a fraudulent or unlawful business, or that it is not carrying out its terms of contract, or that it cannot, within three months from the date of notice of default, pay its obligations, he must cite the president, secretary, manager, or general agent of the corporation, or all of them, to appear before him, stating the time and place, to show cause why the authority of the corporation to do business should not be revoked, and if cause is not shown, then he must report the facts to the attorney-general of the state, who must commence proceedings in the proper court to restrain the corporation from doing any further business.

History: Enacted March 20, 1905, Stats. and Amdts. 1905, c. CCCLIII, p. 421. See introductory note to this chapter. A codification of §§ 9 and 10 Act March 19, 1891, Stats. and Amdts. 1891, p. 129. Compare Act 1856, Stats. 1856, p. 752. See *In Matter Calif. Mut. L. Ins. Co.*, 181 Cal. 364, 22 Pac. Rep. 869; *Murray vs. Superior Court*, 129 Cal. 628, 633, 62 Pac. Rep. 191.

1. Financial condition—How determined.
2. Insolvency and failure to make up capital—Proceedings.
- 3, 4. Insurance commissioners—Executive and quasi judicial officer—Extensive powers—Duties

5. Same—Hearing and notice in proceedings by.
6. Same—Object of statute.
7. Non-payment of final judgment—Insufficient allegations.
8. Parties—Corporation necessary defendant.

- 9, 10. Receiver—Prohibition against appointment.
11, 12. Revocation of authority to do business—Procedure.

1. **FINANCIAL CONDITION**—How determined.—In passing upon financial condition of company commissioner should take into consideration all appropriate data, such, for instance, as amount of cash received, balance on hand, manner of loaning or investing surplus, number and character of risks taken, running expenses, probable losses upon unexpired risks, losses already sustained, etc.—*Spruance vs. Farmers & M. Ins. Co.*, 9 Colo. 73, 10 Pac. Rep. 285.

2. **Insolvency and failure to make up capital**—Proceedings.—See Pol. Code §§ 600-602 and notes.

3. **INSURANCE COMMISSIONER** is executive officer, although to certain extent he is clothed with sort of judicial power.—*Spruance vs. Farmers & M. Ins. Co.*, 9 Colo. 73, 10 Pac. Rep. 285.

4. **Extent of powers**.—Superintendent of insurance has almost unlimited power to investigate affairs and management of such corporations. If they disobey the law, or become financially unsound, he must act in accordance with statute.—*Spruance vs. Farmers & M. Ins. Co.*, 9 Colo. 73, 10 Pac. Rep. 285.

5. **Hearing before insurance commissioner**.—By provisions of section corporation is given right to be heard before insurance commissioner, after being notified.—*Murray vs. Superior Court*, 129 Cal. 628, 634, 62 Pac. Rep. 191 (construing similar provisions in Act Dec. 19, 1891, § 10. Stats. and Amdts. 1891, p. 126).

6. **Object of legislature in providing for organization and maintenance of state insurance department** is to protect interest of persons who do business with insurance companies.—*Spruance vs. Farmers & M. Ins. Co.*, 9 Colo. 73, 10 Pac. Rep. 285.

7. **NON-PAYMENT OF FINAL JUDGMENT**—Insufficient allegations.—Section 453g pro-

vides that failure to make payment within thirty days after notice, etc., constitutes forfeiture of right to do business. Court exceeds its jurisdiction in appointment of receiver under section 453i when non-payment of final judgment is not alleged, but the only averment in complaint as to insufficiency is as follows: "That a large amount of money is due upon its policies issued upon lives of its policyholders, and that holders thereof are clamorous for amounts due."—*Murray vs. Superior Court*, 129 Cal. 628, 634, 62 Pac. Rep. 191.

8. **PARTIES**.—Corporation is necessary defendant in quo warranto proceedings, and should be heard before any decree is made affecting its right.—*People ex rel. Schindler vs. Flint*, 64 Cal. 49, 52, 28 Pac. Rep. 495.

9. **RECEIVER**.—It would seem that court has no authority to appoint receiver where it does not appear that officers of corporation cannot wind up its affairs in such manner as to protect interests of all persons concerned.—*State Invest. & Ins. Co. vs. Superior Court*, 101 Cal. 135, 147-150, 35 Pac. Rep. 549.

As to directors being trustees upon dissolution of corporation, see ante § 400 and note.

10. **Prohibition against receivership**.—Where court appoints receiver without proper jurisdictional facts being alleged, to wit, non-payment of final judgment, as provided in section 453g, supreme court will issue writ of prohibition.—*Murray vs. Superior Court*, 129 Cal. 628, 634, 62 Pac. Rep. 191.

11. **REVOCATION OF AUTHORITY TO DO BUSINESS**—Procedure.—It seems that if corporation is to be subject only to provisions of act, "it would have to be restricted from doing business by machinery provided in this section." There is no other method provided by which its authority can be revoked.—*Murray vs. Superior Court*, 129 Cal. 628, 634, 62 Pac. Rep. 191. See *San Francisco Sav. Union vs. Long*, 123 Cal. 107, 112, 55 Pac. Rep. 708.

12. **Compare**: Ante § 453e note par. 5.

§ 453m. **LAPSING OF POLICIES. WHEN FORBIDDEN.** No policy or certificate issued by any corporation or association doing business under the provisions of this chapter lapses for the non-payment of any assessments, dues, or premiums, unless the corporation or association has first mailed to the insured under such policy or certificate, at his or her last given post-office address, a notice setting forth the amount to be paid, and the time the same is due and payable; and such notice must be mailed at least fifteen days before the assessment is due; provided, that such corporations doing business under this chapter as collect specific amounts at specific dates, as contained in the contract, are not compelled to send such notices; and an affidavit made by the officer, bookkeeper, or clerk of any such corporation having charge of the mailing of notices, setting forth the facts as they appear on the records in the office of the said corporation, showing that such notice was mailed and the date of mailing, is conclusive evidence of the mailing of such notice.

History: Enacted March 21, 1905, Stats. and Amdts. 1905, c. CCCLIII, pp. 421-422. See introductory note to this chapter. A codification of § 11 Act March 19, 1891, Stats. and Amdts. 1891, pp. 129-130.

1. "AFFIDAVIT CONCLUSIVE EVIDENCE OF MAILING OF NOTICE"—Constitutionality doubted.—This extraordinary clause of the section, which invites perjury, is not constitutional, in all likelihood, because, for one reason, it is an improper interference by legislature with prerogative of judiciary.—See *Dougherty vs. Bethune*, 7 Ga. 90, 92, 93 (arising under Ga. Act, Dec. 23, 1843, which provided, in the first section, that an assignment made by Chattahoochee Railroad & Banking Company to John Bethune,—among other assignments specified in the act,—“which assignments conform to the act of the last general assembly, and are of record in the clerk's office of superior court of Muscogee County, shall be taken, held, and considered valid for all purposes, both in law and in equity.” Rights of plaintiff depended upon fact that assignment had been made by bank to defendant, and it was held that it was incumbent upon plaintiff, notwithstanding such statute, to prove the assignment; and Nisbet, J., said: “The legislature has no power to legislate the truth of facts. Whether the facts upon which rights depend are true or false are inquiries for the courts to make under

legal forms; it belongs to the judicial department of the government”); *Wright vs. Crandlebaugh*, 3 Nev. 341, 349 (wherein Beatty, C. J., said: “We apprehend it is beyond power of the legislature to restrain defendant in any suit, from setting up a good defense to an action against him. The legislature could not directly take the property of A. to pay the taxes of B. Neither can it indirectly do so by depriving A. of setting up in his answer that his separate property has been jointly assessed with that of B., and asserting his right to pay his own taxes without being encumbered with those of B.”).

According to this clause, an affidavit, made ex parte, and without opportunity for cross-examination, and which, at most, is secondary evidence of the contents of the corporation's books or “records,” rises higher than its source, and cannot be impeached even by the records themselves. It is doubtful, even, whether a false affidavit could be made the basis of a prosecution for perjury, for, on such prosecution, if the statute is upheld, would not the affidavit be “conclusive evidence” of its recitals as against any evidence—even the confession of the affiant?

§ 453n. **FEES AND PENALTIES.** The fees for filing statements, certificates, or other documents required by this chapter, or for any service or act of the insurance commissioner, and the penalties for any violation of this chapter, must, except as otherwise provided herein, be the same as provided in the laws of this state relating to life insurance companies, and must be disposed of as provided by such laws.

History: Enacted March 20, 1905, Stats. and Amdts. 1905, c. CCCLIII, p. 422. See introductory note to this chapter. A codification of § 12 Act March 19, 1891, Stats. and Amdts. 1891, p. 130.

§ 453o. **INSURANCE COMMISSIONER TO PRESENT BILLS FOR CERTAIN EXPENSES.** For all lawful expenses under this chapter, or by reason of any of its provisions, in the prosecution of any suit or proceeding, or otherwise, for the enforcement of the provisions of this chapter, the insurance commissioner must present bills, duly certified by him, and accompanied with vouchers, to the state board of examiners, who may allow the same, and direct payment thereof to be made; and the state controller must draw warrants therefor on the state treasurer for the payment of the same to the insurance commissioner, out of the general fund, in addition to the ordinary contingent expense.

History: Enacted March 20, 1905, Stats. and Amdts. 1905, c. CCCLIII, p. 422. See introductory note to this chapter. A codification of § 13 Act of March 19, 1891, Stats. and Amdts. 1891, p. 130.

§ 453p. **EXEMPTION OF FRATERNAL SOCIETIES FROM THIS CHAPTER.** The provisions of this chapter do not apply to secret or fraternal societies, lodges, or councils, which conduct their business and secure membership on the lodge system exclusively, having ritualistic work and ceremonies in their societies, lodges, or councils, nor to any mutual or benefit association organized or formed and composed of members of any such society, lodge, or council exclusively.

History: Enacted March 20, 1905, Stats. and Amdts. 1905, c. CCCLIII, p. 422. See introductory note to this chapter. A codification of § 14 Act March 19, 1891, Stats. and Amdts. 1891, p. 130.
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6. May cross, etc., other roads. To cross, intersect, join, or unite its railroad with any other railroad, either before or after construction, at any point upon its route, and upon the grounds of such other railroad corporation, with the necessary turn-outs, sidings and switches, and other conveniences in furtherance of the objects of its connections; and every corporation whose railroad is, or shall be hereafter intersected by any new railroad, shall unite with the owners of such new railroad in forming such intersections and connections, and grant facilities therefor; and if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points or the manner of such crossings, intersections and connections, the same shall be ascertained and determined as is provided in title seven, part three, Code of Civil Procedure (secs. 1237-1263);

7. May purchase lands, timber, stone, etc. To purchase lands, timber, stone, gravel or other materials to be used in the construction and maintenance of its road, and all necessary appendages and adjuncts, or acquire them in the manner provided in title seven, part three, Code of Civil Procedure, for the condemnation of lands; and to change the line of its road, in whole or in part, whenever a majority of the directors so determine, as is provided hereinafter; but no such change must vary the general route of such road, as contemplated in its articles of incorporation;

8. May carry persons and freight. To carry persons and property on their railroad, and to receive tolls or compensation therefor;

9. May erect buildings. To erect and maintain all necessary and convenient buildings, stations, depots, fixtures and machinery for the accommodation and use of their passengers, freight and business;

10. May regulate time and tolls; subject to legislation. To regulate the time and manner in which passengers and property shall be transported, and the tolls and compensation to be paid therefor within the limits prescribed by law and subject to alteration, change or amendment by the legislature at any time;

11. May establish rules for management of business. To regulate the force and speed of their locomotives, cars, trains or other machinery used and employed on their road, and to establish, execute and enforce all needful and proper rules and regulations for the management of its business transactions usual and proper for railroad corporations;

12. May purchase other roads not in competition. To purchase, lease or acquire the franchises, rights and property, or any part thereof, of any railroad corporation, leasing or owning any railroad outside of the state of California, and to operate the same, and to use the franchises of any such road, and to build and operate extensions thereof; provided that nothing herein shall authorize any corporation to purchase the franchises, rights and property of any railroad operated in competition with it; and to purchase, acquire and hold the stocks, bonds or other securities of any railroad corporation organized under the laws of this state or of any other state or territory, with full power to sell the same; provided that nothing herein will authorize any corporation to purchase the stock of any railroad corporation operated in competition with it.

History: Enacted March 21, 1872, founded upon and is a substantial re-enactment of § 17 of Act May 20, 1861, Stats. 1861, pp. 614-616; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 367, held unconstitutional, see history, § 4 ante; amendment re-enacted, and paragraph 12 added, March 20, 1903, Stats. and Amdts. 1903, pp. 245-246. In effect March 20, 1903.

I. In General.

1. Applied, cited, construed, referred to, etc.
2. All railroad corporations governed by section.
3. Changing location of route.
4. Duties with respect to time-tables, stopping at stations, etc.
5. Enumerated powers only can be exercised.
6. Running steamboats not authorized.

II. Grant and Purchase of Land.

7. Public land grant strictly construed.
8. Quantity of land which may be acquired.

III. Eminent Domain—Exercise of Power Generally.

9. Definition and nature of right.
10. Compensation—Must be made to landowner.
11. Same—All property is within rule.
12. Same—Benefits to landowner considered.
13. Same—Condition subsequent.
14. Same—Expense of removing not considered.
15. Same—Expert evidence as to value.
16. Same—Jury trial to assess—Guaranteed.
17. Same—Liberal compensation must be made.
18. Same—Money compensation not necessary.
19. Same—Time of payment—Discretion of court.
20. Same—Title does not vest in corporation until payment.
21. Same—Vested and absolute right to damages.
22. Condemnation proceedings must be instituted.
23. Construction of statute strict.
24. Large and liberal power to exercise right.
25. Necessity for land—Must exist.
26. Same—Acquisition for railroad purposes only.
27. Same—Any land necessary may be taken.
28. Same—Burden of proof in corporation.
- 29-31. Same—Cuts may be made—Blasting—Negligence.
- 32, 33. Same—Discretion of corporation in selecting land—Quantity.
34. Same—Evidence—Location of road prima facie evidence of necessity.
35. Same—False pretenses.
36. Same—Prospective necessity considered.
37. Same—Quantity of land which corporation may hold generally.
38. Same—Reasonable necessity of corporation.
39. Same—Right of way may be taken.
40. Same—Storage—Land may be acquired for purpose of.
41. Same—Water front may be acquired for docks, etc.
42. Same—Wharf may be taken incidental to bridge building.
- 43, 44. Pleading—Alleging necessity—Denials of answer.
45. Presumption of ownership from possession.
46. Record must show compliance with statute.

47-50. Remedies of landowner—Injunction—Accounting—Trespass.

51. Report of commissioners—Motion to set aside.
52. Title not tried in condemnation proceedings.

IV. Surveying Road.

53. Entry for exploration not taking.
- 54, 55. Time of making compensation.

V. Streets, Streams, etc.—Occupation of.

56. Abutting landowner cannot disturb tracks.
57. Authority from municipal corporation to occupy street.
58. Compensation—Must be made for use of street.
59. Same—Special damage necessary.
60. Condemnation of street permitted.
61. Crossing stream—Compensation of injury to adjacent property.
62. Dedication of highway—Gives corporation right to use.
63. Ejectment lies until compensation.
64. Elevated railroads—Appropriation of easement by.
65. Forfeiture of right to occupy street—Collateral attack not permitted.
66. License to use street not revocable.
67. Middle of street—Location of track in.
68. Nuisance committed in use of street—Damages.
69. Private rights must not be disregarded.
70. Proprietary interest in street not acquired.
71. Tunneling street permissible—Approaches.

VI. Crossing and Connecting Roads—Joint User.

72. Compensation must be made.
73. Condemnation of portion of another road permissible.
74. Invasion of exclusive right not permitted.
75. Joint use of tracks—Compensation.
76. Same—Amount of compensation.
77. Negligence of servant jointly employed.
78. Place and manner of crossing.
79. Receivership—Procedure in case of.
80. Statutory authority necessary.
81. Taking another's land not authorized.
82. Union station—Compensation for use of another's property.

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83. Car-barn may be maintained.
84. Elevators may be established.
- 85, 86. Nuisance—Engine-house, etc.—Turntable.
87. Station—Contract to locate at particular place.
88. Same—Discretion of corporation as to necessity.
89. Same—Land may be taken for.
90. Workshops—Land may be taken for.

VIII. Tolls and Compensation.

91. Common law does not give right to take.
92. Implied right to take.
93. Rate of charges.
94. Strict construction of right.

I. IN GENERAL.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Southern Pac. R. Co.

vs. Raymond, 53 Cal. 222, 227, 228 (construed and applied); Eel R. & E. R. Co. vs. Field, 67 Cal. 429, 431, 432, 7 Pac. Rep. 814 (referred to); Weyl vs. Sonoma Valley R. Co., 69 Cal. 202, 206, 10 Pac. Rep. 510 (construed and applied); Pacific R. Co. vs. Wade, 91 Cal. 449, 452, 25 Am. St. Rep. 201, 27 Pac. Rep. 768, 13 L. R. A. 754 (referred to); Arcata vs. Arcata & M. R. R. Co., 92 Cal. 639, 645, 28 Pac. Rep. 676 (construed and applied); Southern Pac. R. Co. vs. Ferris, 93 Cal. 263, 265, 28 Pac. Rep. 828, 13 L. R. A. 510 (referred to); Southern Pac. R. Co. vs. Southern Cal. R. Co., 111 Cal. 221, 227, 43 Pac. Rep. 602 (construed); Robinson vs. Southern Cal. R. Co., 129 Cal. 8, 11, 61 Pac. Rep. 947 (construed and applied); San Francisco & S. J. V. R. Co. vs. Leviston, 134 Cal. 412, 414, 415 (referred to), 60 Pac. Rep. 473; Harvey vs. Whittier State School, 142 Cal. 391, 392, 75 Pac. Rep. 1086 (referred to).

2. ALL RAILROAD CORPORATIONS ARE GOVERNED by the provisions of this section.—Pacific R. Co. vs. Wade, 91 Cal. 449, 452, 25 Am. St. Rep. 201, 27 Pac. Rep. 768, 13 L. R. A. 754.

3. Changing location of route.—See post § 467 and note.

4. DUTIES WITH RESPECT TO TIME-TABLES, STOPPING AT STATIONS, ETC.—See post § 481 and note.

5. ENUMERATED POWERS ONLY CAN BE EXERCISED.—It is well settled that railroad corporation created by statute can exercise no powers except those which law confers upon it, or which are incident to its existence.—Perrine vs. Chesapeake & D. Canal Co., 50 U. S. (9 How.) 172, 184, bk. 13 L. ed. 92.

6. RUNNING STEAMBOATS.—Railroad corporations cannot engage in the business of running steamboats in connection with their road.—Vandall vs. South San Francisco Dock Co., 40 Cal. 83.

II. GRANT AND PURCHASE OF LAND.

7. PUBLIC LAND GRANT TO CORPORATION STRICTLY CONSTRUED.—Where public land is granted to railroad corporation, "if the words would fairly admit of different meanings, it would be right to adopt that which is more favorable to the interest of the public and against that of the company, . . . because the public ought not to be charged unless it be clear that it was so intended."—Dubuque & P. R. Co. vs. Litchfield, 64 U. S. (23 How.) 66, bk. 16 L. ed. 500 (quoting Lord Ellenborough in *Gildart vs. Gladstone*, 12 East 632).

8. Quantity of land which corporation may acquire.—See ante § 360 and note.

III. EMINENT DOMAIN—EXERCISE OF POWER, GENERALLY.

9. DEFINITION AND NATURE OF RIGHT OF EMINENT DOMAIN.—The right of eminent domain is the right to take private property, either real or personal, and appropriate it to public use whenever the exigencies of the public cannot be adequately met and provided for in any other way; and such right, it is well settled, may be exercised by taking property which may be necessary for railroads, because

such companies are quasi public corporations, and land taken by them is for a public use.—*Contra Costa C. M. R. Co. vs. Moss*, 23 Cal. 324, 325; *Fox vs. Western Pac. R. Co.*, 31 Cal. 533, 549; *California Pac. R. Co. vs. Armstrong*, 46 Cal. 85, 90; *Southern Pac. R. Co. vs. Wilson*, 49 Cal. 396, 398; *Moran vs. Ross*, 79 Cal. 159, 161, 21 Pac. Rep. 547. See *California Pac. R. Co. vs. Central Pac. R. Co. of Cal.*, 47 Cal. 549, 554; *People vs. Pittsburgh R. Co.*, 53 Cal. 694, 697. *Ala. Aldridge vs. Tuscumbia C. & D. R. Co.*, 2 Stew. & P. 199, 23 Am. Dec. 307. *Ill. O'Hare vs. Chicago, M. & N. R. Co.*, 139 Ill. 151, 28 N. E. Rep. 923. *Iowa. Stewart vs. Polk Co.*, 30 Iowa 9, 1 Am. Rep. 238. *Mass. Boston Water Power Co. vs. Boston & W. R. Co.*, 40 Mass. (23 Pick.) 360, 394, 395. *Mich. Swan vs. Williams*, 2 Mich. 427. *Miss. Brown vs. Beatty*, 34 Miss. 227, 69 Am. Dec. 389. *Nev. Gibson vs. Mason*, 5 Nev. 233, 303-308; *Virginia & T. R. Co. vs. Elliott*, 5 Nev. 358, 367. *N. J. Jersey City & B. R. Co. vs. Jersey City & H. H. R. Co.*, 20 N. J. Eq. (5 C. E. Gr.) 61, 70, 71. *N. Y. Buffalo & N. Y. C. R. Co. vs. Brainard*, 9 N. Y. 100, 109; *Rensselaer & S. R. Co. vs. Davis*, 43 N. Y. 137, 142; *New York & H. R. Co. vs. Kip*, 46 N. Y. 547, 551, 7 Am. Rep. 385; *In re Matter of New York C. & H. R. R. Co.*, 77 N. Y. 248, 256.

10. COMPENSATION.—Must be made when land belonging to private persons is taken for railroad purposes.—*Sacramento V. R. Co. vs. Moffatt*, 7 Cal. 577, 579; *San Francisco, A. & S. R. Co. vs. Caldwell*, 31 Cal. 367, 372; *Fox vs. Western Pac. R. Co.*, 31 Cal. 533, 549; *Central Pac. R. Co. vs. Pearson*, 35 Cal. 247, 261; *California Pac. R. Co. vs. Armstrong*, 46 Cal. 85, 91. See *Ala. Aldridge vs. Tuscumbia, C. & D. R. Co.*, 2 Stew. & P. 199, 23 Am. Dec. 307. *Ill. O'Hare vs. Chicago, M. & N. R. Co.*, 139 Ill. 151, 28 N. E. Rep. 923. *Iowa. Stewart vs. Polk Co.*, 30 Iowa 9, 1 Am. Rep. 238. *Ky. Willis vs. Kentucky & I. B. Co.*, 104 Ky. 186, 46 S. W. Rep. 488. *Mass. Metropolitan R. Co. vs. Quincy R. Co.*, 94 Mass. (12 Allen) 262, 271, 272. *Minn. Adams vs. Chicago, B. & N. R. Co.*, 39 Minn. 286, 12 Am. St. Rep. 644, 39 N. W. Rep. 629, 1 L. R. A. 493. *Miss. Brown vs. Beatty*, 34 Miss. 227, 69 Am. Dec. 389. *Mont. Root vs. Butte, A. & P. R. Co.*, 20 Mont. 354, 51 Pac. Rep. 155. *Neb. Omaha & N. P. R. Co. vs. Janacek*, 30 Neb. 276, 46 N. W. Rep. 478. *Nev. Virginia & T. R. Co. vs. Elliott*, 5 Nev. 358, 367. *N. J. Jersey City & B. R. Co. vs. Jersey City & H. H. R. Co.*, 20 N. J. Eq. (5 C. E. Gr.) 61, 71, 72; *Costigan vs. Pennsylvania R. Co.*, 54 N. J. L. 233, 23 Atl. Rep. 810. *N. Y. Lehr vs. Metropolitan E. R. Co.*, 104 N. Y. 268, 10 N. E. Rep. 528; *Garvey vs. Long Island R. Co.*, 159 N. Y. 823, 70 Am. St. Rep. 550, 54 N. E. Rep. 57. *R. I. In re Providence & W. R. Co.*, 17 R. I. 324, 31 Atl. Rep. 965. *Tenn. Smith vs. East End S. R. Co.*, 37 Tenn. 626, 636, 11 S. W. Rep. 709. *Tex. Gainesville, H. & W. R. Co. vs. Hall*, 78 Tex. 169, 22 Am. St. Rep. 42, 14 S. W. Rep. 259. *Wm. Evans vs. Chicago, S. P. M. & O. R. Co.*, 26 Wis. 597, 39 Am. St. Rep. 908, 57 N. W. Rep. 354. *Fed. Bonaparte vs. Camden & A. R. Co.*, *Baldw. C. C.* 205, 3 Fed. Cas. 821.

11. All property is within rule that it cannot be taken by railroad corporation under power of eminent domain without payment of just compensation.—*Adams vs. Chicago, B. &*

N. R. Co., 39 Minn. 286, 12 Am. St. Rep. 644, 39 N. W. Rep. 629, 1 L. R. A. 493.

12. **Benefits resulting to landowner may be considered in determining what compensation shall be paid to him for land taken for railroad purposes.**—San Francisco, A. & S. R. Co. vs. Caldwell, 31 Cal. 367, 374 (wherein will be found an exhaustive collation of authorities pro and con); California Pac. R. Co. vs. Frisbie, 41 Cal. 356, 359; California Pac. R. Co. vs. Armstrong, 46 Cal. 85, 91.

13. **Condition subsequent.**—Assessment and payment of damages for taking of land by railroad corporation is condition subsequent to its right of entry.—Bloodgood vs. Mohawk & H. R. R. Co., 14 Wend. (N. Y.) 51, 57.

As to condition subsequent, see full discussion post §1438 and note.

14. **Expense of removing from premises imposed upon landowner by taking his property, is not an item which should be considered in fixing his compensation.**—Central Pac. R. Co. vs. Pearson, 35 Cal. 247, 263.

15. **Expert evidence as to value of land must consist of opinions of witnesses, founded upon (1) a knowledge of the location, productiveness, or (2) adaptation of the land to other uses, or (3) of the market or selling price of the land in the vicinity; and the opinions of witnesses who do not possess such requisite knowledge are inadmissible.**—Central Pac. R. Co. vs. Pearson, 35 Cal. 247, 261, 262.

16. **Jury trial.**—The right to have the question of compensation determined by a jury when railroad corporation takes property, is guaranteed by Const. 1879, Art. I, §14.—See Pacific R. Co. vs. Wade, 91 Cal. 449, 456, 25 Am. St. Rep. 201, 27 Pac. Rep. 768, 13 L. R. A. 754.

17. **Liberal compensation must be made.**—"A company possessing this sovereign power of entering upon and taking land of citizen in invitum should certainly be made to render complete, just, and liberal compensation to owner whose property they so appropriate. To secure unrestrained enjoyment of property is one of the first and most vital objects of government; and, theoretically, at least in this country, the right is secured and protected by the strongest possible guaranties, admitting of no exception save where the public welfare, which in all governments is superior to individual rights, demands it. And when so demanded, compensation awarded should be liberal without being unjust to the public, and this is accomplished by payment of full actual value in money, of property claimed."—Virginia & T. R. Co. vs. Elliott, 5 Nev. 358, 367. See Sullivan's Heirs vs. Louisville, 5 Dana (Ky.) 28.

18. **Money compensation not necessary, but merely just compensation, which is all that the owner of the property can demand.**—Betts vs. Williamsburg, 15 Barb. (N. Y.) 255, 259 (under a statute, —2 N. Y. Rev. Laws 407, §178, —providing that commissioners to assess damages shall report only the excess and surplus of loss and damage over and above the value of the benefit and advantage). See People vs. Mayor etc., 4 N. Y. 435, 55 Am. Dec. 266; Rexford vs. Knight, 11 N. Y. 303; Genet vs. City of

Brooklyn, 99 N. Y. 396, 305, 1 N. E. Rep. 777; Eldridge vs. City of Binghamton, 120 N. Y. 309, 313, 24 N. E. Rep. 462; Granger vs. City of Syracuse, 38 How. Pr. (N. Y.) 308; Birdsall vs. Cary, 66 How. Pr. (N. Y.) 358; Long Island R. Co. vs. Bennett, 10 Hun (N. Y.) 91; Livingston vs. Mayor etc., 3 Wend. (N. Y.) 85, 23 Am. Dec. 622.

19. **Time of payment.**—Discretion may be used, depending on circumstances of case, of which court of equity will judge, so as to secure to owner just indemnity without unreasonable delay on one hand, or unnecessarily impeding prosecution of great works of public improvement on other hand.—Bonaparte vs. Camden & A. R. Co., Baldw. C. C. 205, 3 Fed. Cas. 821.

20. **Title does not vest in corporation until compensation has been made, notwithstanding previous possession and appropriation.**—Bloodgood vs. Mohawk & H. R. R. Co., 14 Wend. (N. Y.) 51, 55.

21. **Vested and absolute right to damages is acquired by owner as soon as land is taken by railroad corporation, although actual payment may not be made until long time after he has been deprived of use and enjoyment of his land.**—Bloodgood vs. Mohawk & H. R. R. Co., 14 Wend. (N. Y.) 51, 56, 31 Am. Dec. 313.

22. **CONDEMNATION PROCEEDINGS MUST BE FIRST INSTITUTED** before railroad corporation can enter upon land and construct its road, otherwise, like natural person under similar circumstances, it will be regarded as trespassor, and subject to common-law remedy of owner of the land.—Robinson vs. Southern Cal. R. Co., 129 Cal. 8, 11, 61 Pac. Rep. 947. See Bonaparte vs. Camden & A. R. Co., Baldw. C. C. 205, 3 Fed. Cas. 821.

23. **CONSTRUCTION OF STATUTE STRICT.**—In special proceedings by which land is taken by railroad company, statute must be strictly construed.—Southern Pac. R. Co. vs. Wilson, 49 Cal. 396, 398. See Rex vs. Croke, 1 Cowp. 26 (wherein Lord Mansfield said: "This is a special authority, delegated by act of parliament, to particular persons to take away a man's property and estate against his will; therefore it must be strictly pursued, and must appear to be so upon the face of the order").

24. **LARGE AND LIBERAL POWER TO EXERCISE RIGHT.**—"It is very difficult, if not impossible, to prescribe any general rule that would define with precision power of government in exercise of right of eminent domain, or manner of its exercise. It must be large and liberal so as to meet public exigencies and demands, and it must be so guarded as to secure rights of citizen."—Buffalo & N. Y. C. R. Co. vs. Brainard, 9 N. Y. 100, 109.

25. **NECESSITY**—Must exist, otherwise property cannot be taken by a railroad corporation.—Southern Pac. R. Co. vs. Southern Cal. R. Co., 111 Cal. 221, 227, 43 Pac. Rep. 602.

26. **Acquisition for railroad purposes only.**—It is difficult, as matter of law, to define by general statement what purposes are corporate purposes, or what are necessary purposes for which land may be taken by railroad company, and probably subject is incapable of exact limit.

tation. Acquisition of lands for purpose of speculation or sale, or to prevent interference by competing lines, or in aid of collateral enterprises remotely connected with running or operating of road; although they may increase company's revenues and business, are not such purposes as authorize the condemnation of private land (dictum).—*Rensselaer & S. R. Co. vs. Davis*, 43 N. Y. 137, 146.

27. Any land which is necessary for railroad purposes may be taken.—*Worcester & N. R. Co. vs. Railroad Commissioners*, 118 Mass. 561, 567.

28. Burden of proving necessity for land rests upon corporation where landowner traverses averment that land is needed.—*O'Hare vs. Chicago, M. & N. R. Co.*, 139 Ill. 151, 28 N. E. Rep. 923; *Rensselaer & S. R. Co. vs. Davis*, 43 N. Y. 137, 146.

29. Cuts may be made under authority to make railroad.—*Dodge vs. Essex Co.*, 44 Mass. (3 Met.) 380, 383.

30. Same—Blasting with gunpowder is proper and is reasonable and appropriate mode of making cuts through ledges of rock and banks of earth, if due precautions are taken to prevent unnecessary damage; and "it follows that necessary damage occasioned thereby to dwelling-house or other building, which cannot be removed out of way of such danger, is one of natural and unavoidable consequences of executing work, and within provisions of statute."—*Dodge vs. Essex Co.*, 44 Mass. (3 Met.) 380, 383.

31. Same—Same—Carelessness or negligence is not permissible, and would constitute tort, for which an action at law would lie.—*Dodge vs. Essex Co.*, 44 Mass. (3 Met.) 380, 383.

32. Discretion of corporation in selecting land.—When land is sought by railroad company for legitimate purpose, it is within its discretion to select land, and if the necessity for land selected is shown, court will not control corporation's exercise of discretion, or direct which of several plats of ground shall be taken.—*New York & H. R. R. Co. vs. Kip*, 46 N. Y. 547, 553, 554, 7 Am. Rep. 385.

33. Same—As to quantity of land required.—Discretion of corporation as to quantity of land required.—*O'Hare vs. Chicago, M. & N. R. Co.*, 139 Ill. 151, 28 N. E. Rep. 923.

See par 37 this note.

34. Evidence—Location of road over land is prima facie evidence that land is needed for right of way, and that appropriation of land was proper and necessary.—*O'Hare vs. Chicago, M. & N. R. Co.*, 139 Ill. 151, 28 N. E. Rep. 923.

35. False pretenses.—Dissolution of corporation will be decreed in an action brought by attorney-general where it appears that land was improperly taken for mere private use, under false pretenses.—*People vs. Pittsburgh R. Co.*, 53 Cal. 694, 697. See *People vs. Dashaway Assoc.*, 84 Cal. 114, 117, 24 Pac. Rep. 277.

36. Prospective necessity of corporation, and not merely its present needs, may be considered when it is sought to take land for railroad purposes.—*Rensselaer & S. R. Co. vs. Davis*, 43 N. Y. 137, 142; *New York & H. R. R. Co. vs. Kip*, 46 N. Y. 547, 554, 7 Am. Rep. 385.

37. Quantity of land which may be acquired by corporations generally.—See ante §360 and note; also par 23 this note.

38. Reasonable necessity of corporation.—Only limit to power of railroad company to acquire land is reasonable necessity of corporation in discharge of its duty to public. This necessity includes acquisition of land for accommodation of all depots and buildings, convenient and proper for storing and keeping of its cars, locomotives, etc.—In re Matter of N. Y. C. & H. R. R. Co., 77 N. Y. 248, 263.

39. Right of way may be taken by corporation under power of eminent domain.—*O'Hare vs. Chicago, M. & N. R. Co.*, 139 Ill. 151, 28 N. E. Rep. 923.

40. Storage—Land may be acquired for purpose of erecting a storehouse where it is not contemplated to establish business of warehouseman, but only to acquire place of deposit or storage of property after its arrival until it can conveniently be taken by consignee.—In re Matter of N. Y. C. & H. R. R. Co., 77 N. Y. 248, 260, 261.

41. Water front may be acquired by railroad company, and lands adjacent to it which are under water, where company is in need of piers, wharfs, docks whereon tracks may be laid and at which vessels may lie to receive freight, same being auxiliaries which company requires.—In re Matter of N. Y. C. & H. R. R. Co., 77 N. Y. 248, 257-259 (distinguishing *Rensselaer & S. R. Co. vs. Davis*, 43 N. Y. 137, 146, 147, wherein remarks that slips were not required were based upon particular facts of the case, without any attempt to lay down general rule applicable to all cases).

42. Wharf property may be taken by railroad company when it is necessary to construction and maintenance of bridge.—See *California Pac. R. Co. vs. Central Pac. R. Co. of Cal.*, 47 Cal. 549, 554.

43. PLEADING—Alleging necessity for land.—In proceedings by railroad company to condemn land complaint alleging that suitable buildings for workshops for repairing cars and locomotives of plaintiff, and for safely keeping the same, are necessary appendages and adjuncts of the road, is perhaps not as precise and specific as it should be, but in absence of special demurrer it is sufficient.—*Southern Pac. R. Co. vs. Raymond*, 53 Cal. 228, 227, 228.

44. Answer must raise issue as to necessity for land in an action to condemn land for right of way of railroad, and if answer raise no such issue court need not make any findings upon such answer.—*Moran vs. Ross*, 79 Cal. 159, 165, 21 Pac. Rep. 547. See *O'Hare vs. Chicago, M. & N. R. Co.*, 139 Ill. 151, 28 N. E. Rep. 923.

45. PRESUMPTION OF OWNERSHIP in proceedings by railroad company to condemn land results from possession.—*Sacramento V. R. Co. vs. Moffatt*, 7 Cal. 577, 579. See *Hutchinson vs. Perley*, 4 Cal. 33, 34, 60 Am. Dec. 578.

46. RECORD MUST SHOW COMPLIANCE WITH STATUTE in proceedings to take land for railroad purposes.—*Central Pac. R. Co. vs. Pearson*, 35 Cal. 247, 258.

47. REMEDIES OF LANDOWNER.—Injunction.—Will be granted against unlawful entry and construction of railroad without first instituting condemnation proceedings.—See *Robinson vs. Southern Cal. R. Co.*, 129 Cal. 8, 11, 61 Pac. Rep. 947. *Ky.* *Fulton vs. Short Route R. T. Co.*, 85 Ky. 640, 7 Am. St. Rep. 619, 4 S. W. Rep. 332. *N. Y.* *Garvey vs. Long Isl. R. Co.*, 159 N. Y. 323, 70 Am. St. Rep. 550, 54 N. E. Rep. 57. *Fed.* *Bonaparte vs. Camden & A. R. Co.*, *Baldw. C. C.* 205, 3 Fed. Cas. 821.

48. Accounting for damages may be decreed in an action to enjoin unlawful occupation of land by railroad corporation, such relief being merely incidental and not an essential part of main cause of action.—*Garvey vs. Long Island R. Co.*, 159 N. Y. 323, 70 Am. St. Rep. 550, 54 N. E. Rep. 57.

49. Impending acts.—"To entitle party to this remedy it is not necessary that there be any threat or declared intention to commit act which will cause injury; it is enough that preparatory acts are done, from which inference is made of defendant's intention, as, if he employs surveyor who marks trees, it is presumed to be done with intention of cutting them down."—*Bonaparte vs. Camden & A. R. Co.*, *Baldw. C. C.* 205, 3 Fed. Cas. 821.

50. Trespass quare clausum fregit will lie against a railroad corporation when it enters upon land and constructs its road without first commencing condemnation proceedings.—*Robinson vs. Southern Cal. R. Co.*, 129 Cal. 8, 11, 61 Pac. Rep. 947. See *Potter vs. Ames*, 43 Cal. 75, 79; *Evans vs. Chicago, St. P. M. & O. R. Co.*, 86 Wis. 597, 39 Am. St. Rep. 908, 57 N. W. Rep. 354.

51. REPORT OF COMMISSIONERS.—Motion to set aside.—Where in proceedings of railroad company under Act May 20, 1861, §31 (*Stats.* 1861, p. 607), commissioners report that defendant owns undivided interest in portion of land over which railroad company seeks to acquire right of way, and assess value of his interest at specified sum; if company is dissatisfied with such report it should move to set aside same as to tract or tracts of land in which it is found that defendant holds undivided interest, and should not move that report be set aside merely as to defendant and his interest.—*Southern Pac. R. Co. vs. Wilson*, 49 Cal. 396, 398.

52. TITLE IS NOT TRIED in proceedings by railroad company to condemn land, but party in actual possession will be deemed to be owner and to be entitled to compensation.—*Sacramento V. R. Co. vs. Moffatt*, 7 Cal. 577, 579. See *Gunier vs. Geary*, 1 Cal. 462, 465.

IV. SURVEYING ROAD.

53. ENTRY IS NOT TAKING.—An entry on private property by railroad company for sole purpose of making necessary explorations for location is not taking it. Right remains in owner as fully as before, and no permanent injury is sustained by him unless corporation commits wanton acts, or does unnecessary damage, in which case it would be a trespass.—*Bonaparte vs. Camden & A. R. Co.*, *Baldw. C. C.* 205, 3 Fed. Cas. 821.

54. TIME OF MAKING COMPENSATION.—

Railroad company may cause surveys and examinations of land to be made and may enter upon and take possession of land within prescribed limits without first making compensation therefor, and it is sufficient to make compensation after construction of road and expediency of taking land has been fully ascertained. Any other rule would be inexpedient and impracticable. It is "highly expedient that it should not be made imperative upon corporation to attempt to purchase land required from owners, or to have their damages assessed faster than road is substantially completed."—*Bloodgood vs. Mohawk & H. R. R. Co.*, 14 Wend. (N. Y.) 51, 54; *Bonaparte vs. Camden & A. R. Co.*, *Baldw. C. C.* 205, 3 Fed. Cas. 821.

55. Compare: *Root vs. Butte & A. P. R. Co.*, 20 Mont. 354, 51 Pac. Rep. 155 (wherein it is said: "It is not necessary that there be any physical invasion of an individual's property for public use to entitle him to compensation"); *Omaha & N. P. R. Co. vs. Janecek*, 30 Neb. 276, 46 N. W. Rep. 478.

V. STREETS, STREAMS, ETC.—CONSTRUCTION OF ROAD OVER AND UPON.

56. ABUTTING LANDOWNER CANNOT DISTURB TRACKS where railroad corporation has rightfully constructed its road under subd. 5 of this section, and if track is disturbed corporation has remedy by injunction.—*Southern Pac. R. Co. vs. Ferris*, 93 Cal. 263, 265, 28 Pac. Rep. 823, 15 L. R. A. 510.

57. Authority from municipal corporation to occupy street.—See post § 470 and note.

58. COMPENSATION.—Must be paid in compliance with the statute even where right of way over street is taken.—*Weyl vs. Sonoma Valley R. Co.*, 69 Cal. 202, 206, 207, 10 Pac. Rep. 510; *Finch vs. Riverside & A. R. Co.*, 87 Cal. 597, 598, 602, 25 Pac. Rep. 765. See *Ky.* *Fulton vs. Short Route R. T. Co.*, 85 Ky. 640, 7 Am. St. Rep. 619, 4 S. W. Rep. 332. *N. Y.* *Davis vs. New York*, 14 N. Y. 506, 67 Am. Dec. 186. *Tex.* *Gainesville H. & W. R. Co. vs. Hall*, 78 Tex. 169, 22 Am. St. Rep. 42, 14 S. W. Rep. 269.

59. Special or peculiar damage must have been suffered in order to entitle private party to maintain action at common law when obstruction of street is objected to by abutting landowner.—*Evans vs. Chicago, St. P. M. & O. R. Co.*, 86 Wis. 597, 39 Am. St. Rep. 908, 57 N. W. Rep. 354. See *Fritz vs. Hobson*, L. R. 14 Ch. Div. 542.

60. CONDEMNATION OF STREET PERMITTED.—Railroad corporation cannot exercise power of eminent domain in reference to property already dedicated to public use without an express grant, but this rule has never been carried to extent of holding that streets and avenues included in land sought to be condemned are so far appropriated to public use that no authority can be conferred to obtain right to use same for public purposes.—*Ky.* *Willis vs. Kentucky & I. B. Co.*, 104 Ky. 186, 46 S. W. Rep. 488. *Minn.* *Romer vs. St. Paul C. R. Co.*, 75 Minn. 211, 77 N. W. Rep. 825. *N. J.* *Jersey City & B. R. Co. vs. Jersey City & H. H. R. Co.*, 20 N. J. Eq. 61, 70, 71. *N. Y.*

In re Matter of N. Y. C. & H. R. R. Co., 77 N. Y. 248, 256, 257.

61. CROSSING STREAM WILL NOT BE PERMITTED in such manner as to cause injury to adjacent property, unless compensation is made therefor.—*Brown vs. Cayuga & S. R. Co.*, 12 N. Y. 486, 491.

62. DEDICATION OF HIGHWAY, and public user thereof, are sufficient to entitle railroad company to occupy it with its road, under subd. 5 of this section, and court will not enter into nice questions of user in determining whether highway has been abandoned or not.—*Southern Pac. R. Co. vs. Ferris*, 93 Cal. 263-265, 28 Pac. Rep. 828, 18 L. R. A. 510.

63. EJECTMENT MAY BE MAINTAINED TO RECOVER POSSESSION OF STREET by abutting landowner against railroad corporation which occupies such street without first having paid compensation therefor.—*Weyl vs. Sonoma Valley R. Co.*, 69 Cal. 202, 205, 207, 10 Pac. Rep. 510. See *Finch vs. Riverside & A. R. Co.*, 87 Cal. 597, 602, 25 Pac. Rep. 765.

64. ELEVATED RAILROADS—Appropriation of easement by.—See 20 Encyc. Pl. & Prac. pp. 840-846.

65. FORFEITURE OF RIGHT TO OCCUPY STREET may be judicially declared, but the question cannot be collaterally raised in action of ejectment by town which has granted right to occupy street.—*Arcata vs. Arcata & M. R. R. Co.*, 92 Cal. 639, 647, 28 Pac. Rep. 676.

66. LICENSE NOT REVOCABLE.—Where trustees of incorporated town grant railroad company license to lay sidetrack in street, such license is not revocable at pleasure of board, and it cannot be rescinded or recalled unless corporation fails to comply with the terms or conditions of grant.—*Arcata vs. Arcata & M. R. R. Co.*, 92 Cal. 639, 645, 28 Pac. Rep. 676.

67. Middle of street—Location of track in.—See post § 498 and note.

68. NUISANCE WILL NOT BE PERMITTED in occupation of street without payment of damages.—*Mont. Root vs. Butte & A. P. R. Co.*, 20 Mont. 354, 51 Pac. Rep. 155. *Neb. Omaha & N. P. R. Co. vs. Janeczek*, 30 Neb. 276, 278, 46 N. W. Rep. 478. *N. Y. Lahr vs. Metropolitan E. R. Co.*, 104 N. Y. 268, 10 N. E. Rep. 528; *Garvey vs. Long Island R. Co.*, 159 N. Y. 323, 70 Am. St. Rep. 550, 54 N. E. Rep. 57. *Tenn. Smith vs. East End S. R. Co.*, 87 Tenn. 626, 636, 11 S. W. Rep. 709. *Tex. Gainesville, H. & W. R. Co. vs. Hall*, 78 Tex. 169, 22 Am. St. Rep. 42, 14 S. W. Rep. 259. *Wis. Evans vs. Chicago, St. P. M. & O. R. Co.*, 86 Wis. 597, 39 Am. St. Rep. 908, 57 N. W. Rep. 854.

69. PRIVATE RIGHTS MUST NOT BE DISREGARDED.—When railroad corporation is granted authority to use street, such grant is accompanied with implied qualification that use of street shall not unreasonably interfere with and disturb peaceful and comfortable enjoyment of others, and corporation is not licensed to disregard rights of private owners.—*Willis vs. Kentucky & I. B. Co.*, 104 Ky. 186, 46 S. W. Rep. 458; *Baltimore & P. R. Co. vs. Fifth Baptist Church*, 108 U. S. 317, 331, bk. 11 L. ed. 739, 2 Sup. Ct. Rep. 719.

70. PROPRIETARY INTEREST IN STREET IS NOT ACQUIRED by street railroad company by grant of its franchise.—*Pacific R. Co. vs. Wade*, 91 Cal. 449, 452, 25 Am. St. Rep. 201, 27 Pac. Rep. 768, 18 L. R. A. 754.

71. TUNNELING STREET BY RAILROAD COMPANY is permissible and company may make properly graded approaches such as are indispensable to use of the tunnel.—*O'Brien vs. Baltimore B. R. Co.*, 74 Md. 363, 22 Atl. Rep. 141.

VI. CROSSING AND CONNECTING ROADS—JOINT USER.

72. COMPENSATION MUST BE MADE for the use of track of another corporation as such use is clearly taking or appropriation of property of corporation which built the road.—*Jersey City & B. R. Co. vs. Jersey City & H. H. R. Co.*, 20 N. J. Eq. (5 C. E. Gr.) 61, 78.

73. CONDEMNING OTHER ROAD.—One railroad may condemn portion of right of way of another road where such condemnation works no injury and produces only such inconvenience as is covered by damages awarded. Such condemnation would be taking property for more necessary public use than that to which it has heretofore been used.—*Southern Pac. R. Co. vs. Southern Cal. R. Co.*, 111 Cal. 221, 227, 43 Pac. Rep. 602.

74. INVASION OF EXCLUSIVE RIGHT NOT PERMITTED.—Where statute provides that crossings and intersections may be upon ground of constructed railroad it is not intended to authorize invasion of lands or buildings already appropriated to railroad uses, which in their nature require exclusive occupation, or which would be materially impaired by subjecting land to new uses.—*Matter of Boston, H. T. & W. R. Co.*, 79 N. Y. 64, 68.

75. JOINT USE OF TRACKS.—Compensation must be made to corporation owning tracks.—*Metropolitan R. Co. vs. Quincy R. Co.*, 94 Mass. (12 Allen) 262, 271, 272; *Worcester & N. R. Co. vs. Railroad Commissioners*, 118 Mass. 561, 567, 568.

76. Amount of compensation to be paid by one street railroad to another for use of latter's tracks is that portion of profits from passengers carried over whole or part of both roads which is derived from carrying them on road of corporation which owns the road, or rightly belongs to business of that road, having regard to capacity and work contributed by each company in transportation; and also entire receipts from passengers carried wholly on that road, allowing to other railroad company only cost of transportation, which must include an allowance for interest on capital invested in cars, etc., used by that corporation in such transportation of passengers.—*Metropolitan R. Co. vs. Quincy R. Co.*, 94 Mass. (12 Allen) 262, 271.

77. NEGLIGENCE OF SERVANT JOINTLY EMPLOYED.—Where railroad corporation uses tracks of another and both corporations intrust switchman with business of attending to switch, corporation which so uses other road is liable for his negligence, although he is paid by corporation which owns road so used.—*Taylor vs. Western Pac. R. Co.*, 45 Cal. 323,

334. See *Overacre vs. Blake*, 82 Cal. 77, 81, 23 Pac. Rep. 979.

78. PLACE AND MANNER OF CROSSING must be such as will not unreasonably disturb use to which land is already appropriated.—*Matter of Boston, H. T. & W. R. Co.*, 79 N. Y. 64, 68, 69.

79. RECEIVERSHIP—Procedure where one corporation is in hands of receiver.—Where street railroad company is in hands of receiver and another street railroad company seeks under subd. 6 of this section, to join or unite its railroad with that of company which is in hands of receiver, it is not necessary to bring action against the receiver in manner and form required by title on eminent domain, but it is sufficient to file petition in courts wherein receiver was appointed, praying an order authorizing petitioner to operate over and on tracks, and directing receiver to grant all necessary facilities therefor.—*Pacific R. Co. vs. Wade*, 91 Cal. 449, 453-457, 25 Am. St. Rep. 201, 27 Pac. Rep. 768, 18 L. R. A. 754.

80. STATUTORY AUTHORITY NECESSARY—Land already legally appropriated by railroad company cannot be taken by another railroad company unless authority to take it is conferred by statute.—*Contra Costa R. Co. vs. Moss*, 23 Cal. 324, 330. See *Boston & M. R. Co. vs. Lowell & L. R. Co.*, 124 Mass. 368, 370.

81. TAKING ANOTHER CORPORATION'S LAND NOT AUTHORIZED—No authority to take lands, etc., of one railroad corporation is given to another, but merely power to use such land.—See *Worcester & N. R. Co. vs. Railroad Commissioners*, 118 Mass. 561, 568.

82. UNION STATION — Compensation.—Where union station is established and one railroad company undertakes to use land of another, compensation must be made.—*Worcester & N. R. Co. vs. Railroad Commissioners*, 118 Mass. 561, 567, 568.

VII. BUILDINGS, STATIONS, ETC.

83. CAR-BARN—May be maintained, and where same is not improperly or unreasonably located, it does not constitute nuisance for which neighboring landowner may maintain action for damages.—*Romer vs. St. Paul C. R. Co.*, 75 Minn. 211, 77 N. W. Rep. 325.

84. ELEVATORS MAY BE ESTABLISHED by railroad company for temporary storage of grain; and with this end in view it may acquire land upon which to erect such elevator.—In re *Matter of N. Y. C. & H. R. R. Co.*, 77 N. Y. 248, 262.

85. NUISANCE NOT PERMITTED—Engine-house and machine-shop immediately adjoining church edifice cannot be maintained by railroad corporation in such way as to be nuisance and interfere with religious exercises in such edifice.—*Baltimore & P. R. Co. vs. Fifth Baptist Church*, 108 U. S. 317, bk. 27 L. ed. 739. See *Methodist Episcopal Church vs. Pennsylvania R. Co.*, 48 N. J. Eq. 452, 455, 32 Atl. Rep. 183.

86. Turn-table cannot be erected when same is annoying to adjacent landowners without making due compensation.—*Garvey vs. Long*

Isl. R. Co., 159 N. Y. 323, 70 Am. St. Rep. 550, 54 N. E. Rep. 57.

87. STATION—Contract to locate at particular place.—A contract to convey land to railroad corporation in consideration that it will locate depot or station at certain place, is contrary to public policy, and equity will not decree specific performance thereof, because it tends injuriously to affect public interest in having fittest location for such depot or station.—*Pacific R. Co. vs. Seely*, 45 Mo. 212, 100 Am. Dec. 369. See *Commonwealth vs. Wilkinson*, 33 Mass. (16 Pick.) 175, 26 Am. Dec. 654.

88. Discretion of corporation as to necessity—Where land is sought for depot, quantity of land required is determinable, to large extent, by company itself, and court will not substitute its discretion for that of the company, if it appears that latter is acting in good faith, and there is evidence showing that land is necessary for purpose claimed; there being no exact standard in such case whereby wants of company may be definitely ascertained.—*Virginia & T. R. Co. vs. Elliott*, 5 Nev. 353, 355.

89. Land may be taken for—Passenger depots, convenient and proper places for keeping cars and locomotives when not in use, etc., are among acknowledged necessities of railroad corporation, and land may be taken therefor.—*New York & H. R. R. Co. vs. Kip*, 46 N. Y. 546, 547, 552, 553, 7 Am. Rep. 385. See *Virginia & T. R. Co. vs. Elliott*, 5 Nev. 358, 365.

90. WORKSHOPS—Land may be taken for.—The court will take judicial notice that workshops for repair of engines and cars of railroad corporation are necessary appendages and adjuncts, and railroad company may condemn land upon which to erect such workshops; but it may be that company already has sufficiency of workshops for its purpose, and consequently question of fact arises which must be ascertained on proper issues framed for that purpose.—*Southern Pac. R. Co. vs. Raymond*, 53 Cal. 223, 228.

VIII. TOLLS AND COMPENSATION.

91. COMMON LAW DOES NOT GIVE RIGHT TO TAKE TOLLS, and whether or not railroad corporation may lawfully demand compensation from person who uses its highway depends upon language of charter, and not upon rules of common law.—Ill. *Sturgeon Bay & L. M. Ship Canal & H. Co. vs. Leatham*, 164 Ill. 239, 244, 45 N. E. Rep. 422. Minn. *Blake vs. Winona & St. P. R. Co.*, 19 Minn. 418, 18 Am. Rep. 345. N. J. *Proprietors of Bridges vs. Hoboken L. & L. Co.*, 18 N. J. Eq. 503, 538; Penn. *Sylvania R. Co. vs. National R. Co.*, 23 N. J. Eq. 441, 461. Fed. *Munn vs. Illinois*, 94 U. S. 113, bk. 24 L. ed. 77. Eng. *Stourbridge Canal vs. Wheeley*, 2 Barn. & Ad. 792, 22 Eng. C. L. 185.

92. IMPLIED RIGHT TO TAKE TOLL—The right to take some toll under charter of railroad company is but an implied right. It arises by necessary implication only, if it arises at all. It can also be by necessary implication only, if at all, that it is right to take reasonable toll.—*Blake vs. Winona & St. P. R. Co.*, 19 Minn. 418, 18 Am. Rep. 345.

93. Rates of charges for transportation of passengers and freight.—See Const. 1879, Art. XII, § 22; post § 489 and note.

94. STRICT CONSTRUCTION OF RIGHT.—Rule of strict construction applies in determining right of railroad corporation to exact tolls, and where words of statute or charter are ambiguous meaning most favorable to

public, and most adverse to that of the company, must be attached.—*Camblos vs. Philadelphia & R. R. Co.*, 4 Brewst. (Pa.) 562, 4 Fed. Cas. 1089, 1107. See *Perrine vs. Chesapeake & D. Canal Co.*, 50 U. S. (9 How.) 172, 184 bk. 13 L. ed. 92; *Bridge Proprietors vs. Hoboken L. & I. Co.*, 68 U. S. (1 Wall.) 116, bk. 17 L. ed. 571. See note Co-op. Ed. 11 Pet. 420, bk. 9 L. ed. 774.

§ 465a. WHAT MOTIVE POWER MAY BE USED. AUTHORITY MUST BE OBTAINED. Every person or corporation now or hereafter authorized to operate a railroad by steam motive power, is also authorized to use electricity or compressed air, or both, either with or without such steam, for the purpose of propelling cars or trains on such railroad or upon any portion thereof. In incorporated cities, towns, or cities and counties having more than five thousand inhabitants, authority must be obtained from the legislative authority thereof.

History: Enacted by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 368, held unconstitutional, see history, § 4 ante; re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXIII, p. 574. A codification of § 1 Act March 23, 1893, Stats. and Amdts. 1893, p. 208.

§ 466. MAP AND PROFILE TO BE FILED. Every railroad corporation in this state must, [1] within a reasonable time after its road is finally located, [2] cause to be made a map and profile thereof, and [3] of the land acquired for the use thereof, and [4] the boundaries of the several counties through which the road may run, and [5] file the same in the office of the secretary of state; and also [6] like maps of the parts thereof located in different counties, and file the same in the office of the clerk of the county in which such parts of the road are, there to remain of record forever.

The maps and profiles must be certified by [1] the chief engineer, [2] the acting president and secretary of such company, and copies of the same, so certified and filed, [3] be kept in the office of the secretary of the corporation, subject to examination by all parties interested.

History: Enacted March 21, 1872, founded upon § 43 Act May 20, 1861, Stats. 1861, pp. 623-624.

Applied, cited, construed, referred to, etc., 432, 7 Pac. Rep. 814 (referred to in discussion in: *Eel River & E. R. Co. vs. Field*, 67 Cal. 429, in connection with other sections).

§ 467. MAY CHANGE LINE OF ROAD. If, at any time after the location of the line of the railroad and the filing of the maps and profiles thereof, as provided in the preceding section, it appears that the location can be improved, the directors may, as provided in subdivision seven, section four hundred and sixty-five, [1] alter or change the same, and [2] cause new maps and profiles to be filed, showing such changes, in the same offices where the originals are of file, and [3] may proceed, in the same manner as the original location was acquired, to acquire and take possession of such new line, and [4] must sell or relinquish the lands owned by them for the original location, within five years after such change.

[How new location to be run.] No new location, as herein provided, must be so run as to avoid any points named in their articles of incorporation.

History: Enacted March 21, 1872, founded upon § 18 Act May 20, 1861, Stats. 1861, p. 616.

1. Applied, cited, construed, referred to, etc.

2. Compensation must be paid where new land is taken.

3. Desirability of previous route considered.

4. Nature of power is same as original power to take.

1. Applied, cited, construed, referred to, etc., in: *Eel River & E. R. Co. vs. Field*, 67 Cal. 429, 432, 7 Pac. Rep. 814 (construed with other sections).

2. Compensation must be paid where location is changed and new land is taken.—In re *Providence & W. R. Co.*, 17 R. L. 324, 21 Atl. Rep. 965.

3. Desirability of previous route considered.

—Taking of property for right of way is not unnecessary on account of previous acquisition of less desirable right of way.—*Eel River & E. R. Co. vs. Field*, 67 Cal. 429, 432, 7 Pac. Rep. 814.

4. Nature of power to relocate is like power to locate, and it is conferred without limitation as to time.—In re *Providence & W. R. Co.*, 17 R. L. 324, 21 Atl. Rep. 965.

§ 468. **FORFEITURE OF FRANCHISE. [FAILURE TO OPERATE, REVERTER.]** Every railroad corporation must, within two years after filing its original articles of incorporation, begin the construction of its road, and must every year thereafter complete and put in full operation at least five miles of its road, until the same is fully completed; and upon its failure so to do, for the period of one year, its right to extend its road beyond the point then completed is forfeited.

[When completed must be operated—Forfeiture of right to operate.] After the completion of any railroad, or any part thereof, capable of being operated, its owner must operate it, and upon his failure to keep it, or any part thereof, in full operation for the period of six months, his right to operate it in whole or in part, as the case may be, is forfeited, and the lands occupied for the purposes of the road, so far as the same is not operated, revert to the original owners or their successors in interest. A railroad is in full operation when one passenger train, or one mixed train, is run over it once a day in each direction and a sufficient number of freight trains to accommodate the traffic on the road. If a railroad is wholly constructed at an elevation of five thousand feet or more above the level of the sea, its owner is not required to maintain and operate it, nor to run passenger or other trains thereon, between the fifteenth of October of any year and the fifteenth of May of the year following.

[Exception.] This section must not be construed to require the operation of a road when prevented by the act of God, nor when the operation of the road, together with its branch and trunk lines, does not yield income sufficient to defray the expenses of maintaining and operating it in connection with its branch and trunk lines. The railroad commissioners have the power to examine and determine whether a railroad, together with its branch and trunk lines, yields income sufficient to operate the same.

History: Enacted March 21, 1872, founded upon § 54 Act May 20, 1861, Stats. 1861, p. 626, as amended Act April 1, 1870, Stats. 1869-70, p. 578; amended by Code Commission, Act March 21, 1901, Stats. and Amdts. 1900-1, p. 368, held unconstitutional; see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXIII, p. 574.

1. Applied, cited, construed, referred to, etc.
2. Misuser and non-user—Forfeiture for.
3. Sidetracks and switches not within statute.
4. Time when corporation must organize.

1. Applied, cited, construed, referred to, etc., in: *Arcata vs. Arcata & M. R. R. Co.*, 92 Cal. 639, 646, 28 Pac. Rep. 676 (construed and applied).

2. Misuser and non-user—Forfeiture for.—See monographic note § Am. St. Rep. 179-202.

3. Sidetracks and switches not within statute.—This section applies to construction of main road provided for in company's articles of incorporation, and not to every switch or sidetrack which company may find necessary for proper conduct of business and convenience of public after road has been put in operation.—*Arcata vs. Arcata & M. R. R. Co.*, 92 Cal. 639, 646, 28 Pac. Rep. 676.

4. Time when corporation must organize.—See ante § 368 and note.

§ 469. **CROSSINGS AND INTERSECTIONS. CONDEMNATION.** Whenever the track of one railroad intersects or crosses the track of another railroad, whether

the same be a street railroad, wholly within the limits of a city or town, or other railroad, the rails of either or each road must be so cut and adjusted as to permit the passage of the cars on each road with as little obstruction as possible; and, in case the persons or corporations owning the railroads cannot agree as to the compensation to be made for cutting and adjusting the rails, the condemnation of the right of way over the one for the use of the other road may be had in proceedings under title seven, part three, Code of Civil Procedure, and the damages assessed and the right of way granted as in other cases.

History: Enacted March 21, 1872, founded upon § 2 Act May 6, 1862, Stats. 1862, p. 498.

1. Eminent domain—Nature of right and procedure.—See Code Civ. Proc. §§ 1237-1263.

2. Joint use of railroad property.—See ante § 465 sub. 6 and note.

§ 470. NOT TO USE STREETS, ALLEYS, OR WATER, IN CITIES OR TOWNS, EXCEPT BY A TWO-THIRD[S] VOTE OF THE CITY OR TOWN AUTHORITIES. No railroad corporation must use any street, alley, or highway, or any of the land or water, within any incorporated city or town, unless the right to so use the same is granted by a two-third[s] vote of the town or city authority from which the right must emanate.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Abutting owner must be compensated.
3. Easement only is acquired.
4. "Incorporated" cities and towns.
5. Limitation upon right to occupy street.
6. Municipal action—Veto power of mayor.

1. Applied, cited, construed, referred to, etc., in: *Weyl vs. Sonoma V. R. Co.*, 69 Cal. 202, 206, 10 Pac. Rep. 510 (referred to); *Arcata vs. Arcata & M. R. R. Co.*, 92 Cal. 639, 645, 23 Pac. Rep. 676 (construed with § 465); *Eisenhuth vs. Ackerson*, 105 Cal. 87, 94, 95, 33 Pac. Rep. 530 (construed and applied); *South Pasadena vs. Los Angeles T. R. Co.*, 109 Cal. 315, 319, 41 Pac. Rep. 1093 (construed with other sections).

2. Abutting owner's right to compensation.—See ante § 465 and note.

3. Easement only is acquired.—Condemnation of street for use of railroad company gives

it no title to land or any interest in it except mere easement consisting of right of way over street in common with general public.—*Southern Pac. R. Co. vs. Reed*, 41 Cal. 256, 261.

4. "Incorporated" cities and towns.—The statute, it would seem, applies only to taking of streets, etc., in an "incorporated" city or town.—See *Arcata vs. Arcata & M. R. R. Co.*, 92 Cal. 639, 645, 23 Pac. Rep. 676.

5. Limitation upon right to occupy street.—Section limits right granted by § 465, ante, to use public streets for railroad purposes.—*Weyl vs. Sonoma V. R. Co.*, 69 Cal. 202, 206, 10 Pac. Rep. 510; *Arcata vs. Arcata & M. R. R. Co.*, 92 Cal. 639, 645, 23 Pac. Rep. 676.

6. Municipal action—Veto power of mayor.—Section does not prescribe mode in which council may grant right to use streets, nor does it retract from veto power of mayor.—*Eisenhuth vs. Ackerson*, 105 Cal. 87, 94, 95, 33 Pac. Rep. 530.

§ 471. CONVEYANCE OF PASSENGERS WITHIN CITY LIMITS (repealed).

History: Enacted March 21, 1872, founded upon § 21 Act 1861, Stats. 1861, p. 618; amended April 1, 1876, Code Amdts. 1875-6, p. 76; repealed April 1, 1878, Code Amdts. 1877-8, p. 84.

§ 472. WHEN CROSSING RAILROADS OR HIGHWAYS, HOW OTHER LANDS ARE ACQUIRED. Whenever the track of such railroad crosses a railroad or highway, such railroad or highway may be carried under, over, or on a level with the track, as may be most expedient; and in cases where an embankment or cutting necessitates a change in the line of such railroad or highway, the corporation may take such additional lands and material as are necessary for the construction of such road or highway on such new line. If such other necessary lands cannot be had otherwise, they may be condemned as provided in title seven, part three,

Code of Civil Procedure; and when compensation is made therefor, the same becomes the property of the corporation.

History: Enacted March 21, 1872, founded upon § 19 Act May 20, 1861, Stats. 1861, pp. 616-617.

1. Approach to highway must be properly made.
2. Compensation of abutting landowner.
3. Condemnation proceedings unnecessary.
4. Discretion of corporation as to mode of crossing highway.
5. Eminent domain—Nature of right and procedure.
6. Grade crossing—Considerations of convenience as to mode.
7. Impairment of usefulness of highway permissible.
8. Indictment lies for not keeping highway in repair.
9. Mandamus lies to compel restoration of highway.
10. Repair of highway—Common-law duty of corporation.

1. Approach to highway must be properly made and must be kept in suitable repair.—*People vs. New York C. & H. R. R. Co.*, 74 N. Y. 302, 306.

2. Compensation of abutting landowners.—While the right in state to grant power to railroad corporation to occupy street is unquestionable, abutting landowners are entitled to compensation where cut or tunnel operates injuriously.—*O'Brien vs. Baltimore B. R. Co.*, 74 Md. 363, 22 Atl. Rep. 141.

3. Condemnation proceedings unnecessary.—Deprivation of use of street is not taking of private property for public use and does not necessitate preliminary proceeding by way of condemnation.—*O'Brien vs. Baltimore B. R. Co.*, 74 Md. 363, 22 Atl. Rep. 141.

4. Discretion of corporation as to mode of crossing highway.—Election is with railroad corporation as to mode of crossing highway, and when such election is exercised in good faith it is not reviewable by the courts.—*People vs. New York C. & H. R. R. Co.*, 74 N. Y. 302, 304 (decided under statute similar to our own).

See *Regina vs. Southeastern R. Co.*, 20 L. J. Rep. (N. S.) Q. B. 428, 15 Jur. 871, 6 Eng. L. & Eq. 214.

5. Eminent domain—Nature of right and procedure.—See Code Civil Procedure §§ 1237-1263 and notes.

6. Grade crossing—Considerations of convenience determine method.—In determining whether or not grade was properly fixed court will regard circumstances of particular case, and will not impose unreasonable burdens upon railroad corporation.—*People vs. New York C. & H. R. R. Co.*, 74 N. Y. 302, 305 (decided under similar statute).

7. Impairment of usefulness of highway.—Statute implies that usefulness of highway intersected by railroad may be to some extent impaired, but usefulness of highway must not be destroyed.—*People vs. New York C. & H. R. R. Co.*, 74 N. Y. 302, 305 (decided under similar statute).

8. Indictment will lie for not keeping highway in repair against any one whose duty it is to keep it in repair, and this rule applies to railroad corporation which crosses highway, and which fails to keep its approaches to highway in suitable repair.—*People vs. New York C. & H. R. R. Co.*, 74 N. Y. 302, 307 (decided under statute which enjoined the duty of restoring the highway).

9. Mandamus to compel restoration of highway will lie when statute imposes upon railroad corporation duty of restoring highway and keeping it in repair (dictum).—*People vs. New York C. & H. R. R. Co.*, 74 N. Y. 302, 306.

10. Repair of highway devolves upon corporation as common-law duty, even though it is not expressly imposed.—*Eyler vs. Allegany Co.*, 49 Md. 257, 33 Am. Rep. 249. See *Northern C. R. Co. vs. Baltimore*, 46 Md. 425; *Indianapolis & C. R. Co. vs. City*, 37 Ind. 389, 502.

§ 473. CONSOLIDATION OF RAILROAD CORPORATION. PROCEEDINGS NECESSARY THERETO. Any railroad corporation incorporated under the laws of this state may consolidate with one or more railroad corporations incorporated under the laws of this state, or under the laws of any other state or territory of the United States, its capital stock, properties, roads, equipments, adjuncts, franchises, claims, demands, contracts, agreements, obligations, debts, liabilities and assets of every kind and description, upon such terms and in such manner as may be agreed upon by their respective boards or directors; provided,

No such consolidation shall take effect until the same shall have been ratified and confirmed in writing by stockholders of the respective corporations representing three fourths of the subscribed capital stock of their respective corporations. In case of such consolidation

"Articles of incorporation and consolidation" must be prepared, setting forth:

1. The name of the new corporation;

2. The purpose for which it is formed;
3. The place where its principal business is to be transacted;
4. The term for which it is to exist, which shall not exceed fifty years;
5. The number of its directors (which shall not be less than five, nor more than thirteen) and the names and residences of the persons appointed to act as such until their successors are elected and qualified;
6. The amount of its capital stock (which shall not exceed the amount actually required for the purposes of the new corporation, as estimated by competent engineers), and the number of shares into which it is divided;
7. The amount of stock actually subscribed, and by whom;
8. The termini of its road or roads and branches;
9. The estimated length of its road or roads and branches;
10. The names of the constituent corporations, and the terms and conditions of consolidation in full.

[**Signing articles; method of—Memorandum of ratification.**] Said articles of incorporation and consolidation must be signed and countersigned by the presidents and secretaries of the several constituent corporations and sealed with their corporate seals. There must be annexed thereto memoranda of the ratification and confirmation thereof by the stockholders of each constituent corporation, which must be respectively signed by stockholders representing at least three fourths of the capital stock of their respective corporations. When completed as aforesaid said

Articles must be filed in the office of the county clerk of [1] the county in which the original articles of incorporation of either of the consolidating corporations are filed, and [2] a copy of the articles of incorporation and consolidation certified by such county clerk must be filed in the office of the secretary of state, and thereupon the constituent corporations named therein must be deemed and held to have become extinct in all courts and places, and said new corporation must be deemed and held in all courts and places to have succeeded to all their several capital stocks, properties, roads, equipments, adjuncts, franchises, claims, demands, contracts, agreements, assets, choses and rights in action of every kind and description, both at law and in equity, and to be entitled to possess, enjoy, and enforce the same and every thereof, as fully and completely as either and every of its constituents might have done had no consolidation taken place.

[**New corporation subrogated to constituents.**] Said consolidated or new corporation must also, in all courts and places, be deemed and held to have become subrogated to its several constituents and each thereof, in respect to all their contracts and agreements with other parties, and all their debts, obligations, and liabilities, of every kind and nature, to any persons, corporations, or bodies politic, whomsoever, or whatsoever, and said new corporation must sue and be sued in its own name in any and every case in which any or either of its constituents might have sued or might have been sued at law or in equity had no such consolidation been made. Nothing in this section contained shall be construed to impair the obligation of any contract to which any of such constituents were parties at the date of such consolidation. All such contracts may be enforced by action or suit, as the case may be, against the consolidated corporation, and satisfaction obtained out of the property which, at the date of the consolidation, belonged to the con-

stituent which was a party to the contract in action or suit, as well as out of any other property belonging to the consolidated corporation.

History: Enacted March 21, 1872, founded upon § 40 Act May 20, 1861, Stats. 1861, pp. 622-623; amended March 16, 1901, Stats. and Amdts. 1900-1, pp. 327-328 (became a law, under constitutional provision, without Governor's approval). In effect March 16, 1901.

1. Applied, cited, construed, referred to, etc.
2. Articles of consolidation must be filed.
3. Contract against public policy—Regulation of freight rates.
4. Corporations organized before code may consolidate.
5. Debts—Assumption of antecedent liabilities.
6. Same—Liability not escaped.
7. Legislative authority necessary.
8. Mode of consolidation—Corporations may arrange terms.
9. Publication of notice.
10. Purchase of rival railroad—Not authorized.
11. Same—Stockholder entitled to injunction.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: California S. R. Co. vs. Southern Pac. R. Co., 67 Cal. 59, 61, 7 Pac. Rep. 123 (construed); California Cent. R. Co. vs. Hooper, 76 Cal. 404, 405, 407, 18 Pac. Rep. 599 (referred to); Smith vs. Los Angeles & P. R. Co., 98 Cal. 210, 216, 33 Pac. Rep. 53 (applied); Market St. R. Co. vs. Hellman, 109 Cal. 571, 577 (referred to), 583 (quoted), 584 (construed and applied), 586 (quoted), 593, 601 (construed and applied), 42 Pac. Rep. 225.

2. ARTICLES OF CONSOLIDATION CONSTITUTE NEW ARTICLES of incorporation which must be filed under provisions of this section.—California S. R. Co. vs. Southern Pac. R. Co., 67 Cal. 59, 61, 7 Pac. Rep. 123; Market St. R. Co. vs. Hellman, 109 Cal. 571, 601, 42 Pac. Rep. 225.

3. CONTRACT AGAINST PUBLIC POLICY.—An association of railroad corporations to regulate price of freight, with provisions prohibiting members from similar business out of association, has tendency to increase price of carriage and to suppress competition, and is therefore illegal.—Denver & N. O. R. Co. vs. Atchison, T. & S. F. R. Co., 15 Fed. Rep. 650, 655. See Hooker vs. Vandewater, 4 Den. (N. Y.) 349, 352-354, 47 Am. Dec. 258; Stanton vs. Allen, 5 Den. (N. Y.) 434, 442, 49 Am. Dec. 282.

4. CORPORATIONS ORGANIZED PRIOR TO ADOPTION OF CODE may consolidate under provisions of this section.—Market St. R. Co. vs. Hellman, 109 Cal. 571, 583, 584, 42 Pac. Rep. 225; Murphy vs. Pacific Bank, 119 Cal. 334, 343, 51 Pac. Rep. 317.

5. DEBTS—Assumption of antecedent debts.

—Consolidated corporation may assume and make itself liable for antecedent liabilities of consolidating companies, and while such agreement does not, without their assent, bind creditors, yet suit brought by creditor upon demand so assumed against corporation which has agreed to pay, is of itself sufficient evidence of acceptance of new debtor in lieu of the old.—Smith vs. Los Angeles & P. R. Co., 98 Cal. 210, 216, 33 Pac. Rep. 53. See Morgan vs. Overman S. M. Co., 37 Cal. 534, 536. See 59 Am. St. Rep. 554-560.

6. Liability not escaped.—Consolidation does not relieve either of consolidating companies from its liability.—Smith vs. Los Angeles & P. R. Co., 98 Cal. 210, 216, 33 Pac. Rep. 53.

7. LEGISLATIVE AUTHORITY IS NECESSARY to enable railroad corporations to consolidate.—Elkins vs. Camden & A. R. Co., 36 N. J. Eq. (9 Stew.) 5, 11, 12. See York & M. L. R. Co. vs. Winans, 53 U. S. (17 How.) 31, bk. 15 L. ed. 27.

8. MODE OF CONSOLIDATION.—Consolidation may be made in such manner as consolidating corporations may agree upon by their respective boards of directors, terms of consolidation being left to them with no limitation upon their powers in that respect, except that written consent of holders of three fourths of stock of each constituent company is essential to validity of consolidation.—Market St. R. Co. vs. Hellman, 109 Cal. 571, 586, 42 Pac. Rep. 225.

9. PUBLICATION OF NOTICE for one month in paper which is printed every day except Sunday, in two daily papers for more than one month, and five consecutive times in weekly newspaper, is full compliance with requirements of statute.—Market St. R. Co. vs. Hellman, 109 Cal. 571, 593, 42 Pac. Rep. 225.

10. PURCHASE OF RIVAL RAILROAD by railroad corporation is foreign to objects for which it is incorporated, and authority to do so is not conferred by authority to unite and consolidate.—Elkins vs. Camden & A. R. Co., 36 N. J. Eq. (9 Stew.) 5, 12, 13.

11. Stockholder is entitled to injunction against purchase of another railroad which is not necessary for proper operation of defendant's own road.—Elkins vs. Camden & A. R. Co., 36 N. J. Eq. (9 Stew.) 5, 12-16.

§ 473a. RIGHT TO LEASE OR USE ANOTHER ROAD IN COMMON. Railroad corporations doing business in this state and organized under any law of this state or the United States, or of any state or territory thereof, have power to enter into contracts with one another, whereby the one may lease of the other the whole or any part of its railroad, or may acquire of the other the right to use, in common with it, the whole or any part of its railroad.

History: Added by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 369; re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXXII, p. 575. A codification of § 2 Act April 3, 1880, Stats. 1880, p. 21.

§ 474. STATE LANDS GRANTED FOR USE OF CORPORATIONS. There is granted to every railroad corporation the right of way for the location, construction, and maintenance of their necessary works, and for every necessary adjunct thereto, over any swamp, overflowed, or other public lands of the state not otherwise disposed of or in use, not in any case exceeding in length or width that which is necessary for the construction of such works and adjuncts, or for the protection thereof, not in any case to exceed two hundred feet in width.

History: Enacted March 21, 1872; this and following sections of chapter founded upon §§ 20-22 Act May 20, 1861, Stats. 1861, pp. 617-618.

§ 475. GRANT NOT TO EMBRACE TOWN LOTS. The grants mentioned in the preceding section do not apply to public lands of the state within the corporate limits of towns and cities, or within three miles thereof.

History: Enacted March 21, 1872; this, the preceding section, and following sections of chapter founded upon §§ 20-22 Act May 20, 1861, Stats. 1861, pp. 617-618.

§ 476. WOOD, STONE, AND EARTH MAY BE TAKEN FROM STATE LANDS. The right to take from any of the lands belonging to the state, adjacent to the works of the corporation, all materials, such as wood, stone, and earth, naturally appurtenant thereto, which may be necessary and convenient for the original construction of its works and adjuncts, is granted to such corporations.

History: Enacted March 21, 1872; this and following sections of chapter founded upon §§ 20-22 Act May 20, 1861, Stats. 1861, pp. 617-618.

§ 477. LANDS TO REVERT TO STATE, WHEN. If any corporation receiving state lands or appurtenances thereunder is dissolved, ceases to exist, is discontinued, or the route or line of its works is so changed as not to cover or cross the lands selected, or the use of the lands selected is abandoned, such selected lands revert, and the title thereto is reinvested in the state or its grantees, free from all such uses.

History: Enacted March 21, 1872; this and following section of chapter founded upon §§ 20-22 Act May 20, 1861, Stats. 1861, pp. 617-618.

§ 478. SELECTIONS MADE, HOW PROVED AND CERTIFIED TO. When any selection of the right of way, or land for an adjunct to the works of a railroad corporation, is made by any corporation, the secretary thereof must transmit to the surveyor-general, controller of state, and recorder of the county in which the selected lands are situate, a plat of the lands so selected, giving the extent thereof and uses for which the same is claimed or desired, duly verified to be correct; and, if approved, the surveyor-general must so indorse the plat, and issue to the corporation a permit to use the same, unless, on petition properly presented to the court, a review is had and such use prohibited.

History: Enacted March 21, 1872; this and preceding four sections founded on §§ 20-22 Act May 20, 1861, Stats. 1861, pp. 617-618.

1. Applied, cited, construed, referred to, etc.
2, 3. Time of construction not limited.

1. Applied, cited, construed, referred to, etc.
in: *San Pedro vs. Southern Pac. R. Co.*, 101 Cal. 333, 336, 337, 35 Pac. Rep. 993 (construed and applied).

2. Time of construction not limited.—Section does not limit time in which construction work shall be commenced under surveyor-

general's permit, and implies continuance of permit until such use is prohibited upon petition properly presented to court.—*San Pedro vs. Southern Pac. R. Co.*, 101 Cal. 333, 336, 337, 35 Pac. Rep. 993.

3. "The permit is only a license for a right of way over the public lands of the state, and does not confer any proprietorship in the lands themselves, and the state would have the right to revoke the license at any time, and would

be justified in doing so if it should appear that there was unnecessary delay on the part of the corporation in availing itself of the privi-

lege, but unless the state makes the objection the privilege cannot be declared forfeited at the instance of any other person."—*Ibid.*

CHAPTER III.

BUSINESS, HOW CONDUCTED.

- § 479. Checks to be affixed to all baggage. [Damages.]
- § 480. Annual report to be verified. Form of report.
- § 481. Duties of corporation. [Time of running to be fixed by public notice. Sufficient accommodations to be furnished.]
- § 482. Corporation to pay damages for refusal.
- § 483. Furnish room inside passenger cars, and be responsible for damages occurring on freight and other cars.
- § 484. Corporation to post printed regulations, and not responsible for damages in violation of rules.
- § 485. To pay damages. Not liable in certain cases. Corporations may recover damages, when.
- § 486. Regulations of trains. Penalty.
- § 487. Passenger refusing to pay fare.
- § 488. Officers to wear badge.
- § 489. Rates of charges established by railroad commissioners. Notice served.
- § 490. Railroad tickets entitle purchaser to what. Penalty for failure to provide such tickets.
- § 491. Quality of rail to be used.
- § 492. Elevated or underground railroads. Who may grant franchise.
- § 493. To what above section applicable.
- § 494. Railroad corporations may sell property and franchises to other railroads.

§ 479. CHECKS TO BE AFFIXED TO ALL BAGGAGE. [DAMAGES.] A check must be affixed to every package or parcel of baggage when taken for transportation by any agent or employee of such railroad corporation, and a duplicate thereof given to the passenger or person delivering the same in his behalf; and if such check is refused on demand, the railroad corporation must pay to such passenger the sum of twenty dollars, to be recovered in an action for damages; and no fare or toll must be collected or received from such passenger, and if such passenger has paid his fare, the same must be returned by the conductor in charge of the train; and on producing the check, if his baggage is not delivered to him by the agent or employee of the railroad corporation, he may recover the value thereof from the corporation.

History: Enacted March 21, 1872, founded upon § 42 Act May 20, 1861, Stats. 1861, p. 623.

- 1. "Baggage" and "luggage" same.
- 2. Baggage-car—Baggage must be carried in.
- 3. Baggage-master's authority.
- 4. Same—Checking merchandise without exacting release.
- 5. Burden of showing non-receipt of baggage on company.
- 6. Common carrier's liability for baggage.
- 7. Connecting carriers—Either liable on through check.
- 8. Delivery of baggage—Surrender of check—Reasonable hours.
- 9. Same—Forged order—Carrier liable.
- 10. Same—Partial delivery—Party with check without baggage.
- 11. Duty to carry baggage.
- 12. Evidence—Check shows delivery to carrier.
- 13. Same—Destination of baggage shown by check.
- 14. Same—Exchange of check—Transfer of baggage presumed.
- 15. Fare includes compensation for carrying baggage.
- 16. Justice has jurisdiction of action for penalty.
- 17. Lien on baggage for fare.
- 18. Limitation in ticket of liability for baggage.
- 19. "Luggage" defined.
- 20. Notice limiting liability.
- 21. Penalty prescribed not exclusive.
- 22. Place of delivery—Union depot not exclusive.
- 23. Pleading—Alleging that plaintiff was passenger unnecessary.
- 24. Purpose of check—Care of baggage imposed upon railroad company.
- 25. Relation of common carrier arises on giving check.
- 26. Special train—Necessity to check baggage on.
- 27. Union depot company agent for railroad company.
- 28. Weight of baggage—Limitation by statute.
 - 1. "BAGGAGE" AND "LUGGAGE" signify one and the same thing.—*Pfister vs. Central Pac. R. Co.*, 70 Cal. 169, 173, 59 Am. Rep. 404, 11 Pac. Rep. 686.
See post §§ 2180-2183 and notes.
 - 2. Baggage-car—Baggage must be carried in.—See post § 2183 and note.

2. BAGGAGE—MASTER'S AUTHORITY.—Where railroad company places baggage-master in its baggage-room it thereby holds out to public that he has authority to make arrangements as to what sort of baggage shall be carried, and he has authority to make contract to take extra baggage consisting of merchandise upon payment of extra charges.—*Strouss vs. Wabash, St. L. & P. R. Co.*, 17 Fed. Rep. 209, 211. See *Talcott vs. Wabash R. Co.*, 159 N. Y. 461, 54 N. E. Rep. 1; *Trimble vs. New York C. & H. R. Co.*, 162 N. Y. 84, 56 N. E. Rep. 532, 48 L. R. A. 115.

4. Failure to exact release upon checking trunk of samples, in violation of rules of railroad corporation, will preclude railroad corporation from insisting upon exemption from liability.—*Trimble vs. New York C. & H. R. Co.*, 162 N. Y. 84, 56 N. E. Rep. 532, 48 L. R. A. 115.

5. BURDEN OF SHOWING NON-RECEIPT of baggage by railroad company rests upon latter where passenger has check in his possession which calls for such baggage.—*Dill vs. South Carolina R. Co.*, 7 Rich. L. (S. C.) 153, 62 Am. Dec. 407.

6. Common carrier's liability for baggage.—See post § 2182.

7. CONNECTING CARRIERS.—Where different railroad corporations, forming connecting or continuing line, give through check, action lies against either corporation for loss of the baggage.—*Illinois Central R. Co. vs. Copeland*, 24 Ill. 332, 76 Am. Dec. 749. See *Muschamp vs. Lancaster R. Co.*, 8 Mees. & W. 421.

8. DELIVERY OF BAGGAGE TO PASSENGER.—Railroad corporation is bound to be at depot at proper and reasonable times for delivery of baggage to passenger upon surrender of check.—*Dinlinny vs. New York & N. H. R. Co.*, 49 N. Y. 546, 550.

9. Forged order.—Mere arrival of baggage at its place of destination does not discharge carrier's responsibility, and if baggage is delivered on forged order to one who is not entitled to it, carrier is liable.—*Powell vs. Myers*, 26 Wend. (N. Y.) 591, 595-598.

10. Partial delivery.—Where check is delivered by passenger to railroad corporation and duplicate check is taken from trunk, but by reason of passenger's inability to procure expressman to carry trunk, it is left at depot, there is no complete delivery, and liability of railroad corporation continues.—*Dinlinny vs. New York & N. H. R. Co.*, 49 N. Y. 500, 546, 551.

11. Duty to carry baggage.—See post § 2180.

12. EVIDENCE.—Check is *prima facie* evidence of delivery of baggage by passenger to railroad company when such check is in possession of passenger.—*Davis vs. Michigan R. Co.*, 22 Ill. 278, 74 Am. Dec. 151; *Illinois Cent. R. Co. vs. Copeland*, 24 Ill. 332, 76 Am. Dec. 749; *Ahlbeck vs. St. Paul, M. & M. R. Co.*, 39 Minn. 424, 12 Am. St. Rep. 661, 40 N. W. Rep. 364; *Dill vs. South Car. R. Co.*, 7 Rich. L. (S. C.) 158, 62 Am. Dec. 407.

13. Destination of baggage, and route by which baggage is to go, may be shown by check when facts are recited therein.—*Illinois*

Central R. Co. vs. Copeland, 24 Ill. 332, 76 Am. Dec. 749.

14. Exchange of checks.—Where passenger delivers his check to agent of connecting railroad company, and receives its check in exchange therefor, presumption is, in absence of proof to contrary, that baggage is received in due course by latter company, and it is responsible therefor.—*Ahlbeck vs. St. Paul, M. & M. R. Co.*, 39 Minn. 424, 12 Am. St. Rep. 661, 40 N. W. Rep. 364.

15. FARE CHARGED FOR PASSAGE includes compensation for transportation of baggage where passenger accompanies his baggage.—*Pfister vs. Central Pac. R. Co.*, 70 Cal. 169, 174, 59 Am. Rep. 404, 11 Pac. Rep. 686. See *The Elvira Harbeck*, 2 Blatchf. C. C. 336, 3 Fed. Cas. 532.

16. JUSTICE OF PEACE HAS JURISDICTION of action to recover statutory penalty.—See *Commonwealth vs. Connecticut River R. Co.*, 81 Mass. (15 Gray) 447, 448.

17. Lien on baggage for fare.—See post § 2191 and note.

18. LIMITATION IN TICKET OF LIABILITY FOR BAGGAGE.—See post § 2176 and note.

19. "Luggage" defined.—See post § 2182 and note.

20. Notice limiting liability.—See post § 2174 and note.

21. PENALTY PRESCRIBED NOT EXCLUSIVE.—Where statute prescribes penalty for failure to transport or deliver baggage, such penalty is not measure of damages in an action against railroad corporation for its refusal to check passenger's baggage.—*Norfolk & W. R. Co. vs. Irvine*, 84 Va. 553, 5 S. E. Rep. 532.

22. PLACE OF DELIVERY.—Union depot.—Where railroad corporation has five passenger stations within corporate limits of city, one of which is a union depot, and terminus of the railroad, and passenger is entitled to stop at any one of such stations, he is entitled to have his baggage checked to station at which he intends to stop, and to have it delivered to him there; railroad company is not entitled to establish union depot as sole place of delivery.—*Pittsburgh, C. & St. L. R. Co. vs. Lyon*, 123 Pa. St. 140, 10 Am. St. Rep. 517, 16 Atl. Rep. 607.

23. PLEADING.—Allegation that plaintiff was passenger is not necessary in declaring for lost baggage.—*Illinois Central R. Co. vs. Copeland*, 24 Ill. 332, 76 Am. Dec. 749.

24. PURPOSE OF CHECK and its delivery to passenger is to relieve him from all care and superintendence of baggage, and to devolve same upon the railroad company.—*Davis vs. Michigan S. R. Co.*, 22 Ill. 278, 74 Am. Dec. 151.

25. RELATION OF COMMON CARRIER arises upon giving check, as respects baggage, between passenger and railroad corporation.—*Strouss vs. Wabash, St. L. & P. R. Co.*, 17 Fed. Rep. 209, 211.

26. SPECIAL TRAIN.—Necessary to check baggage on.—Check must be given for baggage on special train, even though it may be that railroad corporation is not bound to carry baggage on such trains, if in fact it accepts

the baggage.—*Commonwealth vs. Connecticut River R. Co.*, 81 Mass. (15 Gray) 447, 451.

27. UNION DEPOT COMPANY AGENT FOR RAILROAD COMPANY.—Where union depot company is agent of railroad corporation in taking baggage from trains and delivering

same to passengers, railroad corporation is liable for negligence of such union depot company.—*Jacobs vs. Tutt*, 33 Fed. Rep. 412, 414, 415.

28. Weight of baggage—Limitation by statute.—See post § 2180 and note.

§ 480. ANNUAL REPORT TO BE VERIFIED. FORM OF REPORT. Every railroad corporation must make an annual report to the secretary of state, or other officer designated by law, of its operations for each year, ending on the thirty-first day of December, verified by the oaths of the president or acting superintendent of operations, the secretary and treasurer of such corporation, and file it in the office of the secretary of state, or such other designated officer, by the twentieth day of February, which must state:

1. The capital stock, and the amount thereof actually paid in;
2. The amount expended for the purchase of lands for the construction of the road, for buildings, and for engines and cars, respectively;
3. The amount and nature of its indebtedness, and the amount due the corporation;
4. The amount received from the transportation of passengers, property, mails, and express matter, and from other sources;
5. The amount of freight, specifying the quantity in tons;
6. The amount paid for repairs of engines, cars, buildings, and other expenses, in gross, showing the current expenses of running such road;
7. The number and amount of dividends, and when paid;
8. The number of engine-houses and shops, of engines and cars, and their character.

History: Enacted March 21, 1872, founded upon § 44 Act May 20, 1861, Stats. 1861, pp. 624-625.

§ 481. DUTIES OF CORPORATION. [TIME OF RUNNING TO BE FIXED BY PUBLIC NOTICE. SUFFICIENT ACCOMMODATIONS TO BE FURNISHED.] Every such corporation must start and run its cars, for the transportation of persons and property, at such regular times as it shall fix by public notice, and must furnish sufficient accommodations for the transportation of all such passengers and property as, within a reasonable time previous thereto, offer or are offered for transportation, at the place of starting, at the junction of other railroads, and at siding and stopping-places established for receiving and discharging way passengers and freight; and must take, transport, and discharge such passengers and property at, from, and to such places, on the due payment of tolls, freight, or fare therefor.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 369, held unconstitutional; see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXIII, p. 575.

Section founded upon Act May 20, 1861, § 45 (Stats. 1861, p. 625). The language of the section as it now stands amended is almost a verbatim copy of that section of the Act of 1861 which is construed in *Contra Costa C. M. R. Co. vs. Moss*, 23 Cal. 323, 328.

North Carolina statute (N. C. Code § 1963) is almost word for word the same as this section, and is construed in *Purcell vs. Richmond & D. R. Co.*, 108 N. C. 414, 12 S. E. Rep. 954, 12 L. R. A. 113.

Oklahoma statute (§ 1036) is identical with this section, and is construed in *Chaddick vs. Lindsay*, 5 Okla. 616, 49 Pac. Rep. 940.

1. Applied, cited, construed, referred to, etc.
2. All persons entitled to transportation.
3. Same—Civil rights must not be violated.
- 4-7. Same—Exclusion of improper persons—Drunkenness—Gamblers.
- 8, 9. Same—Refusal to sell ticket—Return of fare.
- 10-12. Same—Ladies' car—Exclusion of negroes and persons of bad character.
13. All property must be carried.
14. All railroad corporations bound by statute.
15. Appliances must be fit.
- 16-20. Baggage—Rules relating to.
21. Cars must be furnished on application.
22. Same—Reasonable notice must be given.
23. Charter requires acceptance of freight.
24. Common carriers—What constitute.
- 25, 26. Contract—Ticket, bill of lading, etc.—Release.
27. Delay—Liability for want of ordinary care.
28. Discretion of corporation in general.
29. Express facilities—No duty to afford to all.
- 30, 31. Fare—Legal tender—Worn coin.
- 32-34. Same—When payable—Ejection for non-payment—Payment on train.
35. Gate-keeper—Reasonable rules governing admission to trains.
36. Same—Wrongful refusal of entry.
37. Live stock—Common law imposes no duty to accept.
38. Same—Conditions may be imposed.
39. Same—Custom—Assumption of duty.
40. Same—Same—Burden of proof on shipper.
41. Passengers—Civility, etc., necessary.
- 42, 43. Preferences only to United States and state.
- 44, 45. Punitive damages—Acts of agent.
46. Rules for government of passengers.
47. Seats for passengers must be provided.
48. Stop-over—Right of passenger to.
49. Stopping at stations.
50. Same—Flag-station—Disobedience of signal—Damages.
51. Same—Through trains—Reasonable rules.
52. Strike excuse for not operating train.
53. "Sufficient accommodations"—In general.
54. Same—Food for passengers must be provided.
55. Same—Ingress and egress must be safe.
56. Same—Same—Access to cars.
57. Same—Lights must be provided at night.
58. Same—Nature of road and traffic considered.
59. Stations and depots—Discretion of corporation as to location of.
60. Same—Flag-stations—Freight and passenger depots unnecessary.
61. Same—Same—Through trains need not stop.
62. Same—Mandamus—Does not lie ordinarily to compel location.
63. Same—Same—Public necessity—Abuse of discretion.
64. Same—Same—Remuneration of corporation considered.
65. Same—Statute not applicable.
66. Tickets—Blurred or defaced ticket must be accepted.

67. Same—Penalty for failure to provide—Rights under.
68. Same—Season tickets give no special rights.
69. Time-tables—Contain representations.
70. Same—Enter into contract.
71. Same—False representations render corporation liable.
72. Same—Holding train after sale of ticket.
73. Same—Not absolute guaranty.
74. Same—Obligation to use care and skill as respects time.
75. Same—Variation of time-table—Is permissible.
- 76, 77. Same—Same—Notice must be given public.
78. Vehicles—Obligation to provide.
79. Warehouseman—When corporation liable as.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: San Francisco & S. J. V. R. Co. vs. Leviston, 184 Cal. 412, 414, 66 Pac. Rep. 478 (cited with other sections); Harvey vs. Board of Trustees, 142 Cal. 391, 392, 75 Pac. Rep. 1086 (referred to with other sections).

2. ALL PERSONS WHO OFFER THEMSELVES AS PASSENGERS are entitled to protection of statute, it being obligatory upon railroad corporations to act as common carriers for conveyance of passengers if they are fit and decorous.—Contra Costa C. M. R. Co. vs. Moss, 28 Cal. 322, 328; Tarbell vs. Central Pac. R. Co., 84 Cal. 616, 622. Ill. Chicago & N. W. R. Co. vs. Williams, 55 Ill. 185, 3 Am. Rep. 641. Md. Baltimore & O. R. Co. vs. Carr, 71 Md. 135, 17 Atl. Rep. 1052. Mich. Day vs. Owen, 5 Mich. 520, 72 Am. Dec. 62. N. C. Purcell vs. Richmond & D. R. Co., 108 N. C. 414, 12 S. E. Rep. 954, 956, 12 L. R. A. 113.

3. Civil rights violated.—Railroad corporation cannot capriciously discriminate between passengers on account of their nativity, color, race, social position, or their political or religious belief.—Chicago & N. W. R. Co. vs. Williams, 55 Ill. 185, 3 Am. Rep. 641.

4. Exclusion of improper persons is permissible, such as persons who are guilty of gross and vulgar habits of conduct, or whose characters are doubtful or dissolute or suspicious, and especially whose characters are unequivocally bad.—Pittsburgh C. & St. L. R. Co. vs. Vandyne, 57 Ind. 576, 26 Am. Rep. 68; Jencks vs. Coleman, 2 Sumn. C. C. 221, 13 Fed. Cas. 442, per Story, J.

5. Same—Drunkenness is ground for exclusion.—Railroad company is not bound to receive any person as passenger who is drunk to such degree as to be disgusting, offensive, disagreeable, or annoying; and person so drunk as to be likely to violate common proprieties, civilities, and decencies of life has no right to passage while in that condition.—Pittsburgh C. & St. L. R. Co. vs. Vandyne, 57 Ind. 576, 26 Am. Rep. 68.

6. Same—Same—Slight intoxication, such as would not be likely seriously to affect conduct of person intoxicated, is not sufficient ground for refusing him passage, although his behavior might not be in all respects strictly

becoming.—*Pittsburgh C. & St. L. R. Co. vs. Vandyne*, 57 Ind. 576, 26 Am. Rep. 68.

7. Same—Gambler may be excluded, when he is engaged in traveling on railroad in question for purpose of plying his calling as "monteman."—*Thurston vs. Union Pac. R. Co.*, 4 Dill. C. C. 321, 23 Fed. Cas. 1192.

8. Same—Refusal to sell ticket.—Railroad corporation should in the first instance refuse to sell ticket to person whom it is proper to exclude from privilege of transportation, and should exclude him if he attempts to enter car without ticket.—*Jencks vs. Coleman*, 2 Sumn. C. C. 221, 13 Fed. Cas. 442.

9. Same—Return of fare.—If ticket has been inadvertently sold to an unfit person, and corporation desires to rescind contract, it should tender return of money paid for ticket; and under any circumstances, if person proposing to travel is not carried, he may recover what he paid for ticket.—*Jencks vs. Coleman*, 2 Sumn. C. C. 221, 13 Fed. Cas. 442.

10. Ladies' car.—Corporation may establish ladies' car and adopt a rule setting it apart for the exclusive use of ladies and gentlemen accompanied by ladies.—*Chicago & N. W. R. Co. vs. Williams*, 55 Ill. 185, 3 Am. Rep. 641.

11. Same—Exclusion from ladies' car.—Woman of notoriously bad character may properly be excluded from the ladies' car.—*Brown vs. Memphis & C. R. Co.*, 4 Fed. Rep. 37, 38-40.

12. Same—Same—Exclusion of negro woman is not proper, where such exclusion is capricious and is apparently because of her being a negro.—*Chicago & N. W. R. Co. vs. Williams*, 55 Ill. 185, 3 Am. Rep. 641.

13. ALL PROPERTY MUST BE CARRIED which is offered to railroad company for conveyance, statute making it obligatory upon railroad corporations to convey property.—*Contra Costa C. M. R. Co. vs. Moss*, 23 Cal. 323, 328. See post § 2169 and note.

14. ALL RAILROAD CORPORATIONS ARE BOUND BY STATUTE and it is obligatory upon them to act as common carriers.—*Contra Costa C. M. R. Co. vs. Moss*, 23 Cal. 323, 328.

15. APPLIANCES CONNECTED WITH TRANSPORTATION must be such as highest degree of human skill and prudence can furnish, and corporation must exercise highest degree of prudence and skill to determine that everything is safe for purpose for which it is intended; although corporation is not insurer and is not bound to transport with perfect safety.—*Anthony vs. Louisville & N. R. Co.*, 27 Fed. Rep. 724, 725, 726.

16. Baggage-checks must be affixed.—See ante § 479 and note.

17. Same—Definition of baggage.—See post § 2181 and note.

18. Same—Liability for baggage.—See post § 2182 and note.

19. Same—Mode of carrying and delivery.—See post § 2183 and note.

20. Same—Obligation to carry.—See post § 2180 and note.

21. CARS MUST BE FURNISHED suitable for property proposed to be transported upon

reasonable notice whenever railroad corporation can do so with reasonable diligence without jeopardizing its other business as common carrier.—*Ayres vs. Chicago & N. W. R. Co.*, 71 Wis. 372, 5 Am. St. Rep. 226, 37 N. W. Rep. 432. See post § 2184 and note.

22. Reasonable notice is such as will enable corporation, with reasonable diligence under circumstances then existing, to furnish cars without interfering with previous orders from other shippers at same station, or jeopardizing its business on other portions of road.—*Ayres vs. Chicago & N. W. R. Co.*, 71 Wis. 372, 5 Am. St. Rep. 226, 37 N. W. Rep. 432.

23. CHARTER REQUIRES RAILROAD CORPORATION TO ACCEPT FREIGHT, and this rule applies to all property tendered to them, such as is usually transported on railroads.—*Michigan S. & N. I. R. Co. vs. McDonough*, 21 Mich. 165, 4 Am. Rep. 466.

24. Common carriers—What constitute.—See post § 2168 and note.

25. Contract—Expressed in ticket, bill of lading, etc.—See post § 2176 and note.

26. Same—Release from negligence, fraud, etc., not permissible.—See post § 2175 and note.

27. Delay—Liability for want of ordinary care.—See post § 2196 and note.

28. DISCRETION OF CORPORATION AS TO LOCATION, CONSTRUCTION, AND OPERATION.—Railroad corporations, in absence of statutory provisions limiting and restricting their powers, are vested with very broad discretion in matter of locating, constructing, and operating their railways, and of locating and maintaining their freight and passenger stations. This discretion, however, is not absolute, but is subject to condition that it must be exercised in good faith, and with due regard to necessities and convenience of the public.—*People ex rel. Hunt vs. Chicago & A. R. Co.*, 130 Ill. 176, 22 N. E. Rep. 857.

29. EXPRESS FACILITIES.—It is not duty of railroad corporation to furnish express facilities to all alike who demand them, and it is sufficient that company has furnished such facilities to one express company in manner that is sufficient to insure reasonable express accommodations to public and requisite promptness and security.—*Phister vs. Central Pac. R. Co.*, 70 Cal. 169, 183, 59 Am. Rep. 404, 11 Pac. Rep. 686. See *Memphis & L. R. R. Co. vs. Southern Ex. Co.* ("Express Cases"), 117 U. S. 1, bk. 29 L. ed. 791, 6 Sup. Ct. Rep. 542, 628.

30. FARE—Coin which is worn smooth.—Genuine silver coin of United States which is worn only by natural abrasion, which is not appreciably diminished in weight, and which retains appearance of coin duly issued from the mint, is legal tender for its original value, although it is worn smooth, and if conductor refuses to accept such coin in payment of fare, and ejects a passenger, railroad corporation is liable.—*Morgan vs. Jersey City & B. R. Co.*, 52 N. J. L. (23 Vr.) 60, 18 Atl. Rep. 904. See *United States vs. Lissner*, 12 Fed. Rep. 840, 841, 842.

31. Legal tender notes may be tendered on train.—Conceding that statute authorizing rail-

road corporation to demand coin in payment of fare would be constitutional, in absence of such statute and of contract stipulating for coin, legal tender notes may be tendered.—*Tarbell vs. Central Pac. R. Co.*, 34 Cal. 616, 622, 623.

32. When payable.—See post § 2187 and note.

33. Ejection of passengers for non-payment.—See post § 2188 and note.

34. Payment on train—Additional charge.—See post § 2189 and note.

35. GATE-KEEPER—REASONABLE RULES.—Railroad corporation may make and enforce reasonable rules and regulations for admission of passengers to trains in crowded depot, and for government of gate-keepers; but although gate-keeper may have been mistaken as to departure of train in fact, or as to his duty under rules and regulations of corporation, yet, if circumstances are such, at time passenger presents himself at gate, as to entitle him to admission to train which is in depot and which has not started, corporation is liable for wrongfully refusing admission to train, and such mistake of gate-keeper affords no defense.—*Baltimore & O. R. Co. vs. Carr*, 71 Md. 135, 17 Atl. Rep. 1052.

36. Wrongful refusal of entry to train will render corporation liable.—*Northern Central R. Co. vs. O'Conner*, 76 Md. 207, 35 Am. St. Rep. 422, 24 Atl. Rep. 449, 16 L. R. A. 449.

37. LIVE STOCK—COMMON LAW IMPOSES NO DUTY TO ACCEPT and receive or transport cattle or hogs, as common carriers, because transportation of live stock by common carriers by land was unknown to common law when duties and responsibility of common carriers were fixed, making them insurers against all loss and injuries not arising from act of God or of public enemies.—*Michigan S. & N. L. R. Co. vs. McDonough*, 21 Mich. 165, 4 Am. Rep. 466; *Lake Shore & M. S. R. Co. vs. Perkins*, 25 Mich. 329, 12 Am. Rep. 275.

38. Conditions and terms may be imposed upon acceptance of live stock by railroad corporation as corollary to its right to refuse altogether to accept such property.—*Michigan S. & N. L. R. Co. vs. McDonough*, 21 Mich. 165, 4 Am. Rep. 466. See *Richardson vs. Chicago & N. W. R. Co.*, 61 Wis. 596, 601, 21 N. W. Rep. 49, 18 Am. & Eng. R. Cas. 530.

39. Custom of railroad corporation to transport live stock and engage in that business, will render it common carrier of live stock, with such restrictions and limitations of its common-law duties and liabilities as arise from the instincts, habits, propensities, wants, necessities, vices, or locomotion of such animals, and will impose upon corporation duty to furnish suitable cars therefor, upon reasonable notice, whenever it is within its power to do so.—*Ayres vs. Chicago & N. W. R. Co.*, 71 Wis. 372, 5 Am. St. Rep. 226, 37 N. W. Rep. 432. See *Richardson vs. Chicago & N. W. R. Co.*, 61 Wis. 596, 601, 21 N. W. Rep. 49, 18 Am. & Eng. R. Cas. 530. See *Kansas Pac. R. Co. vs. Nichols*, 9 Kan. 235, 12 Am. Rep. 494; *Lake Shore & M. S. R. Co. vs. Perkins*, 25 Mich. 329, 12 Am. Rep. 275.

40. Burden of proof is on shipper to show

that railroad corporation has voluntarily assumed to make itself a common carrier of live stock.—*Lake Shore & M. S. R. Co. vs. Perkins*, 25 Mich. 329, 12 Am. Rep. 275.

41. Passengers—Civility and proper attention must be accorded to.—See post § 2103 and note.

42. Preference as to time, price, etc.—Must not be given.—See post § 2170 and note.

43. Same—United States and state may be given preference.—See post § 2171 and note.

44. PUNITIVE DAMAGES ARE RECOVERABLE for wanton, malicious, and tortious breach of duty imposed by law.—*Mendelsohn vs. Anaheim Lighter Co.*, 40 Cal. 657, 661.

45. Acts of agents.—Railroad corporation is liable for actual damage caused by act of its agent done in usual course of his employment, but not responsible for wanton and malicious acts done by agent without consent, approval, or subsequent ratification of corporation.—*Turner vs. Long Beach & M. R. Co.*, 34 Cal. 594, 599; *Mendelsohn vs. Anaheim Lighter Co.*, 40 Cal. 657, 662; *Warner vs. Southern Pac. Co.*, 113 Cal. 105, 116, 54 Am. St. Rep. 327, 45 Pac. Rep. 187.

46. Rules for government of passengers may be made.—See post § 2186 and note.

47. Seats for passengers necessary—Overcrowding not permitted.—See post § 2185 and note.

48. Stop-over—Right of passenger to.—See post § 490 and note pars. 7-9.

49. STOPPING AT STATIONS.—When railroad corporation advertises its schedule and purchaser of ticket presents himself at advertised time at regular passenger station of road he has right to be taken aboard cars on their arrival at that point, and if corporation does not stop its train at station in accordance with the schedule corporation is liable.—*Purcell vs. Richmond & D. R. Co.*, 108 N. C. 414, 12 S. E. Rep. 954, 956, 12 L. R. A. 113. See *St. Louis I. M. & S. R. Co. vs. Adcock*, 52 Ark. 406, 13 S. W. Rep. 874.

50. Flag-station.—Disobedience of signal and failure to stop train for an intending passenger, in disregard of corporation's custom and rules and its duty to such intending passenger, will render corporation liable; but no more than actual damages are recoverable when such failure to stop was due merely to non-observance of signal by accident and signal was not seen and wilfully disregarded.—*Morse vs. Duncan*, 14 Fed. Rep. 396, 397, 398.

51. Reasonable rules and regulations.—In absence of statutory provisions to contrary railroad corporation has right to adopt regulations providing that one or part of its regular passenger trains, running regularly upon its road, shall not stop at certain designated stations or places, and duty is imposed upon travelers to inform themselves whether trains which they propose to take will stop at desired places.—*Noble vs. Atchison, T. & S. F. R. Co.*, 4 Okla. 534, 46 Pac. Rep. 483.

52. STRIKE—Excuse for not operating train.—Where railroad corporation fails to operate its train because of strike due to disin-

clination of employees to serve corporation for wages proposed to be paid, court will not grant writ of mandamus to compel operation of tins, on petition of attorney-general, which alleges that sufficient competent, skilled, and experienced men are available, ready and willing to serve corporation in operation of its road for reasonable compensation, because court cannot undertake to inquire and determine what would be schedule of reasonable wages for corps of skilled and unskilled employees such as would be necessary for operation of the road; and especially will such relief be denied when corporation is engaged in interstate commerce.—*State ex rel. Haskell vs. Great Northern R. Co.*, 14 Mont. 381, 38 Pac. Rep. 458.

53. "SUFFICIENT ACCOMMODATIONS"—In general.—Railroad corporations, independently of their pecuniary ability to do so, are required to provide all things necessary to security of passengers reasonably consistent with their business, "and appropriate to means of conveyance employed by them," and to adopt highest degree of care, diligence, and security that is consistent with operation of their road.—*Arkansas M. R. Co. vs. Canman*, 52 Ark. 517, 13 S. W. Rep. 280.

54. Food for passengers must be provided, and necessary refreshments and easy mode of obtaining same, e. g. eating stations, where passengers are being carried on long journeys, such as from Chicago to New Orleans.—*Peniston vs. Chicago, St. L. & N. O. R. Co.*, 34 La. Ann. 777, 44 Am. Rep. 444.

55. Ingress and egress which is safe and easy must be furnished by corporation, such as ingress and egress to and from platforms, station approaches, etc.—See *Jamison vs. San Jose & S. C. R. Co.*, 55 Cal. 593, 598. *La. Peniston vs. Chicago, St. L. & N. O. R. Co.*, 34 La. Ann. 777, 44 Am. Rep. 444. *Me. Law vs. Grand Trunk R. Co.*, 12 Me. 397. *Vt. Beard vs. Connecticut & P. R. Co.*, 48 Vt. 101. *Wis. Patten vs. Chicago & N. W. R. Co.*, 32 Wis. 524, 528.

56. Same—Access to cars which is safe and sufficient must be furnished, but rule is that carrier is bound simply to exercise ordinary care in view of dangers to be apprehended, nature of road, character of traffic, and place where station is situated.—*Falls vs. San Francisco & N. P. R. Co.*, 97 Cal. 114, 119-121, 31 Pac. Rep. 901. See *Cincinnati, W. & M. R. Co. vs. Peters*, 80 Ind. 168; *Pennsylvania Co. vs. Marion*, 104 Ind. 239, 3 N. E. Rep. 874; *Kelly vs. Manhattan R. Co.*, 112 N. Y. 443, 20 N. E. Rep. 383, 3 L. R. A. 74.

57. Lights must be provided at night where passengers are required to cross over plank way upon bridge which is temporarily unsafe for passage of trains, and no duty is imposed upon passenger to call for lights.—*Jamison vs. San Jose & S. C. R. Co.*, 55 Cal. 593, 597, 598. See *La. Peniston vs. Chicago, St. L. & N. O. R. Co.*, 34 La. Ann. 777, 44 Am. Rep. 444. *Vt. Beard vs. Connecticut & P. R. Co.*, 48 Vt. 101. *Wis. Patten vs. Chicago & N. W. R. Co.*, 32 Wis. 524, 528.

58. Nature of road considered.—All railroad corporations are not required to adopt like expensive provisions, but provisions required

vary as exigencies of traffic and its remunerative character demand and justify.—*Arkansas M. R. Co. vs. Canman*, 52 Ark. 517, 13 S. W. Rep. 280.

59. STATIONS AND DEPOTS.—Discretion of corporation as to location, as respects exact spot where same shall be located, such discretion being limited only by condition that it must be so located as to reasonably subserve convenience of community to be accommodated thereby.—*Florida Cent. & P. R. Co. vs. State*, 31 Fla. 482, 34 Am. St. Rep. 30, 13 So. Rep. 103, 20 L. R. A. 419; *People ex rel. Hunt vs. Chicago & A. R. Co.*, 130 Ill. 175, 22 N. E. Rep. 857; *Northern Pac. R. Co. vs. Washington Ter.*, 142 U. S. 492, bk. 35 L. ed. 1092, 12 Sup. Ct. Rep. 283.

60. Flag-stations—Freight and passenger depots unnecessary.—At small places which are established for convenience of inhabitants as well as for benefit of corporation latter has right to use platform for depositing freight, and for accommodation of passengers, and is not required to keep and maintain freight and passenger depots with agents to care for same.—*Falls vs. San Francisco & N. P. R. Co.*, 97 Cal. 114, 120, 31 Pac. Rep. 901. See *Arkansas M. R. Co. vs. Canman*, 52 Ark. 517, 525, 13 S. W. Rep. 280.

61. Same—Through trains.—Refusal of railroad corporation to designate as flag-station for its through trains place which is not an incorporated town, which contains only few houses and is situated within three miles of regular station, is not, as matter of law, an unreasonable regulation; and there is no question to be submitted to jury for determination when facts are uncontroverted.—*St. Louis I. M. & S. R. Co. vs. Adcock*, 53 Ark. 406, 12 S. W. Rep. 374.

62. Mandamus will not lie to control railroad corporation's exercise of its discretion as to place of locating stations and depots.—*Florida Cent. & P. R. Co. vs. State*, 31 Fla. 482, 34 Am. St. Rep. 30, 13 So. Rep. 103, 20 L. R. A. 419. See *Northern Pac. R. Co. vs. Washington Ter.*, 142 U. S. 492, bk. 35 L. ed. 1092, 12 Sup. Ct. Rep. 283.

63. Public necessity absolutely requiring establishment of station, court will grant writ of mandamus to compel its establishment, as where town of over 1800 inhabitants, situated on line of railroad, is without railroad facilities, and accommodation of public living in and near such town requires establishment of passenger and freight depot on line of such road within said town.—*People ex rel. Hunt vs. Chicago & A. R. Co.*, 130 Ill. 175, 22 N. E. Rep. 857; *Northern Pac. R. Co. vs. Territory*, 3 Wash. Ter. 303, 13 Pac. Rep. 604.

64. Remuneration of corporation considered.—If charter of railroad corporation simply authorizes without requiring it to construct and maintain railroad to certain point, it cannot be compelled by mandamus to complete or to maintain its road to that point when it would not be remunerative to do so.—*Northern Pac. R. Co. vs. Washington Ter.*, 142 U. S. 492, bk. 35 L. ed. 1092, 12 Sup. Ct. Rep. 283.

65. Statute does not require erection and maintenance of station-houses, etc., as it pro-

vides for transportation alone, and sufficient accommodation which shall be furnished is for "transportation."—*Chaddick vs. Lindsay*, 5 Okla. 616, 49 Pac. Rep. 940 (decided under identical statute). See *People vs. New York L. E. & W. R. Co.*, 104 N. Y. 58, 9 N. E. Rep. 856.

66. **TICKET BLURRED OR DEFACED.**—Where, at time ticket is delivered to passenger, it is blurred or defaced so that date thereon is illegible and it is presented by passenger in same condition as when he received it, if he is refused passage thereon, corporation is liable; and when such ticket is presented to gateman at depot and he refuses to allow passenger to pass to train passenger is under no obligation to take time and trouble to go to "ticket receiver" and have him indorse it so as to give it validity.—*Northern Cent. R. Co. vs. O'Conner*, 76 Md. 207, 35 Am. St. Rep. 422, 24 Atl. Rep. 449, 16 L. R. A. 449.

67. **Penalty for failure to provide—Rights under.**—See post § 490 and note.

68. **Season tickets** give purchaser no special preference over passengers who pay in advance for single passage.—*Gordon vs. Manchester & L. R.*, 52 N. H. 596, 13 Am. Rep. 97.

69. **TIME-TABLES**—Contain representations "which cannot be treated as mere waste paper" (per Lord Campbell, C. J.).—*Denton vs. Great Northern R. Co.*, 5 El. & Bl. 860, 865, 85 Eng. C. L. 860.

See post § 2173 and note.

70. **Enter into contract** between passenger and corporation and forms part of it.—*Sears vs. Eastern R. Co.*, 96 Mass. (14 Allen) 433, 436.

71. **False representations** that train will start when corporation knows that it will not, and failure to make any effort to comply with advertisement, will render corporation liable.—*Denton vs. Great Northern R. Co.*, 5 El. & Bl. 860, 865, 85 Eng. C. L. 860.

72. **Holding train after sale of ticket.**—Sale of railroad ticket at ticket office does not give specific right to purchaser to take particular

train which is then at station or is about to arrive, and does not devolve upon corporation duty to hold such train long enough to enable passenger to go upon it; but ticket merely gives general right to take train provided he presents himself in time and does not require its delay for his special benefit, and if any delay is necessary purchaser must wait for succeeding train.—*Paulitsch vs. New York C. & H. R. R. Co.*, 102 N. Y. 280, 6 N. E. Rep. 577.

73. **Not an absolute and unconditional engagement** that train shall arrive and depart at precise moments indicated, and it does not make company warrantor or insurer of punctuality and liable for delays due not to its fault but to accident.—*Denton vs. Great Northern R. Co.*, 5 El. & Bl. 860, 865, 85 Eng. C. L. 860.

74. **Obligation of using due care and skill** to have trains arrive and depart at times thus indicated is imposed, and for any want of punctuality which corporation could have avoided by use of due care and skill it is liable.—*Denton vs. Great Northern R. Co.*, 5 El. & Bl. 860, 865, 85 Eng. C. L. 860.

75. **Variation of time-table**—Is permissible, even as against persons who have purchased packet tickets, under reasonable limitations, this reserved right entering into contract and forming part of it.—*Sears vs. Eastern R. Co.*, 96 Mass. (14 Allen) 433, 437.

76. **Reasonable notice of changes** must be made as against persons who have purchased tickets.—*Sears vs. Eastern R. Co.*, 96 Mass. (14 Allen) 433, 437.

77. **Same—Notice of change of time posted in cars and stations** on day of change, such change being made for purpose of accommodating theater-goers, etc., is not sufficient where regular time-table is advertised in newspapers.—*Sears vs. Eastern R. Co.*, 96 Mass. (14 Allen) 433, 437, 438.

78. **Vehicles—Obligation to provide.**—See para. 21, 22 this note, post § 2184 and note.

79. **Warehouseman—When corporation liable as.**—See post § 2120 and note.

§ 482. **CORPORATION TO PAY DAMAGES FOR REFUSAL.** In case of refusal by such corporation or their agents so to take and transport any passengers or property, or to deliver the same, at the regular appointed places, such corporation must pay to the party aggrieved all damages which are sustained thereby, with costs of suit.

History: Enacted March 21, 1872, founded upon § 46 Act May 20, 1861, Stats. 1861, p. 624.

1. Applied, cited, construed, referred to, etc.
2. Measure of damages.
3. Remedy—Election to sue in contract or in tort.
4. Statute strictly construed—Applies only to transportation.

1. **Applied, cited, construed, referred to, etc., in:** *San Francisco & S. J. V. R. Co. vs. Leviston*, 134 Cal. 413, 414, 86 Pac. Rep. 473 (cited with other sections); *Harvey vs. Board of Trustees*, 142 Cal. 391, 392, 75 Pac. Rep. 1088 (referred to).

2. **Measure of damages.**—If railroad corporation has been guilty of mere negligence or simple carelessness or inadvertence plaintiff is restricted to compensatory damages, but if conduct of corporation was wilful or showed such gross negligence as to indicate wanton disregard of rights of plaintiff under statute he is entitled to recover punitive damages in addition.—*Purcell vs. Richmond & D. R. Co.*, 108 N. C. 414, 12 S. E. Rep. 954, 13 L. R. A. 113.

3. **Remedy—Action on contract or for tort.**—For a violation of such statutory duty the plaintiff may sue in contract or he can elect

to sue in tort for the injury and breach of public duty.—*Purcell vs. Richmond & D. R. Co.*, 108 N. C. 414, 12 S. E. Rep. 954, 12 L. R. A. 113 (decided under statute of like import). See *Baltimore & O. R. Co. vs. Carr*, 71 Md. 135, 17 Atl. Rep. 1052.

4. Statute strictly construed, and applies only to transportation of passengers, etc., and not to failure to erect stations or warehouses.—*Chaddick vs. Lindsay*, 5 Okla. 616, 49 Pac. Rep. 940 (decided under similar statute).

§ 483. FURNISH ROOM INSIDE PASSENGER-CARS, AND BE RESPONSIBLE FOR DAMAGES OCCURRING ON FREIGHT AND OTHER CARS.

Every railroad corporation must furnish, on the inside of the passenger-cars, sufficient room and accommodations for all passengers to whom tickets are sold for any one trip and for all persons presenting tickets entitling them to travel thereon; and when fare is taken for transporting passengers on any baggage, wood, gravel, or freight car, the same care must be taken and the same responsibility is assumed by the corporation as for passengers on passenger-cars.

History: Enacted March 21, 1872, founded upon §§ 45, 46 Act May 20, 1861, Stats. 1861, p. 624.

1. Accommodations must be furnished.
2. Contributory negligence—Passenger on crowded car not guilty.
- 3, 4. Duty of passenger on overcrowded car—Payment of fare.
5. Ejectment for non-payment of fare.
6. Excursion trains must not be overcrowded.
7. Freight-trains—Custom of carrying passengers.
8. Same—Rule excluding passengers valid.
9. Same—Same—Excess of authority by conductor.
10. Same—Same—Notice of rule must be given.
11. Same—Stopping at station for passenger.
12. Negligence—Overcrowding constitutes.
13. Same—Question of fact for jury.
14. Safe place must be furnished.
15. Standing on platform—Notice waived by overcrowding.

1. Accommodations must be furnished.—See ante § 481 and note.

2. CONTRIBUTORY NEGLIGENCE.—Passenger is not to be deemed guilty of contributory negligence for standing upon platform of car in motion while there is no vacant seat in the car.—*Graham vs. Manhattan R. Co.*, 149 N. Y. 336, 43 N. E. Rep. 917. See *Dennis vs. Pittsburgh & C. S. R. Co.*, 165 Pa. St. 624, 31 Atl. Rep. 52.

See post § 484 and note.

3. DUTY OF PASSENGER WHEN NO SEAT IS PROCURABLE is to pay his fare and accept such accommodations as are offered or refuse to pay his fare and leave the train on first reasonable opportunity.—*Hardenbergh vs. St. Paul, M. & M. R. Co.*, 39 Minn. 3, 12 Am. St. Rep. 610, 38 N. W. Rep. 625.

4. Passenger is not trespasser because he refuses to pay his fare when seat is not provided, unless he refuses to leave train on reasonable opportunity.—*Hardenbergh vs. St. Paul, M. & M. R. Co.*, 39 Minn. 3, 12 Am. St. Rep. 610, 38 N. W. Rep. 625.

5. EJECTMENT OF PASSENGER FOR NON-PAYMENT OF FARE.—Where no seat is procurable by passenger, and he refuses to pay his fare, he must be put off at regular station and not out in country.—*Hardenbergh*

vs. St. Paul M. & M. R. Co., 39 Minn. 3, 12 Am. St. Rep. 610, 38 N. W. Rep. 625.

6. EXCURSION TRAINS ARE WITHIN THE RULE that railroad corporation must furnish sufficient accommodation, and not overcrowd.—*Chicago & A. R. Co. vs. Dumser*, 161 Ill. 190, 43 N. E. Rep. 698.

7. FREIGHT-TRAINS—Custom of carrying passengers renders corporation liable.—Where railroad corporation customarily takes passengers as such on its freight-trains it is under same obligation to carry them safely as if they were on regular passenger-trains, but passenger who takes freight-train must accede in all the usual incidents due of freight-train.—*Hazard vs. Chicago B. & Q. R. Co.*, 1 Biss. C. C. 503, 11 Fed. Cas. 921.

8. Rules excluding passengers.—A railroad corporation may make rules forbidding passengers from traveling on freight-trains, and such a rule is a highly salutary regulation.—*Ill. Chicago & A. R. Co. vs. Randolph*, 53 Ill. 510, 5 Am. Rep. 60. *Me. Dunn vs. Grand Trunk R.*, 58 Me. 187, 4 Am. Rep. 267. *N. Y. Eaton vs. Delaware L. & W. R. Co.*, 57 N. Y. 332, 15 Am. Rep. 513. *Tex. Houston & T. C. R. Co. vs. Moore*, 49 Tex. 31, 30 Am. Rep. 98.

9. Same—Excess of authority by conductor.—Where conductor exceeds authority in permitting passenger to ride on freight-train in violation of corporation's rules, and passenger knows that conductor is exceeding his authority, passenger cannot hold corporation liable as common carrier.—*Eaton vs. Delaware L. & W. R. Co.*, 57 N. Y. 332, 15 Am. Rep. 513; *Houston & T. C. R. Co. vs. Moore*, 49 Tex. 31, 30 Am. Rep. 98.

10. Same—Notice must be given passenger, and if he has no notice of company's rule, and is not requested to leave freight-train by conductor, he is not trespasser, and corporation is liable to him as common carrier.—*Dunn vs. Grand Trunk R.*, 58 Me. 187, 4 Am. Rep. 267.

11. Stopping at station for passenger.—Where passenger wrongfully rides on freight-train, even though ticket is taken up, no duty is imposed to stop train for him at station which is not designated in schedule.—*Chicago*

& A. R. Co. vs. Randolph, 53 Ill. 510, 5 Am. Rep. 60.

12. NEGLIGENCE—Overcrowding cars.—Railroad corporation which overcrowds its cars and puts passengers under necessity of going upon platform is guilty of negligence.—Chicago & A. R. Co. vs. Dumser, 161 Ill. 190, 43 N. E. Rep. 698; Graham vs. Manhattan R. Co., 149 N. Y. 336, 43 N. E. Rep. 917; Dennis vs. Pittsburgh & C. S. R. Co., 165 Pa. St. 624, 31 Atl. Rep. 52; Graham vs. McNeill, 20 Wash. 466, 55 Pac. Rep. 631.

13. Question of fact.—Whether overcrowding cars is negligence is question of fact for jury under instructions from the court.—Lehr

vs. Steinway & H. P. R. Co., 118 N. Y. 556, 23 N. E. Rep. 889; Graham vs. Manhattan R. Co., 149 N. Y. 336, 43 N. E. Rep. 917.

14. SAFE PLACE in which to ride must be furnished passengers.—Graham vs. Manhattan R. Co., 149 N. Y. 336, 43 N. E. Rep. 917.

15. WAIVER OF NOTICE AGAINST STANDING ON PLATFORM.—A railroad corporation waives its notice against standing on platform when it fails to provide suitable accommodation for passengers inside its coaches, and yet receives them on its trains.—Graham vs. McNeill, 20 Wash. 466, 55 Pac. Rep. 631.

See post § 484 and note part II.

§ 484. CORPORATIONS TO POST PRINTED REGULATIONS, AND NOT RESPONSIBLE FOR DAMAGES IN VIOLATION OF RULES. Every railroad corporation must have printed and conspicuously posted on the inside of its passenger-cars its rules and regulations regarding fare and conduct of its passengers; and in case any passenger is injured on or from the platform of a car, or on any baggage, wood, gravel, or freight car, in violation of such printed regulations, or in violation of positive verbal instructions or injunctions given to such passenger in person by any officer of the train, the corporation is not responsible for damages for such injuries, unless the corporation failed to comply with the provisions of the preceding section.

History: Enacted March 21, 1872, founded upon § 48 Act May 20, 1861, Stats. 1861, p. 625.

I. Steam Railroads.

1. Applied, cited, construed, referred to, etc.
2. Chair cars—Extra fare may be exacted.
3. Riding on platform—Passing to another car, etc.
4. Same—Under sense of impending danger.

II. Street Railroads.

5. In general.
6. Distinction between street railroad cars and ordinary railroad trains.
7. Duties and rights of motorman when car is overcrowded.
8. Duty of passenger to stand between seats.
9. Evidence of negligence to overcrowd car.
10. Gripman's aisle—Right of passenger to ride in.
11. Invitation or permission to ride on platforms—Higher degree of care required of company.
12. Judicial notice of invitation to ride on platforms.
13. Lookout must be kept by passenger riding on foot-board.
14. Passengers riding on foot-boards and platforms of car struck by objects near track.
15. Proper place for passenger is inside of car.
16. Question of contributory negligence is for jury.
17. Reasonableness of rule prohibiting riding on platform.
18. Request to ride on platform not necessary.
19. Vacation of seat in favor of women.
- 20, 21. Waiver of posted notices.

I. STEAM RAILROADS.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Mitchell vs. Southern Pac. R. Co., 87 Cal. 62, 73, 25 Pac. Rep. 245, 11 L. R. A. 130 (construed and applied); Wright vs. California Cent. R. Co., 78 Cal. 360, 364, 20 Pac. Rep. 740 (applied).

2. CHAIR CAR—Extra fare for riding in.—Under the facts it was held that the court was not bound to submit the question to the jury whether regulations exacting extra fare for riding in chair car were lawful, public, uniform in their application and reasonable.—Wright vs. California Cent. R. Co., 78 Cal. 360, 364, 20 Pac. Rep. 740.

3. RIDING ON PLATFORM.—This statute was intended to prevent the imprudent act of standing or riding on the platform, and not to absolve the railroad companies from the responsibility for every injury which might happen at that place when a passenger passing over it was justifiably entering or leaving the car.—Mitchell vs. Southern Pac. R. Co., 87 Cal. 62, 75, 25 Pac. Rep. 245, 11 L. R. A. 130; Buel vs. New York C. R. Co., 31 N. Y. 314, 38 Am. Dec. 271.

See ante § 483 note par. 2.

4. UNDER A SENSE OF IMPENDING DANGER.—This section does not relieve the railroad company from the responsibility for an injury resulting to a passenger who leaves the coach and goes out upon the platform under a sense of impending danger, with the intention of jumping from the train, believing that he would thereby escape with less injury than if he remained in the car.—Robinson vs.

Western P. R. Co., 48 Cal. 409, 421; Lawrence vs. Green, 70 Cal. 417, 420, 422, 59 Am. Rep. 428, 11 Pac. Rep. 750; Lewis vs. Riverside Water Co., 76 Cal. 249, 250, 251. 18 Pac. Rep. 214; Mitchell vs. Southern Pac. R. Co., 37 Cal. 62, 73-77, 25 Pac. Rep. 245, 11 L. R. A. 180. See Minn. Wilson vs. Northern Pac. R. Co., 23 Minn. 278, 282-285, 37 Am. Rep. 386 note; Smith vs. St. Paul City R. Co., 32 Minn. 1, 50 Am. Rep. 550, 18 N. W. Rep. 827. N. Y. Twomley vs. Central Park R. Co., 69 N. Y. 153, 160, 25 Am. Rep. 162; Dyer vs. Erie R. Co., 71 N. Y. 228, 234, 236. Wis. Schultz vs. Chicago & N. W. R. Co., 44 Wis. 638, 644, 645.

II. STREET RAILROADS.

5. IN GENERAL.—Provisions of this section are made applicable to street railroad companies by § 510 post.

6. DISTINCTION BETWEEN STREET RAILROAD CARS AND ORDINARY RAILROAD TRAINS.—Rule applicable to passengers on street railroad cars is very different from that applied to passengers on trains drawn by steam power, and passengers on street railroad cars are not held to same exactness in complying with rules to go inside as are passengers on railroad trains.—Seller vs. Market St. R. Co., 139 Cal. 268, 272, 72 Pac. Rep. 1006, 14 Am. Neg. Rep. 249. See Watson vs. Portland & C. E. R. Co., 91 Me. 584, 64 Am. St. Rep. 268, 40 Atl. Rep. 699, 44 L. R. A. 157.

7. DUTIES AND RIGHTS OF MOTORMAN WHEN CAR IS OVERCROWDED.—When car is overcrowded, and it is boarded by child of tender years, it is within province of motorman to compel such child to go inside the car, or to stop the car and put the child off, and if he does not do so it is for the jury to say whether he was guilty of negligence.—Jackson vs. St. Paul City R. Co., 74 Minn. 48, 76 N. W. Rep. 956, 5 Am. Neg. Rep. 47.

8. DUTY OF PASSENGER TO STAND BETWEEN SEATS.—Where car is crowded it is not necessarily duty of passenger to crowd himself into space between occupied seats rather than to ride upon the running board, and question whether he was guilty of contributory negligence for riding upon running board is for jury.—Hasson vs. Nassau Elec. R. Co., 53 N. Y. Supp. 1069, 5 Am. Neg. Rep. 83.

9. EVIDENCE OF NEGLIGENCE TO OVERCROWD CARS.—It is evidence of negligence on part of street railroad company to carry passengers greatly in excess of seating capacity and permit them to stand upon platform and steps of cars.—See Seller vs. Market St. R. Co., 139 Cal. 268, 272, 72 Pac. Rep. 1006, 14 Am. Neg. Rep. 249. **III.** West Chicago St. R. Co. vs. Marks, 182 Ill. 15, 55 N. E. Rep. 67, 6 Am. Neg. Rep. 470. Minn. Jackson vs. St. Paul City R. Co., 74 Minn. 48, 76 N. W. Rep. 956, 5 Am. Neg. Rep. 47. Neb. Pray vs. Omaha St. R. Co., 44 Neb. 167, 43 Am. St. Rep. 717, 62 N. W. Rep. 447; East Omaha St. R. Co. vs. Godola, 50 Neb. 906, 70 N. W. Rep. 491, 2 Am. Neg. Rep. 24. N. Y. Hasson vs. Nassau Elec. R. Co., 53 N. Y. Supp. 1069, 5 Am. Neg. Rep. 83. Wash. Graham vs. McNeill, 20 Wash. 466, 73 Am. St. Rep. 121, 55 Pac. Rep. 631, 43 L. R. A. 300, 5 Am. Neg. Rep. 484.

10. GRIPMAN'S AISLE.—Right of passenger to ride in.—Where car is improperly overcrowded it is not necessarily contributory negligence for passenger to go into gripman's aisle, where it appears that it is not unusual for passengers to resort to such course.—West Chicago St. R. Co. vs. Johnson, 180 Ill. 285, 54 N. E. Rep. 334.

11. INVITATION OR PERMISSION TO RIDE ON PLATFORM.—Higher degree of care required of company.—When there is an invitation or permission to passengers to ride on platform of electric car it is duty of company to observe higher degree of care in running of cars at points where there is danger that passenger may be thrown off, and there should be corresponding increase of care and vigilance on part of passengers who voluntarily assume such position of danger.—Reber vs. Pittsburg & B. Tr. Co., 179 Pa. St. 339, 57 Am. St. Rep. 599, 36 Atl. Rep. 245, 1 Am. Neg. Rep. 181.

12. JUDICIAL NOTICE OF INVITATION TO RIDE ON PLATFORMS.—Court will take judicial notice of fact that street railroad companies invite passengers to ride on platform when cars are overcrowded.—See Seller vs. Market St. R. Co., 139 Cal. 268, 272, 72 Pac. Rep. 1006, 14 Am. Neg. Rep. 249; Watson vs. Portland & C. E. R. Co., 91 Me. 584, 64 Am. St. Rep. 268, 40 Atl. Rep. 699, 44 L. R. A. 157.

13. LOOKOUT MUST BE KEPT BY PASSENGER RIDING ON FOOT-BOARD.—Where car is overcrowded, but there is standing room in car proper, and passenger rides on foot-board, he must keep diligent lookout to avoid collision with vehicles which may come in contact with car.—Fraser vs. California St. C. R. Co., 146 Cal. —, 81 Pac. Rep. —. See Conn. Nugent vs. Fair Haven & W. St. R. Co., 73 Conn. 139, 46 Atl. Rep. 875, 8 Am. Neg. Rep. 179. Me. Watson vs. Portland & C. E. R. Co., 91 Me. 584, 64 Am. St. Rep. 268, 40 Atl. Rep. 699, 44 L. R. A. 157. N. J. Flynn vs. Consolidated Traction Co., 67 N. J. L. (38 Vr.) 546, 52 Atl. Rep. 869, 7 Am. Neg. Rep. 475.

14. PASSENGERS RIDING ON FOOT-BOARDS AND PLATFORM OF CAR STRUCK BY OBJECTS NEAR TRACK.—See note 3 Am. Neg. Rep. 179, 180.

15. PROPER PLACE FOR PASSENGER IS INSIDE OF CAR, and unless he shows some valid reason to excuse him he must take the risk of going elsewhere.—Thane vs. Scranton Tr. Co., 191 Pa. St. 249, 71 Am. St. Rep. 767, 43 Atl. Rep. 136, 6 Am. Neg. Rep. 185.

16. QUESTION OF CONTRIBUTORY NEGLIGENCE IS FOR JURY.—Where passenger of crowded electric car rides on platform, question whether he was guilty of contributory negligence is one for jury, as such act is not contributory negligence per se.—Seller vs. Market St. R. Co., 139 Cal. 268, 271, 72 Pac. Rep. 1006, 14 Am. Neg. Rep. 249. See Ill. West Chicago St. R. Co. vs. Johnson, 180 Ill. 285, 54 N. E. Rep. 334; West Chicago St. R. Co. vs. Marks, 182 Ill. 15, 55 N. E. Rep. 67, 6 Am. Neg. Rep. 470. Ind. Terre Haute Elec. R. Co. vs. Lauer, 21 Ind. App. 466, 52 N. E. Rep. 703, 5 Am. Neg. Rep. 581. Me. Watson vs. Portland & C. E. R. Co., 91 Me. 584, 64 Am. St. Rep.

288, 40 Atl. Rep. 699, 44 L. R. A. 157. *Mass. Lapointe vs. Middlesex R. Co.*, 144 Mass. 18, 21, 10 N. E. Rep. 497; *Sweetland vs. Lynn & B. R. Co.*, 177 Mass. 574, 59 N. E. Rep. 443, 51 L. R. A. 783, 9 Am. Neg. Rep. 575. *Minn. Jackson vs. St. Paul City R. Co.*, 74 Minn. 48, 76 N. W. Rep. 956, 5 Am. Neg. Rep. 47. *Neb. Pray vs. Omaha St. R. Co.*, 44 Neb. 167, 48 Am. St. Rep. 717, 62 N. W. Rep. 447; *East Omaha St. R. Co. vs. Godola*, 50 Neb. 906, 70 N. W. Rep. 491, 2 Am. Neg. Rep. 24. *N. J. Flynn vs. Consolidated Tr. Co.*, 67 N. J. L. (38 Vr.) 546, 52 Atl. Rep. 369, 7 Am. Neg. Rep. 475. *N. Y. Hasson vs. Nassau Elec. R. Co.*, 53 N. Y. Supp. 1069, 5 Am. Neg. Rep. 83. *Pa. Reber vs. Pittsburg & B. Traction Co.*, 179 Pa. St. 339, 57 Am. St. Rep. 599, 36 Atl. Rep. 245, 1 Am. Neg. Rep. 181; *Thane vs. Scranton Tr. Co.*, 191 Pa. St. 249, 71 Am. St. Rep. 767, 43 Atl. Rep. 136, 6 Am. Neg. Rep. 185. *Wash. Graham vs. McNeill*, 20 Wash. 466, 55 Pac. Rep. 621, 43 L. R. A. 300, 5 Am. Neg. Rep. 484.

17. REASONABLENESS OF RULE PROHIBITING RIDING ON PLATFORM.—It is reasonable for company to forbid passengers from riding on front platform.—*Sweetland vs. Lynn & B. R. Co.*, 177 Mass. 574, 59 N. E. Rep. 443, 51 L. R. A. 783, 9 Am. Neg. Rep. 575. See *O'Neill vs. Lynn & B. R. Co.*, 155 Mass. 371, 29 N. E. Rep. 630; *Byrnes vs. Boston Elevated R. Co.*, 183 Mass. 96, 66 N. E. Rep. 418, 13 Am. Neg. Rep. 527.

18. REQUEST TO RIDE ON PLATFORM NOT NECESSARY.—It is not necessary per se

for passenger on overcrowded street-car to ride upon platform, but question is one for the jury, and it is immaterial whether passenger so rode of his own motion or upon request of conductor.—*Terre Haute Elec. R. Co. vs. Lauer*, 21 Ind. App. 466, 52 N. E. Rep. 703, 5 Am. Neg. Rep. 581.

19. VACATION OF SEAT IN FAVOR OF WOMAN.—Where passenger has seat and when car becomes overcrowded, at request of conductor he vacates his seat in favor of woman and rides upon platform, and is subsequently injured by reason of being in such position, he is not per se guilty of contributory negligence.—*Terre Haute Elec. R. Co. vs. Lauer*, 21 Ind. App. 466, 52 N. E. Rep. 703, 5 Am. Neg. Rep. 581.

20. WAIVER OF POSTED NOTICE.—Company waives its notice against standing on platform when it falls to provide suitable accommodations for passengers on inside of its cars.—See *Seller vs. Market St. R. Co.*, 139 Cal. 268, 273, 72 Pac. Rep. 1006, 14 Am. Neg. Rep. 1249. *Mass. Sweetland vs. Lynn & B. R. Co.*, 177 Mass. 574, 59 N. E. Rep. 443, 51 L. R. A. 783, 9 Am. Neg. Rep. 575. *Minn. Jones vs. Chicago St. P. M. & O. R. Co.*, 43 Minn. 279, 45 N. W. Rep. 444. *N. J. New York L. E. & W. R. Co. vs. Ball*, 53 N. J. L. (24 Vr.) 286, 21 Atl. Rep. 1052. *Wash. Graham vs. McNeill*, 20 Wash. 466, 55 Pac. Rep. 621, 43 L. R. A. 300, 5 Am. Neg. Rep. 484.

21. Compare: *Byrnes vs. Boston El. R. Co.*, 183 Mass. 96, 66 N. E. Rep. 418, 13 Am. Neg. Rep. 527.

§ 485. TO PAY DAMAGES. NOT LIABLE IN CERTAIN CASES. CORPORATION MAY RECOVER DAMAGES, WHEN. Railroad corporations must make and maintain a good and sufficient fence on either or both sides of their track and property. In case they do not make and maintain such fence, if their engine or cars shall kill or maim any cattle or other domestic animals upon their line of road which passes through or along the property of the owner thereof, they must pay to the owner of such cattle or other domestic animals a fair market price for the same, unless it occurred through the neglect or fault of the owner of the animal so killed or maimed.

[Not liable in damages for killing stock, when.] Railroad corporations paying to the owner of the land through or along which their road is located an agreed price for making and maintaining such fence, or paying the cost of such fence with the award of damages allowed for the right of way for such railroad, are relieved and exonerated from all claims for damages arising out of the killing or maiming any animals of persons who thus fail to construct and maintain such fence;

[Damages recoverable by company, when.] And the owners of such animals are responsible for any damages or loss which may accrue to such corporation from such animals being upon their railroad track, resulting from the non-construction of such fence, unless it is shown that such loss or damage occurred through the negligence or fault of the corporation, its officers, agents, or employees.

History: Enacted March 21, 1872, founded upon § 40 Act May 20, 1861, Stats. 1861, p. 623.

1. Applied, cited, construed, referred to, etc.
2. Contributory negligence—Allowing cattle to range not.

3. Same—Knowledge of condition of fence.
4. Same—Opening fence.
5. Jurisdiction of supreme court on appeal.

6. Liability for violating statute.
7. Same—Lessor company's liability.
8. Same—Personal injury to rider of horse.
9. Maintenance of fence—Duty of owner.
10. Negligence in operating train immaterial.
- 11, 12. Ownership of adjoining land by plaintiff—Lessee.
13. Pleading and proof—Complaint.
14. Same—Answer—Paying owner to maintain fence.
- 15, 16. Same—Ownership of fence—Parol evidence.
17. Same—Prima facie evidence of negligence.
18. Same—Rate of speed—Cross-examination.
19. Stations and crossings need not be fenced.
20. Sufficiency of fence—Act 1855.
21. Waiver of statute by landowners.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Butte Co. vs. Boydston*, 64 Cal. 110, 118, 29 Pac. Rep. 511 (applied); *Hynes vs. San Francisco & N. P. R. Co.*, 65 Cal. 316, 318, 4 Pac. Rep. 28 (construed and applied); *Southern Pac. Co. vs. Burr*, 86 Cal. 279, 284, 24 Pac. Rep. 1082 (referred to); *Los Angeles P. & G. R. Co. vs. Rumpp*, 104 Cal. 20, 28, 37 Pac. Rep. 859 (construed with Code Civ. Proc. §1248); *Baker vs. Southern Cal. R. Co.*, 110 Cal. 455, 456, 42 Pac. Rep. 975 (construed and applied); *Baker vs. Southern Cal. R. Co.*, 114 Cal. 501, 508, 46 Pac. Rep. 604 (construed and applied); *Boyd vs. Southern Cal. R. Co.*, 126 Cal. 571, 573, 58 Pac. Rep. 1046 (construed and applied).

2. CONTRIBUTORY NEGLIGENCE—Allowing cattle to range.—Mere fact that party suffers his cows to go at large near line of railroad does not make him guilty of such negligence as to excuse company from reasonable diligence and care to avoid injuring them when they happen to be upon the track; at time of approach of train, company is bound to use usual precautions to drive them away.—*Richmond vs. Sacramento V. R. Co.*, 18 Cal. 351, 353; *Needham vs. San Francisco & S. J. R. Co.*, 37 Cal. 409, 419, 420.

3. Knowledge of condition of fence on part of owner of live stock does not render him guilty of contributory negligence if he does no more than what, but for neglect of corporation, it would be entirely safe and proper for him to do.—*McCoy vs. California Pac. R. Co.*, 40 Cal. 532, 535, 6 Am. Rep. 623. See *Mich. Flint & P. M. R. Co. vs. Lull*, 28 Mich. 510. *N. H. Cressey vs. Northern R.*, 59 N. H. 564, 47 Am. Rep. 227. *Vt. Congdon vs. Central Vt. R. Co.*, 56 Vt. 390, 48 Am. Rep. 793.

4. Opening fence.—Licensees of lessees of land who have made opening in their fence leading on to railroad track of defendant cannot recover from the railroad company for injury to sheep entering upon track through such opening; they stand in no better position than their licensors who made the opening.—*McCoy vs. Southern Pac. Co.*, 94 Cal. 568, 570, 29 Pac. Rep. 110.

5. JURISDICTION OF SUPREME COURT.—Averment of ownership of adjoining land by plaintiff in an action under this statute makes case one involving title to land, whether own-

ership is denied or not, and therefore supreme court has jurisdiction to entertain appeal in such case.—*Boyd vs. Southern Cal. R. Co.*, 126 Cal. 571, 573, 574, 58 Pac. Rep. 1046.

6. LIABILITY FOR VIOLATING STATUTE.—Where railroad maintains unfenced track through field, so long as it runs its cars upon such open track it undertakes, at its peril, that no harm shall come to live stock for want of proper fence.—*McCoy vs. California P. R. Co.*, 40 Cal. 532, 535, 6 Am. Rep. 623; *Hynes vs. San Francisco & N. P. R. Co.*, 65 Cal. 316, 318, 4 Pac. Rep. 28.

7. Lessor company's liability.—Duty of fencing devolves upon company owning road, and it is not relieved from liability by leasing road in unfenced condition to be operated by another company.—*Fontaine vs. Southern Pac. R. Co.*, 54 Cal. 646, 652.

8. Personal injury to rider of horse.—Railroad failing to maintain fences is liable for injury to person riding horse which becomes unmanageable and, owing to absence of fence, runs in front of train and is killed and rider severely injured.—*Hynes vs. San Francisco & N. P. R. Co.*, 65 Cal. 316, 318, 4 Pac. Rep. 28.

9. MAINTAINING FENCE AFTER ITS CONSTRUCTION is upon owner, and expense of doing so is included in damages allowed for right of way in condemnation proceedings by railroad company.—*Los Angeles P. & G. R. Co. vs. Rumpp*, 104 Cal. 20, 28, 37 Pac. Rep. 859.

10. NEGLIGENT OPERATION OF TRAIN NOT AN ELEMENT.—This section provides penalty for killing or maiming cattle or domestic animals on line of road which passes through or along the property of owner thereof, without regard to manner in which train may be operated, unless company fences its line of road.—*Baker vs. Southern Cal. R. Co.*, 126 Cal. 516, 518, 58 Pac. Rep. 1055.

11. OWNERSHIP OF ADJOINING LAND BY PLAINTIFF.—To recover for injury to animals killed under provisions of this section plaintiff must be owner of land through which line of road passes.—*Baker vs. Southern Cal. R. Co.*, 110 Cal. 455, 456, 42 Pac. Rep. 975.

12. Tenant or licensee of owner.—Plaintiff must show (1) that he is either owner of land through which road passes or (2) tenant or licensee of such owner.—*Baker vs. Southern Cal. R. Co.*, 126 Cal. 516, 518, 519, 58 Pac. Rep. 1055.

13. PLEADING AND PROOF—Complaint.—It is permissible to show that horses came through open gate out upon track and were killed, without any averment whatever in complaint that gate was left open or allowed to remain open through carelessness and negligence of railroad, which operated as approximate cause of horses being killed.—*Ja Hant vs. Central P. R. Co.*, 74 Cal. 9, 11, 15 Pac. Rep. 362.

14. Answer—Paying owner price of making and maintaining fence.—Where railroad pays owner of land price of making and maintaining fence, thus relieving itself from liability to such owner for defective construction or maintenance, it must plead fact in defense.—*Baker*

vs. Southern Cal. R. Co., 114 Cal. 501, 508, 46 Pac. Rep. 604.

15. Ownership of fence may be proved by parol, notwithstanding fact that fence is generally considered to be part of realty upon which it is built.—*Siglin vs. Coos B. R. & E. R. & N. Co.*, 35 Oreg. 79, 81, 76 Am. St. Rep. 463, 56 Pac. Rep. 1011.

16. Same—Repair of fence by corporation's servants may be shown for purpose of proving ownership.—*Siglin vs. Coos B. R. & E. R. & N. Co.*, 35 Oreg. 79, 82, 76 Am. St. Rep. 463, 56 Pac. Rep. 1011.

17. Prima facie evidence of the negligence—How made out.—In action against railroad corporation for killing live stock at point on its line where it had failed to comply with statute requiring it to fence its tract, plaintiff is only required to prove (1) fact of killing, (2) ownership and value of live stock and (3) that track at that point was unfenced, and such evidence makes out his case prima facie.—*Union Pac. R. Co. vs. High*, 14 Neb. 14, 14 N. W. Rep. 547.

18. Rate of speed.—Plaintiff in cross-examining fireman who was on locomotive when horse was killed may require him to testify as to rate of speed at which train was going.

for purpose of testing his accuracy of observation as to location at which horse was killed.—*Kyser vs. Kansas City, St. J. & C. B. R. Co.*, 56 Iowa 207, 9 N. W. Rep. 132.

19. STATIONS AND HIGHWAY CROSSINGS.—This section does not impose upon railroads duty of fencing their tracks at stations and highway crossings, or to close all roads or avenues leading to station, or fence off station or station-grounds so as to prevent access thereto.—*Baker vs. Southern Cal. R. Co.*, 114 Cal. 501, 508, 46 Pac. Rep. 604.

20. SUFFICIENCY OF FENCE.—This act does not itself prescribe any standard or test of sufficiency of fence, but it must be considered as referring to and adopting standard previously established by fence laws of 1855.—*Enright vs. San Francisco & S. J. R. Co.*, 33 Cal. 230, 234.

21. WAIVER OF STATUTE.—This statute was designed to protect owners of land through which railroad is operated, and its provisions may be waived by them.—*Enright vs. San Francisco & S. J. R. Co.*, 33 Cal. 230, 236; *Baker vs. Southern Cal. R. Co.*, 126 Cal. 516, 519, 58 Pac. Rep. 1055; *Boyd vs. Southern Cal. R. Co.*, 126 Cal. 571, 573, 58 Pac. Rep. 1046.

§ 486. REGULATIONS OF TRAINS. PENALTY. [1] A bell, of at least twenty pounds weight, must be placed on each locomotive engine, and be rung at a distance of at least eighty rods from the place where the railroad crosses any street, road, or highway, and be kept ringing until it has crossed such street, road, or highway; or [2] a steam whistle must be attached, and be sounded, except in cities, at the like distance, and be kept sounding at intervals until it has crossed the same, under [3] a penalty of one hundred dollars for every neglect, to be paid by the corporation operating the railroad, [4] which may be recovered in an action prosecuted by the district attorney of the proper county, for the use of the state. [Liability in damages.] The corporation is also liable for all damages sustained by any person, and caused by its locomotives, train, or cars, when the provisions of this section are not complied with.

History: Enacted March 21, 1872, founded upon § 41 Act May 20, 1861, Stats. 1861, p. 623.

1. Applied, cited, construed, referred to, etc.
- 2, 3. Construction—Vigilance at crossing required.
- 4, 5. Contributory negligence—Constitutes defense—Proximate cause.
6. Same—Allowing child to play on track.
7. Same—Failure to stop, look, and listen.
8. Same—Leaving horse unattended.
9. Same—Standing between tracks.
10. Same—Walking on trestle.
11. Culverts and trestles not within statute.
12. Duty of corporation in general.
13. Negligence presumed from violation of statute.
- 14, 15. Right to assume that statute will be complied with.
16. Whistle need not be continuously sounded.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Meeks vs. Southern Pac. R. Co.*, 52 Cal. 602, 604 (construed); *Strong vs. Sacramento & P. R. Co.*, 61 Cal. 326, 328

(construed and applied); *Orcutt vs. Pacific Coast R. Co.*, 85 Cal. 291, 296, 297, 24 Pac. Rep. 661 (construed); *Toomey vs. Southern Pac. R. Co.*, 86 Cal. 374, 378, 380, 24 Pac. Rep. 1074, 10 L. R. A. 139 (construed and applied); *Hager vs. Southern Pac. Co.*, 98 Cal. 309, 311, 33 Pac. Rep. 119 (construed and applied); *Green vs. Southern Pac. Co.*, 132 Cal. 254, 256, 64 Pac. Rep. 255 (referred to.)

2. CONSTRUCTION—Vigilance at crossings required.—Object of this statute is to compel railroad corporations to exact vigilance and diligence of those to whom they intrust running of engines, trains, or cars across such places of danger to public as streets and highways.—*Orcutt vs. Pacific Coast R. Co.*, 85 Cal. 291, 296, 24 Pac. Rep. 661.

3. This section of code does not abrogate doctrine of contributory negligence, or operate to give right of action where negligence of plaintiff, if an adult, or if an infant, negli-

gence of parent of person standing in loco parentis, materially and proximately contributed to the injury.—*Meeks vs. Southern Pac. R. Co.*, 52 Cal. 602, 604. See *Flemming vs. Western Pac. R. Co.*, 49 Cal. 253; *Glascock vs. Central Pac. R. Co.*, 73 Cal. 137, 14 Pac. Rep. 518; *Hager vs. Southern Pac. Co.*, 98 Cal. 309, 311, 33 Pac. Rep. 119, 11 Am. Neg. Cas. 213; *Pepper vs. Southern Pac. Co.*, 105 Cal. 389, 399, 38 Pac. Rep. 974, 11 Am. Neg. Cas. 200; *Bailey vs. Market St. C. R. Co.*, 110 Cal. 320, 331, 42 Pac. Rep. 914; *Green vs. Southern Pac. Co.*, 122 Cal. 254, 259, 64 Pac. Rep. 255.

4. Contributory negligence of plaintiff will preclude him from recovery for injury which was caused by railroad corporation's violation of statute.—*Meeks vs. Southern Pac. R. Co.*, 52 Cal. 602, 604; *Tennebrock vs. Southern Pac. R. Co.*, 59 Cal. 269, 271; *Glascock vs. Central Pac. R. Co.*, 73 Cal. 137, 14 Pac. Rep. 518; *Ryall vs. Central Pac. R. Co.*, 76 Cal. 474, 476, 18 Pac. Rep. 430; *Trousdale vs. Pacific Coast S. S. Co.*, 80 Cal. 521, 526, 22 Pac. Rep. 258; *Orcutt vs. Pacific Coast R. Co.*, 85 Cal. 291, 298, 299, 24 Pac. Rep. 661; *Hager vs. Southern Pac. Co.*, 98 Cal. 309, 311, 33 Pac. Rep. 119; *Pepper vs. Southern Pac. Co.*, 105 Cal. 389, 399, 38 Pac. Rep. 974.

5. Compare: *Meeks vs. Southern Pac. R. Co.*, 56 Cal. 513, 517, 519 (where plaintiff's negligence was not proximate cause of injury).

6. Allowing child to play on railroad, unattended, is such contributory negligence as will defeat recovery by its parents for injuries which it has received.—*Meeks vs. Southern Pac. R. Co.*, 52 Cal. 602, 604.

7. Failure to stop, look, and listen on approaching railway crossing is such contributory negligence as will prevent recovery notwithstanding negligence of railroad in failing to ring bell or blow whistle, as required by above section of code.—*Glascock vs. Central Pac. R. Co.*, 73 Cal. 137, 140, 14 Pac. Rep. 518; *Hager vs. Southern Pac. Co.*, 98 Cal. 309, 33 Pac. Rep. 119, 11 Am. Neg. Cas. 213; *Pepper vs. Southern Pac. Co.*, 105 Cal. 389, 38 Pac. Rep. 974, 11 Am. Neg. Cas. 200; *Bailey vs. Market St. C. R. Co.*, 110 Cal. 320, 331, 42 Pac. Rep. 914; *Green vs. Southern Cal. R. Co.*, 123 Cal. 1, 3, 70 Pac. Rep. 926.

See 11 Am. Neg. Cas. 179, 248, 280, 462, 466, 492, 504-506, 533, 535, 573.

8. Leaving horse unattended in lane about half mile from railroad track is not such negligence on part of owner as will preclude him from recovery for an injury to the horse resulting from failure to give statutory signal.—*Orcutt vs. Pacific Coast R. Co.*, 85 Cal. 291, 299, 24 Pac. Rep. 661.

9. Standing between tracks is contributory negligence such as will relieve the corporation

from liability for failure to comply with statute.—*Ryall vs. Central Pac. R. Co.*, 76 Cal. 474, 476, 18 Pac. Rep. 430.

10. Walking on trestle.—Person using railroad and attempting to cross trestle on it is guilty of such negligence as will preclude recovery, notwithstanding omission of trainmen to give signals on approaching trestle.—*Tennebrock vs. South Pac. C. R. Co.*, 59 Cal. 269, 271.

11. CULVERTS AND TRESTLES NOT WITHIN STATUTE, and corporation is under no obligation to give signals upon approaching them.—*Tennebrock vs. South Pac. C. R. Co.*, 59 Cal. 269, 271.

12. DUTY OF CORPORATION IN GENERAL.—There is no duty imposed upon engineers to sound whistle in lawful use of highways, except in approaching crossing on road or other places of public passage, or in coming to stations, or into towns or cities.—*Tennebrock vs. South Pac. C. R. Co.*, 59 Cal. 269, 270, 271.

13. PRESUMPTION OF NEGLIGENCE FROM VIOLATION OF STATUTE.—In action to recover for injuries to cattle, under this section, question whether engineer can see animals near track when engine is approaching crossing is immaterial, because whether he could see them or not when they came running on track when engine was but forty feet from crossing, if he then did all which he could to avoid injuring them, if he failed to give required signals, omission to do so amounted to presumptive negligence.—*Orcutt vs. Pacific Coast R. Co.*, 85 Cal. 291, 297, 24 Pac. Rep. 661.

14. RIGHT TO ASSUME COMPLIANCE WITH STATUTE.—Owners of animals have right to assume that required statutory signals will be given by railroad, or by those operating the trains.—*Higgins vs. Deeney*, 78 Cal. 578, 580, 21 Pac. Rep. 423; *Orcutt vs. Pacific Coast R. Co.*, 85 Cal. 291, 299, 24 Pac. Rep. 661.

15. Traveler may rely upon statute being complied with and, until he reaches point where he can look up and down track, unless he hears bell or whistle he has right to assume that no train is approaching.—*Strong vs. Sacramento & P. R. Co.*, 61 Cal. 326, 328.

16. WHISTLE NEED NOT BE CONTINUOUSLY SOUNDED.—Instruction that corporation was negligent if it did not "ring bell or sound whistle continuously for distance of eighty rods before reaching crossing," is faulty, as statute provides merely that bell shall be rung continuously and requiring no more than that whistle be sounded at intervals.—*Green vs. Southern Pac. Co.*, 122 Cal. 563, 567, 568, 55 Pac. Rep. 577.

§ 487. **PASSENGER REFUSING TO PAY FARE.** If any passenger refuses to pay his fare, or to exhibit or surrender his ticket, when reasonably requested so to do, the conductor and employees of the corporation may put him and his baggage out of the cars, using no unnecessary force, at any usual stopping place, or near any dwelling-house, on stopping the train.

History: Enacted March 21, 1872, founded upon § 49 Act May 20, 1861, Stats. 1861, p. 625.

1. Applied, cited, construed, referred to, etc.
2. After stopping train fare need not be accepted.
3. Assault and battery in ejecting passenger.
4. Children—Fare must be paid for.
5. Same—Fare of custodian returned on ejection.
6. Common law re-enacted.
7. Construction train within rule.
8. Damages—General measure of.
9. Same—Walking to station.
10. Drunkenness of conductors immaterial.
11. Ejection of passengers for non-payment.
12. Exhibiting ticket after train stops.
13. Fare—When payable.
14. Force may be used in ejecting passenger.
15. Fraudulent refusal to pay fare.
16. "Near" dwelling-house—Question for jury.
17. Part payment of fare insufficient.
18. Re-entry of train after ejection—Not permissible unless at station.
19. Same—Payment of full fare required.
20. Rules of corporation admissible in evidence.
21. Seat—Right of passenger to.
22. Servant of corporation must pay fare.
23. Same—Indebtedness of corporation immaterial.
24. Small station—Ejection may be at.
25. Taking up ticket and ejection improper.
26. Tender of fare by strangers good.
27. Trespasser—Passenger not paying fare is.
28. Wrongful ejection after payment of fare.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Bland vs. Southern Pac. R. Co.*, 65 Cal. 626, 628, 4 Pac. Rep. 672 (construed and applied); *Wright vs. California Central R. Co.*, 78 Cal. 860, 865, 20 Pac. Rep. 740 (citing erroneously § 497 instead of this section); *Gorman vs. Southern Pac. Co.*, 97 Cal. 1, 6, 33 Am. St. Rep. 157, 31 Pac. Rep. 1112 (construed and applied).

2. AFTER TRAIN HAS BEEN STOPPED for sole purpose of putting passenger off for non-payment of fare, he is not entitled to tender fare and continue trip after having occasioned such interruption, but if train is stopped at regular stopping place, before he is ejected, he, or others in his behalf, have right to make payment so as to entitle him to passage.—*O'Brien vs. New York C. & H. R. R. Co.*, 80 N. Y. 236, 237. See *Stone vs. Chicago & N. W. R. Co.*, 47 Iowa 82, 29 Am. Rep. 458; *Hoffbauer vs. Delhi & N. W. R. Co.*, 53 Iowa 342, 35 Am. Rep. 278; *Nelson vs. Long Island R. Co.*, 7 Hun (N. Y.) 140; *Hibbard vs. New York & E. R. Co.*, 15 N. Y. 455, 462.

See para. 12, 18 this note.

3. ASSAULT AND BATTERY IN EJECTION OF PASSENGER.—Where passenger is rightfully ejected for non-payment of fare, and no unnecessary force is used, servants of corporation are not guilty of assault and battery.—*State vs. Overton*, 24 N. J. L. (4 Zab.) 435, 61 Am. Dec. 671.

See par. 14 this note.

4. CHILDREN.—Fare must be paid, otherwise expulsion is proper, and custodian of child is responsible for its fare, or liable to be ejected with it for failure to pay the same,

and it does not change rule that both passengers are children.—*Warfield vs. Louisville & N. R. Co.*, 104 Tenn. 74, 78 Am. St. Rep. 911, 55 S. W. Rep. 304. See *Lake Shore & M. S. R. Co. vs. Orndorff*, 55 Ohio St. 589, 60 Am. St. Rep. 716, 45 N. E. Rep. 447.

5. Fare of custodian must be returned.—Where custodian of child refuses to pay fare for such child it is proper to eject both, but where conductor has taken up ticket from custodian, which entitles him to stop over, it is the duty of conductor, before commencing to eject custodian, to offer to pay him unused value of his ticket over and upon fares of both for distance already traveled, or to give him stop-over check and demand fare of child.—*Lake Shore & M. S. R. Co. vs. Orndorff*, 55 Ohio St. 589, 60 Am. St. Rep. 716, 45 N. E. Rep. 447.

6. COMMON LAW has established substantially same rule.—*O'Brien vs. Boston & W. R. Co.*, 81 Mass. (15 Gray) 20, 77 Am. Dec. 347.

7. CONSTRUCTION TRAIN IS WITHIN RULE, where it appears that corporation has been carrying passengers for pay on such train, and corporation must be held to same degree of diligence with respect to such train as is required with respect to regular passenger trains.—*Ohio & M. R. Co. vs. Muhling*, 30 Ill. 9, 81 Am. Dec. 336.

8. DAMAGES.—Measure of damages in ordinary case of wrongful expulsion without unnecessary violence or insult is cost of ticket and damages actually resulting from loss of time. But when expulsion is accompanied by undue violence, or by insult or abuse, injury to feelings, indignity endured, mental suffering, humiliation, and wounded pride, it may be considered as elements of damages.—*Gorman vs. Southern Pacific Co.*, 97 Cal. 1, 6, 33 Am. St. Rep. 157, 31 Pac. Rep. 1112.

9. Walking to station.—Duty not imposed upon passenger wrongfully evicted to go to first dwelling-house and there remain until he can return by carriage to his home or station at which he entered car, but he may walk to station and such walk may be considered by jury in assessing damages.—*Bland vs. Southern Pac. R. Co.*, 65 Cal. 626, 628, 4 Pac. Rep. 672.

10. DRUNKENNESS OF CONDUCTOR IMMATERIAL.—Where person on railroad train wrongfully refuses to pay fare he has no right to complain that conductor was drunk and insolent, because such person is mere trespasser.—*Stone vs. Chicago & N. W. R. Co.*, 47 Iowa 82, 29 Am. Rep. 458.

11. EJECTION OF PASSENGER FOR NON-PAYMENT OF FARE IS AUTHORIZED.—See para. 3, 14 this note; and also post § 2188 and note.

12. EXHIBITION OF TICKET AFTER TRAIN STOPS, where passenger has pertinaciously refused to show his ticket when requested at station to do so, will not save him from expulsion. Any other rule would put it in power of passengers unreasonably to delay trains.—*Hibbard vs. New York & E.*

R Co., 15 N. Y. 455, 462. See *O'Brien vs. New York C. & H. R. R. Co.*, 80 N. Y. 236, 237.

See para. 2, 13 this note.

12. FARE—When payable.—See post § 2137 and note.

14. FORCE MAY BE USED IN EJECTING PASSENGER—Corporation has right to eject passenger who does not pay fare by force, if force is necessary, but is bound to exercise right with ordinary care and prudence, and has no right to eject him under circumstances which would endanger his personal safety; e. g. it is not proper to eject passenger while train is going at high rate of speed.—*Kline vs. Central Pac. R. Co. of Cal.*, 37 Cal. 400, 406, 407, 99 Am. Dec. 282. See *Ala. Louisville & N. R. Co. vs. Johnson*, 108 Ala. 62, 65, 19 So. Rep. 51, 31 L. R. A. 372. *Iowa. Benton vs. Chicago R. I. & P. R. Co.*, 55 Iowa 496, 8 N. W. Rep. 330. *Kan. Kansas City, Ft. S. & G. R. Co. vs. Kelly*, 36 Kan. 655, 658, 59 Am. Rep. 596, 14 Pac. Rep. 172. *Ky. Louisville & N. R. Co. vs. Ballard*, 85 Ky. 307, 7 Am. St. Rep. 600, 3 S. W. Rep. 530. *Md. McClure vs. Philadelphia W. & B. R. Co.*, 34 Md. 532, 6 Am. Rep. 345. *Mich. Chicago & N. W. R. Co. vs. Smith*, 46 Mich. 504, 41 Am. Rep. 177, 9 N. W. Rep. 830. *Mo. Harlan vs. St. Louis K. C. & N. R. Co.*, 65 Mo. 22. *Mont. Higley vs. Gilmer*, 3 Mont. 90, 25 Am. Rep. 450. *Pa. Arnold vs. Pennsylvania R. Co.*, 115 Pa. St. 185, 3 Am. St. Rep. 542, 8 Atl. Rep. 213.

As to ejection of passenger for failure to show or surrender ticket, see monographic note 41 Am. Dec. 476.

As to duty to use reasonable care in ejecting passenger, see note 2 Am. St. Rep. 546.

See par. 3 this note.

15. FRAUDULENT REFUSAL TO PAY FARE—"Rule is well settled that where one gets on passenger-train with deliberate purpose not to pay his fare, and adheres to that purpose, or if, being on train, and having money with him with which he could pay his fare, he falsely and fraudulently represents to conductor that he is without means to pay his fare, and by means of such false representations induces conductor to permit him to remain on train without paying his fare, relation of carrier and passenger and obligations resulting from that relation are not thereby established between him and company, and company owes him no other duty than not to wilfully or recklessly injure him."—*Condran vs. Chicago M. & St. P. R. Co.*, 67 Fed. Rep. 522, 523.

16. "NEAR" DWELLING-HOUSE—Question for jury whether train was stopped "near" dwelling-house within meaning of statute.—*Bland vs. Southern Pac. R. Co.*, 65 Cal. 626, 628, 4 Pac. Rep. 672.

17. PART PAYMENT OF FARE INSUFFICIENT, corporation being entitled to full fare upon demand.—*Hoffbauer vs. Delhi & N. W. R. Co.*, 52 Iowa 342, 35 Am. Rep. 278, 3 N. W. Rep. 121.

18. RE-ENTRY OF TRAIN AFTER EJECTION—Not permissible unless at station.—After passenger has been rightfully expelled from train for non-payment of fare he cannot

again enter same car at place which is not regular station.—*O'Brien vs. Boston & W. R. Co.*, 31 Mass. (15 Gray) 20, 77 Am. Dec. 347.

See para. 2, 13 this note.

19. Full fare must be paid from point at which passenger entered train to his destination, and payment of fare from point at which he was ejected is not sufficient to entitle him to re-enter train.—*Stone vs. Chicago & N. W. R. Co.*, 47 Iowa 82, 29 Am. Rep. 458. See *Warfield vs. Louisville & N. R. Co.*, 104 Tenn. 74, 78 Am. St. Rep. 911, 55 S. W. Rep. 589.

20. RULES ADMISSIBLE IN EVIDENCE to show regulations established by corporation concerning passengers who refuse to pay fare, where such regulations are needful and proper.—*O'Brien vs. Boston & W. R. Co.*, 31 Mass. (15 Gray) 20, 77 Am. Dec. 347.

21. SEAT—Right of passenger to.—See ante § 483 and note.

22. SERVANT OF CORPORATION who is traveling in pursuit of his own business is upon same footing as any other passenger.—*Ohio & M. R. Co. vs. Muhling*, 30 Ill. 9, 81 Am. Dec. 336.

23. Indebtedness of corporation to servant immaterial, and does not deprive it of its right to demand fare when he rides on train in pursuit of his own business.—*Ohio & M. R. Co. vs. Muhling*, 30 Ill. 9, 81 Am. Dec. 336.

24. SMALL STATION.—Train may be stopped for ejection of passengers at small town.—*Wright vs. California Cent. R. Co.*, 78 Cal. 360, 365, 20 Pac. Rep. 740.

25. TAKING UP TICKET AND EJECTION IMPROPER.—Conductor must not take up and retain ticket which he supposes valueless and also eject passenger, but if he ejects passenger must allow him to retain ticket.—*Vankirk vs. Pennsylvania R. Co.*, 76 Pa. St. 66, 18 Am. Rep. 404. See *Lake Shore & M. S. R. Co. vs. Orndorff*, 55 Ohio St. 589, 60 Am. St. Rep. 716, 45 N. E. Rep. 447.

26. TENDER OF FARE BY STRANGERS, where passenger refuses to pay, should be accepted by conductor.—*O'Brien vs. New York C. & H. R. R. Co.*, 80 N. Y. 236, 237.

27. TRESPASSER.—Person who refuses to pay fare is trespasser, and is not entitled to rights and privileges of passengers.—See *Kline vs. Central Pac. R. Co.*, 37 Cal. 400, 406, 407, 99 Am. Dec. 282. *Ala. Louisville & N. R. Co. vs. Johnson*, 92 Ala. 204, 9 So. Rep. 269, 47 Am. & Eng. R. Cas. 611. *Iowa. Stone vs. Chicago & N. W. R. Co.*, 47 Iowa 82, 29 Am. Rep. 458. *Me. Muehlhausen vs. St. Louis R. Co.*, 91 Mo. 332, 2 S. W. Rep. 215, 28 Am. & Eng. R. Cas. 159. *Mont. Higley vs. Gilmer*, 3 Mont. 90, 25 Am. Rep. 450. *Fed. Gilmer vs. Higley*, 110 U. S. 47, bk. 28 L. ed. 62, 3 Sup. Ct. Rep. 471.

28. WRONGFUL EJECTION.—If passenger has once paid his fare he may not be ejected because he refuses to pay second time; and if he is so ejected, company will be liable to him for damages, and fact that conductor is honestly mistaken is no defense.—*Gorman vs. Southern Pac. Co.*, 97 Cal. 1, 5, 6, 23 Am. St. Rep. 157, 31 Pac. Rep. 1112.

§ 488. OFFICERS TO WEAR BADGE. Every conductor, baggage-master, engineer, brakeman, or other employee of any railroad corporation, employed on a passenger-train or at stations for passengers, must wear upon his hat or cap, or in some conspicuous place on the breast of his coat, a badge, indicating his office or station, and the initial letters of the name of the corporation by which he is employed. No collector or conductor, without such badge, is authorized to demand or to receive from any passenger any fare, toll, or ticket, or exercise any of the powers of his office or station; and no other officer or employee, without such badge, has any authority to meddle or interfere with any passenger or property.

History: Enacted March 21, 1872, founded upon § 50 Act May 20, 1861, Stats. 1861, p. 625.

1. Applied, cited, construed, referred to, etc.
2. Fare must be paid notwithstanding violation of statute.
3. Uniforms—Failure to distinguish between conductor and watchman.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO,** etc., in: *Cox vs. Los Angeles T. R.*, 109 Cal. 100, 104, 105, 41 Pac. Rep. 794 (construed and applied).

2. **FARE MUST BE PAID NOTWITHSTANDING VIOLATION OF STATUTE.**—Conductor, unless statute is complied with, is not "authorized" to demand or receive any fare or ticket from passenger, or to exercise any of the powers of his office or station; but if

passenger recognizes conductor he may pay fare to him; passenger is not entitled to free transportation by reason of conductor's omission to wear his badge.—*Cox vs. Los Angeles T. R.*, 109 Cal. 100, 105, 106, 41 Pac. Rep. 794.

3. **UNIFORMS**—Failure to distinguish between conductor and watchman.—Where railroad corporation furnishes watchman and conductor with uniforms which are not distinctive, so that engineer of train is misled by watchman's signal, thinking that it is conductor's signal, and result is that train is not properly managed, corporation is guilty of negligence.—*Kansas City M. & B. R. Co. vs. Sanders*, 98 Ala. 293, 13 So. Rep. 57.

§ 489. RATE OF CHARGES ESTABLISHED BY RAILROAD COMMISSIONERS. NOTICE SERVED. Whenever the board of railroad commissioners, in the discharge of its duties, establishes or adopts rates of charges for the transportation of passengers and freight, pursuant to the provisions of the constitution, said board must serve a printed schedule of such rates, and of any changes that may be made in such rates, upon the person, copartnership, company, or corporation affected thereby; and

[Copies of rates to be posted, where and by whom.] Upon such service it is the duty of such person, copartnership, company, or corporation to immediately cause copies of the same to be posted in all its offices, station-houses, warehouses, and landing offices affected by such rates, or change of rates, in such manner as to be accessible to public inspection during usual business hours.

Said board [of railroad commissioners] must also make such further publication thereof as it deems proper and necessary for the public good. If the party to be served is a corporation, such service may be made upon the president, vice-president, secretary, or managing agent thereof, and if a copartnership, upon any partner thereof.

[Rates go into effect, when.] The rates of charges established or adopted by said board, pursuant to the constitution and the laws of this state, must go into force and effect on the twentieth day after service of such schedule of rates, or changes in rates, upon the person, copartnership, company, or corporation affected thereby.

History: Enacted March 21, 1872, founded upon § 51 Act May 20, 1861, Stats. 1861, p. 625; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 370, held unconstitutional, see history, § 4 ante; amendment re-enacted March 21, 1905, c. CDXXXIII, pp. 575-576.

1. Applied, cited, construed, referred to, etc.
2. Commissioners' note.
3. Repeal by constitution.
4. Street railroads—Rates of charges on.
5. Tolls and compensation may be collected.

1. **Applied, cited, construed, referred to, etc., in:** Robinson vs. Southern Pac. Co., 105 Cal. 526, 544, 545 (cited in discussion), 546-549, 555 (construed with § 490), 38 Pac. Rep. 94, 109, 722, 28 L. R. A. 773.

2. **Commissioners' note.**—Commissioners say: "The three preceding sections are founded on Stats. 1861, p. 625, §§ 49 [41], 50, 51. The provision fixing grades of charges is in accordance with the statutes of the states of Maine,

Missouri, Kansas, and others, and frequent suggestions in this state. In Kansas and Missouri, six cents per mile is the maximum charge for passenger fare, and freightage is graded something like the provisions of this section."

3. **Repeal by constitution.**—It would seem that this section was repealed by Const. 1879, art. XII, § 22.—See Robinson vs. Southern Pac. Co., 105 Cal. 526, 545, 555, 38 Pac. Rep. 94, 109, 722, 28 L. R. A. 773.

4. **Street railroads—Rates of charges on.**—See post § 501 and note.

5. **Tolls and compensation may be collected.**—See ante § 465 subd. 3 and note.

§ 490. RAILROAD TICKETS ENTITLE PURCHASER TO WHAT. PENALTY FOR FAILURE TO PROVIDE SUCH TICKETS. Every railroad corporation must provide, and on being tendered the fare therefor fixed, as provided in the preceding section, furnish to every person desiring a passage on their passenger-cars a ticket, which entitles the purchaser to a ride, and to the accommodations provided on their cars, from the depot or station where the same is purchased to any other depot or station on the line of their road. Every such ticket entitles the holder thereof to ride on their passenger-cars to the station or depot of destination, or any intermediate station, and from any intermediate station to the depot of destination designated in the ticket, at any time within six months thereafter. Any corporation failing so to provide and furnish tickets, or refusing the passage which the same calls for when sold, must pay to the person so refused all actual damages caused thereby, with reasonable counsel fees expended in recovering same.

History: Enacted March 21, 1872; amended March 23, 1901, Stats. and Amdts. 1900-1, p. 600.

1. Applied, cited, construed, referred to, etc.
 2. Constitution has not repealed statute.
 3. Election of remedies for wrongful ejection.
 4. Excessive damages for ejection.
 5. Foreign corporation within statute.
 6. Scalper's ticket—Validity depends on conditions.
- 7-9. Stop-over privileges conferred—Vexatious stop-over.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in:** Robinson vs. Southern Pac. Co., 105 Cal. 526, 537 (construed and applied), 540 (referred to in dis. op.), 542-556 (construed together with § 489), 38 Pac. Rep. 94, 109, 722, 28 L. R. A. 773; Southern Pac. Co. vs. Robinson, 132 Cal. 408, 411, 413, 416, 418, 420, 64 Pac. Rep. 572 (construed and applied).

2. **CONSTITUTION HAS NOT REPEALED STATUTE.**—This section has not been repealed by the Const. 1879, art. XII, § 22.—Robinson vs. Southern Pac. Co., 105 Cal. 526, 537, 38 Pac. Rep. 94, 109, 722, 28 L. R. A. 773.

3. **ELECTION OF REMEDIES FOR WRONGFUL EJECTION.**—Where passenger is wrongfully ejected after he has surrendered his ticket he may either bring action for breach of contract or sue in tort for defendant's violation of its duty as common carrier.—Sloane vs. Southern Cal. R. Co., 111 Cal. 662, 677, 44 Pac. Rep. 320.

4. **EXCESSIVE DAMAGES FOR EJECTION.**—Where through misunderstanding woman who has surrendered her ticket is ejected from train and required to walk about three miles, verdict for \$1,400 is excessive, and she will be required to remit \$1,000.—Sloane vs. Southern Cal. R. Co., 111 Cal. 662, 687, 688, 44 Pac. Rep. 320.

5. **FOREIGN CORPORATION** doing business in this state is subject to this provision.—Robinson vs. Southern Pac. Co., 105 Cal. 526, 537, 38 Pac. Rep. 94, 109, 722, 28 L. R. A. 773.

6. **SCALPER'S TICKET** not good in hands of any one except original holder, where it contains provision to that effect, even though original purchaser has not signed it.—Drummond vs. Southern Pac. Co., 7 Utah 118, 25 Pac. Rep. 733.

Compare: Sleeper vs. Pennsylvania R. Co., 100 Pa. St. 259, 45 Am. Rep. 380.

See 5 Am. & Eng. Encyc. of Law (2d ed.) 490, to the effect that ordinary scalper's ticket is good.

7. **STOP-OVER PRIVILEGES ARE CONFERRED** by this section, and when ticket reads from San Francisco to Oakland "or" Alameda, passenger stopping at Oakland has right to continue to Alameda.—Robinson vs. Southern Pac. Co., 105 Cal. 526, 537, 38 Pac. Rep. 94, 109, 722, 28 L. R. A. 773 (McFarland, J.

vigorously dissenting). See *Southern Pac. Co. vs. Robinson*, 132 Cal. 408, 413, 64 Pac. Rep. 572.

8. Compare: *Drew vs. Central Pac. R. Co.*, 51 Cal. 425, 428, 429.

9. Vexatious step-over, demanded for mere purpose of prosecuting actions to recover penalty, road not liable.—*Southern Pac. Co. vs. Robinson*, 132 Cal. 408, 416, 64 Pac. Rep. 572.

§ 491. QUALITY OF RAIL TO BE USED. All railroads, other than street railroads and those used exclusively for carrying freight or for mining purposes, built by corporations organized under this chapter, must be constructed of the best quality of iron or steel rail, known as T or H rail, or other pattern of equal utility.

History: Enacted March 21, 1872, founded upon § 57 Act May 20, 1861, Stats. 1861, p. 627; amended March 30, 1874, Code Amdts. 1873-4, p. 212.

Applied, cited, construed, referred to, etc., in: *Board of Railroad Comrs. vs. Market St. R. Co.*, 132 Cal. 677, 678, 64 Pac. Rep. 1065 (re-

ferred to by the court in connection with other sections).

See ante § 481 and note par. 15.

§ 492. ELEVATED OR UNDERGROUND RAILROADS. WHO MAY GRANT FRANCHISE. The legislative or other body to whom is intrusted the government of the county, city and county, city, or town, under [1] such regulations, restrictions, and limitations, and [2] upon such terms and payment of license tax as the county, city and county, city, or town authority may provide, may grant franchises for the construction of elevated or underground railroad tracks over, across, or under the streets and public highways of any such county, city and county, city, or town, for the term not exceeding fifty years;

[Petition—By whom signed.] Provided, that before granting such franchise there shall be presented to such legislative or other body a petition signed by the owners of a majority of the landed property, other than public property, on the line of said elevated portion applied for.

History: Enacted March 27, 1895, Stats. and Amdts. 1895, p. 241; repealed by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 370, held unconstitutional, see history, § 4 ante.

§ 493. TO WHAT ABOVE SECTION APPLIES. The provisions of section four hundred and ninety-two shall apply to any railway corporation heretofore or hereafter incorporated.

History: Enacted March 27, 1895, Stats. and Amdts. 1895, p. 242; repealed by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 370, held unconstitutional, see history, § 4 ante; amended March 21, 1905, Stats. and Amdts. 1905, c. CDXXIV, p. 576.

§ 494. RAILROAD CORPORATIONS MAY SELL PROPERTY AND FRANCHISES TO OTHER RAILROADS. Any railroad corporation, person or persons, firm or corporation, owning any railroad in this state, may sell, convey, and transfer its property and franchises, or any part thereof, to any other railroad corporation, whether organized under the laws of this state or of any other state or territory, or under any act of congress; and any other such railroad corporation receiving such conveyance may hold and operate such railroad franchises and property within this state, build and operate extensions and branches thereof, and thereunto exercise the right of eminent domain, and do any other business in connection therewith, as fully and effectually to all intents and purposes as if such corporation were organized under the laws of this state;

[Terms and conditions of sale.] Provided, that before such sale, conveyance, or transfer shall become operative, an agreement in writing must be executed by the

parties thereto, containing the terms and conditions of the purchase and sale, and its execution must be authorized by the board of directors and ratified by three fourths of the stockholders of each of the railroad companies that are parties to such conveyance and transfer, and said agreement or conveyance shall be recorded in each county through which said road or roads pass in this state; and

[Not relieved from debts incurred.] Provided further, that no sale, conveyances, or transfer under this act shall relieve the franchise or property sold, conveyed, or transferred, from the liability of the grantor contracted or incurred in the operation, use, or enjoyment of such franchise or any of its privileges;

[Competing roads shall not be purchased.] Provided, that this section shall not authorize any corporation to purchase any railroad property operated in competition with it;

[Fares and toll shall not be increased. When lowered cannot be raised.] And provided further, that any or all established rates for fares and tolls for carrying passengers or freight between any points upon any railroad purchased under the provisions of this act, shall not be increased without the consent of the governmental authority in which is vested by law the power to regulate fares and freights; and provided further, that whenever a railroad corporation, which has purchased any line of road under this act, shall for the purposes of competing with any other common carrier lower its rates for transportation of passengers or freight from one point to another upon such line purchased, such reduced rates shall not be again raised or increased from such standard without the consent of the governmental authority in which shall be vested the power to regulate fares and freights; and

[Penalty for violation. Duty of attorney-general.] Provided further, that for every violation of the provisions of this act on the part of directors or governing officers of said corporation, the state shall be entitled to recover from such offending railroad company the sum of ten thousand dollars. It is hereby declared to be the duty of the attorney-general of the state, in the event of any such violation, to demand and collect from such company the said penalty; and he is hereby authorized and empowered to prosecute all the necessary actions in the name of the people of the state of California against such company in the courts of the state. All money so collected shall be paid into the general fund of this state.

History: Enacted Feb. 27, 1903, Stats. and Amdts. 1903, pp. 50-51.

Prior legislation covering the same ground, with same number to section, in almost the same language, was enacted March 22, 1899; the latter enactment made no reference to the former; to remedy this anomalous condition the last session of the legislature passed an act repealing the former of these two sections 494 in the following terms: "Section four hundred and ninety-four of the Civil Code, as approved March 22, 1899, is hereby repealed; provided, that nothing in this act contained shall be deemed to repeal any of the provisions of section 494 of said code as approved February 27, 1903." See Stats. and Amdts. 1905, c. CDXXV, p. 576.

TITLE IV.

STREET RAILROAD CORPORATIONS.

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| <p>§ 497. Railway tracks. How authority is obtained to lay. Propelling power. Limitations and restrictions.</p> <p>§ 498. Limitations and restrictions. Manner of laying tracks.</p> <p>§ 499. Two lines street railway may use same track.</p> <p>§ 500. Crossing tracks. Obstruction.</p> <p>§ 501. Rates of fare on street-cars. [Manner of construction of street-cars.] Penalty.</p> <p>§ 502. Time allowed for commencing and completing work. Penalty. Extension of time.</p> | <p>§ 503. May make further regulations and rules.</p> <p>§ 504. Penalty for overcharging.</p> <p>§ 505. Street railroads must furnish tickets. Penalty.</p> <p>§ 506. Proof of agency.</p> <p>§ 507. Reserved rights.</p> <p>§ 508. License to be paid to city or town.</p> <p>§ 509. Track for grading purposes.</p> <p>§ 510. Law governing street railroads.</p> <p>§ 511. Title applicable to natural persons alike with corporations.</p> |
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§ 497. RAILWAY TRACKS. HOW AUTHORITY IS OBTAINED TO LAY. PROPELLING POWER. LIMITATIONS AND RESTRICTIONS. Authority to lay railroad tracks through the streets and public highways of any incorporated city, city and county, or town, may be obtained for a term of years not exceeding fifty, from the trustees, council, or other body to whom is intrusted the government of the city, city and county, or town, under such restrictions and limitations, and upon such terms and payment of license tax, as the city, city and county, or town authority may provide.

[Motive power.] In no case must permission be granted to propel cars upon such tracks otherwise than by electricity, horses, mules, or by wire ropes running under the streets and moved by stationary engines, unless for special reasons in this title hereinafter mentioned; provided, however, that such board or body in granting the right, or at any time after the same is granted, to use electricity or any other of said modes, shall have power to impose such terms, restrictions, and limitations as to the use of streets and the construction and mode of operating such electric and other roads as may, by such board or body, be deemed for the public safety or welfare.

History: Enacted March 21, 1872, founded upon § 1 Act March 29, 1870, Stats. 1869-70, p. 481; amended March 3, 1876, Code Amdts. 1875-6, p. 76; Feb. 25, 1891, Stats. and Amdts. 1891, p. 12; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 370, held unconstitutional, see history, § 4 ante.

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 - 17, 18. Same—Rights included under.
 - 19-33. Construed as to its nature, operation, etc.
 - 34-36. Terms "railway" and "railroad" synonymous.
- #### II. City Ordinance.
37. Nature of ordinances granting right.
 - 38, 39. Same—Subject to veto.
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- 40, 41. Contractual in its nature.
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- 44-47. Extent of authority—Terms.
- 48, 49. Nature of authority.
50. Subsequent authorization by legislature—Effect of.

V. Same—2. Conditions Attached.

- 51-53. Nature and extent of condition.
- 54, 55. Same—As to liability and collection.

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- 56, 57. With condition—How far binding.
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59. Dedication authority for use.
60. Landowners' existing rights remain.
61. Streets in city are not held subject to contractual power.

62. Street railroad necessity and convenience.
62-73. Same—Nature of right—Joint with public.

74. Same—Laying of switch, etc., a lawful right.

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75. Authority of officials cannot interfere with public.

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78-81. Right of action—Damages—Ejectment, etc.

I. IN GENERAL.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Omnibus R. Co. vs. Baldwin*, 57 Cal. 160, 167 (construed and applied), 175 (construed), 176 (construed), 177 (construed with § 499); *Wright vs. California Cent. R. Co.*, 78 Cal. 360, 365, 20 Pac. Rep. 740 (miscited for § 487); *Schmidt vs. Market St. & W. G. R. Co.*, 90 Cal. 37, 38, 39, 27 Pac. Rep. 61 (construed and applied); *People ex rel. Sabichi vs. Los Angeles E. R. Co.*, 91 Cal. 333, 340, 27 Pac. Rep. 673 (construed); *Pacific R. Co. vs. Wade*, 91 Cal. 449, 454, 25 Am. St. Rep. 201, 27 Pac. Rep. 768, 13 L. R. A. 754 (construed and applied); *Elsenhuth vs. Ackerson*, 105 Cal. 87, 92-94, 38 Pac. Rep. 530 (construed and applied); *People ex rel. Warfield vs. Sutter St. R. Co.*, 117 Cal. 604, 611 (construed and applied), 616 (cited in dis. op.), 49 Pac. Rep. 736; *Board of Railroad Comrs. vs. Market St. R. Co.*, 132 Cal. 677, 678, 64 Pac. Rep. 1065 (cited by error for § 797).

As to how far street-railroad company is entitled to right of way over other vehicles, see monographic note 25 Am. St. Rep. 477.

As to municipal power to impose conditions on giving consent to street railroads, see monographic note by H. P. Farnham, 36 L. R. A. 33-36.

As to nature of interest of street-railway company in streets, see 25 Am. St. Rep. 476.

As to right of elevated railroad in street, see monographic note 25 Am. St. Rep. 479.

As to railroad company's rights in streets, see note 34 Am. St. Rep. 684.

As to right to adopt new improvements, see monographic note 25 Am. St. Rep. 479.

As to right to construct railway in street without compensation to abutting landowners, see monographic note 25 Am. St. Rep. 478.

As to right to maintain switches and turn-outs, see monographic note 25 Am. St. Rep. 478.

As to street railroad being an additional servitude, see note 30 Am. St. Rep. 775.

As to street-railroad corporations, rights, duties, and obligations with respect to streets, see monographic note 25 Am. St. Rep. 475.

As to what extent street railroads are public highways, see monographic note 25 Am. St. Rep. 476.

As to street railroads being subject to municipal regulations, see monographic note 25 Am. St. Rep. 479.

2. **ADOPTION OF PREVIOUS LEGISLATION—ACT OF MARCH 20, 1870**, adopted into the code and now in force.—*Omnibus R. Co. vs. Baldwin*, 57 Cal. 160, 165.

3. Act of 1870 gives municipal authorities right to grant rights of way upon reasonable conditions.—*Omnibus R. Co. vs. Baldwin*, 57 Cal. 160, 165. See *Northern Cent. R. Co. vs. Mayor etc. Baltimore*, 21 Md. 93; *Pacific R. Co. vs. Leavenworth*, 1 Dill. C. C. 393, 18 Fed. Cas. 953.

4. Act of 1872, which attempted to deprive city and county of San Francisco of right to impose any conditions upon corporations named therein, discriminated in favor of such corporation and against city and county.—*Omnibus R. Co. vs. Baldwin*, 57 Cal. 160, 165.

5. Act of 1872 § 17 exempting certain corporations therein named from conditions upon which only can any other individual or corporation acquire a similar right, unconstitutional and not adopted.—*Omnibus R. Co. vs. Baldwin*, 57 Cal. 160, 165.

6. Same—Repugnant to constitution § 31, art. IV, as conferring upon a particular corporation a means of employing its corporate powers in such manner as interferes with other like corporations under the general law.—*Omnibus R. Co. vs. Baldwin*, 57 Cal. 160, 176. See *San Francisco vs. Spring Valley Water Works*, 48 Cal. 493; *Waterloo Turnp. Co. vs. Cole*, 51 Cal. 331.

7. **LAWS GOVERNING—Nature of**—Constitution, both late and present, declares that "all laws of general nature shall have uniform operation."—*Omnibus R. Co. vs. Baldwin*, 57 Cal. 160, 165.

8. Act which prescribes how and in what manner individuals or corporations generally may acquire right to lay street-railroad tracks upon public streets are "of general nature."—*Omnibus R. Co. vs. Baldwin*, 57 Cal. 160, 165.

9. Laws relating to street-railroad company must be uniform.—*Omnibus R. Co. vs. Baldwin*, 57 Cal. 160, 165; *Miller vs. Kister*, 68 Cal. 142, 145, 3 Pac. Rep. 813; *People ex rel. Daniels vs. Henshaw*, 76 Cal. 436, 445, 18 Pac. Rep. 413; *People vs. Central Pac. R. Co.*, 83 Cal. 398, 413, 23 Pac. Rep. 303; *Ex parte Clancy*, 90 Cal. 553, 558, 27 Pac. Rep. 411; *Home for Inebriates vs. Reis*, 95 Cal. 142, 150, 30 Pac. Rep. 206.

10. Every general law must have uniform operation.—*French vs. Teschemaker*, 24 Cal. 518, 544; *Miller vs. Kister*, 68 Cal. 142, 145, 3 Pac. Rep. 813.

11. Must operate equally upon all persons and upon all things upon which it acts at all.—*French vs. Teschemaker*, 24 Cal. 518, 544; *Miller vs. Kister*, 68 Cal. 142, 145, 3 Pac. Rep. 813.

12. Laws exempting any particular person or corporation from their operation destroy their uniformity and are void.—*Omnibus R. Co. vs. Baldwin*, 57 Cal. 160, 165.

13. Exception of particular persons from operation of general law destroys its uniformity.—*Miller vs. Kister*, 68 Cal. 142, 145, 3 Pac. Rep. 813.

14. Legislature cannot discriminate or grant indulgence to one which is not accorded to another.—*French vs. Teschemaker*, 24 Cal.

TERMS AND CONDITIONS attached making company liable for cost of improvements in portion of street occupied by it, binds company for payment of such cost and also to collection thereof in same manner as other street assessments, and creates lien upon its roadbed, rolling stock and franchise.—*Schmidt vs. Market St. & W. G. R. Co.*, 90 Cal. 37, 40, 27 Pac. Rep. 61.

As to conditions attached, see pars. 51-55 this note.

57. With a condition attached thereto as one of its terms, to pay cost of any improvement of that portion of street which it occupies, equivalent to an express agreement for payment of its proportion of cost of whatever improvement city should at any time order.—*Schmidt vs. Market St. & W. G. R. Co.*, 90 Cal. 37, 40, 27 Pac. Rep. 61.

58. With condition attached binding company to pay for improvements in street occupied by it, holds company to pay assessment to person entitled to make collection.—*Schmidt vs. Market St. & W. G. R. Co.*, 90 Cal. 37, 40, 27 Pac. Rep. 61.

As to license tax, see post § 508 and note.

VII. RIGHT TO USE OF STREET.

59. **DEDICATION OF STREET** to public use authorizes any public use thereof for street purposes.—*Finch vs. Riverside & A. R. Co.*, 87 Cal. 597, 598, 25 Pac. Rep. 765.

60. **LANDOWNER'S RIGHT TO USE STREET** is same as that which existed prior to franchise giving railroad company power to occupy streets with tracks.—*Rafferty vs. Central Tr. Co.*, 147 Pa. St. 579, 30 Am. St. Rep. 763, 768, 769, 23 Atl. Rep. 884. See *Pacific R. Co. vs. Wade*, 91 Cal. 449, 453, 25 Am. St. Rep. 201, 27 Pac. Rep. 768, 13 L. R. A. 754.

61. **STREETS OF CITY ARE NOT HELD** as corporate or municipal property subject to the power of contractual disposition like the property of an individual.—*San Francisco vs. Spring Valley Water Works*, 48 Cal. 493, 529; *South Pasadena vs. Los Angeles T. R. Co.*, 109 Cal. 315, 322, 41 Pac. Rep. 1093; *In re Philadelphia & T. R. Co.*, 6 Whart. (Pa.) 25, 36 Am. Dec. 202.

62. **STREET RAILROADS ARE A CONVENIENCE** and necessity to all classes of people and are desired by all.—*Driscoll vs. Market St. C. R. Co.*, 97 Cal. 553, 564, 565, 33 Am. St. Rep. 203, 32 Pac. Rep. 591.

63. Cannot monopolize street or construct road in derogation of public and private use to which it has been applied.—*Pacific R. Co. vs. Wade*, 91 Cal. 449, 453, 25 Am. St. Rep. 201, 27 Pac. Rep. 768, 13 L. R. A. 754; *Janesville vs. Milwaukee & M. R. Co.*, 7 Wis. 484; *Farrand vs. Chicago & N. W. R. Co.*, 21 Wis. 435, 439.

64. Has equal right with traveling public to use of street with some few exceptions which arise from fact that cars are designed to run only on railroad track.—*Shea vs. Potrero & B. V. R. Co.*, 44 Cal. 414, 428.

65. Has no exclusive use, but uses street in common with public.—*Shea vs. Potrero & B. V. R. Co.*, 44 Cal. 414, 428; *Market St. R. Co. vs. Central R. Co.*, 51 Cal. 583, 586; *Mahoney vs.*

San Francisco & S. M. R. Co., 110 Cal. 471, 475, 42 Pac. Rep. 963; *Bailey vs. Market St. C. R. Co.*, 110 Cal. 320, 327, 42 Pac. Rep. 914; *Pacific R. Co. vs. Wade*, 91 Cal. 449, 455, 25 Am. St. Rep. 201, 27 Pac. Rep. 768, 13 L. R. A. 754; *Gilmore vs. Federal St. R. Co.*, 153 Pa. St. 31, 34 Am. St. Rep. 682, 25 Atl. Rep. 651.

66. No exclusive or proprietary right to surface occupied by tracks.—*Pacific R. Co. vs. Wade*, 91 Cal. 449, 453, 25 Am. St. Rep. 201, 27 Pac. Rep. 768, 13 L. R. A. 754; *Evers vs. Philadelphia Tr. Co.*, 176 Pa. St. 376, 53 Am. St. Rep. 674, 35 Atl. Rep. 140.

67. And cannot prevent others from driving or passing across or along their tracks at any time, so long as progress of cars is not materially interfered with.—*Bailey vs. Market St. C. R. Co.*, 110 Cal. 320, 327, 42 Pac. Rep. 914. See *Shea vs. Potrero R. Co.*, 44 Cal. 414; *Chicago W. D. R. Co. vs. Ingraham*, 131 Ill. 659, 23 N. E. Rep. 350; *Rend vs. Chicago etc. R. Co.*, 8 Ill. App. 517.

68. No exclusive use to streets, even at crossings.—*Evers vs. Philadelphia Tr. Co.*, 176 Pa. St. 376, 53 Am. St. Rep. 674, 35 Atl. Rep. 140.

69. Even between their own tracks.—*Gilmore vs. Federal St. R. Co.*, 153 Pa. St. 31, 34 Am. St. Rep. 682, 25 Atl. Rep. 651; *Evers vs. Philadelphia Tr. Co.*, 176 Pa. St. 376, 53 Am. St. Rep. 674, 35 Atl. Rep. 140.

70. Gives no right to destroy street as public highway.—*Pacific R. Co. vs. Wade*, 91 Cal. 449, 453, 25 Am. St. Rep. 201, 27 Pac. Rep. 768, 13 L. R. A. 754; *Evans vs. Chicago, St. P. M. & O. R. Co.*, 86 Wis. 597, 39 Am. St. Rep. 908, 57 N. W. Rep. 354.

71. Paramount to that of persons and ordinary vehicles.—Upon that portion of street which alone they travel and cannot leave.—*Bailey vs. Market St. C. R. Co.*, 110 Cal. 320, 327, 42 Pac. Rep. 914.

72. Peculiar only in so far as its inability to move from its track made it so.—*Mahoney vs. San Francisco & S. M. R. Co.*, 110 Cal. 471, 475, 42 Pac. Rep. 963.

73. Trespass is not committed by citizens entering upon track.—*Bailey vs. Market St. C. R. Co.*, 110 Cal. 320, 327, 42 Pac. Rep. 914.

74. Under act of the legislature authorizing grantees of railroad franchise to construct upon line of route prescribed proper and necessary switches and turn-outs, laying down of switch, turn-out and sidetrack and use of it, is the exercise of lawful right.—*Carson vs. Central R. Co.*, 35 Cal. 325, 331, 332. See *Ill. Moses vs. Pittsburgh, Ft. W. & C. R. Co.*, 21 Ill. 516. *Ind. New Albany & S. R. Co. vs. O'Daily*, 12 Ind. 551. *N. J. Morris & Essex R. Co. vs. Newark*, 10 N. J. Eq. (2 Stock.) 352, 359. *N. Y. Davis vs. Mayor of New York*, 14 N. Y. 506, 522, 524; *Radcliff vs. Mayor etc. Brooklyn*, 4 N. Y. 195, 197.

VIII. LANDOWNER—POSITION OF.

75. **MUNICIPAL CORPORATIONS**, whether owner of fee in streets in trust for public, or whether merely trustees of streets and highways, as such, irrespective of any title in soil, have power to authorize their appropriation to

all uses conducive to public good which do not interfere with their complete and unrestricted use as highways.—*Montgomery vs. Santa Ana W. R. Co.*, 104 Cal. 186, 189, 43 Am. St. Rep. 89, 37 Pac. Rep. 786, 25 L. R. A. 654. See *People vs. Kerr*, 27 N. Y. 188, 202; *City of Cincinnati vs. White*, 31 U. S. (6 Pet.) 431, 432, bk. 3 L. ed. 452.

76. **URBAN SERVITUDES** are essential to enjoyment of streets in cities and to comfort of citizens in their densely populated limits.—*Montgomery vs. Santa Ana W. R. Co.*, 104 Cal. 186, 189, 43 Am. St. Rep. 89, 37 Pac. Rep. 786, 25 L. R. A. 654.

77. **Authorize use of street for track of street-car company** under license of city authority without compensation to owner of fee.—*Montgomery vs. Santa Ana W. R. Co.*, 104 Cal. 186, 189, 43 Am. St. Rep. 89, 37 Pac. Rep. 786, 25 L. R. A. 654.

See *Finch vs. Riverside & A. R. Co.*, 87 Cal. 597, 598, 25 Pac. Rep. 765.

78. **Right of action.**—Holder of title in public street may maintain action for damages to his property therein, or may be remitted to injunction to restrain use of street, or if the injury is consummated, he may maintain action for damages or may institute pro-

ceedings to abate same as a nuisance, as the case may be.—*Montgomery vs. Santa Ana W. R. Co.*, 104 Cal. 186, 189, 43 Am. St. Rep. 89, 37 Pac. Rep. 786, 25 L. R. A. 654.

79. **Ejectment will not lie by owner of title** as against one who has taken no possession thereof and is only in exercise of easement thereon conferred by municipal authorities pursuant to their power, and valid as to the public, expiring with easement to public.—*Montgomery vs. Santa Ana W. R. Co.*, 104 Cal. 186, 189, 43 Am. St. Rep. 89, 37 Pac. Rep. 786, 25 L. R. A. 654.

80. **Will be allowed by owner of fee against street-car company** using street in unauthorized and unlawful manner.—*Finch vs. Riverside & A. R. Co.*, 87 Cal. 597, 602, 25 Pac. Rep. 765. See *Weyl vs. Sonoma V. R. Co.*, 69 Cal. 202, 203, 10 Pac. Rep. 510.

81. **Where company enters upon public streets and constructs railroad** without authority from municipal authorities.—*Montgomery vs. Santa Ana W. R. Co.*, 104 Cal. 186, 189, 43 Am. St. Rep. 89, 37 Pac. Rep. 786, 25 L. R. A. 654. See *Weyl vs. Sonoma V. R. Co.*, 69 Cal. 202, 10 Pac. Rep. 510; *Finch vs. Riverside & A. R. Co.*, 87 Cal. 597, 25 Pac. Rep. 765.

§ 498. LIMITATIONS AND RESTRICTIONS. MANNER OF LAYING TRACKS. The city or town authorities, in granting the right of way to street-railroad corporations, in addition to the restrictions which they are authorized to impose, must require a strict compliance with the following conditions, except in the cases of prismoidal or other elevated railways. In such cases, said railway shall be required to be constructed in such a manner as will present the least obstruction to the freedom of the streets on which it may be erected, when allowed by the granting power:

1. To construct their tracks on those portions of streets designated in the ordinance granting the right, which must be as nearly as possible in the middle thereof.
2. To plank, pave, or macadamize the entire length of the street, used by their track, between the rails, and for two feet on each side thereof, and between the tracks, if there be more than one, and to keep the same constantly in repair, flush with the street, and with good crossings.
3. That the tracks must not be more than five feet wide within the rails, and must have a space between them sufficient to allow the cars to pass each other freely.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 212; April 3, 1876, Code Amdts. 1875-6, p. 77; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 371, held unconstitutional, see history, § 4 ante.

Prismoidal railway.—The exception as to "prismoidal and other elevated railways" was introduced by the amendment of 1876. A "prismoidal railway" is one having a prism-shaped single continuous rail, beam, or truss supported on posts or columns. The motor and cars run astride the beam, the motor being provided with grip-wheels to obtain the hold on the track requisite for draft. This is a species of single-rail type of railway, an improvement on the Djiboniti-monorail conceived and put in operation by M. Lartigue a century ago. There are several different systems or modifications of this railway. In the Cook System, the Barmen roads, and the Romanoff System in Russia, the motor and carriage are suspended in the air, running on an inverted rail. The idea has been most highly developed and perfected in the United States, in what is known as the Cook System, with the Behr System in England a close second. The latter system has been in operation in Ballyhunnion, Ireland, for several years, and a road of this kind has re-

cently been completed from Manchester to Liverpool—a distance of thirty-four miles—on which the regular running time is twenty minutes,—just one half the time of the swiftest train on the two-rail road. The improved monorail seems to have solved the problem of rapid, safe, and cheap transportation. But neither the Tunis road nor the Behr System is, properly speaking, an elevated road, but a surface railway. In each the motors and cars are mounted on two-wheel trucks geared tandem fashion, running on a rail strung along the ground, with an inverted rail overhead.

I. In General.

1. Applied, cited, construed, referred to, etc.
- 2, 3. Construed as to assessment of expense and location.
- 4, 5. Same—With reference to its requirements.
6. Judicial notice taken of requirements.

II. Construction of Road.

7. Law placing construed strictly.
8. Laying along side of street unlawful.
9. Same—Meaning controlled by circumstances.
10. Same—Physical possibility to comply exists.
11. Words "as nearly" construed with "as possible."
12. Evidence—Reason for non-compliance must be shown.
13. Same—Traffic less obstructed by act done not enough.

III. Repairs—1. Duty as to.

14. Duty to repair within stipulation.
15. Same—Not increased by subsequent obligation.
16. Repair distinguished from reconstruction.

IV. Same—2. Liability for.

17. Liability for assessments for repairs—Code.
- 18, 19. Same—Extent of existence before code.
20. Track—Meaning.

I. IN GENERAL.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in:** *Whiting vs. Townsend*, 57 Cal. 515, 518 (construed); *Finch vs. Riverside & A. R. Co.*, 87 Cal. 597, 599, 25 Pac. Rep. 765 (construed and applied); *McVerry vs. Boyd*, 89 Cal. 304, 309, 26 Pac. Rep. 385 (construed); *Pacific R. Co. vs. Wade*, 91 Cal. 449, 454, 25 Am. St. Rep. 201, 27 Pac. Rep. 768, 13 L. R. A. 754 (referred to with other sections).

As to duty of company to keep tracks in repair, remove snow, and exercise care over and pave streets, see monographic note 25 Am. St. Rep. 477-482.

As to liability of street-railway company for defects in track or street, see monographic note by G. H. Parmelee, 52 L. R. A. 448-463.

As to liability of street railway company for paving assessment, see monographic note by J. H. Hill, 46 L. R. A. 193-203.

2. **CONSTRUED AS NOT REQUIRING** that any portion of expense incurred under contract with municipal authorities in improving street over which track runs, shall be assessed to company.—*McVerry vs. Boyd*, 89 Cal. 304, 309, 26 Pac. Rep. 385.

3. Words "as nearly as possible" in middle of street construed to mean as near as practicable.—*Finch vs. Riverside & A. R. Co.*, 87 Cal. 597, 600, 25 Pac. Rep. 765.

4. **Requirements of code** those of general statute, of which every citizen is presumed

conclusively to have knowledge.—*Whiting vs. Townsend*, 57 Cal. 515, 518.

5. **Requirements of section** are those of general statute, of which the court takes judicial notice.—*Whiting vs. Townsend*, 57 Cal. 515, 518.

6. **JUDICIAL NOTICE** taken of requirements of statute imposing upon companies the obligation to plank, pave, or macadamize and repair street as pointed out and provided by provisions of code.—*Whiting vs. Townsend*, 57 Cal. 515, 518.

II. CONSTRUCTION OF ROAD.

7. **PLACING OF TRACKS.**—Law requires that it must be placed as near middle of street as practicable and enjoins "street compliance" with requirements.—*Finch vs. Riverside & A. R. Co.*, 87 Cal. 597, 601, 25 Pac. Rep. 765.

8. **Laying track along side of street, unlawful as an obstruction, when it is practical to lay it in center.**—*Finch vs. Riverside & A. R. Co.*, 87 Cal. 597, 600, 25 Pac. Rep. 765.

9. **Meaning of words** must be that location must be controlled in some degree by circumstances of each particular case.—*Finch vs. Riverside & A. R. Co.*, 87 Cal. 597, 600, 25 Pac. Rep. 765.

10. **Physical possibility** to place track in middle of street always exists, although it may not be legally possible.—*Finch vs. Riverside & A. R. Co.*, 87 Cal. 597, 600, 25 Pac. Rep. 765.

11. **Use of words "as nearly"** in connection with "as possible" shows that it was foreseen that location in middle of street could not always be made.—*Finch vs. Riverside & A. R. Co.*, 87 Cal. 597, 600, 25 Pac. Rep. 765.

12. **EVIDENCE**—Must show reason why track could not be located in middle of street.—*Finch vs. Riverside & A. R. Co.*, 87 Cal. 597, 600, 25 Pac. Rep. 765.

13. **Traffic less obstructed by laying track at side than in middle of street** no defense to action for obstruction.—*Finch vs. Riverside & A. R. Co.*, 87 Cal. 597, 600, 25 Pac. Rep. 765.

III. REPAIRS—1. DUTY AS TO.

14. **REPAIRS.**—Street-railway company is bound to keep in repairs portions of street used by it, even in absence of stipulations in charter requiring it so to do.—*Western Pav. & Supply Co. vs. Citizens St. R. Co.*, 128 Ind. 525, 25 Am. St. Rep. 462, 26 N. E. Rep. 182, 23 Id. 33, 10 L. R. A. 770.

15. **Liability to repair imposed by ordinance** cannot be increased by subsequent obligation imposing further liability upon company without its consent.—*Western Pav. & Supply Co. vs. Citizens St. R. Co.*, 128 Ind. 525, 25 Am. St. Rep. 462, 26 N. E. Rep. 182, 23 Id. 33, 10 L. R. A. 770.

16. **REPAIR DISTINGUISHED FROM RE-**

CONSTRUCTION.—Repair means to restore sound state after decay, injury, dilapidation, or partial destruction, while reconstruct means to construct or build again.—*Western Pav. & Supply Co. vs. Citizens St. R. Co.*, 128 Ind. 525, 25 Am. St. Rep. 462, 26 N. E. Rep. 188, 28 Id. 88, 10 L. R. A. 770; *State vs. Corrigan Con. St. R. Co.*, 85 Mo. 263, 55 Am. Rep. 361.

IV. SAME—2. LIABILITY FOR.

17. LIABILITY FOR ASSESSMENT FOR REPAIRS.—Liability of railroad company for expenses incurred under contract with municipal authorities for repairs of streets is not mentioned or referred to in section of code, which only provides that owners of railroad shall improve certain portions over which their

track is laid.—*McVerry vs. Boyd*, 89 Cal. 304, 309, 26 Pac. Rep. 885.

18. Company only liable to keep "space between the rails" in repair under acts of 1861-1866.—*Robbins vs. Omnibus R. Co.*, 32 Cal. 472, 473 (decided prior to code).

19. Company not liable, under acts of 1861-1866, to repair between double track.—*Robbins vs. Omnibus R. Co.*, 32 Cal. 472, 473 (decided prior to the present code).

20. Word "track" used in certain sense in original act cannot be said to be used in different sense in subsequent acts amending former.—*Robbins vs. Omnibus R. Co.*, 32 Cal. 472, 473.

§ 499. TWO LINES OF STREET RAILWAY MAY USE SAME TRACK. Two lines of street railway, operated under different managements, may be permitted to use the same street, each paying an equal portion for the construction of the tracks and appurtenances used by said railways jointly;

[Extent to which may be so used.] But in no case must two lines of street railway, operated under different managements, occupy and use the same street or tracks for a distance of more than five blocks consecutively.

History: Enacted March 21, 1872; amended Feb. 25, 1891, Stats. and Amdts. 1891, p. 13. In force Feb. 25, 1891.

I. In General.

1. Applied, cited, construed, referred to, etc.
- 2-12. Construed as to its meaning, power, application, etc.
13. Same—Second clause adds another limitation.
14. Same—Terms "cost" or "value."

II. Nature of Grant.

15. Grant in excess of code, void.
16. Same of subsequent franchise to another—Effect of.
- 17, 18. Use of line as performance of contract to build.

III. Payment of Portion of Expenses.

19. Equal portion required to be paid.
- 20, 21. When no prior track exists.
22. Right to fix—Receiver of insolvent.
23. Same—Of action to enjoin use.

I. IN GENERAL.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *People vs. Rich*, 54 Cal. 74, 75 (construed and applied); *Omnibus R. Co. vs. Baldwin*, 57 Cal. 160, 163 (construed and applied), 170 (cited in dis. op.); *Pacific R. Co. vs. Wade*, 91 Cal. 449, 452, 454, 25 Am. St. Rep. 201, 27 Pac. Rep. 768, 13 L. R. A. 754 (construed and applied); *Illinois Trust & S. Bk. vs. Pacific R. Co.*, 115 Cal. 285, 297, 47 Pac. Rep. 60 (cited in discussion); *Hook vs. Los Angeles R. Co.*, 129 Cal. 180, 182, 183, 61 Pac. Rep. 912 (construed and applied); *Los Angeles T. Co. vs. Wilshire*, 135 Cal. 654, 659, 67 Pac. Rep. 1086 (referred to in discussion).

As to joint use of tracks, see 27 Am. & Eng. Encyc. of L. (2d ed.) 26.

As to right of one street-railway company to use tracks of another, see monographic note 25 Am. St. Rep. 477.

2. CONSTRUED.—As giving municipal ass-
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therities power to grant another company franchise to connect with existing track, and to use same distances not exceeding five blocks, the same as though such terms were expressly stated in grant to existing company.—*Pacific R. Co. vs. Wade*, 91 Cal. 449, 454, 25 Am. St. Rep. 201, 27 Pac. Rep. 768, 13 L. R. A. 754.

3. As meaning that right to use same street cannot be granted to more than two corporations in any case.—*Omnibus R. Co. vs. Baldwin*, 57 Cal. 160, 163.

4. As meaning that if right is granted to two corporations it must be upon condition that both use same track and that each pay equal portion of cost of constructing it.—*Omnibus R. Co. vs. Baldwin*, 57 Cal. 160, 163.

5. As not permitting occupation of same street by two corporations for more than five blocks.—*People vs. Rich*, 54 Cal. 74, 75, distinguishing *Oakland R. Co. vs. Oakland, B. & F. V. R. Co.*, 45 Cal. 865, 378, 13 Am. Rep. 181, which was decided under act of March 29, 1870, proviso in which statute merely forbid use of same track by two companies "for more than five blocks in all."

6. As not requiring payment of one half of money which might have been paid for construction of tracks and appurtenances, which had become greatly dilapidated, or might have been constructed at time when materials were much more expensive.—*Hook vs. Los Angeles R. Co.*, 129 Cal. 180, 183, 61 Pac. Rep. 912.

7. As permitting corporations to use same street subject to condition and on that condition only.—*Omnibus R. Co. vs. Baldwin*, 57 Cal. 160, 163.

8. As prospective for each of two lines of

street railroad.—*Hook vs. Los Angeles R. Co.*, 129 Cal. 180, 183, 61 Pac. Rep. 912.

9. Limitation in first clause not qualified with respect to use of same street by subsequent clause.—*Omnibus R. Co. vs. Baldwin*, 57 Cal. 160, 168.

10. Literally construed, applies to case where permission is given to them to use street in which no track has yet been constructed.—*Hook vs. Los Angeles R. Co.*, 129 Cal. 180, 183, 61 Pac. Rep. 912.

11. Proper interpretation to section extends to case in which franchise granted to operate street railway over portion of street on which another has already been constructed and is in operation.—*Hook vs. Los Angeles R. Co.*, 129 Cal. 180, 183, 61 Pac. Rep. 912.

12. Provisions relating to compensation as contained in this section relating particularly to street railroads are controlling.—*Pacific R. Co. vs. Wade*, 91 Cal. 449, 452, 25 Am. St. Rep. 201, 27 Pac. Rep. 768, 13 L. R. A. 754.

13. Second clause construed as containing nothing conflicting with first but as adding another limitation with reference to use of same street or track for distance of more than five blocks.—*Omnibus R. Co. vs. Baldwin*, 57 Cal. 160, 168.

14. Term "cost" or "value" not used in defining rights and obligations of two companies.—*Hook vs. Los Angeles R. Co.*, 129 Cal. 180, 183, 61 Pac. Rep. 912.

II. NATURE OF GRANT.

15. NATURE OF GRANT.—Grant of right to use more than five blocks over street upon which another corporation has right of way for use of street railroad void.—*Omnibus R. Co. vs. Baldwin*, 57 Cal. 160, 169. See *People vs. Rich*, 54 Cal. 74.

16. Grant to cable company made to facilitate and not abridge public use of street; subsequent franchise granted to electric company under provisions of code, is not taking of property of cable company for any higher or definite purpose than that to which it is already devoted.—*Pacific R. Co. vs. Wade*, 91 Cal. 449, 454, 25 Am. St. Rep. 201, 27 Pac. Rep. 768, 13 L. R. A. 754. See *Omnibus R. Co. vs. Baldwin*, 57 Cal. 160, 175. III. *Chicago & W. I. Co. vs. Dunbar*, 100 Ill. 110, 138. *Mo. St. Louis R. Co. vs. Southern R. Co.* (Mo. March 31, 1891), 15 S. W. Rep. 1013; *St. Louis R. Co. vs. Southern R. Co.*, 105 Mo. 577, 16 S. W.

Rep. 960. *N. J. Jersey City & Hob. H. R. Co. vs. Jersey City & B. R. Co.*, 21 N. J. Eq. (6 C. E. Gr.) 550, 556. *N. Y. People vs. Kerr*, 37 Barb. 357; *Sixth Avenue Co. vs. Kerr*, 45 Barb. 138. *Ohio. Kinsman St. R. Co. vs. Broadway & N. S. R. Co.*, 36 Ohio St. 339.

17. Use of the line of another company for not more than five blocks consecutively is performance of contract to build street railroad.—*Los Angeles Tr. Co. vs. Wilshire*, 135 Cal. 654, 659, 67 Pac. Rep. 1086.

18. Use of tracks of existing company for distance prescribed by code may prove most practical and usual way to build double-track street railroad.—*Los Angeles Tr. Co. vs. Wilshire*, 135 Cal. 654, 659, 67 Pac. Rep. 1086.

III. PAYMENT OF PORTION OF EXPENSES.

19. PORTION OF EXPENSES.—Section states that each shall pay an equal portion "for construction" without specifying of what "portion" consists.—*Hook vs. Los Angeles R. Co.*, 129 Cal. 180, 183, 61 Pac. Rep. 912.

20. Where no track has yet been constructed, construction of track and appurtenances is matter of construction between two lines under which expenses of construction is borne according to provisions of section.—*Hook vs. Los Angeles R. Co.*, 129 Cal. 180, 183, 61 Pac. Rep. 912.

21. Ellipsis in section supplied by holding legislature intended that in absence of some unusual or controlling circumstances each should contribute one half of reasonable expenses "for the construction," if at time right to use same is sought, both lines were, for first time, making joint use of street and constructing tracks and appurtenances thereon.—*Hook vs. Los Angeles R. Co.*, 129 Cal. 180, 183, 61 Pac. Rep. 912.

22. RIGHT TO FIX PAYMENT OF PORTIONS.—Receiver of insolvent street-railroad company, with permission of court, may settle amount to be paid for construction of track used in common with other company.—*Pacific R. Co. vs. Wade*, 91 Cal. 449, 453, 455, 25 Am. St. Rep. 201, 27 Pac. Rep. 768, 13 L. R. A. 754.

23. STREET-RAILROAD COMPANY HAS NO RIGHT OF ACTION TO ENJOIN OCCUPYING AND USING STREET BY ANOTHER COMPANY, UNDER CITY ORDINANCE, WITHOUT PROPER REASONS, AS SUCH RIGHT WILL BE INQUIRED INTO BY APPROPRIATE PROCEDURE.—*Market St. R. Co. vs. Central R. Co.*, 51 Cal. 533, 536.

§ 500. CROSSING TRACKS. OBSTRUCTIONS. Any proposed railroad track may be permitted to cross any track already constructed, the crossing being made as provided in chapter two, title three, of this part. In laying down the track and preparing therefor, not more than one block must be obstructed at any one time, nor for a longer period than ten working days.

History: Enacted March 21, 1872.

1. Right to maintain does not prevent.
- 2, 3. Right of action for crossing.
- 4-6. Term "crossing" construed.

As to crossing other railroads, see 27 Am. & Eng. Encyc. of L. (2d ed.) 24, 25.

As to crossing railroad without compensation, see monographic note by Burdett A. Rich, editor in chief, in 29 L. R. A. 485, also notes 29 L. R. A. 367, 80 L. R. A. 508; 34 L. R. A. 572, 36 L. R. A. 839, and 44 L. R. A. 269.

1. RIGHT TO MAINTAIN A STREET RAIL-

ROAD does not prevent crossing of its track by another railroad maintained for similar purpose.—*Market St. R. Co. vs. Central R. Co.*, 51 Cal. 583, 586.

2. Fact that company crossing track of another is without proper license, gives other no right of action to enjoin such use.—*Market St. R. Co. vs. Central R. Co.*, 51 Cal. 583, 586.

3. Fact that one company crosses another without lawful license, inquired into on appropriate proceedings.—*Market St. R. Co. vs. Central R. Co.*, 51 Cal. 583, 586.

4. **CROSSINGS.**—Term "crossing," as used in ordinance, according to its common use,

includes all intersection of streets.—*Schneider vs. Market St. R. Co.*, 134 Cal. 482, 487, 66 Pac. Rep. 734.

5. Term "crossing," as used in ordinance, applies equally, though one intersecting street crossing may terminate at point of intersection.—*Schneider vs. Market St. R. Co.*, 134 Cal. 482, 487, 66 Pac. Rep. 734.

6. Reason of rule applies equally to all street crossings or intersections, whether intersecting street passes beyond or terminates in it.—*Schneider vs. Market St. R. Co.*, 134 Cal. 482, 487, 66 Pac. Rep. 734.

§ 501. RATES OF FARE ON STREET CARS. [MANNER OF CONSTRUCTION OF STREET CARS.] PENALTY. The rates of fare on the cars must not exceed ten cents for one fare for any distance under three miles, and in municipal corporations of the first class must not exceed five cents for each passenger per trip of any distance in one direction either going or coming, along any part of the whole length of the road or its connections. The cars must be of the most approved construction for the comfort and convenience of passengers, and provided with brakes to stop the same, when required.

[Fine for violation.] A violation of the provisions of this section subjects the corporation to a fine of one hundred dollars for each offense.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 371, held unconstitutional, see history, § 178; amendment re-enacted March 16, 1908, Stats. and Amdts. 1903, pp. 172-173.

1. Applied, cited, construed, referred to, etc.
- 2, 3. Fares—Power over—Free pass—Convenience, etc.
4. Same—Transfer—Nature of.
- 5-7. Same—Ordinance relating to—Nature, etc.
8. Speed—Power to regulate.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Driscoll vs. Market St. C. R. Co.*, 97 Cal. 553, 563, 33 Am. St. Rep. 203, 32 Pac. Rep. 591 (cited, but thought not to apply since amendment of 1903); *Schneider vs. Market St. R. Co.*, 134 Cal. 482, 485, 66 Pac. Rep. 734 (cited, but thought not to apply since amendment of 1903).

As to speed of street-railroads, see monographic note by Irvin Taylor, 25 L. R. A. 663, and notes 57 Am. St. Rep. 735, 60 Am. St. Rep. 591, and 27 Am. & Eng. Encyc. of L. (2d ed.) 49.

As to ordinance as evidence of speed, see note 16 Am. St. Rep. 247.

2. **FARES.**—Municipal authorities, like individuals, have no authority to provide free passes or other transportation for anybody, unless convict or some such person to whom city occupies relation of guardianship.—*South Pasadena vs. Los Angeles T. R. Co.*, 109 Cal. 315, 322, 41 Pac. Rep. 1093.

3. City has no right to bargain with railroad companies for rates of transportation to distant points for its convenience and others to whom it does not stand in loco parentis, in absence of legislative authority.—*South Pasadena vs. Los Angeles T. R. Co.*, 109 Cal. 315, 320, 41 Pac. Rep. 1093. See *San Diego Water Co. vs. San Diego*, 59 Cal. 517.

4. **TRANSFER.**—Part of contract of carriage, and taken subject to conditions upon which granted as prescribed in ordinance.—*Ex Parte Lorenzen*, 128 Cal. 431, 438, 79 Am. St. Rep. 47, 61 Pac. Rep. 68, 50 L. R. A. 55.

5. Ordinance regulating issue of transfers from passengers to other cars operated by same or different owners and received as fare, and punishing violation of same as misdemeanor, constitutional.—*Ex Parte Lorenzen*, 128 Cal. 431, 436, 79 Am. St. Rep. 47, 61 Pac. Rep. 68, 50 L. R. A. 55.

6. Ordinance relating to transfer, and restraining the assignment or giving way of same, reasonably and equitably construed.—*Ex Parte Lorenzen*, 128 Cal. 431, 438, 79 Am. St. Rep. 47, 61 Pac. Rep. 68, 50 L. R. A. 55.

7. Ordinance or statute relating to transfer construed according to essence and spirit of law, even against express language.—*Ex Parte Lorenzen*, 128 Cal. 431, 438, 79 Am. St. Rep. 47, 61 Pac. Rep. 68, 50 L. R. A. 55.

8. **RATE OF SPEED.**—Street-railroad company has no right to run its cars at such high rate of speed over public crossing or through frequented street in city as will endanger public safety, and put those who are rightfully in use of street to extra hazards, no matter whether ordinance limits speed or not.—*Hall vs. Ogden City St. R. Co.*, 13 Utah 243, 57 Am. St. Rep. 726, 44 Pac. Rep. 1046. See Ill. *Chicago B. & Q. R. Co. vs. Perkins*, 135 Ill. 127, 17 N. E. Rep. 1. Ky. *Louisville etc. R. Co. vs. Commonwealth*, 13 Bush (Ky.) 123, 26 Am. Rep. 205. N. Y. *Thompson vs.*

New York C. & H. Riv. R. Co., 110 N. Y. 636, 17 Ives, 144 U. S. 408, bk. 36 L. ed. 485, 12 Sup. N. E. Rep. 690. Fed. Grand Trunk R. Co. vs. Ct. Rep. 679.

§ 502. **TIME ALLOWED FOR COMMENCING AND COMPLETING WORK. PENALTY. EXTENSION OF TIME.** Work to construct the railroad must be commenced in good faith within not more than one year from the date of the taking effect of the ordinance granting the right of way, and said work must be completed within not more than three years after the taking effect of such ordinance; provided, that the governing body of such municipal corporation at the time of granting said right of way shall have the power to fix the time for either the commencing or completion, or both, of said work; not, however, to a time less than six months for commencing, and not less than eighteen months for completing the same.

[Failure to comply—Forfeiture.] A failure to comply with either of the foregoing provisions of this section, or with either of the provisions of the ordinance granting said right of way, works a forfeiture of the right of way, and also of the franchise, unless the uncompleted portion is abandoned by the person or corporation to whom said right of way is granted, with the consent of the authorities granting the right of way, such abandonment and consent to be in writing.

[Extension—Who may grant—When and for what term.] The authority granting the right of way shall have the power to grant an extension of time for the completion of said work, if it appear that the work has been commenced within the time fixed, and prosecuted in good faith; but no extension of time shall be granted for the commencement of said work, and shall not be granted for more than one year for the completion of the same. All extensions of time shall be in writing, and made a matter of record in the municipality. Provided further, that this act shall not in any way affect any franchise or right of way granted before its passage.

History: Enacted March 21, 1872; amended Feb. 25, 1895, Stats. and Amdts. 1895, p. 17. In effect Feb. 25, 1895.

- I. Commencement and Completion of Work.
 - 1. Applied, cited, construed, referred to, etc.
 - 2, 3. Construed with reference to time, etc.
 - 4. Condition of code followed in grant.
 - 5, 6. Commencement of work—Time—Amount.
 - 7-9. Same—Nature of—Question of fact, etc.
 - 10-13. Same—Extension of time—Validity of.
- II. Forfeiture for Non-compliance—1. In General.
 - 14. Construed as not self-executing.
 - 15, 16. Commencement—Time of.
 - 17. Expression "work of forfeiture"—Meaning of.
 - 18. Nature of at common law.
 - 19-23. When it arises—Non-use.
- III. Same—2. Enforcement of.
 - 24-26. Party able to invoke.
 - 27-30. When action necessary—Time.
 - 31-35. When action not necessary—Legislative acts.
 - 36-38. Words held to create.
- IV. Waiver of Forfeiture.
 - 39-41. By act of party—What constitutes.
 - 42-46. By act of legislature—Constitutionality.

I. COMMENCEMENT AND COMPLETION OF WORK.

1. APPLIED, CITED, CONSTRUED, RE-

FERRED TO, etc., in: Omnibus R. Co. vs. Baldwin, 57 Cal. 160, 178 (construed and applied); People ex rel. Sabichi vs. Los Angeles Electric R. Co., 91 Cal. 338, 341, 342, 27 Pac. Rep. 673 (construed and applied); City of San Pedro vs. Southern Pac. R. Co., 101 Cal. 333, 337, 35 Pac. Rep. 993 (cited in discussion); Santa Rosa City R. Co. vs. Central St. R. Co. (Cal. Jan. 6, 1895), 38 Pac. Rep. 986, 988, 990 (construed and applied); People ex rel. Warfield vs. Sutter St. R. Co., 117 Cal. 604, 611, 612, 616 (cited in dis. op.), 49 Pac. Rep. 736 (construed and applied).

As to forfeiture of franchise of railroad companies, see monographic note 30 Am. St. Rep. 774.

As to necessity of judicial act declaring forfeiture, see monographic note 5 Am. St. Rep. 803-807.

As to non-performance of condition in grant of franchise, see monographic note 5 Am. St. Rep. 803-807.

2. **CONSTRUED.**—As giving grantee three years after commencement of work for completion.—People ex rel. Sabichi vs. Los Angeles R. Co., 91 Cal. 338, 342, 27 Pac. Rep. 673.

3. As giving grantee right, with consent of authorities granting right to abandon uncom-

pleted portion.—*People ex rel. Sabichi vs. Los Angeles Elec. R. Co.*, 91 Cal. 333, 342, 27 Pac. Rep. 673.

4. **CONDITIONS OF GRANT.**—Board cannot grant franchise on terms other than those set forth in code (conceded but not decided).—*People ex rel. Sabichi vs. Los Angeles Elec. R. Co.*, 91 Cal. 333, 341, 27 Pac. Rep. 673.

5. **COMMENCEMENT OF WORK.**—Time for grantees to accept franchise must be signified by commencing work within reasonable time and by prosecuting same to completion with ordinary diligence.—*Rush vs. Jackson*, 24 Cal. 308, 316; *Town of Arcata vs. Arcata & M. R. Co.*, 92 Cal. 639, 645, 28 Pac. Rep. 676.

6. Amount sufficient to constitute not mentioned by legislature.—*Omnibus R. Co. vs. Baldwin*, 57 Cal. 160, 169.

7. A question of fact for court.—*Omnibus R. Co. vs. Baldwin*, 57 Cal. 160, 169.

8. Must be bona fide commencement and prosecution of work within time mentioned (dis. op.).—*Omnibus R. Co. vs. Baldwin*, 57 Cal. 160, 179.

9. Sham commencement, such as merely digging trench, not sufficient (dis. op.).—*Omnibus R. Co. vs. Baldwin*, 57 Cal. 160, 179.

10. Time runs from commencement of work.—*People ex rel. Sabichi vs. Los Angeles Elec. R. Co.*, 91 Cal. 333, 342, 27 Pac. Rep. 673.

11. Extension of time.—Amendment of 1895 authorizing board to fix time for beginning and completing work, and to extend time and providing that it should not affect any franchise or right of way granted before its passage, leaving forfeiture clause same as before, does not repeal section of act as it previously stood and such sections as amended do not therefore begin with amendment.—*People ex rel. Warfield vs. Sutter St. R. Co.*, 117 Cal. 604, 613, 49 Pac. Rep. 736. See *Central Pacific R. Co. vs. Shackelford*, 63 Cal. 261; *Ely vs. Holton*, 15 N. Y. 598.

12. Provision in franchise referring to period when time commences to run which would extend franchise contrary to provisions of § 497, invalid.—*People ex rel. Warfield vs. Sutter St. R. Co.*, 117 Cal. 604, 611, 49 Pac. Rep. 736.

13. Supervisors have no power to extend time within which track must be completed.—*People ex rel. Warfield vs. Sutter St. R. Co.*, 117 Cal. 604, 611, 49 Pac. Rep. 736.

II. FORFEITURE FOR NON-COMPLIANCE—1. IN GENERAL.

14. **CONSTRUCTION.**—Forfeiture construed as not self-executing, as to forfeiture.—*Santa Rosa City R. Co. vs. Central St. R. Co.* (Cal. Jan. 6, 1895), 33 Pac. Rep. 986, 989.

15. **FORFEITURE.**—Commencement.—Date of commencement of work and failure to comply with provisions working forfeiture must date from that time.—*People ex rel. Sabichi vs. Los Angeles Elec. R. Co.*, 91 Cal. 333, 341, 27 Pac. Rep. 673.

16. Takes place immediately upon happening of event of commission of offense, where same is provided for by statute.—*Town of*

Arcata vs. Arcata & M. R. R. Co., 92 Cal. 639, 645, 28 Pac. Rep. 676. See *Rush vs. Jackson*, 24 Cal. 308, 316; *Borland vs. Lewis*, 43 Cal. 569, 572; *Oakland R. Co. vs. Oakland, B. & F. V. R. Co.*, 45 Cal. 365, 379; *Upham vs. Hosking*, 62 Cal. 250, 257.

17. Expression "work of forfeiture" usually understood as meaning merely that default mentioned as ground for forfeiture—a ground for judicial declaration of forfeiture—and does not appear to mean more.—*Santa Rosa City R. Co. vs. Central St. R. Co.* (Cal. Jan. 6, 1895), 33 Pac. Rep. 986, 989. See *Md. Chesapeake & O. Canal Co. vs. Ohio R. Co.*, 4 Gill. & J. 1, 121. *Mass. Briggs vs. Cape Cod Co.*, 137 Mass. 71. *Mich. Toledo & A. A. R. Co. vs. Johnson*, 49 Mich. 148, 13 N. W. Rep. 492. *N. Y. People vs. Hillsdale & C. Turnp. R.*, 23 Wend. 254, 256; *In re Kings Co. El. R. Co.*, 105 N. Y. 97, 119, 13 N. E. Rep. 18; *In re Brooklyn El. R. Co.*, 125 N. Y. 434, 26 N. E. Rep. 474; *Fed. Wallamet Falls C. & L. Co. vs. Kittridge*, 5 Sawy. C. C. 44, 29 Fed. Cas. 85; *Frost vs. Frostburg Coal Co.*, 65 U. S. (24 How.) 278, 283, bk. 16 L. ed. 637; *Schulenberg vs. Harriman*, 33 U. S. (31 Wall.) 44, bk. 23 L. ed. 551.

18. Nature of common-law forfeiture did not operate to divest title or restore to government thing granted without judgment of forfeiture in suit instituted for that purpose.—*Town of Arcata vs. Arcata & M. R. R. Co.*, 92 Cal. 639, 645, 28 Pac. Rep. 676.

19. When arises.—Acts sufficient to cause forfeiture do not per se produce forfeiture.—*People ex rel. Sabichi vs. Los Angeles El. R. Co.*, 91 Cal. 333, 340, 27 Pac. Rep. 673.

20. Mere grant to third party does not of itself effect forfeiture.—*Santa Rosa City R. Co. vs. Central St. R. Co.* (Cal. Jan. 6, 1895), 33 Pac. Rep. 986, 990.

21. Occurs only when holder of franchise is in default in both particulars mentioned in code; i. e. failing to commence and failing to complete within times specified.—*Santa Rosa City R. Co. vs. Central St. R. Co.* (Cal. Jan. 6, 1895), 33 Pac. Rep. 986, 989.

22. Non-use proved by evidence showing no acts done toward operating railroad except running of single car once a day merely for purpose of holding franchise and prevent grant to others.—*People ex rel. Warfield vs. Sutter St. R. Co.*, 117 Cal. 604, 609, 613, 49 Pac. Rep. 736.

23. Use not proved by mere running of car once day and not for purpose of accommodating public or carrying passengers, but to hold franchise and prevent its grant to others.—*People ex rel. Warfield vs. Sutter St. R. Co.*, 117 Cal. 604, 609, 613, 49 Pac. Rep. 736.

III. SAME—2. ENFORCEMENT OF.

24. **PARTY TO INVOKE** right to forfeiture of corporation privilege or franchise existing one, forfeiture invoked only at instance of state.—*City of San Pedro vs. Southern Pac. R. Co.*, 101 Cal. 333, 337, 35 Pac. Rep. 993. See *Western R. Co.'s Appeal*, 104 Pa. St. 399.

25. Government alone can avail itself of ground to forfeiture of public grant.—*Santa Rosa City R. Co. vs. Central St. R. Co.* (Cal. Jan. 6, 1895), 33 Pac. Rep. 986, 990.

26. Government is sole judge of propriety of forfeiture, and may waive right to enforce or declare it.—*Santa Rosa City R. Co. vs. Central St. R. Co.* (Cal. Jan. 6, 1895), 38 Pac. Rep. 986, 990.

27. **WHEN ACTION NECESSARY.**—Corporation continues to exist until authority or sovereignty creating it shall by proper proceedings, and in a proper court, procure an adjudication of forfeiture and enforce it.—*People ex rel. Sabichi vs. Los Angeles E. R. Co.*, 97 Cal. 338, 340, 27 Pac. Rep. 673. *Me. Bear Camp River Co. vs. Woodman*, 2 Me. 404. *N. Y. People vs. Manhattan Co.*, 9 Wend. 351; *Mickles vs. Bank*, 11 Paige Ch. 118, 42 Am. Dec. 103; *Ormsby vs. Copper Min. Co.*, 65 Barb. 369. *Pa. Murphy vs. Farmers Bank*, 20 Pa. St. 415; *Commonwealth vs. Commercial Bank*, 28 Pa. St. 383.

Language used in *People ex rel. Sabichi vs. Los Angeles E. R. Co.*, 91 Cal. 338, to the effect that forfeiture must in all cases be judicially declared, was not used in consideration of question of forfeiture based upon failure to perform work within statutory time, and it is submitted it cannot therefore be held to conflict with the law as declared in the case of *Town of Arcata vs. Arcata & M. R. R. Co.*, 92 Cal. 639, 645, 28 Pac. Rep. 676.

Fine—as to, see par. 30 this note.

28. **Right of company to use of street in absence of statutory provision, or municipal ordinance, or order declaring forfeiture for failure to complete work within reasonable time, can only be determined by judgment of forfeiture in action commenced for that purpose.**—*Town of Arcata vs. Arcata & M. R. Co.*, 92 Cal. 639, 647, 28 Pac. Rep. 676. See *United States vs. Grundy*, 7 U. S. (3 Cr.) 337, 351, bk. 2 L. ed. 459.

29. **Right to avoid public grant on ground of forfeiture for failure to fulfil condition subsequent, exercisable only through judgment of court, or legislative declaration as to forfeiture.**—*Santa Rosa City R. Co. vs. Central St. R. Co.* (Cal. Jan. 6, 1895), 38 Pac. Rep. 986, 989.

30. **POWER TO FINE.**—Court has power to impose fine upon declaring forfeiture of franchise where same granted for number of years but not held for convenience of public, or to facilitate travel, but for purpose of preventing same.—*People ex rel. Warfield vs. Sutter St. R. Co.*, 117 Cal. 604, 609, 613, 49 Pac. Rep. 736.

31. **WHEN ACTION NOT NECESSARY.**—*Legislative acts.*—Action not necessary to enforce forfeiture under statute expressly providing for same for failure to complete work within certain time.—*Town of Arcata vs. Arcata & M. R. R. Co.*, 92 Cal. 639, 645, 28 Pac. Rep. 676.

32. **Statute providing that failure to complete contemplated work within certain time shall work forfeiture, does away with necessity of action to enforce same.**—*Town of Arcata vs. Arcata & M. R. R. Co.*, 92 Cal. 639, 28 Pac. Rep. 676.

33. **Statute must in express terms, or by plain implication, declare forfeiture before**

same will take place without judicial act, or at least legislative determination.—*Santa Rosa City R. Co. vs. Central St. R. Co.* (Cal. Jan. 6, 1895), 38 Pac. Rep. 986, 989; *Schulenburg vs. Harriman*, 88 U. S. (21 Wall.) 44, bk. 22 L. ed. 551.

34. **Statute imposing condition subsequent, as forfeiture, must declare forfeiture in order to avoid grant ipso facto.**—*Santa Rosa City R. Co. vs. Central St. R. Co.* (Cal. Jan. 6, 1895), 38 Pac. Rep. 986, 989.

As to conditions subsequent, see post § 1433 and note.

The language of the court in *Town of Arcata vs. Arcata & M. R. R. Co.*, supra, has been said to be obiter dictum, and the court declared the true rule on the subject was laid down in the cases of *Upham vs. Hosking*, *Borland vs. Lewis*, and *Oakland R. Co. vs. Oakland, B. & F. V. R. Co.*, post; and further declared that such dictum could not be supported upon principle.—*Santa Rosa City R. Co. vs. Central St. R. Co.* (Cal. Jan. 6, 1895), 38 Pac. Rep. 986, 989.

35. **Where statute provides that failure to complete within given time works forfeiture, happening of event, or commission of offense which is statutory basis of forfeiture, works forfeiture of title and immediately vests same in state.**—*Town of Arcata vs. Arcata & M. R. R. Co.*, 92 Cal. 639, 28 Pac. Rep. 676.

36. **WORDS HELD TO CREATE FORFEITURE WITHOUT JUDICIAL PROCEEDINGS.**—“Franchises and privileges herein granted shall utterly cease and be forfeited.”—*Oakland R. Co. vs. Oakland, B. & F. V. R. Co.*, 45 Cal. 365.

37. “Rights granted by this act shall become forfeited to the state.”—*Upham vs. Hosking*, 62 Cal. 250.

38. “Such neglect or failure shall work a forfeiture . . . and the same shall be resold as if no purchase has been made.”—*Borland vs. Lewis*, 43 Cal. 569.

In *Santa Rosa City R. Co. vs. Central St. R. Co.*, supra, the court stated that it did not consider the cases of *Oakland R. Co. vs. Oakland, B. & F. V. R. Co.* and *Borland vs. Lewis*, supra, were authority for the ruling of the court in *Upham vs. Hosking*, supra, for the reason that in each of those cases the decision rested on language beyond the words of forfeiture.—*Santa Rosa City R. Co. vs. Central St. R. Co.* (Cal. Jan. 6, 1895), 38 Pac. Rep. 986, 989.

IV. WAIVER OF FORFEITURE.

39. **WAIVER OF FORFEITURE—ACT OF PARTY.**—Act causing holder of franchise to change his position may be sufficient to infer waiver and to make same conclusive on ground of estoppel.—*Santa Rosa City R. Co. vs. Central St. R. Co.* (Cal. Jan. 6, 1895), 38 Pac. Rep. 986, 990. See *Ark. State vs. Mississippi, O. & R. Co.*, 20 Ark. 495. *Ga. City of Atlanta vs. Gate City Gas Light Co.*, 71 Ga. 106. *Ill. Chicago, R. I. & P. R. Co. vs. Joliet*, 79 Ill. 25, 37; *Martel vs. East St. Louis*, 94 Ill. 67. *La. State vs. Taylor*, 28 La. Ann. 460; *New Orleans, C. & L. R. Co. vs. New Orleans*, 44 La. Ann. 748, 11 So. Rep. 77. *N. H. State vs. Fourth N. H. Turnp.*, 15 N. H. 132, 41 Am. Dec. 690. *N. Y. In re New*

York El. R. Co., 70 N. Y. 327, 333. Ohio. Trustees of McIntire P. S. vs. Zanesville, C. & M. Co., 9 Ohio 203, 290, 34 Am. Dec. 436.

40. Acts of recognition which cause holder of franchise to incur expenses which would not have been incurred if forfeiture were insisted upon, imply waiver, and become conclusive on ground of estoppel.—Santa Rosa City R. Co. vs. Central St. R. Co. (Cal. Jan. 6, 1895), 33 Pac. Rep. 986, 990.

41. Act unequivocally recognizing franchise as still existing and in force, is fact from which waiver may be enforced where state or any subordinate governmental body to whose charge matter has been committed after knowledge of act or omission constructing ground or forfeiture, does such act.—Santa Rosa City R. Co. vs. Central St. R. Co. (Cal. Jan. 6, 1895), 33 Pac. Rep. 986, 990.

42. Legislative act.—Act of legislature passed prior to final adjudication of forfeiture of franchise, said to have been granted in excess of municipal power, is an action waiving forfeiture.—People ex rel. Sabichi vs. Los Angeles Elec. R. Co., 91 Cal. 338, 341, 27 Pac. Rep. 678.

43. Same—Act ratifying and confirming ordinance granting franchise, said to be in excess of municipal authority, is action showing intention to continue franchise in existence.—People ex rel. Sabichi vs. Los Angeles Elec. R. Co., 91 Cal. 338, 341, 27 Pac. Rep. 678.

44. Same—Act ratifying and confirming ordinances granting franchise, said to be in excess of authority, is considered absolute waiver of any existing right to enforce forfeiture of franchise.—People ex rel. Sabichi vs. Los Angeles Elec. R. Co., 91 Cal. 338, 341, 27 Pac. Rep. 678; In re New York El. R. Co., 70 N. Y. 327.

45. Act ratifying and confirming and ordinance granting franchise is not an act remitting forfeiture where there has been no final adjudication of forfeiture.—People ex rel. Sabichi vs. Los Angeles Elec. R. Co., 91 Cal. 338, 341, 27 Pac. Rep. 678.

46. Waiver of forfeiture by act ratifying and confirming ordinance granting franchise in excess of municipal power, not prohibited by constitution.—People ex rel. Sabichi vs. Los Angeles Elec. R. Co., 91 Cal. 338, 341, 27 Pac. Rep. 678.

§ 503. MAY MAKE FURTHER REGULATIONS AND RULES. Cities and towns in or through which street-railroads run may make such further regulations for the government of such street-railroads as may be necessary to a full enjoyment of the franchise and the enforcement of the conditions provided herein.

History: Enacted March 21, 1872, founded upon § 10 Act March 29, 1870, Stats. 1869-70, p. 483.

1. Applied, cited, construed, referred to, etc.
- 2, 3. Franchise does not affect police power, etc.
- 4-6. Power to pass regulations.
- 7, 8. Regulations—Nature of.
- 9-11. Same—As to transfer—Warning, etc.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO,** etc., in: Ex parte Lorenzen, 128 Cal. 431, 436, 437, 79 Am. St. Rep. 47, 61 Pac. Rep. 68, 50 L. R. A. 55 (applied).

2. **FRANCHISE**—Not a contract in sense exempting business or occupation from proper police regulations.—San Jose vs. San Jose & S. C. R. Co., 53 Cal. 475.

3. **Franchise of railroads acting under charters**, or acts of incorporation, are of public nature so far as safety, convenience and comfort of passengers are concerned.—Ex parte Lorenzen, 128 Cal. 431, 437, 79 Am. St. Rep. 47, 61 Pac. Rep. 68, 50 L. R. A. 55; Burdick vs. People, 149 Ill. 600, 41 Am. St. Rep. 329, 38 N. E. Rep. 948, 24 L. R. A. 152.

4. **POWER TO PASS**.—Power to pass reasonable regulations for operation and management of street-car companies expressly granted by code.—Ex parte Lorenzen, 128 Cal. 431, 436, 79 Am. St. Rep. 47, 61 Pac. Rep. 68, 50 L. R. A. 55.

5. **Municipal authorities have right to pass reasonable regulations to remedy threatened or unusual interference for comfort, convenience and general welfare of traveling public.**—Ex parte Lorenzen, 128 Cal. 431, 436, 79 Am. St. Rep. 47, 61 Pac. Rep. 68, 50 L. R. A. 55.

6. **Municipal authorities of city have power to pass reasonable regulations affecting street-car lines.**—Ex parte Lorenzen, 128 Cal. 431, 436, 79 Am. St. Rep. 47, 61 Pac. Rep. 68, 50 L. R. A. 55.

7. **REGULATIONS**.—Reasonable regulations affecting conduct of such public employments are subjects for legislative action.—Ex parte Lorenzen, 128 Cal. 431, 437, 79 Am. St. Rep. 47, 61 Pac. Rep. 68, 50 L. R. A. 55.

8. **Mere fact that ordinance is of penal nature does not render it illegal.**—Ex parte Lorenzen, 128 Cal. 431, 436, 79 Am. St. Rep. 47, 61 Pac. Rep. 68, 50 L. R. A. 55.

9. **Transfer**.—Ordinances relating to issue, selling, and dealing in transfers to parties not passengers valid.—Ex parte Lorenzen, 128 Cal. 431, 436, 437, 79 Am. St. Rep. 47, 61 Pac. Rep. 68, 50 L. R. A. 55.

See ante § 501 pars. 4-7.

10. **WARNING**.—Ordinance of city providing for attachment of bell or gong to every street-car, to be sounded or rung at certain distance from crossings, is reasonable.—Driscoll vs. Market St. C. R. Co., 97 Cal. 553, 564, 565, 33 Am. St. Rep. 203, 32 Pac. Rep. 591. See Slemers vs. Eisen, 54 Cal. 418, 420; Higgins vs. Deeney, 78 Cal. 578, 580, 21 Pac. Rep. 428; Orcutt vs. Pacific Coast R. Co., 85 Cal. 291, 24 Pac. Rep. 661.

11. **Ordinance requiring bell to be sounded at approaching street crossings applies to intersecting streets.**—Schneider vs. Market St. R. Co., 134 Cal. 482, 487, 66 Pac. Rep. 734.

§ 504. PENALTY FOR OVERCHARGING. Any corporation, or agent or employee thereof, demanding or charging a greater sum of money for fare on the cars of such street railroad than that fixed, as provided in this title, forfeits to the person from whom such sum is received, or who is thus overcharged, the sum of two hundred dollars, to be recovered in a civil action, in any justice's court having jurisdiction thereof, against the corporation.

History: Enacted March 21, 1872, founded upon § 1 Act April 14, 1863, Stats. 1863, p. 296; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 871, held unconstitutional, see history, § 4 ante.

§ 505. STREET RAILROADS MUST FURNISH TICKETS. PENALTY. Every street-railroad corporation must provide, and, on request, furnish to all persons desiring a passage on its cars, any required quantity of passenger tickets or checks, each to be good for one ride.

[Penalty for failure to comply.] Any corporation failing to provide and furnish tickets or checks to any person desiring to purchase the same at not exceeding the rate hereinbefore described, shall forfeit to such person the sum of two hundred dollars, to be recovered as provided in the preceding section; provided, that the provisions of this section shall not apply to such street-railroad corporations as charge but five cents fare.

History: Enacted March 21, 1872, founded upon § 1 Act April 14, 1863, Stats. 1863, p. 297; amended March 30, 1874, Code Amdts. 1873-4, p. 213; March 13, 1883, Stats. and Amdts. 1883, p. 84. In force March 13, 1883.

§ 506. PROOF OF AGENCY. Upon the trial of an action for any of the sums forfeited, as provided in the two preceding sections, proof that the person demanding or receiving the money as fare, or for the sale of the ticket or check, was at the time of making the demand or receiving the money, engaged in an office of the corporation, or vehicle belonging to the corporation, shall be prima facie evidence that such person was the agent, servant, or employee of the corporation, to receive the money, and give the ticket or check mentioned.

History: Enacted March 21, 1872, founded upon § 3 Act April 14, 1863, Stats. 1863, p. 297; amended March 30, 1874, Code Amdts. 1873-4, p. 213.

§ 507. RESERVED RIGHTS. In every grant to construct street railroads, the right to grade, sewer, pave, macadamize, or otherwise improve, alter, or repair the streets or highways, is reserved to the corporation, and cannot be alienated or impaired; such work to be done so as to obstruct the railroad as little as possible, and, if required, the corporation must shift its rails so as to avoid the obstructions made thereby.

History: Enacted March 21, 1872, founded upon § 9 Act 1870, Stats. 1869-70, p. 483; amended March 30, 1874, Code Amdts. 1873-4, p. 214; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 372, held unconstitutional, see history, § 4 ante.

§ 508. LICENSE TO BE PAID TO CITY OR TOWN. Each street-railroad corporation must pay to the authorities of the city, town, county, or city and county, as a license upon each car, such sum as the authorities may fix, not exceeding fifty dollars per annum in the city of San Francisco, nor more than twenty-five dollars per annum in other cities or towns. Where any street railroad connects or runs through two or more cities or towns, a proportionate or equal share of such license

tax must be paid to each of the cities or towns; and no such license tax is due the county authorities where the same is paid to any city or town authority.

History: Enacted March 21, 1872, founded upon § 10 of Act March 29, 1870, Stats. 1869-70, p. 483.

- 1, 2. Franchise does not prevent regulations or taxation.
- 3, 4. Power to license and tax—Derivation and nature.
- 5, 6. Same—Legislative action.

As to railroads in streets, right of municipal corporation to authorize same, see note 98 Am. Dec. 247.

1. **FRANCHISE GRANTED TO CONSTRUCT RAILROAD TRACK** through certain streets in city and to run cars thereon, is not contract in such sense as to exempt the business or occupation of operating the road from all proper police regulations.—City of San Jose vs. San Jose & S. C. R. Co., 53 Cal. 475, 480.

2. **Franchise of street-railroad company** is not contract in such a sense as to exempt business or occupation from taxation in same manner as other occupations may be taxed, under legislative authority.—City of San Jose vs. San Jose & S. C. R. Co., 53 Cal. 475; 480; Frankford & P. P. R. Co. vs. Philadelphia, 58 Pa. St. 119, 98 Am. Dec. 242; Johnson vs. Philadelphia, 60 Pa. St. 445.

3. **POWER TO LICENSE AND TAX.**—Whole

charter and general legislation of state respecting subject-matter, must be consulted in construing words of grant in order to determine whether by terms "license and regulate" it was intended to authorize licenses for purposes of revenue.—City of San Jose vs. San Jose & S. C. R. Co., 53 Cal. 475, 480.

4. **Power to "license and regulate"** includes power to raise revenue for municipal purposes by means of license fees.—City of San Jose vs. San Jose & S. C. R. Co., 53 Cal. 475, 481.

5. **Legislative.**—Legislature has power, under constitution, to tax occupations, and to authorize municipalities to tax them.—City of San Jose vs. San Jose & S. C. R. Co., 53 Cal. 475, 481. See People vs. Coleman, 4 Cal. 46, 52, 60 Am. Dec. 581; City of Sacramento vs. California Stage Co., 12 Cal. 134, 138; City of Sacramento vs. Crocker, 16 Cal. 120, 122; Ex parte Hurl, 49 Cal. 557.

6. **Power to tax exists**, even though company's business is that of conveying passengers in stage-coaches chiefly outside corporate limits.—City of Sacramento vs. California Stage Co., 12 Cal. 134, 138, San Jose vs. San Jose & S. C. R. Co., 53 Cal. 475, 481.

§ 509. **TRACK FOR GRADING PURPOSES. [TIME MAY REMAIN.]** The right to lay down a track for grading purposes, and maintain the same for a period not to exceed three years, may be granted by the corporate authorities of any city or town, or city and county, or supervisors of any city or county, but no such track must remain more than three years upon any one street; and it must be laid level with the street, and must be operated under such restrictions as not to interfere with the use of the street by the public.

[Motive power.] The corporate authorities of any city or town, or city and county, may grant the right to use steam or any other motive power in propelling the cars used on such grading track, when public convenience or utility demands it, but the reasons therefor must be set forth in the ordinance, and the right to rescind the ordinance at any time reserved.

History: Enacted March 21, 1872, founded upon § 11 of Act March 29, 1870, Stats. 1869-70, p. 483.

§ 510. **LAW GOVERNING STREET RAILROADS.** Street railroads are governed by the provisions of title three of this part, so far as they are applicable, unless such railroads are therein specially excepted.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 214.

1. Applied, cited, construed, referred to, etc.
- 2-4. Construed as to its application.
5. Same—With reference to its limitation of power.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in:** Market Street R. Co. vs. Hellman, 109 Cal. 571, 577 (construed and applied), 583, 584 (construed), 42 Pac. Rep. 225; Boyd vs. Ebron, 125 Cal. 453, 454, 58 Pac. Rep. 64 (construed and applied).

2. **CONSTRUED AS APPLYING** to consolidation of all street-railroad corporations.—Market St. R. Co. vs. Hellman, 109 Cal. 571, 584, 42 Pac. Rep. 225.

3. **As applying provisions of Title III** to all street railroads not specially excepted therefrom.—Market St. R. Co. vs. Hellman, 109 Cal. 571, 583, 42 Pac. Rep. 225.

4. **As applying sections 456, 457 of Civil Code** to street-railroad corporations with ref-

erence to issue of bonds.—Market St. R. Co. vs. Hellman, 109 Cal. 571, 584, 42 Pac. Rep. 225; Boyd vs. Heron, 125 Cal. 453, 454, 53 Pac. Rep. 64.

5. As qualifying and limiting the meaning of § 268 to "the laws under which such cor-

porations were formed and exist," and not to whole body of laws enacted for government and counted of the future acts and conduct of corporations.—Market St. R. Co. vs. Hellman, 109 Cal. 571, 582, 42 Pac. Rep. 225.

§ 511. TITLE APPLICABLE TO NATURAL PERSONS ALIKE WITH CORPORATIONS. When a street railroad is constructed, owned, or operated by any natural person, this title is applicable to such person in like manner as it is applicable to corporations.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Construed as not applying to railroads.
- 3, 4. Same—As not referring to assignments.
5. Constitution not mentioning—Significant fact.
- 6, 7. Railroad commissioners have no power.
- 8, 9. Same—Act only includes railway companies.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO,** etc., in: Gregory vs. Blanchard, 98 Cal. 311, 314, 33 Pac. Rep. 199 (construed with other sections); Board of Railroad Comrs. vs. Market St. R. Co., 132 Cal. 677, 678, 64 Pac. Rep. 1065 (construed with other sections).

2. **CONSTRUED AS PART OF LAW OF LAND,** and as separate and distinct from sections of code relating to railroad corporations.—Board of Railroad Comrs. vs. Market St. R. Co., 132 Cal. 677, 678, 679, 64 Pac. Rep. 1065.

3. With § 531 as not referring to assignment or other disposition of franchise.—Gregory vs. Blanchard, 98 Cal. 311, 314, 33 Pac. Rep. 199.

4. Does not refer in any respect to assignment or other disposition of franchise.—Gregory vs. Blanchard, 98 Cal. 311, 314, 33 Pac. Rep. 199.

5. **CONSTITUTION NOT MENTIONING STREET RAILWAY CORPORATIONS,** significant fact, and omission not unintentional.—Board of Railroad Comrs. vs. Market St. R. Co., 132 Cal. 677, 679, 64 Pac. Rep. 1065.

6. **RAILROAD COMMISSIONERS.**—Street-railroad companies expressly excepted from act organizing and defining power of railroad commissioners.—Board of Railroad Comrs. vs.

Market St. R. Co., 132 Cal. 677, 679, 680, 64 Pac. Rep. 1065.

7. Street-railroad companies obtain their franchise from municipal authorities of town or city in which they carry on business.—Board of Railroad Comrs. vs. Market St. R. Co., 132 Cal. 677, 679, 64 Pac. Rep. 1065.

8. Words "railroad company," as used in acts defining power of railroad commissioners, not intended to mean street railway.—Board of Railroad Comrs. vs. Market St. R. Co., 132 Cal. 677, 682, 64 Pac. Rep. 1065.

9. Term "railroad company" or "railroad" not understood to mean street railroad engaged in business of carrying passengers entire distance, or any part of distance, over which road runs for one and same fare in ordinary acceptance of the term.—Board of Railroad Comrs. vs. Market St. R. Co., 132 Cal. 677, 682, 64 Pac. Rep. 1065. See Ferguson vs. Sherman, 116 Cal. 169, 47 Pac. Rep. 1023, 37 L. R. A. 622. Fla. Bloxham vs. Consumers Elec. L. & St. R. Co., 36 Fla. 519, 51 Am. St. Rep. 44, 18 So. Rep. 444. Iowa. Sears vs. Marshalltown St. R. Co., 65 Iowa 742, 23 N. W. Rep. 150. Ky. Fidelity L. & T. Co. vs. Louisville City R. Co., 3 Duv. 175. Minn. Funk vs. St. Paul City R. Co., 61 Minn. 435, 52 Am. St. Rep. 608, 63 N. W. Rep. 1099, 23 L. R. A. 203. Pa. Gyger vs. Philadelphia C. P. R. Co., 136 Pa. St. 96, 20 Atl. Rep. 399, 9 L. R. A. 369. Wash. Front St. C. R. Co. vs. Johnson, 2 Wash. 112, 25 Pac. Rep. 1084, 11 L. R. A. 693. Fed. Manhattan Trust Co. vs. Sioux City C. R. Co., 68 Fed. Rep. 82; Massachusetts L. & T. Co. vs. Hamilton, 38 Fed. Rep. 583.

TITLE V.

WAGON ROAD CORPORATIONS.

- § 512. Three commissioners to act with surveyor.
- § 513. Survey and map to be filed and approved.
- § 514. Bridges or ferries on line. Tolls; limits of. Franchise forfeited, when.
- § 515. No tolls to be charged on highways or public roads.
- § 516. Rates of toll must be posted.
- § 517. Persons detained until toll is paid.
- § 518. Persons unnecessarily detained or overcharged, damages.

- § 519. Persons avoiding toll to pay five dollars.
- § 520. Penalties for trespasses on property of corporation.
- § 521. Revenue, how appropriated. [Reduction of tolls, when.]
- § 522. Property may be mortgaged or hypothecated.
- § 523. This title applies to natural persons as well as corporations.
- § 524. Franchises granted for construction of roads for use of horseless vehicles.

§ 512. THREE COMMISSIONERS TO ACT WITH SURVEYOR. Where a corporation is formed for the construction and maintenance of a wagon road, the

road must be laid out as follows: Three commissioners must act in conjunction with the surveyor of the corporation, two to be appointed by the board of supervisors of the county through which the road is to run, and one by the corporation, who must [1] lay out the proposed road and [2] report their proceedings, together [3] with the map of the road, to the supervisors, as provided in the succeeding section.

History: Enacted March 21, 1872, founded on § 2 Act April 22, 1853, Stats. 1853, p. 114; amended March 30, 1874, Code Amdts. 1873-4, p. 214.

I. In General.

1. Applied, cited, construed, referred to, etc.
2. Corporation in possession, one de facto.
- 3, 4. Dedication—How created or effected.
5. Distinguished from public highways—How.

II. Wagon Roads—1. Creation and Nature of.

6. Means by which created.
- 7-12. Nature of road when created.
- 13, 14. Ownership of—How proved or determined—Mandamus.
15. Right to travel.

III. Same—2. Power of Legislature over.

- 16-22. Authority of legislature—Extent and nature of.
23. Same—Burden of proof, when disputed.
- 24-27. Statutes of 1857, 1878, 1893 construed.

IV. Same—3. Property Rights Acquired by.

- 28-33. Extent of right to hold.
34. From what right arises.
35. Terms for which held under Act of 1853.
- 36, 37. Same—Effect of code provisions.

I. IN GENERAL.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in:** *Blood vs. Woods*, 95 Cal. 78, 86, 30 Pac. Rep. 129 (construed).

Facts necessary to be stated in articles of incorporation of wagon road company.—See ante § 291 and note.

Provisions relating to toll roads in general, their construction, use, obstruction, inspection and repair.—See Pol. Code §§ 2779, 2832 and notes.

Right to sell franchise of toll road under execution.—See ante § 388 and note.

Subscribed capital stock required of wagon road companies.—See ante § 293 subd. 3.

2. **CORPORATION DE FACTO.**—Corporation in undisputed possession and control of road under grant obtained from public authorities pursuant to statute is corporation de facto.—*Stockton & L. G. R. Co. vs. Stockton & C. R. Co.*, 45 Cal. 680, 685.

3. **DEDICATION.**—Constructing road and opening it for use, being used on payment of toll, is an emphatical dedication.—*People ex rel. El Dorado Co. vs. Davidson*, 79 Cal. 166, 169, 31 Pac. Rep. 538. See *Craig vs. People*, 47 Ill. 487.

See par. 10 this note.

4. **Not affected by demanding toll and its use upon that condition.**—*Blood vs. Woods*, 95 Cal. 78, 84, 30 Pac. Rep. 129.

5. **DISTINGUISHED FROM PUBLIC HIGHWAY.**—Difference between turnpike and public

highway is that, instead of being made at public expense in first instance, it is authorized and laid out by public authority and made at expense of individuals, cost of construction and maintenance being reimbursed by toll levied by public authority.—*Wood vs. Truckee T. Co.*, 24 Cal. 474, 490; *Virginia Canon T. R. Co. vs. People ex rel. Vivian*, 22 Colo. 429, 435, 45 Pac. Rep. 398, 37 L. R. A. 711; *Commonwealth vs. Wilkinson*, 33 Mass. (16 Pick.) 175, 177, 26 Am. Dec. 654.

II. WAGON ROADS—1. CREATION AND NATURE.

6. **CREATION OF WAGON ROADS.**—Toll road only made such by grant of franchise from some source.—*Blood vs. Woods*, 95 Cal. 78, 84, 30 Pac. Rep. 129.

7. **NATURE OF ROAD.**—Right to road granted wagon road company is private property for public use and incident and necessary to privilege of collecting toll thereon.—*Appeal of North Beach & M. R. Co.*, 32 Cal. 499, 506; *Welsh vs. Plumas Co.*, 30 Cal. 338, 341, 22 Pac. Rep. 254; *Southern Pac. Co. vs. Burr*, 86 Cal. 279, 284, 24 Pac. Rep. 1032.

8. **Turnpike roads are public easements and not private property.**—*Wood vs. Truckee T. Co.*, 24 Cal. 474, 490; *Commonwealth vs. Wilkinson*, 33 Mass. (16 Pick.) 175, 177, 26 Am. Dec. 654.

9. **Are public highways established by public authority for public uses.**—*Wood vs. Truckee T. Co.*, 24 Cal. 474, 490; *People ex rel. El Dorado Co. vs. Davidson*, 79 Cal. 166, 168, 31 Pac. Rep. 538; *Blood vs. Woods*, 95 Cal. 78, 86, 30 Pac. Rep. 129; *People ex rel. Waugh vs. Auburn & Y. J. T. Co.*, 122 Cal. 335, 339, 55 Pac. Rep. 10; *Virginia Canon T. R. Co. vs. People ex rel. Vivian*, 22 Colo. 429, 435, 45 Pac. Rep. 398, 37 L. R. A. 711.

10. **Constructed by corporation under statute of 1853 is public highway by dedication, subject to right to collect tolls for limited period.**—*People ex rel. Dedemeyer vs. Anderson & U. V. R. Co.*, 76 Cal. 190, 191, 18 Pac. Rep. 308.

As to dedication, see pars. 3, 4 this note.

11. **Under control of board of supervisors.**—*Blood vs. Woods*, 95 Cal. 78, 86, 30 Pac. Rep. 129; *People vs. Volcano Canyon T. R. Co.*, 100 Cal. 87, 90, 34 Pac. Rep. 522; *Commonwealth vs. Wilkinson*, 33 Mass. (16 Pick.) 175, 26 Am. Dec. 654; *Newberry Port T. Corp. vs. Eastern R. Co.*, 40 Mass. (23 Pick.) 326.

12. **Although capital is advanced by shareholders and income benefits them.**—*Inhabitants of Worcester R. Corp.*, 45 Mass. (4 Met.) 564, 566.

12. OWNERSHIP—Proof of.—Existence of turnpike road for number of years is prima facie evidence of ownership.—*Weaverville & M. W. Road Co. vs. Board Supervrs. of Trinity Co.*, 64 Cal. 69, 71, 28 Pac. Rep. 496.

14. TITLE OF TURNPIKE ROAD cannot be inquired into and determined upon mandamus.—*Weaverville & M. W. Road Co. vs. Board Supervrs. Trinity Co.*, 64 Cal. 69, 71, 28 Pac. Rep. 496.

15. TRAVEL—Right to.—Travelers have same right to use it, paying toll established by law, as they have to use any other public highway.—*Wood vs. Truckee T. Co.*, 24 Cal. 474, 490; *Appeal of North Beach & M. R. Co.*, 32 Cal. 499, 506; *People ex rel. El Dorado Co. vs. Davidson*, 79 Cal. 166, 168, 21 Pac. Rep. 538; *Welsh vs. Plumas Co.*, 80 Cal. 338, 341, 22 Pac. Rep. 254; *Southern Pac. Co. vs. Burr*, 86 Cal. 279, 284, 24 Pac. Rep. 1032; *Blood vs. Woods*, 95 Cal. 78, 30 Pac. Rep. 129; *Kellett vs. Clayton*, 99 Cal. 210, 213, 33 Pac. Rep. 885; *Commonwealth vs. Wilkinson*, 33 Mass. (16 Pick.) 175, 177, 26 Am. Dec. 654.

III. SAME—2. LEGISLATIVE POWER OVER.

16. POWER OF LEGISLATURE.—Power of legislature over highways is adequate to secure their establishment, maintenance, and discontinuance.—*Blood vs. McCarty*, 112 Cal. 561, 564, 44 Pac. Rep. 1025.

17. Legislature competent to deal with or dispose of highway at its pleasure.—*City of San Francisco vs. Burr*, 108 Cal. 460, 461, 41 Pac. Rep. 482; *Blood vs. McCarty*, 112 Cal. 561, 564, 44 Pac. Rep. 1025.

18. Confers upon turnpike company power to appropriate public road subject to certain restrictions and limitations enforced by board of supervisors.—*Waterloo T. Co. vs. Cole*, 51 Cal. 381, 386. See *Truckee & T. Turnp. R. Co. vs. Campbell*, 44 Cal. 89.

19. Exercisable through instrumentality of subordinate bodies such as county board of supervisors.—*Polack vs. San Francisco Orphan Asylum*, 48 Cal. 490; *Brook vs. Horton*, 68 Cal. 554, 558, 10 Pac. Rep. 204.

20. Extends to allowance of franchise for taking of tolls as compensation for building roads.—*Blood vs. McCarty*, 112 Cal. 561, 564, 44 Pac. Rep. 1025; *Panton T. Co. vs. Bishop*, 11 Vt. 198.

21. Same—To franchise for taking of tolls as compensation for keeping road in repair.—*Blood vs. McCarty*, 112 Cal. 561, 564, 44 Pac. Rep. 1025; *Panton T. Co. vs. Bishop*, 11 Vt. 198.

22. Same—To making grant subject to, with any restrictions which it may impose.—*Virginia Canon T. R. Co. vs. People ex rel. Vivian*, 22 Colo. 429, 436, 45 Pac. Rep. 398, 37 L. R. A. 711.

23. Burden of proof rests upon party disputing legislative authority, to show some provision of organic law which is contravened by statute granting power to subordinate bodies.—*City San Francisco vs. Burr*, 108 Cal. 460, 461, 41 Pac. Rep. 482.

24. Statute of 1867 authorizing board of supervisors to grant turnpike corporations

franchise enjoyable and exercisable within county but not common to all other similar corporations under general law unconstitutional and void.—*Waterloo T. Co. vs. Cole*, 51 Cal. 381, 384. See *City of San Francisco vs. Spring Valley Water Works*, 48 Cal. 493.

25. STATUTE OF APRIL 1, 1878, authorizing board of supervisors to declare toll road, and to repair same, merely grant of franchise to county to collect tolls on road, and no authority to grant franchise to other persons.—*People ex rel. Williams vs. Horsley*, 65 Cal. 381, 382, 4 Pac. Rep. 384.

26. County Government Act of 1893, giving county board of supervisors jurisdiction to grant licenses or franchises on taking toll on public highways whenever expenses necessary for maintaining road are too great to justify county in operating same, does not contravene §13 of art. 11 of constitution 1879.—*Blood vs. McCarty*, 112 Cal. 561, 563, 564, 44 Pac. Rep. 1025.

27. Distinguished: Case of *Blood vs. Woods*, 95 Cal. 78, 30 Pac. Rep. 129, is distinguished in *Blood vs. McCarty*, supra, upon the ground that in former case no authority to collect toll had been delegated to board, and case was decided prior to the act of 1893, and the court stated that act was no doubt enacted with that case in view and for purpose of conferring power there held to be wanting.

IV. SAME—3. PROPERTY RIGHTS ACQUIRED BY.

28. PROPERTY RIGHTS ACQUIRED BY.—Turnpike corporation possesses only such powers as are conferred by law of its creation.—*Coleman vs. San Rafael T. R. Co.*, 49 Cal. 517, 522.

29. Can take no estate in lands above the level of a servitude on it.—*Wood vs. Truckee T. Co.*, 24 Cal. 474, 489.

30. Have no occasion prima facie for any larger interest in land than a way over it.—*Wood vs. Truckee T. Co.*, 24 Cal. 474, 489; *Tucker vs. Tower*, 26 Mass. (9 Pick.) 108.

31. May hold such real estate as may be necessary for construction and maintenance of turnpike road.—*Coleman vs. San Rafael T. R. Co.*, 49 Cal. 517, 522.

32. Property which company cannot hold in its own name, it cannot hold in name of another, and whenever it cannot take legal title it cannot take beneficial interest.—*Coleman vs. San Rafael T. R. Co.*, 49 Cal. 517, 522.

33. Statute providing for formation of corporations for construction of turnpike roads empowers them to hold such real estate as purposes of corporation may require.—*Coleman vs. San Rafael T. R. Co.*, 49 Cal. 517, 522.

34. SOURCE OF RIGHT.—Sole interest company has in road arises from right and power to collect tolls as compensation for building road for public.—*Wood vs. Truckee T. Co.*, 24 Cal. 474, 489; *Blood vs. McCarty*, 112 Cal. 561, 564, 44 Pac. Rep. 1025.

35. Term of holding.—Under act of 1853 held for twenty years.—*People ex rel. Waugh vs. Auburn & Y. J. T. Co.*, 122 Cal. 335, 337, 341, 55 Pac. Rep. 10.

36. Property rights and privileges preserved and enjoined by provisions of code as to continuance of corporate existence.—People ex rel. Waugh vs. Auburn & Y. J. T. Co., 122 Cal. 335, 337, 341, 55 Pac. Rep. 10.

37. Turnpike incorporated prior to code may

elect to continue after for fifty years under §§ 287 and 402 of code, subject to supervisors' powers to fix rates.—People ex rel. Waugh vs. Auburn & Y. J. T. Co., 335, 337, 341, 55 Pac. Rep. 10.

§ 513. SURVEY AND MAP TO BE FILED AND APPROVED. When the route is surveyed a map thereof must be submitted to and filed with the board of supervisors of each county through or into which the road runs, giving its general course, and the principal points to or by which it runs, and its width, which must in no case exceed one hundred feet, and the supervisors must either approve or reject the survey. If approved, it must be entered of record on the journal of the board, and such approval authorizes the use of all public lands and highways over which the survey runs; but the board of supervisors must require the corporation, at its own expense, and the corporation must so change and open the highways so taken and used as to make the same as good as before the appropriation thereof; and must so construct all crossings of public highways over and by its road and toll-gates, as not to hinder or obstruct the use of the same.

History: Enacted March 21, 1872, founded on § 1 Act 1854, Stats. 1854, p. 74; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 372, held unconstitutional, see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXVI, p. 577.

I. Board of Supervisors—1. Duty of.

1. Applicant—Duty to inquire as to.
- 2, 3. Acceptance—Nature and mode of.
- 4, 5. Compliance with statute—Necessity and nature of.
6. Recording road—Necessity of.

II. Same—2. Powers of.

- 7-13. Extent and nature of power.
14. Mode of exercising.

III. Franchise—1. Acceptance, Extent, and Nature.

15. Acceptance amounts to dedication.
16. Extent of, power to build.
- 17-20. Nature of—Exclusive privileges.

IV. Same—2. Right to Question.

21. Effect of grant of franchise upon right.
- 22, 23. Right of party using road—Trespasser.
24. Burden of proof on party disputing.

V. Same—3. Transfer of.

- 25-27. When not permitted.
- 28, 29. When permitted—Secondary franchise.

VI. Same—4. Vacation, Abandonment, etc.

30. Abandonment and adverse use—Effect of.
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32. Conditions may limit.
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I. BOARD OF SUPERVISORS—1. DUTY OF.

As to delegation of municipal power as to tolls, see monographic note by Irwin Taylor, 20 L. R. A. 726.

As to grant not preventing subsequent grant, see note 26 Am. Rep. 294.

As to franchise being subject to execution, see note 27 Am. Rep. 84.

As to judicial sale of franchise, see monographic note by H. P. Farnham, 20 L. R. A. 737-740.

As to location and construction of turnpike and toll roads, see 29 Am. & Eng. Encyc. c. L. (2d ed.) 3-13.

As to nature and powers of turnpike and toll roads, see 29 Am. & Eng. Encyc. of L. (2d ed.) 3-7.

1. APPLICANT—Inquiry as to.—Board, upon application, should inquire as to right of applicant to franchise.—People vs. Volcano Canyon T. R. Co., 100 Cal. 37, 90, 34 Pac. Rep. 522.

2. ACCEPTANCE.—Acceptance of road as one constructed under authority of code and of fixing tolls, is to some extent a judicial act.—Blood vs. Woods, 95 Cal. 78, 27, 30 Pac. Rep. 129.

3. Mode of acceptance of grant is not manifested by code.—Welsh vs. Plumas Co., 80 Cal. 338, 341, 22 Pac. Rep. 254.

4. COMPLIANCE WITH STATUTE.—Prescribed statutory conditions must be complied with to acquire franchise under general law.—People vs. Selfridge, 52 Cal. 331; People vs. Montecito Water Co., 97 Cal. 276, 33 Am. St. Rep. 172, 32 Pac. Rep. 236.

5. Substantial rather than literal compliance with statutory conditions sufficient.—People vs. Selfridge, 52 Cal. 331; People vs. Montecito Water Co., 97 Cal. 276, 33 Am. St. Rep. 172, 32 Pac. Rep. 236. See People vs. Stockton etc. R. Co., 45 Cal. 306, 313, 13 Am. Rep. 178.

6. RECORDING ROAD.—Board of supervisors need not cause road to be recorded as such to render strip of land dedicated to pub-

lie as public road, legal public highway.—*Blood vs. Woods*, 95 Cal. 78, 87, 80 Pac. Rep. 129.

II. SAME—2. POWER OF.

7. EXTENT AND NATURE OF POWER.—Granting of franchise is use of delegated power, and cannot be exceeded.—*Blood vs. Woods*, 95 Cal. 78, 86, 80 Pac. Rep. 129.

8. Municipal body, having no powers except those expressly granted by sovereign authority or which are necessary to exercise of powers granted in terms.—*El Dorado Co. vs. Davison*, 80 Cal. 520, 523.

9. Cannot inquire into or determine the rights of corporations or exercise franchise of which it has been in enjoyment of for period of nearly twenty years.—*Weaverville & Minersville W. R. Co. vs. Board of Supervrs. of Trinity Co.*, 64 Cal. 69, 71, 28 Pac. Rep. 496.

10. Have no authority to authorize tolls to be collected except at gates prescribed.—*Waterloo T. Co. vs. Cole*, 51 Cal. 381, 385.

11. Have no power except to regulate collection of tolls on roads constructed pursuant to provisions of code.—*Blood vs. Woods*, 95 Cal. 78, 86, 80 Pac. Rep. 129.

12. Have no power to delegate to directors of road authority to locate toll-gates at their discretion.—*Waterloo T. Co. vs. Cole*, 51 Cal. 381, 385.

13. Statute confers power to manage and control toll roads as public roads upon board of supervisors.—*Blood vs. Woods*, 95 Cal. 78, 86, 80 Pac. Rep. 129.

14. MODE OF EXERCISING POWER.—Mode in which board must exercise power to grant such franchises is prescribed by statutes.—*Blood vs. Woods*, 95 Cal. 78, 86, 80 Pac. Rep. 129.

III. FRANCHISE—1. ACCEPTANCE, EXTENT AND NATURE.

15. FRANCHISE.—Acceptance by corporation of franchise to construct road and operation thereof constitute dedication as public highway.—*Virginia Canon T. Co. vs. People ex rel. Vivian*, 22 Colo. 429, 435, 45 Pac. Rep. 398, 37 L. R. A. 711.

16. Extent of.—Power to build road includes power to buy existing road over same route, or one subsequently built.—*Virginia Canon T. R. Co. vs. People ex rel. Vivian*, 22 Colo. 429, 435, 45 Pac. Rep. 398, 37 L. R. A. 711. See *Camden & A. R. Co. vs. May's Landing*, E. H. C. R. Co., 48 N. J. L. (19 Vr.) 530, 7 Atl. Rep. 523; *Branch vs. Jesup*, 106 U. S. 468, bk. 27 L. ed. 279, 1 Sup. Ct. Rep. 495.

17. Nature of.—Franchises are special privileges conferred by government on individuals, which do not belong to citizens of country generally by common right.—*Wood vs. Truckee T. Co.*, 24 Cal. 474, 486.

18. Granting of franchise is legislative act.—*Blood vs. Woods*, 95 Cal. 78, 86, 80 Pac. Rep. 129.

19. Neither act of incorporation nor special act authorizing formation of corporation for construction of plank or turnpike roads gives any exclusive privileges to take or travel upon

line.—*Indian Canyon R. Co. vs. Robinson*, 13 Cal. 519, 520; *Fall vs. Sutter Co.*, 21 Cal. 237.

20. Unless expressly made so by the grant itself.—*Bartram vs. Central T. Co.*, 25 Cal. 233, 238.

As to property rights of corporation, see ante § 512 and note.

IV. SAME—2. RIGHT TO QUESTION.

21. RIGHT TO QUESTION.—Fact that franchise granted does not prevent inquiry into question as to whether road is free public highway or turnpike road.—*Blood vs. Woods*, 95 Cal. 78, 87, 80 Pac. Rep. 129.

22. Individual using road cannot question franchise, where board has determined right to grant same.—*Truckee T. R. Co. vs. Campbell*, 44 Cal. 89; *People vs. Volcano Canyon T. R. Co.*, 100 Cal. 87, 90, 34 Pac. Rep. 522.

23. Trespasser has no right to inquire into right of corporation de facto to hold lands.—*Stockton & L. G. R. Co. vs. Stockton & C. R. Co.*, 45 Cal. 680, 685.

24. Evidence.—Burden of proof is upon party claiming franchise where exercise of his right is disputed.—*People vs. Volcano Canyon T. R. Co.*, 100 Cal. 87, 90, 34 Pac. Rep. 522.

V. SAME—3. TRANSFER OF.

25. TRANSFER.—When not permitted.—Primary franchise of incorporated company to be corporation can never be alienated, without legislative permission.—*Virginia Canon T. R. Co. vs. People ex rel. Vivian*, 22 Colo. 429, 435, 45 Pac. Rep. 398, 37 L. R. A. 711.

26. Cannot be transferred by forced sale, as they are special privileges and personal trusts.—*Wood vs. Truckee T. Co.*, 24 Cal. 474, 486. See *Munroe vs. Thomas*, 5 Cal. 470; *Thomas vs. Armstrong*, 7 Cal. 286.

27. Without permission of governor, and if special mode is pointed out, it must be followed.—*Wood vs. Truckee T. Co.*, 24 Cal. 474, 486.

28. When permitted.—Recognized by board of supervisors by their approving of bond given by assignee, cannot be objected to upon ground that granting of franchise was personal trust.—*Carter vs. Meull*, 122 Cal. 367, 369, 55 Pac. Rep. 138. See *Wood vs. Truckee T. Co.*, 24 Cal. 474; *People vs. Duncan*, 41 Cal. 507, 511; *Visalia vs. Sims*, 104 Cal. 326, 328, 43 Am. St. Rep. 105, 37 Pac. Rep. 1042.

29. Secondary franchises of corporation, such as right to exact tolls for services performed, may be transferred in connection with assignment with tangible property of corporation when property can be fully enjoyed by grantee only by exercise of secondary franchise.—*Miners' Ditch Co. vs. Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300; *Virginia Canon T. R. Co. vs. People ex rel. Vivian*, 22 Colo. 429, 435, 45 Pac. Rep. 398, 37 L. R. A. 711.

VI. SAME—4. VACATION, ABANDONMENT, ETC.

30. ABANDONMENT AND ADVERSE USE.—Franchise of toll road may be lost by adverse public use and abandonment which may mean dedication of same as public highway.—*Blood*

vs. Woods, 95 Cal. 76, 84, 30 Pac. Rep. 129. See People ex rel. El Dorado Co. vs. Davidson, 79 Cal. 166, 170, 21 Pac. Rep. 538.

31. Vacation destroys road as public highway, where it passes over private lands, and road-bed, bridges and other structures pass to landowners, and will not pass by subsequent grant of franchise.—Carter vs. Meuli, 122 Cal. 367, 369, 55 Pac. Rep. 138.

As to expiration of franchise by non-user of road, see § 2619 Pol. Code and note.

VII. RIGHT TO CONSTRUCT OTHER ROADS.

32. CONDITIONS IN GRANT.—Toll bridge or ferry or other franchise often granted with provision that no other competing bridge, ferry, or turnpike shall be erected within certain distance above one granted, and such exclusiveness may be limited or unrestrained in duration.—Hyde's Ferry T. Co. vs. Davidson Co., 91 Tenn. 291, 295, 18 S. W. Rep. 626. See Turnpike Co. vs. Maury, 8 Humph. (Tenn.) 342; Legisay vs. Delp, 9 Baxt. (Tenn.) 415; Moses vs. Sanford, 11 Lea (Tenn.) 731; Rice vs. Minnesota & N. W. R. Co., 66 U. S. (1 Black) 358, 380, bk. 17 L. ed. 147; Chenango Bridge Co. vs. Binghamton Bridge Co., 70 U. S. (3 Wall.) 51, bk. 18 L. ed. 137; Washington & B. T. Co. vs. Maryland, 70 U. S. (3 Wall.) 210, bk. 18 L. ed. 180; Holyoke Water-Power Co. vs. Lyman, 82 U. S. (15 Wall.) 500, 512, bk. 21 L. ed. 133.

33. DISTINCTION BETWEEN ROADS, BRIDGES AND FERRIES with respect to exclusive use or right to control travel between termini, law forbidding even license or grant by board of supervisors within mile of that granted in case of bridges and ferries.—Indian Canyon R. Co. vs. Robinson, 13 Cal. 519, 520.

34. GRANT OF FRANCHISE MAY BE EXCLUSIVE or it may be silent in that respect.—Hyde's Ferry T. Co. vs. Davidson Co., 91 Tenn. 291, 295, 18 S. W. Rep. 626. See Turnpike Co. vs. Maury, 8 Humph. (Tenn.) 342; Legisay vs. Delp, 9 Baxt. (Tenn.) 415; Moses vs. Sanford, 11 Lea (Tenn.) 731; Rice vs. Minnesota & N. W. R. Co., 66 U. S. (1 Black) 358, 380, bk. 17 L. ed. 147; Chenango Bridge Co. vs. Binghamton Bridge Co., 70 U. S. (3 Wall.) 51, bk. 18 L. ed. 137; Washington & B. T. Co. vs. Maryland, 70 U. S. (3 Wall.) 210, bk. 18 L. ed. 180; Holyoke Water-Power Co. vs. Lyman, 82 U. S. (15 Wall.) 500, 512, bk. 21 L. ed. 133.

35. GRANTING POWERS.—Have right to grant franchise for construction of parallel road, even though there may be existing road operated under franchise.—Bartram vs. Central T. Co., 25 Cal. 283, 290.

36. Not restrained from making similar grant even though last grant necessarily interferes with profits and business of first.—Indian Canyon R. Co. vs. Robinson, 13 Cal. 519, 520. See Charles River Bridge vs. Warren Bridge, 36 U. S. (11 Pet.) 420, 421, bk. 9 L. ed. 733.

37. Not restrained even by implication.—Indian Canyon R. Co. vs. Robinson, 13 Cal. 519, 520. See Charles River Bridge vs. Warren Bridge, 36 U. S. (11 Pet.) 420, 421, bk. 9 L. ed. 733.

38. Not restrained, even though it greatly impair or even totally destroy value of former

grant while grant is not exclusive in its terms.—Hyde's F. T. Co. vs. Davidson Co., 91 Tenn. 291, 295, 18 S. W. Rep. 626. See Turnpike Co. vs. Maury, 8 Humph. (Tenn.) 342; Legisay vs. Delp, 9 Baxt. (Tenn.) 415; Moses vs. Sanford, 11 Lea (Tenn.) 731; Rice vs. Minnesota & N. W. R. Co., 66 U. S. (1 Black) 358, 380, bk. 17 L. ed. 147; Chenango Bridge Co. vs. Binghamton Bridge Co., 70 U. S. (3 Wall.) 51, bk. 18 L. ed. 137; Washington & Baltimore T. Co. vs. Maryland, 70 U. S. (3 Wall.) 210, bk. 18 L. ed. 180; Holyoke Water-Power Co. vs. Lyman, 82 U. S. (15 Wall.) 500, 512, bk. 21 L. ed. 133.

39. LEGISLATIVE ACT—Effect of.—Right to grant franchise for construction of parallel roads is not affected by legislative acts of 1862.—Bartram vs. Central T. Co., 25 Cal. 283, 290.

40. Omission in grant.—When grant is not exclusive in its terms no presumptions or implications will supply omissions therein.—Hyde's Ferry T. Co. vs. Davidson Co., 91 Tenn. 291, 295, 18 S. W. Rep. 626. See Turnpike Co. vs. Maury, 8 Humph. (Tenn.) 342; Legisay vs. Delp, 9 Baxt. (Tenn.) 415; Moses vs. Sanford, 11 Lea (Tenn.) 731; Rice vs. Minnesota & N. W. R. Co., 66 U. S. (1 Black) 358, 380, bk. 17 L. ed. 147; Chenango Bridge Co. vs. Binghamton Bridge Co., 70 U. S. (3 Wall.) 51, bk. 18 L. ed. 137; Washington & B. T. Co. vs. Maryland, 70 U. S. (3 Wall.) 210, bk. 18 L. ed. 180; Holyoke Water-Power Co. vs. Lyman, 82 U. S. (15 Wall.) 500, 512, bk. 21 L. ed. 133.

41. Road may be built.—When required by public convenience or necessity, even though its effect demolishes or destroys the value of franchise formerly granted to turnpike.—Hyde's Ferry T. Co. vs. Davidson Co., 91 Tenn. 291, 295, 18 S. W. Rep. 626. See Me. Rock Island Water Co. vs. Camden & R. W. Co., 80 Me. 544, 15 Atl. Rep. 785, 787, 1 L. R. A. 388. Ohio. State ex rel. Hamilton Gas & C. Co. vs. Hamilton, 47 Ohio St. 52, 23 N. E. Rep. 935, 938. Tenn. Turnpike Co. vs. Maury, 8 Humph. (Tenn.) 342; Legisay vs. Delp, 9 Baxt. (Tenn.) 415; Moses vs. Sanford, 11 Lea (Tenn.) 731. Fed. Rice vs. Minnesota & N. W. R. Co., 66 U. S. (1 Black) 358, 380, bk. 17 L. ed. 147; Chenango Bridge Co. vs. Binghamton Bridge Co., 70 U. S. (3 Wall.) 51, bk. 18 L. ed. 137; Washington & B. T. Co. vs. Maryland, 70 U. S. (3 Wall.) 210, bk. 18 L. ed. 180; Holyoke Water-Power Co. vs. Lyman, 80 U. S. (15 Wall.) 500, 512, bk. 21 L. ed. 133; Lehigh Water Co. vs. Easton, 121 U. S. 388, 391, bk. 30 L. ed. 1059, 7 Sup. Ct. Rep. 916; Hamilton Gas. L. Co. vs. Hamilton, 146 U. S. 258, bk. 36 L. ed. 963, 13 Sup. Ct. Rep. 90; Pearsall vs. Great Northern R. Co., 161 U. S. 648, bk. 40 L. ed. 838, 844, 16 Sup. Ct. Rep. 705; Long Island Water Supply Co. vs. Brooklyn, 166 U. S. 635, bk. 41 L. ed. 1165, 17 Sup. Ct. Rep. 725; Westerly Water Works Co. vs. Westerly, 80 Fed. Rep. 611, 623.

42. Where there is no contract or exclusive privilege conferred upon existing company either in express terms or by necessary implication.—Washington & B. T. Co. vs. Maryland, 70 U. S. (3 Wall.) 210, bk. 18 L. ed. 180.

43. When right denied.—Road cannot be built for purpose and intent of evading payment of toll upon a turnpike.—Hyde's Ferry T.

Co. vs. Davidson Co., 91 Tenn. 291, 295, 18 S. W. Rep. 627. See Turnpike Co. vs. Maury, 8 Humph. (Tenn.) 242; Legisay vs. Delp, 9 Baxt. (Tenn.) 415; Moses vs. Sanford, 11 Lea (Tenn.) 781; Rice vs. Minnesota & N. W. R. Co., 66 U. S. (1 Black) 358, 380, bk. 17 L. ed. 147; Che-

nango Bridge Co. vs. Binghamton Bridge Co., 70 U. S. (3 Wall.) 51, bk. 18 L. ed. 137; Washington & B. T. Co. vs. Maryland, 70 U. S. (3 Wall.) 210, bk. 18 L. ed. 180; Holyoke Water-Power Co. vs. Lyman, 32 U. S. (15 Wall.) 500, 512, bk. 21 L. ed. 133.

§ 514. **BRIDGES OR FERRIES ON LINE. TOLLS, LIMIT OF. FRANCHISE FORFEITED, WHEN.** All wagon road corporations may bridge or keep ferries on streams on the line of their road, and must do all things necessary to keep the same in repair. They may take such tolls only on their roads, ferries, or bridges, as are fixed by the board of supervisors of the proper county through which the road passes, or in which the ferry or bridge is situate.

[Amount of tolls permissible.] But in no case must the tolls be more than sufficient to pay fifteen per cent, nor less than ten per cent per annum, on the cost of construction, after paying for repairs and other expenses for attending to the roads, bridges, or ferries.

[Penalty for violation.] If tolls, other than as herein provided, are charged or demanded, the corporation forfeits its franchise, and must pay to the party so charged one hundred dollars as liquidated damages.

History: Enacted March 21, 1872, founded on § 1 Act 1857, Stats. 1857, p. 280; amended March 28, 1874, Code Amdts. 1873-4, p. 272; March 30, 1874, Code Amdts. 1873-4, pp. 214-215; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 372, held unconstitutional, see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXVI, p. 577.

Note.—The act of March 30, 1874, covered the entire subject, and repealed, by implication, the amendment of March 28, 1874, although the amendment of March 28 is given as the law in former compilations, and no reference made to amendment of March 30.

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- 47, 48. Grantee—Position of—Injunction.

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I. IN GENERAL.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc.,** in: *Stony Hill T. R. Co. vs. Board Supervrs. Placer Co.*, 88 Cal. 632, 633, 26 Pac. Rep. 513 (construed and applied); *People ex rel. Waugh vs. Auburn & Y. J. T. Co.*, 122 Cal. 325, 338, 55 Pac. Rep. 10 (applied).

As to inspection of public toll-books, see monographic note by Irwin Taylor, 27 L. R. A. 82-85.

As to legislative regulation of toll, see monographic note by Burdett A. Rich, 20 L. R. A. 177-189.

As to rights over existing public highways and fixing of toll thereon, see post § 515 and note.

As to right to take tolls without franchise, see monographic note by Burdett A. Rich, 37 L. R. A. 711-719.

As to toll roads, see §§ 2779-2832 Pol. Code and notes.

2. **CONSTRUED**—As forbidding the collection of toll unless rate fixed by board of supervisors.—*Stony Hill Turnp. Co. vs. Placer Co.*, 88 Cal. 632, 633, 26 Pac. Rep. 518.

3. As giving wagon road corporations power to take only such tolls as are fixed by board of supervisors.—*People ex rel. Waugh vs. Auburn & Y. J. T. Co.*, 122 Cal. 335, 338, 55 Pac. Rep. 10.

4. **BUILDING OF ROAD**—Building of road within time mentioned gives right to whatever passes by legislative grant.—*Rush vs. Jackson*, 24 Cal. 308; *Welsh vs. Plumas Co.*, 80 Cal. 338, 341, 22 Pac. Rep. 254.

5. **Building and maintenance of road**—Necessary under act giving privilege or franchise of collecting toll upon such road for private wagon advantage of grantees in consideration of such building.—*Welsh vs. Plumas Co.*, 80 Cal. 338, 341, 22 Pac. Rep. 254.

6. **DISSEIZIN**—Exclusion of party from entering land except on payment of toll and then only for purpose of passing over same amounts to disseizin.—*Mahon vs. San Rafael T. R. Co.*, 49 Cal. 269, 272.

7. **GRANT**—Construction and nature of.—Grant of franchise to turnpike company must be strictly construed.—*Bartram vs. Central T. Co.*, 25 Cal. 283, 288.

8. **FRANCHISE**—Charged with duty and trust for performance of public services for which granted.—*Lowell vs. City of Boston*, 111 Mass. 454, 15 Am. Rep. 39.

9. Equivalent of or compensation for cost of building and maintaining road.—*Virginia Canon T. R. Co. vs. People ex rel. Vivian*, 22 Colo. 429, 435, 45 Pac. Rep. 398, 37 L. R. A. 711.

10. **Grantee's title or estate**—Grantee can take nothing by implication.—*Bartram vs. Central T. Co.*, 25 Cal. 283, 288.

11. **LAYING OUT**—Nature of.—Laying out of highway by private corporation at its own expense and opening up of same for travel where no such facilities existed before, subserve public good, and payment of toll by public, for privilege of passing thereover, is only "another form or rather in lieu of taxation."—*Virginia Canon T. R. Co. vs. People ex rel. Vivian*, 22 Colo. 429, 435, 45 Pac. Rep. 398, 37 L. R. A. 711.

12. **RIGHT TO FRANCHISE—WHEN NOT ADMITTED**—Right to toll road franchise not admitted, in complaint filed for purpose of having road declared public highway and to enjoin collection of toll, by allegation "that for more than six months last passed defendant has had no franchise or right to demand or take toll from passengers or travelers upon said road for privilege of passing over or along same," etc.—*People vs. Volcano Canyon T. R. Co.*, 100 Cal. 87, 90, 34 Pac. Rep. 522.

13. **TOLL-GATE**—When a nuisance.—Toll-gate erected upon public highway belonging to state or people is nuisance and abatable as such.—*El Dorado Co. vs. Davison*, 80 Cal. 520, 524; *State vs. Flannagan*, 67 Ind. 140, 147.

II. REPAIRS.

14. **DUTY TO REPAIR**—Company must erect and keep in repair bridges, if necessary.

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for purposes of maintaining their road in proper condition, even though their liability in this respect is not stated in their franchise.—*People vs. President, Directors & Co. of Hillsdale & C. T. Co.*, 23 Wend. (N. Y.) 254, 256.

15. **FAILURE TO REPAIR**—Effect of.—Collection of tolls cannot be insisted upon where company has neglected to repair.—*Washington & B. T. Co. vs. Maryland*, 70 U. S. (3 Wall.) 210, bk. 13 L. ed. 180.

16. **Toll-gate** cannot be maintained upon part of road out of repair for unreasonable time.—*State vs. Flannagan*, 67 Ind. 140, 145.

17. **How shown**—Shown as legal conclusion where road had been in broken and worn-out condition for over six years its entire length, and continued to be entirely unsafe for vehicles to pass over.—*People ex rel. Coon vs. Plymouth Plank R. Co.*, 32 Mich. 248, 250.

18. Finding that road has been for more than six years in broken and worn-out condition, and still continues to be entirely unsafe, and in an unsafe condition for vehicles to pass over and upon, is sufficient without stating that it was in unsafe condition through negligence or fault of the corporation.—*People ex rel. Coon vs. Plymouth Plank R. Co.*, 32 Mich. 248, 250.

19. **FORFEITURE—Non-repair**—Neglect or failure to repair road will not in every case work forfeiture, even though parties may have been liable to indictment.—*People vs. Royalton & W. T. Co.*, 11 Vt. 431, 432. See *People vs. President etc. Hillsdale & C. T. Co.*, 23 Wend. (N. Y.) 254, 256.

20. Neglect must be suffered for considerable period to afford just cause for taking forfeiture.—*State vs. Pasumpsic T. Co.*, 3 Vt. 179; *People vs. Royalton & W. T. Co.*, 11 Vt. 431, 432.

21. Jury should find whether conditions have been broken or grant or charter forfeited.—*People vs. Royalton & W. T. Co.*, 11 Vt. 431, 432.

22. **Effect of**—Public entitled to have road thrown open as public highway for neglect in repair.—*People vs. President etc. Hillsdale & C. T. Co.*, 23 Wend. (N. Y.) 254, 256.

23. Public may proceed by way of information, by quo warranto, in case of neglect to repair road.—*People vs. President etc. Hillsdale & C. T. Co.*, 23 Wend. (N. Y.) 254, 256.

24. **NUISANCE**—Company insisting upon maintaining toll-gate upon part of road, over which its right to collect tolls has ceased by non-repair for unreasonable time, commits nuisance and obstructs road.—*State vs. Flannagan*, 67 Ind. 140, 145.

III. TOLL—1. DUTY TO FIX RATE.

25. **BOARD OF SUPERVISORS—Duty of**—Must fix rates of toll before it can be collected.—*Stony Hill T. R. Co. vs. Board Supervrs. Placer Co.*, 38 Cal. 632, 633, 26 Pac. Rep. 513.

26. Cannot arbitrarily refuse to fix rates of toll upon application, and so confiscate corporation's property.—*Stony Hill T. R. Co. vs. Board Supervrs. Placer Co.*, 38 Cal. 632, 633, 26 Pac. Rep. 513.

27. **Distinguishing:** *People vs. Davidson*, 79 Cal. 166, 170, 21 Pac. Rep. 538, upon ground that case was not authority where corporation was organized under code for construction of road and in good faith had proceeded with its construction.—*Stony Hill T. R. Co. vs. Board Supervrs. Placer Co.*, 83 Cal. 632, 633, 26 Pac. Rep. 513.

28. **NATURE OF DUTY.**—Roads upon which board of supervisors are required to fix rates of toll are those laid out and built as toll roads under provisions of code.—*Blood vs. Woods*, 95 Cal. 78, 30 Pac. Rep. 129; *People vs. Volcano Canyon T. R. Co.*, 100 Cal. 87, 90, 34 Pac. Rep. 522.

29. **APPLICATION TO FIX RATE OF TOLL.**—Question whether corporation is legally incorporated or a road, cannot be inquired into in application to compel board to fix rate of toll.—*People vs. Volcano Canyon T. R. Co.*, 100 Cal. 87, 89, 34 Pac. Rep. 522. See *Volcano Canyon R. Co. vs. Board Supervrs.*, 83 Cal. 634, 26 Pac. Rep. 513.

IV. SAME—2. RIGHT TO COLLECT.

30. **ACQUISITION OF RIGHT.**—Right of corporation or individual to exact toll does not exist in absence of legislative grant.—*Virginia Canon T. R. Co. vs. People ex rel. Vivian*, 22 Colo. 429, 435, 45 Pac. Rep. 398, 37 L. R. A. 711.

31. Right to collect toll can only be exercised under legislative grant by authorities having power to grant franchise.—*Bartram vs. Central T. Co.*, 25 Cal. 283, 290.

32. **EXISTENCE OF RIGHT.**—Franchise to collect tolls does not exist until toll-gate is legally established or located on road.—*Waterloo T. Co. vs. Cole*, 51 Cal. 381, 385.

33. **NATURE OF RIGHT.**—Right to tolls, mere incorporeal hereditament not carrying any estate in land.—*Welsh vs. Plumas Co.*, 80 Cal. 328, 342, 22 Pac. Rep. 254.

34. Right to take toll is an easement.—*Kelleth vs. Clayton*, 99 Cal. 210, 212, 33 Pac. Rep. 885.

35. Right of corporation or of individual to exact tolls is not common right.—*Virginia Canon T. R. Co. vs. People ex rel. Vivian*, 22 Colo. 429, 435, 45 Pac. Rep. 398, 37 L. R. A. 711.

36. Power of collecting tolls is part of sovereign power of state which legislature may delegate in return for supposed public good.—*Virginia Canon T. R. Co. vs. People ex rel. Vivian*, 22 Colo. 429, 435, 45 Pac. Rep. 398, 37 L. R. A. 711.

37. Right to impose toll does not confer right to use road as public highway.—*Kelleth vs. Clayton*, 99 Cal. 210, 212, 33 Pac. Rep. 885.

38. **PRESUMPTION OF AUTHORITY.**—Party in possession collecting tolls according to established rates will be presumed authorized to construct and maintain toll road.—*Carter vs. Meull*, 122 Cal. 367, 369, 55 Pac. Rep. 133.

39. Party in possession of toll road, collecting tolls, presumed to claim same under original grant.—*Blood vs. Woods*, 95 Cal. 78, 87, 30 Pac. Rep. 129.

40. **RIGHT OF PRE-EXISTING CORPORATIONS.**—Corporation existing prior to enacting of code may elect to continue its existence under code provisions.—*People ex rel. Attorney-General vs. Pfister*, 57 Cal. 532, 533; *People ex rel. Waugh vs. Auburn & Y. J. T. Co.*, 122 Cal. 335, 338, 55 Pac. Rep. 10.

41. Electing to continue its existence thereunder becomes code corporation upon filing its certificate and otherwise complying with terms of code.—*People ex rel. Attorney-General vs. Pfister*, 57 Cal. 532, 533.

42. Electing to continue its existence thereunder has right to collect such tolls as board of supervisors may authorize it to collect.—*People ex rel. Attorney-General vs. Pfister*, 57 Cal. 532, 533.

43. Extending existence under provisions of code carries with it right to collect no tolls beyond period of twenty years from date of its original organization (dis. op.).—*People ex rel. Attorney-General vs. Pfister*, 57 Cal. 532, 533.

44. **RIGHT TO RESTRAIN INTERFERENCE WITH.**—Injunction granted at instance of party having right to receive toll to restrain interference by county supervisors where complaint shows ownership and possession of road.—*Welsh vs. Plumas Co.*, 80 Cal. 328, 341, 22 Pac. Rep. 254. See *Conniff vs. City of San Francisco*, 67 Cal. 45, 7 Pac. Rep. 41.

45. **UNLAWFUL COLLECTION.**—What is.—Collection of toll after period for which corporation was organized to carry on business has expired is unlawful.—*Virginia Canon T. R. Co. vs. People ex rel. Vivian*, 22 Colo. 429, 435, 45 Pac. Rep. 398, 37 L. R. A. 711.

V. SAME—3. EXEMPTION FROM.

46. **NATURE OF.**—Exemption from paying toll is not an easement.—*Kelleth vs. Clayton*, 99 Cal. 210, 212, 33 Pac. Rep. 885.

47. **GRANTEE.**—Position of.—Grant exempting payment of toll made by corporation having right thereto does not prevent collection of toll as against subsequent grantee.—*Kelleth vs. Clayton*, 99 Cal. 210, 212, 33 Pac. Rep. 885.

48. Injunction will not lie on behalf of subsequent grantee to prevent collection of toll under agreement made with grantor for exemption of toll.—*Kelleth vs. Clayton*, 99 Cal. 210, 212, 33 Pac. Rep. 885.

VI. SAME—4. WHEN RIGHT CEASES.

49. **CESSATION OF RIGHT TO COLLECT.**—Tolls cannot be collected after expiration of time limited by terms of grant of franchise.—*People ex rel. Dedemeyer vs. Anderson & U. V. R. Co.*, 76 Cal. 190, 191, 18 Pac. Rep. 308; *People ex rel. El Dorado Co. vs. Davidson*, 79 Cal. 166, 170, 21 Pac. Rep. 538; *People ex rel. El Dorado Co. vs. O'Keefe*, 79 Cal. 171, 172, 21 Pac. Rep. 539; *McMullin vs. Leitch*, 83 Cal. 239, 23 Pac. Rep. 294.

50. **EFFECT OF CESSATION.**—Toll road becomes free public highway immediately right to take toll ceases, and may be used without charge.—*People ex rel. Waugh vs. Auburn & Y. J. T. Co.*, 122 Cal. 335, 339, 55 Pac. Rep. 10; *People vs. Volcano Canyon T. R.*

Co., 100 Cal. 37, 90, 34 Pac. Rep. 533; Virginia Canon T. R. vs. People ex rel. Vivian, 22 Colo. 429, 435, 45 Pac. Rep. 398, 37 L. R. A. 711.

51. **RIGHT OF ACTION AGAINST COMPANY.**—County has right to have toll road declared public highway where franchise granted has been repealed.—People ex rel. El Dorado Co. vs. Davidson, 79 Cal. 166, 170, 21 Pac. Rep. 538.

52. May enjoin demanding and taking of tolls on toll roads where franchise granted repealed by supervisors.—People ex rel. El Dorado Co. vs. Davidson, 79 Cal. 166, 170, 21 Pac. Rep. 538.

53. May restrain interfering and obstruction of travel over toll road, franchise of which has been repealed.—People ex rel. El Dorado Co. vs. Davidson, 79 Cal. 166, 170, 21 Pac. Rep. 538.

VII. FORFEITURE OF FRANCHISE.

54. **FORFEITURE.**—Forfeiture declared at common law by reason of non-performance.—People vs. Jackson & Michigan P. R. Co., 9 Mich. 385.

55. **EFFECT OF.**—Franchise of company not necessarily affected by forfeiture of right to collect.—State vs. Flannagan, 67 Ind. 140, 147.

56. **Right of way terminated by forfeiture** for abuse of franchise in collecting illegal

tolls.—Welsh vs. Plumas Co., 30 Cal. 338, 341, 22 Pac. Rep. 254.

57. Road lapses on forfeiture of right to collect toll for time being, into condition of public highway free to all.—State vs. Flannagan, 67 Ind. 140, 147.

58. Right to demand toll on portion of road constructed not affected by failure to complete toll road under state statute.—People vs. Jackson & M. P. R. Co., 9 Mich. 385.

59. **HOW WORKED.**—Destruction of bridge, which by reason of its not being restored leaves road impassable for any considerable length of time works a forfeiture at common law.—People vs. President etc. Hillsdale & C. T. Co., 23 Wend. (N. Y.) 254, 256.

60. **STATUTE—Constitutionality of.**—Act imposing entire forfeiture of franchise in case of non-repair of road is invalid, where question of repair of road is satisfactorily provided for in charter granting right of way prior to passing of act.—People vs. Jackson & Michigan P. R. Co., 9 Mich. 385, 307.

61. **SUPERVISORS—Duty of.**—Upon forfeiture for abuse of franchise in collecting illegal tolls board of supervisors required, by proper ordinance, either to cause road to be recorded as highway free to public or if necessary, for use of public, to abolish or discontinue.—Welsh vs. Plumas Co., 30 Cal. 338, 342, 22 Pac. Rep. 254.

§ 515. NO TOLLS TO BE CHARGED ON HIGHWAYS OR PUBLIC ROADS.

When any highway or public road is taken and used by any wagon road corporation as a part of its road, the corporation must not place a toll-gate on or take tolls for the use of such highway or public road by teamsters, travelers, drovers, or any one transporting property over the same.

History: Enacted March 21, 1872, founded upon § 3 Act April 22, 1853, p. 115.

1, 2. Ordinary power to impose toll.

3-5. Statutory power to impose—Necessity.

6. Same—Record must show necessity.

7. Same—Resurvey necessary.

8. Toll-gate—When a nuisance.

1. **ORDINARY POWER TO IMPOSE TOLL.**—Board of supervisors has no authority to grant a franchise to collect toll upon a free public highway.—El Dorado Co. vs. Davison, 30 Cal. 520, 521; Blood vs. Woods, 95 Cal. 78, 86, 30 Pac. Rep. 129; Kelleth vs. Clayton, 99 Cal. 210, 212, 33 Pac. Rep. 335; People ex rel. Waugh vs. Auburn & Y. J. T. Co., 122 Cal. 335, 339, 55 Pac. Rep. 10; Carter vs. Meull, 122 Cal. 367, 369, 55 Pac. Rep. 133; Virginia Canon T. R. Co. vs. People ex rel. Vivian, 22 Colo. 429, 435, 45 Pac. Rep. 398, 37 L. R. A. 711.

2. No power to convert existing public highway into toll road.—El Dorado Co. vs. Davison, 30 Cal. 520, 523.

3. **STATUTORY POWER TO IMPOSE.**—Board of supervisors, under County Government Act of 1893, § 25, subd. 41, may authorize collection of tolls upon free public highways when in their judgment expense necessary to operate and maintain such road as free public highway is too great to justify the county in

so operating or maintaining it.—Bedell vs. Scott, 126 Cal. 675, 59 Pac. Rep. 210.

4. **Judgment and determination of board of supervisors** that necessary expense in operating public highway is too great to justify county in operating it is prerequisite to its power to confer license or franchise upon any one to collect toll over such road.—Bedell vs. Scott, 126 Cal. 675, 676, 59 Pac. Rep. 210.

5. **Jurisdiction of board of supervisors** under County Government Act depends upon its determination, and its records must show same.—Bedell vs. Scott, 126 Cal. 675, 676, 59 Pac. Rep. 210. See Ala. Wightman vs. Karsner, 20 Ala. 446. Colo. People vs. Brown, 23 Colo. 425, 48 Pac. Rep. 661. Ind. Rosenthal vs. Plank R. Co., 10 Ind. 359. Me. Plummer vs. Inhabitants of Waterville, 32 Me. 566. Nev. Johnson vs. Eureka Co., 12 Nev. 28. N. M. Armija vs. Board of Commissioners, 3 N. Mex. 397, 7 Pac. Rep. 19.

6. **Record must show necessity.**—Records of board of supervisors must show that board received evidence, and made its determination that expense was too great, as stated in statute.—Bedell vs. Scott, 126 Cal. 675, 676, 59 Pac. Rep. 210.

7. Resurvey necessary.—Resurvey of location of public road is necessary where turnpike company is authorized to construct road over public road.—*Waterloo T. Co. vs. Cole*, 51 Cal. 381, 386.

8. TOLL-GATES NUISANCE.—Erection of toll-gate upon public highway is nuisance and abatable as such.—*El Dorado Co. vs. Davison*, 30 Cal. 521, 524.

§ 516. RATES OF TOLL MUST BE POSTED. The corporation must affix and keep up, at or over each gate, or in some conspicuous place, so as to be conveniently read, a printed list showing, first, the date when the franchise or privilege under which the right to collect tolls is claimed, was granted and the term of duration of said franchise; second, the date upon which rates of tolls were last fixed by the board of supervisors; and, third, the rates of tolls levied and demanded. Failure to comply with the provisions of this act shall work an immediate forfeiture of franchise.

History: Enacted March 21, 1872, founded upon § 80 Act May 12, 1853, Stats. 1853, p. 176; amended Feb. 14, 1901, Stats. and Amdts. 1900-1, p. 5. In force Feb. 14, 1901.

§ 517. PERSONS DETAINED UNTIL TOLL IS PAID. Each toll-gatherer may prevent from passing through his gate any person, animal, or vehicle, subject to toll, until the toll authorized to be collected for such passing has been paid.

History: Enacted March 17, 1872, founded on § 29 Act May 12, 1853, Stats. 1853, p. 176; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 372, held unconstitutional, see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXXVI, p. 577.

Applied, cited, construed, referred to, etc., 594, 602 (cited with other sections, apparently in: *People ex rel. Burke vs. Badlam*, 57 Cal. by error).

§ 518. PERSONS UNNECESSARILY DETAINED OR OVERCHARGED, DAMAGES. Every toll-gatherer who, at any gate, unreasonably hinders or delays any traveler or passenger or any vehicle or animal liable to the payment of toll, or demands or receives from any person more than he is authorized to collect, for each offense forfeits the sum of twenty-five dollars to the person aggrieved.

History: Enacted March 21, 1872, founded upon § 31 Act May 12, 1853, Stats. 1853, p. 176; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 372, held unconstitutional, see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXXVI, p. 578.

1. Applied, cited, construed, referred to, etc.
2. Toll-gatherer.—Definition of.
3. Same.—When liable.
- 4-7. Same.—When not liable.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Brown vs. Rice*, 51 Cal. 439, 490 (construed and applied).

2. TOLL-GATHERER.—Defined.—Party collecting toll under authority of turnpike corporation at rates fixed by board of supervisors is toll-gatherer, within provisions of code, even though board of supervisors may not have fixed and prescribed rates of toll from year to year.—*Brown vs. Rice*, 51 Cal. 439, 490.

3. When liable.—Statute imposes liability upon toll-gatherer demanding and receiving more than he is authorized by law to collect.—*Culbertson vs. Kinevan*, 73 Cal. 68, 71, 14 Pac. Rep. 364.

4. When not liable.—Toll-gatherer not liable

for merely receiving amount of toll paid without objection in same manner, as party has paid toll before without demand.—*Culbertson vs. Kinevan*, 73 Cal. 68, 71, 14 Pac. Rep. 364.

5. Statute imposes no liability upon toll-gatherer for acts of corporation employing him.—*Culbertson vs. Kinevan*, 73 Cal. 68, 71, 14 Pac. Rep. 364.

6. Statute imposes no liability upon toll-gatherer for acts or omissions of board of supervisors.—*Culbertson vs. Kinevan*, 73 Cal. 68, 71, 14 Pac. Rep. 364.

7. Under act of 1853 providing for collection of such tolls as may be fixed and prescribed by board of supervisors, as amended by act of 1857, party is not liable for receiving unauthorized tolls by reason of neglect of board of supervisors to fix the amount of toll in any year.—*Culbertson vs. Kinevan*, 73 Cal. 68, 71, 14 Pac. Rep. 364.

§ 519. PERSONS AVOIDING TOLLS TO PAY FIVE DOLLARS. Every person who, to avoid the payment of the legal toll, with his team, vehicle, or horse,

turns out of a wagon, turnpike, or plank road, or passes any gate thereon on ground adjacent thereto, and again enters upon such road, for each offense forfeits the sum of five dollars to the corporation injured.

History: Enacted March 21, 1872, founded upon § 33 Act May 12, 1853, Stats. 1853, p. 176.

§ 520. PENALTIES FOR TRESPASSES ON PROPERTY OF CORPORATION.

Every person who:

1. Wilfully breaks, cuts down, defaces, or injures any mile-stone or post on any wagon, turnpike, or plank road; or,
2. Wilfully breaks or throws down any gate on such road; or,
3. Digs up or injures any part of such road or anything thereunto belonging; or,
4. Forcibly or fraudulently passes any gate thereon without having paid the legal toll;

For each offense forfeits to the corporation injured the sum of twenty-five dollars, in addition to the damages resulting from his wrongful act.

History: Enacted March 21, 1872, founded on § 32 Act May 12, 1853, Stats. 1853, p. 176.

No offense is committed by traveler breaking down toll-gate maintained upon road out of repair for unreasonable time.—State vs. Flannagan, 67 Ind. 140, 146.

§ 521. REVENUE, HOW APPROPRIATED. [REDUCTION OF TOLLS, WHEN.] The entire revenue derived from the road shall be appropriated: first, to repayment to the corporation of the costs of its construction, together with the incidental expenses incurred in collecting tolls and keeping the road in repair; and, second, to the payment of the dividend among its stockholders, as provided in section five hundred and fourteen. When the repayment of the cost of construction is completed, the tolls must be so reduced as to raise no more than an amount sufficient to pay said dividend, and incidental expenses, and to keep the road in good repair.

History: Enacted March 21, 1872, founded on § 4 Act April 22, 1853, p. 115; amended March 30, 1874, Code Amdts. 1873-4, p. 215.

§ 522. PROPERTY MAY BE MORTGAGED OR HYPOTHECATED. The corporation may mortgage or hypothecate its road and other property for funds with which to construct or repair its road, but no mortgage or hypothecation is valid or binding unless at least twenty-five per cent of the capital stock subscribed has been paid in and invested in the construction of the road and appurtenances, and then only after an affirmative vote of two thirds of the capital stock subscribed.

History: Enacted March 21, 1872, founded on § 19 Act May 12, 1853, Stats. 1853, p. 173; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 373, held unconstitutional, see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXVI, p. 578.

1. Applied, cited, construed, referred to, etc.
2. Exercise powers given by resolutions.
3. Mortgage—Consent necessary to.
- 4, 5. Same—Power and ratification.
6. Note—Ratification of sufficient.
7. Evidence to prove ratification.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Welsh vs. County of Plumas*, 80 Cal. 333, 341, 22 Pac. Rep. 354 (construed and applied).

2. EXERCISE POWERS GIVEN BY RESOLUTIONS.—Act of 1853 relating to turnpike road companies denies board of directors right to exercise any powers except such as are given by the stockholders in their resolutions and by laws.—*Forbes vs. San Rafael T. Co.*, 50 Cal. 340, 343.

3. MORTGAGE—Consent necessary.—Consent of stockholders necessary to validity of mortgage must be shown by two-thirds vote,

under mortgage valid.—*Forbes vs. San Rafael T. Co.*, 50 Cal. 340, 343.

4. Power to.—Wagon road may be mortgaged or hypothecated to obtain funds for repair of same.—*Welsh vs. Plumas Co.*, 80 Cal. 338, 341, 22 Pac. Rep. 254.

5. Ratification.—Fact that two thirds of stockholders paid assessments with understanding that money was to be applied in liquidation of mortgage does not tend to prove ratification of same.—*Forbes vs. San Rafael T. Co.*, 50 Cal. 340, 343.

6. NOTE.—Ratification.—Subsequent resolution adopted by majority of stockholders levying assessment for express purpose of liquidating note equivalent to previous authority.—*Forbes vs. San Rafael T. Co.*, 50 Cal. 340, 343. See *Seeley vs. San Jose Independent M. & L. Co.*, 59 Cal. 22, 25.

7. Evidence to prove.—Subsequent resolution by majority of stockholders levying assessment to pay note is admissible to prove ratification.—*Forbes vs. San Rafael T. Co.*, 50 Cal. 340, 343.

§ 523. THIS TITLE APPLIES TO NATURAL PERSONS AS WELL AS CORPORATIONS. When a wagon, turnpike, or plank road is constructed, owned, or operated by any natural person this title is applicable to such person in like manner as it is applicable to corporations.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.

2. Construed as having no reference to transfer.

3, 4. Same.—As including individuals.

5, 6. Same.—With sections 511, 513, 522.

7-9. Individuals.—Rights of.—Application, etc.

10-11. Same.—When cannot claim right.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *People vs. Davidson*, 79 Cal. 166, 168, 21 Pac. Rep. 538 (construed and applied); *Welsh vs. Plumas Co.*, 80 Cal. 338, 341, 22 Pac. Rep. 254 (applied); *Gregory vs. Blanchard*, 98 Cal. 311, 313, 33 Pac. Rep. 199 (referred to in discussion).

2. CONSTRUED.—As having no reference to transfer of franchise.—*Gregory vs. Blanchard*, 98 Cal. 311, 313, 33 Pac. Rep. 199.

3. As making provisions of title applicable to individuals as well as corporations.—*Gregory vs. Blanchard*, 98 Cal. 311, 313, 33 Pac. Rep. 199.

4. As making rights and obligations defined by Title V, Pt. 4, applicable to all owners of wagon roads, whether individuals or corporations.—*Gregory vs. Blanchard*, 98 Cal. 311, 313, 33 Pac. Rep. 199.

5. With §§ 511, 513 as not referring in any respect to assignment or other disposition of franchise.—*Gregory vs. Blanchard*, 98 Cal. 311, 313, 33 Pac. Rep. 199.

6. With § 522 as giving power to mortgage and hypothecate to natural persons as well as corporations.—*Welsh vs. Plumas Co.*, 80 Cal. 338, 341, 22 Pac. Rep. 254.

7. RIGHTS OF INDIVIDUALS.—Individuals have same right to construct and operate toll roads as corporations since adoption of code.—*People ex rel. El Dorado Co. vs. Davidson*, 79 Cal. 166, 168, 21 Pac. Rep. 538; *Welsh vs. Plumas Co.*, 80 Cal. 338, 341, 22 Pac. Rep. 254.

8. Individuals who can procure from landholder right of way may construct and maintain a road.—*Bartram vs. Central T. Co.*, 25 Cal. 283, 290.

9. Individual desirous of constructing and maintaining road need only apply to legislature or public authority with respect to right to collect toll when constructed.—*Bartram vs. Central T. Co.*, 25 Cal. 283, 290.

10. When right cannot be claimed.—Party cannot claim possession of public highway as such by taking name of corporation where there was no person acting under name and no directors or officers and no acts in corporate form.—*People vs. Volcano Canyon T. R. Co.*, 100 Cal. 87, 90, 24 Pac. Rep. 523.

11. Distinguishing *Weaverville & M. W. R. Co. vs. Board of Supervisors*, 64 Cal. 69, 28 Pac. Rep. 496, as in that case party was an acting corporation and that fact held sufficient and conclusive to entitle them to action.

§ 524. FRANCHISES GRANTED FOR CONSTRUCTION OF ROADS FOR USE OF HORSELESS VEHICLES. The legislative or other body to whom is intrusted the government of any county, city and county, city, or town, may, under such regulations, restrictions, and limitations as it may provide, subject to existing laws, grant franchises for the construction of paths and roads, either on the surface, elevated, or depressed, on, over, across, or under the streets and public highways of any such county, city, or town, for the use of bicycles, tricycles, motorcycles, and other like horseless vehicles, for a term not exceeding fifty years.

In incorporated cities no franchise must be granted for the purpose herein expressed, unless the consent in writing of the owners of a majority of the frontage

upon the road or street along which said path or road is sought to be constructed, is first had and obtained, and filed with such legislative or governing body.

History: Enacted by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 373, held unconstitutional, see history, § 4 ante; re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXVII, p. 578.

TITLE VI.

BRIDGES, FERRY, WHARF, CHUTE, AND PIER CORPORATIONS.

§ 528. Toll not to be collected without authority.

§ 529. Corporate existence ceases, when.

§ 530. President and secretary to make annual report to supervisors; what report must

contain. Damages for failure to report.

§ 531. This title to apply to natural persons alike with corporations.

§ 528. TOLL NOT TO BE COLLECTED WITHOUT AUTHORITY. No corporation must construct, or take tolls on, a bridge, ferry, wharf, chute, or pier until authority is granted therefor by the supervisors, or other governing body having authority in that behalf.

History: Enacted March 21, 1872, founded upon § 1 Act April 8, 1858, Stats. 1858, p. 120, as amended by § 1 Act 1870, Stats. 1869-70, p. 526; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 373, held unconstitutional, see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXVIII, p. 579.

1. Applied, cited, construed, referred to, etc.

2. Formation of corporation.

3. License is necessary.

4. Public ferries and toll-bridges—General provisions governing.

5. Quasi public use.

6. Wharves, chutes, and piers—General provision governing.

1. Applied, cited, construed, referred to, etc., in: Los Angeles T. Land Co. vs. Muir, 136 Cal. 36, 49, 68 Pac. Rep. 308 (referred to).

2. Formation of corporation for purpose of operating ferry may be under this title.—Los Angeles T. Land Co. vs. Muir, 136 Cal. 36, 49, 68 Pac. Rep. 308.

3. License is necessary in order to enable person establishing bridge or ferry to receive compensation for same.—Norris vs. Farmers & Teamsters' Co., 6 Cal. 590, 597, 65 Am. Dec. 535; Ward vs. Severance, 7 Cal. 126, 128, 129. See Los Angeles T. L. Co. vs. Muir, 136 Cal. 36, 49, 68 Pac. Rep. 308.

4. Public ferries and toll-bridges—General provisions governing.—See Pol. Code §§ 2843-2858, 2870-2881, 2892-2895 and notes.

5. Quasi public use.—Ferry is quasi public use.—Los Angeles T. Land Co. vs. Muir, 136 Cal. 36, 49, 68 Pac. Rep. 308.

6. Wharves, chutes and piers—General provisions governing.—See Pol. Code §§ 2906-2921 and notes.

§ 529. CORPORATE EXISTENCE CEASES, WHEN. Every such corporation ceases to be a body corporate:

1. If, within six months from filing its articles of incorporation, it has not obtained such authority from the board of supervisors, or other governing body having authority in that behalf; and if, within one year thereafter, it has not commenced the construction of the bridge, wharf, chute, or pier, and actually expended thereon at least ten per cent of the capital stock of the corporation;

2. If, within three years from filing the articles of incorporation, the bridge, wharf, chute, or pier is not completed;

3. If, when the bridge, wharf, chute, or pier of the corporation is destroyed, it is not reconstructed and ready for use within three years thereafter;

4. If the ferry of any such corporation is not in running order within three months after authority is obtained to establish it, or if at any time thereafter it ceases for a like term consecutively to perform the duties imposed by law.

History: Enacted March 21, 1872, founded upon § 169 Act April 22, 1850, Stats. 1850, p. 373; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 373, held unconstitutional, see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXVIII, p. 579.

§ 530. PRESIDENT AND SECRETARY TO MAKE ANNUAL REPORT TO SUPERVISORS; WHAT REPORT TO CONTAIN. DAMAGES FOR FAILURE TO REPORT. The president and secretary of every bridge, ferry, wharf, chute, or pier corporation must annually, under oath, report to the board of supervisors, or other governing body having authority in that behalf, of the county in which the articles of incorporation are filed:

1. The cost of constructing and providing all necessary appendages and appurtenances for its bridge, ferry, wharf, chute, or pier;
2. The amount of all moneys expended thereon, since its construction, for repairs and incidental expenses;
3. The amount of its capital stock, how much paid in, and how much actually expended thereof;
4. The amount received during the year for tolls, and from all other sources, stating each separately;
5. The amount of dividends made, and the indebtedness of the corporation, specifying for what it was incurred;
6. Such other facts and particulars respecting the business of the corporation, as the board of supervisors or other governing body having authority in that behalf may require.

[Publication of report.] This report the president and secretary must cause to be published for four weeks in a daily newspaper published nearest the bridge, ferry, wharf, pier, or chute, if required by order of the board of supervisors or other governing body having authority in that behalf. **A failure to make such report subjects the corporation to a penalty of two hundred dollars, and for every week permitted to elapse after such failure an additional penalty of fifty dollars, payable in each case to the county from which the authority of the corporation was derived.**

[Duty of district attorney or city attorney.] All such cases must be reported by the board of supervisors, or other governing body having authority in that behalf, to the district attorney or city attorney, who must commence an action therefor.

History: Enacted March 21, 1872, founded upon §§ 170-173 Act April 22, 1850, Stats. 1850, p. 373; amended by Code Commission, Act March 6, 1901, Stats. and Amdts. 1900-1, p. 374, held unconstitutional, see history, § 4 ante; amendment re-enacted March 25, 1905, Stats. and Amdts. 1905, c. CDXXVIII, pp. 579-580.

§ 531. THIS TITLE TO APPLY TO NATURAL PERSONS ALIKE WITH CORPORATIONS. When a bridge, ferry, wharf, chute, or pier is constructed, operated, or owned by a natural person, this title is applicable to such person in like manner as it is applicable to corporations.

History: Enacted March 21, 1872.

Applied, cited, construed, referred to, etc., 33 Pac. Rep. 199 (referred to in connection in: Gregory vs. Blanchard, 98 Cal. 311, 314, with § 511 in discussion).

TITLE VII.

TELEGRAPH AND TELEPHONE CORPORATIONS.

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| <p>§ 536. May use right of way along waters, roads, and highways.</p> <p>§ 537. Liability for damaging telegraph or telephone property.</p> | <p>§ 538. Penalty for wilfully or maliciously injuring telegraph or telephone property.</p> <p>§ 539. Conditions on which damage to subaqueous cable may be recovered.</p> <p>§ 540. May dispose of certain rights.</p> |
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[The former Title VII, including §§ 536-541, was repealed by Act March 20, 1905, and the provisions in the following sections substituted therefor. Stats. and Amdts. 1905, c. CCCLXXXV, p. 491. Prior legislation upon which original Title VII was founded will be found in Stats. 1850, p. 347, § 152; 1857, p. 117, § 2; 1862, p. 290, § 8.]

§ 536. MAY USE RIGHT OF WAY ALONG WATERS, ROADS, AND HIGHWAYS. Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this state, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters.

History: Enacted March 20, 1905, Stats. and Amdts. 1905, c. CCCLXXXV, p. 492; see introductory note to this title.

- 1, 2. Appropriation of private property.
3. Common carriers—Telegraph and telephone companies as.
- 4-6. Compensation—Abutting owner's right dependent on ownership of fee.
7. Ejectment maintainable by abutting owner.
- 8, 9. Eminent domain—Exercise of power.
10. Exclusive grant by railroad company—Post-road.
11. Foreign corporation—Right to do business—Collateral attack.
12. Injunction lies in favor of abutting owner.
13. Intervention in receivership—Constructing line along railroad.
14. Measure of damages—Rule stated.
15. Municipal ordinance—Cannot enlarge authority.
16. Nuisance—Planting poles, etc., not.
17. Transpacific telegraph—Act 1872 to facilitate.
18. Trees on highway—Right to cut and trim.
- 19, 20. Trespass maintainable by abutting owner.

1. APPROPRIATION OF PRIVATE PROPERTY.—Planting and maintaining telephone or telegraph posts etc., along or upon a road or highway, reversion of which is owned by abutting owner, is an appropriation of private property and unlawful, unless right to do so is acquired by contract or condemnation.—*Md. Chesapeake & P. Tel. Co. vs. Mackenzie*, 74 Md. 36, 28 Am. St. Rep. 219, 21 Atl. Rep. 690. *N. J. Broome vs. New York & N. J. Tel. Co.*, 42 N. J. Eq. (15 Stew.) 141, 7 Atl. Rep. 851; *Nicoll vs. New York & N. J. Tel. Co.*, 62 N. J. L. (33 Vr.) 733, 72 Am. St. Rep. 666, 42 Atl. Rep. 553. *Va. Western Union Tel. Co. vs. Williams*, 86 Va. 696, 19 Am. St. Rep. 908, 11 S. E. Rep. 106.

2. Contra: *Magee vs. Overshiner*, 150 Ind. 127, 65 Am. St. Rep. 353, 49 N. E. Rep. 951,

40 L. R. A. 370 (wherein irreconcilable decisions of various courts are collated and discussed at length); *Cater vs. Northwestern Tel. Ex.*, 60 Minn. 539, 51 Am. St. Rep. 543, 63 N. W. Rep. 111, 28 L. R. A. 310.

3. COMMON CARRIERS.—Telegraph and telephone companies as.—See post §§ 2207-2209 and notes.

4. COMPENSATION.—Abutting owner is entitled to when telegraph or telephone poles are erected and maintained along and upon road or highway, if such abutting owner has title to reversionary interest in bed of such road or highway, because such use of road or highway is an additional servitude; and legislature is powerless to give corporations authority to make such use of road or highway without making appropriate provision for just compensation to owner.—*Ill. Board of Trade Tel. Co. vs. Barnett*, 107 Ill. 507, 47 Am. Rep. 453; *Postal Tel. C. Co. vs. Eaton*, 170 Ill. 513, 62 Am. St. Rep. 590, 49 N. E. Rep. 365, 39 L. R. A. 722. *Md. American T. & T. Co. vs. Pearce*, 71 Md. 535, 18 Atl. Rep. 910, 7 L. R. A. 200; *Chesapeake & P. Tel. Co. vs. Mackenzie*, 74 Md. 36, 28 Am. St. Rep. 219, 21 Atl. Rep. 690. *N. J. Nicoll vs. New York & N. J. Tel. Co.*, 62 N. J. L. (33 Vr.) 733, 72 Am. St. Rep. 666, 42 Atl. Rep. 553.

See monographic note 28 Am. St. Rep. 229-236.

5. Contra: *Magee vs. Overshiner*, 150 Ind. 127, 65 Am. St. Rep. 353, 49 N. E. Rep. 951 (wherein irreconcilable decisions of various courts are collated and discussed); *Pierce vs. Drew*, 136 Mass. 75, 49 Am. Rep. 7; *Cater vs. Northwestern Tel. Ex.*, 60 Minn. 539, 51 Am. St. Rep. 543, 63 N. W. Rep. 111, 28 L. R. A. 310.

6. Title to fee not being owned, abutting owners cannot enjoin construction of line, etc.,

where it is not alleged and shown that they and their property will suffer peculiar or unnecessary or greater injury by erection of poles, etc., than would result to others in like situations as to poles planted on road or highway upon which their property abuts.—*Hershfield vs. Rocky Mtn. Bell Tel. Co.*, 12 Mont. 102, 29 Pac. Rep. 883.

7. EJECTMENT MAY BE MAINTAINED BY ABUTTING OWNER against telegraph company which unlawfully occupies road or highway which he owns in fee without instituting proceedings to condemn.—*Postal Tel. C. Co. vs. Eaton*, 170 Ill. 513, 62 Am. St. Rep. 890, 49 N. E. Rep. 365, 39 L. R. A. 722.

8. EMINENT DOMAIN—Exercise of power.—Construction of telegraph and telephone lines along and upon road or highway where abutting owner has title to reversion, if done without consent of such owner, can be done only by exercise of power of eminent domain.—*Ill. Board of Trade Tel. Co. vs. Barnett*, 107 Ill. 507, 47 Am. Rep. 453; *Postal Tel. C. Co. vs. Eaton*, 170 Ill. 513, 62 Am. St. Rep. 890, 49 N. E. Rep. 365, 39 L. R. A. 722. *Md. American T. & T. Co. vs. Pearce*, 71 Md. 535, 18 Atl. Rep. 910, 7 L. R. A. 200; *Chesapeake & P. Tel. Co. vs. Mackenzie*, 74 Md. 36, 28 Am. St. Rep. 219, 21 Atl. Rep. 690. *N. J. Broome vs. New York & N. J. Tel. Co.*, 42 N. J. Eq. (15 Stew.) 141, 7 Atl. Rep. 851; *Nicoll vs. New York & N. J. Tel. Co.*, 62 N. J. L. (33 Vr.) 733, 72 Am. St. Rep. 666, 42 Atl. Rep. 583. *Va. Western U. Tel. Co. vs. Williams*, 86 Va. 696, 19 Am. St. Rep. 908, 11 S. E. Rep. 106, 8 L. R. A. 429.

9. Contra: *Magee vs. Overshiner*, 150 Ind. 127, 65 Am. St. Rep. 358, 49 N. E. Rep. 951, 40 L. R. A. 370 (wherein irreconcilable decisions of various courts are collated and discussed at length); *Cater vs. Northwestern Tel. Ex.*, 60 Minn. 539, 51 Am. St. Rep. 543, 63 N. W. Rep. 111, 28 L. R. A. 310.

10. EXCLUSIVE GRANT BY RAILROAD COMPANY TO CONSTRUCT LINE ON POST-ROAD.—Under Rev. Stats. U. S., §5263, which authorizes telegraph companies to construct lines of telegraph, etc., over and along any of military or post roads of United States, and railroad company which operates railroad which is military and post road cannot grant to telegraph company exclusive right to construct its line of telegraph upon such railroad so as to preclude another telegraph company from exercising its right under statute, and contract between such railroad corporation and telegraph company granting such exclusive privilege is void.—*Union Trust Co. vs. Atchison T. & S. F. R. Co.*, 8 N. Mex. 327, 43 Pac. Rep. 701. See *Western Union Tel. Co. vs. Burlington & S. W. R. Co.*, 11 Fed. Rep. 1, 3, 4; *United States vs. Union Pac. R. Co.*, 160 U. S. 1, bk. 40 L. ed. 319, 16 Sup. Ct. Rep. 190.

11. FOREIGN CORPORATION.—Right to do business within state cannot be questioned collaterally in action involving its right to construct its lines, etc., but question can be raised only by state.—*Hershfield vs. Rocky Mtn. Bell Tel. Co.*, 12 Mont. 102, 29 Pac. Rep. 883; *Union Trust Co. vs. Atchison T. & S. F. R. Co.*, 8 N. Mex. 327, 43 Pac. Rep. 701.

12. INJUNCTION LIES IN FAVOR OF OWNER OF REVERSION to restrain corporation from erecting and maintaining poles along and upon road or highway without making compensation.—*American T. & T. Co. vs. Pearce*, 71 Md. 535, 18 Atl. Rep. 910, 7 L. R. A. 200; *Chesapeake & P. Tel. Co. vs. Mackenzie*, 74 Md. 36, 28 Am. St. Rep. 219, 21 Atl. Rep. 690.

13. INTERVENTION IN RECEIVERSHIP—Construction of line along railroad.—Where telegraph company seeks to obtain leave to construct telegraph line, etc., over and along right of way of railroad company, and such railroad company is in hands of receiver, telegraph company may come in by intervention and litigate its right.—*Union Trust Co. vs. Atchison T. & S. F. R. Co.*, 8 N. Mex. 327, 43 Pac. Rep. 701.

14. MEASURE OF DAMAGES—Diminution of rental value—Difference in value before and after.—Measure of damages is not what particular individual would be willing to charge for having pole put up or remain, nor amount some other person might consider rental value was depreciated for purposes of his business; but where land of plaintiff is not taken nor his soil actually invaded, measure of damages is either,—1. The extent to which rental or usable value of particular property has been diminished by the trespass or injury complained of; or, 2. The difference in value of property before construction of poles and its value afterwards, if depreciation in value has been caused by erection and maintenance of poles.—*Chesapeake & P. Tel. Co. vs. Mackenzie*, 74 Md. 36, 28 Am. St. Rep. 219, 21 Atl. Rep. 690.

15. MUNICIPAL ORDINANCES—Cannot enlarge authority which statute gives to erect poles, etc., along and upon highways, etc.—*Chesapeake & P. Tel. Co. vs. Mackenzie*, 74 Md. 36, 28 Am. St. Rep. 219, 21 Atl. Rep. 690.

16. NUISANCE.—Planting of telegraph or telephone poles in highway or street is not public nuisance, because legislature has authorized same.—*Southern Bell Tel. Co. vs. Francis*, 109 Ala. 224, 55 Am. St. Rep. 920, 19 So. Rep. 1, 31 L. R. A. 193; *Chesapeake & P. Tel. Co. vs. Mackenzie*, 74 Md. 36, 28 Am. St. Rep. 219, 21 Atl. Rep. 690.

17. TRANSPACIFIC TELEGRAPH—Act 1872 to facilitate.—See *HENNING'S GENERAL LAWS*, tit. *Telegraph Corporations*.

18. TREES—Cutting and trimming.—Even though corporation may be absolved from liability to abutting owner of fee for cutting and trimming trees growing upon road or highway where such cutting and trimming is necessary, yet it is not lawful for corporation unnecessarily and wantonly to interfere with trees; and if cutting and trimming clearly exceeds necessity and consequential injury results to abutting property, owner will have his appropriate remedy at law to redress injury.—See *Southern Bell Tel. Co. vs. Francis*, 109 Ala. 224, 55 Am. St. Rep. 920, 19 So. Rep. 1, 31 L. R. A. 193.

19. TRESPASS Q. C. F. MAY BE MAINTAINED BY ABUTTING OWNER.—Construction and maintenance of telegraph line upon

read or highway is new and additional burden on fee, and owner of fee is entitled to recover additional compensation of such use, and may maintain action of trespass quare clausum fregit.—Board of Trade Tel. Co. vs. Barnett, 107 Ill. 507, 47 Am. Rep. 453 (following Indianapolis B. & W. R. Co. vs. Hartley, 67 Ill. 439, analogous case, involving remedy against

railroad company); Western Union Tel. Co. vs. Williams, 86 Va. 696, 19 Am. St. Rep. 908, 11 S. E. Rep. 106, 8 L. R. A. 429. See Postal Tel. C. Co. vs. Eaton, 170 Ill. 513, 62 Am. St. Rep. 390, 49 N. E. Rep. 365, 59 L. R. A. 722.

20. Compare: Southern Bell Tel. Co. vs. Francis, 109 Ala. 224, 55 Am. St. Rep. 930, 19 So. Rep. 1, 31 L. R. A. 193.

§ 537. LIABILITY FOR DAMAGING TELEGRAPH OR TELEPHONE PROPERTY. Any person who injures or destroys, through want of proper care, any necessary or useful fixture of any telegraph or telephone corporation, is liable to the corporation for all damages sustained thereby. Any vessel which, by dragging its anchor, or otherwise, breaks, injures, or destroys the subaqueous cable of a telegraph or telephone corporation, subjects its owner to the damages hereinbefore specified.

History: Enacted March 20, 1905, Stats. and Amdts. 1905, c. CCCLXXXV, p. 492; see introductory note to this title.

Criminal prosecution for malicious injury to telegraph lines, etc.—See Penal Code § 591 and note where the authorities will be found fully collected.

§ 538. PENALTY FOR WILFULLY OR MALICIOUSLY INJURING TELEGRAPH OR TELEPHONE PROPERTY. Any person who wilfully and maliciously does any injury to any telegraph or telephone property, mentioned in the preceding section, is liable to the corporation for one hundred times the amount of actual damages sustained thereby, to be recovered in any court of competent jurisdiction.

History: Enacted March 20, 1905, Stats. and Amdts. 1905, c. CCCLXXXV, p. 492; see introductory note to this title.

Criminal prosecution for malicious injury to telegraph lines, etc.—See Penal Code § 591 and note where the authorities will be found fully collected.

§ 539. CONDITIONS ON WHICH DAMAGES TO SUBAQUEOUS CABLE MAY BE RECOVERED. No telegraph or telephone corporation can recover damages for the breaking or injuring of any subaqueous telegraph or telephone cable, unless such corporation has previously erected on either bank of the waters under which the cable is placed, a monument, indicating the place where the cable lies, and publishes for one month in some newspaper most likely to give notice to navigators, a notice giving a description and the purpose of the monuments, and the general course, landings, and termini of the cable.

History: Enacted March 20, 1905, Stats. and Amdts. 1905, c. CCCLXXXV, p. 492; see introductory note to this title.

§ 540. MAY DISPOSE OF CERTAIN RIGHTS. Any telegraph or telephone corporation may at any time, with the consent of the persons holding two thirds of the issued stock of the corporation, sell, lease, assign, transfer, or convey any rights, privileges, franchises, or property of the corporation, except its corporate franchise.

History: Enacted March 20, 1905, Stats. and Amdts. 1905, c. CCCLXXXV, p. 492; see introductory note to this title.

TITLE VIII.

WATER AND CANAL CORPORATIONS.

- § 548. Corporation may obtain contract to supply city or town.
 § 549. Must furnish water for family use upon demand. Rules may be prescribed.
 § 550. Right to use streets, ways, alleys, and roads (repealed).

- § 551. Construction of canal, etc. Construction and repair of bridges. Supervisors may construct bridges and recover therefor.
 § 552. Right of purchasers to use water for irrigating.

§ 548. CORPORATION MAY OBTAIN CONTRACT TO SUPPLY CITY OR TOWN. No corporation formed to supply any city, city and county, or town with water must do so unless previously authorized by an ordinance of the authorities thereof, or unless it is done in conformity with a contract entered into between the city, city and county, or town and the corporation.

[Regulating rates—Term of grant.] Contracts so made are valid and binding in law, but do not take from the city, city and county, or town the right to regulate the rates for water, nor must any exclusive right be granted. No contract or grant must be made for a term exceeding fifty years.

History: Enacted March 21, 1872, founded upon § 3 Act May 3, 1852, Stats. 1852, p. 171.

1. Legislative power over water not interfered with.
- 2-5. Same—Extent of—Constitution—Ordinance.
6. Same—How restrained—Injunction.
- 7-9. Constitution—Effect of.
- 10-13. Right to use—Effect of appropriation—Rate.
- 14-16. Rates—How determined—Discrimination.

1. **LEGISLATIVE POWER.**—Courts will not interfere with legislative discretion in amending charter relating to water.—Spring Valley Water Works vs. Schottler, 110 U. S. 347, bk. 28 L. ed. 173, 4 Sup. Ct. Rep. 43.

2. Legislature empowered to regulate rates.—Spring Valley Water Works vs. Schottler, 110 U. S. 347, bk. 28 L. ed. 173, 4 Sup. Ct. Rep. 43.

3. Legislature has power to substitute commission selected without co-operation of water company.—Spring Valley Water Works vs. Schottler, 110 U. S. 347, bk. 28 L. ed. 173, 4 Sup. Ct. Rep. 43.

4. Legislature has no power, since constitution of 1879, to say whether use of water shall be public use or not.—People vs. Stephens, 62 Cal. 209, 234.

5. **ORDINANCE—Validity of.**—Ordinance passed before time specified in constitution to take effect, but after time mentioned therein in which it is to be passed, is valid.—Fitch vs. Board Supervrs. San Francisco, 122 Cal. 285, 54 Pac. Rep. 901.

6. Injunction lies restraining board of supervisors passing ordinances working an irreparable injury.—Spring Valley Water Works vs. Bartlett, 16 Fed. Rep. 615.

7. **CONSTITUTION 1879, ART. 14, § 1,** declares that use to all water heretofore or

hereafter appropriated for sale, rental or distribution shall be public use.—People vs. Stephens, 62 Cal. 209, 234; McCrary vs. Beaudry, 67 Cal. 120, 122, 7 Pac. Rep. 264; Spring Valley Water Works vs. San Francisco, 82 Cal. 286, 305, 16 Am. St. Rep. 116, 22 Pac. Rep. 910, 6 L. R. A. 756.

See pars. 4, 5 this note.

8. Substituted board of supervisors for board of commissioners authorized under the act of 1858, and functions of two bodies are same.—Jacobs vs. Board Supervrs. San Francisco, 100 Cal. 121, 137, 34 Pac. Rep. 630.

9. Proceedings instituted under provisions of constitution must be in name of people.—Fitch vs. Board Supervrs. San Francisco, 122 Cal. 285, 294, 54 Pac. Rep. 901.

10. **RIGHT TO USE OF WATER.**—Appropriation of water for distribution and sale gives the public right to use it.—McCrary vs. Beaudry, 67 Cal. 120, 122, 7 Pac. Rep. 264.

11. Is ipso facto diversion to public use.—McCrary vs. Beaudry, 67 Cal. 120, 122, 7 Pac. Rep. 264; Spring Valley Water Works vs. San Francisco, 82 Cal. 286, 305, 16 Am. St. Rep. 116, 22 Pac. Rep. 910, 1046, 6 L. R. A. 756.

12. Each member of county, by paying rate fixed for supplying it, has right to use reasonable quantity in reasonable manner.—McCrary vs. Beaudry, 67 Cal. 120, 122, 7 Pac. Rep. 264.

13. Water appropriated for distribution and sale to public is inconsistent with right to person appropriating it to exercise same control that he might have exercised if he had never so appropriated it.—McCrary vs. Beaudry, 67 Cal. 120, 122, 7 Pac. Rep. 264.

14. **RATES—How determined.**—Rates to be charged by water companies must be determined by reference to provisions of general

law in respect to that class of corporations.—*Spring Valley Water Works vs. Bryant*, 52 Cal. 132, 141.

See HENNING'S GENERAL LAWS, tit. Irrigation Companies.

15. Power to charge rates of tolls for water as franchise can be exercised only in manner provided by general laws forming such companies.—*Spring Valley Water Works vs. Bryant*, 52 Cal. 132, 140.

16. Acts establishing water rates in city and county of San Francisco (1875, 1876) attempting to fix rates to be charged, differing from provisions for establishing rates allowed to other companies formed under general laws, unconstitutional and void.—*Spring Valley Water Works vs. Bryant*, 52 Cal. 132, 141, affirmed *City and County of San Francisco vs. Spring Valley Water Works*, 53 Cal. 608, 611. See *People vs. Cent. Pac. R.*, 83 Cal. 393, 418.

§ 549. MUST FURNISH WATER FOR FAMILY USE UPON DEMAND. RULES MAY BE PRESCRIBED. All corporations formed to supply water to cities or towns must furnish pure fresh water to the inhabitants thereof, for family uses, so long as the supply permits, at reasonable rates and without distinction of persons, upon proper demand therefor; and must furnish water to the extent of their means, in case of fire or other great necessity, free of charge. The board of supervisors, or the proper city or town authorities, may prescribe proper rules relating to the delivery of water, not inconsistent with the laws of the state.

History: Enacted March 21, 1872, founded upon § 4 Act April 22, 1858, Stats. 1858, p. 219; amended March 30, 1874, Code Amdts. 1873-4, p. 216; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 375, held unconstitutional, see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXIX, p. 580.

I. Constitutional Provisions as to Rates.

1. Applied, cited, construed, referred to, etc.
2. Constitution repeals Act of 1858.
- 3-12. Construed as to application—Authorization, etc.

II. Fixing of Rates—1. Authority to Fix.

13. Constitution—Provisions as to fixing.
14. Same—Mayor no part of power under.
- 15, 16. Legislature invested with right under constitution.
- 17, 18. Municipality special tribunal—Charter.
- 19, 20. Supervisors' rights to pass—Mayor's veto.
21. Restraining fixing of rates—Prohibition.

III. Same—2. Extent of Authority.

- 22, 23. Investigation to be made and reasonable rates fixed.
24. Power must not be used to discriminate.
- 25, 26. Power does not extend to private corporations.
27. Supervisors—Investigation to be made by.

IV. Same—3. Nature of Authority.

- 28-35. Judicial—Governmental—Legislative.
36. How limited by United States constitution.
37. Not subject to mayor's veto.
38. Performance—Presumption in favor of.
- 39, 40. Supervisors—Exercise of discretion, etc.

V. Same—4. Matters to be Considered.

41. Consideration to be given to public, etc.
- 42-44. Matters to be taken into consideration.
- 45-49. Matters not to be considered.

VI. Same—5. Amount of Compensation.

50. Compensation must be just to company and public.

51, 52. Constitution—Requirement to be observed.

53. Rates actually collected by owners legally accepted.

54, 55. Price within supervisors' powers.

56. Question analogous to cases under eminent domain.

57, 58. Rates should not create fraud, loss, etc.

59. Rates should be same whether capital borrowed or not.

60. Violate duty when not reasonable.

61. Contract for less than maximum not illegal.

62. Value determined by revenue standard.

63-65. Meters proper system of measurement—Assumption.

VII. Same—6. Parties Right to Compel.

66, 67. Constitutional declaration as to party.

68. Legislative authority—Extent and indication of.

69-73. Party injuriously affected—Who is.

VIII. Same—7. Proceedings to Compel.

74, 75. Mandamus—When not proper remedy.

76. Same—When lies.

IX. Same—9. Reviewable by Court.

77. Constitution—Power conferred by to courts.

78, 79. Courts—Assumption by, as to fixing, etc.

80-85. Court's power—Nature and extent of.

86, 87. Grounds for review.

88-90. Evidence and burden of proof.

X. Power to Collect and Enforce.

91-93. Nature and extent of.

94, 95. Power to shut off water.

XI. Contracts Between Municipality and Company.

96, 97. Power of city to use and appropriate under.

98. When void.

XII. Free Supply—Under General Laws and Constitution.

- 99-104. Rights as to free water under general laws considered.
105-111. Words and phrases in act construed.
112-117. Constitution of 1879—Effect of on free supply.

I. CONSTITUTIONAL PROVISIONS AS TO RATES.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Spring Valley Water Works vs. Bryant*, 52 Cal. 132, 134 (cited in discussion), 141 (construed and applied).

As to assumption of public duty by water company, see note 63 Am. St. Rep. 344.

As to right of water company to enforce rules, see note 63 Am. St. Rep. 344.

2. **CONSTITUTION OF 1879, ART. 14, §1**, repeals act of 1858 giving board of supervisors power to fix water-rates, and to appoint commissioners for that purpose, relating to rates of compensation to be collected for water supply.—*Spring Valley Water Works vs. Board Supervrs. San Francisco*, 61 Cal. 3, 4, 5.

3. **CONSTITUTION CONSTRUED**—As having no application to water furnished by municipality itself as shown by concluding clause of §19, article 11.—*People vs. Stephens*, 62 Cal. 209, 237.

4. As applying to rates of compensation to be fixed for collection by individual or corporation introducing water "in any city where there are no public works owned and controlled by the municipality."—*People vs. Stephens*, 62 Cal. 209, 237.

5. As declaring right to collect rates or compensation established under its provisions a franchise.—*People vs. Stephens*, 62 Cal. 209, 234.

6. As giving board power to determine proper proportion for property to pay through taxation for benefits received.—*San Francisco P. W. Factory vs. Brickwedel*, 60 Cal. 166, 171.

7. What sums individuals should pay for benefits received.—*San Francisco P. W. Factory vs. Brickwedel*, 60 Cal. 166, 171.

8. As giving no right to collect rates or compensation except by authority and in manner prescribed by statute.—*People vs. Stephens*, 62 Cal. 209, 234.

9. As not authorizing board of supervisors to fix rates to be paid by city and county and then provide that they should be added to rates fixed for private customers in case city did not pay.—*San Francisco P. W. Factory vs. Brickwedel*, 60 Cal. 166, 169.

10. As not authorizing board to fix rates to be paid by city or county and to allow amount paid by city and county to private consumers.—*San Francisco P. W. Factory vs. Brickwedel*, 60 Cal. 166, 169.

11. As not contravening provisions of the United States constitution as operating to deprive water company of its property without due process of law in not making provision for notice to, and an opportunity to be heard by, those whose rights are to be affected.—*San Diego Water Co. vs. San Diego*, 118 Cal.

556, 555, 556, 62 Am. St. Rep. 261, 50 Pac. Rep. 633, 33 L. R. A. 460.

12. As secures to individuals and corporations duly incorporated under laws of state, right to introduce water into municipalities with right to fix rates or compensation for its use.—*People vs. Stephens*, 62 Cal. 209, 237.

II. FIXING OF RATES—1. AUTHORITY TO FIX.

13. **CONSTITUTION, ART. 14, §1**, makes use subject to regulation and control of state; that is to say, of legislature as prescribed by statute, subject to provisions contained in constitution relating to rates of compensation for water supplied to city or inhabitants.—*People vs. Stephens*, 62 Cal. 209, 234.

14. Constitution does not make mayor part of power fixing water-rates.—*Jacobs vs. Supervisors of San Francisco*, 100 Cal. 121, 139, 34 Pac. Rep. 630.

15. **LEGISLATURE MUST PROVIDE LAWS**, if none exists constitution having fixed manner of establishing rates of compensation chargeable for water furnished, and declared right to collect franchise exercisable only by authority imposed by law.—*People vs. Stephens*, 62 Cal. 209, 234.

16. Failure of legislature to provide needful laws governing collection of rates and compensation, does not prevent establishment of rates or compensation specifically required by constitution.—*People vs. Stephens*, 62 Cal. 209, 234.

17. **MUNICIPALITY CREATED SPECIAL TRIBUNAL** by constitution and legislation thereunder to determine as between public and water company reasonable rates for water during certain limited period.—*Jacobs vs. Board Supervrs. San Francisco*, 100 Cal. 121, 137, 34 Pac. Rep. 630. See *Spring Valley Water Works vs. Schottler*, 110 U. S. 347, bk. 23 L. ed. 173, 4 Sup. Ct. Rep. 48.

18. **PROVISIONS OF CITY CHARTER** must be construed in subordination of laws of state under which company incorporated.—*San Diego Water Co. vs. San Diego*, 59 Cal. 517, 521.

Ordinance, see para. 20, 21 this note.

19. **SUPERVISORS** have sole power to fix rates granted by constitution.—*Jacobs vs. Board Supervrs. San Francisco*, 100 Cal. 121, 132, 34 Pac. Rep. 630.

20. May pass ordinance over mayor's veto legally fixing rates to be charged for water.—*Jacobs vs. Board Supervrs. San Francisco*, 100 Cal. 121, 138, 34 Pac. Rep. 630.

21. **RESTRAINING FIXING**.—Prohibition cannot be awarded to restrain supervisors or city from passing ordinance fixing water rate.—*Spring Valley Water Works vs. Bartlett*, 63 Cal. 246, 246.

III. SAME—2. EXTENT OF AUTHORITY.

22. **CONSTITUTION GIVES POWER TO GOVERNING BODY** of municipality, upon their investigation, and with exercise of judgment and discretion, to fix reasonable rates and allow just compensation.—*San Diego Water Co.*

vs. San Diego, 118 Cal. 556, 566, 62 Am. St. Rep. 261, 50 Pac. Rep. 633, 38 L. R. A. 460.

See par. 27 this note.

23. **Body of municipality attempting to act arbitrarily, without investigation or without exercise of judgment and discretion, or fixing rates so palpably unreasonable and unjust as to amount to arbitrary action, violates duty, and goes beyond power conferred.**—San Diego Water Co. vs. San Diego, 118 Cal. 556, 566, 62 Am. St. Rep. 261, 50 Pac. Rep. 633, 38 L. R. A. 460. See Spring Valley Water Works vs. San Francisco, 82 Cal. 286, 305-314, 16 Am. St. Rep. 116, 22 Pac. Rep. 910, 1046, 6 L. R. A. 756.

24. **Bonds cannot be imposed upon one corporation which cannot be cast upon any other individual or corporation.**—Spring Valley Water Works vs. Board Supervrs. San Francisco, 61 Cal. 18, 25.

25. **Power of board of supervisors does not extend to corporation formed for purpose of supplying water to landowners and occupants of limited and particular district.**—McFadden vs. Board Supervrs. Los Angeles Co., 74 Cal. 571, 573, 16 Pac. Rep. 397.

26. **Over private corporation organized for purpose of supplying water to its own stockholders for private use and not otherwise for sale or distribution.**—McFadden vs. Board Supervrs. Los Angeles Co., 74 Cal. 571, 573, 16 Pac. Rep. 397.

27. **Supervisors should hear parties interested and fairly weigh evidence presented and decide property rights according to their honest convictions and just judgment.**—Jacobs vs. Board Supervrs. San Francisco, 100 Cal. 121, 130, 34 Pac. Rep. 630.

See par. 23 this note.

IV. SAME—3. NATURE OF AUTHORITY.

28. **NATURE OF FIXING WATER RATES, not judicial in so far as to enable court to, is prohibition.**—Spring Valley Water Works vs. Bartlett, 63 Cal. 245, 246.

29. **Acts of board of supervisors are judicial in fixing rates.**—Jacobs vs. Board Supervrs. San Francisco, 100 Cal. 121, 130, 34 Pac. Rep. 630; Spring Valley Water Works Co. vs. Schottler, 110 U. S. 347, 354, bk. 28 L. ed. 173.

30. **Not an adversary judicial proceeding such as, under constitution, will conclude private rights.**—San Diego Water Co. vs. San Diego, 118 Cal. 556, 563, 62 Am. St. Rep. 261, 50 Pac. Rep. 633, 38 L. R. A. 460.

31. **FIXING WATER RATES BY COUNCIL IS GOVERNMENTAL PROCEEDING** conducted without notice to either water company or rate payers and without any right on their part to intervene.—San Diego Water Co. vs. San Diego, 118 Cal. 556, 563, 62 Am. St. Rep. 261, 50 Pac. Rep. 633, 38 L. R. A. 460.

32. **Which cannot operate to divest private rights, and when it does so is unlawful exercise of governmental power and void.**—San Diego Water Co. vs. San Diego, 118 Cal. 556, 563, 62 Am. St. Rep. 261, 50 Pac. Rep. 633, 38 L. R. A. 460.

33. **Is legislative act exercisable by city council of each municipality as legislative body under constitution upon which devolves**

fixing of rates.—Sheward vs. Citizens Water Co., 90 Cal. 635, 640, 27 Pac. Rep. 439.

34. **To extent that action of proper bodies being clothed with such power cannot be controlled by writs which can issue only for purpose of controlling judicial action.**—Spring Valley Water Works vs. Bryant, 52 Cal. 132; Spring Valley Water Works vs. San Francisco, 52 Cal. 111; Spring Valley Water Works vs. Bartlett, 63 Cal. 245; Spring Valley Water Works vs. San Francisco, 82 Cal. 286, 307, 16 Am. St. Rep. 116, 22 Pac. Rep. 910, 1046, 6 L. R. A. 756.

35. **Where judicial, legislative or administrative, it is not above control of courts in proper cases.**—Spring Valley Water Works vs. San Francisco, 82 Cal. 286, 307, 16 Am. St. Rep. 116, 22 Pac. Rep. 910, 1046, 6 L. R. A. 756.

36. **LIMITED BY UNITED STATES CONSTITUTION, as to power of state to fix and regulate rates of compensation by persons and corporations in charge of public utilities, in such a manner that it cannot be exercised to such an extent as to require such persons to furnish property or services without reward.**—San Diego Water Co. vs. San Diego, 118 Cal. 556, 563, 62 Am. St. Rep. 261, 50 Pac. Rep. 633, 38 L. R. A. 460.

37. **Mayor has no power to veto resolution of board of supervisors fixing water-rates.**—Jacobs vs. Board Supervrs. San Francisco, 100 Cal. 121, 127, 34 Pac. Rep. 630.

38. **PERFORMANCE OF ACT must receive all presumptions and sanctions belonging to acts of legislative body generally.**—Sheward vs. Citizens Water Co., 90 Cal. 635, 640, 27 Pac. Rep. 439.

39. **FIXING RATES.**—Supervisors must exercise discretion in reasonable and fair manner in fixing rates.—Spring Valley Water Works vs. San Francisco, 82 Cal. 286, 305, 16 Am. St. Rep. 116, 22 Pac. Rep. 910, 1046, 6 L. R. A. 756.

40. **Supervisors must not act arbitrarily in fixing of rates, but must exercise discretion with reference to what they should be and to the expense to company necessary in furnishing water or to what is fair and reasonable compensation.**—Spring Valley Water Works vs. San Francisco, 82 Cal. 286, 305, 16 Am. St. Rep. 116, 22 Pac. Rep. 910, 1046, 6 L. R. A. 756.

V. SAME—4. MATTERS TO BE CONSIDERED.

41. **FIXING RATES—Right of public as well as that of stockholders of company must be considered.**—Redlands L. & C. D. W. Co. vs. Redlands, 121 Cal. 365, 369, 53 Pac. Rep. 843.

42. **Cost of plant prior element for consideration in determining value although not conclusive.**—Redlands L. & C. D. W. Co. vs. Redlands, 121 Cal. 365, 368, 53 Pac. Rep. 843.

43. **Matters of repair, reconstruction, or replacement considered in fixing rates.**—San Diego Water Co. vs. San Diego, 118 Cal. 556, 573, 62 Am. St. Rep. 261, 50 Pac. Rep. 633, 38 L. R. A. 460.

44. **VALUE OF PROPERTY necessarily used in furnishing water is basis upon which to determine amount of revenue to be provided**

by ordinance fixing rates.—Redlands L. & C. D. W. Co. vs. Redlands, 121 Cal. 365, 368, 53 Pac. Rep. 843.

45. Company not entitled to be reimbursed from income derived from rates fixed in ordinance, annual depreciation of payment aside from amount required for maintenance and repairs during year.—Redlands L. & C. D. W. Co. vs. Redlands, 121 Cal. 312, 313, 53 Pac. Rep. 843. See San Diego Water Co. vs. San Diego, 118 Cal. 556, 564, 62 Am. St. Rep. 261, 50 Pac. Rep. 633, 38 L. R. A. 460.

46. Amount of capital stock paid into corporation immaterial factors.—Redlands L. & C. D. W. Co. vs. Redlands, 121 Cal. 365, 368, 53 Pac. Rep. 843.

47. Bonded indebtedness of company not taken into consideration in fixing compensation.—San Diego Water Co. vs. San Diego, 118 Cal. 556, 571, 583, 62 Am. St. Rep. 261, 50 Pac. Rep. 633, 38 L. R. A. 460; Redlands L. & C. D. W. Co. vs. Redlands, 121 Cal. 365, 368, 53 Pac. Rep. 843.

48. Interest on bonded indebtedness not taken into consideration.—Redlands L. & C. D. W. Co. vs. Redlands, 121 Cal. 365, 368, 53 Pac. Rep. 843.

49. Stockholders' dividends not taken into consideration in fixing amounts of rates.—Redlands L. & C. D. W. Co. vs. Redlands, 121 Cal. 365, 369, 53 Pac. Rep. 843.

VII. SAME—5. AMOUNT OF COMPENSATION.

50. COMPANY ONLY ENTITLED TO SUCH COMPENSATION as under all circumstances will give both just compensation to company and public.—Redlands L. & C. D. W. Co. vs. Redlands, 121 Cal. 365, 369, 53 Pac. Rep. 843. See Covington etc. T. Co. vs. Sandford, 164 U. S. 573, bk. 41 L. ed. 560, 17 Sup. Ct. Rep. 198.

51. CONSTITUTION NOT INTENDED TO MAKE DISTINCTION between rights then existing and those to be thereafter acquired, or to confiscate private property.—San Diego Water Co. vs. San Diego, 118 Cal. 556, 566, 62 Am. St. Rep. 261, 50 Pac. Rep. 633, 38 L. R. A. 460.

52. Required by constitution 1879.—Art. 14, §1, only requires such rates to be collected for water as are authorized to be introduced by article 11, §19.—People vs. Stephens, 62 Cal. 209, 237.

53. Actual rates established and collected by water owners, legally accepted rates under Supervisors Act.—Fresno C. & Irr. Co. vs. Park, 129 Cal. 437, 447, 62 Pac. Rep. 87.

54. PRICE AT WHICH WATER SHALL be sold is matter within power of board of supervisors to determine.—Spring Valley Water Works vs. San Francisco, 32 Cal. 286, 305, 16 Am. St. Rep. 116, 22 Pac. Rep. 910, 1046, 6 L. R. A. 756. See Munn vs. Illinois, 94 U. S. 113, bk. 24 L. ed. 77; Spring Valley Water Works vs. Schottler, 110 U. S. 347, bk. 28 L. ed. 173, 4 Sup. Ct. Rep. 48.

55. PUBLIC AUTHORITIES SHOULD FIX SUCH RATES as is fair and reasonable taking into consideration actual value of plant of company.—San Diego Water Co. vs. San Diego,

118 Cal. 556, 577, 62 Am. St. Rep. 261, 50 Pac. Rep. 633, 38 L. R. A. 460.

56. QUESTION OF JUST COMPENSATION analogous to question arising in case of appropriation under power of eminent domain, and public should pay actual value of that which is appropriated to public use.—San Diego Water Co. vs. San Diego, 118 Cal. 556, 567, 62 Am. St. Rep. 261, 50 Pac. Rep. 633, 38 L. R. A. 460.

57. RATES SHOULD BE FIXED SO AS TO CREATE NO PALPABLE FRAUD upon company, city, or the inhabitants.—Spring Valley Water Works vs. San Francisco, 32 Cal. 286, 306, 16 Am. St. Rep. 116, 22 Pac. Rep. 910, 1046, 6 L. R. A. 756.

58. So as to prevent loss or practical confiscation of company's property.—Spring Valley Water Works vs. San Francisco, 32 Cal. 286, 305, 16 Am. St. Rep. 116, 22 Pac. Rep. 910, 1046, 6 L. R. A. 756.

59. SHOULD BE SAME, whether works are acquired or constructed by company from its own resources or with borrowed money.—Redlands L. & C. D. W. Co. vs. Redlands, 121 Cal. 365, 368, 53 Pac. Rep. 843. See San Diego Water Co. vs. San Diego, 118 Cal. 556, 62 Am. St. Rep. 261, 50 Pac. Rep. 633, 38 L. R. A. 460.

60. WHEN NOT REASONABLE OR COMPENSATION NOT JUST, in plain violation of duty.—Spring Valley Water Works vs. San Francisco, 32 Cal. 286, 306, 16 Am. St. Rep. 116, 22 Pac. Rep. 910, 1046, 6 L. R. A. 756.

61. Contract for less than maximum amount not illegal under Act of 1885, which gives board right to fix maximum.—Fresno C. & Irr. Co. vs. Park, 129 Cal. 437, 446, 62 Pac. Rep. 87.

62. VALUE DETERMINED BY STANDARD OF REVENUE which property is capable of producing, and not by ascertaining what property could be sold for (its market value) or by what it would cost to replace it.—San Diego Water Co. vs. San Diego, 118 Cal. 556, 567-569, 62 Am. St. Rep. 261, 50 Pac. Rep. 633, 38 L. R. A. 460.

63. METERS.—Board may fix rate for all purposes by system of measurement or any other mode which will attain required results.—San Francisco P. W. Factory vs. Brickwedel, 60 Cal. 166, 171.

64. Company has right to attach meter and receive compensation for exact amount consumed.—Sheward vs. Citizens Water Co., 90 Cal. 635, 642, 27 Pac. Rep. 439.

65. Court will assume that meter makes correct measurement and determines quantity of water passed through it.—Sheward vs. Citizens Water Co., 90 Cal. 635, 642, 27 Pac. Rep. 439.

VII. SAME—6. PARTIES' RIGHT TO COMPEL.

66. CONSTITUTION EXPRESSLY DECLARES RATES OR COMPENSATION fixed in specified manner at certain time by certain body, and upon failure same is subject to peremptory process to compel action by party interested and to such further process and

penalties as legislature prescribes.—*People vs. Stephens*, 62 Cal. 209, 234.

67. "Party interested" within meaning of article 14, §1, of constitution, as authorized to invoke peremptory process, is party who has interest in fixing rates, and would be injuriously affected if not fixed.—*Fitch vs. Board Supervrs. San Francisco*, 122 Cal. 285, 287, 54 Pac. Rep. 901.

68. Legislature cannot authorize prosecution at instance of individuals where offense is against entire state and not against individuals alone.—*Fitch vs. Board Supervrs. San Francisco*, 122 Cal. 285, 54 Pac. Rep. 901.

69. REFUSAL TO ACT.—"Party interested," as used in act of March 7, 1881, rather than "person," indicates legislative intention that suit should be instituted by one having personal interest and injuriously affected.—*Fitch vs. Board Supervrs. San Francisco*, 122 Cal. 285, 289, 54 Pac. Rep. 901.

70. Furnisher of water may be party injuriously affected within meaning of constitution, if rates not fixed.—*Fitch vs. Board Supervrs. San Francisco*, 122 Cal. 285, 287, 54 Pac. Rep. 901.

71. Mere fact that party is consumer of water and ratepayer does not make him party interested entitled to commence prosecution to compel action of board.—*Fitch vs. Board Supervrs. San Francisco*, 122 Cal. 285, 289, 54 Pac. Rep. 901.

72. One citizen of state or city not more interested in having penalty inflicted for delinquency in official duty than another.—*Fitch vs. Board Supervrs. San Francisco*, 122 Cal. 285, 289, 54 Pac. Rep. 901.

73. Ratepayer not party interested within terms of constitution. — *Fitch vs. Board Supervrs. San Francisco*, 122 Cal. 285, 54 Pac. Rep. 901.

VIII. SAME—7. PROCEEDINGS TO COMPEL.

74. MANDAMUS DOES NOT LIE TO CONTROL board of supervisors to change its determination in fixing rates or to take further action.—*Jacobs vs. Board Supervrs. San Francisco*, 100 Cal. 121, 130, 132, 34 Pac. Rep. 630. See *Berryman vs. Perkins*, 55 Cal. 483; *Spring Valley Water Works vs. San Francisco*, 82 Cal. 286, 308, 16 Am. St. Rep. 116, 22 Pac. Rep. 910, 1046, 6 L. R. A. 756.

75. To compel supervisors to act upon mayor's objections and to fix water rates for ensuing year as same would be the controlling of judgments.—*Jacobs vs. Board Supervrs. San Francisco*, 100 Cal. 121, 125, 34 Pac. Rep. 630.

76. Mandamus proper remedy for enforcement right to supply water against irrigation or canal company organized under Act of 1862.—*Price vs. Riverside L. & Irr. Co.*, 56 Cal. 421, 441.

IX. SAME—8. REVIEWABLE BY COURT.

77. CONSTITUTION DOES NOT CONFER UPON COURT POWER or jurisdiction to control, supervise, or set aside action of board in respect to water-rates.—*Spring Valley Water Works vs. San Francisco*, 82 Cal. 286, 306, 16

Am. St. Rep. 116, 22 Pac. Rep. 910, 1046, 6 L. R. A. 756.

78. Court will assume that councils in fixing rates have adopted measures of compensation just toward both ratepayer and company.—*Sheward vs. Citizens Water Co.*, 90 Cal. 635, 640, 27 Pac. Rep. 439.

79. Court will assume that mode of collection pointed out by council is that which will best subserve interests and rights of both parties.—*Sheward vs. Citizens Water Co.*, 90 Cal. 635, 640, 27 Pac. Rep. 439.

80. Rates fixed by legislative power, or otherwise than by appropriate judicial proceedings in which full notice and opportunity to appear and defend are given, are reviewable to extent of ascertaining whether they furnished some reward for property used and services furnished.—*San Diego Water Co. vs. San Diego*, 118 Cal. 556, 564, 62 Am. St. Rep. 261, 50 Pac. Rep. 633, 38 L. R. A. 460.

81. COURT ENTERTAINS PROCEEDINGS by water company to set aside public ordinance on ground that rates will allow no reward for property used and services furnished, as taking property for public use without just compensation.—*San Diego Water Co. vs. San Diego*, 118 Cal. 556, 564, 62 Am. St. Rep. 261, 50 Pac. Rep. 633, 38 L. R. A. 460.

82. Courts do not sit as appellate tribunals to review correctness of consumer's determination in fixing rates; they only consider result of council's actions upon question of taking property without just compensation.—*San Diego Water Co. vs. San Diego*, 118 Cal. 556, 563, 62 Am. St. Rep. 261, 50 Pac. Rep. 633, 38 L. R. A. 460.

83. Function of court to inquire into constitutionality of proceedings is merely to ascertain whether power has been carried beyond constitutional limits.—*San Diego Water Co. vs. San Diego*, 118 Cal. 556, 563, 62 Am. St. Rep. 261, 50 Pac. Rep. 633, 38 L. R. A. 460.

84. COURTS WILL NOT INTERFERE with board of supervisors fairly investigating and exercising discretion in fixing rates on sole ground that rates fixed are not reasonable.—*Spring Valley Water Works vs. San Francisco*, 82 Cal. 286, 305, 16 Am. St. Rep. 116, 22 Pac. Rep. 910, 1046, 6 L. R. A. 756. See *Davis vs. Mayor of New York*, 1 Duer (N. Y.) 451, 497; *Munn vs. Illinois*, 94 U. S. 113, bk. 24 L. ed. 77; *Spring Valley Water Works vs. Schottler*, 110 U. S. 347, bk. 28 L. ed. 173, 4 Sup. Ct. Rep. 48; *Chicago & N. W. R. Co. vs. Dey*, 35 Fed. Rep. 866.

85. FUNCTION OF COURT.—Question as to the constitutionality or validity of proceedings of city council in fixing rates, is mixed one of fact and law, to be decided upon evidence produced before court.—*San Diego Water Co. vs. San Diego*, 118 Cal. 556, 565, 62 Am. St. Rep. 261, 50 Pac. Rep. 633, 38 L. R. A. 460.

86. GROUNDS OF REVIEW.—Actual fraud in fixing rates must exist or they must be so palpably and grossly unreasonable and unjust as to amount thereto in order to entitle the courts to interfere.—*Spring Valley Water Works vs. San Francisco*, 82 Cal. 286, 306, 16

Am. St. Rep. 116, 22 Pac. Rep. 910, 1046, 6 L. R. A. 756.

87. Relief will be granted against rates fixed so palpably unreasonable and unjust as to amount to taking of property without just compensation.—San Diego Water Co. vs. San Diego, 118 Cal. 556, 566, 62 Am. St. Rep. 261, 50 Pac. Rep. 633, 38 L. R. A. 460.

88. EVIDENCE AND BURDEN OF PROOF.—Each case must defend its own special facts.—Redlands L. & C. D. W. Co. vs. Redlands, 121 Cal. 365, 370, 53 Pac. Rep. 791. See Covington etc. T. Co. vs. Sandford, 164 U. S. 578, bk. 41 L. ed. 560, 17 Sup. Ct. Rep. 193.

89. Incumbent upon company to present to superior court and to have incorporated into record upon appeal to supreme court, facts upon which it claims invalidity of ordinance fixing rates.—Redlands L. & C. D. W. Co. vs. Redlands, 121 Cal. 365, 370, 53 Pac. Rep. 791.

90. Value of plant being basis upon which sufficiency of compensation is determined, that fact must be presented to court before corporation will be entitled to judgment that rates are unreasonable.—Redlands L. & C. D. W. Co. vs. Redlands, 121 Cal. 365, 370, 53 Pac. Rep. 791.

X. POWER TO COLLECT AND ENFORCE.

91. POWER TO CHARGE AND COLLECT TOLLS OR RATES FOR WATER is franchise conferred on corporation formed under general laws for formation of water companies.—Spring Valley Water Works vs. Bryant, 52 Cal. 132, 140.

92. Is franchise not exercisable without authority as prescribed by law.—McCrary vs. Beaudry, 67 Cal. 120, 121, 7 Pac. Rep. 264.

93. Company or corporation collecting rates in any city and county or city or town otherwise than as established, forfeits franchise of waterworks for public use.—San Francisco P. W. Factory vs. Brickwedel, 60 Cal. 166, 172.

94. POWER TO SHUT OFF WATER.—Company has power to shut off water on refusal to pay for water supply.—Sheward vs. Citizens Water Co., 90 Cal. 635, 642, 27 Pac. Rep. 439.

95. Party obtaining permission to lay pipes and conduct water for sale to residents of section of the city at certain rate cannot shut off water and refuse to turn it on again without valid excuse.—McCrary vs. Beaudry, 67 Cal. 120, 121, 7 Pac. Rep. 264.

As to right of irrigation company to refuse to supply and shut off water, see post § 552 and note.

XI. CONTRACTS BETWEEN MUNICIPALITY AND COMPANY.

96. CONTRACT BY CITY AUTHORITIES GIVING RIGHT TO WATER COMPANY to take and supply water for domestic purposes alone entitles city to use of water for sprinkling streets without compensation.—Los Angeles Water Co. vs. Los Angeles, 55 Cal. 176, 178.

97. CONTRACT MADE BY WATER COMPANY WITH CITY authorities not to dispose of any water for purposes of irrigation or to take from river any more than required for

domestic purposes, gives city right to appropriate all water excepting that used for domestic purposes to its own use under contract.—Los Angeles Water Co. vs. Los Angeles, 55 Cal. 176, 178.

98. Contract made by water company bound by general act to supply water to city for specified purposes free of charge, with city authorities undertaking to construct waterworks in consideration of corporation's paying certain amount a year for supply of water, is void as in violation of policy of law in granting privileges to water corporations.—San Diego Water Co. vs. San Diego, 59 Cal. 517, 521.

XII. FREE SUPPLY—RIGHTS UNDER GENERAL LAWS AND CONSTITUTION.

99. FREE SUPPLY TO CITIES UNDER GENERAL LAWS.—To extent of company's means free of charge to city or town to which water conducted, in case of fire or other great necessity.—San Francisco vs. Spring Valley Water Works, 48 Cal. 493, 531; Spring Valley Water Works vs. San Francisco, 52 Cal. 111, 119.

100. FOR ALL ORDINARY USES OF ENGINES and engine-houses of fire department.—Spring Valley Water Works vs. San Francisco, 52 Cal. 111, 122.

101. FOR ALL PURPOSES CITY AND COUNTY demand, in discharge of their duties, as governmental agents as distinguished from family uses.—Spring Valley Water Works vs. San Francisco, 52 Cal. 111, 122.

102. FOR PURPOSES OF SPRINKLING STREETS, public squares, and parks and flushing sewers, as such things are necessities in ordinary significance of words.—Spring Valley Water Works vs. San Francisco, 52 Cal. 111, 121.

103. POWER TO CHARGE FOR SPRINKLING, ETC.—Water company has right to charge ordinary rates for supplying water for sprinkling and culinary purposes, for purposes of lavation and other like domestic uses to inhabitants or occupants of various institutions, penal or charitable, established by or under control of city and county government.—Spring Valley Water Works vs. San Francisco, 52 Cal. 111, 122.

104. Has right to charge ordinary rates for water supplied to public schools and public offices for drinking, culinary, and domestic purposes.—Spring Valley Water Works vs. San Francisco, 52 Cal. 111, 122.

105. WORDS AND PHRASES.—Term "family use" used in act of 1858 includes the inhabitants, men, women, and children, who are to be supplied with water for family use, domestic use, drinking, lavation, etc.—Spring Valley Water Works vs. San Francisco, 52 Cal. 111, 120.

106. Includes occupants of jail, keepers and prisoners who have such "family use" as well as best ordered families, parents, children, and servants.—Spring Valley Water Works vs. San Francisco, 52 Cal. 111, 121.

107. Means such uses as are appropriate to individual members of household in its collec-

tive capacity.—Spring Valley Water Works vs. San Francisco, 52 Cal. 111, 120.

108. Words "in case of fire" mean more than that water must be turned on after conflagration has actually commenced.—Spring Valley Water Works vs. San Francisco, 52 Cal. 111, 122.

109. MEAN AND INCLUDE—Obligation of supplying water for such preventive measures as may be adopted by fire department.—Spring Valley Water Works vs. San Francisco, 52 Cal. 111, 122.

110. Word "necessity" in general law of 1858 must not be construed as meaning absolutely indispensable.—Spring Valley Water Works vs. San Francisco, 52 Cal. 111, 121.

111. Means for uses of such character as are incidental to direct employment by municipalities of governmental or police powers as distinguished from family uses of inhabitants.—Spring Valley Water Works vs. San Francisco, 52 Cal. 111, 121.

112. CONSTITUTION—Effect of.—Constitution of 1879, art. 11, § 19, and art. 14, § 1, abrogates liability imposed upon water corporations by general laws of 1858, for free supply of water to cities and counties for purposes therein specified.—Spring Valley Water Works vs. Board Supervrs. San Francisco, 61 Cal. 18, 25.

113. Relieves companies organized under laws of 1858 of obligation to furnish water to city and county free of charge for any pur-

pose.—San Francisco P. W. Factory vs. Brickwedel, 60 Cal. 166, 174.

114. Supervisors of city have, since new constitution, power to fix and determine rates or compensation to be collected from city and county as well as private persons.—San Francisco P. W. Factory vs. Brickwedel, 60 Cal. 166, 171.

115. Have power to determine what amounts, respectively, are proper for individual use and for purposes of fire, flushing sewers, public buildings, offices, sprinkling streets and beautifying parks.—San Francisco P. W. Factory vs. Brickwedel, 60 Cal. 166, 171.

116. COMPANIES FORMED UNDER ACT OF 1858 prior to constitution of 1879 have no right which is prohibited by constitution of United States from impairing or taking away, to charge their customers with prices for water fixed from time to time by commissioners made up of two persons selected by company, two by public authorities, and, if necessary, fifth selected by four, or by sheriff of county.—Spring Valley Water Works vs. Schottler, 110 U. S. 347, bk. 28 L. ed. 173, 4 Sup. Ct. Rep. 48. See Stone vs. Farmers L. & T. Co., 116 U. S. 336, bk. 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 338, 1191.

117. PROVISION FOR FIXING RATES cannot be separated from remainder of statute of 1858 by calling it contract.—Spring Valley Water Works vs. Schottler, 110 U. S. 347, bk. 28 L. ed. 173, 4 Sup. Ct. Rep. 48.

§ 550. RIGHT TO USE STREETS, WAYS, ALLEYS, AND ROADS (repealed).

History: Enacted March 21, 1872; repealed by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 375, held unconstitutional, see history, § 4 ante; re-repealed March 21, 1905, Stats. and Amdts. 1905, a. CDXXIX, p. 580.

1, 2. Legislative power over laying pipes.

3-6. Constitution—Effect on legislative power.

7-10. Same—How considered and construed.

11. Word "city" includes town.

12. Excavations—How restrained.

1. LEGISLATIVE POWER.—Prior to constitution of 1879, legislature could delegate to municipal governments power prescribing terms and conditions of laying water pipe.—People vs. Stephens, 62 Cal. 209, 232.

2. Legislature has power to prescribe terms and conditions upon which pipe could be laid in streets of incorporated cities and towns for purpose of supplying inhabitants with water.—People vs. Stephens, 62 Cal. 209, 231, 232.

3. CONSTITUTION OF 1879—Effect of.—Constitution of 1879, § 19, art. 11, gives privilege for laying pipes in public streets and thoroughfares of any city, where there are no public works owned and controlled by municipality, so far as necessary for introducing and supplying inhabitants with water.—People vs. Stephens, 62 Cal. 209, 235.

4. Changed radically pre-existing conditions relating to the laying of pipes for furnishing water to inhabitants of cities.—People vs. Stephens, 62 Cal. 209, 232.

5. Grants privilege, subject to directions of superintendent of streets, or other officers in control thereof, under municipal regulations

prescribed for damages and indemnity, and of municipal right to regulate charges.—People vs. Stephens, 62 Cal. 209, 235.

6. Intended for purpose of laying stronger hand upon public uses in hands of legislature, and to place them in the hands of constitution itself, and not to make them independent of state.—People vs. Stephens, 62 Cal. 209, 233.

7. SAME—HOW CONSIDERED AND CONSTRUED.—Must be considered with reference to mischief intended to be remedied by change.—People vs. Stephens, 62 Cal. 209, 233.

8. Must be considered with reference to prior state of the law.—People vs. Stephens, 62 Cal. 209, 233.

9. Must be taken and read together and effect must be given to each provision.—People vs. Stephens, 62 Cal. 209, 232.

10. Must receive practical common-sense construction.—People vs. Stephens, 62 Cal. 209, 233.

11. Word "city" used in § 19, article 11, include towns, being read in connection with § 1 of article 14.—People vs. Stephens, 62 Cal. 209, 236.

12. EXCAVATIONS FOR LAYING.—Injunction restraining excavations in streets of town for purposes of laying pipes for supplying inhabitants with water dissolved on authority of People vs. Stephens, 62 Cal. 209.—Town of Woodland vs. Stephens, 62 Cal. 238.

§ 551. CONSTRUCTION OF CANAL, ETC. CONSTRUCTION AND REPAIR OF BRIDGES. SUPERVISORS MAY CONSTRUCT BRIDGES AND RECOVER THEREFOR. No canal, flume, or other appliance for the conducting of water must be so laid, constructed, or maintained as to obstruct any public highway; and every person or corporation owning, maintaining, operating, or using any such canal, flume, or appliance, crossing or running along any public highway, must construct, maintain, and keep in repair such bridges across the same as may be necessary to the safe and convenient use of such highway by the public; and on failure so to do, the board of supervisors of the county, after seven days' notice in writing to said person or corporation, may construct or repair such bridge or bridges, and recover of such person or corporation the amount of the expenditure made in so doing.

History: Enacted March 21, 1872, founded upon § 4 Act May 14, 1862, Stats. 1862, p. 541; amended March 21, 1905, Stats. and Amdts. 1905, c. CDXXXIX, pp. 580-581.

1. Applied, cited, construed, referred to, etc.
- 2, 3. Construed with § 2757 Political Code.
4. Same—As to word "person."
5. Duty to repair, etc.—Not affected by Political Code.
- 6, 7. Public use—What amounts to.
- 8, 9. Public nuisance—Abatement, etc.
10. Remedy to compel compliance—Mandamus.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *City of Fresno vs. Fresno C. & Irr. Co.*, 98 Cal. 179, 183, 32 Pac. Rep. 943 (cited in discussion).

2. Construed with § 2737 Political Code as imposing a duty.—*Fresno vs. Fresno C. & Irr. Co.*, 98 Cal. 179, 183, 32 Pac. Rep. 943.

3. As not repealed by § 2737 of the Political Code.—*County of Fresno vs. Fowler S. C. Co.*, 68 Cal. 359, 360, 9 Pac. Rep. 309.

4. Word "persons," as used in Political Code, construed as including canal corporations mentioned in § 551 of the Civil Code.—*County of Fresno vs. Fowler S. C. Co.*, 68 Cal. 359, 360, 9 Pac. Rep. 309.

5. **DUTY IMPOSED**—How not affected.—Canal company not relieved of duty imposed upon it by § 551 of Civil Code by provisions of Political Code.—*County of Fresno vs. Fowler S. C. Co.*, 68 Cal. 359, 360, 9 Pac. Rep. 309.

6. **PUBLIC USE**—What amounts to.—Constitution declares use of all water now appro-

priated or hereafter to be appropriated for sale, rental, or distribution to be a public use.—*City of Fresno vs. Fresno C. & Irr. Co.*, 98 Cal. 179, 183, 32 Pac. Rep. 943. See *People vs. Stephens*, 62 Cal. 209; *McCrory vs. Beaudry*, 67 Cal. 120, 7 Pac. Rep. 264; *County of Fresno vs. Fowler S. C. Co.*, 68 Cal. 359, 9 Pac. Rep. 309.

7. **DITCHES AND CANALS** recognized as public use and regulated as such.—*City of Fresno vs. Fresno C. & Irr. Co.*, 98 Cal. 179, 183, 32 Pac. Rep. 943.

8. **PUBLIC NUISANCE**—When not abated as.—Canal running through street of city prior to its incorporation without objection by county supervisors, and used by public for business and other purposes, taxed by city after its incorporation, will not be ordered destroyed or abated as public nuisance.—*City of Fresno vs. Fresno C. & Irr. Co.*, 98 Cal. 179, 184, 32 Pac. Rep. 943.

9. **How prevented**.—Injunction will lie to restrain or to remedy manner in which canal may be conducted or managed so as to prevent its becoming public nuisance.—*City of Fresno vs. Fresno C. & Irr. Co.*, 98 Cal. 179, 184, 32 Pac. Rep. 943.

10. **REMEDY TO COMPEL COMPLIANCE**.—Mandamus lies to control canal company to bridge over ditch across highway.—*County of Fresno vs. Fowler S. C. Co.*, 68 Cal. 359, 360, 9 Pac. Rep. 309.

§ 552. RIGHT OF PURCHASERS TO USE WATER FOR IRRIGATING.

Whenever any corporation, organized under the laws of this state, furnishes water to irrigate lands which said corporation has sold, the right to the flow and use of said water is and shall remain a perpetual easement to the land so sold, at such rates and terms as may be established by said corporation in pursuance of law.

[Person furnishing water entitled to continuance, when.] And whenever any person who is cultivating land on the line and within the flow of any ditch owned by such corporation, has been furnished water by it, with which to irrigate his land, such person shall be entitled to the continued use of said water, upon the same terms as those who have purchased their land of the corporation.

History: Enacted April 3, 1876, Code Amdts. 1875-6, p. 77. In effect April 3, 1876.

1. Applied, cited, construed, referred to, etc.
- 2, 3. Construed as to the easement—Right of purchasers.
- 4, 5. Same—As to duties imposed.
- 6, 7. Same—With reference to outside owners.
- 8, 9. Same—With reference to manner and person supplied.
10. Same—With subject-matter of code.
- 11, 12. Public use—Irrigation serves.
- 13, 14. Contract to supply—Necessity of writing.
15. Same—How enforced—Mandamus.
- 16-18. Duty to supply—Parties—Tender.
- 19-22. Rates—Right to contract as to—Statutes.
23. Sale of stock—Effect of.
- 24, 25. Same—Position of purchaser.
- 26-28. Supply—Right to stop—Nature of, etc.
29. Same—Non-payment of rates.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc.**, in: *Price vs. Riverside L. & Irr. Co.*, 56 Cal. 431, 440, 441 (construed and applied); *Dorris vs. Sullivan*, 90 Cal. 279, 286, 27 Pac. Rep. 216 (construed and applied with § 801); *Merrill vs. Southside Irr. Co.*, 112 Cal. 426, 434, 435, 44 Pac. Rep. 720 (construed and applied); *Fresno C. & Irr. Co. vs. Park*, 129 Cal. 437, 448, 62 Pac. Rep. 37 (construed).

As to duty of company to furnish water for irrigation, see monographic note 81 Am. St. Rep. 488, 492.

As to entire diversion for irrigation purposes, see note 98 Am. Dec. 542.

As to right of riparian proprietor to divert for irrigation purposes, see note 98 Am. Dec. 543.

As to liability of company for failure to supply, see monographic note 81 Am. St. Rep. 488-492.

As to mandamus to compel furnishing of water for irrigation, see note 81 Am. St. Rep. 488.

As to what is reasonable use for irrigation purposes, see note 98 Am. Dec. 543.

As to irrigation, see 17 Am. & Eng. Encyc. of L. (2d ed.) 485.

2. **CONSTRUED**—As creating perpetual easement in land in favor of persons purchasing of corporation.—*Price vs. Riverside L. & Irr. Co.*, 56 Cal. 431, 441.

3. As giving persons purchasing land before date code took effect superior right to all the others to quantity of water to be supplied.—*Price vs. Riverside L. & Irr. Co.*, 56 Cal. 431, 441.

4. As imposing duty upon irrigation company to continue to furnish water to those within flow and on line of their ditches who are cultivating land which has been furnished with water for irrigation.—*Merrill vs. Southside Irr. Co.*, 112 Cal. 426, 435, 44 Pac. Rep. 720.

5. As imposing duties pointed out in statute of 1885 upon irrigation corporations in favor of those to whom water has been previously sold by such company.—*Crow vs. San Joaquin & K. R. C. & Irr. Co.*, 130 Cal. 309, 313, 62 Pac. Rep. 562, 1058.

6. As not giving people owning outside land right of additional supply to detriment of first purchasers.—*Price vs. Riverside L. & Irr. Co.*, 56 Cal. 431, 441.

7. As not giving persons owning outside land right to increase their demands to detriment of subsequent purchasers.—*Price vs. Riverside L. & Irr. Co.*, 56 Cal. 431, 441.

8. As pointing out manner in which water is to be distributed.—*Price vs. Riverside L. & Irr. Co.*, 56 Cal. 431, 440.

9. Construed as pointing out persons and order in which they were to be supplied with water.—*Price vs. Riverside L. & Irr. Co.*, 56 Cal. 431, 440.

10. With subject matter under treatment in previous sections in title.—*Merrill vs. Southside Irr. Co.*, 112 Cal. 426, 435, 44 Pac. Rep. 720.

11. **Public use**.—Water used for irrigation purposes is used for public use and may be regulated by legislature.—*Merrill vs. Southside Irr. Co.*, 112 Cal. 426, 435, 44 Pac. Rep. 720.

12. Use of water appropriated for "sale, rental or distribution" is a public use under constitution and Acts of 1885 enacted to carry out constitutional provisions.—*Crow vs. San Joaquin & K. R. C. & Irr. Co.*, 130 Cal. 309, 313, 62 Pac. Rep. 562, 1058.

13. **CONTRACT TO SUPPLY**—Necessity of writing.—Contract in writing to supply water from irrigation ditch in perpetuity or as long as same can be conveyed through ditch, creates servitude or easement upon ditch property.—*Dorris vs. Sullivan*, 90 Cal. 279, 286, 27 Pac. Rep. 216.

14. Servitude or easement in irrigation ditch not created by verbal contract to supply water.—*Dorris vs. Sullivan*, 90 Cal. 279, 286, 27 Pac. Rep. 216.

As to contract as to rates, see pars. 19-22 this note.

15. **How enforced**.—Mandamus lies at instance of property owner against irrigation company to compel supply of water under contract to supply him with water in consideration of grant of right of way.—*Merrill vs. Southside Irr. Co.*, 112 Cal. 426, 435, 44 Pac. Rep. 720.

16. **DUTY TO SUPPLY**.—Parties within the flow and within line of ditches, cultivating land, are entitled to continued use of water to irrigate land bought from company.—*Merrill vs. Southside Irr. Co.*, 112 Cal. 426, 435, 44 Pac. Rep. 720.

17. **Tender of rates**.—Water or irrigation company bound to supply water upon tender of established rates.—*Crow vs. San Joaquin & K. R. C. Irr. Co.*, 130 Cal. 309, 313, 62 Pac. Rep. 562, 1058.

18. **Rule calling for supply of water upon tender of established rates** precludes idea that any other duties can be implied or imposed, except tender of rate as condition for supplying water is required by law.—*Crow vs. San Joaquin & K. R. C. Irr. Co.*, 130 Cal. 309, 313, 62 Pac. Rep. 562, 1058.

As to right to contract as to rates, see pars. 19-22 this note.

Parties entitled to use, see par. 16 this note. Purchaser.—See pars. 22, 25 this note.

19. **RATES**—Right to contract as to.—Fact that supervisors fix maximum rate does not

prevent consumers from making contract at other rates.—*Fresno C. & Irr. Co. vs. Park*, 129 Cal. 437, 447, 62 Pac. Rep. 87.

20. Statute of 1885 giving power to supervisors to fix maximum rates does not interfere with rights under contract entered into for purposes of irrigation.—*Fresno C. & Irr. Co. vs. Park*, 129 Cal. 437, 446, 62 Pac. Rep. 87.

21. Act of 1885, as amended by Act of 1897, does not invalidate or prohibit existing contracts, or contracts thereafter made by persons mentioned in section two relating to sale, etc., of water or easements in respect thereto.—*Fresno C. & Irr. Co. vs. Park*, 129 Cal. 437, 447, 62 Pac. Rep. 87.

22. Act of 1885, as amended by Act of 1897, does not prohibit or interfere with vesting of rights under any contract relating to sale and distribution of water.—*Fresno C. & Irr. Co. vs. Park*, 129 Cal. 437, 447, 62 Pac. Rep. 87.

As to necessity of written contract, see para. 13, 14 this note.

23. **SALE OF STOCK**—Effect of.—Stock in irrigation company, when sold for non-payment of assessments, becomes separated from lands.—*Spurgeon vs. Santa Ana V. Irr. Co.*, 120 Cal. 71, 75, 76, 52 Pac. Rep. 140, 39 L. R. A. 701.

24. **PURCHASER OF STOCK**—Position of.—Purchasers of stock in an irrigation company

sold by reason of delinquency of its owner for non-payment of assessments, entitled to hold and have same delivered to him for irrigation purposes.—*Spurgeon vs. Santa Ana V. Irr. Co.*, 120 Cal. 71, 75, 76, 52 Pac. Rep. 140, 39 L. R. A. 701.

25. **Right of purchaser of stock in irrigation company** sold for non-payment of assessments determined by general law.—*Spurgeon vs. Santa Ana V. Irr. Co.*, 120 Cal. 71, 76, 52 Pac. Rep. 140, 39 L. R. A. 701.

26. **SUPPLY—RIGHT TO STOP**—Arbitrary right is not given to company to cut off supply to persons owning outside land actually supplied with water.—*Price vs. Riverside L. & Irr. Co.*, 56 Cal. 431, 441.

27. Cannot be exercised to place at mercy of such corporation by its refusing to continue supply.—*Merrill vs. Southside Irr. Co.*, 123 Cal. 426, 435, 44 Pac. Rep. 720.

28. Fact that deprivation of water is expected is not sufficient to justify withdrawal of supply under contract to supply same.—*Merrill vs. Southside Irr. Co.*, 112 Cal. 426, 432, 44 Pac. Rep. 720.

29. **Non-payment of rates for preceding year** is not ground for refusal to supply water for irrigation purposes.—*Crow vs. San Joaquin & K. R. C. & Irr. Co.*, 130 Cal. 309, 315, 62 Pac. Rep. 562, 1058.

TITLE IX.

HOMESTEAD CORPORATIONS.

§ 557. Time of corporate existence.

§ 558. By-laws must specify time for and amount of payment of instalments, and penalty for failure to pay. By-laws to be furnished to any member on demand.

§ 559. Advertisement and sale of delinquent and forfeited shares.

§ 560. May borrow and loan funds, how, and for what time.

§ 561. Minor children, wards, and married women may own stock.

§ 562. Forfeiture for speculating in or owning lands exceeding two hundred thousand dollars.

§ 563. When corporation is terminated, and how.

§ 564. Payment of premiums.

§ 565. Annual report to be published.

§ 566. Publication in certain cases.

§ 557. **TIME OF CORPORATE EXISTENCE.** Corporations organized for the purpose of acquiring lands in large tracts, paying off encumbrances thereon, improving and subdividing them into homestead lots or parcels, and distributing them among the shareholders, and for the accumulation of a fund for such purposes, are known as homestead corporations, and must not have a corporate existence for a longer period than ten years.

History: Enacted March 21, 1872, founded upon §§ 1, 3, Act May 20, 1861, Stats. 1861, p. 567; § 1 Act March 30, 1868, Stats. 1867-8, p. 539.

§ 558. **BY-LAWS MUST SPECIFY TIME FOR AND AMOUNT OF PAYMENT OF INSTALMENTS, AND PENALTY FOR FAILURE TO PAY. BY-LAWS TO BE FURNISHED TO ANY MEMBER ON DEMAND.** Such corporations must specify in their by-laws the times when the instalments of the capital stock are payable, the amount thereof, and the fines, penalties, or forfeitures incurred in case of default. A printed copy of the articles of incorporation and by-laws must be furnished to any shareholder on demand.

History: Enacted March 21, 1872.

§ 559. ADVERTISEMENT AND SALE OF DELINQUENT AND FORFEITED SHARES. Whenever any shares of stock are declared forfeited by resolution of the board of directors, the directors may advertise the same for sale, giving the name of the subscriber and the number of shares, by notice of not less than three weeks, published at least once a week in a newspaper of general circulation in the city, town, or county where the principal place of business of such corporation is located. Such sale must be made at auction, under the direction of the secretary of the company. The corporation may be a bidder, and the shares must be disposed of to the highest bidder for cash. No defect, informality, or irregularity in the proceedings respecting the sale invalidates it, if notice is given as herein provided. After the sale is made the secretary must, on receipt of the purchase money, transfer to the purchaser the shares sold, and after deducting from the proceeds of such sale all instalments then due, and all expenses and charges of sale, must hold the residue subject to the order of the delinquent subscriber.

History: Enacted March 21, 1872, founded upon § 4 Act May 20, 1861, Stats. 1861, p. 268, as amended April 4, 1864, Stats. 1863-4, p. 492, as amended by § 2 Act March 30, 1868, Stats. 1867-8, p. 540.

§ 560. MAY BORROW AND LOAN FUNDS, HOW, AND FOR WHAT TIME. Homestead corporations may borrow money for the purposes of the corporation, not exceeding at any one time one fourth of the aggregate amount of the shares or parts of shares actually paid in, and the income thereof; no greater rate of interest must be paid therefor than twelve per cent per annum. For the purpose of completing the purchase of lands intended to be divided and distributed, they may borrow on the security of their shares on the land thus purchased, or that owned by the corporation at the time of procuring the loan, any sum of money which, together with the interest contracted to become due thereon, will not exceed ninety per cent of the unpaid amount subscribed by the shareholders; but no loan must be made to the corporation for a term extending beyond that of its existence.

History: Enacted March 21, 1872, founded upon § 5 Act May 20, 1861, Stats. 1861, p. 569, as amended Act March 29, 1870, Stats. 1869-70, p. 474.

1. Head-line not in keeping with section.
2. Enforcement of loan made without power.
- 3-5. Ultra vires as applied to unauthorized acts.

1. Head-line of this section shows that homestead corporations "may borrow and loan funds," but provisions of section do not give such corporations any power to loan funds. It is therefore misleading, and attention is here drawn to it, as the general rule is that head-lines are to be taken into consideration in construction of whole section. In this case, however, head-line exceeds the powers given to such corporations by provisions of section of code.

2. Homestead corporation can enforce payment of loan made on bond to member even though they have no statutory power to loan.—*Kadish vs. Garden City E. L. & B. Assoc.*, 151 Ill. 531, 42 Am. St. Rep. 256, 38 N. E. Rep. 236.

3. Cannot avail themselves of ultra vires when contract has been in good faith, fully performed by other party, and corporation has had the full benefit of performance of contract, and same rule holds e converso.—*Kadish*

vs. Garden City E. L. & B. Assoc., 151 Ill. 531, 42 Am. St. Rep. 256, 38 N. E. Rep. 236. See *Darat vs. Gale*, 88 Ill. 136, 141; *Bloomington Mut. Ben. Assoc. vs. Blue*, 120 Ill. 121, 123, 53 Am. Rep. 352 note, 11 N. E. Rep. 331; *Whitney Arms Co. vs. Barlow*, 68 N. Y. 62, 20 Am. Rep. 504.

4. Party who has had the benefit of contract fully performed by corporation will not be heard to object that contract and performance were not within legitimate powers of corporation.—*Kadish vs. Garden City E. L. & B. Assoc.*, 151 Ill. 531, 42 Am. St. Rep. 256, 38 N. E. Rep. 236.

5. Plea of ultra vires should not prevail, whether interposed for or against corporation, when it would not advance justice, but would accomplish legal wrong.—*Kadish vs. Garden City E. L. & B. Assoc.*, 151 Ill. 531, 42 Am. St. Rep. 256, 38 N. E. Rep. 236. See *Carson City Sav. Bank vs. Carson City Elevator Co.*, 90 Mich. 550, 30 Am. St. Rep. 454, 51 N. W. Rep. 641; *Holmes & Griggs Mfg. Co. vs. Holmes Met. Co.*, 137 N. Y. 352, 34 Am. St. Rep. 448, 27 N. E. Rep. 331.

§ 561. MINOR CHILDREN, WARDS, AND MARRIED WOMEN MAY OWN STOCK. Such shares of stock in homestead corporations as may be acquired by children, the cost of which, and the deposits and assessments on which are paid from the personal earnings of the children, or with gifts from persons other than their male parents, may be taken and held for them by their parents or guardians. Married women may hold such shares as they acquire with their personal earnings, or those of their children, voluntarily bestowed therefor, or from property bequeathed or given to them by persons other than their husbands.

History: Enacted March 21, 1872, founded upon § 6 Act May 20, 1861, Stats. 1861, p. 567.

§ 562. FORFEITURE FOR SPECULATING IN OR OWNING LANDS EXCEEDING TWO HUNDRED THOUSAND DOLLARS. Homestead corporations must not purchase and sell, or otherwise acquire and dispose of real property, or any interest therein, or any personal property, for the sole purpose of speculation or profit. Nor must any such corporation at any one time own or hold, in trust or otherwise, for its purposes, real property, or any interest therein, which in the aggregate exceeds in cash value the sum of two hundred thousand dollars.

[Penalty for violation.] For any violation of the provisions of this section, corporations forfeit their corporate rights and powers. On the application of any citizen to a court of competent jurisdiction such forfeiture may be adjudged, and the judgment carries with it costs of the proceedings.

History: Enacted March 21, 1872.

§ 563. WHEN CORPORATION IS TERMINATED, AND HOW. Except for the purpose of winding up and settling its affairs, every homestead corporation must terminate at the expiration of the time fixed for its existence in the articles of incorporation, or when dissolved as provided in this part. No dividend of funds must be made on termination of its corporate existence, until its debts and liabilities are paid; and upon the final settlement of the affairs of the corporation, or upon the termination of its corporate existence, the directors, in such manner as they may determine, must divide its property among its shareholders in proportion to their respective interests, or, upon the application of a majority in interest of the stockholders, must sell and dispose of any or all of the real estate of the corporation upon such terms as may be most conducive to the interests of all the stockholders, and must convey the same to the purchaser, and distribute the proceeds among the shareholders, or may at any time, when best for the interests of all the shareholders, cause the lands of the corporation to be subdivided into lots and distributed, by sale for premiums, at auction or otherwise, among the shareholders.

History: Enacted March 21, 1872, founded upon § 7 Act May 20, 1861, Stats. 1861, p. 569; § 1 Act March 29, 1870, Stats. 1869-70, p. 474.

§ 564. PAYMENT OF PREMIUMS. Such premiums on lots may be made payable at the time they are bid off, and, if not so paid on any lot of land, the directors may immediately offer the same for sale again. If made payable at a future day, and any shareholder fails to pay his bid on the day the same is made due and payable, the directors may advertise and sell the shares of stock representing the lots of land on which the premiums remain unpaid, in the manner

provided in the by-laws for the sale of shares on account of delinquent instalments and premiums.

History: Enacted March 21, 1872, founded upon § 1 Act March 29, 1870, Stats. 1869-70, p. 474.

§ 565. ANNUAL REPORT TO BE PUBLISHED. The actual financial condition of all homestead corporations must, by the directors thereof, be published annually in the [a] newspaper published at the principal place of business of the corporation, for four weeks, if published in a weekly, and two weeks, if published in a daily. The statement must be made up to the end of each year, and must be verified by the oath of the president and secretary, showing the items of property and liabilities.

History: Enacted March 21, 1872, founded upon § 8 Act May 20, 1861, Stats. 1861, p. 569.

§ 566. PUBLICATION IN CERTAIN CASES. In any case in which a publication is required, and no newspaper is published at the principal place of business, the publication may be made in a paper published in an adjoining county.

History: Enacted March 21, 1872.

TITLE X.

SAVINGS AND LOAN CORPORATIONS.

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| <p>§ 571. May loan money, on what terms, how, and to whom, and how long.</p> <p>§ 572. Capital stock, and rights and privileges thereof.</p> <p>§ 573. No dividends, except from surplus profits. To contract no liability, except for deposits.</p> <p>§ 574. Property which may be owned by corporation. What may not hold, etc.</p> <p>§ 575. Married women and minors may own stock in their own right.</p> <p>§ 576. May issue transferable certificates of deposit. Special certificates.</p> | <p>§ 577. To provide a reserve fund for the payment of losses.</p> <p>§ 578. Prohibition on director and officer, and what vacates office.</p> <p>§ 579. Definition of phrase "create debts."</p> <p>§ 580. Banks, amount of capital stock required.</p> <p>§ 581. Restrictions on savings banks.</p> <p>§ 582. True name of persons engaged in banking business must be shown.</p> <p>§ 583. Dividends. Surplus funds.</p> <p>§ 583a. Capital actually paid up must be published.</p> <p>§ 583b. Biennial report to bank commissioners of unclaimed deposits.</p> |
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§ 571. MAY LOAN MONEY, ON WHAT TERMS, HOW, AND TO WHOM, AND HOW LONG. Corporations organized for the purpose of accumulating and loaning the funds of their members, stockholders, and depositors, may loan and invest the funds thereof, receive deposits of money, loan, invest, and collect the same, with interest, and may repay depositors with or without interest. No such corporation must loan money, except on adequate security on real or personal property, and such loan must not be for a longer period than ten years.

History: Enacted March 21, 1872, founded upon §§ 4, 5 Act April 11, 1862, Stats. 1862, p. 199, as amended Act April 12, 1864, Stats. 1863-4, p. 158; amended March 15, 1901, Stats. and Amdts. 1900-1, p. 295. In force March 15, 1901.

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| <p>1. Applied, cited, construed, referred to, etc.</p> <p>2. Banks in general may loan money.</p> <p>3, 4. Deposits—May be received, etc.—Qualifying sections.</p> <p>5. Discount is mode of loan.</p> <p>6-8. Distinction between savings bank and ordinary bank—Deposits—Loans.</p> <p>9. Formation of banks—Constitution 1849.</p> <p>10, 11. Investment of funds—Loans.</p> | <p>12. Methods of business not restricted.</p> <p>13. Name of corporation need not signify business.</p> <p>14. Pass-book not negotiable.</p> <p>1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Mitchell vs. Beckman, 64 Cal. 117, 123, 28 Pac. Rep. 110 (referred to); Los Angeles vs. State L. & T. Co., 109 Cal. 396.</p> |
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401, 42 Pac. Rep. 149 (construed and applied); Wells vs. Black, 117 Cal. 157, 160, 59 Am. St. Rep. 162, 48 Pac. Rep. 1090, 37 L. R. A. 619 (referred to); Savings Bank San Diego Co. vs. Barrett, 126 Cal. 413, 415, 58 Pac. Rep. 914 (construed and applied); Winchester vs. Howard, 136 Cal. 432, 442, 89 Am. St. Rep. 153, 64 Pac. Rep. 692 (construed with other sections), sub nom. Rice vs. Howard, 69 Pac. Rep. 77, 80.

2. BANKS IN GENERAL NOT FORBIDDEN TO LOAN MONEY.—Authority given savings banks to loan money on real estate does not prohibit commercial banks from doing same.—Bank of Sonoma Co. vs. Fairbanks, 52 Cal. 196, 198; Bank of Martinez vs. Hemme O. & L. Co., 105 Cal. 376, 377, 38 Pac. Rep. 963.

3. DEPOSITS.—May be received, loaned, and invested.—Section expressly authorizes savings and loan societies to receive deposits, loan and invest same, and repay depositors with or without interest.—Security Sav. B. & T. Co. vs. Hinton, 97 Cal. 214, 222, 32 Pac. Rep. 3.

4. Qualifying sections.—The direction in this section as to disposition of money on deposit is qualified by §§ 574, 578 post.—Winchester vs. Howard, 136 Cal. 432, 442, 89 Am. St. Rep. 153, 64 Pac. Rep. 692, sub nom. Rice vs. Howard, 69 Pac. Rep. 77, 80.
See post §§ 574, 578 and notes.

5. DISCOUNT is mode of loan.—Bank of Sonoma Co. vs. Fairbanks, 52 Cal. 196, 198; Bank of Martinez vs. Hemme O. & L. Co., 105 Cal. 376, 377, 38 Pac. Rep. 963.

6. DISTINCTION BETWEEN SAVINGS BANK AND ORDINARY BANK.—Corporation organized to do general savings and commercial business, to buy and sell real and personal property, to discount bills, notes and other negotiable paper, to buy and sell exchange, to receive money on deposit with or without agreement to pay dividends or interest thereon, to borrow and loan money, to improve and lease real estate, and to do any and all acts incident or necessary to transaction of any and all such matters, is commercial bank and not savings bank.—Mitchell vs. Beckman, 64 Cal. 117, 122, 28 Pac. Rep. 110.

7. As respects deposits.—Distinction between savings and loan associations and commercial banks is that in commercial banks money deposited becomes property of bank and relation of debtor and creditor is created;

while in savings and loan associations deposit remains in certain sense money of depositor.—Los Angeles vs. State L. & T. Co., 109 Cal. 396, 399, 42 Pac. Rep. 149. See Wells vs. Black, 117 Cal. 157, 160, 59 Am. St. Rep. 162, 48 Pac. Rep. 1090, 37 L. R. A. 619.

8. Power to loan money on real estate is not what distinguishes savings bank from commercial bank.—Bank of Sonoma Co. vs. Fairbanks, 52 Cal. 196, 198; Bank of Martinez vs. Hemme O. & L. Co., 105 Cal. 376, 377, 38 Pac. Rep. 963.

9. FORMATION OF BANKS.—Under Const. 1849, Art. IV, § 24, deposit and loan associations could be formed which did not issue paper to circulate as money. Such corporations were not banks within prohibition of constitution.—Bank of Sonoma Co. vs. Fairbanks, 52 Cal. 196, 198; Bank of Martinez vs. Hemme O. & L. Co., 105 Cal. 376, 377, 38 Pac. Rep. 963.

10. INVESTMENT OF FUNDS.—Savings banks are authorized under the power given by this section to "invest" their funds, to purchase promissory notes.—Savings Bank San Diego Co. vs. Barrett, 126 Cal. 413, 415, 58 Pac. Rep. 914.

11. Loans.—Authority given by this section to "invest" funds is distinct from that known as to "loan" them, and may be exercised with same effect.—Savings Bank San Diego Co. vs. Barrett, 126 Cal. 413, 415, 58 Pac. Rep. 914.

12. METHODS OF BUSINESS.—Savings banks are not restricted by statute or any principles of law to particular mode of business which must be pursued as between bank and depositor.—Los Angeles vs. State L. & T. Co., 109 Cal. 396, 403, 42 Pac. Rep. 149.

13. NAME OF CORPORATION.—In order to be savings and loan association it is not necessary that name of corporation should in any manner express fact that it is such.—Los Angeles vs. State L. & T. Co., 109 Cal. 396, 403, 42 Pac. Rep. 149.

14. PASS-BOOK NOT NEGOTIABLE.—Pass-book in savings bank is an account kept between bank and depositor. It is not of itself negotiable, nor can agreement of parties have effect to invest it with that character in commercial sense.—Witte vs. Vincenot, 43 Cal. 325, 330.

§ 572. CAPITAL STOCK, AND RIGHTS AND PRIVILEGES THEREOF.

When savings and loan corporations have a capital stock specified in their articles of incorporation, certificates of the ownership of shares may be issued; and the rights and privileges to be accorded to, and the obligations to be imposed upon, such capital stock, as distinct from those of depositors, must be fixed and defined, either in the articles of incorporation or in the by-laws.

History: Enacted March 21, 1872, founded upon § 17 Act April 11, 1862, Stats. 1862, p. 203.

1. Applied, cited, construed, referred to, etc.
2. By-laws—Concerning deposits and profits.
3. Same—Exemption of stockholders from liability.
4. Capital stock—Option to have or not.

5. Corporation formed before code—Saving statute.
6. Two systems of savings banks.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Mitchell vs. Beckman, 64

Cal. 117, 123, 23 Pac. Rep. 110 (referred to); *Los Angeles vs. State L. & T. Co.*, 109 Cal. 396, 401, 42 Pac. Rep. 149 (construed and applied); *Wells vs. Black*, 117 Cal. 157, 162, 59 Am. St. Rep. 162, 48 Pac. Rep. 1090, 37 L. R. A. 619 (referred to in discussion).

2. BY-LAWS—Concerning deposits and profits.—Savings banks may make by-laws prescribing conditions upon which deposits shall be received and time and manner of dividing profits.—*People vs. San Francisco Sav. Union*, 72 Cal. 199, 200, 13 Pac. Rep. 498.

3. Exemption of stockholders from liability.—By-law of savings bank providing that stockholders are not held for their constitutional liability is void.—*Wells vs. Black*, 117 Cal. 157, 162, 59 Am. St. Rep. 162, 48 Pac. Rep. 1090, 37 L. R. A. 619.

As to by-laws generally, see ante § 301 and note.

§ 573. NO DIVIDENDS, EXCEPT FROM SURPLUS PROFITS. TO CONTRACT NO LIABILITY, EXCEPT FOR DEPOSITS. The directors of savings and loan corporations may, at such times and in such manner as the by-laws prescribe, declare and pay dividends of so much of the profits of the corporation, and of the interest arising from the capital stock and deposits, as may be appropriated for that purpose under the by-laws or under their agreements with depositors.

The directors must not contract any debt or liability against the corporation for any purpose whatever, except for deposits. The capital stock and the assets of the corporation are a security to depositors and stockholders, depositors having the priority of security over the stockholders, but the by-laws may provide that the same security shall extend to deposits made by stockholders.

History: Enacted March 21, 1872, founded upon § 10, Act April 11, 1862, Stats. 1862, p. 201, as amended Act March 4, 1870, Stats. 1869-70, p. 130.

1. Applied, cited, construed, referred to, etc.
- 2-4. Depositor as creditor—Contract changing relation.
5. Dividends—Interest earned but not collected not basis of.
6. Interest on deposits—Fixed by contract.
7. "Net receipts" defined.
8. "Profits" defined.
9. Trustee—Savings bank is.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Mitchell vs. Beckman*, 64 Cal. 117, 123, 23 Pac. Rep. 110 (referred to with other sections); *Los Angeles vs. State L. & T. Co.*, 109 Cal. 396, 401, 42 Pac. Rep. 149 (construed and applied); *Wells vs. Black*, 117 Cal. 157, 160, 59 Am. St. Rep. 162, 48 Pac. Rep. 1090, 37 L. R. A. 619 (referred to with other sections); *Murphy vs. Pacific Bank*, 119 Cal. 334, 343, 51 Pac. Rep. 317 (construed).

2. DEPOSITOR IS CREDITOR OF BANK.—Deposit in savings bank having capital stock is debt against corporation.—*Los Angeles vs. State L. & T. Co.*, 109 Cal. 396, 403, 42 Pac. Rep. 149; *Wells vs. Black*, 117 Cal. 157, 162, 59 Am. St. Rep. 162, 48 Pac. Rep. 1090, 37 L. R. A. 619.

3. Compare: *People vs. Badlam*, 57 Cal. 594, 602 (holding "ordinary relation of debtor and creditor does not exist"); *State vs. Carson City Sav. Bank*, 17 Nev. 146, 158, 30 Pac. Rep. 703.

4. Contract changing relation.—Relation of debtor and creditor existing between depositor

4. CAPITAL STOCK—Option to have.—Savings and loan companies may be formed with or without capital stock.—*Los Angeles vs. State L. & T. Co.*, 109 Cal. 396, 401, 42 Pac. Rep. 149.

5. CORPORATION ORGANIZED PRIOR TO CODE, although its certificate omits to state amount of capital stock, under Act March 4, 1870, and Act March 24, 1870, has legal existence, and, under code, may have capital stock.—*People vs. Perrin*, 56 Cal. 345, 346-349.

6. TWO SYSTEMS OF SAVINGS BANKS.—Savings banks may be organized under two plans or systems: (1) Savings bank having a capital stock in which deposit is debt against corporation; and (2) savings bank having no capital stock, in which depositors are, in effect, members of corporation.—*Los Angeles vs. State L. & T. Co.*, 109 Cal. 396, 401, 402, 42 Pac. Rep. 149.

and bank having capital stock may be changed by agreement of parties.—*Wells vs. Black*, 117 Cal. 157, 161, 59 Am. St. Rep. 162, 48 Pac. Rep. 1090, 37 L. R. A. 619.

5. DIVIDENDS—Interest earned but not collected not basis of.—Capital and all assets, except surplus profits, must be retained intact and form fund to which creditors of corporation have prior right over stockholders, and no portion of this fund can be distributed in lieu of interest earned but not collected.—*People ex rel. Farnum vs. San Francisco Sav. Union*, 72 Cal. 199, 204, 13 Pac. Rep. 498.

6. INTEREST ON DEPOSITS—Fixed by contract.—Directors may agree with depositors as to interest.—*Los Angeles vs. State L. & T. Co.*, 109 Cal. 396, 401, 42 Pac. Rep. 149.

7. "Net receipts" are receipts of business, deducting current expenses.—*People ex rel. Farnum vs. San Francisco Sav. Union*, 72 Cal. 199, 202, 13 Pac. Rep. 498.

8. "Profits" signifies excess of value of returns over value of advances. Excess of receipts over expenditures: net earnings.—*People ex rel. Farnum vs. San Francisco Sav. Union*, 72 Cal. 199, 202, 13 Pac. Rep. 498.

9. TRUSTEE—Savings bank is.—Moneys deposited with savings banks are held in trust for depositors.—*People vs. Badlam*, 57 Cal. 594, 602.

§ 574. PROPERTY WHICH MAY BE OWNED BY CORPORATION. WHAT MAY NOT HOLD, ETC. Savings and loan corporations may purchase, hold and convey real and personal property as follows:

1. The lot and building in which the business of the corporation is carried on, the cost of which must not exceed one hundred thousand dollars; except, on a vote of two thirds of the stockholders the corporation may increase the sum to an amount not exceeding two hundred and fifty thousand dollars;

2. Such as may have been mortgaged, pledged or conveyed to it in trust, for its benefit in good faith, for money loaned in pursuance of the regular business of the corporation;

3. Such as may have been purchased at sales under pledges, mortgages or deeds of trust made for its benefit, for money so loaned, and such as may be conveyed to it by borrowers in satisfaction and discharge of loans made thereon;

4. No such corporation must purchase, hold or convey real estate in any other case or for any other purpose; and all real estate described in subdivision three of this section must be sold by the corporation within ten years after the title thereto is vested in it by purchase or otherwise;

5. No such corporation must purchase, own, or sell personal property, except such as may be requisite for its immediate accommodation for the convenient transaction of its business, mortgages on real estate, bonds, securities or evidences of indebtedness, public or private, gold and silver bullion and United States mint certificates of ascertained value and evidences of debt issued by the United States;

6. No such corporation must purchase, hold or convey bonds, securities or evidences of indebtedness, public or private, except bonds of the United States, of the state of California, and of the counties, cities, or cities and counties, or towns, or school districts of the state of California, or bonds of railroad or street-railroad corporations owning property and having their principal place of business in the state of California, unless such corporation has a capital stock or reserve fund paid in of not less than one hundred thousand dollars.

History: Enacted March 21, 1872, founded upon § 13 Act April 11, 1862, Stats. 1862, p. 202, as amended by Act March 12, 1864, Stats. 1863-4, p. 158, and by Act March 31, 1866, Stats. 1865-6, p. 626; amended March 30, 1874, Code Amdts. 1873-4, p. 273; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 375, held unconstitutional, see history, § 4 ante; amended March 23, 1901, Stats. and Amdts. 1900-1, p. 659. In force March 23, 1901.

1. Applied, cited, construed, referred to, etc.
2. Deposits—Limitation upon power over.
3. Escheat of land—Constitutional provision.
4. Mortgages on real estate may be acquired.
5. Notes may be purchased.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Mitchell vs. Beckman*, 64 Cal. 117, 123, 28 Pac. Rep. 110 (referred to with other sections); *Los Angeles vs. State L. & T. Co.*, 109 Cal. 396, 401, 42 Pac. Rep. 149 (referred to with other sections); *Wells vs. Black*, 117 Cal. 157, 160, 59 Am. St. Rep. 162, 48 Pac. Rep. 1090, 37 L. R. A. 619 (referred to with other sections); *Savings Bank San Diego Co. vs. Barrett*, 126 Cal. 413, 416, 417, 58 Pac. Rep. 914 (subds. 4, 5 construed and applied); *People vs. Stockton Sav. & L. Soc.*, 123 Cal. 611, 612, 35 Am. St. Rep. 225, 65 Pac. Rep. 1078 (subds. 3, 4 construed); *Winchester vs. Howard*, 136

Cal. 432, 442, 89 Am. St. Rep. 153, 64 Pac. Rep. 692, sub nom. *Rice vs. Howard*, 69 Pac. Rep. 77 (subd. 6 construed with § 571).

2. **DEPOSITS—Limitation upon power over.**—Subdivision 6 of this section is a limitation upon power given savings banks in § 571 to dispose of money deposited.—*Winchester vs. Howard*, 136 Cal. 432, 442, 89 Am. St. Rep. 153, 64 Pac. Rep. 692, sub nom. *Rice vs. Howard*, 69 Pac. Rep. 77.

See ante § 571 and note.

3. **ESCHEAT—Lands held by savings bank for more than five years**, in violation of subd. 4, cannot be escheated to state under provisions of section 9 of article XII of the constitution of 1879, as provisions of constitution are not self-executing, and no statute providing for escheats has been enacted.—*People vs. Stockton Sav. & L. Soc.*, 123 Cal. 611, 612, 65 Pac. Rep. 1078.

4. MORTGAGES ON REAL ESTATE.—Prohibition in subd. 5 of purchase of personal property "except . . . mortgages on real estate." implies that bank is authorized to purchase mortgages on real estate and obligations secured by mortgages. Exception of this class of personal property leaves corporation free to exercise power given in § 354.—Savings

Bank San Diego Co. vs. Barrett, 126 Cal. 413, 416, 417, 58 Pac. Rep. 914.

See ante § 354 and note.

5. PROMISSORY NOTES MAY BE PURCHASED.—Savings banks are not prohibited by this section from purchasing promissory notes.—Savings Bank San Diego Co. vs. Barrett, 126 Cal. 413, 417, 58 Pac. Rep. 914.

§ 575. MARRIED WOMEN AND MINORS MAY OWN STOCK IN THEIR OWN RIGHT. Married women and minors may, in their own right, make and draw deposits and draw dividends, and give valid receipts therefor.

History: Enacted March 21, 1872, founded upon §§ 14, 15 Act April 11, 1862, Stats. 1862, p. 202, as amended Act March 12, 1864, Stats. 1863-4, p. 160, and amendatory Act March 4, 1870, Stats. 1869-70, p. 132.

1. Applied, cited, construed, referred to, etc.
2. Separate property of wife in deposits.

1. Applied, cited, construed, referred to, etc., in: Mitchell vs. Beckman, 64 Cal. 117, 123, 28 Pac. Rep. 110 (referred to with other sections); Wells vs. Black, 117 Cal. 157, 160, 59 Am. St. Rep. 162, 48 Pac. Rep. 1090, 37 L. R. A. 619 (referred to with other sections); Rowe vs. Hibernia Sav. & L. Soc., 134 Cal. 403, 405, 66 Pac. Rep. 569 (construed and applied).

2. Separate property of wife in deposits.—This section does not change status of property deposited by wife in her own name after her marriage. Community property thus deposited does not thereby become her separate property.—Fennell vs. Drinkhouse, 131 Cal. 447, 451, 82 Am. St. Rep. 361, 63 Pac. Rep. 734; Rowe vs. Hibernia Sav. & L. Soc., 134 Cal. 403, 405, 66 Pac. Rep. 569.

See ante § 164 and note para. 18-20.

§ 576. MAY ISSUE TRANSFERABLE CERTIFICATES OF DEPOSIT. SPECIAL CERTIFICATES. Savings and loan corporations may issue general certificates of deposit, which are transferable, as in other cases, by indorsement and delivery; may issue, when requested by the depositor, special certificates, acknowledging the deposit by the person therein named of a specified sum of money, and expressly providing on the face of such certificate that the sum so deposited and therein named may be transferred only on the books of the corporation; payment thereafter made by the corporation to the depositor named in such certificate, or to his assignee named upon the books of the corporation, or, in case of death, to the legal representative of such person, of the sum for which such special certificate was issued, discharges the corporation from all further liability on account of the money so paid.

History: Enacted March 21, 1872, founded upon § 1 Act March 28, 1868, Stats. 1867-8, p. 459.

1. Applied, cited, construed, referred to, etc.
2. Certificate of deposit may be issued.
3. Mode of business not restricted.

1. Applied, cited, construed, referred to, etc., in: Mitchell vs. Beckman, 64 Cal. 117, 123, 28 Pac. Rep. 110 (referred to with other sections); Los Angeles vs. State L. & T. Co., 109 Cal. 396, 403, 42 Pac. Rep. 149 (construed and applied); Wells vs. Black, 117 Cal. 157, 160, 59 Am. St. Rep. 162, 48 Pac. Rep. 1090, 37 L. R. A. 619 (referred to with other sections); Murphy vs. Pacific Bank, 119 Cal. 334, 341, 51 Pac. Rep.

317 (construed and applied); Abbott vs. Jack, 136 Cal. 510, 512, 69 Pac. Rep. 257 (referred to).

2. Certificate of deposit may be issued by savings and loan corporations under provisions of this section.—Murphy vs. Pacific Bank, 119 Cal. 334, 341, 51 Pac. Rep. 317.

3. Mode of business not restricted.—Savings banks are not restricted to any particular method of business which must be pursued as between bank and depositor.—Los Angeles vs. State L. & T. Co., 109 Cal. 396, 403, 42 Pac. Rep. 149.

§ 577. TO PROVIDE RESERVE FUND FOR THE PAYMENT OF LOSSES. Savings and loan corporations may prescribe by their by-laws the time and conditions on which repayment is to be made to depositors; but whenever there is any call by depositors for repayment of a greater amount than the corporation may have disposable for that purpose, the directors or officers thereof must not make

any new loans or investments of the funds of the depositors, or of the earnings thereof, until such excess of call has ceased.

[Corporations without capital—Reserve fund.] The directors of any such corporation having no capital stock must retain, on each dividend day, at least five per cent of the net profits of the corporation, to constitute a reserve fund, which must be invested in the same manner as other funds of the corporation, and must be used toward paying any losses which the corporation may sustain in pursuing its lawful business.

[Excess of reserve fund—Disposition on dissolution.] The corporation may provide by its by-laws for the disposal of any excess in the reserve fund over one hundred thousand dollars, and the final disposal, upon the dissolution of the corporation, of the reserve fund, or of the remainder thereof, after payment of losses.

History: Enacted March 21, 1872, founded upon § 11 Act April 11, 1862, Stats. 1862, p. 201; Acts March 31 and April 4, 1870, Stats. 1869-70, pp. 523, 822.

1. Applied, cited, construed, referred to, etc.
2. Deposits and net profits—Trust funds.

1. Applied, cited, construed, referred to, etc., in: *People ex rel. Burke vs. Badlam*, 57 Cal. 594, 602 (applied); *Mitchell vs. Beckman*, 64 Cal. 117, 123, 28 Pac. Rep. 110 (referred to

with other sections); *City of Los Angeles vs. State L. & T. Co.*, 109 Cal. 396, 401, 42 Pac. Rep. 149 (referred to with other sections).

2. Deposits and net profits—Trust funds.—See ante § 573 and note.

§ 578. PROHIBITION ON DIRECTOR AND OFFICER, AND WHAT VACATES OFFICE. No director or officer of any savings and loan corporation must, directly or indirectly, for himself or as the partner or agent of others, borrow any of the deposits or other funds of such corporation, nor must he become an indorser or surety for loans to others, nor in any manner be an obligor for moneys borrowed of or loaned by such corporation. The office of any director or officer who acts in contravention of the provisions of this section immediately thereupon becomes vacant.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Directors are trustees for stockholders.
3. State alone can enforce statute.

1. Applied, cited, construed, referred to, etc., in: *Mitchell vs. Beckman*, 64 Cal. 117, 123, 28 Pac. Rep. 110 (referred to with other sections); *Savings Bank San Diego Co. vs. Burns*, 104 Cal. 473, 476, 480, 38 Pac. Rep. 102 (construed and applied); *Wells vs. Black*, 117 Cal. 157, 160, 59 Am. St. Rep. 162, 48 Pac. Rep. 1090, 37 L. R. A. 619 (referred to with other sections); *Brittan vs. Oakland Bank of Sav.*, 124 Cal. 282, 291, 71 Am. St. Rep. 53, 57 Pac. Rep. 84 (construed and applied); *State L. & T. Co. vs. Cochran*, 130 Cal. 245, 257, 62 Pac. Rep. 466, 600 (referred to with other sections); *Winchester vs. Howard*, 136 Cal. 432, 442, 89 Am. St. Rep. 153, 64 Pac. Rep. 692, sub nom. *Rice vs. Howard*, 69 Pac. Rep. 77 (applied).

2. Directors are trustees for stockholders, and must not deal with subject of trust for their own advantage, or be interested ad-

versely in any trust transaction, nor can they undertake another trust adverse in its nature to interest of their beneficiary. If they willfully use power which is subject of trust for unauthorized purposes and loss ensue, they must make good the loss, although they, in good faith, thought to promote interest of their beneficiary, and were not seeking advantage for themselves. The ground of their liability is wilful misappropriation of property.—*Winchester vs. Howard*, 136 Cal. 432, 442, 89 Am. St. Rep. 153, 64 Pac. Rep. 692, sub nom. *Rice vs. Howard*, 69 Pac. Rep. 77.

3. State alone can enforce statute.—Section does not prescribe recovery by bank of deposits of funds of such bank borrowed by its officers directly or indirectly, and state alone can enforce provision.—*Sav. Bank San Diego Co. vs. Burns*, 104 Cal. 473, 476, 480, 38 Pac. Rep. 102; *Brittan vs. Oakland Bank of Sav.*, 124 Cal. 282, 291, 71 Am. St. Rep. 53, 57 Pac. Rep. 84.

§ 579. DEFINITION OF PHRASE "CREATE DEBTS." Receiving deposits, issuing certificates of deposit, checks, and bills of exchange and the like, in the transaction of the business of savings and loan corporations, must not be con-

strued to be the creation of debts within the meaning of the phrase "create debts," in section 309.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc., in: *People ex rel. Burke vs. Badlam*, 57 Cal. 594, 602 (referred to with other sections); *Mitchell vs. Beckman*, 64 Cal. 117, 123, 28 Pac. Rep. 110 (referred to with other sections); *Wells vs. Black*, 117 Cal. 157, 160, 59 Am. St. Rep. 162, 48 Pac. Rep. 1090, 37 L. R. A. 619 (referred to with other sections).

§ 580. **BANKS, AMOUNT OF CAPITAL STOCK REQUIRED.** No savings bank, or bank, or banking corporation, shall be incorporated in this state and conduct such banking business in a city or town of five thousand inhabitants or under with a capital stock of less than twenty-five thousand dollars, or in a city or town of over five thousand and not exceeding ten thousand inhabitants with a capital stock of less than fifty thousand dollars, or in a city or town of over ten thousand and not exceeding twenty-five thousand inhabitants with a capital stock of less than one hundred thousand dollars, or in a city or town of over twenty-five thousand inhabitants with a capital stock of less than two hundred thousand dollars.

[Amount of stock to be subscribed—Amount paid in—Within what time remainder to be paid.] Before the secretary of state issues to any corporation that proposes to do a banking business his certificate of the filing of the articles of incorporation, there must be filed in his office the affidavit of the persons named in said articles as the first directors of the corporation, that all the capital stock has been actually and in good faith subscribed, and at least fifty per centum thereof paid, in lawful money of the United States, to a person in such affidavit named, for the benefit of the corporation. The remainder of the capital stock required by law must be paid in within two years after said banking corporation receives its certificate of incorporation, and if not so paid said banking corporation shall not be authorized to do business; provided, however, that the provisions of this section shall not apply to corporations now in existence.

History: Original section enacted by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 376, held unconstitutional, see history, § 4 ante; an entirely different provision with sectional number enacted March 5, 1903, Stats. and Amdts 1903, p. 87; re-enacted almost verbatim March 20, 1905, Stats. and Amdts. 1905, c. CCCXCIV, p. 507. In effect March 20, 1905.

§ 581. **RESTRICTIONS ON SAVINGS BANKS.** No savings bank shall lend to exceed sixty per cent of the market value of any piece of real estate to be taken as security, except for the purpose of facilitating the sale of property owned by the corporation. And it shall be unlawful for any savings and loan society, or savings bank, to purchase, invest, or loan its capital, or the money of its depositors, or any part of either, in mining shares or stocks. Any president or managing officer who knowingly consents to a violation of the above provision shall be deemed guilty of a felony.

History: Enacted March 21, 1903, Stats. and Amdts. 1903, p. 352. In force March 21, 1903.

§ 582. **TRUE NAMES OF PERSONS ENGAGED IN BANKING BUSINESS MUST BE SHOWN.** Every person or number of persons not being incorporated, engaged in the business of banking, or publicly receiving money on deposit must conduct such business under a name which shows the true names of all persons engaged therein, unless such person or persons have complied with the provisions

of article seven of chapter two of title ten of part four of division third of said Civil Code.

[Penalty for violation.] Every person violating any of the provisions of this section is guilty of a misdemeanor, and is punishable by imprisonment in the county jail for not less than ninety days nor more than six months, or by fine of not less than one hundred dollars nor more than five hundred dollars, or by both such fine and imprisonment.

History: Enacted March 21, 1903, Stats. and Amdts. 1903, pp. 352-353. In force March 21, 1903.

§ 583. DIVIDENDS. SURPLUS FUNDS. The directors of any savings bank, bank, or banking corporation having a capital stock, may semi-annually declare a dividend of so much of the net profits of the stockholders as they shall judge expedient; but every such corporation shall, before the declaration of such dividend, carry at least one tenth (1-10) part of the net profits of the stockholders for the preceding half year to its surplus or reserve fund until the same shall amount to twenty-five per centum of its paid-up capital stock. But the whole or any part of such surplus or reserve fund, if held as the exclusive property of stockholders, may at any time be converted into paid-up capital stock, in which event such surplus or reserve fund shall be restored in manner as above provided until it amounts to twenty-five per centum of the aggregate paid-up capital stock. A larger surplus or reserve fund may be created, and nothing herein contained shall be construed as prohibitory thereof.

History: Enacted March 21, 1903, Stats. and Amdts. 1903, p. 353. In effect March 21, 1903.

1. Applied, cited, construed, referred to, 605. 65 Pac. Rep. 321, 66 Id. 360 (mis cited for etc., in: Hamilton vs. Hubbard, 134 Cal. 603, § 353).

§ 583a. CAPITAL ACTUALLY PAID UP MUST BE PUBLISHED. No banker, nor officer of any bank or corporation doing a banking business, shall advertise in any manner, or publish any statement of the capital stock authorized or subscribed, unless he advertise and publish in connection therewith, the amount of capital actually paid up. Any officer, or the officers of any bank or corporation doing a banking business, advertising in any manner, or publishing, a statement of the capital stock of such bank or banking corporation, authorized or subscribed, without the statement in connection therewith of the stock actually paid up, shall be guilty of a misdemeanor.

History: Enacted March 21, 1903, Stats. and Amdts. 1903, p. 353. In effect March 21, 1903.

§ 583b. BIENNIAL REPORT TO BANK COMMISSIONERS OF UNCLAIMED DEPOSITS. The president of every savings bank, savings and loan society, and every other bank, depository, society, or institution in which deposits of money are made, whether any interest or dividend is paid, or agreed to be paid, thereon or not, must, within fifteen days after the first day of January of every odd-numbered year, return to the board of bank commissioners a sworn statement showing the amount placed to his credit, the last known place of residence or post-office address, and the fact of death, if known to such president, of every depositor who has not made a deposit therein or withdrawn therefrom any part of his deposit, or any part of the interest or dividends thereon, for a period of more than ten years next preceding. Such president must give notice of these deposits in one

or more newspapers published in or nearest the town, city, or city and county where such bank, society, or other institution is situated or has its principal place of business, at least once a week for four successive weeks, the cost of such publication to be paid pro rata out of such unclaimed deposits. This section does not apply to any deposit made by or in the name of a person known to the president to be living, or which, with the accumulation thereon, is less than fifty dollars. The board of bank commissioners must incorporate in their subsequent report each return made to them as provided in this section. Any president of any of the institutions mentioned in this section who neglects or refuses to make the sworn statement required thereby is guilty of a misdemeanor.

History: Enacted March 21, 1905, Stats. and Amdts. 1905, pp. 580-581. The act contains two repealing sections as follows: § 2. The act entitled "An act to compel savings banks to publish a sworn statement of all unclaimed deposits," approved March 23, 1893, is hereby repealed. § 3. The act entitled "An act to compel all depositories of money and commercial banks to publish a sworn statement of all unclaimed deposits," approved February 25, 1897, is hereby repealed.

1. Report of banks—Former legislation.
2. Same—Penalty for non-compliance.
3. Same—Bank Commissioners' Act.

1. Report of banks—Former legislation.—This section is a codification of prior general laws. All persons and institutions doing a banking business were required by § 1 Act April 1, 1876 (Stats. 1875-6, p. 729), to publish, in January and July every year, and file with county recorder, a sworn statement of "capital" actually paid in, and also a sworn statement of the actual condition and value of assets and liabilities. That act was repealed by Act March 9, 1893 (Stats. and Amdts. 1893, p. 112).—Savings Bank vs. Burns, 104 Cal. 473-479, 38 Pac. Rep. 102; and was again repealed by Act March 26, 1895 (Stats. and Amdts., p. 77). The act had been previously construed in Pacific Trust Co. vs. Dorsey, 72 Cal. 55, 12 Pac. Rep. 49.

The act was not repealed by Bank Commissioners' Act March 30, 1878 (Stats. 1877-8, p. 740).—Bank of British N. A. vs. Cahn, 79 Cal. 463, 465, 21 Pac. Rep. 863.

2. Same—Penalty for non-compliance with the act.—As to, see Bank of British N. A. vs. Alaska Impr. Co., 97 Cal. 28, 34, 31 Pac. Rep. 726; Bank of British N. A. vs. Madison, 99 Cal. 125, 127, 33 Pac. Rep. 762; First Nat. Bank vs. Henderson, 101 Cal. 307, 312, 35 Pac. Rep. 899; California Sav. & L. Soc. vs. Harris, 111 Cal. 133, 137, 43 Pac. Rep. 525.

3. Same—Bank Commissioners' Act.—By § 9 of the Bank Commissioners' Act of 1878 (Stats. 1877-8, p. 742), "every savings bank, or bank, or banking corporation," was required to make semi-annual reports to the bank commissioners.—See HENNING'S GENERAL LAWS, tit. Bank Commissioners' Act and note thereunder.

TITLE XI.

MINING CORPORATIONS.

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| § 586. Transfer agencies. [May establish in other states.] | secretary. Stockholders' right to inspect. |
| § 587. Stock issued at transfer agencies. [Surrender of certificate.] | § 589. Right of stockholders to visit mine with expert. [Duty of superintendent.] |
| § 587a. Consolidation of mining corporations. [Written consent of stockholders.] | § 590. Liability of presidents and directors. [Refusal to permit examination; damages.] |
| § 588. Books and balance-sheet to be kept by | |

[The original Title XI, embracing §§ 584-587, and each and every section thereof, was repealed March 21, 1905, and a new Title XI substituted therefor, embracing §§ 586-590, Stats. and Amdts. 1905, c. CDXXXI, pp. 584-587, and is substantially the codification of Act 1880 (Stats. 1880, p. 134), as amended by Act 1897 (Stats. and Amdts. 1897, p. 38), and amendments proposed by Code Commission, Act March 16, 1901 (Stats. and Amdts. 1900-1, p. 377), hold unconstitutional, see history, § 4 ante.]

§ 586. TRANSFER AGENCIES. [MAY ESTABLISH IN OTHER STATES.]

Any corporation organized in this state for the purpose of mining or carrying on mining operations in or without this state, may establish and maintain agencies in other states of the United States, for the transfer and issuing of their stock;

and a transfer or issue of the same at any such transfer agency, in accordance with the provisions of its by-laws, is valid and binding as fully and effectually for all purposes as if made upon the books of such corporation at its principal office within this state. The agencies must be governed by the by-laws and the directors of the corporation.

History: Enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXXII, pp. 584-585; see introductory note to this title.

1. Applied, cited, construed, referred to, etc.
2. Statute is constitutional.

1. Applied, cited, construed, referred to, etc., in: *Harvey vs. Whittier St. School*, 142 Cal. 391, 392, 75 Pac. Rep. 1086 (referred to with other sections).

2. Constitutionality—Sufficiency of title.—

Act March 30, 1874 (Stats. 1873-4, p. 366), which was the forerunner of this title, was held constitutional, and not open to the objection that subject of act was not sufficiently expressed in its title to include the penalty provided.—*Francais vs. Somps*, 92 Cal. 503, 505, 28 Pac. Rep. 592. See *Johnson vs. Tautphaus*, 127 Cal. 606, 606, 607, 60 Pac. Rep. 172.

§ 587. STOCK ISSUED AT TRANSFER AGENCIES. [SURRENDER OF CERTIFICATE.] All stock of any such corporation, issued at a transfer agency, must be signed by the president and secretary of the corporation, and countersigned at the time of its issue by the agent having charge of the transfer agency. No stock must be issued at a transfer agency unless the certificate of stock, in lieu of which the same is issued, is at the time surrendered for cancelation.

History: Enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXXII, p. 585; see introductory note to this title.

§ 587a. CONSOLIDATION OF MINING CORPORATIONS. [WRITTEN CONSENT OF STOCKHOLDERS.] It is lawful for two or more corporations formed, or that may hereafter be formed, under the laws of this state, for mining purposes, which own or possess mining claims or lands adjoining each other, or lying in the same vicinity, to consolidate their capital stock, debts, property, assets, and franchises, in such manner and upon such terms as may be agreed upon by the respective boards of directors or trustees of such corporations so desiring to consolidate their interests; but

No such consolidation must take place without the written consent of the stockholders representing two thirds of the capital stock of each corporation, and no such consolidation can, in any way, relieve such corporations, or the stockholders thereof, from any and all just liabilities; and in case of such consolidation,

Due notice of the same must be given, by advertising, for one month, in at least one newspaper in the county where the said mining property is situated, if there is one published therein, and also in one newspaper published in the county where the principal place of business of any of said corporation is.

[Certificate of consolidation—Filed, where.] And when the consolidation is completed, a certificate thereof, containing the manner and terms of such consolidation, must be filed in the office of the county clerk of the county in which the original certificate of incorporation of each of said corporations is filed, and a copy thereof must be filed in the office of the secretary of state.

[Same—To be signed by boards—Calling meeting of stockholders—Notice.] Such certificate must be signed by a majority of each board of trustees or directors of the original corporations, and it is their duty to call, within thirty days after the filing of such certificate, a meeting of the stockholders of all of said corporations so consolidated, to elect a board of trustees or directors for the con-

solidated corporation, for the year thence next ensuing; and to cause notice of the time and place fixed for such meeting to be mailed to each stockholder of each of such corporations at his last known place of residence or business at least ten days before the time fixed for such meeting. The said certificate must also contain all the requirements prescribed by section two hundred and ninety.

History: Enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXXII, p. 585; see introductory note to this title.

1. Consolidation of railroad corporations.
2. Distribution of stock in new corporation among stockholders.
3. Remedy of stockholders—Injunction against consolidation.

1. Consolidation of railroad corporations.—See ante § 473 and note.

2. Distribution of stock in new corporation among stockholders.—Where two corporations having adjoining mining claims consolidate by each conveying to new corporation, created for that express purpose, even unanimous assent or agreement of stockholders will not authorize distribution of shares of stock in new corporation, which old corporations received, among stockholders of such old corporations, because § 309 provides that directors of cor-

porations must not make dividends except from surplus profits arising from business; "nor must they divide, withdraw, or pay to the stockholders, or any of them, any part of the capital stock."—Kohl vs. Lillenthal, 81 Cal. 378, 384-390, 20 Pac. Rep. 401, 22 Id. 689, 6 L. R. A. 520.

See ante § 309 and note.

3. Remedy of stockholders — Injunction against consolidation.—Where directors are acting ultra vires in attempting to consolidate two corporations, stockholder may bring suit for injunction without consulting directors.—Botts vs. Simpsonville & B. C. Turnp. R. Co., 88 Ky. 54, 10 S. W. Rep. 134, 2 L. R. A. 594. See Hawes vs. Contra Costa Water Co., 104 U. S. 450, bk. 26 L. ed. 327 (case arising in California).

§ 588. BOOKS AND BALANCE-SHEET TO BE KEPT BY SECRETARY. STOCKHOLDERS' RIGHT TO INSPECT. It is the duty of the secretary of every corporation formed for the purpose of mining, or conducting mining in California, whether such corporation be formed and organized under the laws of the state of California or of any other state, territory, or foreign country, to keep at some place within the state of California an office and in such office to keep a complete set of books showing all receipts and expenditures of such corporation, the sources of such receipts, and the objects of such expenditures, and also all transfers of stock. All books and papers must, at all times during business hours, be open to the inspection of any stockholder. He is entitled to be accompanied by an expert, and to make copies or extracts from any such books or papers.

[**Stockholder may examine mining property.**] He may, at reasonable hours, examine such mining property, accompanied by an expert, take samples, and make such other examination as he may deem necessary.

[**Monthly balance-sheet—Verified by oath, of whom.**] It is the duty of the directors, on the second Monday of each and every month, to cause to be made an itemized account or balance-sheet for the previous month, embracing a full and complete statement of all disbursements and receipts, showing from what sources such receipts were derived, and to whom and for what object or purpose such disbursements or payments were made; also all indebtedness or liabilities incurred or existing at the time, and for what the same were incurred, and the balance of money, if any, on hand. Such account or balance-sheet must be verified under oath by the president and secretary, and posted in some conspicuous place in the office of the company.

[**Superintendent to file monthly account; what must show.**] It is the duty of the superintendent, on the first Monday of each month, to file with the secretary an itemized account, verified under oath, showing all receipts and disbursements made by him for the previous month, and for what said disbursements

were made. Such account must also contain a verified statement showing the number of men employed under him, and for what purpose, and the rate of wages paid to each.

[Same—Report attached to account—Open to inspection.] He must attach to such account a full and complete report, under oath, of the work done in said mine, the amount of ore extracted, from what part of mine taken, the amount sent to mill for reduction, its assay value, the amount of bullion received, the amount of bullion shipped to the office of the company or elsewhere, and the amount, if any, retained by the superintendent. It is his duty to forward to the office of the company a full report, under oath, of all discoveries of ores or mineral-bearing quartz made in said mine, whether by boring, drifting, sinking, or otherwise, together with the assay value thereof. All accounts, reports, and correspondence from the superintendent must be kept in some conspicuous place in the office of said company, open to the inspection of all stockholders.

History: Enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXXII, pp. 585-586; see introductory note to this title.

1. Alternative "itemized account or balance-sheet."
2. "Conducting mining"—Formation of corporation for purpose of.
3. Same—Placer mining in creeks and rivers.
4. Constitutionality of statute—Foreign corporations not included immaterial.
5. Same—Not special legislation.
6. Delay in complying with statute.
7. Distinction between itemized account and balance-sheet.
8. Lack of information no defense.
9. Mining corporations only included.
10. Right of inspection—Absolute right.
11. Same—Mandamus lies to enforce right.
12. Same—Motion in suit in equity.
13. Same—Original papers and vouchers.
14. Same—Reason or occasion for inspection.
15. Time of filing report—Statute governs time of making.

1. **ALTERNATIVE "ITEMIZED ACCOUNT OR BALANCE-SHEET."**—If balance-sheet is posted, statute is complied with, without posting itemized account, as provision is in alternative and names two papers, to wit, "balance-sheet" and "itemized account," either one of which may be posted.—*Eyre vs. Harmon*, 92 Cal. 580, 584, 28 Pac. Rep. 779 (decided under Act 1880).

See par. 7 this note.

2. **"CONDUCTING MINING"**—Formation of corporations for purpose of.—Under §1 Act March 30, 1874 (Stats. 1873-4, p. 866), which corresponds in some respects to this section, duty is imposed upon secretary of corporation which is "formed" for purpose of carrying on and conducting business of mining; consequently corporation need not be actually carrying on or conducting business of mining, and finding that corporation has been formed for purpose specified, and that it has duly appointed president, superintendent, and secretary, and that it has disbursed money and has funds on hand, is sufficient to bring corporation and delinquent officer within statute.—*Francais vs. Samps*, 92 Cal. 503, 505, 506, 28 Pac. Rep. 592.

See *Beal vs. Osborne*, 72 Cal. 805, 306, 13 Pac. Rep. 871.

3. **Placer mining in creeks and rivers.**—Corporation formed for purpose of dredging in channels of navigable streams or in estuaries or creeks and rivers, and bringing up mud and sand supposed to contain gold, is within statute.—*Ball vs. Tolman*, 119 Cal. 358, 360, 361, 51 Pac. Rep. 546. See *Miles vs. Woodward*, 115 Cal. 308, 312, 313, 46 Pac. Rep. 1076.

4. **CONSTITUTIONALITY OF STATUTE**—Failure to provide against foreign corporations.—Statute is not unconstitutional for reason that it operates only upon domestic corporations.—*Miles vs. Woodward*, 115 Cal. 308, 311, 46 Pac. Rep. 1076 (upholding Act April 23, 1880). See *Ball vs. Tolman*, 119 Cal. 358, 363, 46 Pac. Rep. 1076.

5. **Special legislation.**—Statute is not unconstitutional as being a special law.—*Miles vs. Woodward*, 115 Cal. 308, 311-313, 46 Pac. Rep. 1076 (upholding Act April 23, 1880).

6. **DELAY IN COMPLYING WITH STATUTE.**—Statute is mandatory in regard to time when acts must be done, and where balance-sheet is not made and posted, etc., on first Monday of month as required, an attempt to comply with statute subsequently will constitute no defense.—*Schenck vs. Bandmann*, 81 Cal. 231, 235, 22 Pac. Rep. 654 (decided under Act 1880).

7. **DISTINCTION BETWEEN ITEMIZED ACCOUNT AND BALANCE-SHEET.**—"Balance-sheet, as that word is uniformly used by bookkeepers and business men, is a paper which shows a 'summation or general balance of all account,' but not particular items going to make up several accounts, and it is therefore essentially different from a paper embracing 'a full and complete statement of all the disbursements and receipts, showing from what sources such receipts were derived, and for what and to whom such disbursements or payments were made, and for what object or purpose the same was made'; but such matters may find an appropriate place in an itemized

account."—*Eyre vs. Harmon*, 92 Cal. 580, 584, 585, 28 Pac. Rep. 779 (decided under Act 1880).

See par. 1 this note.

8. LACK OF INFORMATION ON PART OF DIRECTORS necessary to enable them to comply with statute is no defense in action to recover penalty.—*Schenck vs. Bandmann*, 81 Cal. 231, 235, 22 Pac. Rep. 654 (decided under Act 1880).

9. MINING CORPORATIONS ONLY INCLUDED.—Statute applies only to corporations formed under laws of this state for purpose of mining.—See *Schenck vs. Bandmann*, 81 Cal. 231, 233, 234, 22 Pac. Rep. 654 (decided under Act 1880).

10. RIGHT TO INSPECT BOOKS AND RECORDS.—Absolute right.—Stockholder has absolute right, at all reasonable hours, to inspect records showing financial condition of corporation.—*Foster vs. White*, 86 Ala. 467, 6 So. Rep. 88; *Ellsworth vs. Dorwart*, 95 Iowa 108, 58 Am. St. Rep. 427, 63 N. W. Rep. 583 (decided under Code Iowa §§1078, 1279). See *Ranger vs. Champion Cotton-Press Co.*, 51 Fed. Rep. 61, 62.

11. Mandamus lies to enforce stockholder's right, as statute confers right of inspection in absolute terms, and if writ is to be refused in any case it seems it is only when stockholder is seeking an examination of books to gratify an idle whim or to perplex, annoy, or harass officers having books in charge.—*Ala. Foster vs. White*, 86 Ala. 467, 6 So. Rep. 88. *Iowa. Ellsworth vs. Dorwart*, 95 Iowa 108, 58 Am. St. Rep. 427, 63 N. W. Rep. 588. *Wis. State ex rel. Bergenthal vs. Bergenthal*, 73 Wis. 314, 39 N. W. Rep. 566. *Fed. Ranger vs. Champion Cotton-Press Co.*, 51 Fed. Rep. 61, 62.

12. Motion in suit in equity.—Where suit in equity is instituted by stockholder for ac-

counting and other equitable relief it is within discretion of court, on motion, to order corporate authorities to permit plaintiff to inspect books at any stage of suit, but it will not make such an order upon the filing of the bill or before the parties have appeared and pleaded except under the most pressing necessity.—*Ranger vs. Champion Cotton-Press Co.*, 51 Fed. Rep. 61, 62.

13. Original papers and vouchers.—Strict construction of statute perhaps does not give stockholder right to examine original papers and vouchers, and, if such right exists at all it is given by liberal construction of language used or by common law.—*Ellsworth vs. Dorwart*, 95 Iowa 108, 58 Am. St. Rep. 427, 63 N. W. Rep. 583.

14. Reason or occasion for examination.—Under statute giving stockholders right to examine books at reasonable and proper times (Code Ala. 1886, §1677), stockholder is not required to show any reason or occasion rendering examination opportune and proper, or definite and legitimate purpose. The custodian of books or papers cannot inquire into his motives and purposes. The only express limitation is that right shall be exercised at reasonable and proper times; and implied limitation is that it shall not be exercised from idle curiosity or for unlawful purposes.—*Foster vs. White*, 86 Ala. 467, 6 So. Rep. 88.

15. TIME OF FILING SUPERINTENDENT'S REPORTS.—Superintendent's reports are not required to be on file on first Monday of month or at any other particular date, but statute only requires that they shall be made and forwarded weekly so that they may be received weekly.—*Eyre vs. Harmon*, 92 Cal. 580, 583, 28 Pac. Rep. 779 (decided under Act 1880).

§ 589. RIGHT OF STOCKHOLDER TO VISIT MINE WITH EXPERT. [DUTY OF SUPERINTENDENT.] Any stockholder of a corporation formed under the laws of this state for the purpose of mining, is entitled to visit, accompanied by his expert, and examine the mine or mines owned by such corporation, and every part thereof, at any time he may see fit; and when such stockholder applies to the president of such corporation, he must immediately cause the secretary thereof to issue and deliver to such applicant an order, under the seal of the corporation, directed to the superintendent, commanding him to show and exhibit such parts of said mine or mines as the party named in said order may desire to visit and examine.

It is the duty of the superintendent, on receiving such order, to furnish such stockholder every facility for making a full and complete inspection of said mine or mines, and of the workings therein, and to accompany said stockholder either in person, or to furnish some person familiar with said mine or mines to accompany him in his visit to and through such mine or mines, and every part thereof.

[Failure of superintendent to obey orders—Removal.] If the superintendent fails to obey such order, such stockholder is entitled to recover, in any court of competent jurisdiction, against the corporation, the sum of one thousand dollars, and traveling expenses to and from the mine, as liquidated damages, together with costs of suit. In case of such refusal, it is the duty of the directors of the

corporation forthwith to remove the officer so refusing, and thereafter he must not be employed directly or indirectly by the corporation, nor must any salary be paid to him.

History: Enacted March 21, 1905, c. CDXXXII, pp. 586-587; see introductory note to this title.

§ 590. LIABILITY OF PRESIDENT AND DIRECTORS. [REFUSAL TO PERMIT EXAMINATION; DAMAGES.] In case of the refusal or neglect of the president to cause to be issued by the secretary the order mentioned in section five hundred and eighty-nine, such stockholder is entitled to recover against said president the sum of one thousand dollars and costs, as provided in the last section.

If the directors fail to have the reports and accounts current made and posted as provided in section five hundred and eighty-eight, they are liable, either severally or jointly, to an action by any stockholder complaining thereof, and on proof of such refusal or failure, he may recover judgment for actual damages sustained by him, with costs of suit.

[Removal of directors.] Each of such defaulting directors is also liable to removal for such neglect.

History: Enacted March 21, 1905, c. CDXXXII, p. 587; see introductory note to this title.

1. Capacity in which superintendent acted.
2. Failure of corporation to maintain office.
3. Ignorance of statute no defense.
4. Jurisdiction of foreign courts.
5. Liability of one director for default of another.
6. Motives of plaintiff in suing for penalty immaterial.
7. Penal and remedial statute.
8. Presumption of wilfulness.
9. Repeal of statute pending motion for new trial.
- 10, 11. Several violations—Amount of recovery—Joinder of causes.
12. Superintendent's neglect—Directors liable.
13. Wilful violation of statute—No attempt to comply.

1. CAPACITY IN WHICH SUPERINTENDENT ACTED.—Where superintendent, when elected, told other directors that he would not serve as such, but nevertheless he did serve, and during entire month superintended and managed business of taking out ores, he is liable under statute, notwithstanding claim that he was acting on his own account and that under sheriff's sale he had acquired some title to property which he was asserting against company. — *Beal vs. Osborne*, 72 Cal. 305, 306, 13 Pac. Rep. 871 (decided under Act 1880).

2. FAILURE OF CORPORATION TO MAINTAIN OFFICE.—In action to recover penalty, it is no defense that corporation did not have an office for the transaction of its business, and answer setting up such fact does not raise a material issue. — *Chapman vs. Doray*, 89 Cal. 52, 53, 54, 26 Pac. Rep. 605 (decided under Act April 23, 1880).

3. IGNORANCE OF STATUTE IS NO DEFENSE in an action to recover penalty for

failure to post accounts, etc. — *Ball vs. Tolman*, 119 Cal. 358, 362, 363, 51 Pac. Rep. 546.

4. JURISDICTION OF FOREIGN COURTS.—Liability of director, being penal, is not enforceable, it would seem, in another state. — See *First Nat. Bank vs. Price*, 33 Md. 487, 3 Am. Rep. 204 (holding that action would not lie on Pennsylvania statute to recover penalty).

5. LIABILITY OF ONE DIRECTOR FOR DEFAULT OF ANOTHER.—Where statute (Act Mich. 1885, §12) provides that if "any of said directors" shall wilfully neglect or refuse to make report, etc., "they shall each be liable," etc., meaning of statute is that such of directors as wilfully neglect or refuse to make report shall be liable, and no penalty is imposed upon one director for wilful neglect of his fellow director. — *Gennert vs. Ives*, 103 Mich. 547, 61 N. W. Rep. 9.

6. MOTIVES OF PLAINTIFF IN BRINGING ACTION TO RECOVER PENALTY for failure to post accounts, etc., are immaterial, except to extent that they go to his credibility as a witness, and it is no defense that he had knowledge of the accounts and had means of learning their contents, and that his motive in bringing the action is solely "to get even with defendants for removing him from his berth of assistant superintendent." — *Ball vs. Tolman*, 119 Cal. 358, 363, 51 Pac. Rep. 546.

7. PENAL AND REMEDIAL STATUTE.—The act is not only penal in its nature, but it is also remedial and of much consequence and value to stockholders; and it must therefore receive construction with reference to its beneficent objects as well as to its penal character. — *Ball vs. Tolman*, 119 Cal. 358, 363, 51 Pac. Rep. 546.

8. PRESUMPTION OF WILFULNESS.—

Where statute provides that if directors shall "wilfully neglect or refuse" to make report they shall be liable, etc., in absence of proof, failure to file report is to be presumed wilful.—Gennert vs. Ives, 102 Mich. 547, 61 N. W. Rep. 9 (decided under Act Mich. 1885, § 12).

9. **REPEAL OF STATUTE PENDING MOTION FOR NEW TRIAL.**—Where action was brought under Act April 28, 1880, to recover penalty, and pending motion for new trial, penal provisions of such act were repealed by Act Feb. 26, 1897 (Stats. 1897, p. 39), and motion was denied and judgment for plaintiff rendered, and appeal taken, as all proceedings subsequent to repeal were without authority and execution not authorized, it became the duty of the supreme court to vacate the judgment.—Ball vs. Tolman, 135 Cal. 375, 380, 381, 87 Am. St. Rep. 110, 67 Pac. Rep. 339.

10. **SEVERAL VIOLATIONS OF STATUTE.**—Stockholder or stockholders may at their election either proceed against directors for single delinquency, or may forbear to do so until more than one dereliction of duty has occurred, but in neither event can more than one penalty be recovered.—Loveland vs. Gar-

ner, 71 Cal. 541, 543, 544, 12 Pac. Rep. 616 (decided under Act 1880).

11. **Joinder of several distinct causes of action.**—Where complaint sets up several delinquencies and claims right to recover penalty for each, although only one can be recovered, it is not open to demurrer on the ground that it joins several distinct causes of action.—Loveland vs. Garner, 71 Cal. 541, 544, 12 Pac. Rep. 616 (decided under Act 1880).

12. **SUPERINTENDENT'S FAILURE TO MAKE REPORTS, ETC.**—If superintendent fails to make reports referred to in § 588, directors are liable.—Eyre vs. Harmon, 92 Cal. 580, 585, 28 Pac. Rep. 779 (decided under Act 1880).

13. **WILFUL AND INTENTIONAL VIOLATION OF STATUTE.**—In action to recover penalty for failure to post accounts, etc., defendant is liable if it appears that he made no attempt to comply with the law, and there is no force in the contention that violation of statute must be wilful and intentional.—Ball vs. Tolman, 119 Cal. 353, 362, 51 Pac. Rep. 546.

TITLE Xia.

CORPORATIONS FOR THE FORMATION OF CHAMBERS OF COMMERCE, BOARDS OF TRADE, MECHANICS' INSTITUTES, AND OTHER KINDRED ASSOCIATIONS.

§ 591. Formation, organization and powers of.

§ 592. Capital stock and certificates of.

§ 592a. Powers which may be conferred on the trustees, directors, or the executive committee.

§ 592b. Power to acquire, sell, possess, and use property.

§ 592c. The by-laws. [Meetings, how called and conducted.]

§ 592d. Power to levy and collect assessments.

§ 592e. Pre-existing corporations may become entitled to the benefit of this title.

[This title was added by Act March 21, 1905, Stats. and Amdts. 1905, c. CDXXXIII, pp. 587-589. The sections are a verbatim re-enactment of the similarly numbered sections of the Code Commission, Act March 16, 1901 (Stats. and Amdts. 1900-1, pp. 380, 381), held unconstitutional, see history, § 4 ante. This added title is a codification of Act 1866 (Stats. 1865-6, p. 469, as amended by Act 1868 (Stats. 1867-8, p. 15), and Act 1885 (Stats. and Amdts. 1885, p. 76). See Stats. and Amdts. 1900-1, p. 429.]

§ 591. **FORMATION, ORGANIZATION AND POWER OF.** Corporations for the formation and organization of chambers of commerce, boards of trade, mechanics' institutes, and other associations formed for the extension and promotion of trade and commerce, or the advancement, protection, and improvement of the mechanic arts, may be formed by twenty or more persons, who must execute and file articles of incorporation as prescribed in chapter one of title one of part four of this code. Upon receiving from the secretary of state a certificate of the filing with him of a certified copy of its articles of incorporation, such corporation becomes a body corporate, and by its corporate name has succession for the period limited in its articles, and power: (1) To sue and be sued in any court; (2) to make and use a common seal, and alter it at pleasure; (3) to lease, purchase, hold, sell, mortgage, convey in trust, convey, release from trust or mortgage, such real and personal property as hereinafter provided; (4) to elect and appoint such officers, agents, and servants as the business of the corporation may require; and (5) to make by-laws, not inconsistent with the laws of this state, pro-

viding for the organization of the corporation and the management of its affairs.

[Business.] No corporation formed under this title must engage in any mercantile, commercial, or mechanical business.

History: Enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXXIII, p. 588.

I. In General.

- 1-4. Character and status of.
- 5-8. Members bound by rules, etc.
9. Right to pursue business—Termination of.
10. Rules must be conformed to.
- 11, 12. Statute—How construed.
- 13-15. Transactions—Nature of—Members.
- 16-21. Telegraphic information—Rights as to.

II. By-laws—1. Power to Make.

22. Expressly granted in general terms.
- 23-25. Extent of power.

III. Same—2. Binding Effect of.

- 26-35. Constitution and by-laws—To what extent binding.
- 36-38. Effect of subsequent incapacity upon—Amendments.
39. Estoppel by failure to object to.

IV. Same—Settlement of Disputes, etc.

- 40-44. By-laws as to disputes—Validity and effect of.
- 45-50. Settlements by arbitration—Award—Injunction.

V. Same—When Valid or Invalid.

- 51-61. By-law held valid.
- 62-66. Same—Held invalid.

VI. Management—Powers Conferred on Committee.

67. Power of board to delegate.
- 68-71. Powers of delegated committee—Judgment of.

VII. Members—Interests in Property.

72. Interests coextensive with performance of contract.
73. Same—Not descendible.
- 74-79. Seat on board—Nature of and rights over.

VIII. Proceedings Against Member—1. Expulsion.

80. Nature of right to expel.
- 81-83. Power to expel—How conferred—Silence.
- 84-92. Same—Extent and validity of.
- 93-95. Judgment—Effect and nature of.
96. Threatening expulsion—Effect of.
- 97-98. Proceedings—Complaint, etc.
99. Right—When exercisable.
- 100, 101. Right of courts to interfere.
- 102-106. Unreasonable expulsion—Action for—Injunction.
- 107-109. Reinstatement—Right to—Mandamus.

IX. Same—2. Notice and Opportunity to be Heard.

- 110-113. Necessity of notice—Information.
114. Failure to give—Mandamus.
- 115, 116. Evidence—By-laws, how far.
- X. Power Over Board.
- 117, 118. Injunction—When granted.
119. State authority over.

XI. Courts—Jurisdiction of.

- 120-122. Right to appeal to courts.
- 123-133. Right to interfere—Extent of.

I. IN GENERAL.

As to arbitration clause and jurisdiction of arbitration committee, see 26 Am. & Eng. Encyc. of L. (2d ed.) 805.

As to conclusiveness of decisions of tribunals of association or corporations, see monographic note by G. H. Parmele 49 L. R. A. 353-401.

As to remedy of members, see monographic note 59 Am. St. Rep. 198-209.

As to right to resort to courts, see note 53 Am. St. Rep. 319, 48 Am. St. Rep. 316, 18 Am. St. Rep. 301.

As to rules and regulations of exchanges, boards of trade, chambers of commerce and commercial associations, see 26 Am. & Eng. Encyc. of L. (2d ed.) 803.

As to stock and produce exchanges, see 26 Am. & Eng. Encyc. of L. (2d ed.) 788.

As to validity of constitution, by-laws and proceedings of voluntary associations, see monographic note 69 Am. Dec. 670-678.

1. STATUS OF BOARD.—Board of trade merely voluntary organization, even though incorporated under act of general assembly.—Board of Trade vs. Nelson, 162 Ill. 431, 53 Am. St. Rep. 312, 44 N. E. Rep. 743; People ex rel. Rice vs. Board of Trade, 80 Ill. 134.

2. CHARACTER OF ASSOCIATION must be determined by its charter.—Board of Trade vs. Nelson, 162 Ill. 431, 53 Am. St. Rep. 312, 44 N. E. Rep. 743; People ex rel. Rice vs. Board of Trade, 80 Ill. 134.

3. Not changed by fact that it rents out rooms and derives income therefrom.—Board of Trade vs. Nelson, 162 Ill. 431, 53 Am. St. Rep. 312, 44 N. E. Rep. 743; People ex rel. Rice vs. Board of Trade, 80 Ill. 134.

4. Word "produce" as used in association entitled "Produce Exchange" as part of its name, is not sufficient to indicate that purposes limited board's jurisdiction to contracts relating to agricultural products.—Haebler vs. New York Produce Ex., 149 N. Y. 414, sub nom. In re Haebler, 44 N. E. Rep. 87.

5. Board of trade not bound to admit any person to membership.—Board of Trade vs. Nelson, 162 Ill. 431, 53 Am. St. Rep. 312, 44 N. E. Rep. 743; People ex rel. Rice vs. Board of Trade, 80 Ill. 134.

6. Cannot be compelled by law to admit applicant.—Hutchinson vs. Lawrence, 67 How. Pr. (N. Y.) 38, 39; White vs. Brownell, 3 Abb. Pr. N. S. (N. J.) 318, 4 Id. 162, 2 Daly (N. Y.) 329.

7. PARTY BECOMES MEMBER BY HIS OWN VOLUNTARY ACT in applying for membership, and by his contract is bound by rules

and regulations thereof.—Board of Trade vs. Nelson, 162 Ill. 431, 53 Am. St. Rep. 312, 44 N. E. Rep. 743; People ex rel. Rice vs. Board of Trade, 80 Ill. 134.

8. PRIVILEGE OF MEMBERSHIP NOT CONFERRED by sovereign power, but created solely by organization.—Hutchinson vs. Lawrence, 67 How. Fr. (N. Y.) 38, 39; White vs. Brownell, 3 Abb. Pr. N. S. (N. Y.) 318, 4 Id. 162, 2 Daly (N. Y.) 329.

9. RIGHT TO PURSUE BUSINESS AS MEMBER of such organization in hall of building devoted to that purpose, may be thing of value, but its value is incidental to membership, and termination of such membership destroys right under it.—Board of Trade vs. Nelson, 162 Ill. 431, 53 Am. St. Rep. 312, 44 N. E. Rep. 743; People ex rel. Rice vs. Board of Trade, 80 Ill. 134.

10. RULES ENACTED BY BOARD OF TRADE must be conformed to by it in all matters relating to its members with reference to their actions and in disciplining them.—Green vs. Board of Trade, 174 Ill. 585, 51 N. E. Rep. 599, 49 L. R. A. 365.

11. STATUTE CREATING EXCHANGE containing no provision limiting contracts between members, to any particular product, will be construed so as to include an article which may become one of merchandise upon manufacture.—Haebler vs. New York Produce Ex., 149 N. Y. 414, sub nom. In re Haebler, 44 N. E. Rep. 37.

12. Legislature did not intend when conferring public functions upon board of trade in matter relating to inspection of grain and collection of fees that such powers and privileges should be used for private gain and profit of such board.—Jones vs. Board of Trade, 53 Kans. 95, 34 Pac. Rep. 453.

13. TRANSACTIONS OF BOARD OF TRADE are public only so far as board or its members see fit to make them so.—Metropolitan Grain & Stock Ex. vs. Chicago Board of Trade, 15 Fed. Rep. 847.

14. Members acting for others only are required to make disclosures of their transactions to those for whom they act.—Metropolitan Grain & Stock Ex. vs. Chicago Board of Trade, 15 Fed. Rep. 847.

15. Compellable to disclose prices to principals, but not public.—Metropolitan Grain & Stock Ex. vs. Chicago Board of Trade, 15 Fed. Rep. 847.

16. Board of trade permitting telegraph company to have its reporters, operators, and instruments upon floor of exchange for purpose of obtaining and sending out information as to prices, may close its doors against employees of same whenever it sees fit to do so, where company enjoys privilege only at will and sufferance of board.—Metropolitan Grain & Stock Ex. vs. Chicago Board of Trade, 15 Fed. Rep. 847.

17. Exercise option in withholding from public information as to prices.—Metropolitan Grain & Stock Ex. vs. Chicago Board of Trade, 15 Fed. Rep. 847.

18. Information or reports obtained by

telegraph company at sufferance of board can only be imparted by company with permission of board.—Metropolitan Grain & Stock Ex. vs. Chicago Board of Trade, 15 Fed. Rep. 847.

19. Fact that members of board of trade have been in habit of informing public of prices is no evidence that they are obliged to do so unless they see fit.—Metropolitan Grain & Stock Ex. vs. Chicago Board of Trade, 15 Fed. Rep. 847.

20. Telegraph companies terminating contract with board of trade for transmission of information regarding business cannot be compelled to enter into new one or to continue one terminating.—Metropolitan Grain & Stock Ex. vs. Chicago Board of Trade, 15 Fed. Rep. 847.

21. Telegraph company not bound to collect and transmit information from board of trade, but if they follow such employment voluntarily, they are bound to do it with fidelity while their contract continues.—Metropolitan Grain & Stock Ex. vs. Chicago Board of Trade, 15 Fed. Rep. 847.

II. BY-LAWS—1. POWER TO MAKE.

22. POWER TO MAKE BY-LAWS expressly granted in general terms, to enable corporation to accomplish objects of its creation, and limited to such objects or purposes.—Dickenson vs. Chamber of Commerce, 29 Wis. 45, 48, 9 Am. Rep. 544.

23. Extends to such as are reasonable and consistent with general principles of laws of land, which are determined by courts when case is properly before them, and to alteration, amendment, and repeal of same.—Parish vs. New York Produce Ex., 169 N. Y. 34, 61 N. E. Rep. 977, 56 L. R. A. 149.

24. Extends to regulation or modification of constitution, but not to alteration of it.—Parish vs. New York Produce Ex., 169 N. Y. 34, 61 N. E. Rep. 977, 56 L. R. A. 149. See Railroad Co. City of Chicago vs. Allerton, 85 U. S. (18 Wall.) 232, bk. 21 L. ed. 902; Rex vs. Cutbush, 4 Burr. 2204.

25. TO ALTERATION, AMENDMENT, OR REPEAL if power to pass reasonable by-laws agreeable to law.—Parish vs. New York Produce Ex., 169 N. Y. 34, 61 N. E. Rep. 977, 56 L. R. A. 149.

III. SAME—2. BINDING EFFECT OF.

26. CONSTITUTION, ARTICLES, AND BY-LAWS are laws as to members.—Thompson vs. Adams, 93 Pa. St. 55, 56, 66.

27. Agreed upon by members contain all stipulations of parties and forming law governing such association when not organized pursuant to statute and terms of membership not fixed upon principles of common law.—Haight vs. Dickerman, 18 N. Y. Supp. 559, 63 Hun 632; White vs. Brownell, 3 Abb. Pr. N. S. (N. Y.) 318, 4 Id. 162, 2 Daly (N. Y.) 329.

28. Express contract by which party becomes member and which binds him and measures his rights, duties, and liabilities as member.—Goldsmith vs. Sawyer, 46 Cal. 209, 213; Weston vs. Ives, 97 N. Y. 222; Belton vs. Hatch, 109 N. Y. 593, 4 Am. St. Rep. 495, 17 N.

E. Rep. 225; O'Brien vs. Grant, 146 N. Y. 162, 173, 40 N. E. Rep. 871, 28 L. R. A. 361. See People vs. New York Cotton Ex., 3 Hun (N. Y.) 216, 220.

29. Member of board of trade subscribing to by-laws agrees to submit to rules and regulations.—Green vs. Board of Trade, 174 Ill. 585, 51 N. E. Rep. 599, 49 L. R. A. 365. See Bauer vs. Samson Lodge, 102 Ind. 262, 1 N. E. Rep. 571; Presbyterian Mut. Assur. Fund vs. Allen, 106 Ind. 593, 7 N. E. Rep. 317; Coles vs. Insurance Co., 18 Iowa 425.

30. Member of board of trade agreeing in writing to abide by rules, regulations, and by-laws estopped from denying jurisdiction of committee, appointed pursuant to such rules, of person and subject-matter.—Ryan vs. Cudahy, 157 Ill. 103, 48 Am. St. Rep. 305, 41 N. E. Rep. 760, 49 L. R. A. 353.

31. Bound by rule when not in conflict with law of land.—Hutchinson vs. Lawrence, 67 How. Pr. (N. Y.) 38, 39; White vs. Brownell, 3 Abb. Pr. N. S. (N. Y.) 318, 4 Id. 162, 2 Daly (N. Y.) 327, 329.

32. By such as are authorized by nature of corporation and laws of country, and not contrary to policy of law or unreasonable.—Green vs. Board of Trade, 174 Ill. 585, 51 N. E. Rep. 599, 49 L. R. A. 365. See Sayre vs. Louisville U. B. Assoc., 1 Duv. (Ky.), 143, 85 Am. Dec. 613; People vs. Thropp, 12 Wend. (N. Y.) 183.

33. Must personally assent to provision in order to give constitution and laws of boards of trade and other similar institutions binding effect upon member recognizable and enforceable by the courts.—Heath vs. New York Gold Ex., 38 How. Pr. (N. Y.) 168, 169; Austin vs. Searing, 16 N. Y. 112, 69 Am. Dec. 665.

34. Must either submit to rules or surrender membership, and has his option to retain membership by complying with rules.—Rorke vs. San Francisco Stock & Ex. Board, 99 Cal. 196, 202, 33 Pac. Rep. 881. See Bohn Mfg. Co. vs. Hollis, 54 Minn. 223, 40 Am. St. Rep. 319, 55 N. W. Rep. 1119, 21 L. R. A. 337; White vs. Brownell, 3 Abb. Pr. N. S. (N. Y.) 318, 4 Id. 162, 2 Daly (N. Y.) 329, 327; Lafond vs. Deems, 81 N. Y. 507; Weston vs. Ives, 97 N. Y. 222; Belton vs. Hatch, 109 N. Y. 593, 4 Am. St. Rep. 495, 17 N. E. Rep. 225; Lewis vs. Wilson, 121 N. Y. 284, 24 N. E. Rep. 474; Hyde vs. Woods, 2 Saw. C. C. 655, 12 Fed. Cas. 1114; Greer Mills Co. vs. Stoller, 77 Fed. Rep. 1, 8.

35. Voluntarily submits himself to operation of all laws enacted for its government, and agrees to be bound by them so far as they have corporate authority.—Board of Trade of Chicago vs. Nelson, 162 Ill. 431, 53 Am. St. Rep. 312, 44 N. E. Rep. 743; People ex rel. Rice vs. Board of Trade, 80 Ill. 134.

36. Subsequent mental incapacity will not relieve member from effect of previous neglect and refusal to discharge legal and just duties.—MacDowell vs. Ackley, 93 Pa. St. 277, 284.

37. MEMBER BOUND BY AMENDMENTS where he has recognized constitution and by-laws.—MacDowell vs. Ackley, 93 Pa. St. 277, 283.

38. Member who could have been present at meeting amending constitution and by-laws

and not dissenting therefrom, taken as voluntarily refraining from participating and not dissenting from amendment.—MacDowell vs. Ackley, 93 Pa. St. 277, 283.

39. ESTOPPEL.—Failure of stockholder to object to void by-law until attempt made to enforce sale against him does not work an estoppel.—Kolff vs. St. Paul Fuel Ex., 48 Minn. 215, 50 N. W. Rep. 1036.

IV. SAME—3. SETTLEMENT OF DISPUTES.

40. BY-LAWS MAY PROVIDE MANNER OF INVESTIGATION, trial, body before whom trial is to take place, exclusion of professional counsel, as same are methods of discipline, and infringe no rule of law.—Green vs. Board of Trade, 174 Ill. 585, 51 N. E. Rep. 599, 49 L. R. A. 365.

41. Board of trade will be left to enforce their rules and regulations in manner they have adopted for their own government and method of disciplining, where by-laws infringe no public policy or rule of law, and are not unreasonable, and courts will not interfere or control such enforcement.—Fisher vs. Board of Trade, 80 Ill. 85; People vs. Board of Trade, 80 Ill. 134; Baxter vs. Board of Trade, 83 Ill. 146; Sturges vs. Board of Trade, 86 Ill. 441; Pitcher vs. Board of Trade, 121 Ill. 412, 13 N. E. Rep. 187; Ryan vs. Cudahy, 157 Ill. 103, 48 Am. St. Rep. 305, 41 N. E. Rep. 760, 49 L. R. A. 353; Board of Trade vs. Nelson, 162 Ill. 431, 53 Am. St. Rep. 312, 44 N. E. Rep. 743; Green vs. Board of Trade, 174 Ill. 585, 51 N. E. Rep. 599, 49 L. R. A. 365.

42. Party becoming member of board of trade and agreeing in writing to abide by rules, regulations, and by-laws voluntarily submits himself to trial by committee in manner pointed out in by-laws, and cannot call in question jurisdiction of such committee or subject-matter.—Ryan vs. Cudahy, 157 Ill. 103, 48 Am. St. Rep. 305, 41 N. E. Rep. 760, 49 L. R. A. 353.

43. Not bound by proceeding not according to rules and regulations provided for action of committee for trial of disputes as to property rights between members of board.—Ryan vs. Cudahy, 157 Ill. 103, 48 Am. St. Rep. 305, 41 N. E. Rep. 760, 49 L. R. A. 353.

44. Waives irregularities of minor nature by appearing before board of directors and submitting case for trial without objection, either to manner in which board is constituted or to mode of its proceeding.—Pitcher vs. Board of Trade, 121 Ill. 412, 13 N. E. Rep. 187; Sperry's App. 116 Pa. St. 391, 9 Atl. Rep. 478.

45. AGREEMENTS TO ARBITRATE are not enforceable either by court of law or equity, as they are deemed against public policy, and courts of justice are presumed to be better capable of administering and enforcing rights of parties than mere private arbitrators.—Heath vs. New York Gold Ex., 38 How. Pr. (N. Y.) 168, 170; Haggart vs. Morgan, 5 N. Y. 422, 55 Am. Dec. 350; Kill vs. Hollister, 1 Wilson 129; Agar vs. Maclews, 2 Sim. & S. 418; Street vs. Rigby, 6 Ves. 815; Milnes vs. Gery, 14 Ves. 400, 9 Rev. Rep. 307; Thompson vs. Charnock, 8 Durnf. & E. (3 T.

R.) 139. See *British Empire Shipping Co. vs. Somes*, 3 K. & J. 433, 26 L. J. Ch. 759.

46. Arbitration clause contained in constitution and by-laws, even assuming that member assented to constitution in such manner as to establish valid contract, has only same force and effect as agreement in writing made by persons to submit to decision of one or more arbitrators in controversies existing between them, as enforcement of such agreements is deemed against public policy.—*Heath vs. New York Gold Ex.*, 38 How. Pr. (N. Y.) 163, 169.

See 26 Am. & Eng. Encyc. of L. (2d ed.) 805.

47. Fact that member has opportunity to arbitrate or conciliate differences before complaint referred to board managers, does not affect reasonableness of by-law or its validity.—*Haebler vs. New York Produce Ex.*, 149 N. Y. 414, sub nom. In re *Haebler*, 44 N. E. Rep. 87. See *People ex rel. Thacher vs. New York Commercial Assoc.*, 18 Abb. Pr. 271; *Matthews vs. Associated Press*, 136 N. Y. 333, 32 Am. St. Rep. 746, 32 N. E. Rep. 981.

48. Revocable any time before submission under New York revised statutes.—*Heath vs. New York Gold Ex.*, 38 How. Pr. 163, 170.

49. AWARD OF ARBITRATORS claimed to be made pursuant to provision of constitution and by-laws of board, after member has revoked or annulled contract of submission, cannot be enforced against member.—*Heath vs. New York Gold Ex.*, 38 How. Pr. 163, 171.

50. INJUNCTION WILL NOT LIE AT INSTANCE of member to restrain enforcement of award in arbitration where such member has annulled or revoked his contract, as same cannot be enforced, and cannot affect or injure him in any way.—*Heath vs. New York Gold Ex.*, 38 How. Pr. 163, 171. See *Woodward vs. Harris*, 2 Barb. (N. Y.) 439; *Bruce vs. Delaware & H. Canal Co.*, 19 Barb. (N. Y.) 371; *Gallatin vs. Oriental Bank*, 16 How. Pr. (N. Y.) 253; *McCafferty vs. Glazier*, 10 How. Pr. (N. Y.) 475.

V. SAME—4. WHEN VALID OR INVALID.

51. BY-LAW APPLYING TO BUSINESS CONDUCT and relation of members between themselves and to all contracts made upon the floor of the chamber or otherwise during the session held valid.—*Dickenson vs. Chamber of Commerce*, 29 Wis. 45, 49, 9 Am. Rep. 544.

52. Authorizing boards to censure, suspend, or expel member within charter giving right to admit or expel those board sees fit as prescribed by rules valid.—*Pitcher vs. Board of Trade*, 121 Ill. 412, 13 N. E. Rep. 187.

53. Excluding counsel upon investigations before board or any committee thereof on behalf of accused, does not violate any sense of right, and is not against public policy or unreasonable.—*Green vs. Board of Trade*, 174 Ill. 585, 51 N. E. Rep. 599, 49 L. R. A. 365.

54. Giving board power to discipline only when a member refuses to arbitrate or conciliate is not unreasonable, coercive, contrary to public policy, or invalid.—*Haebler vs. New York P. Ex.*, 149 N. Y. 414, sub nom. In re *Haebler*, 44 N. E. Rep. 87.

55. Having for their object establishment of high moral standard in conducting business transactions and control over those who belong to chamber in their trade with each other and strangers, and subjecting them to supervisory care, valid.—*Dickenson vs. Chamber of Commerce*, 29 Wis. 45, 49, 9 Am. Rep. 544. See *People ex rel. Page vs. Board of Trade*, 45 Ill. 112; *People ex rel. Thacher vs. N. Y. Commer. Assoc.*, 18 Abb. Pr. (N. Y.) 271, 279.

56. Prohibiting members gathering in any public place in vicinity of exchange room in forming market for purpose of trade or contract of future trade "before the time fixed for opening the exchange room for general trading, or after the time fixed for closing the same day" is reasonable and not in restraint of trade or otherwise void as being uncertain in its provisions.—*State ex rel. Cuppel vs. Milwaukee Chamber of Commerce*, 47 Wis. 670, 3 N. W. Rep. 760.

57. Prohibiting smoking in business hours valid.—*Albers vs. Merchants Ex.*, 133 Mo. 140, 39 S. W. Rep. 473.

58. Providing for preliminary investigation by committee for purposes of determining whether charges shall be preferred against member, reasonable and valid.—*Green vs. Board of Trade*, 174 Ill. 585, 51 N. E. Rep. 599, 49 L. R. A. 365.

59. Providing that if members fail to comply with business contract made with another member, he shall be expelled, is valid.—*Board of Trade of Chicago vs. Nelson*, 162 Ill. 431, 53 Am. St. Rep. 312, 44 N. E. Rep. 743; *People ex rel. Page vs. Board of Trade*, 45 Ill. 112.

60. Providing that "on all sales of grain in bulk on elevator receipts, the buyer shall pay the first ten days' storage, unless otherwise specified at the time of sale," valid.—*Goddard vs. Merchants Ex.*, 73 Mo. 609, 610, affirming 9 Mo. App. 290.

61. Valid, although it may differ from common law.—*Goddard vs. Merchants Ex.*, 73 Mo. 609, 610, affirming 9 Mo. App. 290.

62. AMENDMENT DIVERTING GRATUITY FUND of members of produce exchange for use which differs from those contemplated by original constitution and by-laws, thereby destroying members' rights, is void.—*Parish vs. New York Produce Ex.*, 169 N. Y. 34, 61 N. E. Rep. 977, 56 L. R. A. 149.

63. By-law disturbing vested rights is not reasonable or agreeable to law.—*Parish vs. New York Produce Ex.*, 169 N. Y. 34, 61 N. E. Rep. 977, 56 L. R. A. 149. See *Gray vs. President etc.*, 3 Mass. 364, 3 Am. Dec. 156; *Weller vs. Equitable Aid Union*, 92 Hun (N. Y.) 277, 36 N. Y. Supp. 734.

64. Interfering with, to regulate or control stockholders in conduct of their several individual business wholly outside of authority, contrary to articles of incorporation and ultra vires.—*Kolff vs. St. Paul Fuel Ex.*, 48 Minn. 215, 50 N. W. Rep. 1036.

65. Prohibiting members of exchange from having more than one office within limits of city in addition to yard offices located at receiving points, and providing that board shall

fix prices at which articles shall be sold, and which is intended to apply and control not merely business of buying and selling by corporation, but by members separately and in their individual business, is void as ultra vires.—*Kolff vs. St. Paul Fuel Ex.*, 48 Minn. 215, 50 N. W. Rep. 1066.

66. Providing for inquiry to terminate whether mere complaint or rumors shall be investigated and tried before board on charge preferred against member, is entirely unreasonable as in contravention of public policy.—*Green vs. Board of Trade*, 174 Ill. 585, 15 N. E. Rep. 599, 49 L. R. A. 365.

VI. MANAGEMENT OF BOARD—POWERS CONFERRED ON COMMITTEES.

67. BOARD OF DIRECTORS MAY, where statutory provisions give extensive authority with respect to enactment of rules and by-laws, delegate to board of directors the power to suspend or expel member.—*State ex rel. Cappel vs. Chamber of Commerce*, 47 Wis. 670, 3 N. W. Rep. 760. See *State ex rel. Graham vs. Board of Trade*, 20 Wis. 63.

68. COMMITTEE APPOINTED BY BOARD OF TRADE to hear and determine question brought before them pursuant to rules and regulations may hear evidence bearing on claim of either party, although not required to hear evidence that has no bearing upon question involved.—*Ryan vs. Cudahy*, 157 Ill. 108, 48 Am. St. Rep. 305, 41 N. E. Rep. 760, 49 L. R. A. 353.

As to power to impart or withhold information by telegraphic means, see pars. 16-18 this note.

69. Appointed to determine margin deposit and to whom it belonged or should be paid, regarded as tribunal of limited jurisdiction, bound to proceed in conformity to rules under which elected.—*Ryan vs. Cudahy*, 157 Ill. 108, 48 Am. St. Rep. 305, 41 N. E. Rep. 760, 49 L. R. A. 353.

70. Must not confine itself to mere calculation between difference of contract price and figures established by combination on board of trade from day of delivery, but must consider fact whether such figure is real, fictitious, or manipulated by a corner; otherwise its action is that of tribunal of character for legalization of acts prohibited by criminal laws of state.—*Ryan vs. Cudahy*, 157 Ill. 108, 48 Am. St. Rep. 305, 41 N. E. Rep. 760, 49 L. R. A. 353.

71. Judgment of committee appointed to determine to whom margin deposit belongs or should be paid, failing to conduct investigation in accordance with charter and by-laws of board of trade, does not bind board.—*Ryan vs. Cudahy*, 157 Ill. 108, 48 Am. St. Rep. 305, 41 N. E. Rep. 760, 49 L. R. A. 353.

VII. MEMBERS—INTERESTS OF IN PROPERTY.

72. MEMBER ENTITLED TO PRIVILEGES and rights inhering in member so long as he keeps his part of contract expressed in articles and by-laws.—*Greer Mills Co. vs. Stoller*, 77 Fed. Rep. 1, 3. See *Hammerstein vs. Parsons*,

33 Mo. App. 386; *Warren vs. Merchants Ex.*, 53 Mo. App. 157.

73. Interest of member of stock exchange board in investment made according to rules and by-laws of association which were declared to constitute trust fund where used and applied for certain purpose, does not vest any estate in him which will descend to his personal representatives upon decease, so as to allow them to bring action therefor.—*Swift vs. Stock & Ex. Board*, 67 Cal. 567, 568, 3 Pac. Rep. 94.

74. Seat on board is not property subject to execution in any form, but mere personal privilege.—*Lowenberg vs. Greenbaum*, 99 Cal. 162, 166, 37 Am. St. Rep. 42, 33 Pac. Rep. 794, 21 L. R. A. 399; *Pancoast vs. Gowen*, 93 Pa. St. 66, 71; *Thompson vs. Adams*, 93 Pa. St. 55, 56, 66.

75. Right to be used and enjoyed and held subject to limitations and restrictions which constitution chose to place upon it.—*Thompson vs. Adams*, 93 Pa. St. 55, 56, 66.

76. By-law giving power to member to "dispose" of seat includes power to mortgage sale.—*Clute vs. Loveland*, 68 Cal. 254, 261, 9 Pac. Rep. 133.

77. Equitable owner of seat on board not entitled to share proceeds of sale of seat on death of member with members of board to whom he was unknown and where member was indebted to board.—*Thompson vs. Adams*, 93 Pa. St. 55, 56, 66.

78. Mortgagee of seat of member acquires equitable lien or interest subject to rules of association as security for payment.—*Clute vs. Loveland*, 68 Cal. 254, 261, 9 Pac. Rep. 133.

79. Rights to seat of expelled member do not pass until sale.—*Haight vs. Dickerman*, 18 N. Y. Supp. 559, 63 Hun (N. Y.) 632.

VIII. PROCEEDINGS AGAINST MEMBER—1. EXPULSION, ETC.

80. EXPULSION OF MEMBER—Acts of board in a quasi-judicial character in matters of expulsion, and so far as it confines itself to exercise of power vested in it and in good faith pursues methods prescribed by laws, its sentence is conclusive like that of judicial tribunals, provided its acts violate no laws of land or inalienable right of members.—*Otto vs. Journeymen Tailors' P. & B. U.*, 75 Cal. 303, 314, 7 Am. St. Rep. 156, 17 Pac. Rep. 217.

81. Boards of trade or chambers of commerce, duly organized, has power to make by-laws and expel members, though charter silent upon subject.—*Dickenson vs. Chamber of Commerce*, 29 Wis. 45, 9 Am. Rep. 544.

82. Charter providing that it "shall have the right to admit or expel such persons as they may see fit, in any manner to be prescribed by the rules, regulations, and by-laws thereof" authorizes by-law giving authority to board of directors to censure, suspend, or expel member.—*Pitcher vs. Board of Trade*, 121 Ill. 412, 13 N. E. Rep. 187.

83. Silent upon subject of expulsion or granting power in general terms, member can only be expelled where offense is of in-

famous character, indictable at common law, or is against duty to corporation as member, or where offense is compounded of two.—*State ex rel. Graham vs. Chamber of Commerce*, 29 Wis. 63; *Dickenson vs. Chamber of Commerce*, 29 Wis. 45, 49, 9 Am. Rep. 544.

84. Boards have power by constitution and by-laws to suspend, expel, or disfranchise member for offense alleged against it regarded as judicial in its character with special and limited jurisdiction.—*Gregg vs. Massachusetts Med. Soc.*, 111 Mass. 185, 15 Am. Rep. 24. See *Barrows vs. Massachusetts Med. Soc.*, 66 Mass. (12 Cush.) 402.

85. To expel member, breach of duty toward corporation or for any act in contravention of purpose for which charter obtained exists, though contract not made upon floor of exchange nor offense committed against member.—*Haebler vs. New York Produce Ex.*, 149 N. Y. 414, sub nom. *In re Haebler*, 44 N. E. Rep. 87; *People ex rel. Thacher vs. New York Commercial Assoc.*, 13 Abb. Pr. 271.

86. To suspend or expel member upon breach of by-laws relating to fulfillment of his contract.—*White vs. Brownell*, 3 Abb. Pr. N. S. (N. Y.) 218, 4 Id. 162, 2 Daly 329. See *Heath vs. New York Gold Ex.*, 38 How. Pr. 168, 171.

87. May exercise common-law power of expulsion notwithstanding statutory remedies which is merely cumulative, but only in cases where offense recognized by common law was cause of expulsion.—*People ex rel. Bartlett vs. Medical Soc.*, 32 N. Y. 187, 191, 196; *King vs. Mayor of Liverpool*, 2 Burr. 732.

88. BY-LAW GIVING POWER TO SUSPEND or expel member for misconduct in business affairs, making it ground for expulsion that member found guilty of failure to comply promptly with terms of any contract, verbal or written, by him, is valid.—*Dickenson vs. Chamber of Commerce*, 29 Wis. 45, 9 Am. Rep. 544.

89. Providing that member failing to comply with stock contracts his creditors must report to president of board within forty-eight hours after defalcation becomes known to them, and that no claim not so reported shall be recognized or enforced by board, but that during suspension no such report shall be regarded, construed as intended to meet cases in which member has contracted as broker in purchase or sale and delivery of stock and contracts which are within the knowledge and jurisdiction of the board and its members.—*Rorke vs. San Francisco Stock & Ex. Board*, 99 Cal. 196, 201, 33 Pac. Rep. 881.

90. Providing that member interested or associated in business with, or he shall act as representative of, or shall knowingly execute any order or orders for any organization, firm, or individual engaged in business of dealing in differences on fluctuations in market prices, where bona fide purchase, and property has actual delivery, is guilty of unmercantile conduct, rendering him unworthy for membership, and providing for his expulsion from membership in association upon conviction by board of directors, contravenes no rule of public policy or law, and is reasonable.—*Central Stock & Grain Ex. vs. Board of Trade*, 196 Ill. 396, 63 N. E. Rep. 740.

91. EXPULSION OR SUSPENSION of member of board for improper conduct not interference with vested rights, as constitution and by-laws making provision therefor form part of contract.—*Haebler vs. New York Produce Ex.*, 149 N. Y. 414, sub nom. *In re Haebler*, 44 N. E. Rep. 87.

92. Expulsion or suspension of member cannot be complained of where proceedings are authorized and fairly conducted under the charter and by-laws where same are reasonable and fully authorized.—*Hurst vs. New York Produce Ex.*, 100 N. Y. 605, 3 N. E. Rep. 42.

93. Judgment of expulsion may be upon proceedings had according to by-laws of institution is binding.—*Pitcher vs. Board of Trade*, 121 Ill. 412, 13 N. E. Rep. 187.

94. Pursuant to rules not subject to collateral attack.—*Pitcher vs. Board of Trade*, 121 Ill. 412, 13 N. E. Rep. 187.

95. PROCEEDINGS BY WHICH MEMBER SUSPENDED from seat of membership in board under which his right has been sold to satisfy lien or debts contracted by him as member had in obedience to constitution and by-laws extinguishes all rights pertaining thereto, especially where he has failed for specified period to settle the claim or to seek restitution.—*Rorke vs. San Francisco Stock & Ex. Board*, 99 Cal. 196, 202, 33 Pac. Rep. 881.

96. Threatening member with expulsion in event of action and oppressively suspending him for non-fulfilment of contract tends to deter him from exercise of legal right under such charter, not sanctioned by it, is against public policy.—*People ex rel. Johnson vs. New York Produce Ex.*, 3 Misc. 552, 29 N. Y. Supp. 307.

97. Complaint must show that corporation had taken corporate action in respect of expulsion, otherwise no offense recognized by charter is stated and committee has no jurisdiction of offense.—*People ex rel. Johnson vs. New York Produce Ex.*, 3 Misc. 552, 29 N. Y. Supp. 307.

98. Complaint charging non-fulfilment of contract as "a proceeding inconsistent with just and equitable principles of trade" is not sufficient under charter of corporation organized "to inculcate just and equitable principles of trade" where by-laws have not set forth such offenses.—*People ex rel. Johnson vs. New York Produce Ex.*, 3 Misc. 552, 29 N. Y. Supp. 307.

99. RIGHT TO SUSPEND member for reason that contracts entered into were illegal and void as gaming contracts, cannot be exercised until it is made to appear affirmatively that such contracts were entered into as gaming contracts and not as real transactions for the purchase and sale of property.—*Lewis vs. Wilson*, 50 Hun 166, 2 N. Y. Supp. 806, 121 N. Y. 284, 24 N. E. Rep. 474.

100. Courts will not decide whether ground of expulsion is well taken.—*Otto vs. Journeymen Tailors' P. & B. U.*, 75 Cal. 308, 314, 7 Am. St. Rep. 156, 17 Pac. Rep. 317.

101. Court will not entertain jurisdiction to pass upon validity of expulsion of member or to declare same null and void, as they do not set for purpose of making declarations on abstract questions or right.—*Kuehnemundt vs. Smith*, 17 N. Y. St. Rep. 757, 2 N. Y. Supp. 625.

102. ACTION FOR DAMAGES for unreasonable expulsion on ground of malice not maintainable without allegation and proof of want of probable cause.—*Albers vs. Merchants Ex. of St. Louis*, 138 Mo. 140, 39 S. W. Rep. 473.

103. Without proof of want of facts or circumstances sufficient in themselves to induce board, as reasonable and cautious men, to believe that member knowingly violated valid and reasonable rule or by-law and that directors having power to impose fine enforced by suspension and in so doing were actuated by hostile or vindictive motives or that their acts were intentionally with knowledge that they were without legal justification or foundation.—*Albers vs. Merchants Ex. of St. Louis*, 138 Mo. 140, 39 S. W. Rep. 473.

104. INJUNCTION WILL NOT LIE against decisions of board in expelling member for unprofessional conduct where he has been summoned to appear to answer the charges.—*Gregg vs. Massachusetts Med. Soc.*, 111 Mass. 185, 15 Am. Rep. 24.

105. To restrain action of board of trade in proceeding to expulsion of member.—*Pitcher vs. Board of Trade*, 121 Ill. 412, 13 N. E. Rep. 187.

106. To restrain suspension of member unless such suspension is in violation of constitution, rules, or by-laws.—*Hutchinson vs. Lawrence*, 67 How. Pr. (N. Y.) 38, 39; *White vs. Brownell*, 3 Abb. N. S. (N. Y.) 318, 4 Id. 162, 2 Daly (N. Y.) 329.

107. REINSTATEMENT.—Right of suspended member to reinstatement founded upon contract as contained in articles and by-laws.—*Greer Mills Co. vs. Stoller*, 77 Fed. Rep. 1, 2.

108. Mandamus lies to compel admission of member to medical society.—*People ex rel. Bartlett vs. Medical Soc.*, 32 N. Y. 187, 191, 196. See *Baggs Case*, 11 Coke 99.

109. Mandamus will not lie to compel restoration of member where he has been suspended and his rights have been sold to satisfy lien for debts pursuant to by-laws and constitution and he has failed to settle up and seek restitution for considerable period.—*Rorke vs. San Francisco Stock & Ex. Board*, 99 Cal. 196, 202, 33 Pac. Rep. 881.

IX. SAME—2. NOTICE AND OPPORTUNITY TO BE HEARD.

110. MEMBER CANNOT BE EXPELLED without due notice and trial.—*State ex rel. Cuppel vs. Chamber of Commerce*, 47 Wis. 670, 3 N. W. Rep. 760.

111. Entitled to full information of nature of charge brought against him.—*Hutchinson vs. Lawrence*, 67 How. Pr. (N. Y.) 38, 39. See *Thorburn vs. Barnes*, 2 L. R. C. P. 401; *Capel vs. Child*, 2 Cr. & J. 558, 2 Tyr. 689; 1 L. J. N. S. Ex. 205, 37 Rev. Rep. 761; *King vs. Benn & Church*, 6 Term Rep. 198; *Wood vs. Wood*, L. R. 9 Ex. 194; *Plews vs. Middleton*, 6 Ad.

& M. (N. S.) 845, 51 Eng. C. L. 845; *Oswald vs. Grey*, 24 L. J. Q. B. 69; *Walker vs. Frohisher*, 6 Ves. 70, 5 Rev. Rep. 223; *Drew vs. Drew*, 2 Macqueen H. L. C. 1; *Fisher vs. Keane*, 11 Ch. Div. 583.

112. To notice of intention to expel.—*Southern Plank Road Co. vs. Hixon*, 5 Ind. 165. See *People vs. St. Franciscus Ben. Soc.*, 24 How. Pr. (N. Y.) 216; *Delacy vs. Neuse River Nav. Co.*, 1 Hawks (N. C.) 274, 9 Am. Dec. 636.

113. Notice of inquiry to be made on preliminary investigation by committee for purposes of determining whether charges shall be preferred against member not requisite.—*Green vs. Board of Trade*, 174 Ill. 585, 51 N. E. Rep. 599, 49 L. R. A. 365.

114. MANDAMUS LIES TO RESTORE member expelled without notice or opportunity to be heard.—*Delacy vs. Neuse River Nav. Co.*, 1 Hawks (N. C.) 274, 9 Am. Dec. 636. See *Commonwealth ex rel. Fisher vs. German Soc.*, 15 Pa. St. 251.

115. EVIDENCE.—Fact that reference is made to rules and regulations of exchange in telegraphic cipher code does not charge member with notice so as to make some evidence against him.—*Riordan vs. Doty*, 50 S. C. 537, 27 S. E. Rep. 939.

116. BY-LAWS AND RULES of exchange not admissible in evidence unless it is shown that party either knew of or assented to them.—*Riordan vs. Doty*, 50 S. C. 537, 27 S. E. Rep. 939.

X. POWER OVER BOARD.

117. INJUNCTION GRANTED AT SUIT OF STOCKHOLDER to restrain unauthorized action of exchange where same is prejudicial to his rights as a stockholder.—*Kolff vs. St. Paul Fuel Ex.*, 48 Minn. 215, 50 N. W. Rep. 1066.

118. Injunction will not lie at instance of one board of trade against another to restrain the unlawful exercise of power where former has suffered no particular and substantial injury from unlawful exercise of such power or non-observance of law.—*Jones vs. Board of Trade*, 52 Kan. 95, 34 Pac. Rep. 453.

119. State and public officers have authority, where board of trade and its officers are assuming and exercising authority not conferred upon them by the statutes regulating public warehouses and inspection of grain, to prevent the unlawful exercise of power and compel obedience to the law.—*Jones vs. Board of Trade*, 52 Kan. 95, 34 Pac. Rep. 453.

XI. COURTS—JURISDICTION OF.

120. PARTY MUST AVAIL HIMSELF OF RIGHTS given by constitution and by-laws for protection of his rights before he can appeal to the courts to restrain action of committee or the association.—*Loudhe vs. Larvy*, 40 Hun (N. Y.) 546; *Lafond vs. Deems*, 31 N. Y. 507; *Lewis vs. Wilson*, 2 N. Y. Supp. 806, 50 Hun 166, 121 N. Y. 284, 24 N. E. Rep. 474.

121. Member exhausting his right to appeal may resort to equity for relief where proceedings are clearly erroneous and unjust.—*Hutchinson vs. Lawrence*, 67 How. Pr. (N. Y.) 38, 52.

122. Courts have power where property rights are involved to so far supervise action of board of trade as to determine whether they have proceeded according to rules and regulations provided for their action, and if they have failed in a substantial manner to correct abuses which may result from their unwarranted procedure.—*Ryan vs. Cudahy*, 157 Ill. 108, 48 Am. St. Rep. 305, 41 N. E. Rep. 760, 49 L. R. A. 353. See *Commonwealth vs. Pennsylvania etc. Inst.*, 2 Serg. & R. (Pa.) 141; *Commonwealth ex rel. Bryan vs. Pike etc. Soc.*, 8 Watts & S. (Pa.) 247, 250; *Commonwealth ex rel. Fisher vs. German Soc.*, 15 Pa. St. 251, 254; *Society Visitation Sick vs. Commonwealth ex rel. Meyer*, 52 Pa. St. 125, 133, 91 Am. Dec. 139; *Wood vs. Wood*, L. R. 9 Ex. 196.

123. Will inquire into validity of by-law to buy of chamber of commerce by violation of which member is threatened with expulsion or suspension.—*Dickenson vs. Chamber of Commerce*, 29 Wis. 45, 9 Am. Rep. 544; *State ex rel. Cuppel vs. Chamber of Commerce*, 47 Wis. 670, 3 N. W. Rep. 760. See *State ex rel. Graham vs. Chamber of Commerce*, 20 Wis. 63.

124. INTERFERE AND ASSUME JURISDICTION over action by board of trade in settling controversies between its members pursuant to its regulations and by-laws where such board or committee has refused to hear evidence which was within the spirit and letter of the rules and pertinent to the question before the board.—*Ryan vs. Cudahy*, 157 Ill. 108, 48 Am. St. Rep. 305, 41 N. E. Rep. 760, 49 L. R. A. 353. See Ill. *People ex rel. Page vs. Board of Trade*, 45 Ill. 112; *Fisher vs. Board of Trade*, 80 Ill. 85; *People ex rel. Rice vs. Board of Trade*, 80 Ill. 134; *Baxter vs. Board of Trade*, 83 Ill. 146; *Sturges vs. Board of Trade*, 86 Ill. 441; *Pitcher vs. Board of Trade*, 121 Ill. 412, 13 N. E. Rep. 187. N. J. *Morris Canal & B. Co. vs. Jersey City*, 12 N. J. Eq. (1 Beas.) 252. N. Y. *Mooers vs. Smedley*, 4 John. Ch. 28; *Heywood vs. Buffalo*, 14 N. Y. 534; *Van Doren vs. Mayor of New York*, 9 Paige 388; *West vs. Mayor of New York*, 10 Paige 539; *Mayor of Brooklyn vs. Meserole*, 26 Wend. 132.

125. No further than to hold the association for a fair and honest administration of the rules.—*Hutchinson vs. Lawrence*, 67 How. Pr. (N. Y.) 38, 39; *White vs. Brownell*, 3 Abb. Pr. N. S. (N. Y.) 318, 4 Abb. Pr. N. S. (N. Y.) 162, 2 Daly (N. Y.) 329.

126. WILL NOT INTERFERE to control enforcement of by-laws of such association, but they will be left to enforce their rules and

regulations by such means as they may adopt for their government.—*Fisher vs. Board of Trade*, 80 Ill. 85; *People ex rel. Rice vs. Board of Trade*, 80 Ill. 134; *Baxter vs. Board of Trade*, 83 Ill. 146; *Sturges vs. Board of Trade*, 86 Ill. 441; *Pitcher vs. Board of Trade*, 121 Ill. 412, 13 N. E. Rep. 187; *Ryan vs. Cudahy*, 157 Ill. 108, 48 Am. St. Rep. 305, 41 N. E. Rep. 760, 49 L. R. A. 353; *Board of Trade vs. Nelson*, 162 Ill. 431, 53 Am. St. Rep. 312, 44 N. E. Rep. 743; *Green vs. Board of Trade*, 174 Ill. 585, 51 N. E. Rep. 599, 49 L. R. A. 365.

127. To restore to membership member expelled for non-compliance with conditions upon which membership depends.—*Hutchinson vs. Lawrence*, 67 How. Pr. (N. Y.) 38, 39; *White vs. Brownell*, 3 Abb. Pr. N. S. (N. Y.) 316, 4 Id. 162, 2 Daly (N. Y.) 329.

128. With discretionary powers of board of trade.—*Fisher vs. Board of Trade*, 80 Ill. 85; *Baxter vs. Board of Trade*, 83 Ill. 146; *Sturges vs. Board of Trade*, 86 Ill. 441; *Pitcher vs. Board of Trade*, 121 Ill. 412, 13 N. E. Rep. 187.

129. With resolution or vote expelling member where he has remedy under constitution and laws for review of proceedings, and to compel his restoration.—*Hutchinson vs. Lawrence*, 67 How. Pr. (N. Y.) 38, 39; *Olery vs. Brown*, 51 How. Pr. (N. Y.) 92.

130. Will not presume in advance that board will not give member fair trial.—*Green vs. Board of Trade*, 174 Ill. 585, 51 N. E. Rep. 599, 49 L. R. A. 365.

131. Will not take judicial notice of rules or usages of trade and commerce adopted by boards unless they are such as would be recognized after their adoption by any particular board or association, and the party who rules thereon must plead them.—*Goldsmith vs. Sawyer*, 46 Cal. 209, 213.

132. EXISTENCE OF CONTRACTS made through members of the board of trade, as brokers, contemplating actual delivery, enforceable against other parties in name of customers, affords no ground for interference of courts to prevent trial as to conduct of member under rules of the board.—*Green vs. Board of Trade*, 174 Ill. 585, 51 N. E. Rep. 599, 49 L. R. A. 365.

133. FACT THAT CHARGES ARE PRE-ferred by member of board of directors which is to try the accusation against member does not call for interference by court of equity to prevent trial.—*Green vs. Board of Trade*, 174 Ill. 585, 51 N. E. Rep. 599, 49 L. R. A. 365.

§ 592. CAPITAL STOCK AND CERTIFICATES OF. Every corporation formed under this title may have a capital stock and issue certificates to represent the shares thereof, if the articles of incorporation contain a statement of the amount of its capital stock and the number of shares into which it is divided.

[Rights and privileges of stockholders.] The rights and privileges to be accorded to stockholders are distinct from those to be accorded to members at large of the corporation, and the obligations to be imposed upon stockholders in the same relation must be fixed and established in the by-laws of the corporation.

History: Enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXXIII, p. 588,

§ 592a. POWER WHICH MAY BE CONFERRED ON THE TRUSTEES, DIRECTORS, OR THE EXECUTIVE COMMITTEE. The corporation may confer upon a board of trustees or directors, or upon a body to be styled the executive committee of the corporation, the right to exercise all or any of the corporate powers, if the articles of incorporation state that the right to exercise the corporate powers is to be confided to such board of trustees or directors or to such executive committee, and the number of trustees, directors, or committee, and the names of those selected to take charge of the affairs of the corporation for the first six months.

History: Enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXXIII, pp. 588-589.

See ante § 591 note para. 67-71.

§ 592b. POWER TO ACQUIRE, SELL, AND USE PROPERTY. Every corporation formed under this title may lease, purchase, have, hold, use, take possession of, and enjoy in fee simple or otherwise any personal or real property within the state necessary for the uses and purposes of the corporation, and may sell, lease, deed in trust, alien, or dispose of the same at its pleasure.

History: Enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXXIII, p. 589.

§ 592c. THE BY-LAWS. [MEETINGS, HOW CALLED AND CONDUCTED.] The by-laws of any corporation formed under this title without capital stock must prescribe how members of the corporation shall be admitted and how expelled, and how officers, agents, and servants shall be appointed. Such provisions in the by-laws have force and effect as between private parties and the corporation.

[Manner of calling and conducting meetings.] All corporations formed under the provisions of this title must determine, by their by-laws, the manner of calling and conducting their meetings, the number of members that constitute a quorum, the manner of levying and collecting assessments, the officers of the corporation, the manner of their election or appointment and their tenure of office, and may prescribe suitable penalties for the violation of such by-laws, not exceeding in any case one hundred dollars for any one offense.

History: Enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXXIII, p. 589.

See ante § 591 note para. 80-109.

§ 592d. POWER TO LEVY AND COLLECT ASSESSMENTS. Every corporation formed under the provisions of this title has power to levy and collect, from the members thereof, for the purpose of paying the proper and legal expenses of the corporation, assessments in such manner as may be prescribed by its by-laws, but not otherwise.

History: Enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXXIII, p. 589.

§ 592e. PRE-EXISTING CORPORATIONS MAY BECOME ENTITLED TO THE BENEFIT OF THIS TITLE. Every corporation, association, or institution formed prior to the enactment of this title, for any of the purposes contemplated thereby, may, by a vote of the majority of its members voting at a meeting called for that purpose, become entitled to the benefit thereof on filing the certificate hereinafter required.

Notice of such meeting and of its object must be published in a newspaper of general circulation in the county in which the principal place of business of the corporation, association, or institution is located, for at least two weeks before the day on which the meeting is to be held.

[Certificate, execution and contents.] Such certificate must be signed and acknowledged by at least five members of the corporation, association, or institution, must contain a list of the members who desire to become members, and must be filed with the county clerk of such county, and a copy thereof, certified by him, must be filed with the secretary of state. Thereupon such corporation, association, or institution possesses all the powers and privileges conferred by this title.

History: Enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXXIII, p. 589.

TITLE XII.

RELIGIOUS, SOCIAL, AND BENEVOLENT CORPORATIONS.

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| § 593. Number of directors. | § 599. What by-laws, etc., may provide for. |
| § 594. Additional facts articles of incorporation to set out. | § 600. Members admitted after incorporation. |
| § 595. Amount of real estate to be owned by such corporations. | § 601. No member to transfer membership, etc. |
| § 596. How much land friendly, etc., societies may hold. | § 602. Religious society may become a corporation sole. |
| § 597. Directors to make verified report annually. | § 603. Religious society may elect directors and incorporate. Procedure. |
| § 598. Sale, mortgage, and bond of real property. | § 604. Same. |
| | § 605. Consolidation of debts; public notice. |

§ 593. **NUMBER OF DIRECTORS.** Any number of persons associated together for any purpose, where pecuniary profit is not their object, and for which individuals may lawfully associate themselves, may, in accordance with the rules, regulations, or discipline of such association, elect directors, the number thereof to be not less than three nor more than twenty-one, and may incorporate themselves as provided in this part.

History: Enacted March 21, 1872, founded upon Stats. 1869-70, p. 46, and p. 420, § 1; amended April 3, 1880, Code Amdts. 1880 (C. C. pt.), p. 6; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 381. held unconstitutional, see history, § 4 ante; amendment re-enacted March 18, 1905, Stats. and Amdts. 1905, c. CXVI, p. 113.

1. Applied, cited, construed, referred to, etc.
2. Articles of incorporation must be subscribed and acknowledged.
3. Expulsion and suspension of members.
4. Insurance laws—Exemption of insurance societies from.
5. Jurisdiction of courts over.

1. Applied, cited, construed, referred to, etc., in: *Sanches vs. Grace M. E. Church*, 114 Cal. 295, 300 (referred to with other sections), 46 Pac. Rep. 2; *Wheelock vs. First Presbyterian Church*, 119 Cal. 477, 483, 51 Pac. Rep. 341 (cited); *Perkins vs. Fish*, 121 Cal. 317, 321, 53 Pac. Rep. 901 (referred to); *People ex rel.*

Weatherly vs. Golden Gate Lodge of Elks, 128 Cal. 257, 260, 262, 60 Pac. Rep. 865 (construed).

2. Articles of incorporation must be subscribed and acknowledged in accordance with § 292, notwithstanding provisions of this section.—*People ex rel. Weatherly vs. Golden Gate Lodge of Elks*, 128 Cal. 257, 262, 60 Pac. Rep. 865.

See ante § 292 and note.

3. Expulsion and suspension of members.—See post § 599 and note.

4. Insurance laws—Exemption of fraternal societies from.—See ante § 451 and note.

5. Jurisdiction of courts over.—See post § 599 and note.

§ 594. **ADDITIONAL FACTS ARTICLES OF INCORPORATION TO SET OUT.** In addition to the requirements of section two hundred and ninety, the articles of incorporation of any association mentioned in the preceding section must set forth [1] the holding of the election for directors, [2] the time and place

where the same was held, [3] that a majority of the members of such association were present and [4] voted at such election, and [5] the result thereof; which facts [6] must be verified by the officers conducting the election.

History: Enacted March 21, 1872, founded upon § 176, Act April 22, 1850, Stats. 1850, p. 374, as amended Act April 8, 1862, Stats. 1862, p. 125.

1. Applied, cited, construed, referred to, etc.
2. Articles must be subscribed and acknowledged.
3. Nature and effect of articles.
4. Statute mandatory—Abortive efforts to incorporate.

1. Applied, cited, construed, referred to, etc., in: *People vs. Selfridge*, 52 Cal. 331, 333 (construed and applied); *People ex rel. Weatherly vs. Golden Gate Lodge of Elks*, 128 Cal. 257, 260, 261, 262, 60 Pac. Rep. 865 (construed and applied).

2. Acknowledging and subscribing.—Requirements of § 292, as to subscribing and acknowledging articles of incorporation, are not dispensed with by this and preceding section of civil code.—*People ex rel. Weatherly vs. Golden Gate Lodge of Elks*, 128 Cal. 257, 260, 261, 262, 60 Pac. Rep. 865.

See ante § 292 and note.

3. Nature and effect of articles.—Articles of association of benevolent organizations are in nature of terms of contract which members thereof have entered into, and for violation of any of these terms, articles themselves ordinarily provide a penalty and a mode of its enforcement, as well as tribunal to determine whether penalty has been incurred.—*Grand Grove U. A. O. D. vs. Garibaldi*, 105 Cal. 219, 224, 38 Pac. Rep. 947 (in running head-line of report erroneously *Grand Grove U. A. O. D. vs. Duchein*).

4. Statute mandatory.—Articles of association failing to comply with requirements of this section are insufficient to constitute association a corporation.—*People vs. Selfridge*, 52 Cal. 331, 333

§ 595. AMOUNT OF REAL ESTATE TO BE OWNED BY SUCH CORPORATIONS. All such corporations may hold all the property of the association owned prior to incorporation, or acquired thereafter in any manner, and transact all business relative thereto; but no such corporation must own or hold more real estate than may be necessary for the business and objects of the association, and providing burial-grounds for its deceased members, not to exceed six (6) whole lots in any city or town, nor more than fifty (50) acres in the country, the annual increase, income or profit, whereof must not exceed fifty thousand (\$50,000) dollars; provided, that any such corporation now or hereafter having, and having had continuously, for the next preceding three (3) years, the care, custody, control, and maintenance each year, upon an annual average of not less than one hundred (100) orphans, half orphans, and indigent minor children, at any one orphan asylum, shall be entitled and allowed to own and possess any number of acres not exceeding one hundred and sixty (160) acres of land in the country, outside of any incorporated city or town, and the annual income or profit of which does not exceed fifty thousand (\$50,000) dollars; and provided further, that the limitations herein provided for shall not apply to corporations formed, or to be formed, under section six hundred and two (602) of the Civil Code, when the land is held or used for churches, hospitals, schools, colleges, orphan asylums, parsonages, or cemetery purposes or to corporations organized for social purposes and purposes of recreation and not for profit; and provided further, that the limitations herein provided for shall not apply to corporations organized other than for profit, when the land is timber land, and not exceeding one hundred and sixty (160) acres in extent, and is held or used for the purposes of the organizations, in which case said land shall be subject to all laws regulating the preservation of forests.

History: Enacted March 21, 1872, founded upon § 182, Act April 22, 1850, Stats. 1850, p. 374; amended Act May 3, 1852, Stats. 1852, p. 168; Act May 3, 1853, Stats. 1853, pp. 140-141; Act March 6, 1863, Stats. 1863, p. 34; amended April 6, 1881, Stats. and Amdts. 1881, p. 9; April 19, 1899, Stats. and Amdts. 1899, p. 10; by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 382, held unconstitutional, see history, § 4 ante; amendment re-enacted substantially in form passed in 1901, March 13, 1903, Stats. and Amdts. 1903, p. 136; amended February 21, 1905, Stats. and Amdts. 1905, c. XXIII, p. 18.

1. Applied, cited, construed, referred to, etc.
2. Land acquired before incorporation.

1. Applied, cited, construed, referred to, etc., in: *Sanchez vs. Grace M. E. Church*, 114 Cal. 295, 300, 301, 46 Pac. Rep. 2 (referred to with other sections).

2. Land acquired before incorporation.—

Where land is conveyed to trustee of unincorporated church, and thereafter the society is incorporated to take charge of such property, the corporation becomes holder of such land without any conveyance by trustees, and may be sued in ejectment by one having paramount title.—*Sanchez vs. Grace M. E. Church*, 114 Cal. 295, 300, 301, 46 Pac. Rep. 2.

§ 596. HOW MUCH LAND FRIENDLY, ETC., SOCIETIES MAY HOLD. In addition to that provided for in the preceding section, friendly societies and pioneer associations may hold such real estate as may be necessary to carry out their charitable purposes, or for the establishment and endowment of institutions of learning connected therewith. In case any such corporation is the owner, by donation or purchase, of more lands than herein or in preceding section provided for, such surplus must be sold and conveyed by the corporation within five years after its acquisition. Such sale may be made without the order or decree of the superior court as hereinafter provided.

History: Enacted March 21, 1872; amended Act Jan. 25, 1878, Code Amdt. 1877-8, p. 84; Act April 6, 1880, Code Amdt. 1880 (C. C. pt.), p. 6.

§ 597. DIRECTORS TO MAKE VERIFIED REPORT ANNUALLY. The directors must annually make a full report of all property, real and personal, held in trust for their corporation by them, and of the condition thereof, to the members of the association for which they are acting.

History: Enacted March 21, 1872, founded upon § 183, Act April 22, 1850, Stats. 1850, p. 374; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 382, held unconstitutional, see history, § 4 ante.

§ 598. SALE, MORTGAGE, AND BOND OF REAL PROPERTY. Corporations of the character mentioned in section five hundred and ninety-three may mortgage or sell the real property held by them, and may secure the payment of indebtedness by deed of trust or mortgage upon their real property, upon obtaining an order for that purpose from the superior court held in the county in which the property is situated. The corporations above mentioned may also issue bonds, payable at any time within twenty years, as evidence of the indebtedness secured by mortgage or deed of trust.

[Notice by publication.] Before making the order, proof must be made to the satisfaction of the court that notice of the application for leave to sell or mortgage or execute a deed of trust has been given, by publication in such manner and for such time as the court or the judge has directed, and that it is to the interest of the corporation that leave should be granted as prayed for. The application must be made by petition, and any member of the corporation may oppose the granting of the order, by affidavit or otherwise.

[Not to apply to burial plots.] But nothing herein contained shall prohibit or prevent the trustees or directors of such corporation, under such rules and regulations as they may adopt, from disposing of burial plots situated in grounds of such corporation dedicated for burial purposes, without making such application to or obtaining an order from court.

History: Enacted March 21, 1872, founded upon § 179, Act April 22, 1850, Stats. 1850, p. 374, as amended March 7, 1859, Stats. 1859, p. 87; amended March 30, 1874, Code Amdts. 1873-4, p. 216; April 6, 1880, Code Amdts. 1880 (C. C. pt.), p. 6; March 16, 1889, Stats. and Amdts. 1889, p. 230; March 20, 1891, Stats. and Amdts. 1891, p. 179. In force March 20, 1891.

Property of church corporation is held in trust, when it has been dedicated by donors to use of church, and members of church, even though they constitute majority, have no right or power to divert property to use of another

and different church organization.—*Baker vs. Ducker*, 79 Cal. 365, 374, 21 Pac. Rep. 764. See *Wheelock vs. First Presbyterian Church*, 119 Cal. 477, 482, 483, 51 Pac. Rep. 841.

§ 599. WHAT BY-LAWS, ETC., MAY PROVIDE FOR. Corporations now organized or that may hereafter be organized for purposes other than profit, may, either in their by-laws, ordinances, constitutions, or articles of incorporation, provide for:

1. The qualification of members, mode of election or appointment, and terms of admission to membership;
2. The fees of admission and dues to be paid to their treasury by members;
3. The number of persons that shall constitute a quorum at any meeting of the corporation, and that an election of officers of the corporation by a meeting so constituted, or the appointment or selection of such officers, or any of them, in any manner required by the rules, regulations, or discipline of any specified religious denomination, society, or church, shall be as valid as if made at an election at which a majority of the members of the corporation were present and voted;
4. The expulsion and suspension of members for misconduct or non-payment of dues, also for restoration to membership;
5. A special method of organizing the board of directors, and a special method of increasing or diminishing the number of directors within the limits as to number prescribed by section five hundred and ninety-three of this code;
6. Contracting, securing, paying, and limiting the amount of their indebtedness;
7. That the rules, regulations, or discipline, for the time being, of any specified religious denomination, society, or church, shall always be a part of their by-laws, ordinances, constitutions, or articles of incorporation;
8. Other regulations not repugnant to the constitution or laws of the state and consonant with the objects of the corporation.

History: Enacted March 21, 1872, founded upon §§ 8, 9, Act April 27, 1863, Stats. 1863, p. 627; amended March 14, 1885, Stats. and Amdts. 1885, p. 136; March 31, 1897, Stats. and Amdts. 1897, pp. 246, 247.

I. In General.

1. Applied, cited, construed, referred to.
2. Courts—Do not interfere with internal affairs.
3. Same—No ecclesiastical jurisdiction.
4. Dissolution—Application of law of partnership.
5. Same—Expulsion of member wrongfully.
6. Estoppel to attack validity of organization.
7. Schism in religious society—Majority rule.

II. Constitution and By-Laws.

8. Amendment of by-laws.
9. Same—Concerning sick benefits.
10. Same—Violation of contract.
11. Binding effect—Quasi contract.
12. Methods of redressing grievances may be provided.
13. Rules of conduct—Penalties, etc.

III. Expulsion and Suspension of Members.

14. Basis of right of expulsion.

15. Same—Inherent right.
16. Conclusiveness of sentence.
17. Conspiracy—Expulsion is not.
18. Courts—Have no authority to interfere.
19. Same—Jurisdiction to excommunicate inquired into.
20. Damages not receivable.
21. Good faith required.
22. Grounds—Association's nature considered.
23. Same—Betrayal of secrets.
24. Fraud and conversion.
25. Same—Gross immorality.
26. Same—Labor union—Violating order to strike.
- 27, 28. Same—Opprobrious language—Slander.
29. Impartial tribunal necessary.
30. Injunction will not lie.
31. Judicial nature of proceedings.
32. Mandamus—Does not lie ordinarily.
33. Same—Merits of expulsion not inquired into.
34. Same—Other remedies afforded by rules.
- 35, 36. Same—Property rights protected.

- 37. Same—Unlawful expulsion.
- 38. Notice and hearing necessary.
- 39. Same—Other members must have notice.
- 40. Same—Sufficiency of grounds immaterial.
- 41. Procedure prescribed by constitution.
- 42. Revocation of charter of subordinate body—Notice and hearing.
- 43. Suspension of member—Misconduct.
- 44. Same—Damages not recoverable.

I. IN GENERAL

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Peyre vs. Mutual Relief Soc. of T. F. Z.*, 90 Cal. 240, 243, 244, 27 Pac. Rep. 191 (applied); *Sheehan vs. Journeymen B. P. & B. A.*, 142 Cal. 489, 495, 76 Pac. Rep. 238 (referred to).

A. **COURTS**—Do not interfere with internal affairs of religious, social, and benevolent societies, where such matters are governed by their by-laws, and government is fairly and honestly administered.—*Peyre vs. Mutual Relief Soc.*, 90 Cal. 240, 244, 27 Pac. Rep. 191; *Lawson vs. Hewell*, 118 Cal. 613, 620, 50 Pac. Rep. 763, 49 L. R. A. 400. See *Von Arx vs. San Francisco Gruetli Verein*, 113 Cal. 377, 379, 380, 45 Pac. Rep. 685; *Josich vs. Austrian Ben. Soc.*, 119 Cal. 74, 76, 77, 51 Pac. Rep. 18; *Gregg vs. Massachusetts Med. Soc.*, 111 Mass. 185, 193, 194, 15 Am. Rep. 24; *Fitzgerald vs. Robinson*, 112 Mass. 371, 379; *Lafond vs. Deems*, 81 N. Y. 507, 514; *Levy vs. United States Grand Lodge I. O. S. B.*, 30 N. Y. Supp. 835, 836.

B. **Ecclesiastical jurisdiction**—Courts have none, and will not substitute their own judgment for that of ecclesiastical courts established by religious societies.—*Ill. Chase vs. Cheney*, 58 Ill. 509, 11 Am. Rep. 95. *Mass. Fitzgerald vs. Robinson*, 112 Mass. 371, 379. *Fed. Watson vs. Jones*, 80 U. S. (13 Wall.) 679, bk. 20 L. ed. 666; *Bouldin vs. Alexander*, 82 U. S. (15 Wall.) 131, bk. 21 L. ed. 69.

C. **DISSOLUTION**—Application of rules governing partnership is proper in dissolution of benevolent associations.—*Gorman vs. Russell*, 14 Cal. 532, 536, 539.

D. **Expulsion of member wrongfully from participation in rights and privileges of association is ground for dissolution**, but where association retraces steps and removes unauthorized restrictions upon member, court may refuse to dissolve because of passed offenses against him.—*Gorman vs. Russell*, 14 Cal. 532, 535, 18 Id. 688.

E. **ESTOPPEL TO ATTACK VALIDITY OF ORGANIZATION**.—Where association is not legally organized, but all of its acts were done in good faith, and there was no fraud, one who with full knowledge continues to be member is estopped to take advantage of defects of organization.—*Perkins vs. Fish*, 121 Cal. 317, 324, 325, 53 Pac. Rep. 901.

F. **SCHISM IN RELIGIOUS SOCIETY**—Majority rule.—“Where there is a schism which leads to separation into distinct and conflicting bodies, the rights of such bodies to use of property must be determined by ordinary principles which govern voluntary associations. If principle of government in such cases is that majority rules, then numerical majority of members must control right to

use of the property. If there be within congregation officers in whom are vested powers of such control, then those who adhere to acknowledged organism by which body is governed are entitled to use of the property. The minority, in choosing to separate themselves into a distinct body, and refusing to recognize authority of governing body, can claim no rights in the property from fact that they had once been members of the church or congregation.”—*Watson vs. Jones*, 80 U. S. (13 Wall.) 679, bk. 20 L. ed. 666 (wherein numerous authorities are collated).

II. CONSTITUTION AND BY-LAWS.

G. **AMENDMENT**.—By-laws cannot be amended by a simple motion or resolution.—*Red Jacket Tribe I. O. R. M. vs. Gibson*, 70 Cal. 128, 131, 13 Pac. Rep. 127.

H. **Concerning sick benefits**.—Where by-laws provide that they may be amended, amendment may be made changing period during which sick benefits are allowed. Such amendment operates on persons whose sickness has commenced before its adoption as to their future rights, but cannot affect payments which have become due before its adoption.—*Stohr vs. San Francisco M. F. Soc.*, 82 Cal. 557, 560, 561, 22 Pac. Rep. 1125.

I. **Violation of contract**.—By-laws are contracts, and, unless they provide for amendment, cannot be changed without consent of all parties.—*Stohr vs. San Francisco M. F. Soc.*, 82 Cal. 557, 560, 22 Pac. Rep. 1125.

J. **CONSTITUTION AND BY-LAWS BINDING** upon members, and are in nature of voluntary contract into which they have entered.—*Robinson vs. Irish-American Ben. Soc.*, 67 Cal. 135, 137; *Red Jacket Tribe I. O. R. M. vs. Gibson*, 70 Cal. 128, 131, 12 Pac. Rep. 127; *Order of M. Co. vs. Griest*, 76 Cal. 494, 495, 18 Pac. Rep. 652; *Bowie vs. Grand Lodge L. O. W.*, 99 Cal. 392, 396, 34 Pac. Rep. 103; *Grand Grove U. A. O. D. vs. Garibaldi*, 105 Cal. 219, 224, 38 Pac. Rep. 947 (in running head-line of report erroneously *Grand Grove U. A. O. D. vs. Ducheln*); *Carlson vs. American Legion of H.*, 115 Cal. 466, 475, 47 Pac. Rep. 375, 35 L. R. A. 643; *Lawson vs. Hewell*, 118 Cal. 613, 620, 50 Pac. Rep. 763, 49 L. R. A. 400; *Josich vs. Austrian Ben. Soc.*, 119 Cal. 74, 77, 51 Pac. Rep. 18. See *Ill. Chase vs. Cheney*, 58 Ill. 509, 11 Am. Rep. 95. *Md. Anacosta Tribe I. O. R. M. vs. Murbach*, 18 Md. 91, 71 Am. Dec. 625. *Pa. Black & W. S. Soc. vs. Vandyke*, 2 Whart. 309, 30 Am. Dec. 263.

K. **By-laws of ordinary corporations**.—See ante § 303 and note.

L. **METHODS OF REDRESSING GRIEVANCES AND DECIDING CONTROVERSIES** may be provided by by-laws, and they may compel members to resort to methods prescribed before invoking power of courts.—*Bauer vs. Samson Lodge K. of P.*, 102 Ind. 262, 1 N. E. Rep. 571.

M. **RULES OF CONDUCT FOR MEMBERS** during their membership may be prescribed with penalties for their violation, and the tribunal and mode in which offenses shall be determined and penalty enforced.—*Lawson vs. Hewell*, 118 Cal. 613, 618, 50 Pac. Rep. 763, 49 L. R. A. 400.

III. EXPULSION AND SUSPENSION OF MEMBERS.

14. BASIS OF RIGHT OF EXPULSION.—

Right of expulsion from associations of this character may be based and upheld upon two grounds: 1. A violation of such of the established rules of the association subscribed or assented to by members, and which provide expulsion for such violation; 2. For such conduct as clearly violates the fundamental objects of the association, and if persisted in and allowed would thwart those objects or bring association into disrepute.—*Otto vs. Journeymen Tailors' P. & B. U.*, 75 Cal. 308, 314, 7 Am. St. Rep. 156, 17 Pac. Rep. 217.

15. **Inherent right.**—Where member has forfeited his right to membership by reason of his conduct, society has right to expel him.—*Lawson vs. Hewell*, 118 Cal. 613, 620-622, 50 Pac. Rep. 763, 49 L. R. A. 400; *Josich vs. Austrian Benev. Soc.*, 119 Cal. 74, 76, 77, 51 Pac. Rep. 18; *Otto vs. Journeymen T. P. & B. U.*, 75 Cal. 308, 314, 7 Am. St. Rep. 156, 17 Pac. Rep. 217. See *Gregg vs. Massachusetts Med. Soc.*, 111 Mass. 185, 193, 15 Am. Rep. 24; *Black & W. S. Soc. vs. Vandyke*, 2 Whart. (Pa.) 309, 30 Am. Dec. 263.

16. **CONCLUSIVENESS OF SENTENCE.**—So far as association confines itself to exercise of power vested in it, and in good faith pursues methods prescribed by its laws, such laws not being in violation of laws of land or any inalienable right of the member, its sentence is as conclusive as that of a court.—*Otto vs. Journeymen T. P. & B. U.*, 75 Cal. 308, 314, 7 Am. St. Rep. 156, 17 Pac. Rep. 217.

17. **CONSPIRACY**—Expulsion is not, when it consists of nothing but act of majority for purpose of enforcing rules of society.—*Lawson vs. Hewell*, 118 Cal. 613, 620, 50 Pac. Rep. 763, 49 L. R. A. 400.

18. **COURTS**—Have no authority to interfere with decisions of society, except when decision arrived at is contrary to natural justice or rules of society have not been observed, or action of society malicious and not bona fide.—*Otto vs. Journeymen T. P. & B. U.*, 75 Cal. 308, 309, 314, 315, 7 Am. St. Rep. 156, 17 Pac. Rep. 217; *Peyre vs. Mutual Relief Soc.*, 90 Cal. 240, 243, 244, 27 Pac. Rep. 191.

19. **Jurisdiction to excommunicate.**—Although secular courts cannot decide who ought to be members of church, or whether excommunicated persons have been regularly or irregularly cut off, such courts have jurisdiction to inquire whether resolution of expulsion was act of the church or of persons who were not the church, and who consequently had no right to excommunicate others.—*Bouldin vs. Alexander*, 82 U. S. (15 Wall.) 131, bk. 21 L. ed. 69.

20. **DAMAGES FOR WRONGFUL EXPULSION.**—Expulsion from incorporated benevolent association is not ground for damages even if facts upon which expulsion was predicated do not justify it.—*Peyre vs. Mutual Relief Soc.*, 90 Cal. 240, 244, 27 Pac. Rep. 191.

21. **GOOD FAITH REQUIRED OF ASSOCIATION** in expelling members, and if good

faith is not shown court will interfere.—*Otto vs. Journeymen T. P. & B. U.*, 75 Cal. 308, 314, 7 Am. St. Rep. 156, 17 Pac. Rep. 217.

22. **GROUNDS**—Association's nature considered.—Charges which will warrant expulsion of member depend upon nature and objects of association. What might be ground to expel member from club would not warrant his expulsion from business association.—*People ex rel. Meads vs. Alpha Lodge*, 35 N. Y. Supp. 214, 220.

23. **Betrayal of secrets of secret society** would not warrant expulsion where only disclosure of them was through publication of charge preferred against member himself.—*People ex rel. Meads vs. Alpha Lodge*, 35 N. Y. Supp. 214, 220.

24. **Fraudulent conduct towards society, conversion of its property or any act of omission so directly affecting its welfare as to threaten its existence or success, would warrant expulsion.**—*People ex rel. Meads vs. Alpha Lodge*, 35 N. Y. Supp. 214, 220.

25. **Gross immorality in professional transaction is ground for expelling member of medical society.**—*Barrows vs. Massachusetts Med. Soc.*, 66 Mass. (12 Cush.) 402, 410.

26. **Labor union—Working in violation of strike.**—Association of tailors organized for benevolent purposes cannot expel member without hearing or trial for offering to work for persons against whom strike has been ordered, where rules provide only fine for such offenses.—*Otto vs. Journeymen T. P. & B. U.*, 75 Cal. 308, 315, 7 Am. St. Rep. 156, 17 Pac. Rep. 217.

27. **Opprobrious language.**—Where constitution and by-laws authorize expulsion of member for improper conduct, it is for society to determine whether or not to expel member for opprobrious language used toward officer and large number of other members.—*Josich vs. Austrian Benev. Soc.*, 119 Cal. 74, 76, 51 Pac. Rep. 18.

28. **Slander of members.**—That member is guilty of slander against society, vilifying member, unprofessional conduct, disrespectful and contemptuous language to an associate, reporting that lodge would not pay and never intended to pay, offense against law, or ungentlemanly conduct, will not warrant his expulsion.—*Conn. Fuller vs. Trustees*, 6 Conn. 532. *Mich. People ex rel. Roehler vs. Mechanics' Aid Soc.*, 22 Mich. 86; *Erd vs. Bavarian N. A. & R. Assoc.*, 67 Mich. 233, 34 N. W. Rep. 555. *Mo. Mulroy vs. Lodge*, 28 Mo. App. 463. *N. Y. People ex rel. Bartlett vs. Medical Soc.*, 32 N. Y. 187. *Pa. Commonwealth vs. St. Patrick's Soc.*, 2 Blinn. (Pa.) 441, 4 Am. Dec. 453.

29. **IMPARTIAL TRIBUNAL NECESSARY.**—Trial of members before committee one of whose members is brother of prosecutor is not fair trial before an impartial tribunal.—*People ex rel. Meads vs. Alpha Lodge*, 35 N. Y. Supp. 214, 221. See *Chase vs. Cheney*, 58 Ill. 509, 11 Am. Rep. 95.

30. **INJUNCTION WILL NOT LIE** to restrain society from expelling member where society has jurisdiction of subject-matter, and object of bill is to correct and restrain alleged irregu-

larities in procedure or in constitution of body of triers.—*Lawson vs. Hewell*, 118 Cal. 613, 619-622, 50 Pac. Rep. 763, 49 L. R. A. 400. See *Chase vs. Cheney*, 58 Ill. 509, 11 Am. Rep. 95; *Gregg vs. Massachusetts Med. Soc.*, 111 Mass. 185, 193, 194, 15 Am. Rep. 24.

31. JUDICIAL NATURE OF PROCEEDINGS.

—In expelling member society acts in quasi judicial character.—*Otto vs. Journeymen T. P. & B. U.*, 75 Cal. 308, 314, 7 Am. St. Rep. 156, 17 Pac. Rep. 217.

32. **MANDAMUS**—Denied in cases of ordinary expulsion; rule being that court will not interfere to compel reinstatement of expelled member where society has not acted arbitrarily but has merely pursued course prescribed and permitted by articles of association and by-laws, and that member's only redress is within society.—*Josich vs. Austrian Benev. Soc.*, 119 Cal. 74, 76, 77, 51 Pac. Rep. 18; *Barrows vs. Massachusetts Med. Soc.*, 66 Mass. (13 Cush.) 402, 409, 410; *Screwmen's Ben. Assoc. vs. Benson*, 76 Tex. 552, 13 S. W. Rep. 379.

33. **Merits of expulsion cannot be re-examined** on application for writ of mandamus even though member has been expelled irregularly and is entitled to such writ.—*Black & W. S. Soc. vs. Vandyke*, 2 Whart. (Pa.) 309, 30 Am. Dec. 263.

34. **Other remedies, if afforded by rules and regulations of association, must be exhausted before applying for mandamus.**—*Screwmen's Ben. Assoc. vs. Benson*, 76 Tex. 552, 13 S. W. Rep. 379.

35. **Property rights**—Court has jurisdiction to interfere for the protection of property rights of members of association in all proper cases, and as far as applicable will apply rules governing corporations.—*Otto vs. Journeymen T. P. & B. U.*, 75 Cal. 308, 314, 7 Am. St. Rep. 156, 17 Pac. Rep. 217.

36. **Same**—Interest in property incidental to membership and which will cease upon member ceasing to be member without his having any severable proprietary right to any portion of property owned by society, is not such as will justify courts in interfering with his expulsion in accordance with rules of society.—*Lawson vs. Hewell*, 118 Cal. 613, 621, 622, 50 Pac. Rep. 763, 49 L. R. A. 400.

37. **Unlawful expulsion.**—Mandamus lies to restore to membership person unlawfully expelled from an incorporated beneficial association.—*Black & W. S. Soc. vs. Vandyke*, 2 Whart. (Pa.) 309, 30 Am. Dec. 263. See *Otto vs. Journeymen T. P. & B. U.*, 75 Cal. 308, 311, 316, 7 Am. St. Rep. 156, 17 Pac. Rep. 217.

38. **NOTICE AND HEARING.**—It is well settled that member of benevolent or social association cannot be expelled without being given hearing and notice, and there must be fair trial.—*Grand Grove U. A. O. D. vs. Garibaldi*, 105 Cal. 219, 225, 38 Pac. Rep. 947 (in running head-line of report erroneously *Grand Grove U. A. O. D. vs. Duchain*). See *Bouldin vs. Alexander*, 82 U. S. (15 Wall.) 131, bk. 21 L. ed. 69.

39. **Other members must be given notice of meeting and such notice must specify object of meeting.**—See *People ex rel. Meads vs. Alpha Lodge*, 35 N. Y. Supp. 214, 219.

40. **Sufficient ground for expulsion or suspension does not remedy defect of expelling, or suspending without hearing.**—*Grand Grove U. A. O. D. vs. Garibaldi*, 105 Cal. 219, 226, 38 Pac. Rep. 947 (in running head-line of report erroneously *Grand Grove U. A. O. D. vs. Duchain*).

41. **PROCEDURE PRESCRIBED BY CONSTITUTION** in expelling member of benevolent society may be followed, and if any irregularity takes place it is for society to give him redress.—*Peyre vs. Mutual Relief Soc.*, 90 Cal. 240, 244, 27 Pac. Rep. 191.

42. **REVOCAION OF CHARTER OF SUBORDINATE BODY.**—Notice and hearing must be given upon suspending charter of subordinate branch or body of society.—*Grand Grove U. A. O. D. vs. Garibaldi*, 105 Cal. 219, 225, 38 Pac. Rep. 947 (in running head-line of report erroneously *Grand Grove U. A. O. D. vs. Duchain*).

43. **SUSPENSION OF MEMBER** of benevolent society is permissible where he is guilty of misconduct.—*Peyre vs. Mutual Relief Soc.*, 90 Cal. 240, 244, 27 Pac. Rep. 191.

44. **DAMAGES ARE NOT RECOVERABLE** by member who is suspended for misconduct.—*Peyre vs. Mutual Relief Soc.*, 90 Cal. 240, 244, 27 Pac. Rep. 191.

§ 600. **MEMBERS ADMITTED AFTER INCORPORATION.** Members admitted after incorporation have all the rights and privileges, and are subject to the same responsibilities, as members of the association prior thereto.

History: Enacted March 21, 1872, founded upon § 8, Act April 27, 1863, Stats. 1863, p. 627.

§ 601. **NO MEMBER TO TRANSFER MEMBERSHIP, ETC.** No member, or his legal representative, must dispose of or transfer any right or privilege conferred on him by reason of his membership of such corporation, or be deprived thereof, except as herein provided.

History: Enacted March 21, 1872.

§ 602. **RELIGIOUS SOCIETY MAY BECOME A CORPORATION SOLE.** Whenever the rules, regulations, or discipline of any religious denomination,

society, or church so require, for the administration of the temporalities thereof, and the management of the estate and property thereof, it shall be lawful for the bishop, chief priest, or presiding elder of such religious denomination, society, or church to become a sole corporation, in the manner prescribed in this title, as nearly as may be, and with all the powers and duties, and for the uses and purposes in this title provided for religious incorporations, and subject to all the conditions, limitations, and provisions in said title prescribed.

[Powers.] Every corporation sole shall, however, for the purposes of the trust, have power to contract in the same manner and to the same extent as a natural person, and may sue and be sued, and may defend, in all courts and places, in all matters and proceedings whatever, and shall have authority to borrow money, and give promissory notes therefor, and to secure the payment thereof by mortgage or other lien upon property, real or personal; to buy, sell, lease, mortgage, and in every way deal in real and personal property in the same manner that a natural person may, and without the order of any court; to receive bequests and devises for its own use or upon trusts to the same extent as natural persons may; and to appoint attorneys in fact.

[Articles of incorporation to set forth, what.] The articles of incorporation to be filed shall set forth the facts authorizing such incorporation, and declare the manner in which any vacancy occurring in the incumbency of such bishop, chief priest, or presiding elder is required by the rules, regulations, or discipline of such denomination, society, or church to be filled, which statement shall be verified by affidavit, and for proof of the appointment or election of such bishop, chief priest, or presiding elder, or of any succeeding incumbent of such corporation, it shall be sufficient to record with the clerk of the county in which such bishop, chief priest, or presiding elder resides, the original or a copy of his commission, or certificate, or letters of election or appointment, duly attested; provided, all property held by such bishop, chief priest, or presiding elder shall be in trust for the use, purpose, and behoof of his religious denomination, society, or church.

[Certain limitation does not apply.] The limitation in section five hundred and ninety-five shall not apply to corporations formed under this section, when the land is held or used for churches, hospitals, schools, colleges, orphan asylums, parsonages, or cemetery purposes. Any judge of the superior court in the county in which any corporation is formed under this chapter shall at all times have access to the books of such incorporation.

[Continuation of corporation sole.] Any corporation sole heretofore organized and existing under the laws of this state may elect to continue its existence under this title by filing a certificate to that effect, under its corporate seal and the hand of its incumbent, or amended articles of incorporation, in the form required by this title, and as prescribed by section two hundred and eighty-seven of this code; and from and after the filing of such certificate or amended articles, such corporation shall be entitled to the privileges and subject to the duties, liabilities, and provisions in this title expressed.

History: Enacted March 30, 1878, Code Amdts. 1877-8, p. 84; amended April 6, 1880, Code Amdts. 1880 (C. C. pt.), p. 6; March 11, 1897, Stats. and Amdts. 1897, pp. 101, 102.

1. Applied, cited, construed, referred to, etc.
2. Corporate attributes unnecessary—Seal, secretary, etc., unnecessary.
3. Creation of corporation sole—Compliance with statute.
- 4, 5. Tenure of land—Adverse possession.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Blakeslee vs. Hall*, 94 Cal. 159, 161, 29 Pac. Rep. 623 (applied).

2. **CORPORATE ATTRIBUTES NOT NECESSARY**.—Bishop or parson acting as sole corporation, and holding property to him and his successor in right of his office, has no need of corporate name or seal or by-laws, as he acts under his own seal and in his own name and name of office; he needs no secretary or treasurer and need keep no record of his acts.—*Roman Catholic Archbishop vs. Shipman*, 79 Cal. 288, 296, 21 Pac. Rep. 830.

3. **CREATION OF CORPORATION SOLE**, in this state, only by compliance with provisions of this section; deed to a bishop and his

successor in office, does not create.—*Blakeslee vs. Hall*, 94 Cal. 159, 161, 29 Pac. Rep. 623.

4. **TENURE OF LAND**.—Property vesting in sole corporation is held for his own benefit and use while he holds office, and afterward estate and enjoyment of it go together to his successor, when established.—*Roman Catholic Archbishop vs. Shipman*, 79 Cal. 288, 296, 21 Pac. Rep. 830.

5. **Adverse possession**.—Archbishop holding property in his capacity as sole corporation, cannot acquire adverse title to such property where legal title is in him individually; one cannot hold in hostility to himself.—*Roman Catholic Archbishop vs. Shipman*, 79 Cal. 288, 296, 21 Pac. Rep. 830.

§ 603. RELIGIOUS SOCIETY MAY ELECT DIRECTORS AND INCORPORATE. PROCEDURE. Whenever the regulations, rules, or discipline of any church or religious society require, for the administration of the temporalities thereof, or for the management of the property or estate thereof, any diocese, synod, or district organization of such church or religious society may elect directors and become an incorporation in the manner prescribed in this title, and with all the powers and duties, and for the uses and purposes in this title provided for benevolent or religious incorporations, and subject to all the conditions, limitations, and provisions in said title prescribed, except as otherwise provided in this section;

[Convention, etc., to elect directors.] Provided, that directors of such incorporation may be elected, and that the by-laws for its government may be made and amended by the convention, synod, or other representative body of such church or religious society, in and for such district, in accordance with the constitution, by-laws, discipline, or regulation thereof, at any regular meeting, or special meeting called for that purpose; and,

[Certificates of incorporation to be filed.] Provided, the certificate of incorporation and of the election of directors to be filed shall be sufficiently signed and attested by the signature of the presiding officer and secretary of the representative convention, synod, or other such body, in which such election is held; and,

[Property in trust for the society.—Section 595 not to apply to these corporations.] Provided, all property held by such incorporation shall be in trust for the use, benefit, and purpose of the church or religious society, by and for which such incorporation was formed, and in and of which such diocese, synod, or other district is an organized or constituent part; and that the limitation in section five hundred and ninety-five shall not apply to corporations formed under this section, when the land is held or used for churches, hospitals, schools, colleges, asylums, parsonages, or cemetery purposes.

History: Enacted March 12, 1885, Stats. and Amdts. 1885, pp. 109, 110. It is thought the legislature sought to repeal this provision by the act given in next section, but it is manifestly inadequate for that purpose.

1. Applied, cited, construed, referred to, etc.
2. Corporation distinct from ecclesiastical body.
3. Directors do not control church affairs.
4. Division of church—Disposition of funds.
5. Ecclesiastical control of property.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Sanchez vs. Grace M. E.*

Church, 114 Cal. 295, 300, 301, 46 Pac. Rep. 2 (referred to with other sections); *People ex rel. Weatherly vs. Golden Gate Lodge of Elks*, 128 Cal. 257, 262, 60 Pac. Rep. 865 (held not applicable).

2. **CORPORATION DISTINCT FROM ECCLESIASTICAL BODY**.—Religious corporation

organized under laws of this state is distinct from ecclesiastical body of church. Its functions and objects are to stand in capacity of agent holding title to property, power to control same in accordance with interest to spiritual ends of church.—*Wheelock vs. First Presb. Church*, 119 Cal. 477, 483, 51 Pac. Rep. 841.

3. **DIRECTORS OR TRUSTEES OF CHURCH CORPORATION**, as such no authority whatever over church affairs. These matters rest purely with ecclesiastical body.—*Wheelock vs. First Presb. Church*, 119 Cal. 477, 483, 51 Pac. Rep. 841.

4. **DIVISION OF CHURCH**—Disposition of

funds.—Where two churches are divided by authority of main governing body of church, trust funds belonging to original church should be divided among two new churches.—*Wheelock vs. First Presb. Church*, 119 Cal. 477, 483, 484, 51 Pac. Rep. 841.

5. **ECCLESIASTICAL CONTROL OF PROPERTY**.—Ecclesiastical society constituting church and not persons who signed articles of incorporation became legal entity with power to transact all business relative to church property.—*Sanchez vs. Grace M. E. Church*, 114 Cal. 295, 300, 46 Pac. Rep. 2; *Wheelock vs. First Presb. Church*, 119 Cal. 477, 483, 51 Pac. Rep. 841.

§ 604. **SAME.** Any church or other religious association in this state, composed of two or more constituent parishes, missions, congregations, or societies, having a common convention, synod, council, or other representative legislative body, may be incorporated by such representative body under this part and subject to the provisions of this title, except as otherwise provided in this section.

[Name; purpose, term, etc.] The representative body of such religious association electing to incorporate the same, shall determine the name of the proposed corporation, the purpose for which it is formed, the place where its principal business is to be transacted, the term for which it is to exist, and the number of its directors, and shall elect its directors for the first year.

[Signed by secretary and president.] The articles of incorporation need only be signed and acknowledged by the presiding officer and secretary of such representative body, and in addition to the requirements of section two hundred and ninety, shall set forth the proceedings herein prescribed for said representative body, and that the same were duly had in accordance with the constitution, canons, rules, or regulations governing the other proceedings of said representative body, and the time and place thereof.

[Election of directors.] The directors of such corporation shall be elected annually by the representative body of the association.

[By-laws; repeal, amendment, etc.] The representative body providing for such incorporation shall frame by-laws for the corporation, and such by-laws may be repealed or amended, or new by-laws may be adopted by any subsequent representative body in accordance with the constitution, canons, rules, or regulations governing the other proceedings of such representative body. Such corporation may hold and administer not only the common property, funds, and money of such association, but also the property, funds, and money of any constituent parish, mission, congregation, or society.

The limitation in section five hundred and ninety-five shall not apply to corporations formed under this section when the land is held or used for churches, hospitals, schools, colleges, asylums, parsonages, or cemetery purposes.

History: Enacted March 11, 1887, Stats. and Amdts. 1887, p. 104-105. In force March 11, 1887.

It was evidently the intention of legislature, in passing the above act, to repeal the act given in § 603 ante; but the effort is manifestly insufficient for that purpose; the repealing clause being: "An act entitled 'An act to amend an act entitled "An act to establish a Civil Code," approved March twenty-first, eighteen hundred and seventy-two, by adding a new section thereto, to be known as six hundred and four, relating to the formation of religious incorporations for holding and administering church property,' approved March twelfth, eighteen hundred and eighty-five, being inconsistent herewith, is hereby repealed."

§ 605. CONSOLIDATION OF DEBTS; PUBLIC NOTICE. Any corporation, now or hereafter organized for purposes other than profit, may consolidate its debts, property, assets and franchises, with any other like association or corporation, either created under the laws of the state of California or under the laws of any other state or territory, in such manner as may be agreed upon by the respective boards of directors, or trustees, of such corporations; provided, however, that no such consolidation shall take place without the written consent of three fifths (3/5) of the boards of directors, or trustees, of each of the corporations so consolidating, and such consolidation must not in any way relieve either of the corporations parties to it from any or all just debts or liabilities;

[**Must give public notice.**] Provided, further, that in case of any such consolidation, due notice of the same must be given by advertisement published for one month in at least one newspaper published at the place of the principal business of each of the corporations so consolidating.

[**New articles must be filed.**] When their consolidation is completed, a copy of the new articles of incorporation must be filed with the secretary of state, in the same manner as the original articles of incorporation are required to be filed.

History: Enacted March 20, 1903, Stats. and Amdts. 1903, p. 252. In effect March 20, 1903.

TITLE XIIa.

SOCIETIES FOR THE PREVENTION OF CRUELTY TO CHILDREN AND ANIMALS.

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| § 607. Formation of [humane] corporations. | § 607a. Fines, penalties, and forfeitures, and the disposition to be made thereof. |
| § 607a. Power of to receive and dispose of property. [Amount.] | § 607f. Members and agents may be authorized to act as police officers. |
| § 607b. Complaints for violating any law relating to children or animals. | § 607g. Children who may be arrested and brought before a court or magistrate for examination. |
| § 607c. Magistrates and police officers to aid the corporation and its officers. | |
| § 607d. Pre-existing corporations. [Title extends to.] | |

[This is a new title added by Act March 21, 1905 (Stats. and Amdts. 1905, c. CDXXXIV, pp. 590-592), and is a re-enactment of a new title added by Code Commission, Act March 16, 1901 (Stats. and Amdts. 1900-1, pp. 382-384, 429), which was held unconstitutional, see history, § 4 ante. The title is a codification of Act 1874, Stats. 1873-4, p. 499, and Act 1876, Stats. 1875-6, p. 830.]

§ 607. FORMATION OF [HUMANE] CORPORATIONS. Corporations may be formed by any number of persons not less than five, a majority of whom must be citizens and residents of this state, under the general provisions of this code, for the purpose of the prevention of cruelty to children or animals, or both.

History: Enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXXIV, p. 590; see introductory note to this title.

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| 1. Benevolent and charitable institution. | 6 N. E. Rep. 340 (holding that as such it was exempt from taxation). |
| 2. Formation of corporations—General provisions governing. | 2. Formation of corporations—General provisions governing.—See ante §§ 285-321a and notes. |
| 3. Juvenile courts. | 3. Juvenile courts.—See HENNING'S GENERAL LAWS, tit. Juvenile Court and notes. |
| 4. Killing, maiming, or torturing animals—Penal provisions. | 4. Killing, maiming, or torturing animals—Penal provisions.—See Penal Code § 597 and notes. |
1. Benevolent and charitable institution.—Society for prevention of cruelty to animals is benevolent and charitable institution.—Massachusetts S. P. C. A. vs. Boston, 142 Mass. 24.

§ 607a. POWER TO RECEIVE AND DISPOSE OF PROPERTY. [AMOUNT.]

Every such corporation may take and hold, by gift, purchase, devise, or bequest, any property, real or personal, and dispose of the same at its pleasure; but it must not hold real property the annual income of which exceeds fifty thousand dollars.

History: Enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXXIV, p. 590; see introductory note to this title.

Powers of corporations in general.—See ante § 354 and note.

§ 607b. COMPLAINTS FOR VIOLATING ANY LAW RELATING TO CHILDREN OR ANIMALS. Any such corporation, or any member or officer thereof, may prefer a complaint against any person or persons, before any court or magistrate having jurisdiction, for the violation of any law relating to or affecting children or animals, and may aid in the prosecution of any such offender before such court or magistrate in any proceeding taken.

History: Enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXXIV, p. 590; see introductory note to this title.

Arrest without warrant.—See post § 607f.

§ 607c. MAGISTRATES AND POLICE OFFICERS TO AID THE CORPORATION AND ITS OFFICERS. All magistrates, constables, sheriffs, and officers of police must, as occasion may require, aid any such corporation, its officers, members, and agents, in the enforcement of all laws which are now or may be hereafter enacted relating to or affecting children or animals.

History: Enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXXIV, p. 590; see introductory note to this title.

§ 607d. PRE-EXISTING CORPORATIONS. [TITLE EXTENDS TO.] The provisions of this title extend to all corporations heretofore formed and existing for the prevention of cruelty to children or animals, but do not extend or apply to any association, society, or corporation which uses or specifies a name or style the same, or substantially the same, as that of any previously existing society or corporation in this state organized for a like purpose.

History: Enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXXIV, p. 590; see introductory note to this title.

§ 607e. FINES, PENALTIES, AND FORFEITURES, AND THE DISPOSITION TO BE MADE THEREOF. All fines, penalties, and forfeitures imposed and collected in any county, or city and county, of this state under the provisions of any law of this state, now or hereafter enacted, relating to or affecting children or animals, in every case where the prosecution was instituted, aided, or conducted by any such corporation or society now or hereafter existing, must, except where otherwise provided, inure to such corporation or society in aid of the purposes for which it was incorporated or organized.

[Compensation from city or county; amount.] In addition to said fines, penalties and forfeitures, every society incorporated and organized for the prevention of cruelty to animals may, in each city, or city and county, or county, where such society exists, while actively engaged in enforcing the provisions of the laws of this state, now or hereafter enacted, for the prevention of cruelty to animals, or arresting, or prosecuting offenders thereunder, or preventing cruelty to animals, be paid, as compensation therefor, from the county, or city and county general

fund by the board of supervisors, a sum not exceeding one hundred and fifty dollars per month, in the same manner as other claims against said county, or city and county, are paid.

History: Enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXXIV, p. 591; see introductory note to this title.

§ 607f. **MEMBERS AND AGENTS MAY BE AUTHORIZED TO ACT AS POLICE OFFICERS.** All members and agents, and all officers of each or any of such corporations or societies, as may by the trustees thereof be duly authorized in writing, approved by a judge of the superior court of the county in which such corporation or society was organized, and sworn in the same manner as are constables or peace officers, have power lawfully to interfere to prevent the perpetration of any act of cruelty upon any child or dumb animal, and may use such force as is necessary to prevent the same, and to that end may summon to their aid any bystander;

[**Make arrests; badge.**] They may make arrests for the violation of any penal law relating to or affecting children or animals in the same manner as a constable or other peace officer; and may carry the same or similar weapons that such officers are authorized to carry. All such members and agents must, when making such arrests, exhibit and expose a suitable badge to be adopted by such corporation or society.

[**Resisting; penalty.**] All persons resisting such specially appointed officers, when performing any duty under this section, are guilty of a misdemeanor.

History: Enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXXIV, p. 591; see introductory note to this title.

Arrest without warrant.—Members, agents, and officers authorized in the manner prescribed to make arrests, etc., may act without warrant from a magistrate and without any special appointment or authorization for each arrest, where persons arrested are actually engaged in violating law.—*Davis vs. American* S. P. C. A., 75 N. Y. 362, 367.

§ 607g. **CHILDREN WHO MAY BE ARRESTED AND BROUGHT BEFORE A COURT OR MAGISTRATE FOR EXAMINATION.** Any child under the age of sixteen years that comes within any of the following descriptions named:

1. Who is found begging or receiving or gathering alms (whether actually begging, or under the pretext of selling or offering for sale anything), or being in any street, road, or public place for the purpose of so begging, gathering, or receiving alms;

2. Who is found wandering and not having any home or settled place of abode, or proper guardianship, or visible means of subsistence;

3. Who is found destitute, either being an orphan, or having a vicious parent who is undergoing penal servitude or imprisonment;

4. Who frequents the company of reputed thieves or prostitutes, or houses of prostitution or assignation, or dance-houses, concert saloons, theaters, or variety halls, or other places of amusement where spirituous, malt, or vinous liquors are sold, without parent or guardian;

5. Who is engaged or used for or in any business, exhibition, vocation, or purpose, in violation of any law of this state;—

Must be arrested and brought before a court or magistrate, and when, upon examination before such court or magistrate, it appears that any such child has

been engaged in any of the aforesaid acts, or comes within any of the aforesaid descriptions; or when, upon the examination or conviction of any person having the custody of a child, of a criminal assault upon it, the court or magistrate before whom such examination or conviction is had deems it desirable for the welfare of such child that the person so examined or convicted should be deprived of its custody thereafter;

[**Order of court upon examination—Commitment of child.**] Such court or magistrate, when it deems it expedient for the welfare of such child, may commit such child to an orphan asylum, corporation, or society for the prevention of cruelty to children, charitable or other institution, or make such other disposition thereof as now is or hereafter may be provided by law in cases of vagrant, truant, disorderly, pauper, or destitute children.

[**Power to institute proceedings.**] Any corporation, organized under this title, or now existing, for the prevention of cruelty to children, or any officer or member thereof, may institute proceedings under this section for the welfare of any such child.

History: Enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXXIV, pp. 591-592; see introductory note to this title.

1. Constitutionality of statute—Jury trial.
2. Destitution, wandering, etc.
3. Discretion of trial court.
4. Notice to parent.
5. Parental and filial affection must be regarded.
6. Term of commitment—Discretion of court.

1. **Constitutionality of statute—Jury trial.**—Statute which authorizes such children to be committed to house of refuge, which is not prison but school, is not unconstitutional on ground that no provision is made for trial by jury.—*Ex parte Crouse*, 4 Whart. (Pa.) 9. See *Milwaukee Industrial School vs. Milwaukee Co.*, 40 Wis. 328, 22 Am. Rep. 702.

Compare: *People vs. Turner*, 55 Ill. 280, 3 Am. Rep. 646.

2. **Destitution, wandering, etc.**—Boys between eight and fifteen years of age who are not shown to have been guilty of vagrancy, mendicancy or incorrigibility, but merely to have lived in very dirty house and not to have been clothed as well as other boys in the community, are not within statute, although on one occasion, time not shown, with some other boys, they broke into house in neighborhood; it appearing that they had plenty to eat, plenty to wear, that they attended school

regularly, and were not quarrelsome.—See *State vs. Rasch*, 24 Wash. 332, 64 Pac. Rep. 531.

3. **Discretion of trial court.**—Law has relegated a great deal to the discretion of the trial court in actions of this kind.—*State vs. Rasch*, 24 Wash. 332, 64 Pac. Rep. 531; *Milwaukee Industrial School vs. Milwaukee Co.*, 40 Wis. 328, 22 Am. Rep. 702.

4. **Notice to parent.**—It would seem that before court or magistrate can commit child of tender years, found soliciting alms in street, to orphan asylum or other institution, notice should be given to parents, if any.—See *People ex rel. Van Heck vs. New York Catholic Protectory*, 101 N. Y. 195, 4 N. E. Rep. 177 (decided, however, under statute requiring notice).

5. **Parental and filial affection must be regarded,** and court will narrowly scrutinize evidence with view to prevent commitment upon insufficient grounds.—*State vs. Rasch*, 24 Wash. 332, 64 Pac. Rep. 531.

6. **Term of commitment—Discretion of court.**—It would seem that length of time for which child may be committed rests in discretion of committing court or magistrate.—See *Milwaukee Industrial School vs. Milwaukee Co.*, 40 Wis. 328, 22 Am. Rep. 702.

TITLE XIII.

CEMETERY CORPORATIONS.

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| <p>§ 608. How much land may be held, and how disposed of.</p> <p>§ 609. Who are members eligible to vote and hold office.</p> <p>§ 610. May hold personal property, to what amount. How disposed of.</p> <p>§ 611. May issue bonds to pay for grounds. Proceeds of sale, how disposed of.</p> | <p>§ 612. May take and hold title to what, and how.</p> <p>§ 613. When burial lot inalienable. Who may not be buried in lot.</p> <p>§ 614. Lot-owners previous to purchase to be members of the corporation.</p> <p>§ 615. May sell lands, when.</p> <p>§ 616. May take and hold property in trust. Application of income.</p> |
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§ 608. HOW MUCH LAND MAY BE HELD AND HOW DISPOSED OF. Corporations organized to establish and maintain cemeteries may take, by purchase, donation, or devise, land, not exceeding three hundred and twenty acres in extent, [1] in the county wherein their articles of incorporation are filed, or [2] in an adjoining county, and [3] may employ any surplus moneys in the treasury thereof for such purpose; such lands to be held and occupied exclusively as a cemetery for the burial of the dead.

The lands must be surveyed and subdivided into lots or plats, avenues, and walks, under order of the directors, and a map thereof filed in the office of the recorder of the county wherein the lands are situated.

[Sale, conditions, and restrictions.] Thereafter, upon such terms and subject to such conditions and restrictions, to be inserted in the conveyances, as the by-laws or directors may prescribe, the directors may sell and convey the lots or plats to purchasers.

History: Enacted March 21, 1872, founded upon § 4, Act April 18, 1859, Stats. 1859, p. 282; amended March 20, 1891, Stats. and Amdts. 1891, p. 180. In effect March 20, 1891.

1. Applied, cited, construed, referred to, etc.
2. Construction—Grant and limitation of power to hold land.
3. Lawfulness of cemeteries for profit.
4. Police power and regulation—Cemeteries subject to.
5. Same—Nuisances—Cemeteries not per se.
6. Same—Prohibiting burials within city.
7. Same—Unreasonable ordinance—Discrimination.
8. Power of city to establish cemeteries.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Odd Fellows Cem. Assoc. vs. San Francisco*, 140 Cal. 226, 232, 73 Pac. Rep. 937 (construed and applied).

2. CONSTRUCTION.—This section is only a grant of power to cemetery corporations to own property and a limitation of the amount that may be acquired and of the use to which such property may be devoted.—*Odd Fellows Cem. Assoc. vs. San Francisco*, 140 Cal. 226, 232, 73 Pac. Rep. 937.

As to devise of burial lot, see monographic note by P. H. Van Auken, 67 L. R. A. 121.

3. LAWFULNESS OF CEMETERY ENTERPRISES.—It is not unlawful to establish a cemetery for the burial of the dead deriving

profit therefrom as a business enterprise.—*Los Angeles vs. Hollywood Cem. Assoc.*, 124 Cal. 344, 349, 71 Am. St. Rep. 75, 57 Pac. Rep. 153.

4. POLICE POWER AND REGULATION.—Cemeteries are within power of reasonable regulation of both city and county municipality.—*Los Angeles vs. Hollywood Cem. Assoc.*, 124 Cal. 344, 347, 71 Am. St. Rep. 75, 57 Pac. Rep. 153.

5. NUISANCES—Cemeteries are not, per se, nor can they be so regarded in measuring the extent of the police power to regulate them.—*Los Angeles vs. Hollywood Cem. Assoc.*, 124 Cal. 344, 347, 71 Am. St. Rep. 75, 57 Pac. Rep. 153.

6. Prohibiting burying of dead bodies within cemetery or other place within city is valid exercise of police power by city.—*Odd Fellows Cem. Assoc. vs. San Francisco*, 140 Cal. 226, 229, 238, 73 Pac. Rep. 937.

7. Unreasonable exercise of.—An ordinance which makes it unlawful to establish, extend, or enlarge cemeteries within limits of county without permission of board of supervisors, but impliedly permits unrestricted burials in existing cemeteries, is unreasonable exercise of police power, and invalid.—*Los Angeles vs.*

Hollywood Cem. Assoc., 124 Cal. 344, 348, 349, 350, 351, 71 Am. St. Rep. 75, 57 Pac. Rep. 153.

8. POWER OF CITY TO ESTABLISH.—City has authority to establish cemeteries for interment of its dead, and for such purpose

may make deed of trust placing such cemetery in possession and control of suitable trustees who are willing to devote time and trouble necessary for its proper management.—Weisenberg vs. Truman, 58 Cal. 63, 69.

§ 609. WHO ARE MEMBERS ELIGIBLE TO VOTE AND HOLD OFFICE.

Every person of full age who is proprietor of a lot or plat in the cemetery of the corporation, containing not less than two hundred square feet of land, or, if there be more than one proprietor of any such lot, then such of the proprietors as the majority of joint proprietors designate, may, in person or by proxy, cast one vote at all elections had by the corporation for directors or any other purpose, and is eligible to any office of the corporation. At each annual meeting or election, the directors must make a report to the proprietors of all their doings, and of the management and condition of the property and concerns of the corporation.

History: Enacted March 21, 1872, founded upon § 5, Act April 18, 1859, Stats. 1859, pp. 282-283.

Applied, cited, construed, referred to, etc., in: 140 Cal. 226, 232, 73 Pac. Rep. 987 (referred Odd Fellows Cem. Assoc. vs. San Francisco, to with other sections).

§ 610. MAY HOLD PERSONAL PROPERTY, TO WHAT AMOUNT. HOW DISPOSED OF. Such corporations may hold personal property to an amount not exceeding five thousand dollars, in addition to the surplus remaining from the sales of lots or plats after the payments required in the succeeding section. Such surplus must be disposed of in the improvement, embellishment, and preservation of the cemetery, and paying incidental expenses of the corporation, and in no other manner.

History: Enacted March 21, 1872, founded upon § 4, Act April 18, 1859, Stats. 1859, p. 282.

Applied, cited, construed, referred to, etc., in: 140 Cal. 226, 232, 73 Pac. Rep. 987 (referred Odd Fellows Cem. Assoc. vs. San Francisco, to with other sections).

§ 611. MAY ISSUE BONDS TO PAY FOR GROUNDS. PROCEEDS OF SALE, HOW DISPOSED OF. Such corporations may issue their bonds, bearing interest not exceeding twelve per cent per annum, for the purchase of lands for their cemeteries, payable out of the proceeds of the cemetery and not otherwise; sixty per cent of the proceeds of sales of lots, plats, and graves must be applied at least every three months to the payment of the bonds and interest. Such corporations may also agree with the person or persons from whom cemetery lands shall be purchased, to pay for such lands, as the purchase price thereof, any specified share or portion, not exceeding one half, of the proceeds of all sales of lots or plats made from such lands; such payment to be made at such intervals as may be agreed upon. In all cases where cemetery lands shall be purchased and agreed to be paid for in the manner last provided, the prices for lots or plats specified in the by-laws, rules, or regulations first adopted by such association, or prescribed in the agreement between the cemetery and the person or persons from whom the cemetery lands were purchased, shall not be changed without the written consent of a majority in interest of the persons from whom such lands were purchased, their heirs, representatives, or assigns.

History: Enacted March 21, 1872, founded upon § 7, Act April 18, 1859, Stats. 1859, p. 281, as amended Act January 13, 1864, Stats. 1863-4, p. 12, and Act April 16, 1880, Code Amdts. 1880 (C. C. pt.), p. 12. In effect April 16, 1880.

1. Applied, cited, construed, referred to, etc.
2. Bonds may be given in payment for land.

1. Applied, cited, construed, referred to, etc., in: *Odd Fellows Cem. Assoc. vs. San Francisco*, 140 Cal. 226, 232, 73 Pac. Rep. 987 (referred to with other sections).

2. Bonds may be given in payment for land purchased for cemetery purposes together with improvements thereon, and are not ultra vires.—*Seymour vs. Spring Forest Cem. Assoc.*, 19 N. Y. Supp. 94, 98, 99 (decided under similar statute).

§ 612. MAY TAKE AND HOLD TITLE TO WHAT, AND HOW. Any corporation organized to establish and maintain, or to improve, a cemetery, may take and hold title to any cemetery lot, plot or grave, devised or given to it in trust for the specific purpose of perpetually caring for the same.

History: Enacted March 21, 1872, founded upon § 9, Act April 18, 1859, Stats. 1859, p. 284; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 384, held unconstitutional, see history, § 4 ante; amended March 26, 1901, Stats. and Amdts. 1900-1, p. 814.

Applied, cited, construed, referred to, etc., in: 140 Cal. 226, 232, 73 Pac. Rep. 987 (referred to with other sections).

§ 613. WHEN BURIAL LOT INALIENABLE. WHO MAY NOT BE BURIED IN LOT. Whenever an interment is made in any lot or plat transferred to individual owners by the corporation, the same thereby becomes forever inalienable, and descends in regular line of succession to the heirs at law of the owner. When there are several owners of interests in such lot or plat, one or more may acquire by purchase the interest of others interested in the fee simple title thereof, but no one not an owner acquires interest or right of burial therein by purchase; nor must any one be buried in any such lot or plat not at the time owning an interest therein, or who is not a relative of such owner, or of his wife, except by consent of all jointly interested;

[Alienability revived, how.] Provided, however, that when all the bodies buried in any such lot shall have been removed therefrom, with the consent of the owners of such lot, it shall be lawful for the then owners of such lot to sell and transfer the same by deed; and any such sale and transfer heretofore made is hereby declared to be valid and effectual to transfer the title to the purchaser, any law to the contrary thereof notwithstanding.

History: Enacted March 21, 1872, founded upon § 11, Act April 18, 1859, Stats. 1859, p. 284; amended February 10, 1885, Code Amdts. 1885, pp. 1-2; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 385, held unconstitutional, see history, § 4 ante.

1. Applied, cited, construed, referred to, etc.
2. Permission to bury may be given by owner.

1. Applied, cited, construed, referred to, etc., in: *Ex parte Bohen*, 115 Cal. 372, 375, 47 Pac. Rep. 55, 86 L. R. A. 618 (construed and applied); *Odd Fellows Cem. Assoc. vs. San Francisco*, 140 Cal. 226, 232, 73 Pac. Rep. 987 (referred to with other sections).

2. Permission to bury may be given by owner.—Under this section the owner of a cemetery lot may consent to the burial therein of one who had no interest in the lot.—*Ex parte Bohen*, 115 Cal. 372, 375, 47 Pac. Rep. 55, 86 L. R. A. 618.

As to character of estate or property of owner in burial lot, see monographic note by P. H. Van Auken, 67 L. R. A. 118-126.

§ 614. LOT-OWNERS PREVIOUS TO PURCHASE TO BE MEMBERS OF THE CORPORATION. When grounds purchased or otherwise acquired for cemetery purposes have been previously used as a burial-ground, those who are lot-owners at the time of the purchase continue to own the same, and are members of the corporation, with all the privileges a purchase of a lot from the corporation confers.

History: Enacted March 21, 1872, founded upon § 12, Act April 18, 1859, Stats. 1859, p. 285.

Applied, cited, construed, referred to, etc., in: 140 Cal. 226, 232, 73 Pac. Rep. 987 (referred to with other sections).
Odd Fellows Cem. Assoc. vs. San Francisco,

§ 615. MAY SELL LANDS, WHEN. Cemetery corporations may sell lands held by them upon obtaining an order for that purpose from the superior court of the county where the lands are situated. Before making the order, proof must be made to the satisfaction of the court that notice of the application for leave to sell has been given by publication in such manner and for such time as the court has directed, and that the lands are not required for and are not in use for burial purposes, and that it is for the interest of the corporation that such lands be sold. The application must be made by petition, and any member of the corporation may oppose the granting of the order by affidavit or otherwise.

History: Enacted March 4, 1889, Stats. and Amdts. 1889, p. 61. In effect March 4, 1889.

Applied, cited, construed, referred to, etc., in: 140 Cal. 226, 232, 73 Pac. Rep. 987 (referred to with other sections).
Odd Fellows Cem. Assoc. vs. San Francisco,

§ 616. MAY TAKE AND HOLD PROPERTY IN TRUST. APPLICATION OF INCOME. Any corporation organized to establish and maintain, or to improve, a cemetery, may take and hold any property bequeathed, granted, or given to it in trust, to apply the proceeds or income thereof to any and all of the following purposes:

[Purposes for which may hold.] To [1] the improvement or embellishment of such cemetery or of any lot therein; or to [2] the erection, renewal, repair, or preservation of any monument, fence, or other structure in such cemetery; or to [3] the planting or cultivation of trees, shrubs, or plants in or around such cemetery, or any lot therein; or to [4] the improving, ornamenting, or embellishing of such cemetery, or any lot therein, in any other mode or manner not inconsistent with the purposes for which such cemetery was established or is being maintained.

[Investment of proceeds and income, in what.] Such property and the proceeds or income thereof shall be invested and reinvested in bonds of the United States, or of this state, or of any municipality of this state or in first mortgages on real estate, or in centrally located income-producing improved real estate in any city, or city and county in this state, if such investment is not repugnant to the terms of the bequest, grant or gift.

History: Enacted March 26, 1895, Stats. and Amdts. 1895, p. 162; amended March 25, 1901, Stats. and Amdts. 1900-1, p. 814.

1. Applied, cited, construed, referred to, etc.
2. Perpetual trust not permitted.

1. Applied, cited, construed, referred to, in: Estate of Gay, 138 Cal. 552, 557, 94 Am. St. Rep. 70, 71 Pac. Rep. 707 (construed and applied).

2. Perpetual trust not permitted.—This section does not allow creation of perpetual trust for preservation of private grave.—Estate of Gay, 138 Cal. 552, 557, 94 Am. St. Rep. 70, 71 Pac. Rep. 707; Odd Fellows Cem. Assoc. vs. San Francisco, 140 Cal. 226, 232, 73 Pac. Rep. 987.

TITLE XIV.

AGRICULTURAL FAIR CORPORATIONS.

- § 620. May acquire and hold real estate, how much. § 622. Not for profit. May fix fee, etc., for membership.
- § 621. Shall not contract debts or liabilities exceeding amount in treasury.

§ 620. MAY ACQUIRE AND HOLD REAL ESTATE, HOW MUCH. Agricultural fair corporations may purchase, hold, or lease any quantity of land, not exceeding in the aggregate one hundred and sixty acres, with such buildings and improvements as may be erected thereon, and may sell, lease, or otherwise dispose of the same, at pleasure. This real estate must be held for the purpose of erecting buildings and other improvements thereon, to promote and encourage agriculture, horticulture, mechanics, manufactures, stockraising, and general domestic industry.

History: Enacted March 21, 1872, founded upon § 2, Act March 12, 1859, Stats. 1859, p. 105.

§ 621. SHALL NOT CONTRACT DEBTS OR LIABILITIES EXCEEDING AMOUNT IN TREASURY. Such corporation must not contract any debts or liabilities in excess of the amount of money in the treasury at the time of contract, except for the purchase of real property, for which they may create a debt not exceeding five thousand dollars, secured by mortgage on the property of the corporation. The directors who vote therefor are personally liable for any debt contracted or incurred in violation of this section.

History: Enacted March 21, 1872, founded upon § 5, Act March 12, 1859, Stats. 1859, p. 105.

§ 622. NOT FOR PROFIT. MAY FIX FEE, ETC., FOR MEMBERSHIP. Agricultural fair corporations are not conducted for profit, and have no capital stock or income other than that derived from charges to exhibitors and fees for membership, which charges, together with the term of membership and mode of acquiring the same, must be provided for in their by-laws. Such fees must never be greater than to raise sufficient revenue to discharge the debt for the real estate and the improvements thereon, and to defray the current expenses of fairs.

History: Enacted March 21, 1872, founded upon § 4, Act March 12, 1859, Stats. 1859, p. 105.

TITLE XV.

CORPORATIONS TO FURNISH LIGHT FOR PUBLIC USE.

- § 629. Duty to furnish gas or electricity. § 631. Right to enter buildings for inspection.
- § 630. When corporations may refuse to supply gas. § 632. Right to shut off supply of gas or electricity.
- § 630a. When corporations may refuse to supply electric current for light.

[Title XV, and each and every section thereof, was repealed by Act March 21, 1905 (Stats. and Amdts. 1905, p. 592), and a new title substituted therefor, Stats. and Amdts. 1905, pp. 593-594. This substituted title is an exact reproduction, with the addition of § 630a, of the substitution by the Code Commission, Act March 16, 1901 (Stats. and Amdts. 1900-1, pp. 385-386, 429), held unconstitutional, see history, § 4 ante.]

§ 629. DUTY TO FURNISH GAS OR ELECTRICITY. Upon the application in writing of the owner or occupant of any building or premises distant not more than one hundred feet from any main, or direct or primary wire, of the corporation, and payment by the applicant of all money due from him, the corporation must supply gas or electricity as required for such building or premises, and cannot refuse on the ground of any indebtedness of any former owner or occupant thereof, unless the applicant has undertaken to pay the same. If, for the space of ten days after such application, the corporation refuses or neglects to supply the gas or electricity required, it must pay to the applicant the sum of fifty dollars as liquidated damages, and five dollars per day as liquidated damages for every day such refusal or neglect continues thereafter.

History: Enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXXV, p. 593; see introductory note to this title.

I. In General.

1. Applied, cited, construed, referred to, etc.

II. Miscellaneous Matters Peculiar to Gas Corporations.

2. Charter limited by statute.
- 3, 4. Contracts in restraint of trade—Consolidation of companies.
5. Same—Quo warranto lies.
- 6, 7. Discretionary power of city.
8. Eminent domain—Exercise of power in occupying streets.
- 9, 10. Exclusive franchise—City cannot grant, but state may.
- 11, 12. Inspection of gas meters—Provisions governing.
- 13, 14. Lamp-posts—May be removed when useless.
- 15-17. Lease or assignment of franchise not permitted.
18. Limit may be prescribed for works.
- 19-24. Negligence—Leaky pipes—Contributory negligence—Evidence.
25. Obligation to exercise franchise.
26. Permit from fire commissioners not binding on city.
- 27-31. Police power—City may fix rates.
32. Property rights in street not acquired.
33. Public nature of business.

III. Contracts and Dealings with Consumers.

- 34, 35. Application in writing may be required—Reasonableness.
36. Discrimination not permitted.
- 37, 38. Duty to furnish gas.
- 39-41. Injunction lies when gas refused—Excessive charge.
- 42, 43. Mandamus lies when gas refused—Excessive charge.
44. Measure of damages for refusing gas.
45. Penalty not recoverable without payment.
46. Rules may be made—Reasonableness.
47. Time contract fixing price—Consideration.
48. Unreasonable rates.

I. IN GENERAL.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc.,** in: *Capital Gas Co. vs. Young*, 109 Cal. 140, 41 Pac. Rep. 869, 29 L. R. A. 463 (construed and applied); *Smith vs. Capital Gas Co.*, 132 Cal. 209, 211, 212, 64 Pac. Rep. 258, 54 L. R. A. 769 (construed and applied); *Gallagher vs. Equitable Gas L. Co.*, 141

Cal. 699, 706, 75 Pac. Rep. 329 (referred to with other sections); *Baker vs. San Francisco G. & E. Co.*, 141 Cal. 710, 712, 75 Pac. Rep. 342 (construed and applied).

As to right of municipality to confine gas-works within designated district, in exercise of its police power, see *Dobbins vs. City of Los Angeles*, 139 Cal. 179, 72 Pac. Rep. 970, reversed by supreme court of United States, 195 U. S. 223, bk. 49 L. ed. 18, 25 Sup. Ct. Rep. 18.

See also Pol. Code § 19 par. 20; and *HENNING'S GENERAL LAWS*, tit. Gas Companies, Act April 4, 1870.

II. MISCELLANEOUS MATTERS PECULIAR TO GAS CORPORATIONS.

2. **CHARTER LIMITED BY STATUTE**, and hence gas company cannot exercise power of operating works in city without submitting to such regulations as city may by ordinance impose.—*People vs. Chicago Gas Trust Co.*, 130 Ill. 268, 17 Am. St. Rep. 319, 22 N. E. Rep. 798, 8 L. R. A. 497.

3. **CONSOLIDATION OF TWO GAS COMPANIES** by placing the majority of their stock in the hands of a holding corporation is against public policy, and court will interfere by granting writ of quo warranto.—*People vs. Chicago Gas Trust Co.*, 130 Ill. 268, 17 Am. St. Rep. 319, 22 N. E. Rep. 798, 8 L. R. A. 497. See *Chicago Gas Light Co. vs. People's Gas L. Co.*, 121 Ill. 530, 2 Am. St. Rep. 124, 13 N. E. Rep. 169 (holding contract between two companies not enforceable where its effect is to stifle competition.)

4. **CONTRACT ABANDONING FRANCHISE TO ANOTHER COMPANY** is abandonment of public duty and is void and not enforceable.—*Chicago Gas L. Co. vs. People's Gas L. Co.*, 121 Ill. 530, 2 Am. St. Rep. 124, 13 N. E. Rep. 169; *Gibbs vs. Consolidated Gas Co.*, 130 U. S. 396, bk. 32 L. ed. 979, 9 Sup. Ct. Rep. 553.

5. **CONTRACT IN RESTRAINT OF TRADE** between two gas companies by terms of which each is bound to abide by and maintain prices fixed, and each is prohibited from furnishing gas to customers of other, is void as against public policy.—*State vs. Portland N. G. & O. Co.*, 153 Ind. 483, 74 Am. St. Rep. 314, 53 N. E. Rep. 1089, 53 L. R. A. 413.

See para. 14, 15 this note.

6. Quo warranto may be maintained by state against company which is party to such contract, and if facts justify court may, in exercise of its discretion, render judgment against defendant declaring forfeiture of its corporate franchise, or judgment may be forfeiture or ouster only of right of company to carry out or continue illegal act or acts charged and established.—*State vs. Portland N. G. & O. Co.*, 153 Ind. 483, 74 Am. St. Rep. 314, 53 N. E. Rep. 1089, 53 L. R. A. 413. See *State vs. Standard Oil Co.*, 49 Ohio St. 137, 34 Am. St. Rep. 541, 30 N. E. Rep. 279, 15 L. R. A. 145 (as to nature of judgment).

7. DISCRETIONARY POWER OF CITY.—It is within discretion of city or town authorities to give or not to give its consent, and it has right to withhold it from all gas companies.—*Indianapolis vs. Consumers' Gas Trust Co.*, 140 Ind. 107, 49 Am. St. Rep. 183, 39 N. E. Rep. 433, 27 L. R. A. 514.

8. EMINENT DOMAIN—Exercise of power in occupation of streets.—Gas companies enter streets of cities under their charter "in exercise of equivalent of power of eminent domain."—*Gibbs vs. Consolidated Gas Co.*, 130 U. S. 396, bk. 32 L. ed. 979, 9 Sup. Ct. Rep. 553. See *Portland N. G. & O. Co. vs. State*, 135 Ind. 54, 34 N. E. Rep. 318, 21 L. R. A. 639, 640; *State vs. Portland N. G. & O. Co.*, 153 Ind. 483, 74 Am. St. Rep. 314, 53 N. E. Rep. 1089, 53 L. R. A. 413.

9. EXCLUSIVE FRANCHISE—Cannot be granted by city or town authorities unless municipal corporation is given such power either expressly or by necessary implication.—*Saginaw Gas L. Co. vs. Saginaw*, 28 Fed. Rep. 529, 534-540. See *Richmond Co. Gas L. Co. vs. Middletown*, 59 N. Y. 228; *State vs. Cincinnati Gas L. & C. Co.*, 18 Ohio St. 262.

10. State may grant exclusive franchise, and if so granted and accepted it becomes a contract which cannot be impaired by subsequent legislative or constitutional provisions.—*New Orleans Gas L. Co. vs. Louisiana Light & Heat P. & M. Co.*, 115 U. S. 650, bk. 29 L. ed. 516, 6 Sup. Ct. Rep. 252.

11. INSPECTOR OF GAS METERS—Appointment by governor.—See Political Code §368 par. 1 and note.

12. Provisions as to duties, compensation, etc.—See Political Code §§577-584 and notes.

13. Term of office.—See Political Code §369 and note.

14. LAMP-POSTS ON SIDEWALK.—After company has ceased to supply gas and electric plant has been installed company ceases to have any right to have lamp-posts on sidewalk.—*New Orleans Gas L. Co. vs. Hart*, 40 La. Ann. 474, 8 Am. St. Rep. 544, 4 So. Rep. 215.

15. LEASE AND ASSIGNMENT OF CITY'S FRANCHISE by corporation to another is ultra vires and against public policy.—*Visalia Gas & E. L. Co. vs. Sims*, 104 Cal. 326, 330, 331, 43 Am. St. Rep. 105, 37 Pac. Rep. 1042. See *Me. Brunswick Gas L. Co. vs. United Gas F. & L. Co.*, 85 Me. 532, 35 Am. St. Rep. 385, 27 Atl. Rep. 525. *N. Y. Bath Gas L. Co. vs. Claffy*, 74 Hun 638, 26 N. Y. Supp. 237. *Fed. Gibbs vs. Con-*

solidated Gas Co., 130 U. S. 396, bk. 32 L. ed. 979, 9 Sup. Ct. Rep. 553.

16. Lessee or assignee not estopped in action to enforce contract of lease that it is void.—*Visalia Gas & E. L. Co. vs. Sims*, 104 Cal. 326, 333, 43 Am. St. Rep. 105, 37 Pac. Rep. 1042. See *Brunswick Gas L. Co. vs. United Gas F. & L. Co.*, 85 Me. 532, 35 Am. St. Rep. 385, 27 Atl. Rep. 525.

17. Reason why company is not allowed to lease or assign its corporate powers and franchises is that if it were able to do so it might thereby disable itself from the performance of its public duties and thus escape from the power of courts and of legislature to enforce their performance.—*Brunswick Gas L. Co. vs. United Gas E. & L. Co.*, 85 Me. 532, 35 Am. St. Rep. 385, 27 Atl. Rep. 525.

18. LIMITS MAY BE PRESCRIBED by city outside of which gas-works shall not be erected or maintained.—*Dobbins vs. Los Angeles*, 139 Cal. 179, 181-186, 96 Am. St. Rep. 95, 72 Pac. Rep. 970.

19. NEGLIGENCE—Escape of gas from leaky pipe.—Gas company is liable for injury done by escape of gas from leaky pipe, as law casts upon company obligation to keep it in reasonably safe condition, and to so use it as not to unnecessarily injure property or endanger safety of others.—*Kan. Wichita Gas E. L. & P. Co. vs. Wright*, 9 Kan. App. 730, 59 Pac. Rep. 1085. *Mass. Holly vs. Boston Gas L. Co.*, 74 Mass. (8 Gray) 123, 69 Am. Dec. 233. *N. H. Dow vs. Winnepesaukee Gas & E. Co.*, 69 N. H. 312, 314, 315, 76 Am. St. Rep. 173, 41 Atl. Rep. 288, 42 L. R. A. 569. *N. Y. Evans vs. Keystone Gas Co.*, 148 N. Y. 112, 51 Am. St. Rep. 681, 42 N. E. Rep. 513, 30 L. R. A. 651. *R. I. Butcher vs. Providence Gas Co.*, 12 R. I. 149, 34 Am. St. Rep. 626.

20. Contributory negligence is defense, and person who exposes himself carelessly or wilfully to injurious effects of escaping gas cannot hold company responsible for mischievous consequences resulting.—*Holly vs. Boston Gas L. Co.*, 74 Mass. (8 Gray) 123, 69 Am. Dec. 233.

21. Burden of proof is on plaintiff to show that company did not keep its pipes in sound and safe condition for transmission and distribution of gas.—*Holly vs. Boston Gas L. Co.*, 74 Mass. (8 Gray) 123, 69 Am. Dec. 233.

22. Evidence of injury to vegetation by escaping gas.—Coincidence of decay and death of vegetation with existence of leakage of large amount of gas after laying of new main and until its recalking, and fact of healthful growth after the recalking, can be regarded by jury, in connection with other circumstances, that effect of gas escaping in earth and in atmosphere was to cause destruction of vegetation.—*Evans vs. Keystone Gas Co.*, 148 N. Y. 112, 51 Am. St. Rep. 681, 42 N. E. Rep. 513, 30 L. R. A. 651.

23. Ignorance and want of notice immaterial, liability of company not being dependent upon its knowledge of pipe's defective condition.—*Dow vs. Winnepesaukee Gas & E. Co.*, 69 N. H. 312, 315, 76 Am. St. Rep. 173, 41 Atl. Rep. 288, 42 L. R. A. 569.

24. Injury to pipes by city in building sewer will not relieve gas company from liability for escaping gas, as, although gas company could not interfere with city in building such sewer, it was bound to see that in restoring earth to its place pipes were properly supported, and if they were injured to see that injury was repaired as soon as it could reasonably be done.—*Butcher vs. Providence Gas Co.*, 12 R. I. 149, 34 Am. Rep. 626.

25. OBLIGATION TO EXERCISE FRANCHISE.—Gas company is engaged in business of public character, and when it enters streets of city it assumes performance of public duty of furnishing light to inhabitants.—*People vs. Chicago Gas T. Co.*, 130 Ill. 268, 17 Am. St. Rep. 319, 22 N. E. Rep. 798, 8 L. R. A. 497.

26. PERMIT FROM FIRE COMMISSIONERS of city, in pursuance of fire and building ordinance, to erect gas-works does not take away from city its police power to prevent erection and maintenance of gas-works outside of prescribed limits.—*Dobbins vs. Los Angeles*, 139 Cal. 179, 185, 96 Am. St. Rep. 95, 72 Pac. Rep. 970.

27. POLICE POWER—May be exercised by municipal corporation with respect to the erection and maintenance of gas-works within the limits of the corporation, because illuminating gas is within the category of things which interfere with public safety, welfare, and comfort.—*Dobbins vs. Los Angeles*, 139 Cal. 179, 183, 184, 96 Am. St. Rep. 95, 72 Pac. Rep. 970. See *Odd Fellows Cem. Assoc. vs. San Francisco*, 140 Cal. 226, 235, 73 Pac. Rep. 987. *Ind. Muncie Nat. Gas Co. vs. Muncie*, 160 Ind. 97, 66 N. E. Rep. 436, 60 L. R. A. 822. *La. New Orleans Gas L. Co. vs. Hart*, 40 La. Ann. 474, 3 Am. St. Rep. 544, 4 So. Rep. 215. *Ohio. State ex rel. Attorney-General vs. Columbus Gas L. & C. Co.*, 34 Ohio St. 572, 32 Am. Rep. 390. *Fed. New Orleans Gas L. Co. vs. Louisiana L. & H. P. & M. Co.*, 115 U. S. 650, bk. 29 L. ed. 516, 6 Sup. Ct. Rep. 252.

28. Motives which induce police regulations will not be inquired into in judicial proceedings; e. g. where such ordinance restricts gas-works to certain limits court will not inquire whether such ordinance was adopted for purpose of protecting and favoring certain named corporation engaged in manufacture and sale of gas.—*Dobbins vs. Los Angeles*, 139 Cal. 179, 184, 96 Am. St. Rep. 95, 72 Pac. Rep. 970.

29. Rates to be charged for gas may be fixed.—City or town authorities in granting permission to lay down mains or pipes may impose as condition that no more than certain amount shall be charged for gas, and if company accepts franchise containing such terms and conditions it becomes binding contract.—*Muncie Nat. Gas Co. vs. Muncie*, 160 Ind. 97, 66 N. E. Rep. 436, 60 L. R. A. 822. See *Los Angeles City Water Co. vs. Los Angeles*, 88 Fed. Rep. 720, 731 (similar case, arising in California involving power to fix price of water).

30. Compare: *Lewisville N. G. Co. vs. State*, 135 Ind. 49, 34 N. E. Rep. 702, 21 L. R. A. 734 (overruling *Rushville vs. Rushville Natural Gas Co.*, 132 Ind. 575, 28 N. E. Rep. 853, 15 L. R. A. 321).

31. Terms and conditions may be imposed by city or town authorities, and it is not limited alone to the granting of franchise.—*Indianapolis vs. Consumers Gas T. Co.*, 140 Ind. 107, 49 Am. St. Rep. 183, 39 N. E. Rep. 433, 27 L. R. A. 514.

32. PROPERTY RIGHTS IN STREETS NOT CONFERRED where gas company is authorized, to lay its pipes, etc.—*Butcher vs. Providence Gas Co.*, 12 R. I. 149, 34 Am. Rep. 626.

33. PUBLIC NATURE OF BUSINESS of making and supplying gas.—"The business of manufacturing and distributing illuminating gas by means of pipes laid in streets of city is business of public character; it is exercise of franchise belonging to state; the services rendered and to be rendered for such grant are of public nature; companies engaged in such business owe duty to public; any unreasonable restraint upon performance of such duty is prejudicial to public interest and in contravention of public policy."—*People vs. Chicago Gas T. Co.*, 130 Ill. 268, 17 Am. St. Rep. 319, 22 N. E. Rep. 798, 8 L. R. A. 497; *Chicago Gas L. Co. vs. People's Gas Light Co.*, 121 Ill. 530, 2 Am. St. Rep. 124, 13 N. E. Rep. 169. *Ind. Portland N. G. & O. Co. vs. State ex rel. Keen*, 135 Ind. 54, 34 N. E. Rep. 818, 21 L. R. A. 639. *Ohio. State ex rel. Attorney-General vs. Columbus Gas L. & C. Co.*, 34 Ohio St. 572, 32 Am. Rep. 390; *Cincinnati H. & D. R. Co. vs. Bowling Green*, 57 Ohio St. 336, 49 N. E. Rep. 121, 41 L. R. A. 422. *Wis. Shepard vs. Milwaukee Gas L. Co.*, 6 Wis. 539, 70 Am. Dec. 479. *Fed. New Orleans Gas L. Co. vs. Louisiana L. & H. P. & M. Co.*, 115 U. S. 650, bk. 29 L. ed. 516, 6 Sup. Ct. Rep. 252.

III. CONTRACTS AND DEALINGS WITH CONSUMERS.

34. APPLICATION IN WRITING may be required by rule of company, and applicant may be required to sign reasonable regulations.—*Shepard vs. Milwaukee Gas L. Co.*, 6 Wis. 539, 70 Am. Dec. 479; *Shepard vs. Milwaukee Gas L. Co.*, 15 Wis. 318, 82 Am. Dec. 679.

35. Reasonable and unreasonable conditions being contained in the application which is offered to consumer for his signature, he need not sign it.—*Shepard vs. Milwaukee Gas L. Co.*, 15 Wis. 318, 82 Am. Dec. 679.

36. DISCRIMINATION NOT PERMITTED.—Company is bound to serve all of its patrons alike, and can impose on one of them no greater charge than it exacts of others.—*Cincinnati H. & D. R. Co. vs. Bowling Green*, 57 Ohio St. 336, 49 N. E. Rep. 121, 41 L. R. A. 422.

37. DUTY TO FURNISH GAS.—Law exacts of gas company duty to offer and supply gas impartially to all persons desiring its use within territory within which its business is confined, provided always such persons make necessary arrangements to receive which and comply with company's reasonable regulations and conditions.—*Visalia Gas & E. L. Co. vs. Sims*, 104 Cal. 326, 331, 43 Am. St. Rep. 105, 37 Pac. Rep. 1042; *Gallagher vs. Equitable Gas L. Co.*, 141 Cal. 699, 708, 75 Pac. Rep. 329. *Ill. Chicago Gas L. Co. vs. People's Gas L. Co.*, 121 Ill. 530, 2 Am. St. Rep. 124, 13 N. E. Rep. 169. *Ind. Portland N. G. & O. Co. vs. State*

ex rel. Keen, 135 Ind. 54, 34 N. E. Rep. 818, 21 L. R. A. 639; State vs. Portland N. G. & O. Co., 153 Ind. 483, 74 Am. St. Rep. 314, 53 N. E. Rep. 1089, 53 L. R. A. 413. Me. Brunswick Gas L. Co. vs. United States F. & L. Co., 85 Me. 532, 35 Am. St. Rep. 385, 27 Atl. Rep. 525. Mich. Williams vs. Mutual Gas Co., 52 Mich. 499, 50 Am. Rep. 266, 18 N. W. Rep. 236. Mo. St. Louis vs. St. Louis Gas L. Co., 70 Mo. 69. Ohio. Cincinnati H. & D. R. Co. vs. Bowling Green, 57 Ohio St. 336, 49 N. E. Rep. 121, 41 L. R. A. 422. Oreg. Mackin vs. Portland Gas Co., 38 Oreg. 120, 61 Pac. Rep. 134, 49 L. R. A. 596. Wis. Shepard vs. Milwaukee Gas L. Co., 6 Wis. 539, 70 Am. Dec. 479; Shepard vs. Milwaukee Gas L. Co., 15 Wis. 318, 82 Am. Dec. 679. Fed. Gibbs vs. Consolidated Gas Co., 130 U. S. 396, bk. 32 L. ed. 979, 9 Sup. Ct. Rep. 553.

38. Company is not free agent with power to contract or refuse to do so, but it is its duty upon demand to furnish gas.—Capital Gas Co. vs. Young, 109 Cal. 140, 144, 41 Pac. Rep. 869, 29 L. R. A. 463.

39. INJUNCTION WILL LIE to compel company to furnish gas in pursuance of statute.—Gallagher vs. Equitable Gas L. Co., 141 Cal. 699, 708, 75 Pac. Rep. 329. See Wood vs. Auburn, 87 Me. 287, 32 Atl. Rep. 906, 29 L. R. A. 376; Sickles vs. Manhattan Gas Light Co., 64 How. Pr. (N. Y.) 33, 66 Id. 304.

40. Clear right must be established by plaintiff in order to entitle him to peremptory writ of mandamus.—Mackin vs. Portland Gas Co., 38 Oreg. 120, 61 Pac. Rep. 134, 49 L. R. A. 596.

41. Injunction against charging higher rate will be granted at suit of city, and need not be alleged that city is gas consumer, it being sufficient that city made contract which is being violated.—Muncie Nat. Gas. Co. vs. Muncie, 160 Ind. 97, 66 N. E. Rep. 436, 60 L. R. A. 822.

42. MANDAMUS LIES—To compel company to furnish gas.—The right of court to compel by mandamus company engaged in furnishing gas for general consumption to supply all persons along its main or conduits who offer to and do comply with its rules and regulations is undoubted and unquestioned.—Ind. Portland N. G. & O. Co. vs. State ex rel. Keen, 135 Ind. 54, 34 N. E. Rep. 818, 21 L. R. A. 639. N. Y. People vs. Manhattan Gas L. Co., 45 Barb. 136. Oreg. Mackin vs. Portland Gas

Co., 38 Oreg. 120, 61 Pac. Rep. 134, 49 L. R. A. 596.

43. To fix reasonable rate.—Where company arbitrarily exacts an excessive price for its service resort can be had to the courts to compel it to furnish lights at a reasonable price.—Cincinnati H. & D. R. Co. vs. Bowling Green, 57 Ohio St. 336, 49 N. E. Rep. 121, 41 L. R. A. 422.

44. MEASURE OF DAMAGES FOR REFUSAL TO SERVE GAS is such that plaintiff is entitled to be compensated for his pecuniary loss and also for inconvenience and annoyance experienced by him in business, in transaction of which he needs gas, and such measure of damages is not open to objection that it allows him punitive or vindictive damages.—Shepard vs. Milwaukee Gas L. Co., 15 Wis. 318, 82 Am. Dec. 679.

45. PENALTY IS NOT RECOVERABLE WITHOUT PAYMENT, and payment is not excused because of refusal of company to accept the money unless deposit in bank is made in accordance with §1500.—Baker vs. San Francisco Gas & E. Co., 141 Cal. 710, 712, 75 Pac. Rep. 342.

See post §1500 and note.

46. RULES AND REGULATIONS.—Gas companies have right to make all such needful rules and regulations for their own convenience and the security of public as are reasonable and just, and to exact promise of conformity thereto from consumers; but this rule must not be capricious, arbitrary, oppressive, or unreasonable.—Mackin vs. Portland Gas Co., 38 Oreg. 120, 61 Pac. Rep. 134, 49 L. R. A. 596; Shepard vs. Milwaukee Gas L. Co., 6 Wis. 539, 70 Am. Dec. 479.

47. TIME CONTRACT FIXING PRICE.—Consideration.—Where hotel proprietor agrees to take gas instead of electricity, and to pay certain amount for gas as long as he uses it, he is entitled to gas at price stated as long as he is willing to take it, and contract is not void for want of mutuality because it does not oblige company to furnish gas for definite period of time.—Gallagher vs. Equitable Gas L. Co., 141 Cal. 699, 708-709, 75 Pac. Rep. 329.

48. UNREASONABLE RATES.—Company cannot arbitrarily fix price at which it will furnish light to those who desire to use it.—Cincinnati H. & D. R. Co. vs. Bowling Green, 57 Ohio St. 336, 49 N. E. Rep. 121, 41 L. R. A. 422.

§ 630. WHEN CORPORATIONS MAY REFUSE TO SUPPLY GAS. No corporation is required to lay service pipe where serious obstacles exist to laying it, unless the applicant, if required, deposits in advance, with the corporation, a sum of money sufficient to pay the cost of laying such service pipe, or his proportion thereof.

History: Enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXXV, p. 593; see introductory note to this title.

Security for gas to be consumed.—Rule of company allowing it to demand security for gas to be consumed, or deposit of money to

secure payment thereof, is reasonable and will be upheld by the court.—Shepard vs. Milwaukee Gas L. Co., 6 Wis. 539, 70 Am. Dec. 479.

§ 630a. WHEN CORPORATIONS MAY REFUSE TO SUPPLY ELECTRIC CURRENT FOR LIGHT. No corporation is required to construct lines for the

be formed subject to the provisions of this title, and with all the rights, duties, and powers herein specified. Such corporations shall be known as mutual building and loan associations, and the words "mutual building and loan association" shall form part of the name of every such corporation.

[What articles must set forth.] The articles of incorporation, in setting forth the purposes for which the corporation is formed, shall state that it is formed to encourage industry, frugality, home-building, and savings among the stockholders; the accumulation of savings; the loaning to its stockholders of the funds so accumulated, with the profits and earnings; and the repayment to each stockholder of his savings and profits, when they have accumulated to a certain sum, or at any time when he shall desire the same, as provided in the by-laws, or when the corporation shall desire to repay the same; and shall also state that it is formed for all the purposes specified in this title.

History: Enacted March 31, 1891, Stats. and Amdts. 1891, pp. 252-253; see introductory note to this title.

1. Applied, cited, construed, referred to, etc.
2. Commissioners of building and loan associations—Power of.
3. Definition of "building and loan association."
4. Estoppel to attack corporate capacity.
5. Name of corporation—Indicates its character.
6. Nature of land and improvement company.
7. Receiver—Grounds for appointment of.
8. Savings and loan corporations.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc.**, in: *Bay City B. & L. Assoc. vs. Broad*, 136 Cal. 525, 69 Pac. Rep. 225 (referred to).

2. **COMMISSIONERS OF BUILDING AND LOAN ASSOCIATIONS—Powers and duties of.**—See *HENNING'S GENERAL LAWS*, tit. *Building and Loan Associations*.

3. **DEFINITION OF "BUILDING AND LOAN ASSOCIATION."**—See post § 648 and note.

4. **ESTOPPEL TO ATTACK CORPORATE CAPACITY.**—Where association has apparently and in good faith attempted to comply with law governing its organization, borrowers who have received and accepted its stock and dealt with it in its corporate capacity are estopped to question its entity; it is a de facto corporation, and may maintain suits and actions against those who have dealt with it, to enforce their obligations, and state only can complain of its defective organization.—*Washington Nat. B. L. & I. Assoc. vs. Stanley*, 38 Oreg. 319, 84 Am. St. Rep. 793, 63 Pac. Rep. 489, 58 L. R. A. 816.

As to estoppel generally to deny corporate existence, see ante § 285 and note.

5. **NAME OF CORPORATION** where it contains words "building and loan association,"

indicates that it is a building and loan association.—See *People ex rel. Commissioners vs. Union B. & L. Assoc.*, 127 Cal. 400, 404, 59 Pac. Rep. 692.

6. **NATURE OF LAND AND IMPROVEMENT COMPANY.**—Corporation organized for purpose of acquiring real property by purchase or otherwise, buying and selling same, building hotels and street railroads and otherwise developing lands, stands, in suit by judgment creditor to compel payment of unpaid stock subscriptions, upon same basis as ordinary commercial corporations having subscribed capital stock.—*Potter vs. Dear*, 95 Cal. 578, 579, 30 Pac. Rep. 777.

7. **RECEIVER—Grounds for appointment of.**—Under Stats. 1893, p. 231, § 9, which provides that where commissioners of building and loan associations report that building and loan association is conducting its business in an unsafe manner, such as to render its further proceeding hazardous to public and those having funds in its custody, attorney-general may institute action in which court may issue injunction and appoint one or more receivers; state is not entitled to have receiver appointed unless court finds that there was fraud or mismanagement on part of directors or officers of corporation, or want of capacity on their part to liquidate and settle its business and affairs economically in interest of its creditors and stockholders.—*People ex rel. Commissioners vs. Union B. & L. Assoc.*, 127 Cal. 400, 407, 408, 59 Pac. Rep. 692.

As to provisions of Stats. 1893, see *HENNING'S GENERAL LAWS*, tit. *Building and Loan Associations*.

8. **Savings and loan corporations.**—See ante §§ 571-580 and notes.

§ 634. **CAPITAL STOCK. DUES. SHARES, ETC.** The capital stock of such corporations shall be paid in by stockholders in regular, equal, periodical payments, at such times and in such amounts as shall be provided in the by-laws. Such periodical payments shall be called dues. And at or before a time to be stated in the by-laws, each stockholder shall pay to the corporation, upon each share of stock held by him, such an amount of dues as the by-laws shall provide;

and the payment of dues shall so continue on each share of stock issued till it reaches its matured value, or is withdrawn, canceled, or forfeited. The capital stock shall consist of such accumulated dues, together with the earnings and profits of the corporation, and shall in no case exceed two million dollars, except as to corporations now existing. It shall be divided into shares of matured or par value of one hundred dollars, or two hundred dollars each, as shall be provided in the articles of incorporation and fixed by the by-laws.

[Certificates—Series.] Certificates of stock shall be issued to each stockholder on the first payment of dues by him. The shares shall be issued in yearly, half yearly, or quarterly series, except in corporations now existing, in such amounts in each series, and at such times, as shall be determined by the board of directors. No share of a prior series shall be issued after the issuing of shares in a new series. Shares which have not been pledged as a security for the repayments of a loan shall be called free shares. Shares that have been so pledged shall be called pledged shares. All stock matured and surrendered or canceled in any series shall become the property of the corporation, and may be issued in any subsequent series. Payment of dues on shares of stock in each series shall commence from the time that shares began to be issued in such series.

[Fines.] Any such corporation shall have power by its by-laws to impose and collect a fine from each stockholder not exceeding ten per cent of the defaulted amount, for every neglect or refusal to make his payments of dues, or premium, or interest, when due, and to impose and collect a like fine successively on every regular pay-day during such default.

[Entrance and transfer fees.] Every such corporation hereafter formed shall also have power to charge an entrance fee upon each share of stock issued, not exceeding ten cents on each share, and may also charge a transfer fee not exceeding ten cents on each share, all of which shall be paid into the treasury and accounted for as all other funds of the association; provided, that building and loan associations heretofore incorporated may continue to charge and dispose of such entrance and transfer fees as are prescribed by the by-laws of such corporation.

[Payments in advance.] Payment of dues or interest may be made in advance, but no association shall allow interest on such advance payments at a greater rate than six per cent per annum, nor for a longer period than one year.

History: Enacted March 21, 1891, Stats. and Amts. 1891, pp. 253-254; see introductory note to this title.

1. Applied, cited, construed, referred to, etc.
2. By-laws enter into contract with stockholder.
3. Fiction that borrower is stockholder.
4. Liability of stockholder—Estoppel resulting from voting.
5. Mutual rights of members.
6. Power to issue paid-up stock and preferred stock.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO,** etc., in: Bay City B. & L. Assoc. vs. Broad, 136 Cal. 525, 69 Pac. Rep. 225 (referred to).

2. By-laws enter into contract between association and borrowing stockholder.—McNamara vs. Oakland B. & L. Assoc., 131 Cal. 326, 343-345, 63 Pac. Rep. 670. Colo. Hawley vs. North Side B. & L. Assoc., 11 Colo. App. 93,

52 Pac. Rep. 408. Ind. Wohlford vs. Citizens' Bldg., L. & S. Assoc., 140 Ind. 662, 40 N. E. Rep. 694, 29 L. R. A. 177. Iowa. Rabbitt vs. Willcoxen, 103 Iowa 35, 64 Am. St. Rep. 152, 72 N. W. Rep. 306, 38 L. R. A. 183. Utah. Stilwell vs. People's Bldg., L. & S. Assoc., 19 Utah 257, 57 Pac. Rep. 14.

3. **FICTION THAT BORROWER IS STOCKHOLDER.**—Where the borrower subscribes for shares in loan association merely to obtain loan, and is required to make monthly payments upon such shares, and by terms of contract "maturity of the shares" extinguishes debt and cancels stock, borrower is stockholder in fiction, and not in fact, and actual relation between parties is only that of creditor and debtor.—Fidelity Sav. Assoc. vs. Shea, 6 Idaho 405, 55 Pac. Rep. 1023.

4. LIABILITY OF STOCKHOLDER FOR LOSS—Estoppel resulting from voting.—Stockholder is equally bound with other stockholders to stand his proportion of expenses and losses incident to its management; and where stockholder has, by proxy, voted for resolution which resulted in charging his and other outstanding stock with loss, he is effectually estopped from denying that action of directors, taken in obedience to will of the stockholders, was warranted.—*Betz vs. People's Bldg., L. & S. Assoc.*, 22 Utah 149, 61 Pac. Rep. 334.

5. MUTUAL RIGHTS OF MEMBERS.—Members of building association, whether borrowers or non-borrowers, have mutual interest in its affairs, and, sharing alike in its earn-

ings, must assist alike in bearing its losses.—*Eversmann vs. Schmitt*, 58 Ohio St. 174, 53 Am. St. Rep. 632, 41 N. E. Rep. 139, 29 L. R. A. 184.

6. POWER TO ISSUE PAID-UP STOCK AND PREFERRED STOCK.—Power to issue stock payable in instalments would seem to imply power to issue prepaid stock, and there is no apparent reason why it should not be so. But, in absence of charter provision or by-laws authorizing it to do so, or contract to that effect, it could not issue preferred stock; that is, stock entitled to be first paid, after payment of general indebtedness, over other stock of association.—*Hohenshell vs. Home S. & L. Assoc.*, 140 Mo. 566, 41 S. W. Rep. 948.

§ 635. RETIRING FREE SHARES. AMOUNT ANNUALLY. The directors may, at their discretion, under the regulations prescribed in their by-laws, retire the free shares of any series of stock, at any time after four years from the date of their issue, by enforcing the withdrawal of the same; but whenever there shall remain in any series, at the expiration of five years after the date of its issue, an excess above one hundred free shares of the par value of two hundred dollars each, or two hundred free shares of the par value of one hundred dollars each, then it shall be the duty of the directors to retire annually twenty-five per centum of such excess existing at said expiration of five years after the date of its issue, so that no more than one hundred free shares shall remain in such series at the expiration of nine years from the date of its issue;

[Sum appropriated for that purpose.] Provided, that no more than one half the monthly receipts be used for that purpose; and thereafter the directors may, in their discretion, retire such other free shares as they consider to the best interest of the association to retire;

[Retirement determined by lot.] Provided, that whenever, under the provisions of this section, the withdrawal of shares is to be enforced, the shares to be retired shall be determined by lot, drawn from all free shares in the series, as shall be regulated by the by-laws, and the holders thereof shall be paid the amount actually paid in, and the full amount of earnings at the date of last apportionment of profits.

History: Enacted March 31, 1891, Stats. and Amdts. 1891, p. 254; see introductory note to this title; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 386, held unconstitutional, see history, § 4 ante.

Applied, cited, construed, referred to, etc., 525, 69 Pac. Rep. 225 (referred to in general in: *Bay City B. & L. Assoc. vs. Broad*, 136 Cal. way in connection with other sections).

§ 636. MATURED STOCK. AMOUNT APPLICABLE TO PAYMENT OF. When the stock in any series shall have reached its matured value, payment of dues thereon shall cease, and all the stockholders in such series who have borrowed from the association shall be entitled to have their securities returned to them, and a satisfaction of the mortgages made by them to the association; and the holders of free shares of stock in such series shall be paid out of the funds of the association the matured value thereof, with such rate of interest as shall be determined by the by-laws, from the time the board of directors shall declare such share to have matured until paid;

[One third of receipts only to be applied.] But at no time shall more than one third of the receipts of the association be applicable to the payment of matured

shares, without the consent of the board of directors. The order of the payment of the matured shares shall be determined by the by-laws.

History: Enacted March 31, 1891, Stats. and Amdts. 1891, p. 254; see introductory note to this title.

1. Applied, cited, construed, referred to, etc.
2. Cancellation of mortgage—When right accrues.
3. Claim against association upon withdrawal—By-laws considered.
4. Complaint—Must show statutory right to withdraw.
5. Same—Rate of interest must be alleged.
6. Notice of withdrawal without actual withdrawal.
7. Same—Subsequent participation in meetings.
8. Right of withdrawal—Vested under by-law.
9. Status of member after withdrawal.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Bay City B. & L. Assoc. vs. Broad, 136 Cal. 525, 526, 69 Pac. Rep. 225 (referred to).

2. THE CANCELANON OF MORTGAGE—WHEN RIGHT ACCRUES.—Borrowing member is one who receives in advance par value of his shares, and agrees, in consideration of such advance, to pay weekly dues on shares and interest on loan, until dues paid and dividends declared and not paid him are equal to par value of his shares. He then ceases to be member, and is entitled to cancellation of mortgage given to secure the obligations arising from the loan.—Eversmann vs. Schmitt, 53 Ohio St. 174, 53 Am. St. Rep. 632, 41 N. E. Rep. 139, 29 L. R. A. 184.

3. CLAIM AGAINST ASSOCIATION UPON WITHDRAWAL.—By-laws, etc., considered.—Upon withdrawal of member of building and loan association, he assumes role of creditor having claim subject to his antecedent agreement of membership. He is only entitled to his money upon terms and in manner provided in by-laws, and, if amount per month which association may pay upon withdrawals is limited, it is necessary for a withdrawing member, in an action on his claim, to allege and prove that, at time he commenced his action, there were funds in treasury applicable to payment of his claim.—Stilwell vs. People's Bldg., L. & S. Assoc., 19 Utah 257, 57 Pac. Rep. 14.

4. COMPLAINT—Must show statutory right to withdraw.—Where stockholder has paid in his subscriptions and he claims right to withdraw and to be paid out of funds of associa-

tion, he must allege in his complaint facts entitling him to such statutory right, and must aver that defendant association was organized under provisions of statute relating to building and loan associations.—Whitefoot vs. National Frat. B. & L. Assoc., 18 Mont. 164, 44 Pac. Rep. 514.

5. Rate of interest must be alleged, and complaint which does not state rate of interest as fixed by by-laws, is not sufficient to entitle plaintiff to demand stated rate of interest.—Whitefoot vs. National Frat. B. & L. Assoc., 18 Mont. 164, 44 Pac. Rep. 514.

6. NOTICE OF WITHDRAWAL WITHOUT ACTUAL WITHDRAWAL.—Where a member gives notice of withdrawal, but continues his membership with association and continues to pay his monthly dues, and does not rely on his notice of withdrawal, he remains member and is bound by whatever action officers may properly take in management and transaction of business of association.—Hawley vs. North Side B. & L. Assoc., 11 Colo. App. 93, 52 Pac. Rep. 408. See Decatur Bldg. & I. Co. vs. Neal, 97 Ala. 717, 12 So. Rep. 780.

7. Participation in stockholders' meetings after giving notice of withdrawal required by by-law, constitutes waiver of right to withdraw under such notice.—Decatur Bldg. & I. Co. vs. Neal, 97 Ala. 717, 12 So. Rep. 780.

8. RIGHT OF WITHDRAWAL GIVEN BY BY-LAW to non-borrowing stockholder is vested right, given him by contract, of which corporation cannot deprive him, by amending or repealing its by-laws, without his consent.—Holyoke B. & L. Assoc. vs. Lewis, 1 Colo. App. 127, 27 Pac. Rep. 872.

As to power to make, repeal, and amend by-laws, see ante §§ 301, 303, 304 and notes.

9. STATUS OF MEMBER AFTER WITHDRAWAL.—Where member is permitted by by-law to withdraw by giving sixty days' notice, at expiration of term of notice his withdrawal is complete; and, as between himself and other shareholders, he ceases to be member, and becomes creditor of association to amount of his legal claim.—Enterprise B. & L. Soc. vs. Bolin, 12 Colo. App. 304, 55 Pac. Rep. 740.

§ 637. MONEY TO BE LOANED. INSTALMENTS TO BE UNIFORM. The moneys in the hands of the treasurer, and such sums as may be borrowed by the corporation for the purpose, shall be loaned out in open meeting to the member who shall bid the highest premium, or may be loaned at such premium as may be fixed, from time to time, by the board of directors; and the premium may be deducted from the amount of the loan, or such proportion may be deducted as the by-laws shall provide, and in that case the balance of said premium shall be payable in such instalments as the by-laws shall determine; provided, however, that where the premium is payable in instalments, the number of instalments into which the same is divided shall be uniformly applicable to all loans made by the corpora-

tion, and shall be payable at the times and in the manner as provided in the by-laws; and provided further, that in no case shall the amount loaned exceed the matured value of the shares pledged to secure the loan.

History: Enacted March 31, 1891, Stats. and Amdts. 1891, pp. 254-255; see introductory note to this title.

1. Applied, cited, construed, referred to, etc.
2. Construction of contract—Conflict of laws.
3. Same—Note, mortgage, and contract construed together.
4. Same—Ordinary rules applicable—Construction by parties.
5. Dual relation of borrowing stockholder.
6. Equity does not favor contract.
7. Estoppel of borrower to object to non-compliance with statute.
8. Insolvency—Contract terminated.
9. Premium fixed by directors—Borrower cannot object.
10. Public policy not contravened.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc.**, in: *Bay City B. & L. Assoc. vs. Broad*, 136 Cal. 525, 526, 69 Pac. Rep. 225 (construed and held not applicable).

2. **CONSTRUCTION OF CONTRACT—Conflict of laws.**—Where contract for loaning of money is made with building association, secured by trust deed upon real property situated in state where contract is made, it must be construed according to laws of state where land is situated and contract made, and not according to laws of state where contract happens to have been made payable.—*Snyder vs. Fidelity Sav. Assoc.*, 23 Utah 291, 64 Pac. Rep. 870. See *People's Bldg., L. & S. Assoc. vs. Fowble*, 17 Utah 122, 53 Pac. Rep. 999.

3. **Note, mortgage, and contract construed together.**—Note, mortgage, and contract under which borrowing member becomes member of association, are all to be construed together as parts of same contract.—*Interstate S. & L. Assoc. vs. Knapp*, 20 Wash. 225, 55 Pac. Rep. 48.

4. **Ordinary rules applicable**, and courts are justified in adopting interpretation which parties themselves by their acts have placed upon contract.—*Snyder vs. Fidelity Sav. Assoc.*, 23 Utah 291, 64 Pac. Rep. 870.

5. **DUAL RELATION OF BORROWING STOCKHOLDER.**—Where stockholder borrows from association he occupies dual relation to corporation of borrower and stockholder, each of which is distinct from other.—*McNamara vs. Oakland B. & L. Assoc.*, 131 Cal. 336, 341, 63 Pac. Rep. 670; *Home Seekers L. Assoc. vs. Gleeson*, 133 Cal. 312, 314, 65 Pac. Rep. 617. See *Interstate S. & L. Assoc. vs. Knapp*, 20 Wash. 225, 55 Pac. Rep. 48; *Tilley vs. American B. & L. Assoc.*, 52 Fed. Rep. 618, 622.

6. **EQUITY DOES NOT FAVOR CONTRACT.**

—Kind of contract for loaning of money which building and loan associations usually make "is not such as commends itself to special favor of court of equity."—*Sawtelle vs. North Am. Sav. & B. Co.*, 14 Utah 443, 48 Pac. Rep. 211.

7. **ESTOPPEL OF BORROWER TO OBJECT TO NON-COMPLIANCE WITH STATUTE.**—Where corporation loans money to member or stockholder, and stockholder conveys land subject to mortgage, and corporation releases mortgage and takes another mortgage from stockholder's assignee, in action to enforce mortgage so given by assignee, he will not be permitted to make defense that corporation had loaned money to him in mode other than that fixed by this section.—*Bay City B. & L. Assoc. vs. Broad*, 136 Cal. 525, 526, 69 Pac. Rep. 225.

8. **INSOLVENCY—Effect upon borrowing members.**—Where such association becomes insolvent, and receiver is appointed, the courts do and should treat changed condition of affairs as equivalent to termination of contract between it and its members, and hold that neither corporation nor its receiver is entitled to enforce subsequently accruing liabilities, either for dues or premiums, and that mortgages given by borrowing members may be foreclosed, though time for ultimate satisfaction, cancelation, and release of same has not expired.—*Hale vs. Barker*, 129 Cal. 419, 423, 62 Pac. Rep. 168.

9. **PREMIUM FIXED BY DIRECTORS, AND NOT BY BIDDING.**—Where, in violation of statute, money is not loaned to highest bidder or bidders, but premium is fixed by directors, the irregularity is one of which borrowers cannot complain.—*McNamara vs. Oakland B. & L. Assoc.*, 131 Cal. 336, 346, 63 Pac. Rep. 670.

10. **PUBLIC POLICY NOT CONTRAVENED BY BUILDING AND LOAN ASSOCIATIONS.**—Organization of such corporations, terms of their membership, and relations of members to each other and to corporation, and terms upon which such corporations shall transact business within state, are solely within province of legislature, and are controlled by its views of public policy.—*Interstate S. & L. Assoc. vs. Knapp*, 20 Wash. 225, 55 Pac. Rep. 48.

By-laws contravened by such action of the board of directors, and the association suffers loss, a non-borrowing member might have redress, but the borrowing member cannot complain, because himself a party to the violation and receiving the benefits thereof.—*Ibid.*

§ 638. **RATE OF INTEREST ON AND SECURITY FOR LOANS.** The rate of interest on all loans may be fixed by the by-laws; but in case the by-laws fail to fix the rate, then it shall be fixed from time to time by the board of directors. For every loan made a note or obligation secured by a first mortgage or deed of trust upon unencumbered real estate shall be given, accompanied by a transfer and

pledge to the association of at least one share of stock as collateral security for the repayment of the loan, or in lieu of a mortgage or deed of trust there may be pledged and transferred to the association for the payment of the loan, free shares, the withdrawal value of which under the by-laws at the time of such borrowing shall exceed the amount borrowed and interest thereon for six months.

[Repayments.] At the discretion of the board of directors the borrower may repay the loan and all arrears and interest and fines thereon at any time upon surrender of the shares pledged for the loan.

History: Enacted March 31, 1891, Stats. and Amdts. 1891, p. 255; amended February 25, 1897, Stats. and Amdts. 1897, p. 30; March 11, 1901, Stats. and Amdts. 1900-1, p. 268; see introductory note to this title. In force March 11, 1901.

1. Applied, cited, construed, referred to, etc.

2. Interest—General provisions.

3. Usurious rate of interest.

1. Applied, cited, construed, referred to, etc.
in: Bay City B. & L. Assoc. vs. Broad, 136 Cal.
525, 69 Pac. Rep. 225 (referred to).

2. Interest—General provisions as to.—See
post §§ 1914-1920 and notes.

2. Usurious rate of interest.—See 4 Am. &
Eng. Encyc. of L. (2d ed.) 1071-1074.

As to illegality of usurious rate of interest,
see notes 34 L. R. A. 201; 35 Id. 244.

§ 638a. WITHDRAWAL OR SURRENDER OF STOCK, NOTICE OF. A stockholder desiring to withdraw from the association or to surrender a part or all of his stock may do so by giving thirty days' notice, in writing, of his intention. On the expiration of such notice, he is entitled to receive the full amount paid in upon the stock surrendered, together with such proportion of the earnings thereon as the by-laws may provide, or as may be fixed by the board of directors; but not more than one half of the monthly receipts in any one month must be applied to withdrawals for that month, without the consent of the board of directors, and no stockholder must be permitted to withdraw whose stock is pledged to the association as security for a loan until such loan is fully paid. Such withdrawals must be paid in succession in the order that the notices of intention are given.

History: Enacted March 22, 1905, Stats. and Amdts. 1905, c. DLXV, p. 753.

§ 639. ARREARS IN PAYMENTS. NOTICE. FORFEITURE. Whenever any member shall be six months in arrears in the payment of his dues upon free shares, the secretary shall give him notice thereof, in writing, and a statement of his arrearages, by mailing the same to him at the last post-office address given by him to the association, and if he shall not pay the same within two months thereafter, the board of directors may, at their option, declare his shares forfeited; and at the time of such forfeiture the withdrawal value thereof shall be determined and stated, and the defaulting member shall be entitled to withdraw the same without interest, upon such notice as shall be required of a withdrawing shareholder. Whenever a borrowing member shall be six months in arrears on the payment of his dues, or interest, or premium, the whole loan shall become due, at the option of the board of directors; and they may proceed to enforce collection upon the securities held by the association.

[Enforcement—Withdrawal value to be credited.] The withdrawal value, at the time of the commencement of the action, of all shares pledged as collateral security for the loan, shall be applied to the payment of the loan, and said shares, from that time, shall be deemed surrendered to the association.

History: Enacted March 31, 1891, Stats. and Amdts. 1891, p. 255; see introductory note to this title.

1. Applied, cited, construed, referred to, etc.
2. Attorney's fee upon foreclosing mortgage allowable.
3. Cancellation of paid mortgage in suit to foreclose.
4. Crediting borrower with monthly payments, etc.
- 5-7. Same—Decreeing sale of stock without crediting borrower—Partial payments.
8. Defaulting borrower not entitled to accounting.
9. Delay in declaring default immaterial.
10. Fines do not accrue after default declared.
11. Foreclosure—Association has absolute right on default.
12. Same—Receiver must obtain order of court.
13. Tender of payment—Offer to withdraw insufficient.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc.**, in: *Underhill vs. Santa Barbara Land, B. & L. Co.*, 93 Cal. 300, 306, 28 Pac. Rep. 1049 (referred to); *Vercoutere vs. Golden State Land Co.*, 116 Cal. 410, 414, 48 Pac. Rep. 375 (construed); *McNamara vs. Oakland B. & L. Assoc.*, 131 Cal. 336, 341, 63 Pac. Rep. 670 (referring to § 639, as it stood originally); *Bay City B. & L. Assoc. vs. Broad*, 136 Cal. 525, 526, 69 Pac. Rep. 225 (referred to).

2. **ATTORNEY'S FEES UPON FORECLOSING MORTGAGE** may be allowed by court when mortgage expressly so provides; and if mortgager intends to resist payment thereof on ground that association's attorney was its regular salaried attorney he must allege and prove that fact.—*McNamara vs. Oakland B. & L. Assoc.*, 131 Cal. 336, 346, 347, 63 Pac. Rep. 670. See *Hale vs. Stenger*, 22 Wash. 699, 63 Pac. Rep. 554.

3. **CANCELLATION OF NOTE AND MORTGAGE UPON PAYMENT.**—In suit by association against borrowing member to foreclose mortgage and obtain personal judgment upon note, it appearing that defendant has made all payments required by his contract and the rules and by-laws of association, and that he is entitled to have his note and mortgage canceled by surrender of his certificate of stock, court, upon prayer of defendant, will decree such cancellation.—*Pioneer B. & L. Co. vs. Kasper*, 7 Kan. App. 313, 53 Pac. Rep. 623.

4. **CREDITING THE BORROWER WITH MONTHLY PAYMENTS, ETC.**—In absence of any express stipulation in charter or by-laws of mortgage which would necessitate adoption of different rule, where association becomes insolvent, monthly payments which borrowing member has made are, in an action against him to foreclose, to be credited as monthly payments of money borrowed.—*Hale vs. Barker*, 129 Cal. 419, 423-425, 62 Pac. Rep. 163.

Distinguishing Eversman vs. Schmitt, 53 Ohio St. 174, 53 Am. St. Rep. 632, 41 N. E. Rep. 139, 29 L. R. A. 184.

5. **Decreeing sale of stock without crediting debt with payments.**—Where borrowing stockholder gives mortgage to secure loan made to him and also pledges his stock to association, the court, in action to foreclose mortgage, etc., need not credit instalments paid on stock by defendant on mortgage debt, but may give judgment for amount of principal of loan and unpaid interest thereon, and for unpaid instal-

ments on stock, and may decree foreclosure of mortgage and sale of the shares.—*Home Seekers L. Assoc. vs. Gleeson*, 133 Cal. 312, 313, 314, 65 Pac. Rep. 617 (wherein the court declared that cases from other states holding that borrower is entitled to credit for instalments paid on stock are "mostly based on peculiar statutory provisions," and followed *McNamara vs. Oakland B. & L. Assoc.* 131 Cal. 336, 348, 63 Pac. Rep. 670, which, by mistake of reporter in 133 Cal. 312, is given as "132 Cal. 247," which is another case of same name).

6. **Contra**—The current of authority is not uniform as to application to be made of sums paid by borrower, but it is submitted that tendency of modern authority is in direction of holding, whether association is solvent or not, that all such payments, under whatever name made, whether as premiums, dues, fines, or otherwise, are payments upon the loan. In equity mortgager is entitled to have them credited accordingly.—See *Idaho. Stevens vs. Home S. & L. Assoc.*, 5 Idaho 741, 51 Pac. Rep. 779, 986. *N. C. Strauss vs. Carolina Interstate B. & L. Assoc.*, 117 N. C. 303, 53 Am. St. Rep. 585, 23 S. E. Rep. 450, 30 L. R. A. 693. *Oreg. Western L. & Sav. Co. vs. Houston*, 38 Oreg. 377, 65 Pac. Rep. 611. *S. C. Buist vs. Bryan*, 44 S. C. 121, 51 Am. St. Rep. 737, 21 S. E. Rep. 537, 29 L. R. A. 127. *Utah. Hale vs. Thomas*, 20 Utah 426, 59 Pac. Rep. 241. *Wash. Hale vs. Stenger*, 22 Wash. 516, 61 Pac. Rep. 156 (to which case particular reference is made as containing an elaborate citation of authorities, on application for rehearing), 22 Wash. 699, 63 Pac. Rep. 554.

7. **Rule of partial payments not applicable.**—Where bond and mortgage provide for payment to association of named amount per month as interest on loan instead of providing for payment of interest at certain rate per annum, credit must be made against principal sum for all monthly payments of dues and premiums on stock, but it is not proper to apply rule of partial payments and to make deductions for interest upon sums paid by borrower as interest.—*People's Bldg., L. & S. Assoc. vs. Kroeger*, 22 Utah 134, 61 Pac. Rep. 559.

8. **DEFAULTING BORROWER NOT ENTITLED TO ACCOUNTING.**—Shareholder who has borrowed money from association and given it a mortgage, if he defaults in payments of interest and instalments on his shares, is not entitled to claim full benefit of all his partial payments, nor is he entitled to accounting of unascertainable earnings, nor are there any equitable principles which would warrant court in holding that association should pay back to him moneys which, by terms of his agreement, were to be rendered upon his default for benefit of other shareholders. He is entitled to get present cash value of his shares by public sale, proceeds to be credited upon his note or notes.—*McNamara vs. Oakland B. & L. Assoc.*, 131 Cal. 336, 348, 63 Pac. Rep. 670.

9. **Delay in declaring default.**—Default does not become fixed for purposes of adjustment of account until association has taken advantage of its right to declare entire amount due and payable; and while contract is in force association is not only entitled to interest upon

note at rate specified therein, but is also entitled to have payments made upon certificate of stock, and if association does not immediately declare default contract continues and is in full force until such time as association sees fit to assert its right.—United States Sav. & L. Co. vs. Cade, 15 Wash. 33, 45 Pac. Rep. 656.

10. FINES ACCRUING AFTER DEFAULT DECLARED.—After the association exercises its option to declare borrowing member in default payment of fines ceases; nor can association, after commencement of action to foreclose, continue to assess fines.—Murphy vs. Goodland B. & L. Assoc., 2 Kan. App. 330, 43 Pac. Rep. 863.

11. FORECLOSURE.—Association has absolute right to foreclose mortgage, in accordance with its terms, upon default, in accordance with law governing ordinary mortgages.—

Haensel vs. Pacific States S. L. & B. Co., 135 Cal. 41, 44, 67 Pac. Rep. 33.

12. Receiver cannot foreclose under power of sale contained in mortgage given to association without first obtaining an order of court authorizing him to do so.—Strauss vs. Carolina Interstate B. & L. Assoc., 117 N. C. 308, 53 Am. St. Rep. 585, 23 S. E. Rep. 450, 30 L. R. A. 693.

13. TENDER OF PAYMENT.—Offer to withdraw insufficient.—Where borrowing stockholder gives notice to association that he desires to withdraw his shares of stock and accredit them on his loan, which regulations of association permit him to do, and that he be permitted to pay balance due and have mortgage canceled, there is no such tender as will prevent association from foreclosing.—Haensel vs. Pacific States S. L. & B. Co., 135 Cal. 41, 42, 44, 67 Pac. Rep. 33.

§ 640. MAY BUY REAL ESTATE. Any such association may purchase at any sale, public or private, any real estate upon which it may have a mortgage, judgment, lien, or other encumbrance, or in which it may have an interest; and may sell, convey, lease, or mortgage the same at pleasure to any person or persons.

History: Enacted March 31, 1891, Stats. and Amdts. 1891, p. 255; see introductory note to this title.

Applied, cited, construed, referred to, etc., in: Underhill vs. Santa Barbara L. B. & I. Co., 93 Cal. 300, 309, 28 Pac. Rep. 1049 (referred to); Verconture vs. Golden State Land Co., 116 Cal. 410, 414, 48 Pac. Rep. 375 (referred to); Mc-

Namara vs. Oakland B. & L. Assoc., 131 Cal. 336, 341, 63 Pac. Rep. 670 (referring to § 640, as it stood originally); Bay City B. & L. Assoc. vs. Broad, 136 Cal. 525, 69 Pac. Rep. 225 (referred to).

§ 641. MAY BORROW MONEY. Any association organized in pursuance of the provisions of this act may borrow money for the purposes of making loans or paying withdrawals.

History: Enacted March 31, 1891, Stats. and Amdts. 1891, p. 255; see introductory note to this title; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 387, held unconstitutional, see history, § 4 ante.

1. Applied, cited, construed, referred to, etc.
2. Debts beyond subscribed capital.

1. Applied, cited, construed, referred to, etc., in: Verconture vs. Golden State Land Co., 116 Cal. 410, 414, 48 Pac. Rep. 375 (referred to); McNamara vs. Oakland B. & L. Assoc., 131 Cal. 336, 341, 63 Pac. Rep. 670 (referring to § 641, as it stood originally); Bay City B. & L. Assoc. vs. Broad, 136 Cal. 525, 69 Pac. Rep. 225 (referred to).

2. Debts beyond subscribed capital stock

may be created, notwithstanding § 309, construed in connection with § 354. The statute does not limit power of corporation, but only regulates and checks exercise of such power, and, in action to foreclose mortgage given by association to secure its note, it is no defense that indebtedness was created beyond subscribed capital stock.—Underhill vs. Santa Barbara L. B. & I. Co., 93 Cal. 300, 309-311, 28 Pac. Rep. 1049.

See ante §§ 309, 354 and notes.

§ 642. PROFITS AND LOSSES. Profits and losses shall be apportioned at least annually, and shall be apportioned to all the shares in each series outstanding at the time of such apportionment, according to the actual value of such shares as distinguished from their withdrawal value.

History: Enacted March 31, 1891, Stats. and Amdts. 1891, pp. 255-256; see introductory note to this title.

Applied, cited, construed, referred to, etc., in: Underhill vs. Santa Barbara L. B. & I. Co., 93 Cal. 300, 308, 28 Pac. Rep. 1049 (referred to); Verconture vs. Golden State Land Co., 116 Cal. 410, 414, 48 Pac. Rep. 375 (held not appli-

cable); McNamara vs. Oakland B. & L. Assoc., 131 Cal. 336, 342, 63 Pac. Rep. 670 (referring to § 642, as it stood originally); Bay City B. & L. Assoc. vs. Broad, 136 Cal. 525, 69 Pac. Rep. 225 (referred to).

§ 643. MEMBERSHIP. WHO MAY HOLD SHARES. EXEMPTION. Any person of full age and sound mind may become a member of the association, by taking one or more shares therein, and subscribing to the by-laws, and annexing to his signature his post-office address. A minor may hold shares in the name of the parent, guardian, or next friend as trustee. The shares of stock in any such corporation held by any person, to the value of one thousand dollars, shall be exempt from execution.

History: Enacted March 31, 1891, Stats. and Amdts. 1891, p. 256; see introductory note to this title; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 387, held unconstitutional, see history, § 4 ante.

Applied, cited, construed, referred to, etc., in: *Underhill vs. Santa Barbara L. B. & I. Co.*, 93 Cal. 300, 306, 28 Pac. Rep. 1049 (referred to); *Vercoutere vs. Golden State Land Co.*, 116 Cal. 410, 414, 48 Pac. Rep. 375 (held not appli-

cable); *McNamara vs. Oakland B. & L. Assoc.*, 131 Cal. 336, 341, 342, 63 Pac. Rep. 670 (referring to § 643, as it stood originally); *Bay City B. & L. Assoc. vs. Broad*, 136 Cal. 525, 69 Pac. Rep. 225 (referred to).

§ 644. ANNUAL REPORT. OTHER REPORTS. PERJURY. FORFEITURE. Every association organized under the provisions of this act, and every other association doing a like business, shall annually make a full report, in writing, of the affairs and condition of such corporation, within thirty days after its annual meeting, to the bank commissioners of this state. Such report shall be verified by the oath of the officers making the same, and a copy of the same shall be delivered to every stockholder, from the office of the corporation, who may call for such report. Every association shall make any further reports which the said commissioners may require, and in such form and as to such matters relating to the condition and conducting of the business of the association as such commissioners may designate; and said bank commissioners may at any time examine into the affairs of any and every of said associations. Any wilful false swearing in making and verifying said reports shall be deemed perjury.

[Forfeit for failure to report.] Any such association which shall fail to furnish the bank commissioners any such report required, within thirty days after demand, shall forfeit the sum of ten dollars per day for every day such report shall be delayed or withheld; which may be recovered in an action brought by the attorney-general in the name of the people of this state; and all moneys so recovered shall be paid to the treasurer of the state, who shall pay the same into the "bank commissioners' fund."

[Annual report to be published.] The state bank commissioners shall annually publish a full report of the condition of all associations formed under the provisions of this title, and every other association doing a like business in this state, in the same manner as they are now required to do in reference to savings banks.

History: Enacted March 31, 1891, Stats. and Amdts. 1891, p. 256; see introductory note to this title.

Applied, cited, construed, referred to, etc., in: *Underhill vs. Santa Barbara L. B. & I. Co.*, 93 Cal. 300, 306, 28 Pac. Rep. 1049 (referred to); *Vercoutere vs. Golden State Land Co.*, 116 Cal. 410, 414, 48 Pac. Rep. 375 (held

not applicable); *McNamara vs. Oakland B. & L. Assoc.*, 131 Cal. 336, 341, 342, 63 Pac. Rep. 670 (referring to § 644, as it stood originally); *Bay City B. & L. Assoc. vs. Broad*, 136 Cal. 525, 69 Pac. Rep. 225 (referred to).

§ 645. FOREIGN BUILDING AND LOAN ASSOCIATION. DEPOSIT REQUIRED. EFFECT OF FAILURE TO COMPLY. No mutual building and loan association, or company, association, or corporation, organized under the laws of any other state or territory, to carry on a business of a like character to that

authorized by this title, shall be allowed to do business, or to sell their stock in this state, without first having deposited with the state controller, or secretary of state, the sum of fifty thousand dollars in money, or United States or municipal bonds of this state, or in mortgages upon real estate located within this state, as a guarantee fund for the protection and indemnity of residents of the state of California, with whom such companies, associations, or corporations shall do business; the fund so deposited to be paid by the custodian thereof to the residents of California only, and not then until proof of claim by final judgment has been filed with the custodian of said fund against such foreign company, association, or corporation. Any of the securities so deposited may be withdrawn at any time upon others, herein provided for, of like amount, being substituted in lieu thereof.

[Agents of companies not complying, guilty of a misdemeanor.] Any person or persons who shall be found in this state as agent, or in any other capacity, representing such foreign company, association, or corporation, which has not complied with the provisions of this section, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine not exceeding one thousand dollars, or by imprisonment in the county jail not exceeding twelve months, or by both such fine and imprisonment.

History: Enacted March 31, 1891, *Stats. and Amdts. 1891*, pp. 256-257; see introductory note to this title.

1. Applied, cited, construed, referred to, etc.
2. Statute not retroactive.

1. Applied, cited, construed, referred to, etc., in: *Underhill vs. Santa Barbara L. B. & I. Co.*, 98 Cal. 300, 306, 28 Pac. Rep. 1049 (referred to); *Vercoutere vs. Golden State Land Co.*, 116 Cal. 410, 414, 48 Pac. Rep. 375 (held not applicable); *McNamara vs. Oakland B. & L. Assoc.*, 131 Cal. 336, 341, 342, 63 Pac. Rep.

670 (referring to § 645, as it stood originally); *Bay City B. & L. Assoc. vs. Broad*, 136 Cal. 525, 69 Pac. Rep. 225 (referred to).

2. Statute not retroactive, and mortgage executed to foreign society prior to enactment of statute, if lawful when made, is enforceable regardless of whether or not this section has been complied with.—*Hale vs. Stenger*, 22 Wash. 516, 61 Pac. Rep. 156 (decided under similar statute).

§ 646. ELECTION TO CONTINUE BUSINESS. CERTIFICATE. Any building and loan association, now existing and heretofore incorporated, desiring to continue its existence under the provisions of this title, may do so if the holders of [1] a majority of the stock, at [2] their regular annual meeting, or at a [3] special meeting of the stockholders called for that purpose, shall so elect. The notice of the meeting, whether regular or special, shall [1] state as one of the objects of the meeting, to vote on the question whether the corporation shall continue its existence under the provisions of this title; and the notice of meeting [2] shall be published as required by section three hundred and one; and, in addition thereto, [3] a similar notice shall be mailed to each stockholder at his post-office address.

Within thirty days after the holders of a majority of the stock at any such meeting have voted to continue the existence of the corporation under the provisions of this title, the secretary of the corporation shall, [1] under oath, [2] make and subscribe, as such secretary, [3] a certificate, in writing, stating [a] the calling of such meeting, [b] the fact that the holders of a majority of the stock voted to continue the existence of the corporation under this title, [4] which shall be filed in the office of the county clerk in which its original articles of incorporation have been filed, and [5] shall file in the office of the secretary of state a certified copy thereof, according to the provisions of section two hundred and ninety-six; and the secretary of state shall issue his usual certificate, as provided in said section.

Thereupon, such corporation shall be subject to all the provisions of this title, as though originally incorporated under the provisions hereof, except that no change in its name or amount of capital stock shall be made; but the name shall be the same as contained in the original articles.

History: Enacted March 31, 1891, Stats. and Amdts. 1891, p. 257; see introductory note to this title.

1. Applied, cited, construed, referred to, etc.
2. Failure to elect to continue existence.

1. Applied, cited, construed, referred to, etc., in: *Underhill vs. Santa Barbara L. B. & I. Co.*, 93 Cal. 300, 306, 28 Pac. Rep. 1049 (referred to); *Vercoutere vs. Golden State Land Co.*, 116 Cal. 410, 414, 43 Pac. Rep. 375 (held not applicable); *McNamara vs. Oakland B. & L. Assoc.*, 131 Cal. 336, 339, 341, 342, 63 Pac. Rep.

670 (construed and applied); *Bay City B. & L. Assoc. vs. Broad*, 136 Cal. 525, 69 Pac. Rep. 225 (referred to).

2. Failure to elect to continue existence under this section will have effect of preventing provisions of Stats. 1891, p. 252, from applying to the association.—*McNamara vs. Oakland B. & L. Assoc.*, 131 Cal. 336, 341, 63 Pac. Rep. 670.

§ 647. SUBJECT TO PROVISIONS RELATING TO BANK COMMISSIONERS.

All corporations doing the business of building and loan associations in this state shall be subject to the provisions of this title relating to the bank commissioners.

History: Enacted March 31, 1891, Stats. and Amdts. 1891, p. 257; see introductory note to this title.

Applied, cited, construed, referred to, etc., in: *Underhill vs. Santa Barbara L. B. & I. Co.*, 93 Cal. 300, 306, 28 Pac. Rep. 1049 (referred to); *Vercoutere vs. Golden State Land Co.*, 116 Cal. 410, 414, 43 Pac. Rep. 375 (held

not applicable); *McNamara vs. Oakland B. & L. Assoc.*, 131 Cal. 336, 341, 342, 63 Pac. Rep. 670 (referring to § 647, as it stood originally); *Bay City B. & L. Assoc. vs. Broad*, 136 Cal. 525, 69 Pac. Rep. 225 (referred to).

§ 648. BUILDING AND LOAN ASSOCIATION. DEFINITION OF TERM.

The name "building and loan association," as used in this act, shall include all corporations, societies, or organizations, or associations doing a savings and loan or investment business on the building society plan, viz.: loaning its funds to its members or its shareholders, and whether issuing certificates of stock which mature at a time fixed in advance or not.

History: Enacted March 31, 1891, Stats. and Amdts. 1891, p. 257; see introductory note to this title.

1. Applied, cited, construed, referred to, etc.
2. Judicial definition.
3. Object of building and loan associations.

1. Applied, cited, construed, referred to, etc., in: *Lake Shore Cattle Co. vs. Modoc L. & L. S. Co.*, 127 Cal. 37, 39, 59 Pac. Rep. 206 (erroneously citing this section instead of Code Civil Procedure § 648); *McNamara vs. Oakland B. & L. Assoc.*, 131 Cal. 336, 342, 63 Pac. Rep. 670 (referring to § 648 of original code as having been repealed); *Bay City B. & L. Assoc. vs. Broad*, 136 Cal. 525, 69 Pac. Rep. 225 (referred to).

2. Judicial definition.—"As the cases put it, these are mutual benefit organizations, and are neither in fullest extent corporations nor partnerships. Undoubtedly, they partake of elements of both, and we must look to the law applicable to each."—*Hawley vs. North Side B. & L. Assoc.*, 11 Colo. App. 93, 52 Pac. Rep. 408.

3. Object of building and loan association is mutual and equitable benefit of all its members.—*Bets vs. People's Bldg. L. & S. Assoc.*, 22 Utah 149, 61 Pac. Rep. 334.

§ 648½. TAXATION OF. ACT TAXING STOCKS NOT APPLICABLE (repealed).

History: Enacted March 31, 1891, Stats. and Amdts. 1891, pp. 257-258; see introductory note to this title; repealed March 22, 1905, Stats. and Amdts. 1905, c. DLXV, p. 759.

Applied, cited, construed, referred to, etc., in: *Bay City B. & L. Assoc. vs. Broad*.

136 Cal. 525, 69 Pac. Rep. 225 (referred to with other sections in general way).

TITLE XVII.

COLLEGES AND SEMINARIES OF LEARNING.

§ 649. Articles of incorporation; contents of. § 651. Existing corporations may reincorporate
§ 650. Board of trustees; term; quorum; powers. under this act.

[This is a new title added by Act March 14, 1885, Stats. and Amdts. 1885, p. 132.]

§ 649. **ARTICLES OF INCORPORATION; CONTENTS OF.** Any number of persons who may desire to establish a college or seminary of learning, may incorporate themselves as provided in this part, except that in lieu of the requirements of section two hundred and ninety, the articles of incorporation shall contain:

1. The name of the corporation.
2. The purpose for which it is organized.
3. The place where the college or seminary is to be conducted.
4. The number of its trustees, which shall not be less than five nor more than fifteen, and the names and residences of the trustees. The term for which the trustees named and their successors are to hold office may also be stated. If it is desired that the trustees, or any portion of them, shall belong to any organization, society, or church, such limitation shall be stated.
5. The names of those who have subscribed money or property to assist in founding the seminary or college, together with the amount of money and description of property subscribed.

History: Enacted March 14, 1885, Stats. and Amdts. 1885, p. 133. In effect March 14, 1885.

§ 650. **BOARD OF TRUSTEES; TERM; QUORUM; POWERS.** Unless otherwise provided in the articles of incorporation the board of trustees shall, as soon as organized, so classify themselves that one fifth of their number shall go out of office every year, and thereafter the trustees shall hold office for five years.

[**Quorum.**] A majority of the trustees shall constitute a quorum for the transaction of business, and the office of the corporation shall be at the college or seminary.

[**Power of trustees.**] The trustees shall have power:

1. [**Elect president.**] To elect, by ballot, annually one of their number as president of the board.
2. [**Fill vacancy.**] Upon the death, removal out of the state, or other vacancy in the office, or expiration of the term of any trustee, to elect another in his place; provided, that where there are graduates of the institution, such graduates may, under such rules as the board shall prescribe, nominate persons to fill vacancies in the board of trustees. Such nominations shall be considered by the board, but it may reject any or all such nominations, and of its own motion appoint others.
3. [**Elect other trustees.**] To elect additional trustees; provided, the whole number elected shall never exceed fifteen at any one time.
4. [**Declare vacancy.**] To declare vacant the seat of any trustee who shall absent himself from eight succeeding [successive] meetings of the board.
5. [**Hold property.**] To receive and hold, by purchase, gift, devise, bequest, or

grant, real or personal property for educational purposes connected with the corporation, or for the benefit of the institution.

6. [To mortgage and lease property.] To sell, mortgage, lease, and otherwise use and dispose of the property of the corporation in such manner as they shall deem most conducive to the prosperity of the corporation.

7. [Course of study.] To direct and prescribe the course of study and discipline to be observed in the college or seminary.

8. [Appoint president.] To appoint a president of the college or seminary, who shall hold his office during the pleasure of the trustees.

9. [Appoint professors.] To appoint such professors, tutors, and other officers as they shall deem necessary, who shall hold their offices during the pleasure of the trustees.

10. [Issue diplomas.] To grant such literary honors as are usually granted by any university, college, or seminary of learning in the United States, and in testimony thereof to give suitable diplomas under their seal, and the signature of such officers of the corporation and the institution as they shall deem expedient.

11. [Salaries.] To fix salaries of the president, professors, and other officers and employees of the college or seminary.

12. [By-laws.] To make all by-laws and ordinances necessary and proper to carry into effect the preceding powers and necessary to advance the interests of the college or seminary; provided, that no by-laws or ordinance shall conflict with the constitution or laws of the United States, or of this state.

History: Enacted March 14, 1885, Stats. and Amdts. 1885, p. 133-134. In effect March 14, 1885.

§ 651. EXISTING CORPORATIONS MAY REINCORPORATE UNDER THIS ACT. Any educational corporation, or body claiming to be such, now existing, may, by a unanimous vote of those of its trustees present at a special meeting called for that purpose, and of which due notice shall be given to each trustee, convey all its property, rights, and franchises, to a corporation organized under this title. The fact that due notice of the meeting was given to each trustee shall be conclusively proven by the entries in the minutes of the corporation or body making the conveyance. Said minutes shall be certified to be correct by the president and secretary.

History: Enacted March 14, 1885, Stats. and Amdts. 1885, p. 134. In effect March 14, 1885.

TITLE XVIII.

CONSOLIDATION OF COLLEGES AND INSTITUTIONS OF HIGHER EDUCATION.

§ 652. Societies and organizations authorized to consolidate. § 653. Specific grants, etc., must not be diverted.

§ 652. SOCIETIES AND ORGANIZATIONS AUTHORIZED TO CONSOLIDATE. Whenever any benevolent, religious, or fraternal organization or society, having a grand lodge, assembly, conference, or other legislative or representative head in the state of California, having two or more colleges or institutions of higher education under its patronage, shall, for the purpose of greater efficiency and simplicity in the administration of its educational interests, desire to consoli-

date such institutions under one management, such organization or society shall be and is authorized to consolidate such institutions under one management by complying with the following provisions:

1. **[New corporation—Trustees—Term of office.]** Such grand lodge, assembly, conference, or other legislative or representative head having authorized a consolidation of its institutions, a new corporation shall be formed. The board of trustees of the new corporation shall at first consist of the persons constituting the boards of trustees of the several institutions, respectively, thus consolidated, and others; provided, the number of trustees shall not exceed forty-five. The board of trustees shall be so classified that the term of office of one third of its number shall expire each year; the successors of such trustees, as their terms expire, shall be elected by such grand lodge, assembly, conference, or other legislative or representative head, at its annual meeting.

2. **[Annual reports.]** The said board of trustees shall report annually to the grand lodge, assembly, conference, or other legislative or representative head controlling it, the condition of affairs of such corporation, and the amount and manner of its receipts and expenditures.

History: Enacted Feb. 23, 1893, Stats. and Amdts. 1893, p. 4.

§ 653. SPECIFIC GRANTS, ETC., MUST NOT BE DIVERTED. The several boards of trustees of the institutions thus consolidated shall be and are hereby authorized and directed to transfer all property, real and personal, held by them, to the new corporation, as herein constituted, together with all powers, privileges, and authority conferred upon or enjoyed by them under their respective charters or acts of incorporation. The new corporation receiving such property shall assume all indebtedness and liabilities of such institutions as are thus consolidated, but shall not transfer such property from one location to another, except by an affirmative vote of not less than three fourths of the said board of trustees of the new corporation, nor divert specific grants, donations, or bequests from the purposes for which such grants, donations, or bequests were made. That after the boards of trustees have conveyed the property, real and personal, of the various institutions to the new corporation, as hereinabove provided, and the same has been accepted by the said new corporation, then the franchises held by the corporations thus consolidating shall cease, and the said corporations shall be thereby dissolved.

History: Enacted Feb. 23, 1893, Stats. and Amdts. 1893, p. 4; amended March 9, 1895, Stats. and Amdts. 1895, p. 40.

TITLE XIX.

CO-OPERATIVE BUSINESS CORPORATIONS.

§ 653a. Purposes for which may be formed.

[A new title added by Act March 21, 1905, Stats. and Amdts. 1905, c. CDXXXVI, p. 594.]

§ 653a. PURPOSES FOR WHICH MAY BE FORMED. Co-operative business corporations may be formed for doing any lawful business, and dividing a portion of their profits among persons other than their stockholders. Each of such corporations may, in its by-laws, in addition to the matters specified in section three

hundred and three, provide the amount of profits which must be divided among persons other than its stockholders, and the manner in which and the persons among whom such division may be made.

History: Enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXXVI, p. 594.

- 1, 2. Compliance with acts—Necessity of—Formation.
- 3-6. Constitution—Provision considered.
7. Definition of "co-operative."
- 8-11. Nature and effect of incorporation.
12. Shareholder—Right to withdraw money.
13. Same—Relation between association and.
14. Same—Rights to secede to expel officers.
15. Responsibility to government—Forfeiture of charter.

As to how private corporations may be formed, see ante § 285 and note.

As to purposes for which private corporations may be formed, see ante § 286 and note.

Amount due member of co-operative bank subject to trustee process.—*Atwood vs. Dumas*, 149 Mass. 167, 21 N. E. Rep. 236, 3 L. R. A. 416.

Bank, see para. 8, 9, 10, 12, 13 this note.

1. COMPLIANCE WITH STATUTES in substantial degree is requisite in formation of corporations.—*Mokelumne Hill Canal & Min. Co. vs. Woodbury*, 14 Cal. 424, 426, 73 Am. Dec. 658; *Harris vs. McGregor*, 29 Cal. 124, 127; *Bates vs. Wilson*, 14 Colo. 140, 24 Pac. Rep. 99; *Attorney-General vs. Hanchett*, 42 Mich. 436, 4 N. W. Rep. 182.

2. MATERIAL OMISSION IN ACTS DECLARED NECESSARY in process of incorporation, is fatal to existence of corporation and may be taken advantage of collaterally in any form in which fact of incorporation can properly be called in question.—*Mokelumne Hill Canal & Min. Co. vs. Woodbury*, 14 Cal. 424, 426, 73 Am. Dec. 658.

3. CONSTITUTIONAL PROVISION requiring title to be expressed, is not contravened by act entitled "an act in relation to the formation of co-operative associations."—*Finnegan vs. Noerenberg*, 52 Minn. 244, 38 Am. St. Rep. 552, sub nom. *Finnegan vs. Knights L. B. Assoc.*, 53 N. W. Rep. 1150, 18 L. R. A. 778.

4. CONSTITUTIONAL REQUIREMENTS fulfilled by act entitled "an act to require of butter and cheese factories on the co-operative plan to give bonds, and to prescribe penalties for the violation thereof."—*Hawthorn vs. People*, 109 Ill. 302, 313, 50 Am. Rep. 610.

5. CONSTITUTIONAL PROVISIONS DECLARING "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall be inviolate" not infringed by statute requiring members of institution worked on the co-operative plan to give bonds.—*Hawthorn vs. People*, 109 Ill. 302, 313, 50 Am. Rep. 610.

6. PROVISION OF § 36 PROVIDING that "each stockholder of a corporation or joint stock association shall be individually and personally liable for his proportion of all its debts and liabilities" takes from legis-

lature all power over subject, and if considered as controlling and repealing § 32 it may be questioned whether it does not invalidate statutes passed regulating question of personal liability.—*Robinson vs. Bidwell*, 22 Cal. 379, 389.

7. "CO-OPERATIVE" DEFINED to be "promoting the same end; helping; acting generally to accomplish the same end."—*Hawthorn vs. People*, 109 Ill. 302, 313, 50 Am. Rep. 610.

8. CO-OPERATIVE INSTITUTIONS such as co-operative banks formerly appeared as voluntary unincorporated associations.—*Atwood vs. Dumas*, 149 Mass. 167, 21 N. E. Rep. 236, 3 L. R. A. 416. See *Merrill vs. McIntire*, 79 Mass. (13 Gray) 157; *Baxter vs. McIntire*, 79 Mass. (13 Gray) 168; *Delano vs. Wild*, 88 Mass. (6 Allen) 1, 83 Am. Dec. 605.

9. CO-OPERATIVE BANKS stand in same relation as savings banks with regard to bank commissioners.—*Atwood vs. Dumas*, 149 Mass. 167, 21 N. E. Rep. 236, 3 L. R. A. 416.

10. CO-OPERATIVE BANKS resemble savings banks.—*Atwood vs. Dumas*, 149 Mass. 167, 21 N. E. Rep. 236, 3 L. R. A. 416.

11. INCORPORATION OF CO-OPERATIVE institution merely facilitates carrying out purposes for which formed, advancing funds contributed by members to such of them as make the best offers, and dividing profits among the shareholders.—*Atwood vs. Dumas*, 149 Mass. 167, 21 N. E. Rep. 236, 3 L. R. A. 416.

12. Shareholder in co-operative bank instituted under statute, may withdraw money paid in, together with profits; subject, however, to fines and losses.—*Atwood vs. Dumas*, 149 Mass. 167, 21 N. E. Rep. 236, 3 L. R. A. 416.

13. Relation between corporation (co-operative bank) and shareholder depositing money therein is that of debtor and creditor, and constitutes contractual or quasi contractual obligation to pay.—*Atwood vs. Dumas*, 149 Mass. 167, 21 N. E. Rep. 236, 3 L. R. A. 416. See *Totten vs. Tison*, 54 Ga. 139; *Burt vs. Rattle*, 31 Ohio St. 118, 130.

14. MEMBERS OF ASSOCIATION have no authority to secede for the purpose of expelling its regular-elected officers, declaring their offices vacant and constituting themselves successors either by opposition to the authority under which officers act in performance of their functions or irregularity in the performance of their functions.—*McCallion vs. Hibernia Sav. & L. Soc.*, 70 Cal. 163, 166, 12 Pac. Rep. 114.

15. Acts required of individuals seeking to become incorporated and which are not prerequisite to assumption of corporate powers, render corporation responsible only to government in direct proceedings to forfeit charter.—*Mokelumne Hill C. & Min. Co. vs. Woodbury*, 14 Cal. 424, 427, 73 Am. Dec. 658.

TITLE XX.

CO-OPERATIVE BUSINESS ASSOCIATIONS.

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| <p>§ 653b. Formation and purposes of.</p> <p>§ 653c. Rights, interests, and liabilities of members.</p> <p>§ 653d. The articles of association.</p> <p>§ 653e. The by-laws.</p> <p>§ 653f. Execution against the association or its members.</p> <p>§ 653g. Purpose of the association, how may be altered.</p> | <p>§ 653h. Powers of the association.</p> <p>§ 653i. Consolidation of associations.</p> <p>§ 653j. Dissolution and winding up of association.</p> <p>§ 653k. Quo warranto to inquire into the right of an association to do business.</p> <p>§ 653l. What corporations or associations are not affected by this title.</p> |
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[A new title added by Act March 21, 1905, Stats. and Amdts. 1905, c. CDXXXVII, pp. 595-599.]

§ 653b. **FORMATION AND PURPOSE OF.** Five or more persons may form a co-operative association for the transaction of any lawful business, whether for profit or not, or for the promotion of any educational, industrial, benevolent, social, or political purpose. Such association must not have any capital stock, but must issue membership certificates to each member.

[Certificate of membership—Transfer.] Such certificate cannot be assigned, so that the assignee can, by its transfer, become a member of the association, but, by a resolution of its board of directors, such certificate may be transferred, and the transferee made a member in lieu of the last former holder.

History: Enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXXVII, p. 595.

- 1-3. Association—Comprehensiveness of term.
4. Definition of co-operative society.
5. Bonds—Statutory requirements as to.
6. Constitution of—Essentials to.
- 7-8. Proof of existence.

1. **ASSOCIATIONS**, whether corporations or partnerships, are in broad sense co-operative, as all members either by labor or capital or both co-operate to common purpose.—*Finnegan vs. Noerenberg*, 52 Minn. 238, 244, 38 Am. St. Rep. 552, sub nom. *Finnegan vs. Knights L. B. Assoc.*, 53 N. W. Rep. 1150, 18 L. R. A. 778.

2. **LITTLE DIFFERENT** from special or limited partnership or joint stock companies at common law.—*Mokelumne Hill C. Co. vs. Woodbury*, 14 Cal. 265, 267, 78 Am. Dec. 658; *Chater vs. San Francisco S. R. Co.*, 19 Cal. 219, 246; *Robinson vs. Bidwell*, 22 Cal. 379, 389.

3. **LITTLE MORE** than joint stock companies under English laws resembling limited partnerships under special articles.—*Chater vs. San Francisco S. R. Co.*, 19 Cal. 219, 246.

4. **CO-OPERATIVE SOCIETY** "a union of individuals, common laborers, or smaller capitalists formed . . . for prosecution in common of productive enterprise, profits being shared in accordance with amount of capital or labor contributed by each member."—*Finnegan vs. Noerenberg*, 52 Minn. 239, 244, 38 Am. St. Rep. 522, sub nom. *Finnegan vs. Knights L. B. Assoc.*, 53 N. W. Rep. 1150, 18 L. R. A. 778.

5. **BONDS**.—Statute compelling co-operative society to give bonds is within the police power

of state as protecting parties from fraud and wrong.—*Hawthorn vs. People*, 109 Ill. 302, 313, 50 Am. Rep. 610.

6. **ESSENTIALS TO CONSTITUTION OF CORPORATION**.—Existence of charter or some law under which powers assumed may lawfully be created and used by party to the suit, of the rights, claimed to be conferred by such charter or law.—*Finnegan vs. Noerenberg*, 52 Minn. 239, 244, 38 Am. St. Rep. 552, sub nom. *Finnegan vs. Knights L. B. Assoc.*, 53 N. W. Rep. 1150, 18 L. R. A. 778. See *East Norway Lake Church vs. Froislie*, 37 Minn. 447, 35 N. W. Rep. 260.

7. **PROOF OF EXISTENCE**.—Rule that existence of corporation may be proved by producing charter and showing acts of user under it, has no application to corporation formed under provisions of general statute requiring certain acts to be performed before corporation can be considered in esse.—*Mokelumne Hill Canal & Min. Co. vs. Woodbury*, 14 Cal. 424, 426, 78 Am. Dec. 658.

8. Certificate legally defective, for want of conformity to statutory requirements under which made, not admissible in evidence as proof of corporation in esse.—*McCallion vs. Hibernia Sav. & L. Soc.*, 70 Cal. 163, 166, 12 Pac. Rep. 114. See *Mokelumne Hill Canal & Min. Co. vs. Woodbury*, 14 Cal. 424, 425, 73 Am. Dec. 658; *Harris vs. McGregor*, 29 Cal. 124, 127; *People vs. Selfridge*, 52 Cal. 331; *Los Angeles H. B. vs. Spires*, 126 Cal. 541, 544, 58 Pac. Rep. 1049. See ante § 653a note.

§ 653c. **RIGHTS, INTERESTS, AND LIABILITY OF MEMBERS.** In such association the rights and interests of all members are equal, and no member can

have or acquire a greater interest therein than any other member has. At every election held pursuant to the by-laws each member must be entitled to cast one vote and no more.

[Who are eligible to membership.] All persons above the age of eighteen years, regardless of sex, are eligible to membership, if otherwise qualified and elected as the by-laws may provide. The by-laws must provide for the amount of the indebtedness which such association may incur.

[Liability of members.] And no member shall be responsible individually, or personally liable, for any of the debts or liabilities of the association in excess of his proportion of such indebtedness; but in case of the failure and insolvency of such association, may be required to pay any unpaid dues or instalments which have, before such insolvency, become due from such member to the association, pursuant to its by-laws.

History: Enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXXVII, p. 595.

1, 2. Personal liability—How waived.

3. Same—Notice of qualification of inferred.

4, 5. Same—Legislative regulation of.

6. Same—Stipulations as to, limitations of.

1. Personal liability of stockholder may be waived by special contract or in any other mode, or limited or qualified to extent of creditor's claim, and fact that claim is founded upon constitution makes no difference.—*Robinson vs. Bidwell*, 22 Cal. 379, 388.

2. Creditor of joint stock association or partnership bound by agreement made by him in waiving or limiting personal responsibility of members.—*Robinson vs. Bidwell*, 22 Cal. 379, 389.

3. Notice of qualification of personal responsibility of members inferred to creditor from circumstances, such as publication in newspaper taken by creditor.—*Robinson vs. Bidwell*, 22 Cal. 379, 389; *Livingston vs. Roosevelt*, 4 John. (N. Y.) 251, 4 Am. Dec. 273.

4. Question of extent to which legislature may regulate personal responsibility of stockholders under constitution discussed but not decided.—*Robinson vs. Bidwell*, 22 Cal. 379, 389.

5. Question whether principle that creditor bound by stipulation in articles regulating or limiting personal responsibility would apply to regulation of liability by statute of which all parties presumed to have notice not decided.—*Robinson vs. Bidwell*, 22 Cal. 379, 389.

6. Stipulation or provision in articles of partnership association or by-laws regulating, qualifying, or limiting extent of personal responsibility binds dealing with same, with full notice, on ground of assent.—*Robinson vs. Bidwell*, 22 Cal. 379, 389. See *Dow vs. Sayward*, 12 N. H. 271, 275; *Ensign vs. Wanda*, 1 John. Cas. (N. Y.) 171; *Kerridge vs. Hesse*, 9 Car. & P. 200, 38 Eng. C. L. 78.

See ante § 653b note.

§ 653d. **THE ARTICLES OF ASSOCIATION.** Every association formed under this title must prepare articles of association, in writing, stating: The name of the association, the purpose for which it is formed, the place where its principal business is to be transacted, the term for which it is to exist, not to exceed fifty years, the number of the directors thereof, and the names and residences of those selected for the first year, the amount which each member is to pay upon admission as membership fee, and that each member signing the articles has actually paid in such sum, and that the interest and right of each member therein is to be equal.

[Subscription and acknowledgment; filing.] Such articles of association must be subscribed by the original associates or members, and acknowledged by each before some person competent to take an acknowledgment of a deed in this state. Such articles so subscribed and acknowledged must be filed in the office of the clerk of the county wherein the principal business of the association is to be transacted, and a copy thereof certified by such clerk, with the secretary of state, who must thereupon issue his certificate in the form, and having the effect prescribed in section two hundred and ninety-six.

History: Enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXXVII, pp. 595-596.

As to articles of association, what they must set forth, and number of directors, see ante § 290 and note.

As to filing articles of incorporation in the office of the clerk in the county in which the

principal office is to be located, see ante § 294 and note.

As to subscription and acknowledgment of articles of incorporation, see ante § 292 and note.

§ 653e. THE BY-LAWS. Every association formed under this title must, within forty days after it so becomes an association, adopt a code of by-laws for the government and management of the association, not inconsistent with this title. A majority of all the associates is necessary to the adoption of such by-laws, and the same must be written in a book, and subscribed by the members adopting the same, and the same cannot be amended or modified except by the vote of a majority of all the members, after notice of the proposed amendment, given as the by-laws may provide.

[What by-laws may provide—Number, terms, and compensation of officers.] Such association may, by its by-laws, provide for the time, place, and manner of calling and conducting its meetings; the number of directors, the time of their election, their term of office, the mode and manner of their removal, the mode and manner of filling vacancies in the board caused by death, resignation, removal, or otherwise, and the power and authority of such directors, and how many thereof are necessary to the exercise of the powers of such directors, which must be at least a majority; the compensation of any of the directors, or of any officer; the number of the officers, if any, other than the directors, and their term of office; the mode of removal, and the method of filling a vacancy; the mode and manner of conducting business; the mode and manner of conducting elections, and may provide for voting by ballots forwarded by mail or otherwise;

[Manner of conducting elections; qualifications and succession; expulsion.] Provided the method secures the secrecy of the ballot; the mode and manner of succession of membership, and the qualifications for membership, and on what conditions, and when membership must cease, and the mode and manner of expulsion of a member, subject to the right of an expelled member to have the board of directors appraise his interest in the association in either money, property, or labor, as the directors may deem best, and to have the money, property, or labor so awarded him paid, or delivered, or performed within forty days after expulsion;

[Amount of membership fees, dues, etc.] The amount of membership fee, and the dues, instalments, or labor which each member must be required to pay or perform, if any, and the manner of collection or enforcement, and for forfeiting or selling of membership interest for non-payment or non-performance;

[Withdrawal; ascertainment of interest.] The method, time, and manner of permitting the withdrawal of a member, if at all, and how his interest must be ascertained, either in money or property, and within what time the same must be paid or delivered to such member; the mode and manner of ascertaining the interest of a member at his death, if his legal representatives or none of them desire to succeed to the membership, and whether the same must be paid to his legal representatives in money, or property, or labor, and within what time the same must be paid, or delivered, or performed; such other things as may be proper to carry out the purpose for which the association was formed.

[Division of profits.] The by-laws must provide for the time and manner in which profits must be divided among the members, and what proportion of the

profits, if any, must be added to the common property or funds of the association. But the by-laws may provide that the directors may suspend or pass the payment of any such profit, or instalment of earnings, at their discretion.

[Recording and filing by-laws.] The by-laws and all amendments must be recorded in a book and kept in the office of the association, and a copy, certified by the directors, must be filed in the office of the county clerk where the principal business is transacted.

History: Enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXXVII, pp. 596-597.

As to recording and amending by-laws, see ante § 304 and note.

As to what by-laws may provide for, see ante § 303 and note.

As to by-laws, adoption of, etc., see ante § 301 and note.

As to what by-laws may be adopted, see monographic note 85 Am. Dec. 617-622.

§ 653f. EXECUTION AGAINST THE ASSOCIATION OR ITS MEMBERS.

The property of such association is subject to attachment and execution for its lawful debts. The interest of a member in such association, if sold upon execution, or any judicial or governmental order whatever, cannot authorize the purchaser to have any right, except to succeed, as a member in the association, with the consent of the directors, to the rights of the member whose interest is thus sold. If the directors choose to pay or settle the matter after such sale, they may either cancel the membership, and add the interest thus sold to the assets or common property of the association, or reissue the share or right to a new member upon proper payment therefor, as the directors may determine.

History: Enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXXVII, p. 597.

§ 653g. PURPOSE OF THE ASSOCIATION, HOW MAY BE ALTERED. The purpose of the business may be altered, changed, modified, enlarged, or diminished by a vote of two thirds of all the members, at a special election to be called for such purpose, of which notice must be given the same as the by-laws provide for the election of directors.

History: Enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXXVII, p. 597.

§ 653h. POWERS OF THE ASSOCIATION. Every association formed under this title has power of succession by its associate name for fifty years; in such name to sue and be sued in any court; to make and use a common seal, and alter the same at pleasure; to receive by gift, devise, or purchase, hold, and convey real and personal property, as the purposes of the association may require; to appoint such subordinate agents or officers as the business may require; to admit associates or members, and to sell or forfeit their interest in the association for default of instalments, or dues, or work, or labor required, as provided by the by-laws; to enter into any and all lawful contracts or obligations essential to the transaction of its affairs, for the purpose for which it was formed, and to borrow money, and issue all such notes, bills, or evidences of indebtedness or mortgage as its by-laws may provide for; to trade, barter, buy, sell, exchange, and to do all other things proper to be done for the purpose of carrying into effect the objects for which the association is formed.

History: Enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXXVII, pp. 597-598.

As to powers of association, see ante § 305 and note.

§ 653 i. CONSOLIDATION OF ASSOCIATIONS. Two or more associations formed and existing under this title, or under any pre-existing law authorizing their formation for the same purposes, may be consolidated, upon such terms, and for such purposes, and by such name, as may be agreed upon, in writing, signed by two thirds of the members of each such association.

[What agreement must state; filing; fee.] Such agreement must also state all the matters necessary to articles of association, and must be acknowledged by the signers before an officer competent to take an acknowledgment of deeds in this state, and be filed in the office of the county clerk of the county wherein the principal business of the association is to be transacted, and a certified copy thereof in the office of the secretary of state, and pay the same fees for filing and recording as required by this code for the filing and recording of the certified copy of the original articles of association; and from and after the filing of such certified copy, the former associations comprising the component parts cease to exist, and the consolidated association succeeds to all the rights, duties, and powers of the component associations, and is possessed of all the rights, duties, and powers prescribed in the agreement of consolidated association not inconsistent with this title, and is subject to all the liabilities and obligations of the former component associations, and succeeds to all the property and interests thereof, and may make by-laws and do all things permitted by this title.

History: Enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXXVII, p. 598.

§ 653 j. DISSOLUTION AND WINDING UP OF ASSOCIATION. Any association formed or consolidated under this title may be dissolved and its affairs wound up voluntarily by the written request of two thirds of the members. Such request must be addressed to the directors, and must specify reasons why the winding up of the affairs of the association is deemed advisable, and must name three persons who are members to act in liquidation and in winding up the affairs of the association, a majority of whom must thereupon have full power to do all things necessary to liquidation; and upon the filing of such request with the directors, and a copy thereof in the office of the county clerk of the county where the principal business is transacted, all power of the directors ceases and the persons appointed must proceed to wind up the association, and realize upon its assets, and pay its debts, and divide the residue of its money among the members, share and share alike, within a time to be named in said written request, or such further time as may be granted them by two thirds of the members, in writing, filed in the office of said county clerk; and upon the completion of such liquidation the said association must be deemed dissolved. No receiver of any such association, or of any property thereof, or of any right therein, can be appointed by any court, upon the application of any member, save after judgment of dissolution for usurping franchises at the suit of the state of California by its attorney-general.

History: Enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXXVII, p. 598.

§ 653 k. QUO WARRANTO TO INQUIRE INTO THE RIGHT OF AN ASSOCIATION TO DO BUSINESS. The right of any association claiming to be organized under this title to do business may be inquired into by quo warranto, at the suit of the attorney-general of this state, but not otherwise.

History: Enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXXVII, p. 599.

§ 6531. WHAT CORPORATIONS OR ASSOCIATIONS ARE NOT AFFECTED BY THIS TITLE. This title is not applicable to railroads, telegraph, telephone, banking, insurance, building and loan, or any other corporation, unless the special provisions of this code, applicable thereto, are complied with.

History: Enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXXVII, p. 599.

DIVISION SECOND.

PART I. PROPERTY IN GENERAL, §§ 654-749.

II. REAL OR IMMOVABLE PROPERTY, §§ 755-940.

III. PERSONAL OR MOVABLE PROPERTY, §§ 946-994.

IV. ACQUISITION OF PROPERTY, §§ 1000-1425.

PART I

PROPERTY IN GENERAL.

TITLE I. NATURE OF PROPERTY, §§ 654-663.

II. OWNERSHIP, §§ 669-742.

III. GENERAL DEFINITIONS, §§ 748-749.

TITLE I.

NATURE OF PROPERTY.

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| § 654. Property, what. | § 659. Land. |
| § 655. In what property may exist. | § 660. Fixtures. |
| § 656. Wild animals. | § 661. Fixtures attached to mines. |
| § 657. Real and personal. | § 662. Appurtenances. |
| § 658. Real property. | § 663. Personal property. |

§ 654. PROPERTY, WHAT. The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this code, the thing of which there may be ownership is called property.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Common-law definition.
3. Franchise as property.
4. Land—Term—"Property" includes what.
- 5, 6. Miner's "claim."
7. Same—Franchise, and raises presumption.
8. Same—Partition of.
- 9-11. Same—Taxable.
12. Personal property.
- 13, 14. Real property—Parol license.
15. Servitudes in gross—Transferable.
- 16, 17. "Owner"—Includes what.
18. Present fixed right of future enjoyment—Property.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Fudickar vs. East Riverside Irr. Dist.*, 109 Cal. 29, 39, 41 Pac. Rep. 1024 (construed and applied); *Spreckels vs. Spreckels*, 116 Cal. 329, 342, 58 Am. St. Rep. 170, 48 Pac. Rep. 228, 86 L. R. A. 497 (referred to in discussion); *In re Estate of Stanford*, 128 Cal. 112, 119, 58 Pac. Rep. 462, 45 L. R. A. 738 (construed and applied); *Higgins vs. City San Diego*, 131 Cal. 294, 302, 63 Pac. Rep. 470 (construed and applied).

2. COMMON-LAW DEFINITION.—"Property is the exclusive right of possessing, enjoying, and disposing of a thing; it is the right and interest which a man has in lands and chattels,

to the exclusion of others'; and the term is sufficiently comprehensive to include every species of estate, real or personal."—*McKeon vs. Bisbee*, 9 Cal. 137, 140, 70 Am. Dec. 642. See *Crandall vs. Blen*, 13 Cal. 15; *Davis vs. Mitchell*, 34 Cal. 31.

3. Franchise as property and sale under execution.—See ante § 383 and note.

4. LAND.—Term "property," as applied to lands, embraces all titles, legal or equitable, perfect or imperfect. — *Teschemacher vs. Thompson*, 18 Cal. 11, 24, 79 Am. Dec. 151; *Leese vs. Clark*, 20 Cal. 388; *Thompson vs. Dooksum*, 68 Cal. 593, 597, 10 Pac. Rep. 199. See *Soulard vs. United States*, 29 U. S. (4 Pet.) 511, bk. 7 L. ed. 338.

5. Miner's "claim" is property, within the above section, and subject to levy and sale.—*McKeon vs. Bisbee*, 9 Cal. 137, 142, 70 Am. Dec. 642; *State vs. Moore*, 12 Cal. 56, 70; *Hughes vs. Devlin*, 23 Cal. 506. See *Merced Min. Co. vs. Fremont*, 7 Cal. 317, 68 Am. Dec. 262.

As to mine being real estate, see post § 1091 note par. 16.

6. "Such a right, possessory in its nature, yet coupled, under existing laws, with further rights as to acquisition of title, is declared . . . to be real-estate title. Such a property passes to heir, is subject to seizure and sale as real

estate, must be conveyed by deed, and is subject to partition.—*Aspen Min. & Smelt. Co. vs. Rucker*, 28 Fed. Rep. 220, 222. See *McKeon vs. Bisbee*, 9 Cal. 137, 142, 70 Am. Dec. 642; *Watts vs. White*, 13 Cal. 321, 224; *Merritt vs. Judd*, 14 Cal. 60, 64; *Lowe vs. Alexander*, 15 Cal. 296, 302; *Hughes vs. Devlin*, 23 Cal. 502; *Spencer vs. Winselman*, 42 Cal. 479; *Gillett vs. Gaffney*, 3 Colo. 351; *Sears vs. Taylor*, 4 Colo. 38, 40; *Filmore vs. Reithman*, 6 Colo. 120, 124; *Dall vs. Confidence Silver Min. Co.*, 3 Nev. 531, 93 Am. Dec. 419.

7. Same—Franchise, and raises presumption of general grant and title.—See *Merced Min. Co. vs. Fremont*, 7 Cal. 317, 68 Am. Dec. 262; *Gold Hill Q. Min. Co. vs. Ish*, 5 Oreg. 104, 106.

8. Partition may be had of.—*Hughes vs. Devlin*, 23 Cal. 502; *Aspen Min. & Smelt. Co. vs. Rucker*, 28 Fed. Rep. 220, 222.

See Code Civ. Proc. § 752 et seq. and notes.

9. Same—Taxable as property.—*State vs. Moore*, 12 Cal. 56, 69-70; *People vs. Shearer*, 30 Cal. 657. See *State vs. Central Pac. R. Co.*, 21 Nev. 269 (claim in public lands taxable only while party in possession).

10. Distinguished and explained: *Hart vs. Plume*, 14 Cal. 149, 154.

11. Doubted: *People vs. Shearer*, 30 Cal. 645, 657.

12. Personal property,—as to what consti-

tutes, and rights.—See post §§ 633, 953-990 and notes.

13. Real property,—as to what constitutes, see post § 658 and note.

14. Right acquired by parcel license cannot in any sense of the word be called property. It is a mere privilege—a transient, evanescent, and revocable right. It cannot descend to heirs, or pass to administrators.—*State vs. Moore*, 12 Cal. 56, 64.

15. Servitudes in gross are property, and may be transferred.—*Fudickar vs. East Riverside Irr. Dist.*, 109 Cal. 29, 37, 41 Pac. Rep. 1024.

16. "Owner" is term which includes any person having claim or interest in real property, though less than an absolute fee, and may designate person in actual possession and occupancy of premises.—*Higgins vs. City San Diego*, 131 Cal. 234, 308, 63 Pac. Rep. 470.

17. Ownership is constituted not by possession alone, but by right to possess.—In re *Estate of Stanford*, 126 Cal. 112, 119, 58 Pac. Rep. 462, 45 L. R. A. 783.

18. Present fixed right of future enjoyment to five per cent of estate of deceased testator is property, and thing of value, to which testator's beneficiary has right.—In re *Estate of Stanford*, 126 Cal. 112, 119, 58 Pac. Rep. 462, 45 L. R. A. 783.

§ 655. IN WHAT PROPERTY MAY EXIST. There may be ownership of all inanimate things which are capable of appropriation or of manual delivery; of all domestic animals; of all obligations; of such products of labor or skill as the composition of an author, the good-will of a business, trade-marks and signs, and of rights created or granted by statute.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
- 2-7. Corpse—Duty towards—Control—Damage.
- 8-11. Same—Disinterment—Damages.
- 12-14. Same—Property in—Next of kin—Husband.
15. Same—Same—Parents.
- 16, 17. Same—Same—Personal representative.
18. Same—Same—Probate court.
- 19, 20. Same—Same—Widow.
- 21, 22. Same—Replevin of.
- 23, 24. Same—Selection of place of interment.
- 25, 26. Dogs are property.
27. Good-will—What includes.
28. Liquor license—Effect of forfeiture.
29. Mining claim.
30. Production of the mind—How far property.
31. Right of husband to affections of wife.
32. Right to transfer and alienate property.
33. Trade-marks—How far property.
34. Wife's right to support and maintenance.
35. Wild animals—As subjects of property.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: In re *Estate of Stanford*, 126 Cal. 112, 119, 58 Pac. Rep. 462, 45 L. R. A. 783 (applied); *Hansen vs. Wagner*, 133 Cal. 69, 71, 65 Pac. Rep. 142 (referred to).

2. CORPSE—Duty towards.—By the uni-

versal feelings of mankind there is a duty to be discharged by some one toward the dead, a duty, and we may also say, a right, to protect from violation; and it may therefore be considered as a sort of quasi property.—*O'Donnell vs. Slack*, 123 Cal. 285, 289, 55 Pac. Rep. 906, 43 L. R. A. 338. See *N. Y. Patterson vs. Patterson*, 59 N. Y. 574, 583, 17 Am. Rep. 334. *R. I. Pierce vs. Proprietors Swan Point Cem.*, 10 R. I. 227, 14 Am. Rep. 667. *Eng. Queen vs. Stewart*, 13 Ad. & El. 773, 40 Eng. C. L. 192; *Gilbert vs. Buzzard*, 2 Hagg. Const. 333; *Chappel vs. Coopers*, 13 Mees. & W. 252.

As to duty and rights of burial, see note 14 L. R. A. 85.

3. In absence of disposition by will of the remains of a deceased person, the body belongs to the surviving relatives, in the order of inheritance, as other property, and they have the right to the custody and burial of the same.—*Renihan vs. Wright*, 125 Ind. 536, 21 Am. St. Rep. 249, 25 N. E. Rep. 822, 9 L. R. A. 514.

4. In case of testamentary disposition this duty is imposed primarily on the executor.—*Patterson vs. Patterson*, 59 N. Y. 574, 583, 17 Am. Rep. 334; *Hewett vs. Hewett*, 5 Daly (N. Y.) 7; *Wynkoop vs. Wynkoop*, 42 Pa. St. 293, 301, 32 Am. Dec. 506; *Williams vs. Williams*, L. R. 20 Ch. Div. 659.

Otherwise in case there is no testamentary disposition.—See pars. 16, 17 this note.

5. Those who are entitled to possession and custody of remains of deceased person, for purpose of interment, have legal rights therein which the law recognizes and protects, and any interference with such rights is an actionable tort.—*Larson vs. Chase*, 47 Minn. 307, 28 Am. St. Rep. 370, 50 N. W. Rep. 233, 14 L. R. A. 85.

As to right of control and disposition of dead body, see 14 L. R. A. 85.

6. Damages for deprivation of right to bury body of deceased child, action for, may be maintained by the parents of deceased infant.—*Snyder vs. Snyder*, 60 How. Pr. (N. Y.) 368. See *Keyes vs. Konkel*, 119 Mich. 550, 75 Am. St. Rep. 423, 78 N. W. Rep. 649, 44 L. R. A. 242.

7. Mutilation of corpse may be recovered for.—See *Larson vs. Chase*, 47 Minn. 307, 28 Am. St. Rep. 370, 50 N. W. Rep. 233, 14 L. R. A. 85; *Weld vs. Walker*, 130 Mass. 422, 39 Am. Rep. 465; *Burney vs. Children's Hospital*, 169 Mass. 57, 61 Am. St. Rep. 273, 47 N. E. Rep. 401, 38 L. R. A. 85; *Pierce vs. Proprietors Swan Point Cem.*, 10 R. I. 237, 14 Am. Rep. 667; *Faley vs. Phelps*, 1 App. Div. 551.

8. Recovery in such cases is not for damage to corpse as property, but for damage to next of kin by infringement of his right to have body delivered to him for burial without mutilation.—*Keyes vs. Konkel*, 119 Mich. 550, 75 Am. St. Rep. 423, 78 N. W. Rep. 649, 44 L. R. A. 242.

9. SAME — DISINTERMENT — Trespass quare clausum.—Dead body, after burial thereof, of human being, becomes part of the ground to which same has been committed, and an action of trespass quare clausum fregit can be maintained against owner of fee who negligently or wantonly disturbs a grave in a public cemetery in which a body has been interred by the express or implied consent of those in proper control thereof, by the one having right to care and custody of the remains.—*Shipman vs. Baxter*, 21 Ala. 456; *Ledbetter vs. Blassingame*, 31 Ala. 496; *Molnery vs. Irvin*, 90 Ala. 275, 276, 7 So. Rep. 841; *Bonham vs. Loeb*, 107 Ala. 604, 18 So. Rep. 300; *Bessemer Land Imp. Co. vs. Jenkins*, 111 Ala. 135, 56 Am. St. Rep. 26, 18 So. Rep. 565. See *Meagher vs. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759; *Weld vs. Walker*, 130 Mass. 422, 39 Am. Rep. 465; *Page vs. Symonds*, 63 N. H. 17, 56 Am. Rep. 481.

10. Injury to the natural feelings of plaintiff may be considered by jury in estimating amount of damages in an action for trespass for unlawful disinterment of body of plaintiff's child.—*Bessemer Land Co. vs. Jenkins*, 111 Ala. 135, 56 Am. St. Rep. 26, 18 So. Rep. 565; *Meagher vs. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759; *Page vs. Symonds*, 63 N. H. 17, 56 Am. Rep. 480.

11. Same.—Tomb owner is without right to cause removal of remains of dead transferred from places of sepulture first selected by surviving relatives, and deposited by him in tomb under his assurance, accepted by such relatives, and on faith of which they permitted the transfer, that the remains should rest forever in the tomb.—*Choppin vs. Dauphin*, 48 La. Ann. C. C.—39

1217, 55 Am. St. Rep. 313, 20 So. Rep. 681, 33 L. R. A. 133.

As to disinterment, see exhaustive monographic note by Ernest Watts, 42 L. R. A. 721-738.

12. Property right in—Next of kin, while not in full proprietary sense "owning" the body of deceased, have property rights therein which will be protected, and for violation of which they are entitled to indemnification; e. g. if the right is interfered with, damages will be awarded.—*O'Donnell vs. Slack*, 123 Cal. 285, 289, 55 Pac. Rep. 906, 43 L. R. A. 388. See *Renihan vs. Wright*, 125 Ind. 536, 21 Am. St. Rep. 249, 25 N. E. Rep. 822, 9 L. R. A. 514; *Smiley vs. Bartlett*, 6 Ohio C. C. 234.

13. Husband entitled to control of remains of deceased wife as against her relatives, and he may select permanent place of burial of body, and in performance of such right and duty he should not be interfered with.—*Cook vs. Walley* (Colo. Oct. 26, 1891), 27 Pac. Rep. 950; *Durell vs. Hayward*, 75 Mass. (9 Gray) 248, 69 Am. Dec. 284; *Laklin vs. Ames*, 64 Mass. (10 Cush.) 198, 221; *Cunningham vs. Reardon*, 98 Mass. 538, 96 Am. Dec. 670; *Johnston vs. Marinus*, 18 Abb. N. C. (N. Y.) 73.

14. Duty devolves upon husband to inter remains of his deceased wife.—*Carvey vs. McCue*, 3 Redf. (N. Y.) 315. See *Sears vs. Giddey*, 41 Mich. 590, 2 N. W. Rep. 917; *Jenkins vs. Tucker*, 1 H. Bl. 90; *Ambrose vs. Kerrison*, 10 C. B. (1 J. Scott) 776, 70 Eng. C. L. 776; *Chapple vs. Cooper*, 13 Mees & W. 252.

15. Parent of deceased child.—*Reg. vs. Vaun*, 2 Den. Cr. Cas. 325.

16. Personal representatives have no control over the dead body of person who has made no disposition thereof.—*O'Donnell vs. Slack*, 123 Cal. 285, 55 Pac. Rep. 906, 43 L. R. A. 388.

17. Administrator has no such property in his decedent's dead body as will enable him to recover damages for its mutilation through negligence or otherwise.—*Griffith vs. Charlotte, G. & A. R. Co.*, 23 S. C. 25, 55 Am. Rep. 1, 24 Am. L. Reg. N. S. 586.

18. Probate court has no control over dead body of person who has made no testamentary disposition thereof.—*O'Donnell vs. Slack*, 123 Cal. 285, 55 Pac. Rep. 906, 43 L. R. A. 388.

19. Widow has the right of disposal of dead body of husband who has not made any testamentary disposition thereof.—*O'Donnell vs. Slack*, 123 Cal. 285, 55 Pac. Rep. 906, 43 L. R. A. 388; *Hackett vs. Hackett*, 18 R. I. 155, 49 Am. St. Rep. 762, 26 Atl. Rep. 42, 19 L. R. A. 558.

20. But after right of burial has been exercised widow's right of control ceases, and she cannot disinter remains and remove them from lot owned by decedent's daughter, and where remains were interred in compliance with request made in his lifetime.—*Thompson vs. Deeds*, 93 Iowa 228, 278, 61 N. W. Rep. 842, 1004, 35 L. R. A. 56. See *Guthrie vs. Weaver*, 1 Mo. App. 136.

21. Replevin of—Remains of deceased person not property, and an action of replevin can not be maintained.—*Keyes vs. Konkel*, 119 Mich. 550, 75 Am. St. Rep. 423, 78 N. W. Rep. 649, 44 L. R. A. 242. See 15 Cent. Dig. 2459.

22. Right of interment having been exercised, no further right to corpse remains, except to protect same from insult.—*Guthrie vs. Weaver*, 1 Mo. App. 136. See *Thompson vs. Deeds*, 93 Iowa 228, 61 N. W. Rep. 842, 1004, 35 L. R. A. 56.

23. Selection of place of interment of deceased person, question of right of, must be solved upon equitable grounds; although in remains themselves there is no property right existing, yet they are held as sacred trust by person having charge thereof, for benefit of all who may, from either family ties or friendship, have an interest in such remains.—*Snyder vs. Snyder*, 60 How. Pr. (N. Y.) 368.

24. Courts should assume equity jurisdiction in case of contention over remains of deceased person, somewhat in analogy to care and custody of infants, and make such disposition as should seem, under all circumstances, to be best and right.—*Snyder vs. Snyder*, 60 How. Pr. (N. Y.) 368.

25. DOGS ARE PROPERTY, for malicious destruction or injury of which an action for damages will lie.—*Johnson vs. McConnell*, 80 Cal. 545, 549, 22 Pac. Rep. 219. See also *State vs. McDuffie*, 34 N. H. 523, 69 Am. Dec. 516; *Dodson vs. Mock*, 4 Dev. & B. (N. C.) 146, 32 Am. Dec. 677; *Wheatley vs. Harris*, 4 Sneed (Tenn.) 468, 70 Am. Dec. 253.

See note 70 Am. Dec. 259.

As to larceny of dogs, see Pen. Code § 484 and note.

26. Dogs stand, in the sense of property, as it were, between animals *feræ naturæ*, in which, until killed or subdued, there is no property, and domestic animals, in which right of property is perfect and complete.—*Sentell vs. New*

Orleans & C. R. Co., 166 U. S. 698, bk. 41 L. ed. 1169, 17 Sup. Ct. Rep. 692.

27. Good-will as property, and what it includes.—See post § 993 and note.

28. LIQUOR LICENSE is not property, and forfeiture of same does not deprive licensee of his property without due process of law.—*Sprayberry vs. City of Atlanta*, 87 Ga. 120, 13 S. E. Rep. 197.

29. MINING CLAIM as property.—See ante § 654 note para. 5, 11.

30. PRODUCTS OF MIND—HOW FAR SUBJECTS OF PROPERTY or ownership.—See post § 980 and note.

31. RIGHT OF HUSBAND TO AFFECTIONS AND SOCIETY OF HIS WIFE is to be regarded as valuable property right, for loss of which he is entitled to sue. This right is as valuable to wife as to husband.—*Warren vs. Warren*, 89 Mich. 123, 50 N. W. Rep. 842, 14 L. R. A. 545.

32. RIGHT TO TRANSFER AND ALIENATE PROPERTY is included in term "property" as well as right to use and enjoy.—*Arapahoe Co. vs. Rocky Mt. News Pr. Co.*, 15 Colo. App. 189; *State ex rel. Zillmer vs. Kreutzberg*, 114 Wis. 530, 90 N. W. Rep. 1098.

33. TRADE-MARKS AS PROPERTY, and how far may be appropriated.—See post § 991 and note; Pol. Code § 3196.

34. WIFE'S RIGHT TO SUPPORT AND MAINTENANCE FROM HER HUSBAND is capable of remedy and accurate measurement in dollars and cents, and can be said to be a property right.—*Warren vs. Warren*, 89 Mich. 123, 50 N. W. Rep. 842, 14 L. R. A. 545.

35. WILD ANIMALS.—As subjects of property, and as to when private proprietary rights attach, see post § 656 and note.

§ 656. WILD ANIMALS. Animals wild by nature are the subjects of ownership, while living, only when on the land of the person claiming them, or when tamed, or taken and held in possession, or disabled and immediately pursued.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Animals—*Domitæ* and *feræ naturæ*.
3. As to game laws.
4. As to piscatory rights.
5. Reclaimed wild animals.
6. Same—Killed or captured.
- 7, 8. Same—Same—Wounded and escaped.
- 9-11. Same—Same—Pursuit—Captured by another.
- 12-28. Same—Illustrations.
29. Constructions.
30. Wild birds—Within inclosure.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Riverside Water Co. vs. Gage*, 108 Cal. 240, 244, 41 Pac. Rep. 299 (referred to by error); *Kellogg vs. King*, 114 Cal. 378, 388, 55 Am. St. Rep. 74, 46 Pac. Rep. 166 (construed and applied); *Garcia vs. Gunn*, 119 Cal. 315, 321, 323, 51 Pac. Rep. 634 (construed and applied); *Ex parte Kenneke*, 186 Cal. 527, 531, 89 Am. St. Rep. 177, 69 Pac. Rep. 261 (construed).

2. ANIMALS—*Domitæ* and *feræ naturæ*.—Domestic animals are subject of personal prop-

erty, but wild animals are subject of property only when killed or captured and reclaimed or restrained. The property in all wild animals is in the people of the state, in their collective sovereignty.—*Ex parte Maier*, 103 Cal. 476, 42 Am. St. Rep. 129, 37 Pac. Rep. 402. See *State vs. Geer*, 61 Conn. 144, 22 Atl. Rep. 1012, 13 L. R. A. 804, *affd. sub nom. Geer vs. Connecticut*, 161 U. S. 519, bk. 40 L. ed. 793, 16 Sup. Ct. Rep. 600; *State vs. Rodman*, 58 Minn. 393, 59 N. W. Rep. 1098.

3. As to game laws, see monographic note 42 Am. St. Rep. 138-144.

Same—As affecting interstate commerce, see note 13 L. R. A. 804.

4. As to piscatory rights, see monographic note by H. P. Farnum, 60 L. R. A. 481-525.

5. Reclaimed wild animals become subject of private property or ownership.—*Pierson vs. Post*, 3 Cal. (N. Y.) 175, 2 Am. Dec. 264; *Buster vs. Newkirk*, 20 John. (N. Y.) 75; *Goff vs. Kitta*, 15 Wend. (N. Y.) 550; *State vs. House*, 65 N. C. 315, 6 Am. Rep. 744.

6. Same—Caught or killed on his land by

the owner, property vests in him, so long as he retains rightful dominion over them.—*State vs. House*, 65 N. C. 315, 6 Am. Rep. 744; *Riggs vs. Lansdale*, 1 Hurl. & N. 923; *Blades vs. Higgs*, 11 H. L. Cas. 621; *In re Long Pt. Co. vs. Anderson*, 19 Ont. 437.

7. Same—Same—Wounded and escaping from his land with hunter still in pursuit, he is owner if afterwards caught and killed.—*Charlebaix vs. Raymond*, 12 L. C. J. 55.

8. But where game pursued has not been wounded, property is in another who kills or takes it.—*Pierson vs. Post*, 3 Cal. (N. Y.) 175, 2 Am. Dec. 264; *Buster vs. Newkirk*, 20 John. (N. Y.) 75.

9. Same—Same—Pursuit alone gives no right.—*Pierson vs. Post*, 3 Cal. (N. Y.) 175, 2 Am. Dec. 264; *Buster vs. Newkirk*, 20 John. (N. Y.) 75.

10. Hunter starting wild game on land of A and killing it on land of B, is owner thereof, and not B.—See 2 Am. & Eng. Encyc. of L. (2d ed.) 342.

11. Unless he be a trespasser, in which case it belongs to owner of the land.—*Blades vs. Higgs*, 11 H. L. Cas. 621.

12. SAME—ILLUSTRATION of the general rules above enunciated are found in several instances, some of which are (see 70 Am. Dec. 259-262, 2 Am. & Eng. Encyc. of L., 2d ed., 324):

12. Bees—In tree, while remaining there, are the property of owner of the soil.—*Comm. Merrills vs. Goodwin*, 1 Root 309. N. Y. *Ferguson vs. Miller*, 1 Cow. 243, 13 Am. Dec. 519; *Goff vs. Kilts*, 15 Wend. 550; *Gillet vs. Mason*, 7 John. 16. Pa. *Wallis vs. Mease*, 3 Binn. 546. Vt. *Adams vs. Burton*, 43 Vt. 36, 38.

14. Same—In hive, or otherwise reclaimed, are personal property.—See Ind. *State vs. Murphy*, 8 Blackf. 498. N. Y. *Gillet vs. Mason*, 7 John. 16; *Goff vs. Kilts*, 15 Wend. 550. R. I. *Rexroth vs. Coon*, 15 R. I. 35, 2 Am. St. Rep. 863, 23 Atl. Rep. 37.

15. Birds in state of captivity, or tamed, e. g. canary birds or mocking-birds, are the subject of private property.—*Haywood vs. State*, 41 Ark. 479; *Manning vs. Mitcherson*, 69 Ga. 447, 47 Am. Rep. 764.

See pars. 18, 20, 25, 26 this note.

16. Buffalo tamed and domesticated, private property.—*Ulery vs. Jones*, 31 Ill. 403; *State vs. Crenshaw*, 22 Mo. 457.

17. Canary.—See par. 15 this note.

18. Doves are the subject of private property, while upon a man's land.—*Commonwealth vs. Chace*, 26 Mass. (9 Pick.) 15, 19 Am. Dec. 343, 349.

See pars. 15, 20 this note.

19. Fish are fera natura, but the subject of private property where properly restrained, with intention to preserve them.—*State vs. Shaw*, 67 Ohio St. 157, 65 N. E. Rep. 875, 60 L. R. A. 481; *Young vs. Hichens*, 6 Ad. & E. N. S. (6 Q. B.) 606, 51 Eng. C. L. 605, 1 Dav. & Meriv. 592; *Stevens vs. Jeacocks*, 11 Ad. & E. N. S. (11 Q. B.) 781, 63 Eng. C. L. 729.

As to right to fish, see an able and exhaustive monographic note by Henry P. Farnham in 60 L. R. A. 481-525.

As to fish and the right to fish, see monographic note by H. P. Farnum, 60 L. R. A. 481-525.

20. Geese—Wild domesticated are private property, even though they stray away without regaining their liberty *animus revertendi*.—*Amorey vs. Flynn*, 10 John. (N. Y.) 102, 6 Am. Dec. 316. See *Chase vs. Corcoran*, 106 Mass. 286; *Sheldon vs. Sherman*, 42 N. Y. 484, 1 Am. Rep. 569.

See pars. 15, 18 this note.

21. Mocking-bird.—See par. 15 this note.

22. Otter, reclaimed or dead, property vests in the person.—*State vs. House*, 65 N. C. 315, 6 Am. Rep. 744.

23. Oysters planted in bed and properly marked so they may be identified are private property.—*State vs. Taylor*, 27 N. J. L. (3 Dutch.) 117, 72 Am. Dec. 347; *Decker vs. Fisher*, 4 Barb. (N. Y.) 592; *Brinckerhoff vs. Starkins*, 11 Barb. (N. Y.) 248; *Lowndes vs. Dickerson*, 34 Barb. (N. Y.) 586; *Fleet vs. Hegeman*, 14 Wend. (N. Y.) 42.

24. Oysters taken out of state, statute does not govern.—See *Tyler vs. State*, 93 Md. 309, 42 Atl. Rep. 840, 52 L. R. A. 100 and note.

25. Pheasants hatched by and under care of a hen, are domita, and private property.—*Reg. vs. Cary*, 10 Cox C. C. 23; *Reg. vs. Graham*, 3 Cox C. C. 451, 2 Post. & F. 347.

See par. 15 this note.

26. Pigeons are private property, even when absent from home; e. g. a carrier pigeon in its homing journey.—*Rex vs. Brooks*, 4 Car. & P. 181, 19 Eng. C. L. 303; *Queen vs. Cheafor*, 5 Cox C. C. 367, 21 Law J. Rep. (N. S.) M. C. 43, 15 Jur. 1065, 2 Den. C. C. 36, 3 Eng. L. & E. 598.

See par. 15 this note.

27. Raccoon captured and domesticated, is personal property.—*Warren vs. State*, 1 G. Gr. (Iowa) 106.

28. Whale killed and anchored, or harpooned and left to raise to top of water (according to a custom prevailing), where capable of identification, is subject of property.—See *Ghen vs. Rich*, 3 Fed. Rep. 159; *Bartlett vs. Budd*, 1 Low. C. C. 223, 2 Fed. Cas. 966; *Swift vs. Gifford*, 2 Low. C. C. 110, 23 Fed. Cas. 558; *Taber vs. Jenny*, 1 Spra. C. C. 315, 23 Fed. Cas. 605; *Aberdeen Arctic Co. vs. Sutter*, 4 Macg. H. L. Cas. 355; *Littledale vs. Scaith*, 1 Taunt. 243 note.

29. CONSTRUCTION.—This section to be construed to include game birds.—*Ex parte Kenneke*, 136 Cal. 527, 531, 29 Am. St. Rep. 177, 69 Pac. Rep. 261.

30. WILD BIRDS WITHIN INCLOSURE are property, and owner is entitled to protect them from invasion by those not authorized to be there, and any person violating such property rights is as much trespasser as though entering unbidden dwelling of owner of such birds.—*Kellogg vs. King*, 114 Cal. 373, 388, 55 Am. St. Rep. 74, 46 Pac. Rep. 166.

As to right to hunt and ownership of game killed or taken on public land, see notes 13 Am. St. Rep. 416-420; 23 Am. St. Rep. 641.

§ 657. REAL AND PERSONAL. Property is either:

1. Real or immovable; or,
2. Personal or movable.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Common-law rules—Not changed by codes.
3. Estate for years—Chattel real.
4. Nature of thing determining estate.
5. "Things real"—"Interest or estate in things real"—Distinction.

1. Applied, cited, construed, referred to, etc., in: *Jeffers vs. Easton*, 113 Cal. 345, 353, 45 Pac. Rep. 680 (construed).

2. Common-law division of property into real and personal property, and as to those things which are realty and those which are personalty, has not been changed by the codes.—*Jeffers vs. Easton*, 113 Cal. 345, 352-353, 45 Pac. Rep. 680; *Commercial Bank vs. Pritchard*, 126 Cal. 600, 606, 59 Pac. Rep. 130.

3. "Estate for years is, in its nature, personal property—a chattel real; and it is subject, for most purposes, to the law which applies to personal property."—*Commercial Bank vs. Pritchard*, 126 Cal. 600, 606, 59 Pac. Rep. 130; *Jeffers vs. Easton*, 113 Cal. 345, 353, 45 Pac. Rep. 680; *Summerville vs. Stockton Milling Co.*, 142 Cal. 529, 539, 76 Pac. Rep. 243.

4. "Nature of thing itself does not determine character of estate that may exist in it, whether personal or real."—*Jeffers vs. Easton*, 113 Cal. 345, 353, 45 Pac. Rep. 680.

5. "Things real" and "interest or estate in things real" are terms between which there is marked difference.—*Jeffers vs. Easton*, 113 Cal. 345, 353, 45 Pac. Rep. 680.

§ 658. REAL PROPERTY. Real or immovable property consists of:

1. Land;
2. That which is affixed to land;
3. That which is incidental or appurtenant to land;
4. That which is immovable by law.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Appurtenance—What is.
3. Building on leased land—Right of removal.
4. Code Commissioners' note.
5. Fixtures—What are.
6. Land—What is.
7. Poles, wires, and electric lamps.
- 8, 9. Right to continued flow of water—Natural and artificial channel.
- 10-12. Trees—Excepted in conveyance—Distinguishing from reservation.
13. Water appropriated.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Lower Kings River W. Ditch Co. vs. Kings River & F. Canal Co.*, 60 Cal. 408, 410 (applied); *St. Helena Water Co. vs. Forbes*, 62 Cal. 182, 184 (applied); *Standart vs. Round Valley Water Co.*, 77 Cal. 399, 402, 19 Pac. Rep. 689 (applied); *Lavenson vs. Standard Soap Co.*, 80 Cal. 245, 250, 22 Pac. Rep. 184 (applied); *West Coast Lumber Co. vs. Apfield*, 86 Cal. 335, 338, 24 Pac. Rep. 993 (applied); *Pomeroy vs. Bell*, 118 Cal. 635, 636, 50 Pac. Rep. 683 (applied); *Commercial Bank vs. Pritchard*, 126 Cal. 600, 605, 59 Pac. Rep. 130 (applied); *Sears vs. Ackerman*, 138 Cal. 583, 586, 72 Pac. Rep. 171 (applied); *Mount Carmel Fruit Co. vs. Webster*, 140 Cal. 183, 187, 73 Pac. Rep. 826 (applied).

2. Appurtenance—as to, see post § 662 and note.

3. BUILDING ERECTED UPON LAND LEASED for term of years, lessee to remove building at any time before expiration of term, and with right to terminate lease on notice, is real property within this section, and

remains such until severed.—*Commercial Bank vs. Pritchard*, 126 Cal. 600, 605-606, 59 Pac. Rep. 130. See *Griffin vs. Marine Co.*, 52 Ill. 130; *Dobschuetz vs. Holliday*, 82 Ill. 371; *Knapp vs. Jones*, 143 Ill. 375, 32 N. E. Rep. 332; *Ombony vs. Jones*, 19 N. Y. 234.

See post § 660 and note pars 65-79.

4. Code Commissioners' Note.—See post § 660 note pars. 65-79.

5. Fixtures—as to what are, see post § 660 and note.

6. Land, what is.—See post § 659.

7. POLES, WIRES, AND ELECTRIC LAMPS, and other attachments for conveying electricity, erected in street by electric light company, for lighting purposes, are real property.—*Keating Impl. & Mach. Co. vs. Marshall Elec. L. & P. Co.*, 74 Tex. 605, 12 S. W. Rep. 489.

8. RIGHT TO CONTINUED FLOW OF WATER IN NATURAL STREAM through owner's lands, is real property.—*St. Helena Water Co. vs. Forbes*, 62 Cal. 182, 183-184, 45 Am. Rep. 659. See *Lower Kings R. Water Ditch Co. vs. Kings River & F. Canal Co.*, 60 Cal. 408, 410.

9. As to artificial course, e. g. a water-pipe, see *Standart vs. Round Valley Water Co.*, 77 Cal. 399, 403-404, 19 Pac. Rep. 689.

10. TREES GROWING on real property are a part thereof.—*Sears vs. Ackerman*, 138 Cal. 583, 586, 72 Pac. Rep. 171.

11. Trees excepted in conveyance of land, while growing are real property, and exception is an exception or taking back in fee of part of estate, which is not granted at all.—*Sears vs. Ackerman*, supra.

12. Distinction between exception and reservation is that an exception is always of some part of the estate, while a reservation is something taken back which is clearly granted.—*Ibid.*

13. WATER APPROPRIATED for purposes of irrigating land in arid regions,—as to whether real property, see *Mount Carmel Fruit Co. vs. Webster*, 140 Cal. 183, 186-187, 73 Pac. Rep. 826.

§ 659. **LAND.** Land is the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2, 3. Aerolite—Part of soil on which falls.

1. Applied, cited, construed, referred to, etc., in: *Pomeroy vs. Bell*, 118 Cal. 635, 636, 50 Pac. Rep. 683 (referred to with other sections in other discussion); *Mount Carmel Fruit Co. vs. Webster*, 140 Cal. 183, 187, 73 Pac. Rep. 826 (referred to).

2. Aerolite becomes part of the soil on

which it falls and in which it becomes embedded.—*Goddard vs. Winchell*, 86 Iowa 71, 41 Am. St. Rep. 481, 53 N. W. Rep. 1124, 17 L. R. A. 788. See *Haas vs. Amana Soc.*, 13 Ir. L. T. 881, reprinted 16 Abb. L. J. 76.

3. Compare: 20 Abb. L. J. 299, in which it is said to have been determined in France that an aerolite found by a peasant was held to be his property and not that of the owner of the land on which it was picked up.

§ 660. **FIXTURES.** A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or embedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws.

History: Enacted March 21, 1872.

I. In General.

1. Applied, cited, construed, referred to, etc.
2. Definition.
- 3-6. Annexation necessary — Common-law rule.
7. Same—Relaxation of strict rule.
8. Same—Public lands—Fixtures on.
9. Same—Same—Mining claim.
- 10-13. Criterion for determining—Common-law rule.
- 14-19. Same—Requisites for determining.
20. Same—Lord Ellenborough's rule.
- 21-24. Same—Intention in making annexation.
- 25-28. Severance and removal—Effect.

II. As Between Parties in Different Relations.

29. Heir and executor—California rule the common-law rule.
- 30-32. Same—Illustration of rule elsewhere.
- 33, 34. Judgment creditor and debtor.
- 35-38. Landlord and tenant—Generally.
- 39, 40. Same—Agreement as to fixtures.
41. Same—Same—Mechanics' lien upon.
- 42, 43. Same—Right of removal.
- 44, 45. Same—Same—On removal of lease.
- 46, 47. Mortgager and mortgagee—Rule as to.
- 48-52. Same—Machinery passes.
- 53-55. Same—Same—Instances.
56. Same—Mortgagee's remedy for removal.
- 57-59. Vendor and vendee—Rule as to.
- 60-62. Same—Annexed and used pass though severed.
63. Same—Bond for title—Effect.

III. As to What are Fixtures—Particular Instances.

64. As to what are—Generally.
- 65-69. Buildings—Generally.
- 70, 71. Same—Constructed under contract.

- 72, 73. Same—Erected by tenant with right of removal.
74. Same—Erected on land of another by license.
- 75, 76. Same—Erected on land of another by mistake.
- 77-79. Same—Erected under option to purchase.
80. Chandeliers.
- 81, 82. Depot—Removable, when.
- 83, 84. Derrick and boom.
- 85, 86. Engine and boilers.
- 87, 88. Fence—Portable.
- 89-91. Furnace—Portable.
- 92-98. Gas-burners, gas-fixtures, etc.
99. Gas fixtures and heater.
100. Gas-pipes and gaseliers.
101. Iron stove in brickwork.
102. Kitchen range.
- 103-105. Machinery—Dividing line unsettled.
106. Same—Criteria determining.
- 107, 108. Same—Essential to the business.
109. Same—In building erected for particular purpose.
110. Same—Mortgaged.
- 111-113. Manure—Made on agricultural premises.
- 114, 115. Same—Same—Laying in heaps in barnyard.
116. Same—Made partly from produce of land.
117. Same—Not produced from product of land.
- 118, 119. Material for improvement.
120. Mill—Portable.
- 121, 122. Mirrors and mirror frames.
123. Monument erected in public park.
124. Mosquito screens attached.
125. Name of hotel—Not a fixture.
126. Organ in church built in recess.

- 127. Pipes for conducting gas or water.
- 128. Portable furnace.
- 129. Portable grist-mill.
- 130. Pump—Planted on ground.
- 131. Railroad rails—As trade fixtures.
- 132. Range for kitchen.
- 133. Scales—Track.
- 134. Steam boilers—In mill.
- 135. Sugar-mill on plantation.
- 136. Tank—Attached to hotel.
- 137. Tools—Used in slate quarry.
- 138. Track scales.
- 139-141. Trade fixtures.
- 142-144. Wagon scales—Title not to pass.
- 145, 146. Warehouse—Passes by assignment of lease.
- 147. Water-filter—Attached to hotel.
- 148. Wharf—Below high-water mark.

I. IN GENERAL.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc.,** in: *McKiernan vs. Hesse*, 51 Cal. 594 (applied); *Coburn vs. Ames*, 52 Cal. 385, 894, 395, 396, 28 Am. Rep. 634 (applied); *McNally vs. Connolly*, 70 Cal. 3, 6, 11 Pac. Rep. 320 (applied); *Goss vs. Helbing*, 77 Cal. 190, 191, 19 Pac. Rep. 277 (applied); *Lavenson vs. Standard Soap Co.*, 80 Cal. 245, 251, 13 Am. St. Rep. 147, 22 Pac. Rep. 184 (applied); *West Coast Lumber Co. vs. Apfield*, 86 Cal. 335, 338, 24 Pac. Rep. 993 (applied); *Miller vs. Waddingham*, 91 Cal. 377, 379, 27 Pac. Rep. 750, 13 L. R. A. 680 (construed); *Pomeroy vs. Bell*, 113 Cal. 635, 636, 50 Pac. Rep. 683 (cited); *Commercial Bank vs. Pritchard*, 126 Cal. 600, 605, 59 Pac. Rep. 130 (applied); *Sears vs. Ackerman*, 138 Cal. 583, 586, 72 Pac. Rep. 171 (referred to in discussion); *Mount Carmel Fruit Co. vs. Webster*, 140 Cal. 183, 187, 73 Pac. Rep. 326 (referred to with other sections).

2. **DEFINITION.**—A fixture is an article of personal property affixed to the freehold.—*Merritt vs. Judd*, 14 Cal. 59, 64.

3. **Annexation necessary to constitute a chattel appurtenant to and pass with the land.**—*Merritt vs. Judd*, 14 Cal. 59, 64; *Treadway vs. Sharon*, 7 Nev. 37, 42; *Ritchnyer vs. Morse*, 37 How. Pr. (N. Y.) 383, 392; 3 *Keyes* (N. Y.) 352; *Buckley vs. Buckley*, 11 Barb. (N. Y.) 43; *Miller vs. Plumb*, 6 Cow. (N. Y.) 665, 16 Am. Dec. 456; *Raymond vs. White*, 7 Cow. (N. Y.) 319, 321; *Fisher vs. Fisher*, 1 E. D. Smith (N. Y.) 612; *Walker vs. Sherman*, 20 Wend. (N. Y.) 639.

4. The common-law rule is that personal property annexed to the freehold by the owner becomes part of the realty.—*Carpenter vs. Walker*, 140 Mass. 416, 9 N. E. Rep. 160; *Elwes vs. Maw*, 3 East 38, 6 Rev. Rep. 523, 2 Smith Lead. Cas. (8 Am. ed.) 191; *Fisher vs. Dixon*, 12 Clark & F. 312, 323; *Mather vs. Fraser*, 2 Kay & J. 536; *Walmsley vs. Milne*, 7 C. B. N. S. 115, 97 Eng. C. L. 114; *Gibson vs. Hammersmith R. Co.*, 32 L. J. N. S. (Ch.) 337, 340; *Climie vs. Wood*, L. R. 4 Exch. 328; *Holland vs. Hodgson*, L. R. 7 C. P. 328; *Meux vs. Jacobs*, L. R. 7 H. L. 481, 490.

5. Personal property affixed to the freehold for the purpose of permanent improvement, or of use with the real estate, makes fixture

appurtenant to land.—*Potter vs. Cromwell*, 40 N. Y. 237, 294, 100 Am. Dec. 485.

6. **Personalty attached to realty, in whatever manner and however slight, with view to purposes for which it is held or employed, becomes appurtenant eo instanti.**—See *Tillman vs. De Lacy*, 80 Ala. 103; *De Lacy vs. Tillman*, 83 Ala. 155, 3 So. Rep. 294; *Southbridge Sav. Bank vs. Mason*, 147 Mass. 500, 18 N. E. Rep. 406, 1 L. R. A. 350.

Belonging to the soil,—as to, see note 11 L. R. A. 727.

Fastened to a building,—as to method and effect of, see brief in 44 L. R. A. 559.

7. **STRICTNESS OF THE EARLY RULE,** requiring structure to be attached to soil in order to become fixture appurtenant thereto, is being relaxed in this country.—*Hawes vs. Lathrop*, 38 Cal. 493, 497-498 (decided before the code); *Marks vs. Ryan*, 63 Cal. 107, 110.

8. **Fixture appurtenant to public lands to which claim to title has been secured with right under law to protect title, becomes part of realty and, unless diverted, passes with the land.**—*Merritt vs. Judd*, 14 Cal. 59, 64; *Roseville Alta Min. Co. vs. Iowa Gulch Min. Co.*, 15 Colo. 29, 52, 22 Am. St. Rep. 373, 375, 24 Pac. Rep. 920. See *Honeyman vs. Thomas*, 25 Oreg. 539, 542, 36 Pac. Rep. 636; criticizing *Merritt vs. Judd*, supra.

9. **Same—Mining claim is legal estate of freehold, within rule as to fixtures.**—*Merritt vs. Judd*, 14 Cal. 59, 64; *Hughes vs. Devlin*, 23 Cal. 501, 505; *Spencer vs. Winselman*, 42 Cal. 479, 482; *Smith vs. Cooley*, 65 Cal. 46, 48, 2 Pac. Rep. 880; *Gillett vs. Gaffney*, 3 Colo. 351, 358; *Roseville Alta Min. Co. vs. Iowa Gulch Min. Co.*, 15 Colo. 29, 31, 22 Am. St. Rep. 373, 29 Pac. Rep. 920; *Ames vs. Ames*, 160 Ill. 599, 601, 43 N. E. Rep. 592; *Aspen Min. & Smelt Co. vs. Rucker*, 28 Fed. Rep. 220, 222.

As to character of estate in mining claim, see ante § 654 note pars. 5-11.

10. **CRITERION FOR DETERMINING**—Common-law rule was that whatever is annexed to freehold by owner becomes part of the realty.—*Carpenter vs. Walker*, 140 Mass. 416, 5 N. E. Rep. 160. See *Elwes vs. Maw*, 3 East 38, 6 Rev. Rep. 523, 2 Smith Lead. Cas. (8 Am. ed.) 191; *Fisher vs. Dixon*, 12 Clark & F. 312, 323; *Mather vs. Fraser*, 2 Kay & J. 536; *Walmsley vs. Milne*, 7 C. B. N. S. 115, 97 Eng. C. L. 114; *Gibson vs. Hammersmith R. Co.*, 32 L. J. Ch. 337, 340; *Climie vs. Wood*, L. R. 4 Exch. 328; *Holland vs. Hodgson*, L. R. 7 C. P. 328; *Meux vs. Jacobs*, L. R. 7 H. L. 481, 490.

11. **In determining what is fixture, the simple criterion of physical annexation is so limited in its range and so productive of contradiction that it will not apply with much force.**—*Atchison T. & S. F. R. Co. vs. Morgan*, 42 Kan. 23, 16 Am. St. Rep. 471, 21 Pac. Rep. 809, 4 L. R. A. 234.

12. **Whether structure is fixture depends on the nature and character of the act by which it is put in its place, and the purpose for which it is intended to be used.**—*Atchison T. & S. F. R. Co. vs. Morgan*, 42 Kan. 23, 16 Am. St. Rep. 471, 21 Pac. Rep. 809, 4 L. R. A. 234.

12. One of the tests as whether personal property retains its character or becomes a fixture is the uses to which it is put. If it is placed on the realty to improve it or make it more valuable, it is some evidence that it is a fixture; but if it is placed there for a use that does not enhance the value of the realty, this is some evidence that it is personal property.—*Atchison T. & S. F. R. Co. vs. Morgan*, 42 Kan. 23, 16 Am. St. Rep. 471, 21 Pac. Rep. 369, 4 L. R. A. 284.

14. Same.—The requisites for determining whether personal property an appurtenance three requisites must exist: (1) real or constructive annexation of the article in question to the freehold; (2) appropriation or adaptation to the use or purpose of that part of the realty with which it is connected; (3) intention of the party making the annexation to make the article permanent accession to the freehold.—*Binkley vs. Forkner*, 117 Ind. 176, 19 N. E. Rep. 753, 3 L. R. A. 33. See *De Lacey vs. Tillman*, 33 Ala. 155, 3 So. Rep. 294; *Dudley vs. Hurst*, 67 Md. 44, 1 Am. St. Rep. 368, 3 Atl. Rep. 901.

15. RULE FOR DETERMINING whether personal property may become an appurtenance and pass with the realty (1) by incorporation therewith for permanent use, (2) by annexation in such manner as not to be severable without injury to the freehold.—*Hunt vs. Mullanphy*, 1 Mo. 508, 14 Am. Dec. 300; *Burk vs. Baxter*, 3 Mo. 207.

16. Rule for determining fixture is its nature and object, effect and mode of annexation to freehold.—*Hopewell Mills vs. Taunton Sav. Bank*, 150 Mass. 519, 15 Am. St. Rep. 235, 28 N. E. Rep. 327, 330, 6 L. R. A. 249.

17. Chattels annexed to realty still retain character of chattels if party so intended in annexing it, unless it has become so absorbed with realty that its identity as personal property is lost.—*Hendy vs. Dinkerhoff*, 57 Cal. 3, 6, 40 Am. Rep. 107. See *Voorhees vs. McGinnis*, 48 N. Y. 273; *Tift vs. Horton*, 53 N. Y. 377, 380, 13 Am. Rep. 537.

18. Otherwise where mode of annexation or chattel annexed is such that attributes of personal property cannot be predicated of thing in controversy.—*Ford vs. Cobb*, 20 N. Y. 344.

19. "SAFEST CRITERION of a fixture is: 1. Actual annexation to the realty, or something appurtenant thereto; 2. Appropriation to the use or purpose of that part of realty with which it is connected; 3. The intention of the party making annexation to make article a permanent accession to the freehold, this intention being inferred from nature of article affixed, relation and situation of party making the annexation, the structure and mode of annexation, and purpose and use for which annexation has been made. This criterion furnishes a test of general and uniform application; one by which the essential qualities of a fixture can, in most instances, be certainly and easily ascertained, and tends to harmonize the apparent conflict in authorities relating to the subject."—*Teaff vs. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634.

20. SAME—THE LORD ELLENBOROUGH

RULE is the one generally followed in this country, and considers the doctrine of fixture as depending largely in its application upon the relations of the parties, which he divides into three classes: (1) Executor and heir,—as between whom the common-law rule that whatever is affixed to freehold becomes part of it, *quicquid plantatur solo, solo cedit*, is observed in full vigor. In this class falls also mortgager and mortgagee, vendor and vendee, as to whom the strict rule of the common-law is still in force. (2) Executor of tenant for life, or in tail, and remainderman, as between whom right to fixtures is considered more favorable to executor. (3) Landlord and tenant, in which, in favor of trade and to encourage industry, the greatest latitude is allowed; so that all fixtures set up for better enjoyment of trade, are retained by tenant; but this does not include fixtures for agricultural purposes. Where used for mixed purpose of trade and agriculture, they are held to belong to tenant.—*Elwes vs. Maw*, 3 East 38, 6 Rev. Rep. 523, 2 Smith Lead Cas. 228. See *Moore vs. Valentine*, 77 N. C. 138; *Overman vs. Sasser*, 107 N. C. 432, 12 S. E. Rep. 64, 10 L. R. A. 722; *Teaff vs. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634.

21. SAME—INTENTION OF THE PARTY MAKING THE ANNEXATION is the chief element to be considered in determining what are fixtures.—*Dak. Myrick vs. Bill*, 3 Dak. 284, 17 N. W. Rep. 268. *Ill. Jones vs. Ramsay*, 3 Ill. App. 303. *Iowa. Ottumwa Woolen Mill Co. vs. Hawley*, 44 Iowa 57, 24 Am. Rep. 719. *Mass. Allen vs. Mooney*, 130 Mass. 155. *Miss. Perkins vs. Swank*, 43 Miss. 349. *N. J. Penn. Mut. Ins. Co. vs. Semple*, 38 N. J. Eq. (11 Stew.) 575; *Roddy vs. Brick*, 42 N. J. Eq. (15 Stew.) 218, 6 Atl. Rep. 806. *N. C. Foote vs. Grooch*, 96 N. C. 265, 60 Am. Rep. 411, 1 S. E. Rep. 525. *Pa. Hill vs. Sewald*, 53 Pa. St. 271, 91 Am. Dec. 209; *Seeger vs. Pettit*, 77 Pa. St. 437, 18 Am. Rep. 452. *Tenn. McDavid vs. Wood*, 5 Helsk. 95. *Tex. Hutchins vs. Masterson*, 46 Tex. 551, 26 Am. Rep. 236. *Vt. Hill vs. Wentworth*, 28 Vt. 428. *Wis. Huebschmann vs. McHenry*, 29 Wis. 655; *Taylor vs. Collins*, 51 Wis. 123, 129, 3 N. W. Rep. 22. *Fed. Van Ness vs. Pacard*, 27 U. S. (2 Pet.) 137, bk. 7 L. ed. 374.

As to intention governing, see notes 10 L. R. A. 722; 51 Am. St. Rep. 633.

22. Intention of the party enters into the elements in each case. If intention is that articles attached shall not by annexation become part of freehold, as general rule they will not. The exception is where subject or mode of annexation is such that attributes of personal property cannot be predicated of thing in controversy (*Ford vs. Cobb*, 20 N. Y. 344), as when property cannot be removed without practically destroying it, or when it, or part of it, is essential to support of that to which it is attached.—*Manwaring vs. Jenison*, 61 Mich. 117, 27 N. W. Rep. 899. See *Ga. Wade vs. Johnston*, 25 Ga. 331. *Ill. Ballou vs. Jones*, 37 Ill. 95. *Kan. Eaves vs. Estes*, 10 Kan. 314, 15 Am. Rep. 345. *Me. Trull vs. Fuller*, 28 Me. 548. *Mass. Winslow vs. Merchants' Ins. Co.*, 45 Mass. (4 Met.) 306, 38 Am. Dec. 368. *Mich. Crippen vs. Morrison*, 13 Mich.

23; *Adams vs. Lee*, 81 Mich. 440; *McAuliffe vs. Mann*, 87 Mich. 539; *Coleman vs. Stearns' Mfg. Co.*, 38 Mich. 30, 40; *Jones vs. Detroit Chair Co.*, 38 Mich. 92, 31 Am. Rep. 314; *Robertson vs. Corsett*, 39 Mich. 777; *Ferris vs. Quimby*, 41 Mich. 202, 2 N. W. Rep. 9; *Ingersoll vs. Barnes*, 47 Mich. 104, 10 N. W. Rep. 127. *N. J. Crane vs. Brigham*, 11 N. J. Eq. (3 Stockt.) 29-35. *N. Y. Voorhees vs. McGinnis*, 48 N. Y. 278; *Tift vs. Horton*, 53 N. Y. 377, 13 Am. Rep. 537; *McRea vs. Central Nat. Bank*, 66 N. Y. 489; *Slisson vs. Hibbard*, 75 N. Y. 542. *Ohio. Teaff vs. Hewitt*, 1 Ohio St. 511, 530, 59 Am. Dec. 634. *Vt. Hill vs. Wentworth*, 28 Vt. 423, 436.

23. INTENTION MUST CLEARLY APPEAR to make article of personal property part of freehold.—*Conn. Capen vs. Peckham*, 35 Conn. 88, 95. *Miss. Weathersby vs. Sleeper*, 42 Miss. 732. *Mo. Hunt vs. Mullanphy*, 1 Mo. 508, 14 Am. Dec. 300. *Ohio. Teaff vs. Hewitt*, 1 Ohio St. 511, 533, 59 Am. Dec. 634; *Fortman vs. Goepper*, 14 Ohio St. 553. *Tex. Cole vs. Roach*, 37 Tex. 413. *Vt. Hill vs. Wentworth*, 28 Vt. 423, 436.

24. Question for jury whether there was intention to annex.—*Ariz. Nigro vs. Hatch* (Ariz. June 12, 1886), 11 Pac. Rep. 177. *Kan. Atchison T. & S. F. R. Co. vs. Morgan*, 42 Kan. 23, 16 Am. St. Rep. 471, 21 Pac. Rep. 809, 42 L. R. A. 284. *Mich. Robertson vs. Corsett*, 39 Mich. 777; *Adams vs. Lee*, 81 Mich. 440, 442; *Wheeler vs. Bedell*, 40 Mich. 693. *Pa. Seeger vs. Pettit*, 77 Pa. St. 437, 18 Am. Rep. 452.

25. SEVERANCE AND REMOVAL.—The doctrine as to effect of severance and removal of fixtures is not uniform in the various states. But where owner has annexed and used article in connection with freehold, though severed at time of sale, it passes to purchaser.—See pars. 57-59 this note.

As to right of removal, see brief 38 L. R. A. 268.

Same.—By mortgager.—See pars. 46, 47 this note.

Same.—By tenant.—See pars. 35-38 this note.

Same.—By vendee.—See pars. 57-59 this note.

26. SEVERANCE AND REMOVAL OF FIXTURES APPURTENANT to realty converts them into chattel property and relieves them of lien of mortgage on realty.—*Hill vs. Gwin*, 51 Cal. 47, 50. See *Sands vs. Pfeiffer*, 10 Cal. 258; *Buckout vs. Swift*, 27 Cal. 433, 87 Am. Dec. 90.

27. SEVERANCE AND REMOVAL OF HOUSE from freehold converts it into personal property, whether severance and removal was by act of man or God.—*Buckout vs. Swift*, 27 Cal. 433, 437, 87 Am. Dec. 90.

28. REMOVAL WITHOUT INJURY to building or itself does not determine its character as personalty or realty.—*Penn Mut. Ins. Co. vs. Semple*, 38 N. J. Eq. (11 Stew.) 575; *Roddy vs. Brick*, 42 N. J. Eq. (15 Stew.) 213, 6 Atl. Rep. 306.

II. AS BETWEEN PARTIES IN DIFFERENT RELATIONS.

29. HEIR AND EXECUTOR.—California rule common-law rule for determining fixtures ap-

purtenant to land, as between heir and executor or administrator, except in so far as it has been modified by statute.—See *Fratt vs. Whittier*, 58 Cal. 126, 130, 41 Am. Rep. 251.

See par. 20 this note.

30. Fire-engine installed for use in colliery by tenant for life goes to executor and not to heir.—*Lawton vs. Lawton*, 3 Atk. 13. See *Kelsey vs. Durkee*, 33 Barb. (N. Y.) 410; *Bain vs. Brandt*, L. R. 1 H. L. Cas. 762.

31. Fixtures annexed pass with realty, though annexed for purposes of trade.—*Miller vs. Plumb*, 6 Cow. (N. Y.) 665, 16 Am. Dec. 456.

32. Furnace affixed to freehold and purchased by decedent, in house, goes to executor and not to heirs.—*Squier vs. Mayer*, *Freem. Ch.* 249.

33. JUDGMENT CREDITORS AND DEBTORS.—The estate and interest in land by judgment creditor and mortgager is essentially same, only difference being in extent and duration of lien; both are liens upon land, and no more than liens; and each may prevent severance and removal of fixtures therefrom.—*Witmer's Appeal*, 45 Pa. St. 455, 84 Am. Dec. 505. See *Asay vs. Hoover*, 5 Pa. St. 21, 35, 45 Am. Dec. 713; *Edmonson vs. Nichols*, 22 Pa. St. 74, 79; *Wilson vs. Shoenberger*, 31 Pa. St. 295, 299; *Clark's Appeal*, 62 Pa. St. 447, 450; *Maxon's Appeal*, 75 Pa. St. 176, 187; *Rickert vs. Madeira*, 1 Rawle (Pa.) 325, 328.

As to judgment being lien on land without levy, see 13 Am. Dec. 626; 18 Am. Dec. 327; 19 Am. Dec. 743; 23 Am. Dec. 589; 28 Am. Dec. 437; 38 Am. Dec. 450; 51 Am. Dec. 166; 55 Am. Dec. 105; 62 Am. Dec. 705; 64 Am. Dec. 460; 76 Am. Dec. 705; 99 Am. Dec. 267-271; 62 Am. St. Rep. 197; 65 Am. St. Rep. 541; 66 Am. St. Rep. 527; 70 Am. St. Rep. 402, 862; 71 Am. St. Rep. 58; 51 L. R. A. 910; 53 L. R. A. 702; briefs 55 L. R. A. 795, 917; 56 L. R. A. 916; 61 L. R. A. 353; 17 Am. & Eng. Encyc. of L. (2d ed.) 768.

34. "If mortgagee have an interest in mortgaged premises, which may be defrauded by severance and sale of a fixture, so, we may conclude, has judgment creditor. The fraudulent character of severance must be determined by circumstances of each case. So long as debtor uses his estate for its ordinary purposes, according to its nature, he cannot be impeached for fraudulent waste."—*Witmer's Appeal*, supra; *Hoskin vs. Woodward*, 45 Pa. St. 42.

35. LANDLORD AND TENANT—GENERALLY.—As between lessor and lessee, whether building or other improvement becomes fixture, is matter of agreement and intention of parties.—*Nigro vs. Hatch* (Ariz. June 12, 1886), 11 Pac. Rep. 177.

36. Buildings erected upon leased lands in absence of any agreement as to character and title thereof, belong to the landlord.—*Marks vs. Ryan*, 63 Cal. 107, 111; *Switzer vs. Allen*, 11 Mont. 160, 164, 27 Pac. Rep. 403.

37. "Neither mode of annexation nor manner of use, is in all cases conclusive. It must usually depend on express or implied understanding of parties concerned."—*Nigro vs. Hatch*, (Ariz. June 12, 1886), 11 Pac. Rep. 177; *Robertson vs. Corsett*, 39 Mich. 777; *Adams vs.*

Lee, 81 Mich. 440; Wheeler vs. Bedell, 40 Mich. 692.

38. "Where ownership of land is in one person, and of thing affixed to it in another, and in its nature it is capable of severance without injury to former, latter cannot, in contemplation of law, become part of former, but must necessarily remain distinct property, to be used and dealt with as personal estate only."—Nigro vs. Hatch, supra, p. 178; Adams vs. Lee, 31 Mich. 440, 442.

39. Agreement as to fixtures.—The parties to agreement may fix upon chattels annexed to realty whatever character they may agree on.—Fratt vs. Whittier, 58 Cal. 126, 130, 41 Am. Rep. 251; Cramie vs. Hoover, 41 Ind. 161.

As to agreement regarding fixtures, and its effect, see 11 Am. Dec. 244; 68 Am. St. Rep. 420; 19 L. R. A. 441; 13 Am. & Eng. Encyc. of L. (3d ed.) 622-634.

40. Agreement of parties in due form may give to fixtures character either of personality or realty.—Myrick vs. Bill, 3 Dak. 284, 17 N. W. Rep. 268; Case Mfg. Co. vs. Garven, 45 Ohio St. 289, 13 N. E. Rep. 498.

41. Mechanics' liens upon.—Owner of realty in fee, with nothing to show or to put third parties upon notice that buildings erected thereon by tenants would not inure to his benefit, and become a part of the realty, with actual knowledge of the construction of the building, and without giving any notice that he would not be responsible for the same, but who has stood by and seen his tenants erect a large and costly building upon his lots, cannot thereafter be heard to say that the persons who perform labor upon and furnish material for such building have no lien upon his lot therefore, because the building has not become a part of the realty, and is not an improvement upon his property.—West Coast Lumber Co. vs. Apfeld, 86 Cal. 335, 340, 24 Pac. Rep. 992.

42. RIGHT OF REMOVAL.—General rule is that fixture which, by its nature, does not become an integral part of original premises, may be removed by tenant during his term; after expiration of term it becomes part of the realty.—Sands vs. Pfeiffer, 10 Cal. 258, 264; Merritt vs. Judd, 14 Cal. 59, 68-69. See Cramie vs. Hoover, 40 Ind. 61; Sweet vs. Myers, 3 S. D. 324, 329, 53 N. W. Rep. 187.

As to right of removal by tenant, and those claiming under him, of trade and other fixtures, see par. 25 this note; also notes 11 Am. Dec. 241; 16 Am. Dec. 459; 42 Am. St. Rep. 795; 5 L. R. A. 150; 9 L. R. A. 700; 10 L. R. A. 722; briefs in 4 L. R. A. 379, 19 L. R. A. 612; 38 L. R. A. 268; 39 L. R. A. 370.

43. Right of removal may be regulated by agreement.—Merritt vs. Judd, 14 Cal. 59, 70. See pars. 28, 39 this note.

44. Same.—Renewal of lease forfeits right to remove fixtures, unless there is an express reservation of such right, even though first lease provided for removal of trade or other fixtures by tenant.—Merritt vs. Judd, 14 Cal. 59, 71-72; Jungerman vs. Bovee, 19 Cal. 354, 363; Marks vs. Ryan, 63 Cal. 107, 110. See Ill. Sanitary District vs. Cook, 169 Ill. 184, 191,

192, 61 Am. St. Rep. 161, 48 N. E. Rep. 461, 39 L. R. A. 369. *Ind.* Hedderich vs. Smith, 103 Ind. 208, 206, 53 Am. Rep. 509, 2 N. E. Rep. 315. *Md.* Carlin vs. Ritter, 68 Md. 478, 488, 6 Am. St. Rep. 467, 13 Atl. Rep. 370, 16 Id. 301. *Mass.* Madigan vs. McCarthy, 108 Mass. 376, 11 Am. Rep. 371; Holbrook vs. Chamberlin, 116 Mass. 155, 17 Am. Rep. 146; Watriss vs. First Nat. Bank, 124 Mass. 571, 578, 26 Am. Rep. 694. *Neb.* Enyeart vs. Davis, 17 Neb. 228, 236, 23 N. W. Rep. 449. *N. J.* Torrey vs. Burnett, 38 N. J. L. (9 Vr.) 457, 20 Am. Rep. 421. *N. Y.* Loughran vs. Ross, 45 N. Y. 792, 6 Am. Rep. 173.

As to loss of right to remove fixtures by renewal without reservation, see 11 Am. Dec. 243; 59 Am. Dec. 71; 53 Am. Rep. 341.

45. Compare: Kerr vs. Kingsbury, 39 Mich. 150, 33 Am. Rep. 362; Second Nat. Bank vs. O. E. Merrill Co., 69 Wis. 501, 34 N. W. Rep. 514.

46. MORTGAGEE AND MORTGAGEE, as between, same rule for determining fixtures applies as between vendor and vendee.—*Ala.* Tillman vs. De Lacy, 80 Ala. 103; De Lacy vs. Tillman, 83 Ala. 155, 3 So. Rep. 294. *Mass.* Southbridge Sav. Bank vs. Mason, 147 Mass. 500, 18 N. E. Rep. 406, 1 L. R. A. 350. *N. Y.* Davidson vs. Westchester Gas Light Co., 99 N. Y. 558, 2 N. E. Rep. 892. *N. C.* Foote vs. Gooch, 96 N. C. 365, 60 Am. Rep. 411, 1 S. E. Rep. 525.

As to fixtures between mortgagee and mortgagee, see 5 Am. Dec. 107; 7 Am. Dec. 223; 14 Am. Dec. 368; 17 Am. Dec. 690; 38 Am. Dec. 876; 61 Am. St. Rep. 435; 1 L. R. A. 350; 10 L. R. A. 722.

As to removal of fixtures from mortgaged premises, see monographic note by Robert Desty, 7 L. R. A. 273; also note 13 L. R. A. 680.

Bond for title affects relations same as mortgage.—See pars. 77-79 this note.

47. All fixtures annexed by the owner pass to mortgagee, whether they be fixtures for trade or manufacture, agriculture, or habitation.—Merritt vs. Judd, 14 Cal. 59, 72. See *Mass.* Winslow vs. Merchants' Ins. Co., 45 Mass. (4 Met.) 206, 38 Am. Dec. 368. *Mont.* Dutro vs. Kennedy, 9 Mont. 101, 107, 22 Pac. Rep. 763. *N. H.* Cavis vs. Beckford, 62 N. H. 229, 231, 13 Am. St. Rep. 554, 555. *N. Y.* Walker vs. Sherman, 20 Wend. (N. Y.) 636.

48. Machinery placed in factory for use in the business, and to permanently increase value of premises, becomes part of realty, however slight the annexation.—Southbridge Sav. Bank vs. Mason, 147 Mass. 500, 18 N. E. Rep. 406, 1 L. R. A. 350; Hoskin vs. Woodward, 45 Pa. St. 42.

49. Machinery in factory held in place and steadied by screws to floor and connected with rest of building by shafting or belting, but removable without injury to building and useful elsewhere, is not appurtenant and does not pass to mortgagee.—Hubbell vs. East Cambridge Five Cents Sav. Bank, 132 Mass. 447, 42 Am. Rep. 446.

50. Motive-power machinery of factory is appurtenant, and passes to mortgagee.—*Iowa.* Ottumwa Woolen Mill Co. vs. Hawley, 44 Iowa 57, 24 Am. Rep. 719. *Me.* Farrar vs. Stackpole, 6 Me. (6 Greenl.) 154, 19 Am. Dec.

201; *Carliss vs. McClain*, 29 Me. 115; *Parsons vs. Copeland*, 32 Me. 370, 54 Am. Dec. 623. *Md. McKim vs. Mason*, 3 Md. Ch. 136; *Dudley vs. Hurst*, 67 Md. 44, 1 Am. St. Rep. 368, 3 Atl. Rep. 901. *Mass. Winslow vs. Merchants' Ins. Co.*, 45 Mass. (4 Met.) 306, 38 Am. Dec. 368. *N. H. Burnside vs. Twitchell*, 43 N. H. 390. *Ohio. Case Mfg. Co. vs. Garven*, 45 Ohio St. 289, 13 N. E. Rep. 493. *Pa. Voorhis vs. Freeman*, 2 Watts & S. 116, 37 Am. Dec. 490; *Harlan vs. Harlan*, 15 Pa. St. 507, 53 Am. Dec. 612.

51. There is want of harmony in decisions on this point. Among cases holding contrary doctrine (depending upon individual circumstances) are: *Mass. Gale vs. Ward*, 14 Mass. 352, 7 Am. Dec. 223; *Hubbell vs. East Cambridge Five C. Sav. Bank*, 132 Mass. 447, 43 Am. Rep. 446. *N. J. Early vs. Burtis*, 40 N. J. Eq. (13 Stew.) 501, 4 Atl. Rep. 765. *N. Y. Murdock vs. Gifford*, 18 N. Y. 23; *Potter vs. Cromwell*, 40 N. Y. 287, 100 Am. Dec. 485; *Walker vs. Sherman*, 20 Wend. 636, 656. *Ohio. Teaff vs. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634; *Corwin vs. Cowan*, 12 Ohio St. 629. *Vt. Hill vs. Wentworth*, 23 Vt. 428; *Bartlett vs. Wood*, 33 Vt. 372.

52. Even though placed upon freehold after execution of mortgage.—*Dudley vs. Hurst*, 67 Md. 44, 1 Am. St. Rep. 368, 3 Atl. Rep. 901; *Hopewell Mills vs. Taunton Sav. Bank*, 150 Mass. 519, 15 Am. St. Rep. 235, 23 N. E. Rep. 327, 6 L. R. A. 249.

53. SAME—GASOLINE TANKS upon stand of brick in house 30 feet from factory passes to mortgagee.—*Dudley vs. Hurst*, 67 Md. 44, 1 Am. St. Rep. 368, 3 Atl. Rep. 901.

54. Same—Mains and pipes of gas-works are appurtenant.—*Davidson vs. Westchester Gas L. Co.*, 99 N. Y. 558, 2 N. E. Rep. 892.

55. Same—Steam boiler weighing 3,600 pounds resting upon a foundation by its own weight, with 30-foot pipe extending upward, supported by iron bars and clamps, fastened to the main building by large nails and spikes, is not appurtenant.—*Early vs. Burtis*, 40 N. J. Eq. (13 Stew.) 501, 4 Atl. Rep. 765.

56. MORTGAGEE'S REMEDY FOR REMOVAL OF FIXTURES.—Mortgagee whose security is impaired because fixtures permanently attached to realty have been removed may maintain an action for damages against the person or persons removing the same.—*Lavenson vs. Standard Soap Company*, 80 Cal. 245, 252, 13 Am. St. Rep. 147, 22 Pac. Rep. 184.

57. VENDOR AND VENDEE—Rule for determining fixtures as between, is the common-law rule, except in so far as it has been modified by statute; and whatever is accessory to building or land for its convenient use and improvement passes to vendee.—*Fratt vs. Whittier*, 58 Cal. 126, 130, 41 Am. Rep. 351; *Standart vs. Round Valley Water Co.*, 77 Cal. 399, 403, 19 Pac. Rep. 639. See *Stockwell vs. Campbell*, 39 Conn. 363, 12 Am. Rep. 393; *Richardson vs. Borden*, 42 Miss. 71, 3 Am. Rep. 595; *Meigs' Appeal*, 62 Pa. St. 28, 1 Am. Rep. 372; *Jarechi vs. Philharmonic Soc.*, 79 Pa. St.

403, 21 Am. Rep. 73; *Hutchins vs. Masterson*, 46 Tex. 551, 26 Am. Rep. 286.

See post § 1084 and note.

As to right of removal as between, see notes 21 Am. Rep. 80, 13 L. R. A. 680.

58. Rule is construed stronger against seller.—*Fratt vs. Whittier*, 58 Cal. 126, 130, 131, 41 Am. Rep. 251.

59. Fixtures appurtenant to the realty pass by deed of purchase and sale or mortgage.—*Merritt vs. Judd*, 14 Cal. 59.

60. Annexed and used with freehold, though severed at time of sale, pass to purchaser.—*Despatch Packet Line vs. Ballamy Mfg. Co.*, 23 N. H. 66.

61. Fixtures owned pass with realty, though erected for purposes of trade.—*Sands vs. Pfeiffer*, 10 Cal. 253, 264; *Miller vs. Plumb*, 6 Cow. (N. Y.) 655, 16 Am. Dec. 456; *Robinson vs. Preswick*, 3 Edw. Ch. (N. Y.) 247; *Murdock vs. Gifford*, 18 N. Y. 23.

62. Machinery on land used in quarrying passes with the land.—*Williams' Appeal* (Pa. Feb. 18, 1839) 16 Atl. Rep. 810.

63. Bond for title has effect to create relation of mortgager and mortgagee, and same rule as to fixtures and right of removal applies as in relation of mortgager and mortgagee.—*Merritt vs. Judd*, 14 Cal. 59. See *Wells vs. Francis*, 7 Colo. 396, 415, 4 Pac. Rep. 49.

See instructive discussion of the underlying equitable principle in monographic note 4 Am. St. Rep. 396-708.

III. AS TO WHAT ARE FIXTURES—PARTICULAR INSTANCES.

64. AS TO WHAT ARE FIXTURES appurtenant to land, see further post § 1013 and note. See also notes by Robert Desty 4 L. R. A. 674; 5 L. R. A. 150; 5 L. R. A. 594; 6 L. R. A. 249; 10 L. R. A. 722 and brief in 38 L. R. A. 268; 14 Am. Dec. 303; 17 Am. Dec. 236-296; 51 Am. St. Rep. 633; 53 Am. St. Rep. 585; 59 Am. St. Rep. 675.

Boilers and engines.—See para. 85, 86 this note.

65. Barn, that is personal property, to owner of soil on which it stands, is part of the realty.—*Oliver vs. Brown*, 80 Me. 542, 15 Atl. Rep. 599.

66. Buildings.—Whether become fixture appurtenant to land is question of fact to be determined from the facts in each particular case.—*Miller vs. Waddingham*, 91 Cal. 377, 379, 27 Pac. Rep. 750, 13 L. R. A. 680; *Lavenson vs. Standard Soap Co.*, 80 Cal. 245, 250, 13 Am. St. Rep. 147, 22 Pac. Rep. 184.

As to buildings being real estate, see brief 16 L. R. A. 306.

As to mortgage on buildings on leased premises, see note by Irwin Taylor 21 L. R. A. 347.

67. Buildings or cabins set upon blocks resting on ground, not attached to soil, and removable without disturbing land in any way, are not fixtures and not appurtenant to the land.—*Pennybecker vs. McDougal*, 48 Cal. 160, 164. See *Sands vs. Pfeiffer*, 10 Cal. 253; *Tyler vs. Decker*, 10 Cal. 435; *Merritt vs.*

Judd, 14 Cal. 59; Miller vs. Waddingham, 31 Cal. 377, 379, 27 Pac. Rep. 750, 13 L. R. A. 680.

68. Explained in Doscher vs. Blackiston, 7 Oreg. 144, 148.

69. Building, large and substantial structure, resting upon mud-sills embedded in ground and used with land, has, with lot upon which it is situated, to all appearance a single entity.—West Coast Lumber Co. vs. Apfield, 86 Cal. 335, 338, 24 Pac. Rep. 993.

70. Same—Constructed under contract, title to remain in builder until paid for, the standing finish, consisting of windows and doors, sashes, jams, trimmings, wainscotings, baseboards, mantelpieces without the tiling, doors, glass, and hardware, when placed in such building, though mortgaged, do not become a part of the freehold so as to defeat the contractor's right to remove when removal can be made without serious injury to the building.—German Sav. & Loan Soc. vs. Weber, 16 Wash. 95, 47 Pac. Rep. 224, 38 L. R. A. 267.

71. Buildings erected upon land under an agreement they are to belong to contractor until paid for do not become appurtenant to the soil until after that time.—Stowell vs. Waddingham, 100 Cal. 7, 34 Pac. Rep. 436.

72. Same—Erected by tenant with right of removal, there being several subsequent leases, in latter of which there is no provision for removal, buildings become fixtures appurtenant to the land.—Marks vs. Ryan, 68 Cal. 107, 110.

73. Building occupied for hotel is personal property when it is moved by tenant upon vacant city lot which is held under lease for term of years, in which it is provided that at its expiration lot shall be surrendered in the same condition in which it was at date of making of lease.—Docking vs. Frasell, 38 Kan. 420, 17 Pac. Rep. 160.

74. Same—Erected on land of another by his license remains property of erector, and it may be removed by him where it can be done without working serious injury to the land.—Ingalls vs. St. Paul, M. & M. R. Co., 39 Minn. 479, 12 Am. St. Rep. 676, 40 N. W. Rep. 524.

75. Same—Erection upon land of another by mistake becomes fixture and belongs to owner of soil.—Ind. Dutton vs. Ensley, 21 Ind. App. 46, 69 Am. St. Rep. 340, 51 N. E. Rep. 380. See Seymour vs. Watson, 5 Blackf. 555, 36 Am. Dec. 556; Hamilton vs. Huntley, 78 Ind. 521, 41 Am. Rep. 593. Me. Kingsley vs. McFarland, 82 Me. 231, 17 Am. St. Rep. 478, 19 Atl. Rep. 442. Mass. Sudbury vs. Jones, 62 Mass. (8 Cush.) 184. N. J. Campbell vs. Roddy, 44 N. J. Eq. (17 Stew.) 244, 6 Am. St. Rep. 889, 14 Atl. Rep. 279. Pa. Overton vs. Williston, 31 Pa. St. 155.

76. Compare: Atchison, T. & S. F. Co. vs. Morgan, 42 Kan. 23, 16 Am. St. Rep. 471, 21 Pac. Rep. 809, 4 L. R. A. 284, in which it is held that where railroad company, by mistake, digs well upon land of another and puts in boiler and pump for purpose of filling its tank, believing the well and attachments to be on its own land, upon the discovery of the fact that they are upon land of another, may remove the pump, boiler, and fixtures.

See par. 130 this note.

77. Same—Erected under option to purchase, on failure to complete purchase according to contract, house becomes fixture and passes to the vendor.—Central Branch R. Co. vs. Frita, 30 Kan. 430, 27 Am. Rep. 175; Hinkley & E. Iron Co. vs. Black, 76 Me. 473, 35 Am. Rep. 346.

78. Buildings, machinery and fixtures placed upon land by person who takes possession under agreement with owners, by terms of which he has option of purchasing for stipulated sum, payable at future designated day, the property so placed upon land being permanently attached and affixed thereto, without any agreement with owners permitting him to remove any portion of same, becomes part of the land, and under provisions of code belongs to owners of land as appurtenances thereto.—Pomeroy vs. Bell, 118 Cal. 635, 636, 50 Pac. Rep. 683; Globe Marble Mills Co. vs. Quinn, 76 N. Y. 23, 32 Am. Rep. 259. See Sands vs. Pfeiffer, 10 Cal. 258; Davis vs. Easley, 13 Ill. 192; Ogden vs. Stock, 34 Ill. 532, 85 Am. Dec. 332; Congregational Soc. vs. Flemming, 11 Iowa 533, 79 Am. Dec. 511; Hartwell vs. Kelly, 117 Mass. 235; Mills vs. Redick, 1 Neb. 437; Laffin vs. Griffiths, 35 Barb. (N. Y.) 58; Huebschmann vs. McHenry, 29 Wis. 655.

79. But where vendor, after erection of building, breaks his contract and takes possession of land and house thus erected, vendee may recover house by replevin.—Waters vs. Reuber, 16 Neb. 99, 49 Am. Rep. 710, 19 N. W. Rep. 687.

80. CHANDELIERS are part of real property as between vendor and vendee, and are bound with land on mortgage, but may be removable by lessee during his term where especially so provided in lease.—See Smith vs. Commonwealth, 14 Bush (Ky.) 31, 29 Am. Rep. 402.

See gas-fixtures, pars. 92-99 this note.

81. DEPOT, BRICK, said to be removable under certain circumstances (dictum).—Carr vs. Georgia R. Co., 74 Ga. 74.

See railroads, par. 131 this note.

82. Something brought on to land by tenant not to improve land, but to carry on his business, is trade fixture, and does not adhere to land and become appurtenant.—Carr vs. Georgia R. Co., 74 Ga. 74; followed in Van Ness vs. Pacard, 27 U. S. (2 Pet.) 137, bk. 7 L. ed. 374; Elwes vs. Maw, 3 East 38, 6 Rev. Rep. 523.

83. DERRICK erected in stone quarry by tenant for use in quarrying stone, capable of being removed from point to point as exigencies of work require, and fastened by means of post set in ground and guy-ropes attached to rock by anchor-bolts, is not fixture and appurtenant to land if its removal will not injure realty.—Honeyman vs. Thomas, 25 Oreg. 539, 542, 36 Pac. Rep. 636. See Leonard vs. Stickney, 131 Mass. 541; Carpenter vs. Walker, 140 Mass. 416, 5 N. E. Rep. 160; Wall vs. Hinds, 70 Mass. (4 Gray) 256; Henkle vs. Dillon, 15 Oreg. 610, 17 Pac. Rep. 148; Oregon R. & Nav. Co. vs. Mosier, 14 Oreg. 519, 58 Am. Rep. 321, 13 Pac. Rep. 800.

84. DERRICK-BOOM, as between vendor and vendee, is fixture and passes with land.—

Williams' Appeal (Pa. Feb. 18, 1889), 16 Atl. Rep. 310.

85. ENGINE, BOILER, AND FLOURING-MILL MACHINERY erected by lessee on leased premises, and with bolts and screws attached thereto, must be so considered—an agreement between lessee and lessor that latter should be at liberty to remove such engine, boiler, and machinery at expiration of lease, notwithstanding.—*McNally vs. Connolly*, 70 Cal. 3, 6, 11 Pac. Rep. 320.

86. Engine and boilers annexed to land by being fastened with bolts and nuts to timbers which are embedded in soil, are appurtenances to freehold and to which title is acquired by the grantee of deed of conveyance.—*McKiernan vs. Hesse*, 51 Cal. 594, 596.

87. FENCE—Portable, is not fixture.—*Pennybecker vs. McDougal*, 48 Cal. 160, 164. See note 42 Am. Dec. 449.

88. Compare: Seymour vs. Watson, 5 Blackf. (Ind.) 555, 36 Am. Dec. 556.

Fire-engine, as between heir and executor.—See par. 30 this note.

Fixtures, as between heir and executor.—See par. 31 this note.

89. FURNACE in house, resting by its own weight upon foundation, connected with building by air-box and hot-air pipes and registers, is not appurtenant.—*Turner vs. Wentworth*, 119 Mass. 459; *Towne vs. Fiske*, 127 Mass. 125, 34 Am. Rep. 353; *Heysham vs. Dettre*, 89 Pa. St. 506.

See par. 32 this note.

90. Compare: Thielman vs. Carr, 75 Ill. 385; *Day vs. Bisbitch*, Cro. Eliz. 374.

91. Portable, with pipes, registers, etc., put in dwelling-house, is no more part of realty than stove, in absence of evidence that it (1) has any peculiar adaptation to house in which it was placed, (2) was essential to enjoyment of estate, or (3) that it was intended otherwise.—*Towne vs. Fiske*, 127 Mass. 125, 34 Am. Rep. 353; *McConnell vs. Blood*, 123 Mass. 47, 25 Am. Rep. 12. See *Heysham vs. Dettre*, 89 Pa. St. 506.

92. GAS-BURNERS are fixtures appurtenant to building. They are in no sense furniture, but are mere accessories of building.—*Keeler vs. Keeler*, 31 N. J. Eq. (4 Stew.) 181, 191.

See post § 1013 and note.

93. "Gasellers" are part of gas-pipes, and, to use legal expression, they take their nature and are included in fixtures which go with house under lease. They are as much part of gas-pipes as millstones are part of mill. Although the gasellers may be unscrewed and taken off without injuring freehold, they are necessary to enjoyment of gas-pipes, which are of no practical use when separated from them.—*Sewell vs. Angerstein*, 18 L. T. N. S. 301.

94. GAS-FIXTURES attached to gas-pipes by means of screws and cement are not appurtenant.—*McKeage vs. Hanover Fire Ins. Co.*, 31 N. Y. 38, 37 Am. Rep. 471. See *Winslow vs. Merchants' Ins. Co.*, 45 Mass. (4 Met.) 306, 311, 33 Am. Dec. 368; *Rogers vs. Crow*, 40 Mo. 91, 23 Am. Dec. 299; *Shaw vs. Linkey*, 1 Daly (N. Y.) 487; *Lawrence vs. Kemp*, 1 Duer (N. Y.)

363; *Vaughen vs. Haldeman*, 33 Pa. St. 522, 523, 75 Am. Dec. 622; *Jarechl vs. Philharmonic Soc.*, 79 Pa. St. 403, 21 Am. Rep. 78; *Montague vs. Dent*, 10 Rich. (S. C.) L. 136, 67 Am. Dec. 573.

95. Gas-fixtures, whether in form of chandeliers suspended from the top of room, or projecting as brackets from perpendicular walls, though attached to gas-pipes by screws, and made tight by cement, are in nature of furniture, and do not lose their character as chattels by reason of manner in which they are affixed.—*Towne vs. Fiske*, 127 Mass. 125, 34 Am. Rep. 353.

96. Gas-fixtures, chandeliers, brackets, etc., are not appurtenances, and are not subject to mechanics' lien under an act extending mechanics' lien law to "plumbing or gas-fitting."—*Jarechl vs. Philharmonic Soc.*, 79 Pa. St. 403, 21 Am. Rep. 78.

97. Declaration of owner that he intends such articles (and mirrors, see par. 121 this note) shall go with the house does not make them realty.—*McKeage vs. Hanover Fire Ins. Co.*, 31 N. Y. 38, 37 Am. Rep. 471.

98. Gas-fixtures, consisting of chandeliers, globes, brackets, burners, pendants, etc., attached to buildings used for hotel purposes, must be regarded as essential for purposes for which building was used, and are appurtenant.—*Fratt vs. Whittier*, 58 Cal. 126, 131-132.

99. GAS FIXTURES AND HEATER are personal property.—*Heysham vs. Dettre*, 89 Pa. St. 506 (thought to be dictum, as the point does not seem to have been necessary to the decision).

100. GAS-PIPES running through the wall and beneath floors of house, are appurtenant.—*McKeage vs. Hanover Fire Ins. Co.*, 31 N. Y. 38, 37 Am. Rep. 471. See *Winslow vs. Merchants' Ins. Co.*, 45 Mass. (4 Met.) 306, 311, 33 Am. Dec. 368; *Shaw vs. Linkey*, 1 Daly (N. Y.) 487; *Vaughen vs. Haldeman*, 33 Pa. St. 522, 75 Am. Dec. 622; *Montague vs. Dent*, 10 Rich. (S. C.) L. 135, 67 Am. Dec. 573.

As to gasellers attached thereto, see par. 93 this note.

101. IRON STOVES IN THE BRICKWORK OF THE CHIMNEYS of house are appurtenant thereto and pass therewith.—*Folsom vs. Moore*, 19 Me. 252; *Leonard vs. Stickney*, 131 Mass. 541.

102. KITCHEN RANGE with boiler attached to building used for hotel purposes, must be regarded as essential for purposes for which building was used, and are appurtenant.—*Fratt vs. Whittier*, 58 Cal. 126, 131, 132, 41 Am. Rep. 251.

103. MACHINERY.—Dividing line between realty and personalty in case of machinery affixed to mills for use therein is unsettled, decisions being conflicting, large number holding that where article is attached for temporary use, with intention of removing, it does not lose its character of personalty; but if it is placed there for permanent improvement of freehold, it becomes part of realty.—*Mich. Manwaring vs. Jenison*, 61 Mich. 117, 27 N. W. Rep. 399. See *N. J. Crane vs. Brigham*, 11 N. J. Eq. (3 Stockt.) 29. *N. Y. Potter vs. Cromwell*, 40 N. Y. 287, 100 Am. Dec. 485; *Walker vs. Sherman*, 20 Wend. 636. *Eng. Lancaster vs.*

Eve, 5 C. B. N. S. 717, 94 Eng. C. L. 715; Wamsley vs. Milne, 7 C. B. N. S. 115, 97 Eng. C. L. 114; Hellawell vs. Eastwood, 6 Exch. 295, 312.

See specifically the various kinds of machinery this note.

104. Machines may remain chattels for all purposes, even though physically attached to freehold by owner, if mode of attachment indicates that it is merely to steady them for their more convenient use, and not to make them adjunct of building or soil.—*McConnell vs. Blood*, 123 Mass. 47, 25 Am. Rep. 12; *Hubbell vs. East Cambridge Five Cents Sav. Bank*, 132 Mass. 447, 42 Am. Rep. 446; *Maguire vs. Park*, 140 Mass. 21, 1 N. E. Rep. 750; *Carpenter vs. Walker*, 140 Mass. 416, 5 N. E. Rep. 160.

105. Machinery placed in building for purpose of supplying same with electric light, owners thereof having no intention to annex it to realty, does not pass to a purchaser of building at sale of foreclosure.—*Vall vs. Weaver*, 132 Pa. St. 363, 19 Am. St. Rep. 598, 19 Atl. Rep. 138.

106. Same—Criteria determining whether appurtenant and passes with (1) physical attachment, (2) building constructed for the machinery, (3) machinery constructed for building.—*Farmers' L. & T. Co. vs. Minneapolis Engine & Mach. Works*, 35 Minn. 543, 29 N. W. Rep. 349, following *Wolford vs. Baxter*, 33 Minn. 12, 53 Am. Rep. 1, 21 N. W. Rep. 744.

107. Same—Essential to business or building are fixtures.—*Hendy vs. Dinkerhoff*, 57 Cal. 3. *Md. Kirwan vs. Latour*, 1 Har. & J. (Md.) 289, 2 Am. Dec. 519. *Mass. Goddard vs. Chase*, 7 Mass. 432; *Gaffield vs. Hapgood*, 34 Mass. (17 Pick.) 192, 28 Am. Dec. 290; *Noble vs. Bosworth*, 36 Mass. (19 Pick.) 314. *N. H. Kittredge vs. Woods*, 3 N. H. 503, 14 Am. Dec. 393; *Despatch Packet Line vs. Bellamy Mfg. Co.*, 12 N. H. 205, 232, 37 Am. Dec. 203. *Fed. Powell vs. Monson & B. Mfg. Co.*, 3 Mas. C. C. 347, 19 Fed. Cas. 1218.

108. Machines for the manufacture of candles, soap kettles, boiler, and candle-machines, appliances of permanent character, put in and attached to building with intention of using them in manufacture of soap and candles, form part of realty, which pass with grant of same and become subject to lien of mortgage upon said realty.—*Lavenson vs. Standard Soap Co.*, 30 Cal. 248, 251, 18 Am. St. Rep. 184, 22 Pac. Rep. 184.

109. Same—In building erected for particular purpose, and placed therein to effectuate that purpose, and reasonably necessary therefor, and in some substantial manner attached to freehold, carrying idea of permanency, is regarded as appurtenant to freehold.—*Roddy vs. Brick*, 42 N. J. Eq. (15 Stew.) 213, 6 Atl. Rep. 306.

110. Same—Mortgaged, which is subsequently attached as fixture in roller-mill will not affect lien of mortgage where same has been duly recorded under statute.—*Grand Island Bank Co. vs. Frey*, 25 Neb. 66, 13 Am. St. Rep. 478, 40 N. W. Rep. 599; *Cool vs. Roche*, 20 Neb. 550, 31 N. W. Rep. 367. See *Smith vs. McLean*, 24 Iowa 322; *Whitney vs. Heywood*, 60 Mass. (6 Cush.) 82; *Hick vs. Williams*, 17

Barb. (N. Y.) 523; *Kanaga vs. Taylor*, 7 Ohio St. 134, 70 Am. Dec. 62.

See note 13 Am. St. Rep. 481.

111. MANURE MADE ON AGRICULTURAL PREMISES BY FEEDING to stock product of the soil, and the like is a part of the soil.—*Daniels vs. Pond*, 38 Mass. (21 Pick.) 267, 32 Am. Dec. 269; *Fay vs. Muzzey*, 79 Mass. (13 Gray) 53, 55, 74 Am. Dec. 619; *Fletcher vs. Herring*, 112 Mass. 382, 384; *Kittredge vs. Woods*, 3 N. H. 503, 14 Am. Dec. 393; *Lewis vs. Jones*, 17 Pa. St. 262, 264, 55 Am. Dec. 550.

112. Manure made on farm by outgoing tenant may be removed by him, in absence of any covenant or custom to contrary.—*Smithwick vs. Ellison*, 2 Ired. (N. C.) L. 326, 38 Am. Dec. 697; *Sanders vs. Ellington*, 77 N. C. 225.

113. "Manure made on a farm, occupied by a tenant at will or for years, in ordinary course of husbandry, consisting of all collections from stable and barnyard, or of composts formed by an admixture of these with soil or other substances, is, by usage, practice, and general understanding, so attached to, and connected with realty, that, in absence of any express stipulation on subject, an outgoing tenant has no right to remove manure thus collected, or sell it to be removed, and that such removal is tort, for which landlord may have redress; and such sale will vest no property in the vendee."—*Daniels vs. Pond*, 38 Mass. (21 Pick.) 367, 32 Am. Dec. 269. See *Lassell vs. Reed*, 6 Me. (6 Greenl.) 222; *Kittredge vs. Woods*, 3 N. H. 503, 14 Am. Dec. 393.

114. Same—Laying around in heaps around the barayard does not pass with a conveyance.—*Ruckman vs. Outwater*, 28 N. J. L. (4 Dutch.) 581.

115. Compare: *Kittredge vs. Woods*, 3 N. H. 503, 14 Am. Dec. 393.

116. Same—Made partly from the produce of the farm and partly from food purchased by the tenant, in absence of any agreement or custom, the manure is a part of the freehold.—*Bonnell vs. Allen*, 58 Ind. 130, 137.

117. Same—Not produced directly or indirectly from the land and were in no sense the product of agricultural demised premises, such as accumulates in livery stables and like, it is no part of realty, and may be removed by tenant at close of his term.—See *Conn. Parsons vs. Camp*, 11 Conn. 525. *Me. Lassells vs. Reed*, 6 Me. (6 Greenl.) 222. *Md. Gallagher vs. Shipley*, 24 Md. 418, 427-428, 87 Am. Dec. 611. *Mass. Daniels vs. Pond*, 38 Mass. (21 Pick.) 267, 32 Am. Dec. 269; *Strong vs. Doyle*, 110 Mass. 92, 93; *Fletcher vs. Herring*, 112 Mass. 382, 384. *N. H. Plummer vs. Plummer*, 30 N. H. 558; *Perry vs. Carr*, 44 N. H. 118; *Proctor vs. Gilson*, 49 N. H. 65. *Vt. Wing vs. Gray*, 36 Vt. 261, 267.

118. MATERIAL FOR IMPROVEMENTS, provided by owner but not used, pass with conveyance of freehold.—*Cook vs. Whiting*, 16 Ill. 480.

119. Compare: *Ripley vs. Paige*, 12 Vt. 353; *Conklin vs. Parsons*, 2 Pinn. (Wis.) 264.

120. MILL—Portable.—See portable grist-mill, para. 128, 129 this note.

121. MIRRORS supported on hooks driven into walls are not fixtures as between mortgager and mortgagee.—*McKeage vs. Hanover F. Ins. Co.*, 81 N. Y. 38, 37 Am. Rep. 471. See *Mass. Winslow vs. Merchants' Ins. Co.*, 45 Mass. (4 Met.) 806, 38 Am. Dec. 363. *Mo. Rogers vs. Crow*, 40 Mo. 91, 93 Am. Dec. 299. *N. Y. Shaw vs. Lenke*, 1 Daly (N. Y.) 487; *Lawrence vs. Kemp*, 1 Duer (N. Y.) 363. *Pa. Vaughn vs. Haldeman*, 33 Pa. St. 522, 75 Am. Dec. 622. *S. C. Montague vs. Dent*, 10 Rich. (S. C.) L. 185, 67 Am. Dec. 572, 575.

122. But it is otherwise where mirror frames are actually annexed to realty as part of house in process of building, and not as furniture, pass with land, and are subject of mechanics' lien.—*Ward vs. Kilpatrick*, 85 N. Y. 413, 39 Am. Dec. 674.

123. MONUMENT ERECTED UPON AND AS AN ADORNMENT OF A PUBLIC PARK of municipality, though built by private contribution, is fixture to freehold and becomes part of land and is property of municipality.—*Griffith vs. Happersberger*, 36 Cal. 605, 613, 25 Pac. Rep. 137, 487. See *Leonard vs. City of Brooklyn*, 71 N. Y. 498, 27 Am. Rep. 80; *Portland Lumbering & M. Co. vs. School Dist.*, 13 Oreg. 233, 10 Pac. Rep. 350.

124. MOSQUITO SCREENS ATTACHED TO A BUILDING used for hotel purposes must be regarded as essential for purpose for which building used, and are appurtenant, passing by grant.—*Fratt vs. Whittier*, 58 Cal. 126, 131-132, 41 Am. Rep. 251.

125. NAME OF HOTEL NOT FIXTURE AND DOES NOT BECOME ATTACHED TO and appurtenant to the house, when given to it by tenant under lease for term, and he may remove from demised premises to hotel at another place and give to it name he had used in demised premises.—*Woodward vs. Lazar*, 21 Cal. 448, 452, 32 Am. Dec. 751.

126. ORGAN IN CHURCH built into recess left for and adapted for that purpose becomes part of the freehold.—*Chapman vs. Union Ins. Co.*, 4 Bardw. (Ill. App.) 29; *Rogers vs. Crow*, 40 Mo. 91, 93 Am. Dec. 299. See *Me. Cohen vs. Kyler*, 27 Mo. 122. *N. Y. Tabor vs. Robinson*, 33 Barb. 425; *Main vs. Schwarzwelder*, 4 E. D. Smith 273. *N. C. Bryan vs. Lawrence*, 5 Jones (N. C.) L. 337.

127. PIPES FOR CONDUCTING WATER through building are part of the freehold.—*Cohen vs. Kyler*, 27 Mo. 122.

As to pipes for conducting gas, see par. 100 this note; also post §1084 and note.

128. PORTABLE FURNACE for heating church held not appurtenant.—*Rahway Sav. Inst. vs. Irving St. Bapt. Church*, 36 N. J. Eq. (9 Stew.) 61; *Williams vs. Bailey*, 3 Dane Abr. 152.

129. Portable grist-mill upon real property is fixture and appurtenant to land, as between purchaser of land and owner thereof or his creditors.—*Potter vs. Cromwell*, 40 N. Y. 237, 294, 100 Am. Dec. 485.

130. PUMP AFFIXED BY BEING PLANTED DOWN ON GROUND and connected to pipes so as to admit water, is, under meaning

of this section, affixed to the land.—*Goss vs. Helbing*, 77 Cal. 190, 191, 19 Pac. Rep. 277.

See pars. 75, 76 this note.

131. RAILROAD RAILS on road leased for term of years, under obligation to return road at end of lease "in as good condition" as when it was received, lessee is not entitled, under rule of trade fixtures as between landlord and tenant, to remove new sidetracks and erections of various sorts built by lessee upon line of road for use in operating same, nor to remove steel rails and other improved appliances put upon road by lessee, and substitute rails and appliances similar in character to those in use at time lessee took possession under lease.—*Western & A. R. Co. vs. State of Georgia*, Special Judicial Commission of Ga. May 23, 1891, 14 L. R. A. 438.

As to railroad as a trade fixture, see brief 48 L. R. A. 243.

132. Range for kitchen.—See par. 102 this note.

133. Scales—Track,—as, to see par. 133 this note.

134. STEAM BOILERS and other machinery in mill are appurtenant.—*Witmer's Appeal*, 45 Pa. St. 455, 84 Am. Dec. 505.

See pars. 33, 34, 103-110 this note.

135. SUGAR MILL is fixture and passes with the plantation, as between vendor and vendee.—*Hutchins vs. Masterson*, 46 Tex. 551, 26 Am. Rep. 286.

See pars. 57-62, 103-110 this note.

136. TANKS ATTACHED TO BUILDING used for hotel purposes must be regarded as essential for purposes for which building was used, and are appurtenant.—*Fratt vs. Whittier*, 58 Cal. 126, 131-132, 41 Am. Rep. 251.

137. TOOLS ON LAND USED IN QUARRYING SLATE pass with land as fixture, as between vendor and vendee.—*Williams' Appeal* (Pa. Feb. 13, 1889), 16 Atl. Rep. 810.

138. TRACK SCALES bought for and mainly used in connection with business, and useful and necessary in connection therewith, and visibly attached to business, are fixture and passes with the premises, although erected, by license of owner, on adjoining premises.—*McGorrick vs. Dwyer*, 78 Iowa 379, 16 Am. St. Rep. 440, 43 N. W. Rep. 215, 3 L. R. A. 594.

See pars. 142, 143 this note.

139. TRADE FIXTURES as appurtenant to and passing with land.—See post 1013 and note, also heads in this division of this note.

140. "The cases on trade fixtures are innumerable, and apparently not at all reconcilable on principle. Many of them turn on special contracts. The decisions are affected by relationship of parties, as between executor and heirs, mortgager and mortgagee, purchaser and seller, landlord and tenant, etc. Some turn on the mode of annexation, while that is ignored by others."—*Western & A. R. Co. vs. State of Georgia*, Special Judicial Commission of Ga. May 23, 1891, 14 L. R. A. 438.

141. Building erected by lumber company on ground leased as lumber yard for use as an office and place of business and resting

upon posts or underpinning supported by sills laid upon the ground, is trade fixture within the meaning of §1019 of the Code of Civil Procedure, and not fixture appurtenant to the land.—*Security L. & T. Co. vs. Willamette Steam M. L. & M. Co.*, 99 Cal. 636, 639, 34 Pac. Rep. 321.

142. **WAGON SCALES** set on foundation of stone and mortar installed in usual manner with supporting rods and platform, set up for and convenient in or necessary to the business conducted on the premises are fixtures and pass with sale thereof.—*Thomson vs. Smith*, 111 Iowa 718, 82 Am. St. Rep. 541, 83 N. W. Rep. 739, 50 L. R. A. 780.

143. **Sold upon condition title not to pass** until full price paid will not affect title of third person purchasing in good faith without notice.—*Thomson vs. Smith*, supra; *Bringhoff vs. Munzemaier*, 20 Iowa 513; *Stillman vs. Flenniken*, 53 Iowa 450, 10 N. W. Rep. 342, 43 Am. Rep. 120.

144. "The vendor of the scales having put it in power of vendee to attach them as fixture to the land, and as such to sell to innocent purchasers, is not in situation to complain when this was done."—*Thomson vs. Smith*, supra. See *Fisfield vs. Farmers' Nat. Bank*, 148 Ill. 163, 39 Am. St. Rep. 166, 35 N. E. Rep. 802; *Wickes Bros. vs. Hill*, 115 Mich. 333, 73 N. W. Rep. 375; *Muir vs. Jones*, 23 Oreg. 332, 31 Pac. Rep. 646, 19 L. R. A. 441; *Ice L. & W. Co. vs. Lone Star*

Engine & B. W. Co., 15 Tex. Civ. App. 694, 41 S. W. Rep. 835.

See notes 39 Am. St. Rep. 166, 19 L. R. A. 441, 38 L. R. A. 267.

145. **WAREHOUSE** with concrete foundation would ordinarily "rest permanently upon the land," and there being nothing to show that such building and concrete foundation did not so rest upon the land, it will be presumed that it did, and hence, under the definition given in § 658 ante, is real estate.—*Commercial Bank vs. Pritchard*, 126 Cal. 600, 605, 59 Pac. Rep. 130.

146. **Assignment of lease of real property** includes all lessee's interest in leased premises, including warehouse which has been built thereon.—*Commercial Bank vs. Pritchard*, 126 Cal. 600, 605, 59 Pac. Rep. 130.

147. **WATER-FILTER ATTACHED TO BUILDING USED FOR HOTEL** purposes must be regarded as essential for purposes for which building used, and is appurtenant.—*Fratt vs. Whittier*, 53 Cal. 126, 131-132, 41 Am. Rep. 251.

148. **WHARF CONSTRUCTED FROM THE SHORE**, extending into water beyond low-water mark, by lessee of land on the shore of ocean, extending down to low-water mark, is not an improvement on demised premises, nor appurtenant thereto, even if attached to wharf on premises leased, by nails, bolts, and screws.—*Coburn vs. Ames*, 52 Cal. 385, 396, 28 Am. Rep. 634.

§ 661. **FIXTURES ATTACHED TO MINES.** Sluice boxes, flumes, hose, pipes, railway tracks, cars, blacksmith-shops, mills, and all other machinery or tools used in working or developing a mine, are to be deemed affixed to the mine.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
- 2, 3. Engine and boiler—On United States lands.
4. Fixtures in mine—Effect on of option to purchase.
- 5-8. Improvements on mining claim—Lien for materials or labor.
9. Iron pipes, giants, etc.—Part of mine.
10. Lien for labor—Several claims.
11. Machinery and tools—Appurtenant.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Malone vs. The Big Flat G. Min. Co.*, 76 Cal. 578, 582, 585, 18 Pac. Rep. 772 (applied, cited, and construed); *Williams vs. Mountaineer Gold M. Co.*, 102 Cal. 134, 142, 34 Pac. Rep. 702, 36 Pac. Rep. 388 (applied and construed); *Hamilton vs. Delhi Min. Co.*, 118 Cal. 148, 153, 50 Pac. Rep. 378 (construed); *Pomeroy vs. Bell*, 118 Cal. 635, 636, 50 Pac. Rep. 483 (cited).

2. **ENGINE AND BOILER FIRMLY AFFIXED TO GROUND OF QUARTZ LEDGE** and introduced for purpose of working ledge is fixture and becomes a part of land as between lessor and lessee.—*Merritt vs. Judd*, 14 Cal. 59, 64, 63.

3. **On United States lands**, placed there for purpose of operating mining claim, become part of realty.—*Roseville Alta Min. Co. vs. Iowa Gulch Min. Co.*, 15 Colo. 29, 52, 22 Am. St. Rep. 814, 375, 24 Pac. Rep. 920.

4. **FIXTURE PLACED IN MINE** which becomes appurtenant to land, as between lessee and lessor, where option to purchase land is given by lessor to lessee, this relieves fixture of its permanent character, and if severed and removed before expiration of time for completing purchase, does not revert to lessor on failure to complete contract of purchase.—*Merritt vs. Judd*, 14 Cal. 60, 67-70.

5. **IMPROVEMENTS MADE ON MINING CLAIM** become and are part of claim, and are subject to mechanic's lien.—*Williams vs. Mountaineer G. Min. Co.* (Cal. Nov. 8, 1893), 34 Pac. Rep. 702.

6. **Lien for materials furnished** to be used in building upon a mining claim, should be asserted against mining claim as whole, and not against specific structure upon the mine.—*Williams vs. Mountaineer G. Min. Co.*, 102 Cal. 134, 142, 34 Pac. Rep. 702, 36 Id. 388.

7. **Distinguished:** *Pacific Rolling Mill Co. vs. Bear Valley Irr. Co.*, 120 Cal. 94, 96, 98, 65 Am. St. Rep. 158, 52 Pac. Rep. 136.

8. **Lien for labor.**—Where one having contract to purchase mine, puts in machinery leased from another under contract, sufficient as between himself and lessor, to continue character of leased property as personalty, one performing labor in mine will not have lien for labor upon such machinery.—*Jordan vs. Myers*, 126 Cal. 565, 567, 58 Pac. Rep. 1061.

9. **IRON PIPE, GIANTS, etc.**, whether they are attached to mine or not, must be regarded as part of it.—*Malone vs. The Big Flat G. Min. Co.*, 76 Cal. 578, 582, 18 Pac. Rep. 772.

10. **LIENS FOR LABOR**.—Several claims operated as one mine by one owner may be considered one piece of property, and mechanic's lien may be filed against claim as whole.—*Malone vs. Big Flat G. Min. Co.*, 76 Cal. 578,

582, 18 Pac. Rep. 772; *Hamilton vs. Delhi Min. Co.*, 118 Cal. 148, 151, 50 Pac. Rep. 378.

11. **MACHINERY AND TOOLS NOT ERECTED ON MINE**, nor "used in working or developing" thereof, cannot, by virtue of this section, "be deemed fixtures to the mine."—*Hamilton vs. Delhi Min. Co.*, 118 Cal. 148, 153, 50 Pac. Rep. 378.

§ 662. **APPURTENANCES.** A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way, or watercourse, or of a passage for light, air, or heat from or across the land of another.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
- 2-4. Appurtenance—What is.
5. Classes or kinds of appurtenances.
6. Construction—Incorporeal hereditaments.
7. Dam and privilege of flooding.
- 8, 9. Determining what is appurtenant—Rule for.
- 10, 11. Ditch—When appurtenant—Attached to mine.
12. Easements—Pass as.
- 13-15. Franchise—Appurtenance—Sale on execution.
16. Grist-mill—Road appurtenant.
- 17-24. Land will pass as appurtenant.
- 25, 26. Light and air—When appurtenant.
- 27, 28. Mining right—Carries water-right, etc.
- 29-31. Mill—Mill-site—Mill-dam.
- 32, 33. Race-way—Appurtenant.
34. Road and right of way.
35. Tunnel right—What appurtenant.
36. Water—Appropriated to land passes.
- 37-40. Same—Flowing in natural channel.
- 41-44. Same—Flowing in artificial channel.
- 45-47. Same—Percolating waters.
48. Same—Spring water—Unsurveyed lands.
- 49, 50. Water-ditch—Appurtenant, when.
51. Water-power—Appurtenant, when.
52. Water-right in gross—Not appurtenant.
53. Wharf and chute—Below high-water mark.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc.**, in: *Coburn vs. Ames*, 52 Cal. 385, 395, 396, 28 Am. Rep. 634 (applied); *Farmer vs. Ukiah W. Co.*, 56 Cal. 11, 13 (applied); *St. Helena W. Co. vs. Forbes*, 62 Cal. 182, 184, 185, 186, 45 Am. Rep. 659 (applied); *Ginocchio vs. Amador C. & Min. Co.*, 67 Cal. 493, 497, 8 Pac. Rep. 29 (applied); *Standart vs. Round Valley W. Co.*, 77 Cal. 389, 403, 19 Pac. Rep. 689 (applied); *Coonradt vs. Hill*, 79 Cal. 587, 590, 21 Pac. Rep. 1099 (applied); *McShane vs. Carter*, 80 Cal. 310, 315, 316, 22 Pac. Rep. 178 (applied); *West Coast L. Co. vs. Apfeld*, 86 Cal. 335, 338, 24 Pac. Rep. 998 (cited in discussion); *Gould vs. Stafford*, 91 Cal. 146, 155, 27 Pac. Rep. 543 (applied); *Ely vs. Ferguson*, 91 Cal. 187, 190, 27 Pac. Rep. 587 (applied); *Crooker vs. Benton*, 93 Cal. 365, 370, 28 Pac. Rep. 953 (construed); *Fudickar vs. East Riverside Irr. Dist.*, 109 Cal. 29, 36, 41 Pac. Rep. 1024 (applied); *Dixon vs. Schermeier*, 110 Cal. 582, 585, 42 Pac. Rep. 1091 (construed); *Peterson vs. Machado* (Cal. Feb. 7, 1896), 43 Pac. Rep. 611, 612 (construed); *Kennedy vs. Burnap*, 120 Cal. 488, 493, 52 Pac.

Rep. 843, 40 L. R. A. 476 (applied); *Mount Carmel F. Co. vs. Webster*, 140 Cal. 183, 187, 73 Pac. Rep. 826 (referred to).

2. **APPURTENANCE** is that which belongs to another thing, but which has not belonged to it immemorially.—*Farmer vs. Ukiah W. Co.*, 56 Cal. 11, 14.

3. Everything essential to the beneficial use and enjoyment of the property designated, in the absence of language indicating a different intention on the part of the grantor, is to be regarded as an appurtenance and passing by the conveyance.—*McShane vs. Carter*, 80 Cal. 310, 315, 22 Pac. Rep. 178.

4. The grant of a thing impliedly carries with it a grant of whatever is necessary for its beneficial enjoyment.—*Cave vs. Crafts*, 53 Cal. 135, 140.

See par. 17 this note.

5. **CLASSES OR KINDS OF APPURTENANCES** are (1) corporeal and (2) incorporeal.—*Farmer vs. Ukiah W. Co.*, 56 Cal. 11, 14; *Jackson vs. Striker*, 1 John. Cas. (N. Y.) 384.

6. **CONSTRUCTION**.—Whether section refers to other than incorporeal hereditaments, assumed but not decided in *Coburn vs. Ames*, 52 Cal. 385, 396, 28 Am. Rep. 634.

7. **DAM AND PRIVILEGE OF FLOODING** land goes with a mill to which a dam and mill-pond is attached, as an appurtenance.—*Jackson vs. Trullinger*, 9 Oreg. 393.

See pars. 29, 30, 31 this note.

8. **DETERMINING WHAT IS APPURTENANT**—Rule for is that everything essential to the beneficial use and enjoyment of the property designated is, in the absence of language indicating a different intention on the part of the grantor, to be considered as passing by the conveyance.—*Sparks vs. Hess*, 15 Cal. 186, 196; *Cave vs. Crafts*, 53 Cal. 135, 138; *Farmer vs. Ukiah W. Co.*, 56 Cal. 11, 13; *Smith vs. Cooley*, 65 Cal. 46, 48, 2 Pac. Rep. 880; *McShane vs. Carter*, 80 Cal. 310, 315, 22 Pac. Rep. 178. *Ind.* *Scott vs. Michael*, 129 Ind. 250, 254, 23 N. E. Rep. 546. *Mass.* *Gurney vs. Ford*, 84 Mass. (3 Allen) 576; *Ammidown vs. Ball*, 90 Mass. (3 Allen) 293. *Mo.* *Witte vs. Quinn*, 23 Mo. App. 682, 692. *N. H.* *New Ipswich W. L. Factory vs. Batchelder*, 3 N. H. 190, 14 Am. Dec. 346. *N. Y.* *Lampman vs. Milks*, 21 N. Y. 505; *Ward vs. Warren*, 82 N. Y. 365, 368; *Holloway vs. Southmayd*, 139 N. Y. 390, 402, 34 N. E. Rep. 1047. *N. C.* *Bowling vs. Burton*, 101 N. C.

176, 180, 7 S. E. Rep. 701, 2 L. R. A. 235. *Oreg. Jackson vs. Trullinger*, 9 *Oreg.* 293, 298. *Vt. Coolidge vs. Hager*, 43 *Vt.* 9, 14, 5 *Am. Rep.* 256. *Fed. Sheets vs. Selden*, 69 *U. S.* (2 *Wall.*) 177, 187-188, bk. 17 *L. ed.* 822; *Bank of British N. A. vs. Miller*, 6 *Fed. Rep.* 545, 550-551; *Miller vs. Alliance Ins. Co.*, 7 *Fed. Rep.* 649, 651; *Scheel vs. Alhambra Min. Co.*, 79 *Fed. Rep.* 821, 825; *Whitney vs. Olney*, 3 *Mass. C. C.* 280, 29 *Fed. Cas.* 1108; *United States vs. Appleton*, 1 *Sumn. C. C.* 492, 24 *Fed. Cas.* 841.

9. A sale of real property carries with it any easement or privilege which is necessary to its enjoyment, and at time is in use thereon and therewith, as an appurtenance in fact, although not technically so at law, and this upon presumption more or less cogent, according to circumstances, that it was intention of parties to agreement of sale that it should pass with the property to which it was then apparently subservient.—*Bank of British N. A. vs. Miller*, 6 *Fed. Rep.* 545, 550-551. See *Mass. Thayer vs. Payne*, 56 *Mass.* (2 *Cush.*) 327. *Pa. Strickler vs. Todd*, 1 *Serg. & R.* 63, 13 *Am. Dec.* 649. *Vt. Coolidge vs. Hager*, 43 *Vt.* 9, 5 *Am. Rep.* 256. *Fed. Sheets vs. Selden*, 69 *U. S.* (2 *Wall.*) 177, 186, bk. 17 *L. ed.* 822; *Whitney vs. Olney*, 3 *Mass. C. C.* 280, 29 *Fed. Cas.* 1108; *United States vs. Appleton*, 1 *Sumn. C. C.* 492, 24 *Fed. Cas.* 841. *Eng. Nicholas vs. Chamberlain, Cro. Jas.* (3 *Cro.*) 121.

10. DITCH FOR CONVEYING OR TRANSPORTING WATER, intended to be used in place of another ditch, is not appurtenant thereto and does not pass under a sheriff's deed to latter.—*Mitchell vs. Amador C. & Min. Co.*, 75 *Cal.* 464, 493, 17 *Pac. Rep.* 246.

See pars. 49, 50 this note.

11. Ditch by means of which mine is operated is an appurtenance.—*McShane vs. Carter*, 80 *Cal.* 310, 315, 22 *Pac. Rep.* 178.

12. EASEMENTS in lands of grantor which are necessary to full enjoyment of grant pass as an appurtenance without enumeration on conveyance of real estate; as easement in public highway along premises granted, fee to which is in grantor, and highway is subsequently abandoned as such.—*Holloway vs. Southmayd*, 139 *N. Y.* 390, 402, 34 *N. E. Rep.* 1047.

See pars. 16, 34 this note.

13. FRANCHISE OF TURNPIKE ROAD corporation, being an incorporeal hereditament, does not pass under sheriff's deed to the turnpike road.—*Wood vs. Truckee Turnp. Co.*, 24 *Cal.* 474, 486-487. See *Appeal of North Beach & M. R. Co.* (dis. op.), 32 *Cal.* 499, 529; *People ex rel. Jenkins vs. Duncan*, 41 *Cal.* 507, 510.

14. Franchises are special privileges conferred by government on individuals which do not belong to citizens of county generally by common right. The persons to whom privileges in franchises are granted hold them in personal trust, and cannot be transferred by forced sale.—*Munroe vs. Thomas*, 5 *Cal.* 470; *Thomas vs. Armstrong*, 7 *Cal.* 286; *Wood vs. Truckee Turnp. Co.*, 24 *Cal.* 474, 486.

15. The rule as to sale of franchise of corporation on execution was changed by § 388 of the Civil Code.—See ante § 388 and note.

16. GRIST-MILL granted with appurtenances carries right to way immemorially used as means of ingress and egress from public highway.—*Leonard vs. White*, 7 *Mass.* 6, 5 *Am. Dec.* 19.

See para. 12, 23, 29-31, 34 this note.

17. LAND WILL OFTEN PASS BY CONVEYANCE as an appurtenance without any specific designation of it. Everything essential to beneficial use and enjoyment of property designated, in absence of language indicating different intention on part of grantor, is to be considered as passing by conveyance.—*Sparks vs. Hess*, 15 *Cal.* 186, 195-196; *McShane vs. Carter*, 80 *Cal.* 310, 315, 22 *Pac. Rep.* 178; *Sheets vs. Selden*, 69 *U. S.* (2 *Wall.*) 177, bk. 17 *L. ed.* 822; *Miller vs. Alliance Ins. Co.*, 7 *Fed. Rep.* 649, 651; *Whitney vs. Olney*, 3 *Mass. C. C.* 280, 29 *Fed. Cas.* 1108.

See post § 1084 and note.

18. Specific designation and description of parcels of land conveyed, though usual are not always essential. Land will often pass by other terms. Thus grant of a messuage, or a messuage with appurtenances, will carry dwelling-house and adjoining buildings, and also its orchard, garden, and curtilage.—*McShane vs. Carter*, 80 *Cal.* 310, 315, 22 *Pac. Rep.* 178.

19. Bridge and appurtenances conveyed carries fee to land on which the bridge rests.—*Sparks vs. Hess*, 15 *Cal.* 186.

20. Building carries as appurtenances the lot on which erected where the rents thereof are devised.—*Richmond vs. State*, 5 *Ind.* 334; *Wise vs. Wheeler*, 6 *Ired. (N. C.) L.* 196.

21. Exception in deed of conveyance of "brick factory," carries with it lot on which factory stands.—*Allen vs. Scott*, 38 *Mass.* (21 *Pick.*) 25, 32 *Am. Dec.* 238.

22. Canal carries the land adjacent thereto.—*Sheets vs. Selden*, 69 *U. S.* (2 *Wall.*) 177, 183, bk. 17 *L. ed.* 822.

23. Grist-mill, conveyance of one half of, includes also land on which mill is situated.—*Gibson vs. Brockway*, 8 *N. H.* 465, 31 *Am. Dec.* 200.

See par. 16 this note.

24. Mill granted conveys not only land on which the mill stands, but adjacent land thereto passes by implication as appurtenant.—*Forbush vs. Lombard*, 54 *Mass.* (13 *Met.*) 109. See *Gibson vs. Brockway*, 8 *N. H.* 465, 31 *Am. Dec.* 200; *Whitney vs. Olney*, 3 *Mass. C. C.* 280, 29 *Fed. Cas.* 1108.

See par. 31 this note.

25. LIGHT AND AIR may be subject of an easement, and may also become appurtenant to land; and it must be conceded that transfer of a thing transfers all its incidents unless expressly excepted.—*Kennedy vs. Burnap*, 120 *Cal.* 488, 493, 52 *Pac. Rep.* 843, 40 *L. R. A.* 476.

See post § 1084 and note.

26. Use of light and air through windows overlooking defendant's lot is by right in the sense that it does not harm the owner or his property, but it does not follow necessarily that this light and air is to be deemed appurtenant to plaintiff's land, or that enjoyment thereof was by strict right.—*Kennedy vs. Burnap*, 120 *Cal.* 488, 493, 52 *Pac. Rep.* 843, 40 *L. R. A.* 476.

27. **MINING RIGHT GRANTED** carries with it by implication and without express grant whatever is necessary to beneficial enjoyment.—*Clark vs. Duval*, 15 Cal. 85, 86; *Cave vs. Crafts*, 53 Cal. 135; *Smith vs. Cooley*, 65 Cal. 46, 47, 2 Pac. Rep. 380.

28. It carries an interest in the water-rights, reservoirs, and tail-race on the mining grant.—*Smith vs. Cooley*, *supra*.

29. **MILL** granted having connected with it a dam carries with it as appurtenant the easement in ponded water occasioned by such dam or back water therefrom, on land of another person.—*Bowling vs. Burton*, 101 N. C. 176, 180, 7 S. E. Rep. 701, 2 L. R. A. 285.

30. **MILL-DAM**, right to maintain at some height passes with conveyance of mill to which it is appurtenant.—*Scott vs. Michael*, 129 Ind. 250, 254, 23 N. E. Rep. 546.

31. **MILL-SITE** conveyed by deed describing use for which intended and reciting that purchaser was to have use of mill-race and privilege of widening it without unnecessary waste to land, and giving right of entry and passage over land for that purpose carries fee in the land occupied by such mill-race.—*Branson vs. Studabaker*, 133 Ind. 147, 165, 33 N. E. Rep. 98.

See para. 32, 33 this note.

32. **RACE-WAY** is appurtenant to a mill and passes with it by implication on conveyance of mill and water privileges and appurtenances.—*New Ipswich W. & L. Factory vs. Batchelder*, 3 N. H. 190, 14 Am. Dec. 346.

33. Passes as an appurtenant without the word "privileges."—*Pickering vs. Stapler*, 5 Serg. & R. (Pa.) 107, 9 Am. Dec. 336; *Strickler vs. Todd*, 10 Serg. & R. (Pa.) 63, 70, 13 Am. Dec. 649; *Swartz vs. Swartz*, 4 Pa. St. 353, 355, 45 Am. Dec. 697.

See post §§ 1083, 1084 and notes.

34. **ROAD AND RIGHT OF WAY**.—Deed conveying "road and right of way over and across" land, "to be forever appurtenant to," and further providing that neither to the covenant shall, "nor shall his successors in interest, grant or give to any other person right of way over said road," conveys an easement.—*Peterson vs. Machado* (Cal. Feb. 7, 1896), 43 Pac. Rep. 611, 612.

35. **TUNNEL RIGHT** granted through a piece of ground includes, as appurtenant thereto, right to enter upon and occupy ground for purpose of prosecuting work on tunnel, removing and dumping waste rock at mouth of tunnel on land owned by grantor at time of conveyance of tunnel right, such right or easement being necessary for full and free enjoyment of tunnel right.—*Scheel vs. Alhambra Min. Co.*, 79 Fed. Rep. 821, 825.

36. **WATER APPROPRIATED TO LAND** passes with it as appurtenant, where necessary for beneficial enjoyment of the land.—*Cave vs. Crafts*, 53 Cal. 135, 138.

37. **Flowing in natural channel** running through land is not appurtenant thereto but part thereof.—*St. Helena Water Co. vs. Forbes*, 62 Cal. 182, 184, 45 Am. Rep. 659. See *Johnson vs. Jordan*, 43 Mass. (2 Met.) 234, 37 Am. Dec. 55; *Brace vs. Yale*, 93 Mass. (10 Allen) 441, 443.

38. **Water flowing through its natural chan-**

nel is unquestionably real property; and while flowing by right through an artificial aqueduct, which is real property and owned by owner of water, it is appurtenant to aqueduct, and therefore real property.—*Lower Kings River W. D. Co. vs. Kings River & F. C. Co.*, 60 Cal. 408, 410; *St. Helena W. Co. vs. Forbes*, 62 Cal. 182, 184, 45 Am. Rep. 659; *Fudickar vs. Riverside Irr. Dist.*, 109 Cal. 29, 36, 41 Pac. Rep. 1024.

39. **Eminent domain, right of**, may be exercised in condemnation, for public use, of private individual's privilege to enjoy flow of water in its natural channel upon or along his land, which right, aqueduct, and water are incorporeal hereditaments, appurtenances to the land.—*St. Helena W. Co. vs. Forbes*, 62 Cal. 182, 185, 186, 45 Am. Rep. 659.

40. **RIPARIAN OWNER'S RIGHT TO FLOW OF STREAM** of water over his land, although considered part and parcel of it, may be severed or segregated from land by grant, by condemnation, or by prescription.—*Gould vs. Stafford*, 91 Cal. 146, 155, 27 Pac. Rep. 543.

41. **SAME—FLOWING IN ARTIFICIAL CHANNEL** supplied by water-right purchased by deed of conveyance from water company, and put upon land for domestic use and purposes of irrigation, and being necessary for such purposes to enjoyment of land, is appurtenant thereto and passes with land on conveyance.—*Farmer vs. Ukiah W. Co.*, 56 Cal. 11, 13; *Fratt vs. Whittier*, 58 Cal. 126, 41 Am. Rep. 251; *Lower Kings River W. D. Co. vs. Kings River & F. C. Co.*, 60 Cal. 408; *Standart vs. Round Valley Water Co.*, 77 Cal. 399, 403, 19 Pac. Rep. 689; *Coonrad vs. Hill*, 79 Cal. 587, 590, 21 Pac. Rep. 1099. See *Kilgaur vs. Ashcom*, 5 Har. & J. (Md.) 83; *Philbrick vs. Ewing*, 97 Mass. 133; *Coolidge vs. Hager*, 43 Vt. 9, 5 Am. Rep. 256.

42. When owner by means of artificial channel has diverted and carried water to portion of his land to its advantage, to which it is openly and visibly attached, on sale of such portion he cannot diminish or destroy flow by returning water to original or natural channel.—*Lampman vs. Milks*, 21 N. Y. 505, 509-510.

43. **Action to quiet title to water-pipe** and to water flowing through the same to quartz mill from reservoir may be maintained; such water-pipe and water-right are appurtenances to mill.—*Standart vs. Round Valley Water Co.*, 77 Cal. 399, 403, 19 Pac. Rep. 689.

44. **Water leased from another**, flowing through artificial channel to lands (a mine and quartz mill in this case), and necessary for use and enjoyment of those lands, is not appurtenant thereto, and contract by which water is supplied does not pass under sheriff's sale of premises.—*Ginocchio vs. Amador C. & Min. Co.*, 67 Cal. 493, 496, 8 Pac. Rep. 29.

45. **SAME—PERCOLATING WATERS** in the soil belong to owner of freehold.—*Hanson vs. McCue*, 42 Cal. 303, 309, 10 Am. Rep. 299; *Cross vs. Kitts*, 69 Cal. 217, 222, 58 Am. Rep. 553, 10 Pac. Rep. 409; *Roath vs. Driscoll*, 20 Conn. 533, 540, 52 Am. Dec. 352.

46. **Percolating waters** are not governed by the same laws that pertain to running streams. "Uncertainties which must ever attend subterranean waters is reason enough why it

should not be attempted to subject them to certain and fixed rules of law, and that it is better to leave them to be enjoyed absolutely by the owner of the land, as one of its natural advantages, and in the eye of the law a part of it."—*Strait vs. Brown*, 16 Nev. 317, 322, 40 Am. Rep. 497; *Haldeman vs. Bruckhart*, 45 Pa. St. 514, 519, 84 Am. Dec. 511; *Chatfield vs. Wilson*, 28 Vt. 24.

47. "Percolating waters collected or gathered in stream running in defined channel, no distinction exists between waters so running under surface or upon surface of land. They are such property or incidents to property as may be acquired by grant, express or implied, or by appropriation, and when rights in them are thus acquired, owner cannot be divested of his rights by wrongful acts of another."—*Cross vs. Kitts*, 69 Cal. 217, 222, 58 Am. Rep. 558, 10 Pac. Rep. 409.

Compare: *Vineland Irr. Dist. vs. Azusa Irr. Dist.*, 126 Cal. 486, 58 Pac. Rep. 1057, 46 L. R. A. 820; *Katz vs. Walkinshaw*, 141 Cal. 116, 99 Am. St. Rep. 35, 70 Pac. Rep. 663, 74 Id. 766, 64 L. R. A. 236; *McClintock vs. Hudson*, 141 Cal. 275, 74 Pac. Rep. 849; *Cohen vs. La Cañada L. & W. Co.*, 142 Cal. 437, 76 Pac. Rep. 47; *Montecito V. W. Co. vs. Santa Barbara*, 144 Cal. 578, 77 Pac. Rep. 1113.

As to landowner's rights in percolating waters, see monographic note 99 Am. St. Rep. 66-75; monographic note by H. P. Farnham, 64 L. R. A. 236-239.

48. SAME—SPRING WATER.—Unsurveyed public land may have, as an appurtenance,

water flowing from springs and diverted from its natural course by occupant of land, held not being a trespasser thereon.—*Ely vs. Ferguson*, 91 Cal. 187, 190, 27 Pac. Rep. 587.

49. WATER-DITCH by means of which mine is operated is appurtenant.—*McShane vs. Carter*, 80 Cal. 310, 316, 22 Pac. Rep. 178.

50. Water-ditch disassociated from land over which it passed and not appurtenant thereto, may be an easement in gross, yet as such it is a servitude upon the land.—*Dixon vs. Schermeier*, 110 Cal. 582, 585, 42 Pac. Rep. 1091.

51. WATER-POWER, generated by water-right, which has been applied by owner of both to running of mill, and while being so used the mill is sold with appurtenances, the water-power passes on as appurtenance.—*Bank of British N. A. vs. Miller*, 6 Fed. Rep. 545, 550-552.

52. WATER-RIGHT IN GROSS exists as substantive independent right, is easement without fixed and limited dominant estate until affixed by owner thereof.—*Bank of British N. A. vs. Miller*, 6 Fed. Rep. 545, 550.

53. WHARF AND CHUTE built beyond low-water mark by lessees during term of lease, which is attached to wharf on demised premises, and extends thence out to deep water in ocean, cannot be said to be "by right used with land for its benefit," when erected by stranger to the title, even if it be assumed that this section refers to any other than incorporeal hereditaments.—*Coburn vs. Ames*, 52 Cal. 385, 396, 23 Am. Rep. 624.

§ 663. PERSONAL PROPERTY. Every kind of property that is not real is personal.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. As to what constitutes personal property.
3. Apples, blackberries, peaches, etc.
- 4-6. Growing crops—Nature of.
- 7, 8. Same—Not real estate.
9. Same—Not goods and chattels.
10. Same—Lien on.
- 11-18. Same—Chattel mortgage—Interest taken.
19. Same—Raised by trespasser.
20. Same—Unripe growing crop.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Raventas vs. Green*, 57 Cal. 254, 255 (construed and applied); *Jeffers vs. Easton, Eldridge & Co.*, 113 Cal. 345, 353, 45 Pac. Rep. 680 (referred to).

2. As to what constitutes personal property, see ante § 14 subd. 3 and note; also Pol. Code, § 3617 and note.

3. APPLES, BLACKBERRIES, PEACHES, ETC., are classed as fructus industriales.—*Smock vs. Smock*, 37 Mo. App. 56, 64.

4. GROWING CROPS upon land are not goods and chattels, within meaning of statute of frauds, and will pass by deed or conveyance, from very necessity of case, as they are not susceptible of manual delivery until harvested and reduced to actual possession.—*Bours vs. Webster*, 6 Cal. 661, 664; *Bernal vs. Hovious*, 17 Cal. 541, 545, 79 Am. Dec. 147; *Davis vs. McFarlane*, 37 Cal. 634, 638, 99 Am. Dec. 340; *McDermott vs. Apgar*, Cal. July term 1864.

5. Compare: *Mighell vs. Dougherty*, 86 Iowa 480, 41 Am. St. Rep. 511, 53 N. W. Rep. 402, 17 L. R. A. 755; *McIlvaine vs. Harris*, 20 Mo. 457, 64 Am. Dec. 196.

As to fructus industriales, see 1 Kerr's Benj. Sales, p. 111 note 2.

6. Verbal sale by one of two occupants of ranch of his interest in growing crops to other, remaining on ranch and working for such other as hired man, sale will be valid as against creditors.—*Visher vs. Webster*, 13 Cal. 58; *Bernal vs. Hovious*, 17 Cal. 541, 545, 79 Am. Dec. 147.

7. SAME—NOT REAL ESTATE where fructus industriales, within statute of frauds, and contract for sale thereof need not be in writing.—*Davis vs. McFarlane*, 37 Cal. 634, 638, 99 Am. Dec. 340; *Vulicevich vs. Skinner*, 77 Cal. 239, 240, 19 Pac. Rep. 424. See *Bours vs. Webster*, 6 Cal. 661; *Visher vs. Webster*, 13 Cal. 58; *Pacheco vs. Hunsacker*, 14 Cal. 120; *Bernal vs. Hovious*, 17 Cal. 541, 79 Am. Dec. 147; *Marshall vs. Ferguson*, 23 Cal. 66, 69.

8. Contra: *McIlvaine vs. Harris*, 20 Mo. 457, 64 Am. Dec. 196 (holding growing wheat a part of the land). See also *Smith vs. Leighton*, 38 Kan. 544, 5 Am. St. Rep. 778, 17 Pac. Rep. 52 (holding grasses, wild or cultivated, part of the land, requiring written contract).

9. SAME—NOT GOODS AND CHATTELS within statute of frauds, and need not be taken possession of on verbal sale, to make same

valid as against vendor's creditors.—*Davis vs. McFarlane*, 37 Cal. 634, 638, 99 Am. Dec. 340; *Raventas vs. Green*, 57 Cal. 254, 255; *O'Brien vs. Ballou*, 116 Cal. 318, 321, 48 Pac. Rep. 130.

See par. 20 this note.

10. **Lien of.**—Where creditor receives possession of growing crop under agreement with owner whereby he is to harvest it and apply proceeds towards discharge of debt due to him from owner thereof, he thereby acquires lien upon such crop and right to possession thereof which is superior to that of subsequently acquired lien of another creditor of the owner.—*Lovensohn vs. Ward*, 45 Cal. 8, 10.

11. **Chattel mortgage on growing crop superior to subsequently acquired lien by creditor.**—*Kimball vs. Sattley*, 55 Vt. 285, 291, 45 Am. Rep. 614.

12. **Mortgagee of growing crop takes only such interest as mortgagor has therein.**—*Sunol vs. Molloy*, 63 Cal. 369, 370. See *Wentworth vs. Miller*, 53 Cal. 910; *Riddle vs. Dow*, 98 Iowa 7, 29, 66 N. W. Rep. 1066.

13. **Where owner is a tenant on shares mortgagee takes only his interest in crop.**—*Sunol vs. Molloy*, 63 Cal. 369, 370.

14. **Where owner is tenant under agreement to pay cash rent, even though there is verbal agreement that title crop shall remain in lessor, who shall deduct his rent and render the surplus, if any, to tenant, mortgagee of tenant takes whole title.**—*Stockton Sav. & L. Soc. vs. Purvis*, 112 Cal. 236, 241-243, 53 Am. St. Rep. 210, 44 Pac. Rep. 561.

15. **Distinguishing:** *Wentworth vs. Miller*, 53 Cal. 9; *Sunol vs. Molloy*, 63 Cal. 369; and *Blum vs. McHugh*, 92 Cal. 497, 28 Pac. Rep. 592.

16. **Written lease whereby tenant lessee of farming land agrees to pay lessor part of crop as rent, and to give lessor possession of whole crop until rent is paid, lessee will be in possession of harvested crop as servant of**

defendant, and his sale thereof will pass no title as against landlord.—*Wentworth vs. Miller*, 53 Cal. 9, 10; *Sunol vs. Molloy*, 63 Cal. 369, 370; *Howell vs. Foster*, 65 Cal. 169, 173, 3 Pac. Rep. 647. See *Ga. De Vaughn vs. Howell* 82 Ga. 336, 344, 14 Am. St. Rep. 162, 9 S. E. Rep. 173. S. D. Consolidated Land & Irr. Co. vs. Hawley, 7 S. D. 229, 233, 63 N. W. Rep. 904. *Tex. Horseley vs. Moss*, 5 Tex. Civ. App. 341, 345, 23 S. W. Rep. 1115.

As to right of landlord where rent received in part of crop, see 37 Am. Dec. 321; 14 Am. St. Rep. 166.

17. **Compare:** *Stockton Sav. & L. Soc. vs. Purvis*, 112 Cal. 236, 243, 53 Am. St. Rep. 210, 44 Pac. Rep. 561; *Lawrence vs. Phy*, 27 Oreg. 506, 510, 41 Pac. 671.

18. **But landlord can hold only so much of crop under such lease as will satisfy his claim for rent.**—*Blum vs. McHugh*, 92 Cal. 497, 499, 28 Pac. Rep. 592.

19. **SAME—RAISED BY TRESPASSER** and harvested by him, belong to him as against owner of land out of possession; latter can only recover for use and occupation.—*Page vs. Fowler*, 39 Cal. 412, 416, 2 Am. Rep. 462; *Heilbron vs. Heinlen*, 73 Cal. 371, 374, 14 Pac. Rep. 22; *Johnson vs. Fish*, 105 Cal. 420, 422-423, 45 Am. St. Rep. 53, 54, 38 Pac. Rep. 979; *Carlisle vs. Killebrew*, 89 Ala. 329, 332, 6 So. Rep. 756, 6 L. R. A. 617; *Collier vs. Cunningham*, 2 Ind. App. 254, 262, 28 N. E. Rep. 341; *Stockwell vs. Phelps*, 34 N. Y. 363, 90 Am. Dec. 710; *Meeker vs. Gardella*, 1 Wash. 139, 145, 23 Pac. Rep. 337.

20. **UNRIPE GROWING CROP** held not to be appurtenant to land upon which it grows. It is personal property not capable of manual delivery, but is subject to attachment.—*Raventas vs. Green*, 57 Cal. 254, 255. See *Rudolph vs. Saunders*, 111 Cal. 233, 235, 43 Pac. Rep. 619; *McClellan vs. Krall*, 43 Kan. 216, 218, 23 Pac. Rep. 100.

See par. 9 this note.

TITLE II.

OWNERSHIP.

CHAPTER I. OWNERS, §§ 669-672.

II. MODIFICATIONS OF OWNERSHIP, §§ 673-726.

III. RIGHTS OF OWNERS, §§ 732-733.

IV. TERMINATION OF OWNERSHIP, §§ 739-742.

CHAPTER I.

OWNERS.

§ 669. Owner.

§ 670. Property of the state.

§ 671. Who may own property.

§ 672. Aliens inheriting must claim within five years.

§ 669. **OWNER.** All property has an owner, whether that owner is the state, and the property public, or the owner an individual, and the property private. The state may also hold property as a private proprietor.

History: Enacted March 21, 1872.

Applied, cited, construed, referred to, etc., in: *Williams vs. Williams*, 73 Cal. 99, 102, 14

Pac. Rep. 394 (cited in discussion with other sections).

§ 670. PROPERTY OF THE STATE. The state is the owner of all land below tide-water, and below ordinary high-water mark, bordering upon tide-water within the state; of all land below the water of a navigable lake or stream; of all property lawfully appropriated by it to its own use; of all property dedicated to the state; and of all property of which there is no other owner.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 217.

1. Applied, cited, construed, referred to, etc.
2. Grant of land—On seashore by United States.
3. Same—Bordering upon a tidal stream.
4. Presumption.
5. Testator having no next of kin—Trust invalid—Reversion to state.
6. Tide-lands—Above high-water mark.

1. Applied, cited, construed, referred to, etc., in: Upham vs. Hosking, 62 Cal. 250, 259 (applied); Wright vs. Seymour, 69 Cal. 122, 126, 10 Pac. Rep. 323 (applied); Long Beach L. & W. Co. vs. Richardson, 70 Cal. 206, 209, 11 Pac. Rep. 695 (applied); Estate of Gay, 138 Cal. 552, 553, 94 Am. St. Rep. 70, 71 Pac. Rep. 707 (applied).

2. Grant of land on seashore, in absence of evidence to contrary, extends only to high-water mark.—Long Beach L. & W. Co. vs. Richardson, 70 Cal. 206, 209, 11 Pac. Rep. 695.

3. Patent from federal government for land bordering upon tidal stream, in absence of express intention so to do, does not pass title to any land below high-water mark.—Wright vs. Seymour, 69 Cal. 122, 126, 10 Pac. Rep. 323.

4. Presumption title to land between high and low water mark is in state.—Long Beach L. & W. Co. vs. Richardson, 70 Cal. 206, 209, 11 Pac. Rep. 695 (question not involved, but dictum good law).

5. Testator having no next of kin or legal heirs, making provision in his testament attempting to create permanent trust-fund, income of which is to be used for purpose of keeping in good order and proper condition burial plot of testator, property reverts to state, trust being void, as creation of perpetuity is in violation of constitution, § 9, art. 20.—Estate of Gay, 138 Cal. 552, 553, 94 Am. St. Rep. 70, 71 Pac. Rep. 707.

See post §§ 847, 857 and note.

6. Tide-lands below high-water mark were not subject to sale by state under act of 1868, but sales of such lands were validated by ourative act of March 27, 1872, and title of state become vested thereby in grantee of patent issued by state.—Upham vs. Hosking, 62 Cal. 250, 259.

§ 671. WHO MAY OWN PROPERTY. Any person, whether citizen or alien, may take, hold, and dispose of property, real or personal, within this state.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 218.

1. Applied, cited, construed, referred to, etc.
2. Aliens—Defined.
3. Same—Can acquire title to land.
4. Same—Cannot make a lease.
- 5-7. Same—May hold land until "office found."
8. Same—Not of inheritable blood.
9. Same—Purchase by—Common-law rule as to.
- 10, 11. Same—Who included.
12. Construction—Liberal.
13. Same—Common-law rule abrogated.
14. Same—Estate of non-resident alien not escheated.
15. Same—Extraterritorial force not given to.
16. Same—"Take" includes "take by descent."
17. Same—Constitutional provision—Right to inherit.
18. Estate of alien—When vests in sovereign.
- 19, 20. Non-resident aliens—Cannot inherit real property.
21. Same—Cannot maintain ejectment.
22. Same—Legislature may grant equal privilege to.
23. Property—Who may inherit.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: In re Estate of Billings, 66 Cal. 593, 594, 595, 4 Pac. Rep. 639 (construed and applied); Lyons vs. State, 67 Cal. 380, 382, 7 Pac. Rep. 763 (applied); Carrasco vs. State,

67 Cal. 385, 386, sub nom. State vs. Carrasco, 7 Pac. Rep. 766 (applied); State vs. Smith, 70 Cal. 153, 155, 12 Pac. Rep. 121 (cited); People ex rel. Attorney-General vs. Roach, 76 Cal. 294, 296, 13 Pac. Rep. 407 (cited); Blythe vs. Hinckley, 127 Cal. 431, 435, 437, 59 Pac. Rep. 737 (applied).

As to right of an alien to inherit, see post § 1404 and note.

2. ALIEN—Defined as a foreigner, one born in, or belong to, another country; in American law one born out of jurisdiction of United States and not naturalized; under this definition it is held that person born in England, and always resided in that country, and was never in United States, is an alien.—Lyons vs. State, 67 Cal. 380, 382, 7 Pac. Rep. 763.

3. Can acquire title to real property by purchase, or other act of party and hold same until "office found."—Norris vs. Hoyt, 13 Cal. 217, 218.

See para. 5-7 this note.

4. Cannot make lease, although title to estate purchased by him does not vest in sovereign until "office found"; this principle is asserted in same manner that they asserted that "he cannot hold," meaning in both instances that his rights are determined, and land absolutely forfeited upon inquest of office.—Ramirez vs. Kent, 2 Cal. 558, 560.

5. May hold real estate against every one, and even against government, until "office found."—*People ex rel. Attorney-General vs. Folsom*, 5 Cal. 373, 378.

See para. 3, 7, 8 this note.

6. Cannot be deprived of land, or of any rights incident to its ownership, by proof of his alienage in collateral proceeding; if sovereign does not enforce its prerogative there is no cause for subject to complain.—*Ramires vs. Kent*, 2 Cal. 552, 560; *Norris vs. Hoyt*, 18 Cal. 217, 219.

7. Until "office found," rights or titles of claimant of real property cannot be questioned on ground of alienage and non-residence, either collaterally in an action of ejectment, or directly in any other way.—*Norris vs. Hoyt*, 18 Cal. 217, 219.

8. Not of inheritable blood under common law, which disability would attach in this state, except that it has been removed by this section.—*Blythe vs. Hinckley*, 127 Cal. 431, 435, 59 Pac. Rep. 787.

9. Under common law alien might purchase land, and title remained in him until "office found."—*Merle vs. Mathews*, 26 Cal. 455, 473.

See par. 13 this note.

10. Who included.—Aliens, whether residents or non-residents of this state, are included in meaning of this section.—In re *Estate of Billings*, 65 Cal. 593, 595, 4 Pac. Rep. 639.

11. Court is justified in finding that person is an alien-born who was living with his German parents in Germany when he was six years old, and that he came to this country, after the death of his father, when he was eighteen years old, and could not speak the English language.—*Walther vs. Rabolt*, 30 Cal. 185, 188.

12. CONSTRUCTION.—Liberal must be given to this section.—*Carrasco vs. State*, 67 Cal. 385, 386, sub nom. *State vs. Carrasco*, 7 Pac. Rep. 766.

13. Common-law rule abrogated by this section, that aliens could not take property by descent or other mere operation of law.—*Carrasco vs. State*, 67 Cal. 385, 386, sub nom. *State vs. Carrasco*, 7 Pac. Rep. 766.

See par. 9 this note.

14. Estate of non-resident alien is not an escheated estate, as there is nothing in this

section extending right of inheritance to non-resident aliens which is in violation of the constitution.—In re *Estate of Billings*, 65 Cal. 593, 594, 4 Pac. Rep. 639.

See par. 13 this note.

15. Extraterritorial force not given to law of state; this section of code provides rule which confers right to be enjoyed within jurisdiction of state.—*Blythe vs. Hinckley*, 127 Cal. 431, 435, 437, 59 Pac. Rep. 787.

16. "Taken" is broad enough to include the "taking by descent," as well as by purchase, and is used to indicate the "taking or acquisition of property" in either of modes mentioned. Meaning of word cannot be confined to acquisition by purchase.—In re *Estate of Billings*, 65 Cal. 593, 594, 4 Pac. Rep. 639.

17. Constitutional provision that aliens who are, or may become, bona fide residents of this state shall be entitled to enjoy same right, in respect to possession, enjoyment, and inheritance of property, as native-born citizens, by rule of construction heretofore adopted, negatives any supposed right which non-resident alien heirs would otherwise have to inherit.—*Siemssen vs. Bofer*, 6 Cal. 250, 254.

18. ESTATE OF ALIEN.—When vests in sovereign.—An estate purchased by an alien does not vest in sovereign till "office found"; until which the alien is seized and may sustain an action for injury to the property.—*Ramires vs. Kent*, 2 Cal. 553, 560.

See par. 14 this note.

19. NON-RESIDENT ALIEN.—Cannot inherit real property in his state by becoming resident of this state after death of one from whom he would inherit.—*Farrell vs. Enright*, 12 Cal. 450, 457.

20. Otherwise as to adopted illegitimate child never having resided in this state.—See *Blythe vs. Ayres*, 96 Cal. 532, 569, 31 Pac. Rep. 915.

21. Cannot maintain ejectment in this state.—*Siemssen vs. Bofer*, 6 Cal. 250, 254.

22. Legislature may grant same privileges to non-resident aliens as are enjoyed by native-born citizens.—*State of California vs. Smith*, 70 Cal. 153, 155, 12 Pac. Rep. 121.

23. PROPERTY MAY BE INHERITED BY ANY ONE, under familiar rule of jurisprudence, which must prevail in absence of any law on subject.—*People ex rel. Attorney-General vs. Folsom*, 5 Cal. 373, 378.

§ 672. ALIENS INHERITING MUST CLAIM WITHIN FIVE YEARS. If a non-resident alien takes by succession, he must appear and claim the property within five years from the time of succession, or be barred. The property in such case is disposed of as provided in title eight, part three, Code of Civil Procedure.

History: Enacted March 21, 1872; repealed by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 391, held unconstitutional, see history, § 4 ante.

1. Applied, cited, construed, referred to, etc.
2. Construction—Must be liberal.
3. Same—"Appear"—What meaning should have.
4. Same—"Non-resident alien"—Whom refers to.
5. Same—Object of the code.
6. Same—Provision requiring alien to "appear and claim"—What relates to.

7. Parties may "appear"—How.
8. Privilege of resident aliens to protection—May be extended.
9. Proceeding to "vest title in state"—No defense except based on "appearance and claim."

1. **APPLIED, CITED, CONSTRUED, REFERRED TO etc., in:** In re Estate of Billings, 65 Cal. 593, 594, 4 Pac. Rep. 639 (cited); Lyons vs. State, 67 Cal. 380, 384, 7 Pac. Rep. 763 (construed and applied); Carrasco vs. State, 67 Cal. 385, sub nom. State vs. Carrasco, 7 Pac. Rep. 766 (construed); State vs. Smith, 70 Cal. 153, 156, 157, 12 Pac. Rep. 121 (construed).

2. **CONSTRUCTION—Must be liberal to effect intended object.**—Carrasco vs. State, 67 Cal. 385, 386, sub nom. State vs. Carrasco, 7 Pac. Rep. 776.

3. **"Appear"** should have no other meaning than that originally given to it; the legislature would have used different language, clearly showing its meaning, if it had intended to say that no non-resident alien could claim any property in this state by succession unless he came in person to make such claim.—Lyons vs. State, 67 Cal. 380, 384, 7 Pac. Rep. 763.

4. **"Non-resident alien"** refers to those who are neither citizens of United States nor residents of State.—State vs. Smith, 70 Cal. 153, 156, 12 Pac. Rep. 121.

5. **Object of the code was to give non-resident aliens right to property of deceased relatives substantially identical with those secured by constitution to resident aliens.**—Carrasco vs. State, 67 Cal. 385, 386, sub nom. State vs. Carrasco, 7 Pac. Rep. 776.

6. **Provision of section requiring alien to "appear and claim" property relates to appearance and claim, to be proved by acts within**

state identical with an assertion by alien to right to property.—State vs. Smith, 70 Cal. 153, 157, 12 Pac. Rep. 121.

7. **PARTIES MAY "APPEAR" IN COURT, EITHER IN PERSON OR BY ATTORNEY, to claim any supposed rights, whether plaintiff or defendant, and whether resident or non-resident alien.**—Lyons vs. State, 67 Cal. 380, 384, 7 Pac. Rep. 763.

8. **PRIVILEGE OF RESIDENT ALIENS TO PROTECTION, in event of descent, cannot be abridged, but legislature is not disabled from extending it or adding other privileges.**—People vs. Rogers, 13 Cal. 159, 165. See In re Estate of Billings, 65 Cal. 595, 4 Pac. Rep. 639; Lyons vs. State, 67 Cal. 380, 383, 7 Pac. Rep. 763.

9. **PROCEEDING TO "VEST TITLE IN THE STATE" of property of deceased who leaves alien heirs is premature if commenced within five years after his death, as there would seem to be no defense for "non-resident alien" to inquest to "vest the title in the state" except defense based on "appearance and claim" within time specified in the statute.**—State vs. Smith, 70 Cal. 153, 156, 12 Pac. Rep. 121. See People ex rel. Attorney-General vs. Roach, 76 Cal. 294, 296, 18 Pac. Rep. 407. Ala. Nicrosi vs. Phillips, 91 Ala. 299, 307, 8 So. Rep. 561. Iowa. Purcell vs. Smidt, 21 Iowa 540, 544. Nev. State vs. Preble, 18 Nev. 251, 253, 2 Pac. Rep. 754. Fed. McConville vs. Howell, 5 McC. C. C. 319, 17 Fed. Rep. 104, 106 (construing Colorado statute).

CHAPTER II.

MODIFICATIONS OF OWNERSHIP.

Article I. Interests in Property, §§ 678-703.

II. Conditions of Ownership, §§ 707-711.

III. Restraints upon Alienation, §§ 715-718.

IV. Accumulations, §§ 722-726.

ARTICLE I.

INTERESTS IN PROPERTY.

§ 678. Ownership, absolute or qualified.
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 § 701. Interests in real property.
 § 702. Same. [Names and classification of interests.]
 § 703. What future interests are recognized.

§ 678. **OWNERSHIP, ABSOLUTE OR QUALIFIED.** The ownership of property is either:

1. Absolute; or,
2. Qualified.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
- 2, 3. Construed with reference to ownership and transfer.

4-6. Owner—Defined—Husband's interest in community property.

7. Ownership—Nature of.

1. Applied, cited, construed, referred to, etc., in: *Le Breton vs. Cook*, 107 Cal. 410, 420, 40 Pac. Rep. 552 (construed and applied with other sections); *Spreckels vs. Spreckels*, 116 Cal. 339, 345, 58 Am. St. Rep. 170, 48 Pac. Rep. 228, 36 L. R. A. 497 (construed and applied with other sections); *Higgins vs. City of San Diego*, 181 Cal. 294, 307, 63 Pac. Rep. 470 (applied).

2. Construed with § 690 as including ownership of one half of community property until termination of estate by the happening of a possible event.—*Spreckels vs. Spreckels*, 116 Cal. 339, 345, 58 Am. St. Rep. 170, 48 Pac. Rep. 228, 36 L. R. A. 497.

3. Construed with other sections of code as showing that future interests in property, whether real or personal, might be transferred in same manner as present interests.—*Le Bre-*

ton vs. Cook, 107 Cal. 410, 420, 40 Pac. Rep. 552.

4. "Owner" includes any person having a claim or interest in real property, though less than absolute fee.—*Higgins vs. San Diego*, 181 Cal. 294, 307, 63 Pac. Rep. 470; *Loxo vs. Sutherland*, 38 Mich. 168, 171.

5. "Owner" used in city charter reciting that city becomes owner of "any water supply," is not used in sense that city must be holder of title, but rather in sense that it should have control of water supply.—*Higgins vs. San Diego*, 181 Cal. 294, 307, 63 Pac. Rep. 470.

6. Husband's estate in community property is that of an absolute owner until happening of some possible event terminating it.—*Spreckels vs. Spreckels*, 116 Cal. 339, 345, 58 Am. St. Rep. 170, 48 Pac. Rep. 228, 36 L. R. A. 497.

7. Nature of ownership.—Ownership of property is either absolute or qualified.—*Higgins vs. San Diego*, 181 Cal. 294, 307, 63 Pac. Rep. 470.

§ 679. WHEN ABSOLUTE. The ownership of property is absolute when a single person has the absolute dominion over it, and may use it or dispose of it according to his pleasure, subject only to general laws.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
- 2-5. Construed with reference to power over property.
- 6-9. Absolute ownership—What does or does not amount to.
- 10-12. Mortgage—Right to make and effect of—Agreement.
13. Same—Not recorded, when valid.
- 14, 15. Transfer—Intention to make governs nature.
- 16, 17. Same—Nature of right to make.
- 18-20. Same—Right to impose conditions.
21. Possession—Effect of transfer of.
22. Same—Intention to retain when not defeated.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Works vs. Merritt*, 105 Cal. 467, 470, 38 Pac. Rep. 1109 (construed and applied); *Bank of Ukiah vs. Moore*, 106 Cal. 673, 680, 39 Pac. Rep. 1071 (construed and applied with other sections); *Rodgers vs. Bachman*, 109 Cal. 552, 555, 42 Pac. Rep. 448 (construed and applied); *In re Estate of Burdick*, 112 Cal. 387, 399, 44 Pac. Rep. 734 (construed and applied in connection with other sections); *Spreckels vs. Spreckels*, 116 Cal. 339, 345, 58 Am. St. Rep. 170, 48 Pac. Rep. 228, 36 L. R. A. 497 (construed and applied).

2. CONSTRUED—As giving absolute right to deal with and make qualified or absolute transfer of property to fullest extent.—*Works vs. Merritt*, 105 Cal. 467, 469, 38 Pac. Rep. 1109.

3. As giving owner absolute dominion over property with right to use it or dispose of it according to his pleasure.—*In re Estate Burdick*, 112 Cal. 387, 399, 44 Pac. Rep. 734.

4. As including mortgage upon personal property valid at common law between parties and all other except creditors and subsequent

purchasers for value.—*Bank of Ukiah vs. Moore*, 106 Cal. 673, 680, 39 Pac. Rep. 1071. See *Tregear vs. Etiwanda W. Co.*, 76 Cal. 537, 9 Am. St. Rep. 245, 18 Pac. Rep. 658.

5. As not giving husband absolute ownership and dominion over community property with right to use or dispose of it at pleasure.—*In re Estate Burdick*, 112 Cal. 387, 399, 44 Pac. Rep. 734.

6. ABSOLUTE OWNERSHIP—What is.—Claim to public mineral land considered as absolute ownership in this state.—*Merritt vs. Judd*, 14 Cal. 59, 64.

7. Mining claims recognized as legal estates of freehold for all particular purposes except some doctrine of abandonment not perhaps applicable to such estates.—*Hughes vs. Devlin*, 23 Cal. 501, 502, 505. See *Spencer vs. Winselman*, 43 Cal. 479, 483; *Smith vs. Cooley*, 65 Cal. 46, 48, 2 Pac. Rep. 880.

8. What is not.—Ownership of community property is not absolute in either husband or wife.—*In re Estate Burdick*, 112 Cal. 387, 399, 44 Pac. Rep. 734.

9. Interest of husband in community property is not absolute ownership, and he has not absolute dominion over it with right to use it or dispose of it according to his pleasure.—*In re Estate Burdick*, 112 Cal. 387, 399, 44 Pac. Rep. 734.

10. MORTGAGE—Right to make.—Statute contains no expressed restriction against making mortgage upon personal property.—*Works vs. Merritt*, 105 Cal. 467, 470, 38 Pac. Rep. 1109.

11. Effect of.—Mortgage of personal property passes no title or right to absolute possession.—*Bank of Ukiah vs. Moore*, 106 Cal. 673, 681, 39 Pac. Rep. 1071.

12. Agreement between mortgager and mortgagee of chattels giving mortgager right to sell and hold proceeds for mortgagee creates no trust as against creditors and confers no absolute ownership of property in mortgagee.—*Maier vs. Freeman*, 112 Cal. 8, 12, 53 Am. St. Rep. 151-153, 44 Pac. Rep. 357; *Shoobert vs. De Motta*, 112 Cal. 215, 219, 53 Am. St. Rep. 207, 209, 44 Pac. Rep. 437.

13. Mortgage upon personal property not provided by statute to be recorded, valid and at common law between parties and as against all other persons except creditors of mortgager, and subsequent purchasers in good faith for value.—*Tregear vs. Etiwanda W. Co.*, 76 Cal. 537, 539, 9 Am. St. Rep. 245, 18 Pac. Rep. 658; *Works vs. Merritt*, 105 Cal. 467, 470, 38 Pac. Rep. 1109; *Bank of Ukiah vs. Moore*, 106 Cal. 673, 680, 39 Pac. Rep. 1071.

14. TRANSFER.—Intention to make.—Question as to whether an instrument amounts to transfer of property or not is one of intention, and whenever, upon its proper construction, it is apparent that intention of parties was to make conditional sale, court must so construe it.—*Rodgers vs. Bachman*, 109 Cal. 552, 556, 42 Pac. Rep. 448.

15. Construction of.—Instrument construed as absolute sale, rather than bailment, where there is absolute promise to pay.—*Palmer vs. Howard*, 72 Cal. 293, 296, 1 Am. St. Rep. 60, 13 Pac. Rep. 858; *Rodgers vs. Bachman*, 109 Cal. 552, 556, 42 Pac. Rep. 448; *Hart vs. Barney & Co.*, 7 Fed. Rep. 553.

16. TRANSFER.—Right to make.—Absolute owner of property may use it or dispose of it according to his pleasure, subject only to general laws.—*Rodgers vs. Bachman*, 109 Cal. 552, 556, 42 Pac. Rep. 448.

17. Right to deal in property and to make qualified and absolute transfer of it is an essential element of ownership, and may be exercised to fullest extent unless there is some statutory restriction on such right.—*Works vs. Merritt*, 105 Cal. 467, 469, 38 Pac. Rep. 1109.

18. Upon conditions.—Owner of property may include conditions in any executory agreement for sale, and make their performances essential to passing of his ownership.—*Rodgers vs. Bachman*, 109 Cal. 552, 555, 42 Pac. Rep. 448; *Harkness vs. Russell*, 118 U. S. 663, bk. 30 L. ed. 285, 7 Sup. Ct. Rep. 51.

19. Right of owner to sell property upon condition not to divest title until price paid, is not only not prohibited by state laws, but frequently recognized.—*Kohler vs. Hayes*, 41 Cal. 455, 457; *Hegler vs. Eddy*, 53 Cal. 597, 598; *Rodgers vs. Bachman*, 109 Cal. 552, 556, 42 Pac. Rep. 448.

20. Agreement for sale of sheep giving seller power to take possession and sell same at any time, and apply proceeds in payment of contract, in event that purchaser fails to make payments or fails to keep sheep and their increase up to present worth, is within power of owner to make.—*Rodgers vs. Bachman*, 109 Cal. 552, 554, 42 Pac. Rep. 448.

21. POSSESSION.—Effect of transfer of.—Transfer of the possession of personal property does not convey title, except in pursuance of agreement therefor.—*Rodgers vs. Bachman*, 109 Cal. 552, 556, 42 Pac. Rep. 448.

22. Intention to retain.—Intention of vendor to retain possession will not be defeated by delivery to vendee.—*Kohler vs. Hayes*, 41 Cal. 455, 458; *Rodgers vs. Bachman*, 109 Cal. 552, 556, 42 Pac. Rep. 448.

§ 680. WHEN QUALIFIED. The ownership of property is qualified:

1. When it is shared with one or more persons;
2. When the time of enjoyment is deferred or limited;
3. When the use is restricted.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Construed with reference to trusts.
3. Ownership—When qualified.
- 5-7. Same—In community property.
- 8, 9. Same—In trust estates—Beneficiaries.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Le Breton vs. Cook*, 107 Cal. 410, 420, 40 Pac. Rep. 552 (construed and applied with other sections); *In re Estate Burdick*, 112 Cal. 387, 399, 44 Pac. Rep. 734 (construed and applied with other sections); *Spreckels vs. Spreckels*, 116 Cal. 339, 345, 58 Am. St. Rep. 170, 45 Pac. Rep. 228, 36 L. R. A. 497 (construed and applied); *Blackburn vs. Webb*, 133 Cal. 420, 422, 65 Pac. Rep. 952 (construed and applied with other sections).

2. CONSTRUED with other sections as creating no present interest in favor of beneficiaries of trust estate.—*Blackburn vs. Webb*, 133 Cal. 420, 422, 65 Pac. Rep. 952.

3. OWNERSHIP—When qualified.—Ownership of property is qualified when it is shared

with one or more persons.—*In re Estate Burdick*, 112 Cal. 387, 399, 44 Pac. Rep. 734.

4. Community property.—Ownership of community property is not absolute to either husband or wife, but is in each of them, qualified by reason of its being shared with the other.—*In re Estate Burdick*, 112 Cal. 387, 399, 44 Pac. Rep. 734.

5. Husband's ownership of one half of community estate is, in a sense, conditional; it may terminate upon happening of possible event.—*Spreckels vs. Spreckels*, 116 Cal. 339, 345, 58 Am. St. Rep. 170, 45 Pac. Rep. 228, 36 L. R. A. 497.

6. Husband's ownership of one half of community estate is absolute until happening of possible event which may terminate ownership.—*Spreckels vs. Spreckels*, 116 Cal. 339, 345, 58 Am. St. Rep. 170, 45 Pac. Rep. 228, 36 L. R. A. 497.

7. Wife surviving.—Interest of surviving wife in community property subordinate and

not adverse to administrator of husband's estate for all purposes and subject to supervision and control of court in which administration is pending.—In re Estate Burdick, 112 Cal. 387, 399, 44 Pac. Rep. 734.

See § 1452, Code Civ. Proc.

8. Trust of estate.—Present interest does not pass under devise to trustees to hold and manage property until youngest child shall

attain majority, when property "shall vest absolutely in said children."—Blackburn vs. Webb, 133 Cal. 420, 422, 65 Pac. Rep. 952.

9. Future estate only vests under devise to trustees to hold and manage until youngest child becomes of age, at which time whole property to vest.—Blackburn vs. Webb, 133 Cal. 420, 422, 65 Pac. Rep. 952.

§ 681. SEVERAL OWNERSHIP, WHAT. The ownership of property by a single person is designated as a sole or several ownership.

History: Enacted March 21, 1872.

§ 682. OWNERSHIP OF SEVERAL PERSONS. The ownership of property by several persons is either:

1. Of joint interests;
2. Of partnership interests;
3. Of interests in common;
4. Of community interest of husband and wife.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 391, held unconstitutional, see history, § 4 ante.

1. Applied, cited, construed, referred to, etc.
- 2-5. Construed with reference to its application, etc.
6. Partnership interests—Agreement to farm.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: In re Estate of Burdick, 112 Cal. 387, 399, 44 Pac. Rep. 734 (construed and applied); Spreckels vs. Spreckels, 116 Cal. 339, 342, 58 Am. St. Rep. 170, 48 Pac. Rep. 228, 36 L. R. A. 497 (construed with section 687); Richards vs. Fraser, 136 Cal. 460, 463, 69 Pac. Rep. 83 (applied).

2. CONSTRUED—As applying to agreement relating to interest in and to farm land as creating partnership.—Richards vs. Fraser, 136 Cal. 460, 463, 69 Pac. Rep. 83.

3. As implying that husband and wife are

"several persons" in whom is vested ownership of community property.—In re Estate Burdick, 112 Cal. 387, 399, 44 Pac. Rep. 734.

4. As specifying community interest of husband and wife as one species of property, which is owned by several persons.—In re Estate Burdick, 112 Cal. 387, 399, 44 Pac. Rep. 734.

5. With § 687 as showing nature of ownership in, and defining, community property.—Spreckels vs. Spreckels, 116 Cal. 339, 342, 58 Am. St. Rep. 170, 48 Pac. Rep. 228, 36 L. R. A. 497.

6. PARTNERSHIP INTERESTS.—Agreement as to ownership and interest in land and to farm same in partnership creates partnership where agreement is acted upon.—Richards vs. Fraser, 136 Cal. 460, 463, 69 Pac. Rep. 83.

§ 683. JOINT INTEREST, WHAT. A joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 391, held unconstitutional, see history, § 4 ante.

I. In General.

1. Applied, cited, construed, referred to, etc.
- 2, 3. Construed as covering all property.
4. Joint ownership not favored.
- 5-9. Legislative enactments—Effect of.

II. Joint Ownership—Defined and Created, etc.

- 10-12. Defined as feudal estate, etc.
- 13, 14. Creation—What necessary for.
- 15, 16. Same—In equitable interest—Mortgage.
- 17-19. Corporation—Power to hold jointly.
- 20-24. Joint ownership—Where shown.

25-34. Same—When not shown.

35. Evidence—Burden of proof on party claiming joint estate.

36. Same—Words "joint owners" not enough.

I. IN GENERAL

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Denigan vs. San Francisco Sav. Union, 127 Cal. 142, 149, 78 Am. St. Rep. 35, 59 Pac. Rep. 390 (construed and applied); Estate of Hittell, 141 Cal. 432, 435, 75 Pac. Rep. 53 (applied).

As to deposit in bank in joint names becoming gift to survivor, see note 51 Am. St. Rep. 476.

As to joint account in savings bank, see note by H. P. Farnham, 31 L. R. A. 454, 455.

As to what is a joint tenancy, see note 23 L. R. A. 42.

2. **CONSTRUED**.—As not confined in its application to real property, but as applicable to all kinds of property, irrespective of its character.—Denigan vs. San Francisco Sav. Union, 127 Cal. 142, 149, 59 Pac. Rep. 390.

3. As not limited to character of property and applying to all kinds, whether real or personal.—Denigan vs. San Francisco Sav. Union, 127 Cal. 142, 149, 78 Am. St. Rep. 35, 59 Pac. Rep. 390.

4. **NOT FAVORED**.—Joint tenancies not favored in this state.—Bowen vs. May, 12 Cal. 348, 351.

5. **LEGISLATIVE INTERFERENCE WITH JOINT OWNERSHIP**.—Joint tenancies existing prior to the act of 1855 not destroyed thereby.—Dewey vs. Lambier, 7 Cal. 347, 348.

6. Legislature no authority to give retrospective operation of statute so as to deprive existing joint tenants of essential elements of tenure, such as right of survivorship.—Dewey vs. Lambier, 7 Cal. 347, 348; Greer vs. Blanchard, 40 Cal. 194, 198.

7. **STATUTE OF 1855 ABROGATES COMMON-LAW RULE** of conveyance to joint tenants.—Bowen vs. May, 12 Cal. 348, 351.

8. Not retrospective in its operation.—Greer vs. Blanchard, 40 Cal. 194, 198.

9. Only intended to apply to future and not to past conveyances in joint tenancy.—Dewey vs. Lambier, 7 Cal. 347, 348.

II. JOINT OWNERSHIP—DEFINED AND CREATED.

10. **JOINT OWNERSHIP**.—Defined as technical feudal estate founded on principle of aggregation of land estates in hands of few and opposed to division among many persons. De Witt vs. San Francisco, 2 Cal. 289, 297.

11. As one owned by several persons in equal shares by title created by single will or transfer when expressly declared in will or transfer to be joint tenancy.—Denigan vs. San Francisco Sav. Union, 127 Cal. 142, 143, 78 Am. St. Rep. 35, 59 Pac. Rep. 390; Estate of Hittell, 141 Cal. 432, 435, 75 Pac. Rep. 53.

12. As such as are acquired at same time and by same title.—Denigan vs. San Francisco Sav. Union, 127 Cal. 142, 149, 78 Am. St. Rep. 35, 59 Pac. Rep. 390.

13. Created by four unities, viz., unity of interest, title, time, and possession.—De Witt vs. San Francisco, 2 Cal. 289, 297.

14. Express declaration in conveyance itself necessary to create other tenancy in common exists.—Bowen vs. May, 12 Cal. 348, 351. See Fay vs. Hawley, Cal. Jan. 1870.

15. In equitable interest by conveyance to trustee in trust for use and benefit of two parties.—Greer vs. Blanchard, 40 Cal. 194, 197.

16. Fact that two join in mortgage raises

no presumption that estate conveyed is joint.—Bowen vs. May, 12 Cal. 348, 351.

17. **CORPORATIONS**.—Cannot hold as joint tenants, as they want same capacity and title and are perpetual and without survivorship.—De Witt vs. San Francisco, 2 Cal. 289, 297.

18. With natural persons, as reciprocity of survivorship is wanting.—De Witt vs. San Francisco, 2 Cal. 289, 297.

19. Can still hold same in common with each other or with natural persons.—De Witt vs. San Francisco, 2 Cal. 289, 298. See New York & S. C. Co. vs. Fulton Bank, 7 Wend. (N. Y.) 412.

20. **JOINT OWNERSHIP—WHEN SHOWN**.—Joint interest and right to survivorship with right of survivor to sue, exists on mortgage to several to secure note payable to them.—Blake vs. Sanborn, 74 Mass. (8 Gray) 154. See Burnett vs. Pratt, 39 Mass. (22 Pick.) 556.

21. Shown by deposit made with writing at head of account showing agreement that at death of either, balance should go to survivor.—Metropolitan Sav. Bank vs. Murphy, 82 Md. 314, 51 Am. St. Rep. 473, 33 Atl. Rep. 640, 31 L. R. A. 454.

22. Distinguishing Dougherty vs. Moore, 71 Md. 248, 17 Am. St. Rep. 524, 18 Atl. Rep. 35, upon ground that bank's instructions in opening of account showed agreement for balance to go to survivor.

23. Shown by loan by husband and taking promissory note payable to himself and wife.—Sanford vs. Sanford, 45 N. Y. 723. See Fowler vs. Butterly, 44 N. Y. Super. (12 Jones & S.) 148, 161.

24. This decision was doubted by Judge Redfield, in Matter of Ward, 2 Redf. (N. Y.) 251, as being contrary to all settled propositions of law regarding such case and as seemingly not fortified by any authority.—It is also considered as merely dictum, rather than authority, in Denigan vs. San Francisco Sav. Union, 127 Cal. 142, 151, upon ground that after stating that note belonged to wife as survivor court held for other reasons that it belonged to husband's estate and not to wife.

25. **JOINT INTEREST NOT SHOWN BY**.—An account headed husband and wife payable to either or the survivor, money remaining property of original depositor.—Noyes vs. Institution for Sav. Newburyport, 164 Mass. 583, 49 Am. St. Rep. 484, 42 N. E. Rep. 103. See Brabrook vs. Boston Five Cents Sav. Bank, 104 Mass. 228, 6 Am. Rep. 222; Ide vs. Pierce, 134 Mass. 260; Sherman vs. New Bedford Five Cents Sav. Bank, 138 Mass. 531, 582; Nutt vs. Morse, 142 Mass. 1, 6 N. E. Rep. 763; Parkman vs. Suffolk Sav. Bank, 151 Mass. 218, 24 N. E. Rep. 43; Booth vs. Bristol Co. Sav. Bank, 162 Mass. 455, 457, 38 N. E. Rep. 1120.

26. By bequest of real and personal property to two parties regarded and treated as adopted daughters.—Estate of Hittell, 141 Cal. 432, 435, 75 Pac. Rep. 53.

27. By deposits in account with husband and wife, or either, where evidence showed that husband stated that money should belong to wife, and never took any other step or

changed account.—*Schick vs. Grote*, 42 N. J. Eq. (15 Stew.) 352, 355, 7 Atl. Rep. 552.

28. By deposit of money from sale of wife's separate property in bank to the credit of husband or wife.—*Freese vs. Hibernia Sav. & L. Soc.*, 139 Cal. 392, 396, 78 Pac. Rep. 172.

29. By deposits of money sole property of one, in joint names and survivor of them, subject to order of either of them, in absence of evidence showing clear intention to create an interest which would vest property in survivor upon death.—*Taylor vs. Henry*, 48 Md. 550, 30 Am. Rep. 436. See *Gorman vs. Gorman*, 87 Md. 338, 39 Atl. Rep. 1038.

30. By deposit of separate property of wife in bank in name of herself and husband, payable to either, in absence of evidence tending to show intention to part with title.—*Denigan vs. San Francisco Sav. Union*, 127 Cal. 142, 147, 78 Am. St. Rep. 35, 59 Pac. Rep. 390.

31. By deposit of separate estate of wife in bank, where passbook showed account in her name "or" her husband's.—*Denigan vs. San Francisco Sav. Union*, 127 Cal. 142, 147, 78 Am. St. Rep. 35, 59 Pac. Rep. 390.

32. By mere form in which account is kept at bank.—*Freese vs. Hibernia Sav. & L. Soc.*, 139 Cal. 392, 396, 78 Pac. Rep. 172. See *Denigan vs. Hibernia Sav. & L. Soc.*, 127 Cal. 137, 59 Pac. Rep. 289; *Denigan vs. San Francisco Sav. Union*, 127 Cal. 142, 78 Am. St. Rep. 35,

59 Pac. Rep. 390. *Mass. Brabrook vs. Boston Five Cents Sav. Bank*, 104 Mass. 228, 6 Am. Rep. 222. *N. J. Smith vs. Speer*, 34 N. J. Eq. (7 Stew.) 336; *Schick vs. Grote*, 42 N. J. Eq. (15 Stew.) 352, 355, 7 Atl. Rep. 552. *N. Y. Brown vs. Brown*, 23 Barb. 565. *Eng. Marshal vs. Crutwell*, L. R. 20 Eq. 328, 13 Moak Eng. Rep. 830.

33. By reason of account in bank in joint name of husband and wife of separate property of the one.—*Denigan vs. San Francisco Sav. Union*, 127 Cal. 142, 149, 78 Am. St. Rep. 35, 59 Pac. Rep. 390.

34. WORDS IN BANK ACCOUNT "PAYABLE TO EITHER" take away claim of joint interest in absence of declaration of joint tenancy.—*Denigan vs. San Francisco Sav. Union*, 127 Cal. 142, 149, 78 Am. St. Rep. 35, 59 Pac. Rep. 390.

35. Burden of proof upon plaintiff to show that deposit of separate estate of wife in bank in joint names of herself and husband ceases to be separate property.—*Denigan vs. San Francisco Sav. Union*, 127 Cal. 142, 147, 78 Am. St. Rep. 35, 59 Pac. Rep. 390.

36. USE OF WORDS "JOINT OWNERS" does not make the property deposited in bank joint property.—*Denigan vs. San Francisco Sav. Union*, 127 Cal. 142, 147, 78 Am. St. Rep. 35, 59 Pac. Rep. 390. See *Whalen vs. Milholland*, 89 Md. 199, 43 Atl. Rep. 45, 44 L. R. A. 308.

§ 684. **PARTNERSHIP INTEREST, WHAT.** A partnership interest is one owned by several persons, in partnership, for partnership purposes.

History: Enacted March 21, 1872.

I. Partnership—Creation of.

1. Applied, cited, construed, referred to, etc.
- 2-5. Partnership—How created.
- 6, 7. Same—When not created.
- 8-10. Question of intention—Proof when sued.

II. Existence of Partnership.

- 11, 12. When partnership exists.
- 13-15. When partnership not shown.
16. Question of existence one of fact.
17. Question what is one of law.

III. Partnership in Real Estate.

18. Partnership may hold.
- 19-23. When partnership exists in realty—Proof, etc.
24. When fact of holding not sufficient.
- 25, 26. Question of intention—Joint stock.
27. What sufficient holding as against trespasser.

IV. Mining Partnerships.

28. Constructed by agreement for purchase, etc.
- 29-32. How considered—Subject to ordinary rules.
33. How mining partnership differs from ordinary.
- 34-45. Creation and existence of—Acquisition—Corporations.
- 46-52. Who are mining partners.

I. PARTNERSHIP—CREATION OF.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Smith vs. Cooley*, 65

Cal. 46, 48, 2 Pac. Rep. 380 (construed and applied); *People vs. Greening*, 102 Cal. 354, 356, 38 Pac. Rep. 665 (construed and applied).

As to partnership in real estate, see note 47 Am. Dec. 320, 60 Am. Dec. 539, and monographic notes 98 Am. Dec. 197, 201, and by Robert Desty in 8 L. R. A. 657.

As to validity of parol partnerships for dealing in land, see monographic note by H. P. Farnham in 16 L. R. A. 745-750.

As to when real estate will be considered partnership property, see monographic note by Ernest Watts in 27 L. R. A. 449-497.

As to mining partnerships, their nature and constitution, and who are partners therein, see monographic note 83 Am. Dec. 104-111.

2. CREATED BY AGREEMENT executed; in other words, partnership must be "launched."—*Meagher vs. Reed*, 14 Colo. 335, 24 Pac. Rep. 681; *Anaconda C. Min. Co. vs. Butte & B. Min. Co.*, 17 Mont. 519, 43 Pac. Rep. 324.

3. Without express stipulation to share profits and loss.—*Southmayd vs. Southmayd*, 4 Mont. 100, 5 Pac. Rep. 318.

4. By entry in firm books with knowledge and assent of separate owners of building in which business carried on.—*Riedeburg vs. Schmitt*, 71 Wis. 644, 655, 33 N. W. Rep. 336. See *Cal. Duryea vs. Burt*, 28 Cal. 569, 580. *Conn. Sigourney vs. Munn*, 7 Conn. 12, 14. *Kan. Marsh vs. Davis*, 33 Kan. 326, 6 Pac.

Rep. 612. *Mich. Way vs. Stebbins*, 47 Mich. 296, 11 N. W. Rep. 166. *Minn. Arnold vs. Wainwright*, 6 Minn. 358, 30 Am. Dec. 443. *Nev. Hogle vs. Lowe*, 12 Nev. 286. *Ohio. Ludlow vs. Cooper*, 4 Ohio St. 1, 8. *Pa. McDermot vs. Laurence*, 7 Serg. & R. 437, 443; *Black's Appeal*, 29 Pa. 201; *Shafer's Appeal*, 106 Pa. 49. *Wis. Bergeron vs. Richardott*, 55 Wis. 129, 12 N. W. Rep. 384.

5. CONTRACT BETWEEN PARTIES whereby one is to purchase quarry to be operated jointly with equal division of profits, makes stone separated from freehold by joint labor of parties, property of partnership.—*Treat vs. Hiles*, 68 Wis. 344, 60 Am. Rep. 553, 32 N. W. Rep. 517.

6. Not created by agreement to enter into partnership at future day, as such agreement is not sufficient to predicate partnership unless it is shown to be actually consummated.—*Meagher vs. Reed*, 14 Colo. 335, 24 Pac. Rep. 681.

7. EXECUTORY AGREEMENT, partnership is inchoate, not called into existence by action necessary under partnership agreement.—*Meagher vs. Reed*, 14 Colo. 335, 24 Pac. Rep. 681.

8. INTENTION OF PARTIES to become, need not be expressed in words.—*Manville vs. Parks*, 7 Colo. 123, 2 Pac. Rep. 212.

9. LAW SUPPLIES WANT OF WORDS NECESSARY to create intention.—*Manville vs. Parks*, 7 Colo. 123, 2 Pac. Rep. 212.

10. Less strictness of proof is required to prove partnership when partners are sued and when they sue as such.—*Manville vs. Parks*, 7 Colo. 123, 2 Pac. Rep. 212.

II. EXISTENCE OF PARTNERSHIP.

11. PARTNERSHIP EXISTS BY PARTIES ENTERING INTO BUSINESS RELATIONS and carrying out such acts as, in law, constitute a partnership, even though they did not intend to become such.—*Manville vs. Parks*, 7 Colo. 123, 2 Pac. Rep. 212.

12. By reason of implied acts of parties, as well as by express intent and agreement.—*Manville vs. Parks*, 7 Colo. 123, 2 Pac. Rep. 212.

13. Not shown by association of parties under agreement to contribute funds and to share profits and losses.—*Congdon vs. Olds*, 18 Mont. 437, 490, 46 Pac. Rep. 261.

14. By arrangement contingent, or to take effect at a future day.—*Meagher vs. Reed*, 14 Colo. 335, 24 Pac. Rep. 681.

15. By contract for joint relation upon proposed terms if one obtains lease satisfactory to them.—*Meagher vs. Reed*, 14 Colo. 335, 24 Pac. Rep. 681. See *Wilson vs. Campbell*, 5 Gill (Md.) 383.

16. Question whether partnership exists is one of fact.—*Manville vs. Parks*, 7 Colo. 123, 2 Pac. Rep. 212.

17. Question as to what is partnership is one of law.—*Manville vs. Parks*, 7 Colo. 123, 2 Pac. Rep. 212.

III. PARTNERSHIP IN REAL ESTATE.

18. PARTNERSHIP MAY HOLD real property for partnership purposes.—*People vs. Greening*, 103 Cal. 334, 336, 36 Pac. Rep. 665.

19. Exists in real estate purchased with partnership funds for partnership and appropriated to partnership uses, whether legal title is held in the name of part or all the partners as tenants in common.—*Hogle vs. Lowe*, 12 Nev. 286, 295.

20. Requires no further proof to establish intention and agreement of partners.—*Hogle vs. Lowe*, 12 Nev. 286, 296.

21. CONVEYANCE TO INDIVIDUAL PARTNERS, in which they are styled as composing firm, will vest in them title according to terms of deed.—*McCauley vs. Fulton*, 44 Cal. 355; *People vs. Greening*, 103 Cal. 334, 336, 36 Pac. Rep. 665.

22. REAL ESTATE OWNED BY PARTNERSHIP MUST BE SHOWN to be partnership property by evidence establishing agreement or by proof of purchase with partnership funds for partnership purposes.—*Hogle vs. Lowe*, 12 Nev. 286, 296. See *Sigourney vs. Munn*, 7 Conn. 12; *Frink vs. Branch*, 16 Conn. 260, 269; *Hoxie vs. Carr*, 1 Sumn. C. C. 173, 12 Fed. Cas. 746.

23. Used by partnership, in law, belongs to person in whose name title stands, and so considered in equity until shown to be partnership property.—*Hogle vs. Lowe*, 12 Nev. 286, 296.

24. Mere fact of real estate held by partners as tenants in common is used in partnership business for partnership purposes, or agreement made to so use it, not of itself sufficient to convert it into partnership stock without further evidence of agreement to make it partnership property.—*Hogle vs. Lowe*, 12 Nev. 286, 296.

25. Whether real estate is partnership property is question of intention of partner.—*Riedeburg vs. Schmitt*, 71 Wis. 644, 655, 38 N. W. Rep. 336.

26. Whether partnership interest exists in real estate owned by one partner at time of formation of partnership, and which is to be used by firm, depends upon question whether party bringing it in contributed as part of joint stock.—*Riedeburg vs. Schmitt*, 71 Wis. 644, 655, 38 N. W. Rep. 336.

27. Deed conveying real estate to partners of firm establishes partnership so as to enable partner to maintain action against stranger trespassing.—*Smith vs. Smith*, 80 Cal. 323, 327, 21 Pac. Rep. 4, 22 Id. 186, 549.

IV. MINING PARTNERSHIPS.

28. PARTNERSHIP CONSTRUCTED FOR MINING PURPOSES by agreement for purchase of interest in mining claim and to pay for same out of profits where mine is developed by parties and books of account are kept.—*Southmayd vs. Southmayd*, 4 Mont. 100, 5 Pac. Rep. 313.

29. Considered as partnership sub modo only.—*Bissell vs. Foss*, 114 U. S. 252, bk. 29 L. ed. 126, 5 Sup. Ct. Rep. 851.

30. In equity.—*Working of mine under bare "mining right" considered species of trade.*—*Smith vs. Cooley*, 65 Cal. 46, 48, 2 Pac. Rep. 880.

31. PARTNERSHIP IN MINE SUBJECT TO RULES relating to ordinary trade partner-

ships.—*Skillman vs. Lachman*, 23 Cal. 198, 203, 83 Am. Dec. 96.

32. Except so far as general usage of persons engaged in similar pursuits or established practice of particular company alters rule.—*Jones vs. Clark*, 42 Cal. 180, 193.

33. Mining partnership differs from ordinary partnership, not being founded on the delectus personae.—*Dougherty vs. Creary*, 30 Cal. 290, 300, 89 Am. Dec. 116; *Jones vs. Clark*, 42 Cal. 180, 193. *Colo. Charles vs. Eshleman*, 5 Colo. 107, 111; *Meagher vs. Reed*, 14 Colo. 335, 24 Pac. Rep. 681; *Patrick vs. Weston*, 23 Colo. 45, 49, 43 Pac. Rep. 446. *Mont. Southmayd vs. Southmayd*, 4 Mont. 100, 5 Pac. Rep. 318; *Anaconda C. Min. Co. vs. Butte & B. Min. Co.*, 17 Mont. 519, 43 Pac. Rep. 924. *Utah. Kahn vs. Old Tel. Min. Co.*, 2 Utah 174, 217. *Fed. Kahn vs. Central Smelt. Co.*, 102 U. S. 641, bk. 26 L. ed. 266; *Bissell vs. Foss*, 114 U. S. 252, bk. 29 L. ed. 126, 5 Sup. Ct. Rep. 851.

34. Created by acquisition of mining claim for purposes of working, actually engaging therein and sharing according to interest of each, creates partnership without express agreement to become partners and to share profit and loss.—*Duryea vs. Burt*, 28 Cal. 569. See *Divine vs. Mitchum*, 4 B. Mon. (Ky.) 488, 41 Am. Dec. 241; *Carlisle vs. Mulhern*, 19 Mo. 56, 57; *Priest vs. Chouteau*, 35 Mo. 395, 55 Am. Rep. 373.

35. Combination for working of mines merely or as paramount object trading and dealing in productions constitutes partnership for that purpose.—*Manville vs. Parks*, 7 Colo. 128, 2 Pac. Rep. 212.

36. Corporation of mine-owners uniting in working mine causes new relation to exist between themselves, and to certain extent are governed by rules relating to partnership.—*Skillman vs. Lachman*, 23 Cal. 198, 203, 83 Am. Dec. 96.

37. Mining partnership exists where several owners of mine co-operate in its working.—*Charles vs. Eshleman*, 5 Colo. 107, 111.

38. Exist as distinct associations in all mining communities, and to certain extent parties are governed by law relating to partnerships.—*Kahn vs. Central Smelt. Co.*, 102 U. S. 641, bk. 26 L. ed. 266. See *Kahn vs. Old Tel. Min. Co.*, 2 Utah 174, 218.

39. Exists between tenants in common working mine together and taking gold to pay expenses of working and dividing residue in proportion to interests of each in ground.—*Duryea vs. Burt*, 28 Cal. 569; *Nolan vs. Lovelock*, 1 Mont. 224, 227.

40. Exists by reason of certain facts described in statute.—*Anaconda C. Min. Co. vs. Butte & B. Min. Co.*, 17 Mont. 519, 43 Pac. Rep. 924.

41. By reason of oral agreement for location of quartz lodes under which parties work out and develop property and conveyance is taken in name of two parties.—*Hirbour vs. Reeding*, 3 Mont. 15, 21. See *Miller vs. Ball*, 64 N. Y. 286.

42. Exist where parties have interest merely in work of mine, or in carrying on

mining operations, as where they own mine itself.—*Manville vs. Parks*, 7 Colo. 128, 2 Pac. Rep. 212.

43. STRICT PARTNERSHIP MAY EXIST IN WORKING MINE which will be subject to incidents of trading partnership.—*Decker vs. Howell*, 42 Cal. 636, 642.

44. By reason of parties' own agreement and not merely from fact of their common ownership.—*Decker vs. Howell*, 42 Cal. 636, 642. See *Bradley vs. Harkness*, 26 Cal. 69, 76; *Duryea vs. Burt*, 28 Cal. 569, 587.

45. Does not exist where there is no common venture, no common ownership, or sharing of profits and losses.—*Berry vs. Woodburn*, 107 Cal. 504, 512, 40 Pac. Rep. 802.

46. WHO ARE MINING PARTNERS—Co-tenant owners, as well as lessees or parties having only equitable interest in property, or holding under license to work or develop, or where owner furnishes mine, and another capital and labor, under agreement to take profits jointly, are partners for mining purposes.—*Manville vs. Parks*, 7 Colo. 128, 2 Pac. Rep. 212. See *Skillman vs. Lachman*, 23 Cal. 198, 83 Am. Dec. 96.

47. Parties having no common venture, common ownership or sharing of profits and losses are not partners.—*Berry vs. Woodburn*, 107 Cal. 504, 512, 40 Pac. Rep. 802.

48. Parties hiring in consideration of payment of wages and interest in mining are not partners.—*Berry vs. Woodburn*, 107 Cal. 504, 512, 40 Pac. Rep. 802.

49. Parties in mining partnership bound for purpose of carrying on mining operations for particular adventure combining some of the incidents of ordinary partnership, and some of incidents as tenancy in common to extent that interest in property makes them tenants in common, and in working of mine they are considered partners.—*Manville vs. Parks*, 7 Colo. 128, 2 Pac. Rep. 212.

50. Parties interested in mining right are, in their relations to each other, qualified partners.—*Rich vs. Davis*, 6 Cal. 164; *Duryea vs. Burt*, 28 Cal. 569, 579; *Settembre vs. Putnam*, 30 Cal. 490, 496; *Smith vs. Cooley*, 65 Cal. 46, 48, 2 Pac. Rep. 880.

51. Stockholders of unincorporated ditch companies, in their ordinary relations supplying water to miners, like those of usual mining companies organized and conducted upon similar principles, are not those of strict commercial partnerships, but are more of nature of tenancies in common.—*Abel vs. Love*, 17 Cal. 233, 237; *Skillman vs. Lachman*, 23 Cal. 198, 201, 203, 83 Am. Dec. 96; *Bradley vs. Harkness*, 26 Cal. 69, 77; *Duryea vs. Burt*, 28 Cal. 569, 587; *Settembre vs. Putnam*, 30 Cal. 490, 493; *McConnell vs. Denver*, 35 Cal. 365, 369, 95 Am. Dec. 107.

52. TENANTS IN COMMON OWNING MINING PROPERTY are considered as partners in working of mine.—*Dougherty vs. Creary*, 30 Cal. 290, 300, 89 Am. Dec. 116.

53. Majority may control and decide what is necessary.—*Dougherty vs. Creary*, supra; *Nolan vs. Lovelock*, 1 Mont. 227.

§ 685. **INTEREST IN COMMON, WHAT.** An interest in common is one owned by several persons, not in joint ownership or partnership.

History: Enacted March 21, 1872.

I. In General.

1. Applied, cited, construed, referred to, etc.
- 2, 3. Definitions—Tenancy and tenants in common.
- 4-7. Difference between, and joint tenants—Partnerships.
- 8-12. Nature, quality, and quantity of estate.

II. Creation of—1. Deeds, Documents, etc.

- 13-24. When created—By agreement, devise, grant, lease, etc.
- 25-32. When not created by agreement, bond, grant, letting, etc.

III. Same—2. Parties.

33. Exists between corporation and natural persons.
- 34-36. Same—Husband's grantee and wife—Husband, wife, children.
- 37-40. Same—Lessor and lessee, parties irrigating, mining, etc.
- 41-43. Same—Purchaser at sheriff's sale, etc.
- 44, 45. Same—Same—Husband's portion common property, etc.
- 46-49. Same—Widow and children.
50. Same—Not between widow's grantee and children.

IV. Estate and Title—1. Extent of.

- 51-53. Actual possession—Presumption as to, etc.
54. Doctrine of unity of possession—What involved, etc.
- 55-59. Extent of right to possession—Presumption, etc.
60. Same—Water for irrigation.
- 61, 62. Destruction of unity destroys estate—Negligence.

V. Same—2. Acts Affecting or Not Affecting.

63. Can act as in severalty as to share.
- 64-68. Cannot appropriate, acquire tax title, prejudice, etc.
- 69-71. Same—Create easement, homestead, impair.
- 72-74. Same—Possess in severalty, question title—Remove property.
75. Same—Mortgage as to impair right of other.
76. Redemption inures for all.
77. Refusal or delay in paying expenses.

VI. Same—3. Conveyances of Cotenants.

- 78, 79. General power to convey.
- 80-89. Grant of cotenant—Effect of.
- 90-98. Same—Specific portion.
99. Same—Cannot reserve easement.
100. Position of tenant subsequently acquiring cotenant's title.
- 101-107. Same—Of purchaser.

VII. Same—4. Purchase by Cotenant.

108. Outstanding title—Power to purchase.
- 109-113. Purchase of outstanding title—Effect of.
- 114-119. Same—Position of parties in equity—Election.

VIII. Same—5. Rights of Creditors and Purchasers Under.

120. Liability of property for debts.
121. Position of creditor of one cotenant.
- 122-124. Same—Judgment creditor—Licensee.
- 125-128. Same—Mortgagee—Purchaser, sheriff's sale.
129. Taxes—Purchase by cotenant at tax sale.

IX. Same—6. Trespassers and Wrong-Doers.

- 130-132. Possession—Right to, as against trespassers, etc.
- 133-136. Right of action against—Extent of recovery.
137. Same—Lessee of cotenant.
138. Same—Widow in property held in common with children.

X. Right of Action Between Cotenants.

- 139-141. Same—Defense and judgment.
- 142-145. Common-law doctrine—Statute of Anne
- 146, 147. Action lies as against bailiff, etc.
- 148-154. Nature actions lie at common law.
- 155-168. Remedy in equity—Nature and extent of.
169. Same—Interest ascertained before trying ejectment.
170. Subrogation—Right to.
171. Evidence—Sufficiency of.

XI. Ouster—1. In General.

- 172-174. Right of cotenants—As against cotenant and stranger.
- 175-182. Possession—Not presumed adverse, but amicable.
183. Ouster starts adverse possession.
- 184, 185. Same—Does not depend upon fact of notice.
186. Expulsion of licensee a trespass.
- 187-189. Partial exclusion—Effect of as ouster.

XII. Same—2. Intention, Notice, etc.

190. Conversion must be established.
- 191-205. Intention—Nature and necessity of—Hostility.
- 206, 207. Same—Hostility, how lost or affected.
- 208-212. Same—Sufficiency, how judged or shown.
213. Same—Demand as notice of.
- 214-216. Evidence—Presumption as to—Demand and notice.
- 217-222. Notice—Sufficiency of, etc.
223. Same—Necessity of actual.

XIII. Same—3. Acts Constituting, etc.

- 224-235. Nature of acts constituting—Answer, demand, entry.
- 236-245. Same—Not constituting—Adverse holding, etc.

XIV. Same—4. Parties Affected.

- 246-248. Infants—Effect upon.
- 249, 250. Same—Effect of knowledge imparted.

XV. Same—5. Statute of Limitations.

- 251-253. When begins to run—Minority.
254. Effect of.

XVI. Same—6. Evidence of.

255. Question of fact.

256-269. Nature and sufficiency of.
270-273. Not sufficient to prove.

XVII. Same—7. Damages and Defense.

274-282. Nature and extent of.
283, 284. Defenses—Justification.

I. IN GENERAL.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Estate of Hittell, 141 Cal. 432, 435, 75 Pac. Rep. 53 (construed and applied).

As to tenancy by entireties, see monographic note by H. W. B. Mackey in 30 L. R. A. 305-335.

As to exclusive possession by one cotenant, see monographic note by Robert Desty, 12 L. R. A. 261-266.

As to husband and wife as cotenants, see monographic note by H. W. B. Mackey in 30 L. R. A. 305.

As to right of tenant in common to crops, see monographic note by Robert Desty, 9 L. R. A. 625.

As to right to levy on crops owned by cotenants, see monographic note by Ernest Watts in 23 L. R. A. 258, 260-263.

2. DEFINITION.—Tenancy in common is where two or more hold possession of lands or tenants at same time by several and distinct titles.—Carpentier vs. Webster, 27 Cal. 524, 544.

3. "Tenants in common are they which have lands and tenements in fee simple, fee tails, or for term of life, etc.; and they have such lands or tenements by several titles, and not by a joint title; and none of them knoweth of this his several, but they ought by the law to occupy these lands or tenements in common, and pro indiviso, to take the profits in common."—Carpentier vs. Webster, 27 Cal. 524, 545.

4. Tenants in common differ in nothing from sole estates but the blending and unity of possession.—Carpentier vs. Webster, 27 Cal. 524, 545.

5. "DIFFERENCE BETWEEN JOINT TENANTS AND TENANTS IN COMMON is, that joint tenants have land by one joint title and in one right, and tenants in common by several titles, or by one title and by several rights; which is reason that joint tenants have one joint freehold, and tenants in common several freeholds."—Carpentier vs. Webster, 27 Cal. 524, 545.

6. DIFFERS FROM PARTNERSHIP in that latter is result of agreement between parties which supplies rules governing.—Bradley vs. Harkness, 26 Cal. 69, 77.

7. Relation between tenants in common undisturbed by change of tenants, while change in relation of partnership dissolves old firm.—Bradley vs. Harkness, 26 Cal. 69, 77.

8. NATURE, QUALITY, AND QUANTITY OF ESTATE.—Tenancy in common results from rules of law by which it is also controlled and governed.—Bradley vs. Harkness, 26 Cal. 69, 77.

9. One may hold in fee simple and another for life.—Carpentier vs. Webster, 27 Cal. 524, 544.

10. One tenant in common may acquire title by purchase, another by descent.—Carpentier vs. Webster, 27 Cal. 524, 544.

11. Quantity of estate may be different, proportion may be unequal, and mode of acquiring title may be unlike, and only unity between them that of possession.—Carpentier vs. Webster, 27 Cal. 524, 544; Lytle Creek Water Co. vs. Perdew, 65 Cal. 447, 452, 4 Pac. Rep. 426.

12. Shares of cotenants are undivided before partition.—Carpentier vs. Webster, 27 Cal. 524, 545; Tevis vs. Hicks, 38 Cal. 234, 239.

II. CREATION OF—1. DEEDS, DOCUMENTS, ETC.

13. TENANCY IN COMMON CREATED BY AGREEMENTS, designated as lease, one to furnish farming implements and other to work farm, party furnishing implements to receive one third of grain, and to divide specific products,—so far as products concerned.—Bernal vs. Hovious, 17 Cal. 541, 545-546, 79 Am. Dec. 147; Knox vs. Marshall, 19 Cal. 617, 621. See Mass. Beaumont vs. Crane, 14 Mass. 400; Lewis vs. Lyman, 39 Mass. (23 Pick.) 437. N. Y. Caswell vs. Districh, 15 Wend. 379; Putnam vs. Wise, 1 Hill 234, 235; Dinehart vs. Wilson, 15 Barb. 595; Harrower vs. Heath, 19 Barb. 331. S. C. Maverick vs. Lewis, 3 McC. 211.

14. By agreement letting real estate for share of product of land, so far as such products are concerned.—Jones vs. Durrer, 96 Cal. 95, 98, 30 Pac. Rep. 1027.

15. By agreement whereby one is to take care of sheep, and for division of profits of the wool taken therefrom.—Hewlett vs. Owens, 50 Cal. 474.

Deed.—See "Grant," pars. 17-22, 24 this note.

16. By devise to two daughters, and on decease of one her share to go to other heirs of testator.—Estate of Hittell, 141 Cal. 432, 435, 75 Pac. Rep. 53.

17. By government grant to widow and heirs of decedent with party claiming under one of patentees in fee simple.—Wallace vs. Miller, 52 Cal. 655, 656.

18. By grant of definite number of acres, or other definite quantity of lands, within and as parcel of larger tract of land well described, but without locating land conveyed, such grant being construed as conveying undivided interest in larger tract, provided deed does not specifically purport to describe smaller tract, or fails to do so with reasonable certainty.—Cullen vs. Sprigg, 83 Cal. 56, 61, 23 Pac. Rep. 222. See Lick vs. O'Donnell, 3 Cal. 59, 60, 58 Am. Dec. 383; Schenk vs. Evoy, 24 Cal. 104, 110; Lawrence vs. Ballou, 37 Cal. 518; Grogan vs. Vache, 45 Cal. 610; Wallace vs. Miller, 52 Cal. 655; Pepkin vs. Allen, 29 Mo. 229; Dohoney vs. Womack, 1 Tex. Civ. App. 354, 362, 19 S. W. Rep. 333, 20 Id. 950.

19. By grant naming grantees, describing them as composing firm although partnership not evidenced by writing, where property paid for with partnership funds and used for partnership purposes, each partner taking one undivided portion.—McCauley vs. Fulton, 44 Cal. 355, 359.

20. By grant to two persons in terms implying joint tenancy, but not vesting for reason that requisite unities wanting.—*De Witt vs. San Francisco*, 2 Cal. 289, 297.

21. By grant to wife and son and to such other as wife might have during marriage, and after her decease to children of marriage, wife and son becoming tenants in common.—*Brenham vs. Davidson*, 51 Cal. 352, 356.

22. By grant of part of large tract not described by any specific part, creates tenancy in common in whole tract.—*Cullen vs. Sprigg*, 83 Cal. 56, 61, 23 Pac. Rep. 222.

23. UNDER LEASE FOR TERM OF YEARS, landlord to receive certain portion of crop in reasonable time after harvesting.—*Baughman vs. Reed*, 75 Cal. 319, 321, 7 Am. St. Rep. 170, 17 Pac. Rep. 222. See *Bernal vs. Hovious*, 17 Cal. 541, 542, 79 Am. Dec. 147; *Knox vs. Marshall*, 19 Cal. 617; *Callender vs. McLeod*, 74 Cal. 376, 16 Pac. Rep. 194.

24. WHERE DEED IS OF A GIVEN QUANTITY of land parcel of larger tract, and deed fails to locate quantity so conveyed by sufficient description, grantee on delivery of deed becomes interested in all land comprised within larger area as tenant in common with grantor, and as such can claim partition.—*Lawrence vs. Ballou*, 37 Cal. 518, 520; *Schenk vs. Evoy*, 24 Cal. 104, 110; *Lick vs. O'Donnell*, 3 Cal. 59, 58 Am. Dec. 383. See *Mass. Gibbs vs. Swift*, 66 Mass. (12 Cush.) 393. *N. Y. Jackson vs. Livingston*, 7 Wend. 136; *Corbin vs. Jackson*, 14 Wend. 619, 28 Am. Dec. 550; *Long Island R. Co. vs. Conklin*, 39 N. Y. 572. *Vt. Sheafe vs. Wait*, 30 Vt. 735.

25. TENANCY IN COMMON NOT CREATED BY AGREEMENT for farming on shares, sacks of wheat to be returned to lessor for loan made by him of wheat at time lessee entered on premises.—*Callender vs. McLeod*, 74 Cal. 376, 379, 16 Pac. Rep. 194.

26. By agreement to give interest in right of way in consideration of contributing to expense of its construction, although party pays more than his proportion, and homestead claim is therefore lawful.—*Fitzell vs. Leaky*, 72 Cal. 477, 481, 14 Pac. Rep. 98.

27. By bond given by vendor to convey by given date, where parties subsequently enter into agreement showing vendee is to hold in trust for himself and others, including the vendor, equally, with respect to amount paid by vendee in part payment of purchase money on execution of bond.—*Fairchild vs. Mullan*, 90 Cal. 190, 194, 27 Pac. Rep. 201.

28. By grant of party holding adversely under deed from one of several cotenants of entire tract.—*Frick vs. Simon*, 75 Cal. 337, 340, 341, 7 Am. St. Rep. 177, 17 Pac. Rep. 439. See *Carpentier vs. Mendenhall*, 28 Cal. 484, 87 Am. Dec. 135; *Miller vs. Myers*, 46 Cal. 535.

29. By grant of undivided interest in mining ground with water-rights, reservoirs, and tail-race, upon express condition that no other rights except mining rights were conveyed.—*Smith vs. Cooley*, 65 Cal. 46, 47, 2 Pac. Rep. 880.

30. By letting to tenant in consideration of share of product, etc.—*Jones vs. Durrer*, 96 Cal. 95, 98, 30 Pac. Rep. 1027. See *Walls vs.*

Preston, 25 Cal. 50; *Smith vs. Schultz*, 89 Cal. 526, 26 Pac. Rep. 1087.

31. WATER USED FOR IRRIGATION where there is no unity of possession in ditches, land, date of appropriation, use of water, or right to its use.—*Norman vs. Corbley* (Mont. March 13, 1905), 79 Pac. Rep. 1059, 1061; *Crowder vs. McDonnell*, 21 Mont. 367, 54 Pac. Rep. 43.

32. WHERE ONE PURCHASER PAYS WHOLE PURCHASE MONEY and receives exclusive possession, although deed is made to such party with another, where it is shown that land was at time public land, part of Mexican grant for which patent was regularly issued, and title was subsequently acquired by such cotenant by proper conveyance from patentees, and of which possession not claimed for over twenty years.—*Tully vs. Tully*, 71 Cal. 338, 340, 12 Pac. Rep. 246.

III. SAME—2. PARTIES.

33. TENANCY IN COMMON EXISTS BETWEEN CORPORATIONS holding real estate with natural persons.—*De Witt vs. San Francisco*, 2 Cal. 289, 298. See *New York & S. Canal vs. Fulton Bank*, 7 Wend. (N. Y.) 412.

34. Between grantee from husband of property, portion of which is separate property of wife, and other common property, and wife and her heirs.—*Ewald vs. Corbett*, 32 Cal. 493, 497.

35. Between husband and wife and children as much as though they were entire strangers to each other, when land is held in common and is not impressed with character of homestead by reason of their residing upon premises.—*Giblin vs. Jordan*, 6 Cal. 416, 418.

36. Between husband or father immediately upon death or wife, and children who take wife's interest in community property, and are entitled to possess with father.—*Broad vs. Broad*, 40 Cal. 493, 495; *Broad vs. Murray*, 44 Cal. 228, 229; *Johnston vs. Bush*, 49 Cal. 198, 201.

37. Between lessor of land leased under agreement to furnish seed for crop of first year, in consideration of receiving portion of share of crop, and lessee of part of crop claimed in return and for seed furnished.—*Baughman vs. Reed*, 75 Cal. 319, 321, 7 Am. St. Rep. 170, 17 Pac. Rep. 222. See *Callender vs. McLeod*, 74 Cal. 376, 16 Pac. Rep. 194.

38. Between parties using water of stream upon certain conditions, for irrigating and household purposes.—*Lytle Creek Water Co. vs. Perdew*, 65 Cal. 447, 452, 454, 4 Pac. Rep. 426.

39. Between parties working land upon shares, until division of crops.—*Knox vs. Marshall*, 19 Cal. 617, 621; *Walls vs. Preston*, 25 Cal. 59, 63; *Scott vs. Ramsey*, 82 Ind. 330, 334.

40. Between proprietors of ditches in mining districts and their rights in ditch and profits arising from sale of water, although analogous to those of copartners.—*Bradley vs. Harkness*, 26 Cal. 69, 77.

41. Between purchaser at sheriff sale, under attachment proceedings against one of two parties holding under agreement to work farm upon shares, with other party to agreement.—*Bernal vs. Hovious*, 17 Cal. 541, 547, 79 Am. Dec. 147. See *Waldman vs. Broder*, 10 Cal. 373;

Tevis vs. Hicks, 38 Cal. 234, 240; *Veach vs. Adams*, 51 Cal. 609, 611; *Branch vs. Wiseman*, 51 Ind. 1, 3.

42. Between purchaser of landlord's interest, under execution sale of growing crops worked upon shares, and tenant on premises.—*Schell vs. Simon*, 66 Cal. 264, 266, 5 Pac. Rep. 238.

43. Between purchaser of partner's interest at sheriff's sale and remaining partners, and acquires legal title and not mere equity.—*McCaughey vs. Fulton*, 44 Cal. 355, 362. See *Lowe vs. Alexander*, 15 Cal. 296; *Dupuy vs. Leavenworth*, 17 Cal. 262; *Ross vs. Heintzen*, 36 Cal. 313, 314; *Stokes vs. Stevens*, 40 Cal. 391. *Ala. Lang vs. Waring*, 25 Ala. 625, 644, 60 Am. Dec. 533. *Me. Blake vs. Nutter*, 19 Me. 16. *Mass. Peck vs. Fisher*, 61 Mass. (7 Cush.) 386. *N. Y. Buchan vs. Sumner*, 2 Barb. Ch. 165, 193, 47 Am. Dec. 305; *Coles vs. Coles*, 15 John. 159, 160, 8 Am. Dec. 231.

44. Between purchaser from husband of portion of common property and wife, where remaining portion is her separate property.—*Ewald vs. Corbett*, 32 Cal. 493, 498.

45. Between purchaser from one of two parties owning tract, of ditch across same, and purchaser of same ditch from their co-owner.—*Reed vs. Spicer*, 27 Cal. 57, 64. See *Stark vs. Barrett*, 15 Cal. 361.

46. Between widow and children in community property conveyed to her after death of husband.—*Hart vs. Robertson*, 21 Cal. 346, 349.

47. Between widow and children in homestead after death of husband.—*Hoppe vs. Hoppe* (erroneously head-lined *Hoppe vs. Fountain*), 104 Cal. 94, 100, 37 Pac. Rep. 894.

48. Between widow and children of deceased intestate in husband's separate estate, both real and personal.—*McClure vs. Colyear*, 80 Cal. 378, 380, 22 Pac. Rep. 175.

49. Between widow and children of deceased intestate in equitable interest in portion arising from sale of deceased's real estate.—*McClure vs. Colyear*, 80 Cal. 378, 380, 22 Pac. Rep. 175.

50. TENANCY IN COMMON.—Does not exist between grantee of widow and children, so far as to bar homestead right.—*Phelan vs. Smith*, 100 Cal. 168, 166, 34 Pac. Rep. 667.

IV. ESTATE AND TITLE—1. EXTENT OF.

51. ACTUAL POSSESSION OF ONE COTENANT IS PRESUMED TO BE POSSESSION OF ALL, as tenants in common, held by unity of possession.—*Waring vs. Crow*, 11 Cal. 366, 371; *Knox vs. Marshall*, 19 Cal. 617, 621; *Colman vs. Clements*, 23 Cal. 245, 247; *Owen vs. Morton*, 24 Cal. 373, 376; *Carpentier vs. Webster*, 27 Cal. 524, 545; *Seaton vs. Son*, 32 Cal. 481, 483; *Tevis vs. Hicks*, 38 Cal. 234, 239; *Miller vs. Myers*, 46 Cal. 535, 539; *Olney vs. Sawyer*, 54 Cal. 379, 380; *Aguirre vs. Alexander*, 58 Cal. 21, 29; *Unger vs. Mooney*, 63 Cal. 586, 591, 49 Am. Rep. 100; *Tully vs. Tully*, 71 Cal. 338, 346, 12 Pac. Rep. 246; *Oglesby vs. Hollister*, 76 Cal. 136, 140, 9 Am. St. Rep. 177, 13 Pac. Rep. 146; *Newman vs. Bank*, 80 Cal. 368, 373, 13 Am. St. Rep. 169, 22 Pac. Rep. 261, 5 L. R. A. 467; *McClure vs. Colyear*, 80 Cal. 378, 380, 22 Pac. Rep. 175; *Gage vs. Downey*, 94 Cal. 241, 253, 39

Pac. Rep. 635. *Me. Small vs. Clifford*, 38 Me. 312; *Colburn vs. Mason*, 35 Me. 434, 43 Am. Dec. 292. *Md. Vanbibber vs. Frazier*, 17 Md. 436; *Israel vs. Israel*, 30 Md. 120, 96 Am. Dec. 571. *N. Y. Humbert vs. Trinity Church*, 24 Wend. 587. *Pa. Forward vs. Deetz*, 32 Pa. 69, 73.

52. ACTUAL AND EXCLUSIVE POSSESSION by one cotenant does not affect other, as possession of one, in whatever title they have, is possession of the other.—*Waring vs. Crow*, 11 Cal. 366, 371; *Knox vs. Marshall*, 19 Cal. 617, 621; *Colman vs. Clements*, 23 Cal. 245; *Owen vs. Morton*, 24 Cal. 373; *Miller vs. Myers*, 46 Cal. 535; *Tully vs. Tully*, 71 Cal. 338, 346, 12 Pac. Rep. 246.

53. ACTUAL POSSESSION BY ONE WITHOUT ANY HOSTILE ELEMENT is that each per my et per tout, although severally seized.—*Carpentier vs. Webster*, 27 Cal. 524, 545; *Williams vs. Sutton*, 43 Cal. 65, 71; *Unger vs. Mooney*, 63 Cal. 586, 592, 49 Am. Rep. 100.

54. DOCTRINE OF UNITY OF POSSESSION of tenants in common involves doctrine that tenants respectively have right to enter upon whole and every part of land, and occupy and enjoy same, restrained by correlative obligation from resisting exercise of this right in either of its branches.—*Carpentier vs. Webster*, 27 Cal. 524, 545, 546; *Tevis vs. Hicks*, 38 Cal. 234, 239. See *Knox vs. Marshall*, 19 Cal. 617, 621.

55. EACH HAS INTEREST IN WHOLE, is entitled to possession of whole, and to enter at any time as against all persons but cotenant.—*Pico vs. Columbet*, 12 Cal. 414, 420, 73 Am. Dec. 550; *Knox vs. Marshall*, 19 Cal. 617, 621; *Carpentier vs. Webster*, 27 Cal. 524, 545; *Tevis vs. Hicks*, 38 Cal. 234, 239; *Williams vs. Sutton*, 43 Cal. 65, 71; *Lytle Creek Water Co. vs. Perdew*, 65 Cal. 447, 452, 4 Pac. Rep. 426.

56. Has right to assume that possession of cotenant is his possession, and not adverse until informed to contrary by express notice, or acts or declarations equivalent to notice.—*Miller vs. Myers*, 46 Cal. 535, 539; *Aguirre vs. Alexander*, 58 Cal. 21, 29; *Tully vs. Tully*, 71 Cal. 338, 347, 12 Pac. Rep. 246.

57. ENTRY INTO POSSESSION AND ACTS OF POSSESSION are referable to community of title in cotenancy.—*Aguirre vs. Alexander*, 58 Cal. 21, 28, 29.

58. OCCUPATION AND POSSESSION MUST be by them in common.—*Carpentier vs. Webster*, 27 Cal. 524, 545; *Tevis vs. Hicks*, 38 Cal. 234, 239.

59. OCCUPATION BY ONE COTENANT is but the exercise of legal right where he does nothing to exclude his cotenant.—*Pico vs. Columbet*, 12 Cal. 414, 420, 73 Am. Dec. 550.

60. UNITY OF POSSESSION MUST EXTEND TO RIGHT OF USER of water itself, in case of tenancy in common, claiming for irrigation purposes.—*Norman vs. Corbley* (Mont. March 13, 1905), 79 Pac. Rep. 1059, 1061.

61. Destruction of unity of possession destroys tenancy.—*Carpentier vs. Webster*, 27 Cal. 524, 533; *Lytle Creek W. Co. vs. Perdew*, 65 Cal. 447, 452, 4 Pac. Rep. 426.

62. Neglect to enter into legal enjoyment or possession is regarded as an assent to the sole

occupation of the other.—Pico vs. Columbet, 13 Cal. 414, 420, 78 Am. Dec. 550.

As to ouster see para. 173-284 this note.

V. SAME—2. ACTS AFFECTING.

63. RIGHTS OF COTENANT.—EACH COTENANT has, so far as his share is concerned, all rights which any party holding in severalty can have, except that to sole possession.—Carpentier vs. Webster, 27 Cal. 524, 548.

64. Cannot appropriate to himself or exclude his cotenant from any particular parcel of general tract.—Stark vs. Barrett, 15 Cal. 361, 368; Carpentier vs. Webster, 27 Cal. 524, 545; Tevis vs. Hicks, 38 Cal. 234, 239.

65. Cannot acquire tax title and set it up as against his cotenants, as same would be a constructive fraud.—Mills vs. Tukey, 22 Cal. 373, 379, 83 Am. Dec. 74.

66. Rule that one tenant in common cannot acquire tax title and set it up as against cotenant does not apply to case in which fraud must be actual.—Mills vs. Tukey, 22 Cal. 373, 379, 83 Am. Dec. 74.

67. Cannot act to prejudice of his cotenant.—Stark vs. Barrett, 15 Cal. 361, 368.

68. Cannot assail or absolve the common title.—Bornheimer vs. Baldwin, 42 Cal. 27, 34; Olney vs. Sawyer, 54 Cal. 379, 385.

69. Cannot create an easement in common estate as against his common tenant.—Pfeiffer vs. Regents of Univ. Cal., 74 Cal. 156, 162, 15 Pac. Rep. 622; Boston R. Co. vs. Condit, 19 N. J. Eq. (4 C. E. Gr.) 394. See Marshall vs. Trumbull, 28 Conn. 183, 73 Am. Dec. 667; Adam vs. Briggs Iron Co., 61 Mass. (7 Cush.) 361.

70. Cannot declare homestead in lands held in cotenancy.—Wolf vs. Fleischacker, 5 Cal. 244, 245, 63 Am. Dec. 121; In re Estate Carriger, 107 Cal. 618, 619, 40 Pac. Rep. 1032; Reynolds vs. Pixley, 6 Cal. 165, 167. See Giblin vs. Jordan, 6 Cal. 416, 417; Kellersberger vs. Kopp, 6 Cal. 564, 565; Bishop vs. Hubbard, 23 Cal. 514, 518, 83 Am. Dec. 123; Elias vs. Verdugo, 27 Cal. 418, 425; Seaton vs. Son, 32 Cal. 431, 433; Cameto vs. Dupuy, 47 Cal. 79; First Nat. Bank vs. Guerra, 61 Cal. 109; West vs. Ward, 26 Wis. 579, 581.

71. Cannot impair rights of other cotenants, either directly or through court, by any act.—Riley vs. Heisch, 18 Cal. 198, 200; Mahoney vs. Van Winkle, 21 Cal. 552, 553; Hoppe vs. Hoppe (erroneously head-lined Hoppe vs. Fountain), 104 Cal. 94, 102, 47 Pac. Rep. 894.

72. Cannot possess in severalty for reason that it is undivided.—Carpentier vs. Webster, 27 Cal. 524, 545; Tevis vs. Hicks, 38 Cal. 234, 239.

73. Cannot question validity of common title.—Bornheimer vs. Baldwin, 42 Cal. 27, 34; Olney vs. Sawyer, 54 Cal. 379, 385.

74. Cannot remove property of each other from common lands of other in absence of agreement for separate occupation.—Carpentier vs. Webster, 27 Cal. 524, 547.

75. MORTGAGE BY ONE COTENANT of his share cannot impair right of other tenants.—Hoppe vs. Hoppe (erroneously head-lined Hoppe vs. Fountain), 104 Cal. 94, 102, 37 Pac. Rep. 894.

76. REDEMPTION BY ONE OF SEVERAL COTENANTS under sale made at foreclosure proceedings inure for benefit of other cotenants.—Calkins vs. Steinbach, 66 Cal. 117, 130, 4 Pac. Rep. 1103.

77. REFUSAL OR DELAY OF COTENANT to pay expenses or assessments not of itself forfeiture.—Waring vs. Crow, 11 Cal. 366, 372.

VI. SAME—2. CONVEYANCES OF COTENANTS.

As to cotenant's conveyance by metes and bounds, see monographic note by Robert Desty, 11 L. R. A. 278.

As to conveyance by one cotenant of specific part of the common property, see monographic notes 6 Am. Dec. 24, 100 Am. St. Rep. 649.

78. CONVEYANCE BY COTENANTS.—Tenants in common may unite and convey particular quarter of estate so as to vest complete title in grantees.—Stark vs. Barrett, 15 Cal. 361, 371.

79. Tenant in common may grant his entire interest or estate.—Stark vs. Barrett, 15 Cal. 361, 370; White vs. Sayre, 2 Ohio 110.

80. CONVEYANCE BY ONE TENANT IN COMMON of portion of estate is not void.—Stark vs. Barrett, 15 Cal. 361, 368; Gates vs. Salmon, 35 Cal. 576, 589, 95 Am. Dec. 139; Emeric vs. Alvarado, 90 Cal. 444, 456, 27 Pac. Rep. 356; Gordon vs. San Diego, 101 Cal. 522, 531, 40 Am. St. Rep. 73, 36 Pac. Rep. 18. See Varnum vs. Abbot, 12 Mass. 474, 480, 7 Am. Dec. 87; Dall vs. Brown, 59 Mass. (5 Cush.) 289; Eaton vs. Tallmadge, 24 Wis. 217, 223.

81. CONVEYANCE OF ANY SPECIFIC PART of land will not prejudice his cotenant.—Stark vs. Barrett, 15 Cal. 361, 368; Gates vs. Salmon, 35 Cal. 576, 587, 95 Am. Dec. 139; Gordon vs. San Diego, 101 Cal. 522, 531, 40 Am. St. Rep. 73, 36 Pac. Rep. 18. See Comm. Griswold vs. Johnson, 5 Conn. 363. Me. Duncan vs. Sylvester, 24 Me. 432, 41 Am. Dec. 400. Mass. Porter vs. Hill, 9 Mass. 34, 6 Am. Dec. 22; Bartlet vs. Harlow, 12 Mass. 347, 348, 7 Am. Dec. 76; Varnum vs. Abbot, 12 Mass. 474, 7 Am. Dec. 87; Baldwin vs. Whiting, 13 Mass. 57; Rising vs. Stannard, 17 Mass. 232; Nichols vs. Smith, 39 Mass. (22 Pick.) 316; Peabody vs. Minot, 41 Mass. (24 Pick.) 329; Dall vs. Brown, 59 Mass. (5 Cush.) 289, 291. Va. Robinett vs. Preston, 2 Rob. 273. Wis. Eaton vs. Tallmadge, 24 Wis. 217, 223.

82. Of portion of tract does not pass his interest in the whole tract; he still has an undivided interest therein.—Sutter vs. San Francisco, 36 Cal. 112, 116.

83. Cannot defeat right to set apart parcel of land upon partition while retaining his interest in whole tract.—Stark vs. Barrett, 15 Cal. 361, 368.

84. Cannot invest grantee with greater right than cotenant conveying had.—Stark vs. Barrett, 15 Cal. 361, 368.

85. Cannot operate to pass greater rights than grantor had in premises.—Stark vs. Barrett, 15 Cal. 361, 368.

86. Has no legal effect to prejudice of other cotenant.—Stark vs. Barrett, 15 Cal. 361, 368.

87. Is ineffectual against assertion of his interest in suit for partition of general tract, although good as against all others.—*Stark vs. Barrett*, 15 Cal. 361, 368.

88. Is inoperative to impair rights of cotenants.—*Stark vs. Barrett*, 15 Cal. 361, 368.

89. Must be subject to ultimate determination of their rights.—*Stark vs. Barrett*, 15 Cal. 361, 368.

90. Of special tract does not affect position of general tract with respect to partition, so far as cotenants are concerned.—*Gates vs. Salmon*, 35 Cal. 576, 589, 95 Am. Dec. 139.

91. Does not sever special tract from general one, so far as cotenants are concerned.—*Gates vs. Salmon*, 35 Cal. 576, 589, 95 Am. Dec. 139.

92. Operates as an alienation of right and interest of grantor in specific tract.—*Stark vs. Barrett*, 15 Cal. 361, 370-371; *Emeric vs. Alvarado*, 90 Cal. 444, 456, 27 Pac. Rep. 356.

94. Grants by cotenants "special location" are good as against naked trespassers.—*Stark vs. Barrett*, 15 Cal. 361, 368; *Gates vs. Salmon*, 35 Cal. 576, 95 Am. Dec. 139.

95. Grants of "special location" not absolutely void as against cotenant of grantor.—*Stark vs. Barrett*, 15 Cal. 361, 368; *Gates vs. Salmon*, 35 Cal. 576, 587, 95 Am. Dec. 139.

96. Decisions of court in *Stark vs. Barrett*, 15 Cal. 361, and *Gates vs. Salmon*, 35 Cal. 576, 95 Am. Dec. 139, supra, seem to be in conflict with many authorities of high standing, and were based, to some extent, on equitable considerations growing out of particular circumstances.—See *Pfeiffer vs. Regents of Univ. Cal.*, 74 Cal. 156, 163, 15 Pac. Rep. 622.

97. Not binding upon cotenants as deed by specific bounds, unless ratified.—*Gordon vs. San Diego*, 101 Cal. 522, 531, 40 Am. St. Rep. 73, 36 Pac. Rep. 18. See *Boral vs. Rollins*, 30 Cal. 408, 409.

98. Undertaking to convey specific tract in severalty estops denial, as against grantee, that ownership of less interest than deed purports to convey.—*Emeric vs. Alvarado*, 90 Cal. 444, 456, 27 Pac. Rep. 356.

99. TENANT IN COMMON CANNOT, WHEN CONVEYING HIS OWN INTEREST in common property, create, by reservation, personal and separate easement over same for benefit of his adjoining property.—*Pfeiffer vs. Regents of Univ. Cal.*, 74 Cal. 156, 162, 15 Pac. Rep. 622. See *Comm. Marshall vs. Trumbull*, 28 Conn. 183, 73 Am. Dec. 667. *Mass. Adam vs. Briggs Iron Co.*, 61 Mass. (7 Cush.) 361. *N. J. Boston F. Co. vs. Condit*, 19 N. J. Eq. (4 C. E. Gr.) 394.

100. TENANT IN COMMON OBTAINING TITLE of cotenants after sale by him of specific tract, holds title for benefit of his grantee, and if same allotted to him upon partition he holds for such grantee.—*Emeric vs. Alvarado*, 90 Cal. 444, 456, 27 Pac. Rep. 356.

101. POSITION OF PURCHASER.—Grantee under conveyance of parcel of tract from one cotenant entitled to use and possession as cotenant with other tenants until partition.—*Lick vs. O'Donnell*, 3 Cal. 59, 63, 58 Am. Dec. 383; *Stark vs. Barrett*, 15 Cal. 361, 368. See *Bart-*

let vs. Harlow, 12 Mass. 347, 348, 7 Am. Dec. 76; *Varnum vs. Abbot*, 12 Mass. 474, 7 Am. Dec. 87; *Nichols vs. Smith*, 39 Mass. (23 Pick.) 316; *Robinet vs. Preston*, 2 Rob. (Va.) 373, 278.

102. Acquires interest of his grantor in special tract in common with other cotenants.—*Gates vs. Salmon*, 35 Cal. 576, 588, 95 Am. Dec. 139.

103. Acquires title of such cotenant in common in special location described in deed, and becomes tenant in common to each special location, standing in place of his grantor.—*Gates vs. Salmon*, 46 Cal. 361, 371.

104. Hold subject to cotenant's right of partition of whole tract.—*Stark vs. Barrett*, 15 Cal. 361, 368; *Gates vs. Salmon*, 35 Cal. 576, 588, 95 Am. Dec. 139. See *Pfeiffer vs. Regents of Univ. Cal.*, 74 Cal. 156, 15 Pac. Rep. 622.

105. Holds subject to contingency of loss of premises if upon partition of general tract they should not be allotted to his grantor.—*Stark vs. Barrett*, 15 Cal. 361, 368.

106. May have tract conveyed decreed to him on partition proceedings in equity, when such disposition will not materially injure rights of cotenants.—*Emeric vs. Alvarado*, 90 Cal. 444, 457, 27 Pac. Rep. 356. See *Mass. Nichols vs. Smith*, 39 Mass. (23 Pick.) 316, 319. *Mich. Campau vs. Godfrey*, 18 Mich. 27, 100 Am. Dec. 133. *N. J. Holcombe vs. Coryell*, 10 N. J. Eq. (2 Stock.) 392. *Va. McKee vs. Barley*, 11 Gratt. 340.

107. GRANTEES OF SPECIFIC TRACT EMBRACED, deeds purporting to convey whole title, should have such tracts allotted to them in severalty, respectively to shares and interests of cotenants granting same, where such process will not materially injure rights of cotenants not joining in deeds.—*Emeric vs. Alvarado*, 90 Cal. 444, 450, 27 Pac. Rep. 356.

As to right of cotenant to purchase at a tax sale, see pars. 65, 66, 129 this note; also monographic notes by Robert Desty, 9 L. R. A. 740, 10 L. R. A. 101.

As to purchase of outstanding superior title by one cotenant, see pars. 111-115, and also monographic note 28 Am. Dec. 83 and monographic notes by Robert Desty, 9 L. R. A. 571; 10 L. R. A. 101.

VII. SAME—4. PURCHASE BY COTENANT.

108. PURCHASE OF OUTSTANDING INTEREST.—Tenant in common in exclusive actual possession may purchase an outstanding title and take conveyance to himself alone.—*Tully vs. Tully*, 71 Cal. 338, 347, 12 Pac. Rep. 246.

109. Mere fact of purchase does not affect legal relations of cotenant.—*Tully vs. Tully*, 71 Cal. 338, 347, 12 Pac. Rep. 246.

110. Does not per se dissolve the tenancy between himself and his cotenant.—*Tully vs. Tully*, 71 Cal. 338, 347, 12 Pac. Rep. 246.

111. Title acquired by tenant in common on purchase of outstanding interest inures for benefit of both.—*Tully vs. Tully*, 71 Cal. 338, 347, 12 Pac. Rep. 246.

112. Tenant in common so purchasing holds in trust for his copartners.—*Mandeville vs. Solomon*, 39 Cal. 125, 133; *Tully vs. Tully*, 71 Cal. 338, 347, 12 Pac. Rep. 246.

113. Possession by one cotenant of property so purchased does not constitute adverse possession sufficient to set statute of limitation in motion.—Tully vs. Tully, 71 Cal. 383, 347, 12 Pac. Rep. 246.

114. POSITION IN EQUITY.—Equity does not deny tenant in common right to purchase outstanding or adverse claim to common property.—Mandeville vs. Solomon, 39 Cal. 125, 133.

115. Equity will not permit one tenant in common to acquire outstanding title solely for his own benefit or to absolute exclusion of other tenant.—Mandeville vs. Solomon, 39 Cal. 125, 133.

116. Equity exacts from exercise of reasonable diligence by other in making his election to participate in benefit of new acquisition.—Mandeville vs. Solomon, 39 Cal. 125, 133.

117. Equity will not permit other cotenant to equivocate or trifle, or to make it means of speculation, by delay in his determination.—Mandeville vs. Solomon, 39 Cal. 125, 133.

118. Election must be made within reasonable time, and cotenant must contribute or offer to contribute his ratio of consideration actually paid.—Mandeville vs. Solomon, 39 Cal. 125, 133.

119. Unless cotenant elects to participate within reasonable time and offers to contribute, he is deemed to repudiate transaction, and to have abandoned his rights.—Mandeville vs. Solomon, 39 Cal. 125, 133. See Ky. Lee vs. Fox, 6 Dana (Ky.) 176. Pa. Weaver vs. Wible, 25 Pa. St. 270, 64 Am. Dec. 696; Lloyd vs. Lynch, 23 Pa. St. 419, 70 Am. Dec. 137. Eng. Keach vs. Sanford, 1 Lead. Cas. in Eq. 73.

VIII SAME—5. RIGHTS OF CREDITORS AND PURCHASERS UNDER.

120. PROPERTY HELD AS TENANTS IN COMMON liable to partnership debts.—Bishop vs. Hubbard, 23 Cal. 514, 518, 33 Am. Dec. 132.

121. CREDITOR OF ONE TENANT IN COMMON, in possession with consent of such tenant under order accepted by their cotenants, has right to possess as against their creditors.—Knox vs. Marshall, 19 Cal. 617, 621.

122. JUDGMENT CREDITORS, IN QUARE CLAUSUM FREGIT against one cotenant, has not defendant's title so as to constitute him tenant in common with other owners.—Williams vs. Sutton, 43 Cal. 65, 73.

123. JUDGMENT WHICH VESTS NO TITLE AND GIVES NO RIGHT TO SUCCEED to any interests in property and adds nothing to the former title, but leaves it as before, will not convert holder of such judgment into tenant in common with other parties.—Williams vs. Sutton, 43 Cal. 65, 72.

124. LICENSEE OF COTENANT entitled to possession along with other tenants.—Lee Chuck vs. Quan Wo Chong, 91 Cal. 598, 599, 23 Pac. Rep. 40.

125. MORTGAGEE OF COTENANT'S SHARE cannot interfere with rights of cotenants or disturb their possession.—Hoppe vs. Hoppe (erroneously head-lined Hoppe vs. Fountain), 104 Cal. 94, 102, 37 Pac. Rep. 894.

126. PURCHASER AT SHERIFF'S SALE of estate of one tenant in common entitled to

be placed in possession as tenant in common with other tenant.—Tevie vs. Hicks, 38 Cal. 234, 240.

127. UNDER FORECLOSURE PROCEEDINGS not entitled to possession to exclusion of other parties who hold interests not derived from or through his mortgager.—Tevie vs. Hicks, 38 Cal. 234, 240.

128. UNDER MORTGAGE FORECLOSURE SALE entitled to be placed in possession by sheriff by writ of assistance jointly and in common with other parties holding undivided interest.—Tevie vs. Hicks, 38 Cal. 234, 240.

129. TAXES.—Tenant not bound to pay taxes upon undivided interest of his cotenants, and may purchase at tax sale.—Oglesby vs. Hollister, 76 Cal. 136, 140, 9 Am. St. Rep. 177, 18 Pac. Rep. 146.

See para. 65, 66 this note.

IX. SAME—6. TRESPASSERS AND WRONG-DOERS.

130. POSSESSION.—Right to possession of whole tract not affected by party without title wrongfully in possession.—Williams vs. Sutton, 43 Cal. 65, 71.

131. As between themselves and trespassers, are each better entitled to possession than wrong-doer.—Williams vs. Sutton, 43 Cal. 65, 71; Lytle Creek W. Co. vs. Perdew, 65 Cal. 447, 452, 4 Pac. Rep. 426.

132. Trespasser cannot gainsay right of tenant in common to possession of whole.—Lytle Creek W. Co. vs. Perdew, 65 Cal. 447, 452, 4 Pac. Rep. 426. See Williams vs. Sutton, 43 Cal. 71.

133. ACTIONS AGAINST TRESPASSER OR THIRD PARTY.—Tenant in common entitled to action for recovery of whole of premises against all persons except his cotenants and those claiming under them.—Stark vs. Barrett, 15 Cal. 361, 371. See Collier vs. Corbett, 15 Cal. 183, 186; Touchard vs. Crow, 20 Cal. 150, 162, 31 Am. Dec. 108; Clark vs. Lockwood, 21 Cal. 221; Hart vs. Robertson, 21 Cal. 346, 349; Mahoney vs. Van Winkle, 21 Cal. 552, 583; Rowe vs. Bacigalluppi, 21 Cal. 623; Muller vs. Boggs, 25 Cal. 175, 187; Williams vs. Sutton, 43 Cal. 71; Chipman vs. Hastings, 50 Cal. 310; Wilson vs. Wilson, 64 Cal. 92, 94, 27 Pac. Rep. 861; Lytle Creek W. Co. vs. Perdew, 65 Cal. 447, 452, 4 Pac. Rep. 426; Moulton vs. McDermott, 30 Cal. 629, 630, 22 Pac. Rep. 296; Newman vs. Bank of Cal., 30 Cal. 368, 372, 13 Am. St. Rep. 169, 22 Pac. Rep. 261, 5 L. R. A. 467; Lee Chuck vs. Quan Wo Chong, 91 Cal. 593, 599, 23 Pac. Rep. 45. Colo. Weese vs. Barker, 7 Colo. 173, 2 Pac. Rep. 919. Fla. Simmons vs. Spratt, 26 Fla. 449, 3 So. Rep. 123, 9 L. R. A. 343. Ga. Walker vs. Perryman, 23 Ga. 309. Kan. Coulson vs. Wing, 42 Kan. 507, 16 Am. St. Rep. 503, 22 Pac. Rep. 570. Minn. Sherin vs. Larson, 28 Minn. 523, 11 N. W. Rep. 70. Neb. Mattis vs. Boggs, 19 Neb. 698, 23 N. W. Rep. 325. Nev. Brown vs. Warren, 16 Nev. 228. Oreg. Dolph vs. Barney, 5 Oreg. 191. Wash. Hannegan vs. Roth, 12 Wash. 695, 44 Pac. Rep. 256. Wis. George vs. McGovern, 33 Wis. 555, 35 Am. St. Rep. 77, 53 N. W. Rep. 899. Fed. Hardy vs. Johnson, 68 U. S. (1 Wall.) 371, bk. 17 L. ed. 502.

124. Each has right of action against trespasser diverting water of stream used by them as tenants in common.—*Lytle Creek W. Co. vs. Perdew*, 65 Cal. 447, 454, 4 Pac. Rep. 426.

125. CANNOT RECOVER ALL RENTS and profits even as against trespasser under judgment in action to recover possession; own interest all he can claim.—*Muller vs. Boggs*, 25 Cal. 175, 187; *Lee Chuck vs. Quan Wo Chong*, 91 Cal. 593, 599, 23 Pac. Rep. 45.

126. WITHOUT JOINING OTHER COTENANTS as plaintiffs.—*Moulton vs. McDermott*, 30 Cal. 629, 630, 22 Pac. Rep. 296.

127. LESSEE OF COTENANT IN POSSESSION only liable to his lessor in absence of evidence showing an attempted adverse user of ouster.—*Lee Chuck vs. Quan Wo Chong*, 91 Cal. 593, 599, 23 Pac. Rep. 45.

128. Widow entitled to recover in ejectment as tenant in common with children property conveyed to her during marriage as separate property and which she holds as tenant in common with children after husband's death.—*Hart vs. Robertson*, 21 Cal. 346, 349.

129. DEFENSE.—Trespasser may show acquisition of title of other owners by deed, estoppel, statute of limitations, or otherwise in action by one cotenant against him as trespasser, as one cotenant's rights may be barred and another's not.—*Newman vs. Bank*, 30 Cal. 368, 373, 13 Am. St. Rep. 169, 22 Pac. Rep. 261, 5 L. R. A. 467. See *Bronson vs. Adams*, 10 Ohio 135, 136; *McFarland vs. Stone*, 17 Vt. 165, 44 Am. Dec. 325.

140. JUDGMENT RECOVERED IN ACTION BY ONE COTENANT AGAINST TRESPASSER, determines title from commencement of action, and possession dates from that time and inures for benefit of all cotenants.—*Newman vs. Bank*, 30 Cal. 368, 373, 13 Am. St. Rep. 169, 22 Pac. Rep. 261, 5 L. R. A. 467. Ga. *Pendergast vs. Gullatt*, 10 Ga. 218, 224. Tex. *Stovall vs. Carmichael*, 52 Tex. 338, 339; *Reed vs. Allen*, 56 Tex. 176, 182, 190. Vt. *McFarland vs. Stone*, 17 Vt. 165, 175, 44 Am. Dec. 325.

141. Contra: *Gray vs. Givens*, 26 Mo. 291, 302; *Bennett vs. Hethington*, 16 Serg. & R. (Pa.) 193, 196; *Mobley vs. Bruner*, 59 Pa. 481, 483, 98 Am. Dec. 360.

X. RIGHT OF ACTION BETWEEN COTENANTS.

As to liability in common to action, see monographic note by Robert Desty, 12 L. R. A. 261-266.

As to action in assumpsit by one cotenant against another, see note 14 Am. Dec. 587.

As to action by one cotenant against another for rents and profits, see note 14 Am. Dec. 586.

As to liability of cotenants to account for use and occupation, and rents and profits, see monographic note by Ernest Watts, 23 L. R. A. 829 and note, 77 Am. Dec. 665, 668.

142. TENANTS IN COMMON RIGHT OF ACTION.—Common law gives one tenant in common no remedy against another who exclusively occupies premises and receives entire profits, unless he is ousted of possession, when ejectment may be brought, or unless other is acting as bailiff of his interest by agreement,

when the action of ground will lie.—*Pico vs. Columbet*, 12 Cal. 414, 419, 420, 73 Am. Dec. 550. Ala. *Newbold vs. Smart*, 67 Ala. 326; *Brewer vs. Browne*, 68 Ala. 210, 214; *Terrell vs. Cunningham*, 70 Ala. 100, 108; *Fletcher vs. Childs*, 73 Ala. 567, 573; *Wilkinson vs. Stuart*, 74 Ala. 198, 205; *Kirkland vs. Trott*, 75 Ala. 321, 324; *Gayle vs. Johnston*, 80 Ala. 395, 400; *Burrus vs. Meadors*, 90 Ala. 144, 7 So. Rep. 469; *West vs. West*, 90 Ala. 462, 7 So. Rep. 830; *Ferris vs. Montgomery L. & Impr. Co.*, 94 Ala. 563, 33 Am. St. Rep. 146, 10 So. Rep. 607; *Sibley vs. Alba*, 95 Ala. 198, 10 So. Rep. 831; *McCaw vs. Barker*, 115 Ala. 548, 22 So. Rep. 131. Ark. *Hamby vs. Wall*, 48 Ark. 135, 3 Am. St. Rep. 213, 3 S. W. Rep. 105. Ill. *Chapin vs. Foss*, 75 Ill. 280, 282; *Cheney vs. Ricks*, 187 Ill. 171, 58 N. E. Rep. 234; *Wooley vs. Schrader*, 116 Ill. 29, 4 N. E. Rep. 658. Ind. *Humphries vs. Lavis*, 100 Ind. 698. Iowa. *Reynolds vs. Willmeth*, 45 Iowa 693; *Janes vs. Brown*, 48 Iowa 568; *Varnum vs. Leek*, 65 Iowa 751, 23 N. W. Rep. 151; *Belknap vs. Belknap*, 77 Iowa 71, 41 N. W. Rep. 568. Ky. *Coleman vs. Hutchinsonson*, 3 Bibb 209, 6 Am. Dec. 649; *Nelson vs. Clay*, 7 J. J. Marsh. 138, 23 Am. Dec. 387. La. *Becnel vs. Becnel*, 23 La. Ann. 150. Me. *Gowen vs. Shaw*, 40 Me. 58; *Moses vs. Ross*, 41 Me. 360, 66 Am. Dec. 250. Md. *Israel vs. Israel*, 30 Md. 120, 96 Am. Dec. 571; *McLaughlin vs. McLaughlin*, 30 Md. 115, 30 Atl. Rep. 607. Mass. *Sargent vs. Parsons*, 12 Mass. 149; *Peck vs. Carpenter*, 73 Mass. (7 Gray) 283, 66 Am. Dec. 477; *Blood vs. Blood*, 110 Mass. 545. Mich. *Everts vs. Beach*, 31 Mich. 136, 18 Am. Rep. 169. Minn. *Kean vs. Connelly*, 25 Minn. 222, 33 Am. Rep. 453; *Hause vs. Hause*, 29 Minn. 252, 13 N. W. Rep. 43; *O'Connor vs. Delaney*, 53 Minn. 247, 39 Am. St. Rep. 601, 54 N. W. Rep. 1108. Mo. *Ragan vs. McCoy*, 29 Mo. 856, 367. N. J. *Izard vs. Bodine*, 11 N. J. Eq. (3 Stock.) 403, 69 Am. Dec. 595; *Buckelew vs. Snedeker*, 27 N. J. Eq. (13 C. E. Gr.) 82; *Edsall vs. Merrill*, 37 N. J. Eq. (10 Stew.) 114; *Sailer vs. Sailer*, 41 N. J. Eq. (14 Stew.) 398, 5 Atl. Rep. 319. N. Y. *McMurray vs. Rawson*, 3 Hill 59; *Green vs. Putnam*, 1 Barb. 500; *Woolever vs. Knapp*, 13 Barb. 265; *Scott vs. Guernsey*, 48 N. Y. 106; *Wilcox vs. Wilcox*, 48 Barb. 321; *Joslyn vs. Joslyn*, 9 Hun 383; *Le Barron vs. Babcock*, 46 Hun 598; *Zapp vs. Miller*, 109 N. Y. 51, 15 N. E. Rep. 889; *Valentine vs. Healey*, 86 Hun 259, 33 N. Y. Supp. 246. N. C. *Chambers vs. Chambers*, 3 Hawks 232, 14 Am. Dec. 585; *Wagstaff vs. Smith*, 39 N. C. (4 Ired.) Eq. 1; *Northcott vs. Casper*, 41 N. C. (6 Ired.) Eq. 303. Pa. *Anderson vs. Greble*, 1 Ashm. 136. S. C. *Jones vs. Weathersbee*, 4 Strobb. L. 50, 51 Am. Dec. 653; *Jones vs. Massey*, 14 S. C. 292. Tenn. *Tyner vs. Fenner*, 4 Lea 469; *Schneider vs. Taylor*, 16 Lea 304. Tex. *Osborn vs. Osborn*, 62 Tex. 495; *Akin vs. Jefferson*, 65 Tex. 137; *Anderson vs. Clanch* (Tex. Dec. 1837), 6 S. W. Rep. 760. Vt. *Leach vs. Beattie*, 33 Vt. 195. W. Va. *Dodson vs. Hays*, 29 W. Va. 577, 2 S. E. Rep. 415. Eng. *McMahon vs. Burchell*, 2 Phil. 127, 23 Eng. Ch. 125; *Henderson vs. Eason*, 21 L. J. R. (N. S.) Q. B. 82, 9 Eng. L. & Eq. 337.

In unequal occupancy, one tenant in common owing another for unequal use and occupancy, of common property, the obligation is a simple contract debt, and carries no lien on the land.

—Newbold vs. Smart, 67 Ala. 326; Johns vs. Johns, 93 Ala. 244, 9 So. Rep. 419.

142. Not liable for rent or anything in nature of compensation to his cotenant for occupation of dwelling-house or room solely occupied by him without ousting other.—Pico vs. Columbet, 12 Cal. 414, 420, 73 Am. Dec. 550.

144. English statute of Anne gave right of action to one tenant in common against other as bailiff who received more than his proportional share of profits, but only applied to cases where one tenant received from third person money or something else to which both were entitled by reason of cotenancy and retained more than his just share.—Pico vs. Columbet, 12 Cal. 414, 420, 73 Am. Dec. 550; Henderson vs. Eason, 21 L. J. R. (N. S.) Q. B. 82, 9 Eng. L. & Eq. 337; McMahon vs. Burchell, 3 Phil. 127, 22 Eng. Ch. Rep. 125.

145. English statute of Anne was never adopted in this state, and no similar statute exists.—Pico vs. Columbet, 12 Cal. 414, 420, 73 Am. Dec. 550.

146. ACTION OF ACCOUNT IS MAINTAINABLE ONLY AGAINST BAILIFF, who must be appointed or made such by law.—Pico vs. Columbet, 12 Cal. 414, 421, 73 Am. Dec. 550; Sargent vs. Parsons, 13 Mass. 149.

147. One tenant in common by contract makes another his bailiff, or receiver, and so brings him to account in action to recover share of profits of estate actually received beyond his share.—Pico vs. Columbet, 12 Cal. 414, 422, 73 Am. Dec. 550; Sargent vs. Parsons, 13 Mass. 149.

148. ACTION DOES NOT LIE TO RECOVER MONEY REALIZED FROM PROPERTY between several persons, some of whom are tenants in common, in two distinct and separate properties, some of which are leased by one set of cotenants to the others.—Clark vs. Jones, 49 Cal. 618, 620.

149. ACTION IN EJECTMENT DOES NOT LIE by one tenant in common against the other for whole premises, or for undivided moiety, in absence of proof of ouster.—Ewald vs. Corbett, 32 Cal. 493, 499.

150. Ejectment lies by widow, as tenant in common with children, to recover property conveyed to her during marriage as community property, and held by her in common with children since husband's death.—Hart vs. Robertson, 21 Cal. 346, 349.

151. ACTION FOR FORCIBLE ENTRY AND DETAINER does not lie against cotenants, as they are seized for themselves and for each other.—Lick vs. O'Donnell, 3 Cal. 59, 63, 58 Am. Dec. 383.

152. ACTION FOR GOODS, WARES, AND MERCHANDISE sold and delivered, does not lie by one tenant in common against another to recover chattels sold or appropriated to his own use.—Williams vs. Chadbourne, 6 Cal. 559, 561.

153. TRESPASS WILL LIE BY ONE cotenant against another removing personal property of former from separate part of common property occupied by him under agreement.—Carpentier vs. Webster, 27 Cal. 524, 547.

154. TROVER, OR ACTION FOR MONEY

HAD AND RECEIVED, remedy against tenant in common selling chattels or appropriating them to his own use.—Williams vs. Chadbourne, 6 Cal. 559, 561.

155. RIGHT IN EQUITY.—Remedy in equity is by way of partition.—Lick vs. O'Donnell, 3 Cal. 59, 63, 58 Am. Dec. 383.

156. Equity has in some cases sustained account in favor of one tenant in common out of possession against his cotenant for rents and profits, where account has been a collateral incident to claim for partition.—Pico vs. Columbet, 12 Cal. 414, 423, 73 Am. Dec. 550; McCord vs. Oakland Q. M. Co., 64 Cal. 134, 146, 49 Am. Rep. 686, 27 Pac. Rep. 863. See Alm. Pope vs. Haskins, 16 Ala. 321. N. Y. Hannon vs. Osborn, 4 Paige Ch. 336. S. C. Hancock vs. Day, 1 McM. Eq. 69, 86 Am. Dec. 293; Thompson vs. Bostick, 1 McM. Eq. 75; Holt vs. Robertson, 1 McM. Eq. 475.

157. One tenant in common has no right in equity to share in profits resulting from liability incurred and money expended solely by other cotenant, when he has expended nothing and never claimed possession or been liable to compensation in case of loss.—Pico vs. Columbet, 12 Cal. 414, 422, 73 Am. Dec. 550; Sargent vs. Parsons, 13 Mass. 149.

158. Right to account of rents and profits received by tenants of premises exists as incident to partition.—Goodenow vs. Ewer, 16 Cal. 461, 472, 76 Am. Dec. 540.

159. Tenant in common renting or leasing property to others must account for losses and profits received.—Howard vs. Throckmorton, 59 Cal. 79, 89.

160. LIABLE FOR MONEY RECEIVED IN COMMON FROM SALES OF WATER or profits derived from business of ditch or mine.—Abel vs. Love, 17 Cal. 233, 237.

161. Distinguishing Pico vs. Columbet, 12 Cal. 414, 420, 73 Am. Dec. 550, upon the ground that such operations might be regarded as partnership so far as participations from profits derived from the sales concerned.

162. Liable for money received from pastures.—Howard vs. Throckmorton, 59 Cal. 79, 89.

163. Not liable to account for profits, in absence of contract, where he occupies and cultivates premises, investing his own capital and liable at his own risk for losses.—Howard vs. Throckmorton, 59 Cal. 79, 89.

164. Not liable to account for share in profits arising from cultivation and improvements made by cotenant at his own risk.—Pico vs. Columbet, 12 Cal. 414, 420, 73 Am. Dec. 550.

165. Not liable for double rent as holding after notice to quit has been given, on hiring share of cotenant and continuing in possession at expiration of term, without any act preventing cotenant from occupying with him.—Carpentier vs. Webster, 27 Cal. 524, 547; Mumford vs. Brown, 1 Wend. (N. Y.) 52, 19 Am. Dec. 461.

166. Not liable for losses resulting from cultivation and improvements made by his

cotenant at his own risk.—Pico vs. Columbet, 12 Cal. 414, 420, 78 Am. Dec. 550.

167. ACCOUNTING FOR RENTS AND PROFITS in proceedings in equity entitled to deduct taxes paid and expenses incurred in necessary and proper repairs, and additions for preservation and security of buildings, and reasonable allowance for use of his individual property.—Goodenow vs. Ewer, 16 Cal. 461, 472, 76 Am. Dec. 540.

168. Entitled to reasonable allowances for use of individual property when such property required in order to limit premises themselves.—Goodenow vs. Ewer, 16 Cal. 461, 472, 76 Am. Dec. 540; Abel vs. Love, 17 Cal. 234.

169. Interests of parties respectively should be ascertained and settled by court before trying action of ejectment on account of mesne profits.—Mahoney vs. Middleton, 41 Cal. 41, 54; Burgel vs. Prisser, 39 Cal. 70, 72, 26 Pac. Rep. 787.

170. SUBROGATION. — Cotenant under mortgage securing purchase money, which mortgage is assigned and part of purchase money paid, has right of subrogation upon paying whole liability under promise of assignment of cotenant's interest actually executed without knowledge of further incumbrance.—Shaffer vs. McCloskey, 101 Cal. 576, 577, 580, 36 Pac. Rep. 196.

171. Evidence establishing an interest in premises giving right to possession, sufficient under allegation of seisin in complaint.—Souchard vs. Crow, 20 Cal. 150, 162, 81 Am. Dec. 108. See Bush vs. Bradley, 4 Day (Conn.) 302; Smith vs. Starkweather, 5 Day (Conn.) 210.

XI. OUSTER—1. IN GENERAL.

As to adverse claim by payment of taxes by cotenant, see monographic notes by Robert Desty, 3 L. R. A. 172, 9 L. R. A. 740, 10 L. R. A. 101.

172. OUSTER.—Cotenant has right of entry, and when exercising it acts as one.—Bath vs. Valdez, 70 Cal. 350, 357, 11 Pac. Rep. 724.

173. Tenant in common may injure his cotenant by ouster, or by doing any permanent injury to the freehold.—Owen vs. Morton, 24 Cal. 373, 379; Carpentier vs. Webster, 27 Cal. 524, 551; Oglesby vs. Hollister, 76 Cal. 136, 140, 9 Am. St. Rep. 177, 18 Pac. Rep. 146; McCung vs. Ross, 18 U. S. (5 Wheat.) 116, 124, bk. 5 L. ed. 46.

174. Acts amounting to ouster against stranger do not have that effect as against tenant in common.—Bath vs. Valdez, 70 Cal. 350, 357, 11 Pac. Rep. 724.

175. Cotenant absenting himself from premises leaving his associates in possession creates no presumption of abandonment or ouster.—Waring vs. Crow, 11 Cal. 366, 372; Owens vs. Morton, 24 Cal. 373, 376; Oglesby vs. Hollister, 76 Cal. 136, 140, 9 Am. St. Rep. 177, 18 Pac. Rep. 146; Ricard vs. Williams, 20 U. S. (7 Wheat.) 59, 121, bk. 5 L. ed. 398.

176. Neither acts of ownership by one tenant in common nor refusal to allow his cotenants to enter, necessarily work disseizin.

—Carpentier vs. Mendenhall, 23 Cal. 484, 487, 87 Am. Dec. 135.

177. DISSEIZIN OR ADVERSE POSSESSION CANNOT ARISE where possession has commenced with consent of owners or their cotenants, in absence of disclaimer by assertion of adverse title, and notice either direct or inferred from notorious acts.—Oglesby vs. Hollister, 76 Cal. 136, 141, 9 Am. St. Rep. 177, 18 Pac. Rep. 146.

178. Tenant out of possession right to assume possession of cotenant as his possession until informed to contrary by express notice, or acts and declarations equivalent to notice.—Miller vs. Myers, 46 Cal. 535, 539; Gage vs. Downey, 94 Cal. 241, 253, 29 Pac. Rep. 635.

179. Tenant in possession has right to assume that possession of his cotenant is his possession in absence of either express notice or acts or declarations equivalent to notice to contrary.—Miller vs. Myers, 46 Cal. 535, 539.

180. Possession by one tenant has of itself no element of hostility to the right of other.—Unger vs. Mooney, 63 Cal. 586, 591, 49 Am. Rep. 100.

181. Deemed amicable, even though he may be holding adversely, in absence of actual or constructive notice in some form of hostile possession.—Carpentier vs. Mendenhall, 23 Cal. 484, 487, 87 Am. Dec. 135; Thompson vs. Pioche, 44 Cal. 508, 517, 518; Miller vs. Myers, 46 Cal. 535, 539; Packard vs. Johnson, 57 Cal. 130, 132; Aguirre vs. Alexander, 58 Cal. 21, 23; Unger vs. Mooney, 63 Cal. 586, 592, 49 Am. Rep. 100; Gage vs. Downey, 94 Cal. 241, 253, 29 Pac. Rep. 635. Md. Abell vs. Harris, 11 Gill & J. 371. N. Y. Trustees East Hampton vs. Kirk, 84 N. Y. 215, 220, 38 Am. Rep. 505; Culver vs. Rhodes, 87 N. Y. 343, 354. Tex. Fortis vs. Hill, 3 Tex. 373, 378.

182. Even though tenant in possession may have been holding adversely.—Miller vs. Myers, 46 Cal. 535, 539.

183. Adverse possession begins with an actual ouster.—Seaton vs. Son, 32 Cal. 431, 433.

184. OUSTER DOES NOT DEPEND UPON FACT NOTICE OF ENTRY with hostile intent has been neither understood nor comprehended by the disseized, whether such entry be by stranger or cotenant.—Winterburn vs. Chambers, 91 Cal. 170, 186, 27 Pac. Rep. 653.

185. It may be doubted whether actual or constructive notice of a hostile intention is not sufficient to create an ouster, as actual notice may be sufficient to put prudent man upon inquiry, and circumstances may be such as to put a prudent man upon inquiry.—See ante § 19 and note.

186. Cotenant expelling Heemsee of other cotenant is trespasser.—Lee Chuck vs. Quan Wo Chong, 91 Cal. 592, 599, 28 Pac. Rep. 45.

187. PARTIAL EXCLUSION.—Ouster of one tenant in common by another from less than whole breadth of common lands is not impossible as matter of law.—Carpentier vs. Webster, 27 Cal. 524, 548; Carpentier vs. Mitchell, 29 Cal. 320, 323.

188. PARTIAL EXCLUSION no more consists of common right to occupy than total

exclusion.—*Carpentier vs. Webster*, 27 Cal. 524, 549; *Carpentier vs. Mitchell*, 29 Cal. 320, 333.

189. Difference between total exclusion and partial exclusion is that one wrong is more extended than other; in both cases there is tortious exclusion.—*Carpentier vs. Webster*, 27 Cal. 524, 549; *Carpentier vs. Mitchell*, 29 Cal. 320, 333.

XII. SAME—2. INTENTION, NOTICE, ETC.

190. INTENTION TO OUST.—Conversion is point to be established.—*Carpentier vs. Mendenhall*, 28 Cal. 484, 487, 87 Am. Dec. 135.

191. Acts and declarations on part of tenant in possession must be such as to show intention to exclude cotenant to rebut presumption that his possession is not adverse.—*Coleman vs. Clements*, 23 Cal. 245, 248; *Owen vs. Morton*, 24 Cal. 373, 376. See *Ind. Manchester vs. Doddridge*, 3 Ind. 360. *Mass. Parker vs. Proprietors of Locks & Canals*, 44 Mass. (3 Met.) 91, 102, 37 Am. Dec. 121. *N. Y. Northrop vs. Wright*, 24 Wend. 221; *Humbert vs. Trinity Church*, 24 Wend. 537.

192. Acts of ownership are not, in tenancies in common, necessarily acts of disseizin, question depending upon intention with which they are done and their notoriety.—*Oglesby vs. Hollister*, 76 Cal. 136, 141, 9 Am. St. Rep. 177, 18 Pac. Rep. 146; *Prescott vs. Nevers*, 4 Mas. C. C. 326, 19 Fed. Cas. 1286.

193. Acts done must be manifested to person against whom ouster directed.—*Winterburn vs. Chambers*, 91 Cal. 170, 180, 27 Pac. Rep. 653.

194. CONSTITUTING AN OUSTER or disseizin act must be actual, open, notorious, not clandestine; hostile in claim of title exclusive of other rights except one's own and continuous and uninterrupted.—*City & C. of San Francisco vs. Fulde*, 37 Cal. 849, 99 Am. Dec. 278; *Garrison vs. McGlockley*, 38 Cal. 78; *City San Jose vs. Trimble*, 41 Cal. 536; *Grimm vs. Curley*, 43 Cal. 250, 251; *Lovell vs. Frost*, 44 Cal. 471; *Thompson vs. Ploche*, 44 Cal. 503, 517, 518; *Miller vs. Myers*, 46 Cal. 535, 539; *Unger vs. Mooney*, 63 Cal. 586, 590, 595, 49 Am. Rep. 100; *Winterburn vs. Chambers*, 91 Cal. 170, 180, 27 Pac. Rep. 653; *Taylor vs. Florde*, 1 Burr. 60.

195. Intent with which necessary acts are performed determines whether or not they amount to ouster.—*Bath vs. Valdez*, 70 Cal. 350, 357, 11 Pac. Rep. 724; *Winterburn vs. Chambers*, 91 Cal. 170, 180, 27 Pac. Rep. 653; *Felix vs. Felix*, 105 Cal. 1, 4, 38 Pac. Rep. 521.

196. Intent of hostile nature coupled with occupation must exist.—*Unger vs. Mooney*, 63 Cal. 586, 592, 49 Am. Rep. 100.

197. Determines character of possession, but intent must be by actual or presumptive notice directly or indirectly communicated to other cotenant.—*Winterburn vs. Chambers*, 91 Cal. 170, 180, 27 Pac. Rep. 653; *Gage vs. Downey*, 94 Cal. 241, 253, 29 Pac. Rep. 635.

198. Inferred from fact of demand and refusal, but inference must be made by jury, and not court.—*Carpentier vs. Mendenhall*, 28 Cal. 484, 487, 87 Am. Dec. 135. See *Carpentier vs. Webster*, 27 Cal. 524; *Cummings vs. Wyman*, 10

Mass. 464, 468; *Prescott vs. Nevers*, 4 Mas. C. C. 326, 19 Fed. Cas. 1286.

199. Must be established as fact by finding of jury.—*Carpentier vs. Mendenhall*, 28 Cal. 484, 487, 87 Am. Dec. 135.

200. Not mere secret purpose, but purpose which acts themselves manifest done toward person against whom ouster is directed.—*Winterburn vs. Chambers*, 91 Cal. 170, 180, 27 Pac. Rep. 653; *Gage vs. Downey*, 94 Cal. 241, 29 Pac. Rep. 635.

201. Not presumed in law from either acts of ownership or refusal of entry by one cotenant or from both combined.—*Carpentier vs. Mendenhall*, 28 Cal. 484, 487, 87 Am. Dec. 135.

202. Not presumed from exercise of right of entry.—*Bath vs. Valdez*, 70 Cal. 350, 357, 11 Pac. Rep. 724.

203. Presumed to be nothing more than assertion of right to possess and not to oust.—*Bath vs. Valdez*, 70 Cal. 350, 357, 11 Pac. Rep. 724.

204. Should be either by actual or presumptive notice, directly or indirectly communicated to the cotenant.—*Winterburn vs. Chambers*, 91 Cal. 170, 180, 27 Pac. Rep. 653.

205. CHARACTER OF HOSTILE POSSESSION, evidenced by acts as well as by words.—*Unger vs. Mooney*, 63 Cal. 586, 596, 49 Am. Rep. 100.

206. Hostile character of possession may be lost by legal effect of parties becoming cotenants.—*Carpentier vs. Mendenhall*, 28 Cal. 484, 87 Am. Dec. 135; *Carpentier vs. Small*, 35 Cal. 346, 356.

207. Not affected by mere offer of quitclaim deed without evidence of offer to buy, or to do away with hostile position.—*Unger vs. Mooney*, 63 Cal. 586, 597, 49 Am. Rep. 100.

208. Sufficiency of notoriety of acts must be judged from character with which they are made or performed and not from manner in which they are perceived.—*Winterburn vs. Chambers*, 91 Cal. 170, 187, 27 Pac. Rep. 653.

209. Shown by attempted purchase by cotenant at tax sale of his cotenant's interest, and taking of deed purporting to convey same, as acts indicating an intention to claim whole title adversely to his cotenant.—*Oglesby vs. Hollister*, 76 Cal. 136, 140, 9 Am. St. Rep. 177, 18 Pac. Rep. 146; *Pillow vs. Roberts*, 54 U. S. (13 How.) 472, 477, 14 L. ed. 228.

210. By fact that cotenant resided with tenant claiming sole possession, acts of hostility being more readily brought to his notice and give better opportunity to assert claim.—*Felix vs. Felix*, 105 Cal. 1, 5, 38 Pac. Rep. 521.

211. Not manifested by conduct of character sufficient to notify cotenant of its adverse use and nature, not sufficient to set statute of limitations in operation as between tenants.—*Unger vs. Mooney*, 63 Cal. 586, 591, 49 Am. Rep. 100. See *Miller vs. Myers*, 46 Cal. 535, 539.

212. Not manifested by mere act of dispossession by cotenant, and there must be actual notice by open and notorious acts or declarations of such nature as to lead to presumption

that cotenant not in possession was informed of hostile intention.—*Winterburn vs. Chambers*, 91 Cal. 170, 180, 27 Pac. Rep. 658.

213. DEMAND OF POSSESSION of whole of premises made by cotenant is not notice by his other cotenant to quit possession.—*Carpentier vs. Webster*, 27 Cal. 524, 563.

214. EVIDENCE.—Action most effective demand that can be made to be let into possession, and if title and right of entry be denied no further proof of ouster need be made.—*Miller vs. Myers*, 46 Cal. 535, 538; *Greer vs. Tripp*, 56 Cal. 209, 212; *Spect vs. Gregg*, 51 Cal. 198.

215. Demand and refusal are evidence of conversion.—*Carpentier vs. Mendenhall*, 28 Cal. 484, 487, 87 Am. Dec. 135.

216. Entitled to same presumption of correctness as attends other finding of fact depending upon weight and sufficiency of evidence.—*Winterburn vs. Chambers*, 91 Cal. 170, 180, 27 Pac. Rep. 658.

217. Possession may be sufficient notice to put parties upon inquiry, and charge them with knowledge that could be received upon inquiry.—*Winterburn vs. Chambers*, 91 Cal. 170, 182, 27 Pac. Rep. 658.

As to notice, see ante § 19 and note.

218. DISPOSSESSION BY STRANGER TAKING ACTUAL AND EXCLUSIVE POSSESSION is of itself notice of character and intent of such possession.—*Winterburn vs. Chambers*, 91 Cal. 170, 180, 27 Pac. Rep. 658. See *Feliz vs. Feliz*, 105 Cal. 1, 6, 38 Pac. Rep. 521.

219. Inferred from facts of notorious ownership for over twenty years' receipt of rents, payment of taxes, and street assessments.—*Alvarado vs. Nordholt*, 95 Cal. 116, 127, 30 Pac. Rep. 211.

220. Presumed where acts are notorious and of an open character sufficient to put party upon inquiry.—*Winterburn vs. Chambers*, 91 Cal. 170, 184, 27 Pac. Rep. 658. See *Warfield vs. Lindell*, 30 Mo. 372, 282, 77 Am. Dec. 614; *Lodge vs. Patterson*, 3 Watts (Pa.) 74, 77, 27 Am. Dec. 335; *Dikeman vs. Parrish*, 6 Pa. St. 210, 227, 47 Am. Dec. 455.

See ante § 19 and note.

221. Party chargeable with notice of real character of claim in absence of evidence showing his cotenancy, as same is not presumed when he is out of possession.—*Winterburn vs. Chambers*, 91 Cal. 170, 183, 27 Pac. Rep. 658.

222. Parties knowing that one in possession was not of heirs, and that immediate source of his claim was different, chargeable with notice when they see him in possession.—*Winterburn vs. Chambers*, 91 Cal. 170, 182, 27 Pac. Rep. 658. See *Fair vs. Stevenot*, 29 Cal. 486; *Unger vs. Mooney*, 63 Cal. 586, 596, 49 Am. Rep. 100.

223. Not necessary to show actual notice reaching cotenant to charge him with effect of ouster.—*Winterburn vs. Chambers*, 91 Cal. 170, 180, 27 Pac. Rep. 658.

XIII. SAME—3. WHAT ACTS CONSTITUTE, ETC.

224. OUSTER CONSTITUTED. — Actual turning out by shoulder is not necessary to

constitute ouster, but acts of such open and hostile occupation as will put a man upon notice or inquiry are necessary.—*Packard vs. Johnson*, 51 Cal. 545, 549.

225. By acts of equitable ownership of unequivocal character overt and notorious, and of such nature, as by their own import, impart information and give notice of adverse possession and disseizin.—*Bath vs. Valdez*, 70 Cal. 350, 358, 11 Pac. Rep. 724.

226. By adverse possession of one cotenant which is ouster of other.—*Carpentier vs. Webster*, 27 Cal. 524, 551.

227. By answer denying title and right of entry, same being equivalent to ouster.—*Miller vs. Myers*, 46 Cal. 535, 538; *Spect vs. Gregg*, 51 Cal. 198; *Packard vs. Johnson*, 51 Cal. 545; *Greer vs. Tripp*, 56 Cal. 209; *Phelan vs. Smith*, 100 Cal. 158, 167, 34 Pac. Rep. 667.

228. By conveyance of whole estate by warranty deed by one cotenant, and entry by purchaser claiming title to the whole, and refusal to give up any portion to other cotenant.—*Carpentier vs. Webster*, 27 Cal. 524, 547; *Marcy vs. Marcy*, 47 Mass. (6 Met.) 360.

229. By demand of possession claiming property under claim of right, pursuant to which demand other party quits possession, even though party claiming demand may have mistaken extent of his title.—*McCormack vs. Silsby*, 82 Cal. 72, 75, 76, 22 Pac. Rep. 874. See *Sneed vs. Osborn*, 25 Cal. 619, 626; *Carpentier vs. Mendenhall*, 28 Cal. 484, 487, 87 Am. Dec. 135; *Grimm vs. Curley*, 43 Cal. 250; *Bath vs. Valdez*, 70 Cal. 350, 353, 359, 11 Pac. Rep. 724.

230. By entry of cotenant under deed purporting to convey moiety of interest only of grantor by overt and notorious acts of exclusive ownership of unequivocal character.—*Bath vs. Valdez*, 70 Cal. 350, 358, 11 Pac. Rep. 724.

231. By entry and actual possession of cotenant under claim and color of title, with exercise of ownership open and notorious, adversely to other cotenants and world, and paying taxes for more than five years.—*Gregory vs. Gregory*, 102 Cal. 50, 54, 36 Pac. Rep. 364; *Feliz vs. Feliz*, 105 Cal. 1, 4, 38 Pac. Rep. 521.

232. Refusal after proper demand by tenant in common in possession to admit his cotenant into possession, is itself an ouster, and dispenses with necessity all further proof.—*Miller vs. Myers*, 46 Cal. 535, 538; *Greer vs. Tripp*, 56 Cal. 209, 212.

233. Refusal to let his cotenant into possession, although he admits his title, creates an ouster.—*Carpentier vs. Webster*, 27 Cal. 524, 561.

234. By wrongful dispossession or exclusion of party from real property who is entitled to its possession.—*Winterburn vs. Chambers*, 91 Cal. 170, 180, 27 Pac. Rep. 658.

235. GRANTEE UNDER A RECORDER'S DEED of entire estate entering and holding possession thereunder as in his own exclusive right, holds adversely to cotenant.—*Unger vs. Mooney*, 63 Cal. 586, 592, 49 Am. Rep. 100. See *Ga. Horne vs. Howell*, 46 Ga. 9; *Gain vs. Fur-*

low, 47 Ga. 674. III. Goewey vs. Urig, 18 Ill. 238, 242; Hinkley vs. Greene, 52 Ill. 223, 230-233. Iowa. Kinney vs. Slattery, 51 Iowa 353, 1 N. W. Rep. 626. Ky. Gill vs. Fauntleroy's Heirs, 8 B. Mon. 186. Mass. Bigelow vs. Jones, 27 Mass. (10 Pick.) 161, 162; Parker vs. Proprietors of Locks etc., 44 Mass. (3 Met.) 91, 101, 37 Am. Dec. 121. Mo. Warfield vs. Lindell, 30 Mo. 272, 282, 77 Am. Dec. 614; 38 Mo. 561, 578, 90 Am. Dec. 443; Long vs. Stapp, 49 Mo. 508; Lapeyre vs. Paul, 47 Mo. 586, 590. Nev. Abernathie vs. Con. Virginia M. Co., 16 Nev. 260. N. Y. Clapp vs. Bromaghnam, 9 Cow. 530, 531, 533; Bogardus vs. Trinity Church, 4 Paige Ch. 178; Wright vs. Saddler, 20 N. Y. 320, 329, 330. N. C. Thomas vs. Garvan, 4 Dev. 223, 25 Am. Dec. 708; Den ex d. Cloud vs. Webb, 4 Dev. 290, 25 Am. Dec. 711. Pa. Culler vs. Motzer, 18 Serg. & R. 356, 358, 15 Am. Dec. 604. S. C. Gray vs. Bates, 3 Strobb. 500. Tenn. Hubbard vs. Wood, 1 Sneed 286; Weisinger vs. Murphy, 2 Head 674. Tex. Alexander vs. Kennedy, 19 Tex. 488, 496, 70 Am. Dec. 858. Va. Caperton vs. Gregory, 11 Gratt. 505. Fed. Prescott vs. Nevers, 4 Mas. C. C. 330, 19 Fed. Cas. 1286; Green vs. Liter, 12 U. S. (8 Cr.) 229, 230, 3 L. ed. 545; Barr vs. Gratz, 17 U. S. (4 Wheat.) 213, 223, 4 L. ed. 553; Blight vs. Rochester, 20 U. S. (7 Wheat.) 535, 5 L. ed. 516; Society for Propagation of Gospel vs. Pawlett, 29 U. S. (4 Pet.) 480, 504, 506, 7 L. ed. 927; Clarke vs. Courtney, 30 U. S. (5 Pet.) 319, 354, 3 L. ed. 140; Clymer vs. Dawkins, 44 U. S. (3 How.) 674, 690, 11 L. ed. 778. Eng. Townsend & Pastor's Case, 4 Leon. 32; Reed vs. Taylor, 5 Barn. & Ad. 575, 27 Eng. C. L. 126.

236. NOT CONSTITUTED.—Adverse holding and claim to title by one cotenant do not of themselves constitute an ouster.—Miller vs. Myers, 46 Cal. 535, 539.

237. Adverse possession against cotenant out of actual possession does not exist until ouster and disseizin.—Tully vs. Tully, 71 Cal. 338, 347, 12 Pac. Rep. 246.

238. Adverse possession and claim of title by tenants in common with others of tract of land do not of themselves constitute an ouster of cotenant.—Aguirre vs. Alexander, 58 Cal. 21, 23.

239. Admitting cotenant to possession, but disputing his title or right thereto, is not an ouster.—Carpentier vs. Webster, 27 Cal. 524, 561.

240. Demand and refusal of possession are not ouster.—Phelan vs. Smith, 100 Cal. 158, 167, 34 Pac. Rep. 667.

241. Entry under deed under belief that it conveys the whole estate and exclusive actual possession thereunder is not ouster to tenant in common holding undivided part.—Seaton vs. Son, 32 Cal. 481; Packard vs. Johnson, 57 Cal. 180, 183.

242. Holding by one of distributees in administration of decedent's estate not closed is not an ouster.—In re Grider, 81 Cal. 571, 22 Pac. Rep. 908.

243. Mere exclusive occupation removing fences and devoting estate to usual purposes of pasturage or husbandry and payment of

taxes by cotenant in possession, are not of themselves sufficient.—Packard vs. Johnson, 51 Cal. 545, 549.

244. Refusal by one tenant in common to pay his cotenant his just share of rents and profits, unaccompanied with denial of their enjoyment, does not amount to ouster.—Carpentier vs. Webster, 27 Cal. 524, 561. See Fisher vs. Prosser, 1 Cowp. 217.

245. SILENT POSSESSION, accompanied by no acts which can amount to an ouster, or give notice to cotenant that possession is adverse, cannot be construed into adverse possession.—Owen vs. Morton, 24 Cal. 373, 379; McClung vs. Ross, 13 U. S. (5 Wheat.) 116, 124, bk. 5 L. ed. 46.

XIV. SAME—4. PARTIES AFFECTED.

246. OUSTER.—Infant can be ousted from possession by cotenant.—Winterburn vs. Chambers, 91 Cal. 170, 186, 27 Pac. Rep. 658.

247. Ouster not suspended until infant attained majority, but complete at date of act and declaration made by disseisor to infant of his intention to exclude him from possession and physically removing him therefrom.—Winterburn vs. Chambers, 91 Cal. 170, 186, 27 Pac. Rep. 658.

248. Same—Acts and declarations which constitute ouster apply to infant as well as to adult, whether such notice be actual or presumptive.—Winterburn vs. Chambers, 91 Cal. 170, 186, 27 Pac. Rep. 658.

249. Effect of knowledge imparted to infant from notice, suspended by statute of limitations until his majority.—Winterburn vs. Chambers, 91 Cal. 170, 187, 27 Pac. Rep. 658.

250. Protection given to infant by provision of statute continuing adverse holding until expiration of five years from his attaining majority, without diminishing sufficiency of notice by subsequent occurrences.—Winterburn vs. Chambers, 91 Cal. 170, 187, 27 Pac. Rep. 658.

XV. SAME—5. STATUTE OF LIMITATIONS.

251. STATUTE OF LIMITATIONS DOES NOT BEGIN TO RUN UNTIL DEMAND made to be let into possession as cotenant.—Martin vs. Walker, 68 Cal. 317, 321, 9 Pac. Rep. 185.

252. Does not commence to run from time cotenant claims land as exclusively his own, but from time when his cotenant becomes aware of such claim, or from time when, as prudent man ought to have known of assertion of such exclusive right, to land of which both had common possession.—Packard vs. Johnson, 57 Cal. 180, 183.

253. Not suspended during minority, where party under whom infant claims could have maintained action for recovery during lifetime.—Alvarado vs. Nordholt, 95 Cal. 116, 127, 30 Pac. Rep. 211. See McLeran vs. Benton, 73 Cal. 329, 344, 2 Am. St. Rep. 814, 14 Pac. Rep. 879.

254. Works disseizin and runs in favor of party under conveyance from one in exclusive possession under deed purporting to convey the whole, under which grantee enters into open and notorious possession without notice

of cotenant from delivery of deed.—*Bath vs. Valdez*, 70 Cal. 350, 358, 11 Pac. Rep. 724.

See Code Civ. Proc. § 318 note pars. 50-61 note.

XVI. SAME—6. EVIDENCE OF.

255. OUSTER—Question of fact depending upon circumstances of each case, to be submitted to jury whenever there is any substantial evidence.—*Oglesby vs. Hollister*, 76 Cal. 136, 141, 9 Am. St. Rep. 177, 18 Pac. Rep. 146.

256. Grantee from one of two tenants in common, in ejectment, in order to sustain his defense based upon statute of limitations, must prove such an ouster of his cotenant as his grantor must have proved had he remained in possession and set up such adverse possession himself.—*Packard vs. Johnson*, 51 Cal. 545, 549.

257. SUFFICIENCY OF EVIDENCE—Evidence to prove ouster being ultimate fact to be found by courts, it is sufficient if it is sustained by evidence or is necessary result of probated facts which are found.—*Winterburn vs. Chambers*, 91 Cal. 170, 180, 27 Pac. Rep. 658.

258. Acts of ownership inconsistent with recognition of claims of other party of sufficient notoriety to have presumptively been brought to notice and knowledge of cotenants.—*Felix vs. Felix*, 105 Cal. 1, 6, 38 Pac. Rep. 521.

259. Answer setting up title to whole of premises described in complaint, is evidence sufficient in that respect to entitle maintenance of action.—*Packard vs. Johnson*, 51 Cal. 545, 548.

260. Averment in answer in ejectment proceedings denying plaintiff's title and right of interest, sufficient proof of ouster.—*Spect vs. Gregg*, 51 Cal. 198, 201.

261. Demand and refusal of possession sufficient evidence to authorize court to find ouster.—*Phelan vs. Smith*, 100 Cal. 158, 167, 8 Pac. Rep. 667.

262. Denial of title by tenant in possession evidence of ouster.—*Carpentier vs. Gardiner*, 29 Cal. 160, 163.

263. Evidence—Entry of cotenant, inclosing premises with fence, cultivating them for many years, renting them to others, appropriating entire rent, claiming land as his own, paying taxes, taking conveyances purporting to be of entire tract, and executing mortgage to secure debt.—*Felix vs. Felix*, 105 Cal. 1, 5, 38 Pac. Rep. 521.

264. Exclusive possession accompanied with notorious claim of exclusive right.—*Owen vs. Morton*, 24 Cal. 373, 376. See *N. Y. Bromagham vs. Clapp*, 6 Cow. 611. *Fed. Prescott vs. Nevers*, 4 Mas. C. C. 326, 19 Fed. Cas. 1286; *Barr vs. Gratz*, 17 U. S. (4 Wheat.) 215, 223, bk. 4 L. ed. 552; *Ricard vs. Williams*, 20 U. S. (7 Wheat.) 59, 61, 121, bk. 5 L. ed. 398; *Jackson ex dem. Bradstreet vs. Huntington*, 30 U. S. (5 Pet.) 402, 444, bk. 8 L. ed. 170. *Eng. Doe vs. Prosser*, 1 Cowp. 217; *Peaceable vs. Read*, 1 East 277.

265. Exclusive possession by one tenant in common for great number of years without accounting to, or recognition of right of, cotenant, or any evidence explaining why co-

tenant neglected to assert his right, is sufficient evidence from which the jury may infer actual ouster and adverse possession.—*Oglesby vs. Hollister*, 76 Cal. 136, 141, 9 Am. St. Rep. 177, 18 Pac. Rep. 146; *Rickard vs. Rickard*, 30 Mass. (13 Pick.) 251, 254; *Parker vs. Proprietors of Locks etc.*, 44 Mass. (3 Met.) 91, 100, 37 Am. Dec. 121; *Lefavour vs. Homan*, 35 Mass. (3 Allen) 354, 355; *Doe vs. Prosser*, 1 Cowp. 217; *Culley vs. Taylerson*, 11 Ad. & E. 1008, 39 Eng. C. L. 303.

266. Exclusive possession for over twenty years, open and notorious, receipt of rents, payment of taxes, and street improvements assessments by party claiming to be the owner, and generally known as such in the community, sufficient.—*Alvarado vs. Nordholt*, 95 Cal. 116, 127, 30 Pac. Rep. 311.

267. Exclusive possession and holding by cotenant until his death, claiming same as his own, receiving rents and profits, and paying taxes, sufficient.—*Alvarado vs. Nordholt*, 95 Cal. 116, 126, 30 Pac. Rep. 311. See *Unger vs. Mooney*, 63 Cal. 586, 593, 49 Am. Rep. 100; *Bath vs. Valdez*, 70 Cal. 350, 11 Pac. Rep. 724; *Winterburn vs. Chambers*, 91 Cal. 170, 27 Pac. Rep. 658.

268. Greater or less notoriety of exclusive claim, erection of buildings and improvements, pernanacy of entire profits, payment of taxes, etc., evidentiary circumstances proving ouster.—*Packard vs. Johnson*, 57 Cal. 180, 183.

269. Payment of taxes competent evidence, along with other facts, to show adverse holding by party in possession.—*Unger vs. Mooney*, 63 Cal. 586, 593, 49 Am. Rep. 100. See *Keyser vs. Evans*, 30 Pa. St. 509.

270. Ouster not proved where evidence does not show that intent of cotenants in possession extended beyond his own interest, or that other cotenants had notice of existence of intent, even if it were possessed by cotenant in possession.—*Gage vs. Downey*, 94 Cal. 241, 253, 29 Pac. Rep. 635.

271. Not proved by mere evidence of adverse possession without specifying the acts or declarations made by parties in possession from which witness deduced his conclusion that possession was adverse, and that they did not claim by deed or lease from tenant claiming possession.—*Owen vs. Morton*, 24 Cal. 373, 377.

272. EVIDENCE—Mere possession not of itself evidence of claim.—*Winterburn vs. Chambers*, 91 Cal. 170, 182, 27 Pac. Rep. 658.

273. Cotenant out of possession, in order to avail himself of presumption attending acts of stranger, must show he was his cotenant, as there is no presumption of such cotenancy, and in absence of such showing he is charged with notice of real character of claim.—*Winterburn vs. Chambers*, 91 Cal. 170, 182, 27 Pac. Rep. 658.

XVII. SAME—7. DAMAGES.

274. OUSTER DAMAGES—Damages resulting from ouster by cotenant are recoverable in same manner as when tenant is ousted by an entire stranger.—*Carpentier vs. Mitchell*, 29 Cal. 330, 333.

275. Ejected tenant entitled, at common law, to be restored to his moiety, and to damages.—*Carpentier vs. Webster*, 27 Cal. 524, 550.

276. Right to recover mesne profits exists upon recovery in ejectment by cotenant.—*Carpentier vs. Mitchell*, 29 Cal. 330, 333. See *N. Y. Langendyck vs. Burhans*, 11 John. 461. *N. C. Camp. vs. Homesley*, 11 Ired. 212. *Pa. Hare vs. Fury*, 3 Yeates 13, 2 Am. Dec. 358; *Chambers vs. Lapsley*, 7 Pa. St. 25.

See par. 282 this note.

277. DAMAGES RECOVERABLE from time of actual ouster, i. e. from time of demand and refusal unsupported by legal right.—*Carpentier vs. Mendenhall*, 28 Cal. 484, 488, 489, 87 Am. Dec. 135; *Carpentier vs. Mitchell*, 29 Cal. 330, 334.

278. As against cotenants rightfully in possession until the day of ouster, only such damages as are incident to ouster on which recovery rests can be claimed in action to recover possession.—*Carpentier vs. Mitchell*, 29 Cal. 330, 334; *Carpentier vs. Mendenhall*, 28 Cal. 484, 87 Am. Dec. 135.

279. RENTS AND PROFITS NOT RECOVERABLE for time when defendants or most of them became cotenants with plaintiff in ejectment, and time of demand and refusal.—*Carpentier vs. Mendenhall*, 28 Cal. 484, 488, 87

Am. Dec. 135; *Carpentier vs. Mitchell*, 29 Cal. 330, 334.

280. As against naked trespassers wrongfully in possession tenant in common can recover one half of rents and profits during entire period of continuance of such wrongful possession within statute of limitations.—*Carpentier vs. Mitchell*, 29 Cal. 330, 334.

281. Improvements made by trespasser prior to his becoming tenant in common, cannot be set off by him against damages claimed in proceedings to recover title.—*Carpentier vs. Mitchell*, 29 Cal. 330, 335.

282. MESNE PROFITS.—Ejected tenant entitled in equity to no account for damages, but to mesne profits only.—*Carpentier vs. Webster*, 27 Cal. 524, 550.

See par. 276 this note.

283. JUSTIFICATION.—Ouster cannot be justified on ground of purchase of outstanding title by tenant in common in possession.—*Olney vs. Sawyer*, 54 Cal. 379, 384.

284. Distinguishing *Lawrence vs. Webster*, 44 Cal. 335, upon the ground that in that case it did not appear that defendants setting up outstanding title were in possession in any way acknowledging such relation to exist and the possession seemed to have been hostile in its inception.—*Olney vs. Sawyer*, 54 Cal. 379, 382.

§ 686. WHAT INTERESTS ARE IN COMMON. Every interest created in favor of several persons in their own right is an interest in common, unless acquired by them in partnership, for partnership purposes, or unless declared in its creation to be a joint interest, as provided in section six hundred and eighty-three, or unless acquired as community property.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 391, held unconstitutional, see history, § 4 ante.

1. Applied, cited, construed, referred to, etc.
2. Common interested defined.
- 3-5. Same—How created.
- 6-9. Gift to class as distinguished from individuals.
10. Statutory inference, when rebutted.

1. Applied, cited, construed, referred to, etc., in: *In re Estate Hittell*, 141 Cal. 432, 435, 75 Pac. Rep. 53 (construed with other sections).

2. Interest created in favor of several persons is an interest in common, unless joint interest created as provided in § 682, or held in partnership.—*Hittell vs. Greer* (*Estate of Hittell*), 141 Cal. 432, 435, 75 Pac. Rep. 53.

4. Devise or bequest to two or more persons in name and form creating joint tenancy vests whole interest in survivors upon death of one before testator, and same result follows if gift fails as to one of persons from any other cause.—*Downing vs. Marshall*, 23 N. Y. 366, 373, 30 Am. Dec. 290.

5. Devise or grant to two or more without other words creates joint tenancy prior to passing of New York statute, which declared estate to be held in common.—*Coster vs. Lorillard*, 14 Wend. (N. Y.) 365, 343.

6. Persons take as individuals and not as class, where individuals and class are both

named in devise, unless some other clause in will or some other outside evidence calls for different construction.—*In re Estate Hittell*, 141 Cal. 432, 435, 75 Pac. Rep. 53.

7. When an equality or inequality of shares is prescribed in express words, language is held to create tenancy in common; where devise was not to children by name, but as class, although tenancy in common may result, same consequences do not follow as to share of one of class who has died, or for some other reason cannot take.—*Downing vs. Marshall*, 23 N. Y. 366, 373, 30 Am. Dec. 290. See *Doe vs. Sheffield*, 13 East 526; *Tatam vs. Williams*, 3 Hare 247, 25 Eng. Ch. 348.

8. When limitation creates tenancy in common, gift being to several persons by name and not as a class, share of one dying before testator or before time when it is to vest lapses.—*Downing vs. Marshall*, 23 N. Y. 366, 373, 30 Am. Dec. 290.

9. When there is gift to number of persons indicated by name, and also referred to as class to which they belong, gift is *prima facie* distributed gift and not gift to class, and if one dies before testator, there is no right of survivorship in other beneficiaries.—*In re Estate Hittell*, 141 Cal. 432, 435, 75 Pac. Rep. 53.

10. Statutory inference rebutted where there are other words in instrument which upon legal construction necessarily create es-

tate in joint tenancy.—*Coster vs. Lorillard*, 14 Wend. (N. Y.) 265, 343 (examining and discussing the doctrine of *Perry vs. White*, Cowp. 777).

§ 687. COMMUNITY PROPERTY. Community property is property acquired by husband and wife, or either, during marriage, when not acquired as the separate property of either.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2, 3. Community property defined, etc.

1. Applied, cited, construed, referred to, etc., in: *Schuyler vs. Broughton*, 70 Cal. 282, 284, 11 Pac. Rep. 719 (construed and applied).

As to community property and what it includes, its acquisition and transmutation, see ante § 164 and note.

2. Property acquired after marriage by either husband or wife or both is community property.—*Schuyler vs. Broughton*, 70 Cal. 282, 284, 11 Pac. Rep. 719.

3. Property acquired by gift is separate property, and land in which money so applied is invested is, to the extent of the investment, separate real property.—*Schuyler vs. Broughton*, 70 Cal. 282, 284, 11 Pac. Rep. 719.

§ 688. INTERESTS AS TO TIME. In respect to the time of enjoyment, an interest in property is either:

1. Present or future; and,
2. Perpetual or limited.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Absolute gift with power of appointment—Effect of.
- 3-8. Devise or will—Limitation and suspension by, etc.
9. Future estates transferable.
- 10, 11. Gift of chattel for life—Usufruct only—Limitation over.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Le Breton vs. Cook*, 107 Cal. 410, 420, 40 Pac. Rep. 552 (construed and applied with other sections).

2. ABSOLUTE GIFT OF PERSONAL POWER coupled with express power to appoint particular person, confers general right of disposal upon which such power is a qualification rather than power in legal sense.—*Kane vs. Astor*, 5 Sand. (N. Y.) 467, 538.

3. By will or devise—Chattel interest may be limited over by will after life estate in same.—*Gillespie vs. Miller*, 5 John. Ch. (N. Y.) 21, 22.

4. Devise may be made suspending ownership and disposing of income annually as it accrues, but so as not to direct its accumulation except for a single purpose.—*Dodge vs. Pond*, 23 N. Y. 69, 82.

5. Devise may be made suspending absolute ownership of estate and rendering it inalienable during time mentioned in statute.—*Dodge vs. Pond*, 23 N. Y. 69, 82.

6. Devise may be made vesting legacies and providing for their payment at future definite period.—*Dodge vs. Pond*, 23 N. Y. 69, 82.

7. Devise to trustees to retain legal estate until youngest of testator's brothers and sisters, or survivor of them, should attain twenty-one, with right to apply principal as

well as income for use of children, and to convey estate to such parties, or survivor of them, or the heirs and assigns of such survivors, share and share alike, upon youngest attaining such majority, the issue of any dying to take parent's share, gives issue of deceased, devisee vested remainder in real estate, and also vested interest in personal estate, to extent of parent's share.—*Beeckman vs. Schermerhorn*, 3 Sand. Ch. (N. Y.) 181, 183.

8. Devise of wife of real and personal estate, together with rents and profits from real estate, for support during natural life, and after her decease to testator's brother in fee simple, subject to certain legacies, gives wife use of personal estate only during life.—*Gillespie vs. Miller*, 5 John. Ch. (N. Y.) 21, 22.

9. FUTURE INTEREST IN PROPERTY, whether real or personal, may be transferred to same extent and in same manner as present interests.—*Le Breton vs. Cook*, 107 Cal. 410, 420, 40 Pac. Rep. 552.

10. GIFT FOR LIFE OF A CHATTEL is a gift of usufruct only, except as to articles the use of which consists in their consumption.—*Gillespie vs. Miller*, 5 John. Ch. (N. Y.) 21, 22. See *Westcott vs. Cady*, 5 John. Ch. (N. Y.) 334, 346, 9 Am. Dec. 306; *Porter vs. Tournay*, 3 Ves. 311; *Smith vs. Clever*, 2 Vern. 59, 2 Ch. R. 187; *Pleydell vs. Pleydell*, 1 Pr. Wms. 748; *Hyde vs. Parratt*, 1 Pr. Wms. 1, 2 Vern. 331; *Tissen vs. Tissen*, 1 Pr. Wms. 500; *Upwell vs. Halsey*, 1 Pr. Wms. 561; *Claiges vs. Albemarle*, 2 Vern. 245.

11. Use may be given to one for life and property afterwards to another.—*Westcott vs. Cady*, 5 John. Ch. (N. Y.) 334, 346, 9 Am. Dec. 306.

§ 689. PRESENT INTEREST, WHAT. A present interest entitles the owner to the immediate possession of the property.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Delivery—When necessary.
3. Transfer as present interest.

1. Applied, cited, construed, referred to, etc., in: *Le Breton vs. Cook*, 107 Cal. 410, 40 Pac. Rep. 552 (construed with § 690).

2. Delivery is requisite only when a present interest is transferred.—*Le Breton vs. Cook*, 107 Cal. 410, 40 Pac. Rep. 552.

3. Future interest in property may be transferred like present interest.—*Le Breton vs. Cook*, 107 Cal. 410, 40 Pac. Rep. 552.

§ 690. FUTURE INTEREST, WHAT. A future interest entitles the owner to the possession of the property only at a future period.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Definition of future interest.
3. Decree of distribution to be looked to.
- 4-6. Devise vesting future estates.
- 7, 8. Remainder future estate.
9. Transfer—direct of.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Goldtree vs. Thompson*, 79 Cal. 613, 622, 22 Pac. Rep. 50 (construed and applied); *Barnett vs. Barnett*, 104 Cal. 298, 301, 37 Pac. Rep. 1049 (construed and applied with other sections); *Le Breton vs. Cook*, 107 Cal. 410, 420, 40 Pac. Rep. 552 (construed and applied); *Dunn vs. Schell*, 122 Cal. 626, 627, 55 Pac. Rep. 595 (construed and applied with other sections); *Blackburn vs. Webb*, 133 Cal. 420, 422, 65 Pac. Rep. 952 (construed and applied with other sections).

As to estates, when vested and when contingent, see monographic notes by Robert Desty, 1 L. R. A. 432-538, 3 L. R. A. 690-816, 9 L. R. A. 211, 12 L. R. A. 73.

As to right of remaindermen on condemnation, see monographic note by Irwin Taylor, 21 L. R. A. 212-223.

As to rule in *Shelley's case* affecting remainders, see monographic note by Irwin Taylor, 21 L. R. A. 212.

2. FUTURE INTEREST DEFINED to be an interest which entitles owner to possession of property only at future period.—*Goldtree vs. Thompson*, 79 Cal. 613, 622, 22 Pac. Rep. 50.

3. DECREE OF DISTRIBUTION must be looked to in recovering devisee's interest.—*Blackburn vs. Webb*, 133 Cal. 420, 422, 65 Pac. Rep. 952. See *Crew vs. Pratt*, 119 Cal. 139, 51 Pac. Rep. 38; *Goldtree vs. Allison*, 119 Cal. 344, 51 Pac. Rep. 561; *Goad vs. Montgomery*, 119 Cal. 552, 63 Am. St. Rep. 145, 51 Pac. Rep. 681; *In re Estate Trescony*, 119 Cal. 568, 570, 51 Pac. Rep. 551; *Cunha vs. Hughes*, 122 Cal. 111, 63 Am. St.

Rep. 27, 54 Pac. Rep. 535; *Williams vs. Marx*, 124 Cal. 22, 24, 56 Pac. Rep. 603.

4. DEVISE OF REAL ESTATE TO WIFE AND CHILDREN, directing that same shall be kept and remain intact and undivided and undistributed until youngest son attains twenty-one, income meanwhile to be controlled and expended for support of widow and children, gives children vested future interest subject to transfer or encumbrance in same manner as estate in possession.—*Dunn vs. Schell*, 122 Cal. 626, 627, 55 Pac. Rep. 595. See *Williams vs. Williams*, 73 Cal. 99, 14 Pac. Rep. 394.

5. Devise to trustees to invest and pay income to widow during life, and residue for children in equal shares, gives children interest entitling to possession only at future period.—*Goldtree vs. Thompson*, 79 Cal. 613, 622, 22 Pac. Rep. 50.

6. Devise to wife as trustee for children to uphold and manage property until youngest child attains majority, when property is to vest absolutely and not before, gives trustee legal estate, and share of children does not vest until happening of future event named.—*Blackburn vs. Webb*, 133 Cal. 420, 422, 65 Pac. Rep. 952.

7. REMAINDER, not being capable of immediate enjoyment, is future interest.—*Barnett vs. Barnett*, 104 Cal. 298, 301, 37 Pac. Rep. 1049.

8. Though not capable of immediate enjoyment, and therefore a future interest, is, nevertheless, an estate in property capable of transfer in same manner as present interest.—*Barnett vs. Barnett*, 104 Cal. 298, 301, 37 Pac. Rep. 1049.

9. TRANSFER OF FUTURE INTEREST only entitles transferee to possession at future period.—*Le Breton vs. Cook*, 107 Cal. 410, 420, 40 Pac. Rep. 552.

§ 691. PERPETUAL INTEREST, WHAT. A perpetual interest has a duration equal to that of the property.

History: Enacted March 21, 1872.

§ 692. LIMITED INTEREST, WHAT. A limited interest has a duration less than that of the property.

History: Enacted March 21, 1872.

§ 693. KINDS OF FUTURE INTERESTS. A future interest is either:

1. Vested; or,
2. Contingent.

History: Enacted March 21, 1872.

§ 694. **VESTED INTERESTS.** A future interest is vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property, upon the ceasing of the intermediate or precedent interest.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
- 2, 3. Definition of vested estate.
- 4, 5. Distinguished from contingent.
6. Devisee in remainder—When entitled to possession.
- 7-10. Vested estates favored—Uncertainty as affecting.
- 11-23. How created—Devise, grant, etc.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO,** etc., in: *Williams vs. Williams*, 73 Cal. 99, 102, 14 Pac. Rep. 394 (construed and applied); *Dunn vs. Schell*, 122 Cal. 626, 627, 55 Pac. Rep. 595 (construed and applied); *In re Estate Fair*, 132 Cal. 523, 574, 578, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000 (construed and applied); *Blackburn vs. Webb*, 133 Cal. 420, 422, 65 Pac. Rep. 952 (construed with other sections); *In re Estate Sanford*, 136 Cal. 97, 106, 68 Pac. Rep. 494 (construed and applied).

2. **DEFINED**—Vested remainders are those by which present interest passes to party, though to be enjoyed in future; and by which estate is invariably fixed to remain to determinate person after particular estate is spent.—*Coster vs. Lorillard*, 14 Wend. (N. Y.) 265.

3. **Vested remainder** is estate recognized by law.—*Croxall vs. Sherrerd*, 72 U. S. (5 Wall.) 263, bk. 18 L. ed. 572.

4. **DISTINGUISHED FROM CONTINGENT INTERESTS.**—Present capacity to take effect in possession, if possession becomes vacant, and not certainty that possession will become vacant before estate limited in remainder determines, is distinguishing feature of vested from contingent remainder.—*In re Estate Fair*, 132 Cal. 523, 579, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000; *Williamson vs. Field*, 2 Sand Ch. (N. Y.) 533, 553; *Moore vs. Littel*, 41 N. Y. 66.

5. **Person to whom remainder, after life estate, is limited** is ascertained, and event upon which it is to take effect is certain to happen, has vested remainder, although by terms of gift it may be entirely defeated by death of such person before termination of particular estate.—*In re Estate Fair*, 132 Cal. 523, 578, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

6. **DEVISEE ENTITLED TO IMMEDIATE possession** upon termination of precedent estate given for purposes of trust when devisee's estate is only limited by that estate (dis. op.).—*In re Estate Sanford*, 136 Cal. 97, 106, 68 Pac. Rep. 494.

7. **Law favors vesting of estate at death of testator, or as early as possible thereafter, and also an absolute rather than a defeasible estate.**—*Passmore's App.*, 23 Pa. St. 331, 333.

8. **Remainder, limited upon an estate tail, is vested though it is uncertain whether it will ever fall into possession.**—*Wendell vs. Crandall*, 1 N. Y. 491; *Moore vs. Lyons*, 25 Wend. (N. Y.) 119; *Vanderheyden vs. Crandall*,

2 Den. (N. Y.) 9; *Passmore's App.*, 23 Pa. St. 331, 333.

9. **Uncertainty as to precise person in whom would exist right to enforce execution of property in trust will not prevent remainder from vesting.**—*In re Estate Fair*, 132 Cal. 523, 574, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

10. **Same—Uncertainty of right of enjoyment and not actual enjoyment is what renders remainder contingent.**—*In re Estate Fair*, 132 Cal. 523, 574, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

11. **CREATED BY DEVISE TO SUPPORT OF DAUGHTER** for life and to children after death, with remainder to specified parties, gives latter vested estate.—*Belfield vs. Booth*, 63 Conn. 299, 27 Atl. Rep. 535. See *Del. Rubencane vs. McKee* (Del. Sept. Term 1886), 6 Atl. Rep. 639. *Ga. Clanton vs. Estes*, 77 Ga. 352, 1 S. E. Rep. 163. *Ind. Hoover vs. Hoover*, 116 Ind. 498, 19 N. E. Rep. 468; *Harris vs. Carpenter*, 109 Ind. 540, 10 N. E. Rep. 422; *Commons vs. Commons*, 115 Ind. 162, 17 N. E. Rep. 271. *Mass. Seaver vs. Fitzgerald*, 141 Mass. 401, 6 N. E. Rep. 73; *Dole vs. Keyes*, 143 Mass. 237, 9 N. E. Rep. 625. *Miss. McDaniel vs. Allen*, 64 Miss. 417, 60 Am. Rep. 44, 1 So. Rep. 356. *Mo. Preston vs. Brant*, 96 Mo. 552, 10 S. W. Rep. 78. *N. H. Wiggins vs. Perkins*, 64 N. H. 36, 5 Atl. Rep. 904; *Crosby vs. Crosby*, 64 N. H. 77, 5 Atl. Rep. 907. *N. Y. Byrnes vs. Stillwell*, 103 N. Y. 463, 57 Am. Rep. 760, 9 N. E. Rep. 241; *Delafield vs. Shipman*, 103 N. Y. 463, 9 N. E. Rep. 184; *Vanderpoel vs. Loew*, 112 N. Y. 167, 19 N. E. Rep. 481. *Pa. Richardson's Appeal* (Pa. Oct. 4, 1886), 6 Atl. Rep. 204. *R. I. Loring vs. Arnold*, 15 R. I. 428, 3 Atl. Rep. 385. *Tenn. Owens vs. Dunn*, 85 Tenn. 181, 2 S. W. Rep. 29.

12. **By devise vesting estate in fee simple, enjoyment of which is postponed.**—*Williams vs. Williams*, 73 Cal. 99, 102, 14 Pac. Rep. 394. See *Mass. Furness vs. Fox*, 55 Mass. (1 Cush.) 134, 48 Am. Dec. 993. *N. C. Johnson vs. Baker*, 3 Murph. 318, 9 Am. Dec. 606. *Pa. Keed vs. Buckley*, 5 Watts & S. 517, 40 Am. Dec. 531. *Va. Tasewell vs. Smith*, 1 Rand. 313, 10 Am. Dec. 533.

13. **Directing property to be kept in tact until youngest son becomes of age.**—*Dunn vs. Schell*, 122 Cal. 626, 627, 55 Pac. Rep. 595.

14. **Of residuary estate into as many shares as testator had children, and to give each child providing him one share in trust for said child for life and upon his death to convey and deliver over his share to lawful issue and in default of issue to be distributed as estate, issue of child living taking vested remainder in share held in trust for parent, subject to open and let in after-born children, and to be divested by their death before death of parent, rights of grandchildren not being dependent upon action of trustee.**—*Campbell vs. Stokes*, 142 N. Y. 28, 36 N. E. Rep. 311;

Levy vs. Levy, 29 N. Y. Supp. 384, 31 *Adv.* (N. C.) 468, 79 Hun 290.

15. Of residue to trustee upon trust to apply portion of income to support of widow and after her death to "convey, transfer and pay" trust estate to children.—*Weston vs. Weston*, 125 Mass. 268.

16. To daughter for life and after her death to children surviving her, to be divided between them in equal shares, if more than one, upon attaining twenty-one.—*Du Bois vs. Ray*, 7 Bosw. (N. Y.) 244, 286.

17. To mother as trustee to manage estate until youngest child attains majority, on which event property vests absolutely.—*Blackburn vs. Webb*, 133 Cal. 420, 422, 65 Pac. Rep. 952.

18. To trustees in trust to make certain dispositions of income, and thereafter to transfer and convey property to children of deceased brother.—*Toms vs. Williams*, 41 Mich. 552, 2 N. W. Rep. 814.

19. To trustees to be held by them for each of testator's children, to apply income thereof to their use, and upon death of child for whom same held to convey, transfer, and pay over to issue.—*Campbell vs. Stokes*, 142 N. Y. 28, 36 N. E. Rep. 811.

20. To wife, with directions upon her death to sell and divide proceeds among children and issue of those dying leaving issue.—*Richardson's Appeal* (Pa. Oct. 4, 1886), 6 Atl. Rep. 204.

21. To wife, with directions that property

"shall be kept and shall remain intact and undivided and undisturbed until time youngest son shall have attained the age of twenty-one years."—*Dunn vs. Schell*, 122 Cal. 626, 627, 55 Pac. Rep. 595.

22. DEVISE IN TRUST DURING LIFE of testator's children and directing division of estate among grandchildren and brothers and sisters of deceased after death of last surviving child, creates equitable remainder in those to whom property is to be conveyed upon death of surviving child, defeasible, however, upon their death prior to death of last surviving child, and subject to let in after-born children of designated class.—*In re Estate Fair*, 132 Cal. 523, 579, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

23. By grant to one for life and to such children as are living at his death; children living taking vested present right to future possession, subject to be opened and to let in after-born children, and to be divested as to those who die without issue.—*In re Estate Fair*, 132 Cal. 523, 578, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000. See *Mass. Brown vs. Lawrence*, 67 Mass. (3 Cush.) 390, 397; *Blanchard vs. Blanchard*, 83 Mass. (1 Allen) 223. N. Y. *Gilman vs. Reddington*, 24 N. Y. 9. Fed. *Croxall vs. Sherrerd*, 72 U. S. (5 Wall.) 268, bk. 18 L. ed. 572; *McArthur vs. Scott*, 113 U. S. 340, 380, bk. 28 L. ed. 1015, 5 Sup. Ct. Rep. 652.

§ 695. CONTINGENT INTERESTS. A future interest is contingent, whilst the person in whom, or the event upon which, it is limited to take effect remains uncertain.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Distinguished from executory devise.
3. Executory devise—Nature of.
4. Future estate other than reversion—Nature of.
- 5-8. Same—How created.

As to contingent remainders, their definition, classification, and principles relating to generally, see 24 Am. & Eng. Encyc. of L. (2d ed.) 395, 400.

As to estates when vested and when contingent, see monographic notes by Robert Desty, 1 L. R. A. 432, 538; 3 L. R. A. 690, 816; 9 L. R. A. 311.

As to power to cut off contingent interests, see monographic note by B. A. Rich, 19 L. R. A. 247.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Jewell vs. Pierce*, 120 Cal. 79, 84, 52 Pac. Rep. 132 (construed and applied with other sections).

2. CONTINGENT REMAINDER DISTINGUISHED from executory devise upon ground that contingent remainder could not, at common law, be created upon fee which owner had once granted, either absolutely or qualifiedly, and no estate remained in him, although for purpose of carrying into effect provisions of devise, qualified by disposition of estate over, upon happening of contingency on breach of condition, disposition of estate would be

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executory devise.—*Jewell vs. Pierce*, 120 Cal. 79, 84, 52 Pac. Rep. 132.

3. EXECUTORY DEVISE at common law in nature of contingent remainder.—*Jewell vs. Pierce*, 120 Cal. 79, 84, 52 Pac. Rep. 132.

4. FUTURE ESTATE OTHER THAN REVERSION dependent upon precedent estate, is contingent while event upon which it is limited to take effect, remains uncertain.—*Jewell vs. Pierce*, 120 Cal. 79, 84, 52 Pac. Rep. 132.

5. Creation of contingent interests.—Devise in fee defeasible upon contingency of dying without lawful issue with remainder in fee limited upon such contingency, would create conditional limitation by way of executory devise at common law.—*Jewell vs. Pierce*, 120 Cal. 79, 83, 52 Pac. Rep. 132.

6. Contingent estate of remainder created by devise in fee simple defeasible upon contingency of dying without issue with remainder in fee limited upon contingency to heirs.—*Jewell vs. Pierce*, 120 Cal. 79, 83, 52 Pac. Rep. 132.

7. Contingent interest created by devise to grandchildren and nephews and nieces with proviso that "if a son he shall take the same when he arrives at the age of twenty-one years, and if he dies before that age, the devise passes to the son of the next daughter, and so on," each grandchild takes a contingent interest.—*Sager vs. Galloway*, 113 Pa. St.

500, 6 Atl. Rep. 209. See *Ill. Banta vs. Boyd*, 118 Ill. 136, 3 N. E. Rep. 671; *McCartney vs. Osburn*, 118 Ill. 403, 9 N. E. Rep. 210. Ky. *Willett vs. Rutter*, 84 Ky. 317, 1 S. W. Rep. 640. N. H. *Wiggin vs. Perkins*, 64 N. H. 36, 5 Atl. Rep. 904. N. J. *Lafay vs. Campbell*, 42 N. J. Eq. (15 Stew.) 34, 6 Atl. Rep. 300. Pa. *Sager vs. Cobham* (Pa. Oct. 4, 1836), 6 Atl. Rep. 212. R. I. *Bailey vs. Hoppin*, 12 R. I. 560;

Loring vs. Arnold, 15 R. I. 423, 3 Atl. Rep. 325.

8. By devise to party, his heirs and assigns forever, to come into possession at twenty-one, with proviso in event of party dying without issue estate to go to heirs according to law.—*Jewell vs. Pierce*, 120 Cal. 79, 84, 52 Pac. Rep. 132.

§ 696. **TWO OR MORE FUTURE INTERESTS.** Two or more future interests may be created to take effect in the alternative, so that if the first in order fails to vest, the next in succession shall be substituted for it, and take effect accordingly.

History: Enacted March 21, 1872.

1-5. Alternative or successive estates—Legality and nature of.

6. Same—Rule as to creation of.

7-17. Same—How created by devise, etc.

18. Rules apply to personal estate.

As to successive remainders or future estates to take effect in the alternative and in succession, see 24 Am. & Eng. Encyc. of L. (2d ed.) 417 (6) under improper and condemnable head "Double Contingency or Contingency with Double Aspect."

1. **ALTERNATIVE OR SUCCESSIVE ESTATES.**—Two or more several contingent remainders in fee may be limited, one to be substituted for other instead of being dependent and to take effect in succession, one taking effect, the other becomes void.—*Peoria vs. Darst*, 101 Ill. 609, 619; *Dunwoodie vs. Reed*, 3 Serg. & R. (Pa.) 435, 452.

2. **ALTERNATIVE ESTATES OR CONTINGENCIES** with double aspect permissible and recognized before New York revised statutes expressly authorized their creation, and were unobjectionable for reason that only one could vest, and happening of contingency merely substituted one for other and in no respect prolonged any restraint upon alienation.—*Hennessey vs. Patterson*, 85 N. Y. 91, 99. See *Jackson vs. Staats*, 11 John. (N. Y.) 337, 348, 6 Am. Dec. 376; *Sherman vs. Sherman*, 3 Barb. (N. Y.) 385; *Maurice vs. Graham*, 3 Paige Ch. (N. Y.) 483, 486; *Minot vs. Minot*, 17 App. Div. (N. Y.) 521, 45 N. Y. Supp. 554, 559; *Sage vs. Wheeler*, 37 N. Y. Supp. 1107, 1109; *Griffin vs. Shepard*, 124 N. Y. 70, 26 N. E. Rep. 339.

3. Each alternate remainder is of fee, but only one is intended to, or can by any possibility take effect, the second being a substitution for first, and not subsequent to it, one fee not being limited on other.—*Thomas vs. Castle*, 76 Conn. 447, 56 Atl. Rep. 354. See *Broadhurst vs. Morris*, 3 Barn. & Ad. 1, 22 Eng. C. L. 1; *Doe ex d. Herbert vs. Selby*, 2 Barn. & C. 226, 933, 9 Eng. C. L. 277, 26 Rev. Rep. 585, 590; *Crump vs. Norwood*, 7 Taunt. 362, 6 Marsh. 161.

4. Remainder cannot be limited after fee, but two or more several contingent estates in fee may be limited, as substitutes or alternatives one for the other, not to interfere, but so that only one can take effect, and every subsequent limitation be a disposition substituted in the room of the former if former should fail.—*Loddington vs. Kyne*, 1 Ld. Raym. 203,

3 Lev. 431; *Barnarditson vs. Carter*, 3 Bro. Parl. Cas. 64, 1 Ld. Raym. 208.

5. Remainder limited over remainder in fee would be void, but two remainders may be limited, even though each of them may be a fee, so as to be good, where one only takes effect in substitution for and not as subsequent to the other.—*Peoria vs. Darst*, 101 Ill. 609, 619.

6. **RULE STATED.**—Where both limitations are to take effect, latter can only do so as an executory devise; for remainder originally contingent, but afterwards vesting by happening of contingency, is essentially same as if it had been vested at its origin; but where both are limited alternatively on same event, by happening of which one is to vest to exclusion of other, then both are contingent remainders.—*Dunwoodie vs. Reed*, 3 Serg. & R. (Pa.) 435, 452.

7. Created by devise during natural life with remainder to issue of body, their heirs and assigns forever, with remainder over in case of death without issue of other children, their heirs and assigns forever as tenants in common.—*Waddell vs. Rattew*, 5 Rawle (Pa.) 231, 234. See *De Haas vs. Bunn*, 2 Pa. St. 335, 44 Am. Dec. 201; *Norris vs. Clymer*, 2 Pa. St. 277; *George vs. Morgan*, 16 Pa. St. 95; *Wells vs. Ritter*, 3 Whart. (Pa.) 208; *Doe ex d. Herbert vs. Selby*, 2 Barn. & C. 226, 9 Eng. C. L. 277, 278, 26 Rev. Rep. 585.

8. For natural life and after decease to his heirs as tenants in common and their respective heirs and assigns forever, but in case of death without lawful issue, remainder over to brother and his heirs and assigns forever, gives life estates to first party, a tenancy in common to his issue, and contingent estates in remainder to the last named devisee, none of remainders vesting during lifetime of first named devisee.—*Stump vs. Findlay*, 2 Rawle (Pa.) 168, 19 Am. Dec. 632.

9. For natural life and after his decease on to the heirs male, and family of party of such son forever, and in case son dies leaving no lawful issue devise over to daughter and her heirs forever.—*Doe vs. Holme*, 2 Wm. Black. Rep. 177.

10. For life and after death to his children equally and to their heirs, and in case of his death without issue to daughters and their heirs equally.—*Goodright vs. Dunham*, Doug. 265. See *Doe vs. Perryn*, 3 Durn. & E. (3 Tr.

Rep.) 484; *Ives vs. Legge*, 3 Durn. & E. (3 Tr. Rep.) 488.

11. For life "and from and immediately after his decease, then for use and behoof of all and every child and children of said son that shall then be living and the lawful issue of such as shall be deceased, and for want of such child or children of lawful issue then in trust for use and behoof of my right heir forever."—*Buzby's Appeal*, 61 Pa. St. 111, 115.

12. For life, and in case he should have issue male, then to such issue and his heirs forever, and if he should die without issue male, then one portion to go to another in fee, and another portion to another party in fee as making first remainder contingent fee in issue male, and subsequent remainder contingent fee concurrent with former, and a contingency with double aspect.—*Loddington vs. Kyme*, 1 Ld. Raym. 203, 3 Lev. 431; *Barnardiston vs. Carter*, 3 Bro. Parl. Cas. 64, 1 Ld. Raym. 208; *Plunkett vs. Holmes*, 1 Lord Ryam. 28.

13. For life with remainder to children with subsequent remainder over as same does not come within prohibition of rule that no remainder can be limited over remainder in fee.—*Peoria vs. Darst*, 101 Ill. 609, 619.

14. For life with remainder in fee to children of first party, living at his death, arriving at their majority or dying leaving issue, with remainder over.—*Demill vs. Reid*, 71 Md. 175, 17 Atl. Rep. 1014. See *Clagett vs. Worthington*, 3 Gill (Md.) 83; *Woolen vs. Frick*, 38 Md. 428.

15. In trust for son for life with remainder

to issue of his body living at time of his decease, remainder in event of death without issue to the parties entitled under statute relating to intestate's estate.—*Thomas vs. Castle*, 76 Conn. 447, 56 Atl. Rep. 854.

16. DEVISE TO WIFE AND DAUGHTER or the survivor during their lives and in case of daughter's death leaving lawful issue, to such issue, their heirs and assigns forever, but in case daughter dies before mother, leaving lawful issue, issue to take their mother's right from time of death, and in case of daughter's death without issue, proceeds to go to wife's relatives' lawful issue, gives daughter life estate with remainder to her issue in fee, with alternative limitations over.—*Taylor vs. Taylor*, 63 Pa. St. 481, 3 Am. Rep. 565.

17. Remainder to children in fee with remainder over, makes limitations concurrent contingent remainders in fee, limited alternatively on same event to take effect,—not one subsequent to other, in succession, but as a substitute for the other, and not limitation of fee over fee, and permissible.—*Peoria vs. Darst*, 101 Ill. 609, 619.

18. RULE AS TO RESPECTIVE OR SUCCESSIVE REMAINDERS or estates, applies to personal property, for the reason that similar remainders may therein be made dependent upon life estate created by will.—*Thomas vs. Castle*, 76 Conn. 447, 56 Atl. Rep. 854. See *Griggs vs. Dodge*, 2 Day (Conn.) 28, 2 Am. Dec. 82; *Hudson vs. Wadsworth*, 8 Conn. 348, 361; *Langworthy vs. Chadwick*, 13 Conn. 42, 46.

§ 697. CERTAIN FUTURE INTERESTS NOT TO BE VOID. A future interest is not void merely because of the improbability of the contingency on which it is limited to take effect.

History: Enacted March 21, 1872.

1-3. Common-law doctrine.

4. Limitation valid.

As to remoteness of contingency, see 24 Am. & Eng. Encyc. of L. (2d ed.) 402.

1. Common-law doctrine.—Possibility upon which remainder is to depend must be common possibility, or potentia propinqua; e. g. death, or death without issue, or coverture; for potentia est duplex, remota et propinqua.—2 Cruise's Dig. 272.

2. Remainder limited to corporation thereafter to be created, is void, for reason that there is no devisee competent to take at time, and possibility that there might be such cor-

poration during particular estate for life, is too remote.—*Zeisweiss vs. James*, 63 Pa. St. 465, 3 Am. Rep. 558.

3. Not in being at time of limitation, is void, although such corporation may come into existence during particular estate, for reason that at time of limitation it was potentia remota.—*Zeisweiss vs. James*, 63 Pa. St. 465, 3 Am. Rep. 558; *Cholmey's Case*, 2 Rep. 51, a, b; *Cane vs. Cowper*, Moo. 104; *Cowden vs. Clarke*, Hob. 32; *Noe's Case*, Winch. 55; *Simpson vs. South Ward*, 1 Rol. 254.

4. Limitation for life to unborn person is valid.—*Jackson vs. Brown*, 13 Wend. (N. Y.) 427, 442.

§ 698. POSTHUMOUS CHILDREN. When a future interest is limited to successors, heirs, issue, or children, posthumous children are entitled to take in the same manner as if living at the death of their parents.

History: Enacted March 21, 1872.

1. Common-law rule.

2. Infant—When in esse.

3-6. After-born children—When take under grant, etc.

As to posthumous children as grantees, see monographic note by F. H. Bowiby, 44 L. R. A. 489.

As to posthumous children defeating future

interest, see for a full discussion and authorities post § 789 and note.

As to when children *en ventre sa mere* are regarded as *in esse*, see monographic note 43 Am. Dec. 474-476.

See ante § 29 note pars. 59-62.

1. **COMMON-LAW RULE.**—Grant or common-law conveyance conveyed or transferred nothing directly to child *en ventre sa mere* for the reason that it could not be a party to such instrument, yet in a conveyance to uses it was otherwise, for then legal estate vested in trustee and rule of common law was supposed to be satisfied and use was allowed to shift so as to include such child.—Gay vs. Baker, 5 Jones (N. C.) Eq. 344, 78 Am. Dec. 229. See Dupree vs. Dupree, Busb. (N. C.) Eq. 164, 166, 59 Am. Dec. 590; Beale vs. Beale, 1 Pr. Wms. 244; Hewet vs. Ireland, 1 Pr. Wms. 426, Gilb. Eq. Rep. 145; Miller vs. Turner, 1 Ves. Sr. 85; Palmer vs. Cracroft, 2 Vern. 578.

See ante § 29 and note.

2. **Infant regarded as *in esse* from time of conception for purpose of taking estate which is for his benefit, whether by descent, devise, or under statute of distribution, provided he is born alive.**—Harper vs. Archer, 4 Smed. & M. (Miss.) 99, 43 Am. Dec. 472. See Marsellis vs. Thalheimer, 3 Paige Ch. (N. Y.) 35, 21 Am. Dec. 66; Swift vs. Duffield, 5 Serg. & R. (Pa.) 38; Wallis vs. Hodson, 2 Atk. 117.

3. **After-born children take interest in con-**

junction with those living under devise to daughter for life with remainder to her children living at her death.—Kansas City L. Co. vs. Hill, 37 Tenn. 539, 11 S. W. Rep. 797, 5 L. R. A. 45. See Satterfield vs. Mayes, 11 Humph. (Tenn.) 57; McClung vs. McMillan, 48 Tenn. (1 Heisk.) 655; Bridgewater vs. Gordon, 2 Sneed (Tenn.) 5.

4. **GRANT IN TRUST FOR ONE AND HER CHILDREN** includes not only children born and living at the execution of the deed, but also those *en ventre sa mere*.—Gay vs. Baker, 5 Jones (N. C.) Eq. 344, 78 Am. Dec. 229. See Harper vs. Archer, 4 Smed. & M. (Miss.) 99, 43 Am. Dec. 472.

5. **GRANT TO HUSBAND AND WIFE FOR TERM OF NATURAL LIFE** and life of survivor, and after their decease to children and their heirs and assigns forever, vests remainder in children then born subject to be opened at birth of each succeeding child, so as to let them in equally with those born at time.—Graham vs. Houghtalin, 30 N. J. L. (1 Vr.) 552, 558. See Fort Jefferson Impr. Co. vs. Dupoyster, 108 Ky. 792, 51 S. W. Rep. 810, 48 L. R. A. 537; Moore vs. Littel, 41 N. Y. 66.

6. **Remainder lawfully created under statute in favor of unborn children, and deed construed to carry out such intention, where there is no legal obstacle.**—See vs. Derr, 57 Mich. 369, 24 N. W. Rep. 108.

§ 699. QUALITIES OF EXPECTANT ESTATES. Future interests pass by succession, will, and transfer, in the same manner as present interests.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2-17. How far transferable, etc., by deed or descent, etc.

18-20. Right to transfer.—By what instruments created.—Statutes.

21-24. Same.—Parties entitled to exercise.

25-28. Position of transferee.—Delivery.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in:** Barnett vs. Barnett, 104 Cal. 293, 301, 37 Pac. Rep. 1049 (construed and applied); Le Breton vs. Cook, 107 Cal. 410, 420, 40 Pac. Rep. 552 (construed and applied with other sections); In re Estate of Walkerly, 108 Cal. 627, 649, 49 Am. St. Rep. 97, 41 Pac. Rep. 772 (construed and applied); Dunn vs. Schell, 122 Cal. 626, 627, 55 Pac. Rep. 595 (construed and applied); Blackburn vs. Webb, 133 Cal. 420, 422, 65 Pac. Rep. 952 (construed and applied).

As to devolution and transfer of estates in remainder, see 24 Am. & Eng. Encyc. of L. (2d ed.) 406.

2. **ENJOYMENT OF ESTATE MAY BE DEPENDENT UPON CONTINGENCY** of survivorship, but such contingency does not deprive remainderman of present vested rights or interests which can be transferred.—Putnam vs. Story, 132 Mass. 305, 310.

3. **Contingent interest assignable, devisable, and descendable.**—Kenyon vs. See, 94 N. Y. 563, 568.

4. **Interest taken upon contingency** depending upon event of death of party without liv-

ing children, not transmissible or devisable, for reason that remainder was given to such of them only as he survived, yet though not vested in possession, and subject to defeat by death of legatee in remainder during life of owner of particular estate or his children, considered as vested in right from death of testatrix, and capable of alienation subject to same contingencies in hands of assignee as in those of assignor.—Dunn vs. Sargent, 101 Mass. 326, 328. See Winslow vs. Goodwin, 43 Mass. (7 Met.) 363; Gardner vs. Hooper, 69 Mass. (3 Gray) 398; Pierce vs. Lee, 75 Mass. (9 Gray) 42; Nash vs. Nash, 94 Mass. (12 Allen) 845.

5. **Pass to real and personal representatives** according to nature of such interests, as well as vested interests, so as to entitle such personal representatives to them when the contingency happens.—Kenyon vs. See, 94 N. Y. 563, 568. See Winslow vs. Goodwin, 43 Mass. (7 Met.) 363; Pinbury vs. Elkin, 1 Pr. Wms. 563; King vs. Withers, Cas. Temp. Tald. 117; Chaney vs. Graydon, 2 Atk. 616; Barnes vs. Allen, 1 Bro. Ch. 131.

6. **CONTINGENT FUTURE INTEREST** in freehold estate is possibility coupled with interest descendible to heir at law, or releasable, and it would seem descendible if from nature of contingency interest admitted of descent.—Jackson vs. Waldron, 13 Wend. (N. Y.) 178, 193; Marks vs. Marks, 1 Str. 135.

7. **In term releasable, or will pass to personal representative.**—Jackson vs. Waldron, 13

Wend. (N. Y.) 178, 198; Lampet's Case, 10 Co. 48 b.

8. **CONTINGENT REMAINDER ALIENABLE** when uncertainty which made it contingent was in event upon which it was limited to take effect, and only unalienable when uncertain to whom limited.—*Moore vs. Littell*, 41 N. Y. 66, 84. See also the case of *Striker vs. Mott*, 28 N. Y. 82.

9. **Vested interest in contingent remainder** assignable so as to pass to assignees in bankruptcy or insolvency.—*Putnam vs. Story*, 132 Mass. 205, 210. See *Nash vs. Nash*, 94 Mass. (12 Allen) 345; *Dunn vs. Sargent*, 101 Mass. 336; *Belcher vs. Burnett*, 126 Mass. 230.

10. **EXPECTANT INTERESTS ARE DESCENDIBLE**, devisable, and alienable under New York statutes.—*Moore vs. Littell*, 41 N. Y. 66, 84.

11. Under will may be released and conveyed by deed under New York revised statutes.—*Griffin vs. Shepard*, 40 Hun (N. Y.) 356.

12. Whether vested in interest or contingent with vested right or entirely contingent, pass by succession, will, and transfer, like present interests and estates (dictum).—In re Estate Walkerly, 108 Cal. 627, 648, 49 Am. St. Rep. 97, 41 Pac. Rep. 772.

13. The use of the word "expectant" by court in *In re Estate Walkerly*, supra, in connection with this section of the code, would seem to be open to criticism, too broad, as the right of child to inherit is an expectant estate, and yet under § 700, a mere possibility, such as the expectancy of an heir apparent, is not deemed an interest of any kind. If, however, its use was intended to be confined to the expectant right of one entitled in remainder, whether vested or contingent, and is so limited, it may to that extent be allowable, but even that may be doubted.—See 2 *Fearnes' Contingent Remainders*, 23, note 2.

See note by Ernest Watts in 33 L. R. A. 266-287.

14. **FUTURE INTEREST IN PROPERTY**, whether real or personal, may be transferred to same extent and in same manner as present interests.—*Le Breton vs. Cook*, 107 Cal. 410, 420, 40 Pac. Rep. 552. See *McCampbell vs. McCampbell*, 5 Litt. (Ky.) 92, 15 Am. Dec. 43.

15. Possibilities coupled with interest, although not technically clothed with an estate in possession, reversion or remainder, are in nature of remainders and as such devisable.—*Jackson vs. Waldron*, 13 Wend. (N. Y.) 178, 193; *Roe vs. Jones*, 1 H. Blk. 30, 3 Durnf. & E. (3 T. R.) 88, 1 Rev. Rep. 656.

16. **REMAINDER**, though not capable of immediate enjoyment, and therefore denominated a future interest, is an estate in property capable of being transferred in same manner as present interest.—*Barnett vs. Barnett*, 104 Cal. 298, 301, 37 Pac. Rep. 1049.

17. Share of child of tenant for life may be cut down in quantity by birth of other children, although he cannot be displaced as an heir, and has a vested assignable interest which will pass to assignee in bankruptcy

subject to same contingency in hands of such assignee as in those of the assignor.—*Putnam vs. Story*, 132 Mass. 205, 210. See *Winslow vs. Goodwin*, 48 Mass. (7 Met.) 863; *Gardner vs. Hooper*, 69 Mass. (3 Gray) 398.

18. Deed of trust executed by husband and wife giving husband and wife life interest with remainder on death of survivor to children, gives children contingent interests subject of assignment or devise.—*Harris vs. McElroy*, 45 Pa. St. 216, 220.

19. Devise or bequest of equitable interest in trust fund to one for life and at death to such children as should survive him gives children vested interest in contingent remainder assignable by them.—*Putnam vs. Story*, 132 Mass. 205, 210. See *Nash vs. Nash*, 94 Mass. (12 Allen) 345; *Dunn vs. Sargent*, 101 Mass. 336; *Belcher vs. Burnett*, 126 Mass. 230.

20. New York statute abrogates all distinctions and gives to all expectant estates of whatsoever description, whether vested or contingent, and whether contingent, upon an event which may never happen, or by reason of uncertainty in the person, character, or quality of alienation.—*Moore vs. Littell*, 41 N. Y. 66, 84.

21. Devisee in remainder under will devising estate to wife for life with directions that same shall be kept and remain intact, undivided and undisturbed until youngest son attains twenty-one, has power to mortgage or transfer future interest as if he had an estate in possession, having vested future estate.—*Dunn vs. Schell*, 122 Cal. 626, 627, 55 Pac. Rep. 695.

22. Devisee, under devise in trust for children, and to hold and manage property until youngest child attains majority, at which event property to vest absolutely, has no present interest in land but future vested transferable estate.—*Blackburn vs. Webb*, 133 Cal. 420, 422, 65 Pac. Rep. 952.

23. Grantee in remainder under deed trustee to allow grantor to occupy and improve premises and to join with grantor in conveyance, and after grantor's death, or at any time before, upon request by all children then living to convey, has power to assign interest subject to exercise of the powers contained in deed.—*Whipple vs. Fairchild*, 139 Mass. 262, 263, 30 N. E. Rep. 89.

See pars. 17, 18, 19 this note.

24. One of two parties entitled to remainder or to an expectant estate can release his share or right to contingent succession to other.—*Miller vs. Emans*, 19 N. Y. 385, 395, 397.

25. **POSITION OF TRANSFEREE**.—Transferree from trustee under will authorizing sale of homestead and personal estate at expiration of given period or on certain event, only entitled to possession at future period, although right to sell would embrace power to sell reversion in homestead and personal estate.—*Le Breton vs. Cook*, 107 Cal. 410, 420, 40 Pac. Rep. 552.

26. Assignee of remaindermen takes subject to enjoyment of estate by party upon whose

death estate is to fall into possession.—Putnam vs. Story, 132 Mass. 205, 210. See Blanchard vs. Blanchard, 83 Mass. (1 Allen) 223; Moore vs. Lyons, 25 Wend. (N. Y.) 119, 144.

27. Assignment of mortgage by devisees, under devise of determinable fees with executory devise to survivor in case of failure of issue of one dying, does not pass executory

interest of survivor to assignee.—Jackson vs. Waldron, 13 Wend. (N. Y.) 178.

28. Necessity of delivery.—Delivery requisite only when a present interest in transferred; transfer of future interest only entitles transferee to possession at a future period.—Le Breton vs. Cook, 107 Cal. 410, 420, 40 Pac. Rep. 552.

§ 700. SAME. [MERE POSSIBILITY NOT AN INTEREST.] A mere possibility, such as the expectancy of an heir apparent, is not to be deemed an interest of any kind.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
- 2-5. Construed with reference to its application.
- 6-8. Same—With reference to changes in rules of law or equity.
- 9-14. Doctrines of common law and equity.
15. Relinquishment to ancestor.
16. Jurisdiction of court on distribution of decedent's estate.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Schuyler vs. Broughton, 70 Cal. 282, 286, 11 Pac. Rep. 719 (erroneously cited for § 700 Code Civ. Proc.); In re Estate of Burdick, 112 Cal. 387, 393, 44 Pac. Rep. 734 (construed and applied); Supreme Council A. L. of H. vs. Gehrenbeck, 124 Cal. 43, 44, 56 Pac. Rep. 640 (construed and applied); In re Estate of Wickersham, 138 Cal. 355, 361, 70 Pac. Rep. 1076 (construed and applied with § 1045); In re Estate of Ryder, 141 Cal. 366, 370, 74 Pac. Rep. 993 (construed and applied with § 1045); Summerville vs. Stockton Mill. Co., 142 Cal. 529, 539, 76 Pac. Rep. 243 (erroneously cited for § 700 Code Civ. Proc.).

As to validity of transactions between heir and his ancestor relating to the former's expectancy, see monographic note by Ernest Watts, 32 L. R. A. 595, 602.

As to validity of sale of expectant estate by prospective heir, see monographic note by Ernest Watts, 32 L. R. A. 366-287.

2. CONSTRUED AS APPLYING to beneficiary in certificate in mutual benefit association whose interest was held to be like that of heir apparent dying before property vests.—Supreme Council A. L. of H. vs. Gehrenbeck, 124 Cal. 43, 44, 56 Pac. Rep. 640.

3. To community property legal title to which is in husband, who has full and absolute dominion and control over same, wife having no interest but a possibility in whatever remains upon dissolution.—In re Estate Burdick, 112 Cal. 387, 393, 44 Pac. Rep. 734.

4. To transfer by son to residuary legatees of expectant interest in his mother's estate, mother being alive.—In re Estate Wickersham, 138 Cal. 355, 361, 70 Pac. Rep. 1076.

5. Not applying to transfer by son of interest in his deceased father's estate to residuary legatees.—In re Estate Wickersham, 138 Cal. 355, 361, 70 Pac. Rep. 1076.

6. Not intended to overturn long-established principles of law as such intention is not clearly expressed.—In re Estate Garcelon, 104

Cal. 570, 584, 43 Am. St. Rep. 134, 38 Pac. Rep. 414, 32 L. R. A. 595.

7. Not intended to make any change in the rule by which courts of equity were theretofore governed in dealing with this class of contracts.—In re Estate Garcelon, 104 Cal. 570, 584, 43 Am. St. Rep. 134, 38 Pac. Rep. 414, 32 L. R. A. 595.

8. So far as they are substantially same as existing statutes, or common law, as continuations thereof and not as new enactments.—In re Estate Garcelon, 104 Cal. 570, 584, 43 Am. St. Rep. 134, 38 Pac. Rep. 414, 32 L. R. A. 595.

9. NAKED POSSIBILITY IS NOT the subject of assignment or release.—Edwards vs. Varick, 5 Den. (N. Y.) 664; Jackson vs. Waldron, 13 Wend. (N. Y.) 178.

10. Such an expectancy of heir apparent is not interest of any kind.—In re Estate Garcelon, 104 Cal. 570, 584, 43 Am. St. Rep. 134, 38 Pac. Rep. 414, 32 L. R. A. 595.

11. Not regarded at common law as such existing interest as to be subject of sale or capable of passing by assignment.—In re Estate Garcelon, 104 Cal. 570, 584, 43 Am. St. Rep. 134, 38 Pac. Rep. 414, 32 L. R. A. 595.

12. Subject of contract or settlement, and enforceable in equity after ancestor's death, if for valuable consideration and bona fide, not as trust attaching to estate, but as right of contract.—In re Estate Garcelon, 104 Cal. 570, 584, 43 Am. St. Rep. 134, 38 Pac. Rep. 414, 32 L. R. A. 595. Kan. Clendenen vs. Wyatt, 54 Kan. 523, 38 Pac. Rep. 792, 33 L. R. A. 278. N. J. Bacon vs. Bonham, 33 N. J. Eq. (6 Stew.) 614. Tenn. Steele vs. Frierson, 85 Tenn. 430, 3 S. W. Rep. 649.

13. ENFORCEABLE IN EQUITY as agreement to convey or by way of estoppel if on adequate consideration and otherwise unobjectionable.—In re Estate Wickersham, 138 Cal. 355, 362, 70 Pac. Rep. 1076.

14. Right of son to convey contingent interest in his father's estate, the father being alive, to his brother, denied and held not enforceable even in equity.—McCall vs. Hampton, 98 Ky. 186, 56 Am. St. Rep. 335, 32 S. W. Rep. 406, 33 L. R. A. 266.

15. HEIR MAY RELINQUISH TO ANCESTOR all interest in estate of latter which might otherwise in future vest in him as such heir.—In re Estate Garcelon, 104 Cal. 570, 584, 43 Am. St. Rep. 134, 38 Pac. Rep. 414, 32 L. R. A. 595. See Ill. Bishop vs. Davenport, 53 Ill.

105; *Kershaw vs. Kershaw*, 102 Ill. 307; *Crum vs. Sawyer*, 132 Ill. 443, 24 N. E. Rep. 956. *N. J. Havens vs. Thompson*, 26 N. J. Eq. (11 C. E. Gr.) 383; *Brands vs. De Witt*, 44 N. J. Eq. (17 Stew.) 545, 6 Am. St. Rep. 909, 10 Atl. Rep. 181, 14 Id. 894. *Pa. Powers' Appeal*, 63 Pa. St. 443.

16. COURT HAS NO JURISDICTION ON DISTRIBUTION of decedent's estate over con-

veyances made prior to death of deceased by persons who were not at the time either heirs, legatees, or devisees, and who have no interest capable of conveyance.—In *re Estate Ryder*, 141 Cal. 366, 370, 74 Pac. Rep. 993. See *Estate Garcelon*, 104 Cal. 570, 43 Am. St. Rep. 134, 38 Pac. Rep. 414, 22 L. R. A. 595; In *re the Estate of Wickersham*, 138 Cal. 355, 70 Pac. Rep. 1076.

§ 701. INTERESTS IN REAL PROPERTY. In respect to real or immovable property, the interests mentioned in this chapter are denominated estates, and are specially named and classified in part two of this division.

History: Enacted March 21, 1872.

Commissioners' note says: "It has been deemed unadvisable to apply the technical name of estates in real property to interests

in personal property, although there are precedents for such a course."

§ 702. SAME. [NAMES AND CLASSIFICATION OF INTERESTS.] The names and classification of interests in real property have only such application to interests in personal property as is in this division of the code expressly provided.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 391, held unconstitutional, see history, § 4 ante.

§ 703. WHAT FUTURE INTERESTS ARE RECOGNIZED. No future interest in property is recognized by the law, except such as is defined in this division of the code.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 392, held unconstitutional, see history, § 4 ante.

ARTICLE II.

CONDITIONS OF OWNERSHIP.

§ 707. Fixing the time of enjoyment.

§ 708. Conditions.

§ 709. Certain conditions precedent void.

§ 710. Conditions restraining marriage void.

§ 711. Conditions restraining alienation void.

§ 707. FIXING TIME OF ENJOYMENT. The time when the enjoyment of property is to begin or end may be determined by computation, or be made to depend on events. In the latter case, the enjoyment is said to be upon condition.

History: Enacted March 21, 1872.

I. In General.

1. Applied, cited, construed, referred to, etc.

2-10. Construction—Rules for.

11-15. Definitions—Limitations—Estates on condition, etc.

II. Conditions—How Created.

16. Annuity for services to be rendered.

17, 18. Apt words—Provisos, etc.

19, 20. Conditions—Must be expressed.

21, 22. Same—May be void and grant valid.

23. Same—Not shown when.

24. Same—Precedent and subsequent.

25, 26. Conditional limitations—How created.

27-31. Conditional estate—How created.

32, 33. Same—Not created when.

34-39. Deed with condition—Effect.

40. Enjoyment of estate—Limitation.

41-44. Estate upon condition—When and how created.

45, 46. Grant condition under old law—Now a trust—Subsequent change.

47. "Proviso"—Effect of.

48, 49. Words in grant—Create condition, when.

III. Distinction between Conditions and Conditional Limitations.

50, 51. Distinction—Vested right reserved.

52-55. Grant on condition—Entire estate does not pass—Reverter.

IV. Estate Vests, When.

56-61. Conditional estate—Limitation as to time or event.

62. Same—Conditions precedent or subsequent.

V. Evidence—Parol—Admissibility.

63-65. Parol—Admissible, when.

66, 67. Same—Not admissible, when.

VI. Words and Phrases Creating Conditions and Limitations.

68, 69. "Causa" and "pro."

70. "Ea intentione, ad effectum, ad propositum."

71, 72. "Paying"—Limitation in will.

73-79. "Proviso"—Defined—Limitation.

80. "Si, or quod si contingat."

81. "Sub conditione, ita quod proviso."

82. "To pay"—In a will.

I. IN GENERAL.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Nichols vs. Emery*, 109 Cal. 323, 330, 50 Am. St. Rep. 43, 41 Pac. Rep. 1089 (construed and applied).

2. CONSTRUCTION.—Conditions defeating estates should not be construed at option, or through misconduct or neglect of others, where other conclusion reasonable.—*Calkins vs. Smith*, 41 Mich. 409, 1 N. W. Rep. 1048.

3. Condition annexed to an estate given is a divided clause from the grant, and cannot frustrate the grant precedent, neither in anything expressed nor in anything implied which is of its nature incident and separable from the thing granted.—*Murray vs. Green*, 64 Cal. 363, 367, 28 Pac. Rep. 118. See *De Peyster vs. Michael*, 6 N. Y. 467, 57 Am. Dec. 470.

4. Conditions involving forfeitures construed strictly as against the parties for whose benefit created.—*Alexander vs. Jackson*, 92 Cal. 514, 522, 27 Am. St. Rep. 153, 23 Pac. Rep. 593.

5. Deed containing covenants or conditions working a forfeiture, construed with utmost jealousy to prevent restraint going beyond expressed stipulation.—*Randol vs. Scott*, 110 Cal. 590, 596, 42 Pac. Rep. 976.

6. Deed containing covenants must be restrained to the most technical limits and terms and conditions upon which the right is to be exercised.—*Randol vs. Scott*, 110 Cal. 590, 596, 42 Pac. Rep. 976.

7. Deed by municipal corporations, with conditions, construed in same manner as those of natural persons.—*Norris vs. Moody*, 84 Cal. 143, 145, 24 Pac. Rep. 37.

8. Intention of the parties, as shown by instrument, must be looked at to determine nature of condition.—*Bank of Suisun vs. Stark*, 106 Cal. 202, 206, 39 Pac. Rep. 531.

9. Not shown by use of any particular set of technical words.—*Bank of Suisun vs. Stark*, 106 Cal. 202, 206, 39 Pac. Rep. 531.

"Proviso."—See pars. 73-79 this note.

10. Words must admit of no other reasonable interpretation.—*Raley vs. Umatilla Co.*, 15 Oreg. 172, 3 Am. St. Rep. 142, 144, 13 Pac. Rep. 390.

11. DEFINITIONS.—Condition determines estate after breach upon entry or claim of the heirs.—*Brattle Square Church vs. Grant*, 69 Mass. (3 Gray) 142, 63 Am. Dec. 725.

12. Conditional limitation defined as a condition followed by a limitation over, in case condition not fulfilled, or a breach thereof.—*Brattle Square Church vs. Grant*, 69 Mass. (3 Gray) 142, 63 Am. Dec. 725.

13. Limitation marks the period which determines the estate without any act of the party holding expectant interest.—*Brattle Square Church vs. Grant*, 69 Mass. (3 Gray) 142, 63 Am. Dec. 725.

14. Estate on condition defined as one which has the condition expressed in the grant or devise itself, in the qualification annexed whereby the estate commences or is enlarged or diverted upon performance or breach of the condition.—*Wheeler vs. Walker*, 2 Conn. 196, 7 Am. Dec. 264.

15. Estate upon condition is one that vests or is enlarged or diverted upon the happening or not happening of some event.—*Raley vs. Umatilla Co.*, 15 Oreg. 172, 3 Am. St. Rep. 142, 144, 13 Pac. Rep. 390.

II. CONDITIONS—HOW CREATED.

16. ANNUITY TO BE PAID "FOR SERVICES TO BE RENDERED, or privileges to be enjoyed," creates an estate upon condition.—*Rawson vs. Inhabitants of School Dist.*, 39 Mass. (7 Allen) 125, 83 Am. Dec. 670; *Cowper vs. Andrews*, Hob. 41.

17. APT AND SUFFICIENT WORDS expressing a condition must be used.—*Rawson vs. School Dist.*, 39 Mass. (7 Allen) 125, 83 Am. Dec. 670.

18. Appropriate words, such as "on condition," "provided always," "if it shall so happen," or "so that the grantee pay, etc., within a specified time," and the like, must be used in order to create.—*Raley vs. Umatilla Co.*, 15 Oreg. 172, 3 Am. St. Rep. 142, 13 Pac. Rep. 390; *Craig vs. Wells*, 11 N. Y. 320; *Jackson vs. McClallen*, 8 Cow. (N. Y.) 295, 296.

19. CONDITIONS MUST BE EXPRESSED or clearly implied.—*Pacific Coast Steamship Co. vs. Kimball*, 114 Cal. 414, 417, 46 Pac. Rep. 275.

20. Conditions are not to be raised readily by inference or argument.—*Rawson vs. School Dist.*, 39 Mass. (7 Allen) 125, 83 Am. Dec. 670.

21. May be void but the grant valid.—*Patterson vs. Donner*, 48 Cal. 369, 379.

22. Condition which is void cannot be made good by agreement or consent of parties.—*Murray vs. Green*, 64 Cal. 363, 367, 28 Pac. Rep. 118. See *De Peyster vs. Michael*, 6 N. Y. 467, 57 Am. Dec. 470.

23. Not shown by clause "on the expressed stipulation that a dwelling-house of not less than a certain value shall be put upon the land within a certain time."—*Cullen vs. Sprigg*, 83 Cal. 56, 64, 23 Pac. Rep. 222; *Stone vs. Houghton*, 139 Mass. 175, 31 N. E. Rep. 719.

24. Precedent and subsequent.—See post § 708 and note.

25. CONDITIONAL LIMITATION created by words "devising the estate to another party

in event of breach."—*Brattle Square Church vs. Grant*, 69 Mass. (3 Gray) 142, 63 Am. Dec. 725; *Guild vs. Richards*, 32 Mass. (16 Gray) 309; *Lindsey vs. Lindsey*, 45 Ind. 57.

26. Created by use of words "paying forty shillings to each of his brothers and sisters."—*Wellock vs. Hammond*, Cro. Eliz. 204.

27. **CONDITIONAL ESTATE IS CREATED** by use of the words "to pay," or "paying," used in grant.—*Wheeler vs. Walker*, 2 Conn. 196, 7 Am. Dec. 264; *Crickmere vs. Paterson*, Cro. Eliz. 146; *Boraston's Case*, 3 Coke 21; *Mary Portington's Case*, 10 Coke 41; *Wellock vs. Hammond*, Cro. Eliz. 204; *Fox vs. Carlyne*, Cro. Eliz. 454.

28. By use of words "they jointly and severally paying."—*Wheeler vs. Walker*, 2 Conn. 196, 7 Am. Dec. 264.

29. By use of words with a proviso or condition for re-entry.—*Raley vs. Umatilla Co.*, 15 Oreg. 172, 3 Am. St. Rep. 142, 144, 13 Pac. Rep. 890.

30. By use of words "sub condicione ita quod proviso."—*Rawson vs. Inhabitants of School Dist.*, 89 Mass. (7 Allen) 125, 83 Am. Dec. 670.

31. By use of technical words, such as "provided," "so as," or "on condition."—*Rawson vs. Inhabitants of School Dist.*, 89 Mass. (7 Allen) 125, 83 Am. Dec. 670.

32. Not created by deed unless no other construction can be placed upon it.—*Ayer vs. Emery*, 96 Mass. (14 Allen) 67. See Ind. *Scantlin vs. Garvin*, 46 Ind. 277. Oreg. *Raley vs. Umatilla Co.*, 15 Oreg. 172, 3 Am. St. Rep. 142, 13 Pac. Rep. 890. Wis. *Horner vs. Chicago etc. R. Co.*, 38 Wis. 165.

32. Not created by deed with condition attached following deed absolute.—*Alemanly vs. Daly*, 36 Cal. 90, 93.

34. **DEED WITH CONDITION** attached following a deed absolute creates no condition.—*Alemanly vs. Daly*, 36 Cal. 90, 93.

35. With condition giving rise to no claim for damages, or claim for liquidated damages, not a mortgage in equity, but conditional deed at common law.—*Parsons vs. Smilie*, 97 Cal. 647, 653, 32 Pac. Rep. 702. See *Bethlehem vs. Annis*, 40 N. H. 34, 39, 77 Am. Dec. 700.

36. With stipulation for delivery up of the property on failure to comply with conditions, amounts to a transfer in present, and a trust enforceable in equity.—*Cayton vs. Walker*, 10 Cal. 450, 454, 455.

37. For use of church purposes only, does not create a condition.—*Taylor vs. Benford*, 37 Ohio St. 262; *Raley vs. Umatilla Co.*, 15 Oreg. 172, 3 Am. St. Rep. 142, 144, 13 Pac. Rep. 890.

See par. 54 this note.

38. *Habendum* in a deed "to have and to hold for use of said religious Society of Friends so long as it may be needed for meeting purposes, then said premises to fall back to the original tract," does not create a condition.—*Carter vs. Branson*, 79 Ind. 14. See Ga. *Thornton vs. Trammell*, 39 Ga. 302. Ind. *Risley vs. McNiece*, 71 Ind. 434. Mass. *Ayer vs. Emery*, 96 Mass. (14 Allen) 67; *Packard vs. Ames*, 82 Mass. (16 Gray) 327. Pa. *First M. E. Church*

of *Columbia vs. Old Columbia Public Grounds Co.*, 103 Pa. St. 608.

39. Deed of land to set a meeting-house thereon, implies no condition.—*Raley vs. Umatilla Co.*, 15 Oreg. 172, 3 Am. St. Rep. 142, 144, 13 Pac. Rep. 890.

40. **ENJOYMENT OF AN ESTATE** may be limited by trust conditions or covenants.—*Rona vs. Meier*, 47 Iowa, 607, 29 Am. Rep. 493; *Anderson vs. Cary*, 36 Ohio St. 506, 38 Am. Rep. 602.

41. **ESTATE UPON CONDITION.**—Estate must exist in grantor at time, in order to create.—*Alemanly vs. Daly*, 36 Cal. 90, 93.

42. Estate upon condition not created by deed except where grant admits no other interpretation.—*Raley vs. Umatilla Co.*, 15 Oreg. 172, 3 Am. St. Rep. 142, 13 Pac. Rep. 890.

43. Estate cannot be charged with a condition which is not express or implied.—*Pacific Coast Steamship Co. vs. Kimball*, 114 Cal. 414, 417, 46 Pac. Rep. 375.

44. **External form** is necessary to every good condition.—*Rawson vs. Inhabitants School Dist.*, 89 Mass. (7 Allen) 125, 83 Am. Dec. 670.

45. **GRANT A CONDITION UNDER OLD LAW** now construed as in trust.—*Stanley vs. Colt*, 72 U. S. (5 Wall.) 119, bk. 18 L. ed. 502.

See uses and trusts, post 347 et seq. and notes.

46. Grantor of estate absolute cannot afterwards charge same with condition.—*Alemanly vs. Daly*, 36 Cal. 90, 93.

47. **"PROVISO"** restraining the sale of the property and containing conditions as to leasing, creates trust and not condition.—*Stanley vs. Colt*, 72 U. S. (5 Wall.) 119, bk. 18 L. ed. 502.

48. **WORDS IN A DEED**, "for courthouse and other county buildings," create no condition.—*Supervisors of Warren Co. vs. Patterson*, 56 Ill. 119.

See "Words and Phrases" pars. 68-81 this note.

49. "And these presents are upon this condition," create conditional estate without clause of re-entry.—*Jackson vs. Allen*, 3 Cow. (N. Y.) 220.

As to technical words, see par. 68 this note.

III. DISTINCTION BETWEEN CONDITIONS AND CONDITIONAL LIMITATIONS.

50. **DISTINCTION BETWEEN AN ESTATE IN FEE ON CONDITION AND CONDITIONAL LIMITATION** is that former leaves vested right in grantor reserved as present existing interest transmissible to his heirs, while latter passes whole estate at once, creating an estate to arise and vest in third person upon contingency at future uncertain period.—*Brattle Sq. Church vs. Grant*, 69 Mass. (3 Gray) 142, 63 Am. Dec. 725.

51. Introduced in wills to do away with embarrassment arising from common-law rule prohibiting estate from being limited to stranger upon an event destroying prior estate.—*Brattle Sq. Church vs. Grant*, 69 Mass. (3 Gray) 142, 63 Am. Dec. 725.

52. GRANT ON CONDITION.—Entire interest does not pass by the same instrument or conveyance where estate in fee is created on condition.—*Brattle Sq. Church vs. Grant*, 69 Mass. (3 Gray) 142, 63 Am. Dec. 725.

53. Grant of fee on condition does not fetter or tie up estates or restrain alienation, but grant with limitation over does.—*Brattle Sq. Church vs. Grant*, 69 Mass. (3 Gray) 142, 63 Am. Dec. 725.

Passes out of grantor or deviser by same instrument where estate is limited over to third person upon breach.—*Brattle Sq. Church vs. Grant*, 69 Mass. (3 Gray) 142, 63 Am. Dec. 725.

54. GRANT TO TRUSTEES OF CHURCH upon condition that same shall be used as residence by minister or eldest minister of church, and in case same is not improved for that use same to be void and revert to testator's estate and go to his nephew and his heirs, is conditional limitation and not an estate upon condition.—*Brattle Sq. Church vs. Grant*, 69 Mass. (3 Gray) 142, 63 Am. Dec. 725. See pars. 37-39 this note.

55. POSSIBILITY OF REVERTER arises in grantor or deviser on creation of conditional estate.—*Brattle Sq. Church vs. Grant*, 69 Mass. (3 Gray) 142, 63 Am. Dec. 725.

IV. ESTATE VESTS, WHEN.

56. CONDITIONAL ESTATE VESTS by use of the words "so that he pay to another a specific sum within a specified time."—*Wheeler vs. Walker*, 2 Conn. 196, 7 Am. Dec. 264; *Judd vs. Bushnell*, 7 Conn. 204; *Lloyd vs. Holly*, 8 Conn. 490; *Seymour vs. Harvey*, 11 Conn. 275.

57. Vests by use of the words "if it shall so happen."—*Wheeler vs. Walker*, 2 Conn. 196, 7 Am. Dec. 264; *Judd vs. Bushnell*, 7 Conn. 204; *Lloyd vs. Holly*, 8 Conn. 490; *Seymour vs. Harvey*, 11 Conn. 275.

58. Vests by use of the words "provided always."—*Wheeler vs. Walker*, 2 Conn. 196, 7 Am. Dec. 264; *Judd vs. Bushnell*, 7 Conn. 204; *Lloyd vs. Holly*, 8 Conn. 490; *Seymour vs. Harvey*, 11 Conn. 275.

59. Vests under grant to person on condition to be performed within specified time.—*Wheeler vs. Walker*, 2 Conn. 196, 7 Am. Dec. 264; *Judd vs. Bushnell*, 7 Conn. 204; *Lloyd vs. Holly*, 8 Conn. 490; *Seymour vs. Harvey*, 11 Conn. 275.

60. ENJOYMENT OF CESTUI QUE TRUST may commence in future, and depend for its commencement upon termination of an existing life or lives, or of intermediate estate.—*Nichols vs. Emery*, 109 Cal. 223, 230, 50 Am. St. Rep. 43, 41 Pac. Rep. 1089.

61. GRANT TO WIFE ON CONDITION that she continues to live with her husband, vests estate in husband upon her ceasing to live with him.—*Smith vs. Smith*, 23 Wis. 176, 39 Am. Dec. 153.

62. Conditions precedent and subsequent.—Vesting of, see post §708 and note.

V. EVIDENCE.

63. PAROL EVIDENCE.—Admissible to show writing was delivered to take effect upon

happening of condition, evidence not affecting terms or varying legal import.—*Reiner vs. Crawford*, 23 Wash. 669, 23 Am. St. Rep. 248, 63 Pac. Rep. 516.

64. Admissible to show obligation was subject to condition, and that delivery of instrument depended upon its performance.—*McFarland vs. Sikes*, 54 Conn. 250, 1 Am. St. Rep. 111, 7 Atl. Rep. 408.

65. Admissible to show condition on which performance of instrument was to take effect.—*Michels vs. Olmstead*, 14 Fed. Rep. 219.

66. Not admissible to determine whether deed when delivered is to take effect absolute or only upon performance of deed, when condition not expressed.—*Mowry vs. Heney*, 36 Cal. 471, 476, 25 Pac. Rep. 17.

Compare: *Brison vs. Brison*, 75 Cal. 525, 533, 7 Am. St. Rep. 189, 17 Pac. Rep. 639.

67. Not admissible to prove that deed absolute on its face is clothed with condition.—*Hargrave vs. Melbourne*, 36 Ala. 270, 5 So. Rep. 285; *Shelby vs. Tardy*, 84 Ala. 327, 4 So. Rep. 276; *Cherry vs. Herring*, 82 Ala. 458, 3 So. Rep. 667.

VI. WORDS AND PHRASES CREATING CONDITIONS AND LIMITATIONS.

68. "CAUSA" AND "PRO" create condition when instrument is made in express terms for specific purpose or in consideration of something to be done or rendered and interpreted as creating conditional estate.—*Rawson vs. Inhabitants School Dist.*, 73 Mass. (7 Allen) 125, 33 Am. Dec. 670.

69. "Causa" and "pro" confined to cases where grant is of an executory nature.—*Rawson vs. Inhabitants School Dist.*, 73 Mass. (7 Allen) 125, 33 Am. Dec. 670.

70. "EA INTENTIONE, AD EFFECTUM, AD PROPOSITUM," do not of themselves create conditional estate, and must be co-joined with others showing intention to create forfeiture, to work conditional estate.—*Rawson vs. Inhabitants School Dist.*, 73 Mass. (7 Allen) 125, 33 Am. Dec. 670.

71. "Paying" amounts to limitation in will by construction as not being word of conditional limitation.—*Wheeler vs. Walker*, 2 Conn. 196, 7 Am. Dec. 264; *Mary Portington's Case*, 10 Co. Rep. 41.

72. Used in will serves as word of limitation to supply intention of testator.—*Wheeler vs. Walker*, 2 Conn. 196, 7 Am. Dec. 264; *Crickmere vs. Paterson*, Cro. Eliz. 146.

73. "PROVISO,"—Defined as limitation or exception to grant made, or authority conferred, effect of which is to declare that one shall not operate or other be exercised, unless in case provided.—*City of Stockton vs. Weber*, 98 Cal. 433, 440, 33 Pac. Rep. 332; *Voorhees vs. Bank of United States*, 35 U. S. (10 Pet.) 449, bk. 9 L. ed. 490.

74. "Proviso" appropriate as construing common-law conditions in deed or will.—*Stanley vs. Colt*, 72 U. S. (5 Wall.) 119, bk. 18 L. ed. 502.

75. Always implies condition, unless subsequent words changed it to covenant.—*City of*

Stockton vs. Weber, 93 Cal. 433, 440, 33 Pac. Rep. 332.

76. Frequently explained and applied as expressing covenant or limitation in trust.—Stanley vs. Colt, 72 U. S. (5 Wall.) 119, bk. 18 L. ed. 502.

77. Gives way to intention of parties as gathered from examination of whole instrument.—Stanley vs. Colt, 72 U. S. (5 Wall.) 119, bk. 18 L. ed. 502.

78. Used to create condition.—City of Stockton vs. Weber, 93 Cal. 433, 440, 33 Pac. Rep. 332; Gibert vs. Peteler, 33 N. Y. 165, 168, 97 Am. Dec. 785; Raley vs. Umatilla Co., 15 Oreg.

172, 3 Am. St. Rep. 142, 144, 13 Pac. Rep. 390 (rehearing denied).

79. "SI, OR QUOD SI CONTINGAT" create condition if clause of forfeiture or re-entry added.—Rawson vs. Inhabitants School Dist., 73 Mass. (7 Allen) 125, 33 Am. Dec. 670.

80. "SUB CONDITIOE, ITA QUOD, PRO-VISO," are words of condition.—Rawson vs. Inhabitants School Dist., 73 Mass. (7 Allen) 125, 33 Am. Dec. 670; Mary Portington's Case, 10 Co. Rep. 41, 42a.

81. "To pay" in will imports a condition.—Wheeler vs. Walker, 3 Conn. 196, 7 Am. Dec. 264.

§ 708. **CONDITIONS.** Conditions are precedent or subsequent. The former fix the beginning, the latter the ending, of the right.

History: Enacted March 21, 1872.

As to conditions precedent, see post § 1436 and note.

As to conditions subsequent, see post § 1438 and note.

§ 709. **CERTAIN CONDITIONS PRECEDENT VOID.** If a condition precedent requires the performance of an act wrong of itself, the instrument containing it is so far void, and the right cannot exist. If it requires the performance of an act not wrong of itself, but otherwise unlawful, the instrument takes effect and the condition is void.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 392, held unconstitutional, see history, § 4 ante.

1. Applied, cited, construed, referred to, etc.
2. As to unlawful contracts.
3. Construction—"Instrument."
4. Commissioners' note.

1. Applied, cited, construed, referred to, etc., in: Hoag vs. Howard, 55 Cal. 564, 566 (construed with other sections).

2. As to unlawful contracts, see post § 1441 and note.

3. Construction—"Instrument," as used in this and other sections of code, defined as some

written paper or instrument signed and delivered by one person to another, transferring the title to, or creating lien on, property, or giving right to debt or duty.—Hoag vs. Howard, 55 Cal. 564, 565.

4. Commissioners' note appended to this section says: "All the instances of conditions against law are reducible under one of these heads: 1. To do something that is malum in se or malum prohibitum; 2. To omit something that is a duty; 3. To encourage such crimes and omissions.—1 Pr. Wms. 189."

§ 710. **CONDITIONS RESTRAINING MARRIAGE.** [VOID WHEN.] Conditions imposing restraints upon marriage, except upon the marriage of a minor, are void; but this does not affect limitations where the intent was not to forbid marriage, but only to give the use until marriage.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 218.

I. When Against Public Policy.

- 1, 2. Conditions not favored in law.
- 3, 4. Conditions in general restraint of marriage.
- 5-9. Same—Not general, but too rigid, etc.
10. Same—Deed inducing singleness.
- 11-16. Conditions subsequent in restraint of marriage.
- 17, 18. Same—Insurance barring benefits on marriage.
19. Same—Will holding inducements to live separate.

II. When Not Against Public Policy.

- 20-22. Conditions against rash marriages.

23-25. Same—Restraining till twenty-one, etc.

26. Condition subsequent restraining marriage.

27-35. Same—Grant of estate until marriage, etc.

I. WHEN AGAINST PUBLIC POLICY.

1. **CONDITIONS NOT FAVORED IN LAW** when they defeat estates.—Calkins vs. Smith, 41 Mich. 409, 412, 1 N. W. Rep. 1048.

2. **CONDITION** of such nature and rigidity as to operate as probable prohibition, void.—White vs. Equitable N. Benf. Union, 76 Ala. 251, 52 Am. Rep. 325.

3. **CONDITIONS IN GENERAL RESTRAINT**

OF MARRIAGE, whether of man or woman generally, regarded as against public policy and void.—*Bostick vs. Blades*, 59 Md. 231, 43 Am. Rep. 548; *King vs. King*, 63 Ohio St. 362, 81 Am. St. Rep. 635, 59 N. E. Rep. 111, 52 L. R. A. 157; *Little vs. Birdwell*, 21 Tex. 597, 73 Am. Dec. 242.

As to conditions in restraint of marriage, see §1676 and note; also notes 1 L. R. A. 227; 38 Am. Dec. 156-161, 80 Am. Dec. 493.

4. Evasions of the law or cover to restrain marriage generally, are void.—*White vs. Equitable N. Benf. Union*, 76 Ala. 251, 52 Am. Rep. 325, 327.

5. Not general, but otherwise too rigid and unreasonable, are void.—*Little vs. Birdwell*, 21 Tex. 597, 73 Am. Dec. 242.

6. In conveyances or annexed to legacies and devises, in partial restraint of marriage in respect to time, place, or person reasonable and not materially and practically creating an undue restraint, are not void.—*White vs. Equitable N. Benf. Union*, 76 Ala. 251, 52 Am. Rep. 325.

7. Restraining marriage except to person who is not seized of estate in fee simple are void.—*White vs. Equitable N. Benf. Union*, 76 Ala. 251, 52 Am. Rep. 325.

8. Restraining marriage except to man of particular profession held void.—*White vs. Equitable N. Benf. Union*, 76 Ala. 251, 52 Am. Rep. 325.

9. Restraining marriage with party living in certain town or county held void.—*White vs. Equitable N. Benf. Union*, 76 Ala. 251, 52 Am. Rep. 325.

10. Deed making amount to be paid dependent upon time member remains unmarried is void.—*Chalfant vs. Payton*, 91 Ind. 202, 46 Am. Rep. 586.

11. CONDITION SUBSEQUENT in restraint of marriage annexed to legacy, void.—*Commonwealth vs. Stauffer*, 10 Pa. St. 350, 51 Am. Dec. 489.

12. GIFT IN RESTRAINT OF MARRIAGE not providing for vesting of legacy in third person or for its sinking into residue on breach is invalid as in *terrorem*, and gift absolute.—*Phillips vs. Ferguson*, 85 Va. 509, 17 Am. St. Rep. 78, 8 S. E. Rep. 241, 1 L. R. A. 837.

13. To son and daughter upon condition that if daughter marries or dies all should belong to son, void as in restraint of marriage.—*Williams vs. Cowden*, 13 Mo. 211, 53 Am. Dec. 142.

14. To wife during her widowhood and natural life, with remainder after death or marriage, to her children, void under Indiana statute.—*Stilwell vs. Knapper*, 69 Ind. 558, 35 Am. Rep. 240.

15. Grant to wife during her widowhood and ceasing upon her marrying, is in *terrorem*, and void as in restraint of marriage.—*Parsons vs. Winslow*, 6 Mass. 169, 4 Am. Dec. 107.

16. Contra: *Commonwealth vs. Stauffer*, 10 Pa. St. 350, 51 Am. Dec. 489, in which Gibson, C. J., observes: "It would be extremely difficult to say why a husband should not be at liberty to leave a homestead to his wife without being compelled to let her share it with a successor

to his bed, to use it as a nest to hatch a brood of strangers to his blood."

17. Insurance policy barring benefit on marriage within certain time from date of certificate, void, as in restraint of marriage.—*White vs. Equitable N. Benf. Union*, 76 Ala. 251, 52 Am. Rep. 325.

18. Benefit certificates considered as policies of insurance, and void when amount to be paid stops and depends upon time member refrains from marriage.—*Chalfant vs. Payton*, 91 Ind. 202, 46 Am. Rep. 586. See *Franklin F. Ins. Co. vs. Hazzard*, 41 Ind. 116, 13 Am. Rep. 313; *James vs. Jellison*, 94 Ind. 292, 48 Am. Rep. 151.

19. Will holding out inducement to legatee to live separate and apart from husband against public policy.—*Born vs. Horstmann*, 80 Cal. 452, 456 22 Pac. Rep. 338, 5 L. R. A. 577; *Wren vs. Bradley*, 2 De Gex & S. 49; *Brown vs. Peck*, 1 Edm. 140; *Conrad vs. Long*, 33 Mich. 79.

II. WHEN NOT AGAINST PUBLIC POLICY.

20. CONDITIONS—Against rash and imprudent marriages in the exercise of due and reasonable precaution are valid.—*White vs. Equitable N. Benf. Union*, 76 Ala. 251, 52 Am. Rep. 325.

21. Conditions preserving such reasonable and prudent relations and sureties as tend to protect individuals, valid.—*White vs. Equitable N. Benf. Union*, 76 Ala. 251, 52 Am. Rep. 325, 327.

22. Condition providing that in event of any of the daughters becoming a widow or otherwise lawfully separated from her husband to distribute certain portion to daughters not against public policy.—*Born vs. Horstmann*, 80 Cal. 452, 456, 22 Pac. Rep. 338, 5 L. R. A. 577.

23. Restraining marriage under twenty-one, or any other reasonable age, are valid.—*White vs. Equitable N. Benf. Union*, 76 Ala. 251, 52 Am. Rep. 325.

24. With particular persons are valid.—*White vs. Equitable N. Benf. Union*, 76 Ala. 251, 52 Am. Rep. 325; *Bostick vs. Blades*, 59 Md. 231, 43 Am. Rep. 548.

25. Without consent of parents or guardians or executors are valid.—*White vs. Equitable N. Benf. Union*, 76 Ala. 251, 52 Am. Rep. 325.

26. Subsequent restraint of marriage under devise, valid.—*Commonwealth vs. Stauffer*, 10 Pa. St. 350, 51 Am. Dec. 489.

27. Grant of estate to one until marriage, and upon marriage, then over, is valid limitation, as distinguished from condition.—*Bostick vs. Blades*, 59 Md. 231, 43 Am. Rep. 548; *Arthur vs. Cole*, 56 Md. 100, 40 Am. Rep. 409.

28. To daughter at majority, or upon marrying with consent of her mother, is valid.—*Hogan vs. Curtin*, 38 N. Y. 162, 42 Am. Rep. 244; *Bostick vs. Blades*, 59 Md. 231, 43 Am. Rep. 548.

29. To husband for natural life with limitation over in case of his death, or marrying again, valid.—*Bostick vs. Blades*, 59 Md. 231, 43 Am. Rep. 548.

30. To wife "so long as she shall continue my widow, but upon event of her marrying, then her interest to go to my heirs," is not in restraint of marriage.—*Pringle vs. Dunkley*, 14 Smed. & M. (Miss.) 16, 53 Am. Dec. 110.

31. With condition that if she marry again, her share should go to her son, and she should have no control over same, is valid.—*Herd vs. Catron*, 97 Tenn. 662, 37 S. W. Rep. 551, 37 L. R. A. 731.

32. Grant to woman during widowhood, with remainder over in case of remarriage, is valid.—*Dumey vs. Schoeffler*, 24 Mo. 170, 69 Am. Dec. 422; *Hotz's Estate*, 38 Pa. St. 422, 30 Am. Dec. 490.

33. Not restraint of marriage.—*Little vs. Birdwell*, 21 Tex. 597, 73 Am. Dec. 242.

34. Is not void even without limitations over.—*Coppage vs. Alexander's Heirs*, 2 B. Mon. (Ky.) 313, 38 Am. Dec. 153.

35. Provision "unless she shall be married, in which case her life estate shall cease," not restraint on marriage.—*Mann vs. Jackson*, 84 Me. 400, 30 Am. St. Rep. 358, 24 Atl. Rep. 386, 16 L. R. A. 707.

As to effect of statute prohibiting remarriage of guilty party on divorce, see monographic note by H. P. Farnham in 24 L. R. A. 831.

As to injunctions against enforcing contracts relating to marriage under marriage-brokerage contracts, see monographic note by J. H. Hill in 48 L. R. A. 842-850.

As to restraint with limitation over, see pars. 29-32 this note.

§ 711. CONDITIONS RESTRAINING ALIENATION VOID. Conditions restraining alienation, when repugnant to the interest created, are void.

History: Enacted March 21, 1872.

I. In General.

1. Applied, cited, construed, referred to, etc.
- 2-5. Alienable quality inseparable to fee simple.

II. Condition in Restraint of Alienation.

- 6-9. Conditions repugnant to estate—When void.
 - 10-12. Covenants obnoxious to code.
 - 13-20. Grants limiting use of or power over estate.
 21. Heirs not bound by condition.
 22. Restraint against perpetuities.
- ### III. When Not in Restraint of Alienation.
- 23-29. Alienation restrainable by common law—As to time, etc.
 30. Covenant in lease restraining sale.
 - 31-35. Grant less than whole estate—To minor, etc.
 - 36, 37. Same—Grant or devise with condition.
 38. Same—Grant or devise with condition subsequent.

IV. Trusts—Creation and Validity.

- 39-45. Deeds in nature of—Grants raising.

I. IN GENERAL.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Murray vs. Green*, 64 Cal. 363, 367, 28 Pac. Rep. 118 (applied); *Maynard vs. Polhemus*, 74 Cal. 141, 143, 15 Pac. Rep. 451 (applied); *Prey vs. Stanley*, 110 Cal. 423, 426, 427, 42 Pac. Rep. 908 (referred to); *Harter vs. San Jose*, 141 Cal. 659, 667, 75 Pac. Rep. 344 (applied with § 715).

2. ALIENABLE QUALITY of estate cannot be denied an estate in fee simple.—*Rona vs. Meier*, 47 Iowa 607, 29 Am. Rep. 493; *Anderson vs. Cary*, 36 Ohio St. 506, 33 Am. Rep. 602.

3. Is inseparably annexed to an estate in fee simple.—*Murray vs. Green*, 64 Cal. 363, 367, 28 Pac. Rep. 118; *De Peyster vs. Michael*, 6 N. Y. 467, 57 Am. Dec. 470.

4. Not affected by restraint contained in covenant intended to operate as qualification of absolute conveyance, is void.—*Prey vs. Stanley*, 110 Cal. 423, 426, 42 Pac. Rep. 908.

5. Passes by grant as if expressly given therein.—*Murray vs. Green*, 64 Cal. 363, 367, 28

Pac. Rep. 118; *De Peyster vs. Michael*, 6 N. Y. 467, 57 Am. Dec. 470.

II. CONDITION IN RESTRAINT OF ALIENATION.

6. CONDITION RESTRAINING ALIENATION and estate in fee simple, cannot, in their nature, co-exist, because repugnant, inconsistent, and are therefore void.—*Eldridge vs. See Yup Co.*, 17 Cal. 44, 52; *Murray vs. Green*, 64 Cal. 363, 367, 28 Pac. Rep. 118; *Maynard vs. Polhemus*, 74 Cal. 141, 143, 15 Pac. Rep. 451; *Prey vs. Stanley*, 110 Cal. 423, 426, 42 Pac. Rep. 908. Iowa. *McCleary vs. Ellis*, 54 Iowa 311, 37 Am. Rep. 205, 6 N. W. Rep. 571; *McCormick Harvesting Machine Co. vs. Gates*, 75 Iowa 343, 39 N. W. Rep. 657. Ky. *Koenig vs. Kraft*, 37 Ky. 95, 12 Am. St. Rep. 463, 7 S. W. Rep. 622. Mich. *Mandlebaum vs. McDonell*, 29 Mich. 78, 18 Am. Rep. 61. N. Y. *Newkerk vs. Newkerk*, 2 Cal. 345; *Schermmerhorn vs. Negus*, 1 Den. 448; *De Peyster vs. Michael*, 6 N. Y. 467, 57 Am. Dec. 470; *Oxley vs. Lane*, 35 N. Y. 340, 346. Ohio. *Hobbs vs. Smith*, 15 Ohio St. 419; *Anderson vs. Cary*, 36 Ohio St. 506, 33 Am. Rep. 602. Pa. *McWilliams vs. Nisly*, 2 Serg. & R. 507, 7 Am. Dec. 654. Va. *Blair vs. Muse*, 33 Va. 233, 2 S. E. Rep. 31. W. Va. *Baylor vs. Balch*, 24 W. Va. 438, 12 S. E. Rep. 735. Fed. *Taylor vs. Mason*, 23 U. S. (9 Wheat.) 325, bk. 6 L. ed. 101.

As to restraint against alienation, see note 9 Am. Dec. 200-202; monographic note 57 Am. Dec. 488-499, and note 32 Am. Dec. 242, 243; 9 Am. St. Rep. 405-408.

7. Declaring that property shall not be subject "to conveyance or attachment perpetually" is void.—*Blackstone Bank vs. Davis*, 38 Mass. (21 Pick.) 42, 32 Am. Dec. 241.

8. Restraining alienation without the consent of grantor, is void.—*Murray vs. Green*, 64 Cal. 363, 367, 28 Pac. Rep. 118; *De Peyster vs. Michael*, 6 N. Y. 467, 57 Am. Dec. 470.

9. Restraining sale, except to grantor at stipulated price, unreasonable as condition, and void.—*Maynard vs. Polhemus*, 74 Cal. 141, 143, 15 Pac. Rep. 451.

10. COVENANTS IN RESTRAINT OF ALIENATION are void, as obnoxious to, if not

within, this section.—*Prey vs. Stanley*, 110 Cal. 423, 427, 42 Pac. Rep. 908.

11. COVENANTS OF GRANTEE AGAINST ALIENATION as well as conditions of like nature imposed by the grantor are void.—*Prey vs. Stanley*, 110 Cal. 423, 426, 42 Pac. Rep. 908.

12. Made after conveyance by son to mother, not to sell without son's consent, is void as imposing restraint upon alienation.—*Prey vs. Stanley*, 110 Cal. 423, 427, 42 Pac. Rep. 908.

13. GRANT IN FEE SIMPLE WITH CONDITION limiting use of estate, is inconsistent with title in fee simple, and void.—*Eldridge vs. See Yup Co.*, 17 Cal. 44, 52.

14. Distinguished: *Pellissier vs. Corker*, 103 Cal. 516, 518, 27 Pac. Rep. 465.

15. Condition prohibiting the operation of attachment or levy of execution contrary to law and void.—*Blackstone Bank vs. Davis*, 38 Mass. (21 Pick.) 42, 32 Am. Dec. 241.

16. Condition grantee should not part with or sell, nor should any person sell for him, or for his debts, is void.—*McCleary vs. Ellis*, 54 Iowa 311, 37 Am. Rep. 305, 6 N. W. Rep. 571, distinguishing *Nichols vs. Eaton*, 91 U. S. 716, bk. 23 L. ed. 254.

17. GIFT TO ONE "AND THE HEIRS OF HIS BODY" so long as they hold and till the same," void in restraint of alienation.—*Stansbury vs. Hubner*, 73 Md. 228, 25 Am. St. Rep. 584, 20 Atl. Rep. 904, 11 L. R. A. 204.

18. GRANT FOR TERM OF YEARS or any other chattel, real or personal, with a restraint of alienation is void.—*Blackstone Bank vs. Davis*, 38 Mass. (21 Pick.) 42, 32 Am. Dec. 241.

19. Grant to son for his natural life without proviso to convey or encumber by mortgage, and so that same shall not be subject to attachment or levy for debts, void as against judgment creditors.—*McCormick Harvesting Mach. Co. vs. Gates*, 75 Iowa 243, 39 N. W. Rep. 657.

20. GRANT OR DEVISE WITH LIMITATION OVER upon condition or event of uncertain or indeterminate nature ties up the estate and prevents alienation.—*Brattle Sq. Church vs. Grant*, 69 Mass. (3 Gray) 142, 63 Am. Dec. 725.

21. HEIRS NOT BOUND BY CONDITION or proviso restraining sale except to grantor at specified price.—*Maynard vs. Polhemus*, 74 Cal. 141, 143, 15 Pac. Rep. 451.

22. RESTRAINT AGAINST ALIENATION may be invalid as contravening law against perpetuities.—*Mandlebaum vs. McDonell*, 29 Mich. 73, 18 Am. Rep. 61.

See post § 715 and note.

III. CONDITIONS NOT IN RESTRAINT OF ALIENATION.

23. ALIENATION RESTRAINABLE at common law before statute *quia emptores*.—*Mandlebaum vs. McDonell*, 29 Mich. 73, 18 Am. Rep. 61.

24. Restrainable for particular time or to particular person.—*Blackstone Bank vs. Davis*, 38 Mass. (21 Pick.) 42, 32 Am. Dec. 241; *Jack-*

son vs. Schutz, 18 John. (N. Y.) 174, 9 Am. Dec. 195.

25. Restrainable when condition is not repugnant to estate granted.—*Dougal vs. Fryer*, 3 Mo. 40, 22 Am. Dec. 453; *Hunt vs. Wright*, 47 N. H. 396, 93 Am. Dec. 451; *McWilliams vs. Nisly*, 2 Serg. & R. (Pa.) 507, 7 Am. Dec. 654.

26. Restrainable when in accordance with maxim that he who has power to give has power to prescribe terms, and *cujus est dare ejus est disponere*.—*Dougal vs. Fryer*, 3 Mo. 40, 22 Am. Dec. 453.

27. When partial is valid as not affecting estate but power to sell.—*Dougal vs. Fryer*, 3 Mo. 40, 22 Am. Dec. 453.

28. When partial is valid as not inconsistent with reasonable enjoyment of estate.—*McWilliams vs. Nisly*, 2 Serg. & R. (Pa.) 507, 7 Am. Dec. 654. See *Dougal vs. Fryer*, 3 Mo. 40, 22 Am. Dec. 453.

29. Partial restraint on alienation discussed and cases supporting it cited, but its validity doubted.—*Murray vs. Green*, 64 Cal. 363, 367, 28 Pac. Rep. 118.

30. COVENANT IN LEASE GIVING OPTION OF RIGHT TO PURCHASE on condition not to sell without leave and to pay one tenth of price to grantor is valid.—*Jackson vs. Schutz*, 18 John. (N. Y.) 174, 9 Am. Dec. 195.

Devise.—See par. 37 this note.

31. GRANT MAY BE MADE FOR LESS THAN WHOLE ESTATE of grantor; or upon condition breach of which will terminate estate.—*Anderson vs. Cary*, 36 Ohio St. 506, 38 Am. Rep. 602.

32. To minor restraining his possession, and occupancy during his minority except through his guardian, is valid.—*Blackstone Bank vs. Davis*, 38 Mass. (21 Pick.) 42, 32 Am. Dec. 241.

33. To person, his heirs, and assigns "so long" as they keep grist and saw mill doing business on premises "and no longer" is valid.—*Sperry vs. Pond*, 5 Ohio 337, 24 Am. Dec. 296.

34. Restraining personal power of alienation beyond time grantee becomes of age, valid.—*Dougal vs. Fryer*, 3 Mo. 40, 22 Am. Dec. 453.

35. With condition restraining partition or division of land held on shares by members of association not invalid as restraining alienation.—*Hunt vs. Wright*, 47 N. H. 396, 93 Am. Dec. 451.

36. Grant or devise upon condition does not fetter estate or prevent alienation or contravene the policy of law.—*Brattle Sq. Church vs. Grant*, 69 Mass. (3 Gray) 142, 63 Am. Dec. 725.

37. Words "but never to sell it," coupled with an habendum creating an estate in fee simple, do not avoid the consequences of deed, and pass fee.—*Norris vs. Hensley*, 27 Cal. 439, 451.

38. With condition subsequent divesting and forfeiting estate upon insolvency with limitation over is valid.—*Nichol vs. Levy*, 72 U. S. (5 Wall.) 433, bk. 18 L. ed. 596.

As to conditions subsequent, see § 1433 and note.

IV. TRUSTS—CREATION AND VALIDITY.

39. DEED IN THE NATURE OF A TRUST for purpose of securing loan, not in restraint of alienation.—Camp vs. Land, 122 Cal. 167, 170, 54 Pac. Rep. 839; Sacramento Bank vs. Alcorn, 121 Cal. 379, 383, 53 Pac. Rep. 813; Staacke vs. Bell, 125 Cal. 309, 315, 57 Pac. Rep. 1012.

40. DEED VESTING PROPERTY IN TRUSTEE for use under specified conditions of beneficiary not in restraint of alienation.—McCormick Harvesting Mach. Co. vs. Gates, 75 Iowa 343, 39 N. W. Rep. 657.

41. GRANT CREATING TRUST whereby beneficiary may not control corpus or even anticipate profits does not restrain alienation.—Anderson vs. Cary, 36 Ohio St. 506, 38 Am. Rep. 602.

42. Grant in trust to pay income to one until he becomes insolvent with limitation

over is valid.—Nichols vs. Eaton, 91 U. S. 716, bk. 23 L. ed. 254.

43. Grant in trust to pay income into grantee's own hands, and not into another's, whether claiming by authority or otherwise, not restraint on alienation and valid.—Smith vs. Towers, 69 Md. 77, 9 Am. St. Rep. 398, 14 Atl. Rep. 497, 15 Id. 92.

44. Grant in trust with right to enjoy rents during natural lives of cestuis que trust for purpose of taking away power of disposing or creating lien or making same liable to debt, and with that view in end, valid and not in restraint of alienation.—Lampert vs. Haydel, 96 Mo. 439, 9 Am. St. Rep. 358, 9 S. W. Rep. 780, 2 L. R. A. 113.

45. Grant vesting estate in trustees with enjoyment depending upon condition may be valid.—McCleary vs. Ellis, 54 Iowa 311, 37 Am. Rep. 205, 6 N. W. Rep. 571; Nichols vs. Eaton, 91 U. S. 716, bk. 23 L. ed. 254.

ARTICLE III.

RESTRAINTS UPON ALIENATION.

§ 715. How long it may be suspended.

§ 716. Future interests void, which suspend power of alienation.

§ 717. Leases of agricultural land, for over ten years, void.

§ 718. Leases of city lots, for over fifty years, void.

§ 715. HOW LONG IT MAY BE SUSPENDED. The absolute power of alienation cannot be suspended, by any limitation or condition whatever, for a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition, except in a single case mentioned in section seven hundred and seventy-two.

History: Enacted March 21, 1872.

I. In General.

1. Applied, cited, construed, referred to, etc.

2. Commissioners' note—"Limitation on condition."

3, 4. Constitutional declaration—Exception construed.

5. Creation of limitation—When it arises.

6. Deed—When inoperative to pass title.

7, 8. Duration of designated lives and form, materiality of.

9. Perpetuity—Use of term.

10. Policy of law contravened.

11-14. Power of alienation—Nature and extent of.

15, 16. Rule against perpetuities—Nature of.

II. Application of Rule.

17, 18. Applies to conveyances, devises, covenants, conditions—Terms.

19. Children—After-born—Within limitation.

20-25. Estates and interests to which applied.

26. Not applicable to contracts giving no interest.

III. Charitable Uses and Trusts.

27. "Beneficent" refers to charities.

28. Must exist in legal sense.

29. Favored by courts.

30-33. Not in conflict with constitution, or common law, or code.

34. Not created by bequest for private burial-place.

35. Not limited by formula.

36, 37. Cy-pres resorted to by courts.

38-45. Eleemosynary—Nature, extent, and creation.

46-50. Gifts charitable in nature.

51, 52. Learning and religion.

53, 54. Municipality may hold for charity.

55-58. Restraint—When not shown by clauses and trusts in devise.

59. Statute not construed as prohibiting.

IV. Conflict of Laws.

60. Bequest of personalty recognized in other states.

61-67. Domicile, law of—Nature and extent of.

68. Situs governs realty.

V. Construction of Constitution and Code.

69-72. Code construed—As to its application.

73. Same—With respect to vesting of estate.

74-76. Same—As to its permissive power.

77. Same—As shortening common law.
 78-81. Same—With reference to prohibitory powers.
 82-84. Constitution construed, how—Exception.
- VI. Suspension—1. Valid.
85. Agreement to sell.
 86, 87. Bequest to be paid absolutely—Religious.
 88. Condition in mortgage of religious institution.
 89, 90. Direction for sale after designated period—To collect.
 91. Executor requiring time.
 92-94. Provisions directing sale and distribution.
 95-102. Trusts of property—To pay income.
 103. Same—To pay debts.
 104. Same—Not continuing beyond lives.
 105. Where all parties can convey.
- VII. Suspension—2. Invalid.
106. Alienation—When unduly suspended.
 107. Bequest restraining indefinitely.
 108. Same—For care of burial-place.
 109, 110. Covenant for indefinite renewal of lease.
 111. Power of sale—Proceeds held in violation.
 112, 113. Provision restraining sale—Absolute estate—"Fee."
 114, 115. Provision repugnant to estates created.
 116-121. Trusts of property and income—Beyond period.
 122-125. Homestead—Restriction upon alienation of.

I. IN GENERAL.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Estate of Hinckley, 58 Cal. 457, 473, 481, 482 (construed); Williams vs. Williams, 73 Cal. 99, 103, 14 Pac. Rep. 394 (applied); Maynard vs. Polhemus, 74 Cal. 141, 143, 15 Pac. Rep. 451 (erroneously referred to in construing limitations of power to sell to named person); Goldtree vs. Thompson, 79 Cal. 613, 622, 22 Pac. Rep. 50 (applied); Whitney vs. Dodge, 105 Cal. 192, 197, 38 Pac. Rep. 636 (construed); In re Walkerly, 108 Cal. 627, 646, 647 (cited), 656, 657, 658 (applied to trusts in personal property), 49 Am. St. Rep. 97, 41 Pac. Rep. 772; Nichols vs. Emery, 109 Cal. 323, 330, 50 Am. St. Rep. 43, 41 Pac. 1089 (applied); Estate of Hendy, 118 Cal. 656, 657, 658, 50 Pac. Rep. 753 (applied); Crew vs. Pratt, 119 Cal. 129, 146, 51 Pac. Rep. 33 (applied); Sacramento Bank vs. Alcorn, 121 Cal. 379, 382, 53 Pac. Rep. 513 (applied); Toland vs. Toland, 123 Cal. 140, 142, 55 Pac. Rep. 631 (construed with other sections); Estate of Steele, 124 Cal. 533, 536, 57 Pac. Rep. 564 (applied with other sections); Nellis vs. Rickard, 133 Cal. 617, 620, 85 Am. St. Rep. 227, 66 Pac. Rep. 32 (cited); Blakeman vs. Miller, 136 Cal. 133, 141, 142, 89 Am. St. Rep. 120, 68 Pac. Rep. 537 (applied).

As to perpetuities in general, see notes 9 Am. Dec. 577-588; 60 Am. Rep. 230-236; 49 Am. St. Rep. 117-138; 63 Am. St. Rep. 248-269; 64 Am. St. Rep. 755-772; 95 Am. St. Rep. 214-234; and monographic notes by Robert Desty, 1 L. R. A. 453; 3 L. R. A. 145-149; 4 L. R. A. 140; 11 L. R. A. 35-39; also monographic note by H. P. Farnham, 20 L. R. A. 509-517.

2. COMMISSIONERS' NOTE appended to this section says: "The words 'limitation or condition' are substituted for 'estate' so as to include powers."

3. CONSTITUTION DECLARED AGAINST PERPETUITIES before adoption of common law in this state.—In re Estate of Hinckley, 58 Cal. 457, 472.

4. CONSTITUTIONAL—Exception added to prevent words, "no perpetuities shall be allowed," being construed as including proposed charities.—In re Estate of Hinckley, 58 Cal. 457, 472.

5. "CREATION OF THE LIMITATION OR CONDITION," in case of a will, takes place at the death of the testator.—Whitney vs. Dodge, 105 Cal. 192, 197, 38 Pac. Rep. 636.

6. DEED—Freehold to commence in future.—A deed attempting to create or convey a freehold to commence in future, is inoperative at common law, as conveyance of a legal title.—Chandler vs. Chandler, 55 Cal. 267, 270.

Domicile, as to law of governing property.—See pars. 61-67 this note.

7. DURATION OF DESIGNATED LIVES must always be, and be made, the ultimate measure of duration, and it matters not what other measures be taken so long as they cannot extend the period of suspension beyond, and are controlled by the duration of designated lives.—In re Estate Hendy, 118 Cal. 656, 658, 50 Pac. Rep. 753. See Hawley vs. James, 16 Wend. (N. Y.) 61.

8. Form in which the restraint is imposed has nothing to do with the rule.—Prey vs. Stanley, 110 Cal. 423, 427, 43 Pac. Rep. 908.

Homestead—Restraint on alienation of,—as to, see pars. 120-123 this note.

Lease with option to purchase,—as to validity, see par. 85 this note; also post § 718 note par. 5.

Same—Option to renew,—as to, see par. 10.

9. "PERPETUITY" APPLIES TO ATTEMPTS TO INVEST MONEY OR RESTRICT ALIENATION of land so as to retain it for the benefit or in the enjoyment of persons of a particular line of descendants.—Whitney vs. Dodge, 105 Cal. 192, 193, 38 Pac. Rep. 636.

Personal property.—As to law governing disposition and distribution of, see ante pars. 60-67 this note.

10. POLICY OF THE LAW CONTRAVENED by covenant for indefinite renewal of lease at lessee's option.—Morrison vs. Rossignol, 5 Cal. 64, 65. See Diffenderfer vs. Board etc. St. Louis Pub. Schools, 120 Mo. 447, 455, 25 S. W. Rep. 542.

11. POWER OF ALIENATION AS PROHIBITED IS SUCH AS ARISES in the terms or provisions of the instrument by which the limitation, condition, or estate is created, and not such as exists outside or by inference.—Toland vs. Toland, 123 Cal. 140, 142, 55 Pac. Rep. 631; In re Estate of Pforr (Thornagel vs. Pforr), 144 Cal. 121, 77 Pac. Rep. 825. See Brush vs. Beecher, 110 Mich. 597, 64 Am. St. Rep. 373, 68 N. W. Rep. 420.

12. Is identical with the power of conveying an absolute fee.—In re Walkerly, 108 Cal. 627, 647, 49 Am. St. Rep. 97, 41 Pac. Rep. 772.

13. Which by any possibility is suspended beyond prescribed period is void.—In re Estate Cavarly, 119 Cal. 406, 409, 51 Pac. Rep. 629.

14. Does not include a mere power to exchange lands, and such power does not obviate objections as to alienability, within rule against perpetuities.—In re Estate Hinckley, 58 Cal. 457, 481. See Hawley vs. James, 5 Paige Ch. (N. Y.) 318, 444; Belmont vs. O'Brien, 12 N. Y. 394, 402, 405.

Religion.—As to, see pars. 52, 87 this note.

Real property.—As to law governing disposition and distribution of, see par. 68 this note.

15. RULE AGAINST PERPETUITIES NOT A RULE OF LAW OF CONTRACTS, but of property.—Blakeman vs. Miller, 136 Cal. 138, 142, 89 Am. St. Rep. 120, 68 Pac. Rep. 587.

16. Does not depend upon the mere form in which the restraint is imposed.—Prey vs. Stanley, 110 Cal. 423, 427, 42 Pac. Rep. 908.

Situs.—As to law of, governing property, see par. 68 this note.

II. APPLICATION OF RULE.

As to what interests the rule applies, see 22 Am. & Eng. Encyc. of L. (2d ed.) 704-706.

Burial lot.—As to private, see pars. 23, 84, 108 this note.

17. APPLIES TO WHAT.—Law against the suspension of power of alienation applies to all kinds of conveyance and devise of any estate, interest, right, or possibility.—In re Estate Walkerly, 108 Cal. 627, 647, 49 Am. St. Rep. 97, 41 Pac. Rep. 772.

18. Covenants as well as conditions within section.—Prey vs. Stanley, 110 Cal. 423, 427, 42 Pac. Rep. 908.

See par. 109 this note.

Covenant to renew lease.—As to validity of, see par. 109 this note.

19. CHILDREN BORN AFTER THE DEATH of a testator, for whom a trust is created, are within the limitations of section.—Whitney vs. Dodge, 105 Cal. 192, 197, 38 Pac. Rep. 636.

20. EQUITABLE ESTATES AND INTERESTS the vesting of which is beyond the period are within the rule.—Estate Hinckley, 58 Cal. 457, 482.

21. SPRINGING AND SHIFTING USES and trusts are within the law against suspension of the power of alienation.—In re Estate of Walkerly, 108 Cal. 627, 648, 49 Am. St. Rep. 97, 41 Pac. Rep. 772.

22. TERM ESTATES WHICH ARE ABSOLUTE AND CERTAIN TERMS, embraced, no matter how short.—Estate of Hendy, 118 Cal. 456, 658, 50 Pac. Rep. 753; In re Estate Walkerly, 108 Cal. 627, 647, 49 Am. St. Rep. 97, 41 Pac. Rep. 772; Crew vs. Pratt, 119 Cal. 139, 147, 51 Pac. Rep. 38.

23. TRUST FOR MAINTAINING A PRIVATE BURIAL LOT is within, as same is not within constitutional exception.—In re Estate Gay, 138 Cal. 552, 553, 94 Am. St. Rep. 70, 71 Pac. Rep. 707.

24. TRUSTS, whether (1) created by will or deed, (2) whether providing for remainders or executory devises, or (3) merely restraining the power of alienation for a fixed period of years, and (4) then providing for sale and

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gift over.—In re Estate Walkerly, 108 Cal. 627, 647, 49 Am. St. Rep. 97, 41 Pac. Rep. 772.

As to trusts, valid and void, see valuable note by Robert Desty to Hawley vs. James, 5 Paige Ch. (N. Y.) 318, bk. 3 Co-op. ed. N. Y. Chan. Rep. 734-739.

25. Trusts, whether of realty or personalty, suspending power of alienation contrary to code.—In re Estate Walkerly, 108 Cal. 627, 647, 49 Am. St. Rep. 97, 41 Pac. Rep. 772.

26. Same.—Not applicable to contracts to sell lands where no interest is given or acquired thereby, except such as equity gives by way of constructive trust.—Blakeman vs. Miller, 136 Cal. 138, 142, 89 Am. St. Rep. 120, 68 Pac. Rep. 587.

III. CHARITABLE USES AND TRUSTS.

As to charitable uses and trusts, with reference to the rule against perpetuities, see 5 Am. & Eng. Encyc. of L. (2d ed.) 902.

27. "BENEFICENT" REFERS TO CHARITABLE PURPOSES which the testator intended to indicate in the clause as a whole, under maxim *noscitur a sociis* (it is known from its associates).—In re Estate Hinckley, 58 Cal. 457, 511.

28. CHARITABLE USES AND TRUSTS—Must exist in legal sense, and mere fact that purposes may be charitable is not sufficient.—Hallinan vs. Hearst, 133 Cal. 645, 648, 66 Pac. Rep. 17, 55 L. R. A. 216.

As to charitable uses and trusts, see monographic note 63 Am. St. Rep. 248-269; also notes 9 Am. Dec. 577-583; 44 Am. Dec. 98-101; 67 Am. Dec. 184; 90 Am. Dec. 101-106; 38 Am. Rep. 300-303; 39 Am. Rep. 738-750; 58 Am. Rep. 599-601; 60 Am. Rep. 230-236; 49 Am. St. Rep. 117-138.

29. Favored by courts, and carried into effect, if consistent with the law.—In re Estate Hinckley, 58 Cal. 457, 472; In re Estate Willey, 128 Cal. 1, 12, 60 Pac. Rep. 471. See *Helskell vs. Chickasaw Lodge*, 87 Tenn. 668, 11 S. W. Rep. 825, 4 L. R. A. 699.

See monographic note 60 Am. Rep. 234-236.

30. Not in conflict with the constitution of state.—Estate Hinckley, 58 Cal. 457, 473; Estate Robinson, 63 Cal. 620, 621; Spence vs. Widney (Cal. Oct. 16, 1896), 46 Pac. Rep. 463, 466.

31. Not within common-law rule against perpetuities.—In re Estate Hinckley, 58 Cal. 457, 472; Estate Robinson, 63 Cal. 620, 621; Spence vs. Widney (Cal. Oct. 16, 1896), 46 Pac. Rep. 463, 466.

32. Common-law rule as adopted does not disturb distinction recognized by constitution between prohibited perpetuities and charities.—In re Estate Hinckley, 58 Cal. 457, 473.

33. Not prohibited by the code in this state.—In re Estate Hinckley, 58 Cal. 457, 473; Estate Robinson, 63 Cal. 620, 621; In re Estate Willey, 128 Cal. 1, 12, 60 Pac. Rep. 471; In re Estate Winchester, 133 Cal. 271, 274, 65 Pac. Rep. 475, 54 L. R. A. 281; Fay vs. Howe, 136 Cal. 599, 603, 69 Pac. Rep. 423; In re Estate Gay, 138 Cal. 552, 94 Am. St. Rep. 70, 71 Pac. Rep. 707; In re Estate Merchant, 143 Cal. 537, 544, 77 Pac. Rep. 475.

See also Troutman vs. De Boissiere O. F.

Orphans' H. & I. School Assoc. (Kans. March 9, 1901), 64 Pac. Rep. 83; upon subsequent hearing held by divided court that gift in trust for home for orphan children of deceased Odd Fellows and their maintenance and education was not charity within code.—See *Kans. Troutman vs. De Boissiere* O. F. O. H. & I. School Assoc., 66 Kans. 1, 71 Pac. Rep. 286. *Oreg. Raley vs. Umatilla Co.*, 15 Oreg. 172, 3 Am. St. Rep. 142, 18 Pac. Rep. 890; *In re John's Will*, 30 Oreg. 494, 47 Pac. Rep. 341, 50 Id. 226, 36 L. R. A. 242. *Utah. Staines vs. Burton*, 17 Utah 331, 70 Am. St. Rep. 788, 53 Pac. Rep. 1015.

34. Not created by bequest providing for permanent care and beautifying of burial-place and monument.—*In re Estate Gay*, 138 Cal. 552, 557, 94 Am. St. Rep. 70, 71 Pac. Rep. 707. See *Hoeffer vs. Clogon*, 171 Ill. 462, 63 Am. St. Rep. 241, 49 N. E. Rep. 527, 40 L. R. A. 730; *Bates vs. Bates*, 134 Mass. 110, 45 Am. Rep. 305; *Morse vs. Natick*, 176 Mass. 510, 57 N. E. Rep. 996.

35. Not limited by any narrow and stated formula.—*People ex rel. Ellert vs. Cogswell*, 113 Cal. 129, 138, 45 Pac. Rep. 270, 35 L. R. A. 269.

36. CY-PRES DOCTRINE MAY BE RESORTED TO BY COURTS in directing trustees to carry out general and charitable intent, when scheme impracticable or has been unlawful, without departing from strict limits of ordinary chancery jurisdiction.—*In re Estate Hinckley*, 58 Cal. 457, 512, 513. See *In re Estate Winchester*, 133 Cal. 271, 274, 65 Pac. Rep. 475, 54 L. R. A. 281.

See notes 33 Am. Dec. 473; 5 L. R. A. 32, 38; 6 L. R. A. 147, 533; and brief 50 L. R. A. 309.

37. JURISDICTION OF COURT INCLUDES ALL JUDICIAL POWER with respect to charities, including power of cy-pres, so far as directing trustees to carry into effect general lawful and charitable intent, when particular scheme impracticable or has become unlawful.—*In re Estate Hinckley*, 58 Cal. 457, 512.

38. "ELEEMOSYNARY," AS USED IN THE EXCEPTION IN CONSTITUTION forbidding perpetuities, includes schools and libraries equally with asylums, hospitals, or religious institutions.—*People ex rel. Ellert vs. Cogswell*, 113 Cal. 129, 138, 45 Pac. Rep. 270, 35 L. R. A. 269.

39. Includes all charitable purposes.—*In re Estate of Gay*, 138 Cal. 552, 553, 94 Am. St. Rep. 70, 71 Pac. Rep. 707.

40. Is not confined to care of sick or insane.—*People ex rel. Ellert vs. Cogswell*, 113 Cal. 129, 138, 45 Pac. Rep. 270, 35 L. R. A. 269.

41. Need not be confined to gratuities for the poor.—*People ex rel. Ellert vs. Cogswell*, 113 Cal. 129, 138, 45 Pac. Rep. 270, 35 L. R. A. 269.

42. Need not seek to spread religion or piety.—*People ex rel. Ellert vs. Cogswell*, 113 Cal. 129, 138, 45 Pac. Rep. 270, 35 L. R. A. 269.

43. ELEEMOSYNARY.—Gifts of are not within the provisions of state constitution of 1849 or of 1879 prohibiting perpetuities.—*In re Estate Hinckley*, 58 Cal. 457, 472.

44. "Eleemosynary" in law interchangeable with the word "charitable."—*People ex rel. Ellert vs. Cogswell*, 113 Cal. 129, 138, 45 Pac. Rep. 270, 35 L. R. A. 269.

45. Eleemosynary trust may be created for purposes impossible to enumerate specifically.—*People ex rel. Ellert vs. Cogswell*, 113 Cal. 129, 138, 45 Pac. Rep. 270, 35 L. R. A. 269.

46. Gifts for the assistance of "respectable Unitarian congregation" are charitable and within exception.—*In re Estate Hinckley*, 58 Cal. 457, 512.

47. For benefit of the "Friends meeting" are charitable and within exception.—*In re Estate Hinckley*, 58 Cal. 457, 512.

48. For "maintenance of the Shaker Community" is charitable and within exception.—*In re Estate Hinckley*, 58 Cal. 457, 512.

49. For the "Universalist denomination" is charitable and within exception.—*In re Estate Hinckley*, 58 Cal. 457, 512.

50. Gift over of income—For burial and sick benefits is charitable in purpose, but in legal sense not public trust or "charity."—*Hallinan vs. Hearst*, 133 Cal. 645, 648, 66 Pac. Rep. 17, 55 L. R. A. 216.

51. "Learning" is charitable use and within exception.—*In re Estate Hinckley*, 58 Cal. 457, 511-512; *In re Estate Hewitt*, 94 Cal. 376, 378; 29 Pac. Rep. 775.

52. "Religion" charitable use in the broad sense of the word, and within exception.—*In re Estate Hinckley*, 58 Cal. 457, 511; *In re Estate Hewitt*, 94 Cal. 376, 378, 29 Pac. Rep. 775.

See par. 37 this note.

53. Municipal corporation may hold in trust for charitable purposes as being matters germane to its object without violating provisions against perpetuities.—*In re Estate Robinson*, 63 Cal. 620, 623. See *Clayton vs. Hallett*, 30 Colo. 231, 97 Am. St. Rep. 117, 70 Pac. Rep. 429, 59 L. R. A. 407, and particularly brief in 59 L. R. A. 409-414.

54. Bequest of personality to city in trust to apply interest to destitute women and children of city, as same is charitable bequest and within exception.—*In re Estate Robinson*, 63 Cal. 620, 622; *In re Estate Walkerly*, 108 Cal. 627, 657, 49 Am. St. Rep. 97, 41 Pac. Rep. 772 (trusts in personal property have often been recognized and never questioned). See *In re Estate Hinckley*, 58 Cal. 457, 481; *Williams vs. Williams*, 73 Cal. 99, 14 Pac. Rep. 394; *Goldtree vs. Thompson*, 79 Cal. 613, 22 Pac. Rep. 50; *Whitney vs. Dodge*, 105 Cal. 192, 33 Pac. Rep. 636.

55. RESTRAINT ON ALIENATION NOT SHOWN BY CLAUSE IN WILL "anything else whereby the members may be benefited," such words expressing trust.—*Staines vs. Burton*, 17 Utah 351, 53 Pac. Rep. 1015.

56. By devise in trust for "the boys and girls of California" is valid, being within exception of constitution.—*People ex rel. Ellert vs. Cogswell*, 113 Cal. 129, 138, 45 Pac. Rep. 270, 35 L. R. A. 269.

57. By devise in trust "to take charge of and use residue for benefit and advancement of the Oakland Red Cross Society in Cali-

fornia," to be used in equipping hospital, as same creates charitable trust.—In re Estate Merchant, 143 Cal. 537, 539, 544, 77 Pac. Rep. 475.

58. By trust of property "to be owned, controlled, and managed by said university" for purposes of astronomical observatory, as same is public charity.—Spence vs. Widney (Cal. Oct. 16, 1896), 46 Pac. Rep. 463, 466.

59. Statute not construed as prohibiting charitable trusts when they are directly referred to.—In re Estate Hinckley, 58 Cal. 457, 482.

IV. CONFLICT OF LAWS.

As to conflict of laws, see 22 Am. & Eng. Encyc. of L. (2d ed.) 726.

60. BEQUEST OF PERSONALTY VALID IN STATE WHERE MADE recognized in another state into which it may be brought.—Whitney vs. Dodge, 105 Cal. 192, 199, 38 Pac. Rep. 636.

61. DOMICILE OF OWNER GOVERNS THE DISPOSITION AND DISTRIBUTION of personal property as regards the power of alienation.—Whitney vs. Dodge, 105 Cal. 192, 197, 38 Pac. Rep. 636.

62. LAW OF ONE STATE DOES NOT EX PROPRIO VIGORE EXTEND BEYOND ITS OWN TERRITORY, and any state has right to provide that rule shall not prevail within its jurisdiction.—Whitney vs. Dodge, 105 Cal. 192, 198, 38 Pac. Rep. 636.

63. Rule is part of general law of every state in which it is not abrogated by express legislative language or enactment of statutes working abrogation by necessary implication.—Whitney vs. Dodge, 105 Cal. 192, 198, 38 Pac. Rep. 636.

64. LAW OF THE DOMICILE AT THE TIME OF TESTATOR'S DEATH governs trust of personal property.—Penfield vs. Tower, 1 N. D. 216, 46 N. W. Rep. 413.

65. LAW OF THE COUNTRY OF WHICH MAN IS SUBJECT regulates succession of personal property.—Whitney vs. Dodge, 105 Cal. 192, 198, 38 Pac. Rep. 636.

66. LAW OF THE PERSON IS FOLLOWED with respect to disposition and transmission of personal property, as it has no locality.—Whitney vs. Dodge, 105 Cal. 192, 198, 38 Pac. Rep. 636.

67. TRUST OF PERSONAL PROPERTY UNDER WILL EXECUTED IN PENNSYLVANIA, according to the law in that state, valid in California, although it contravenes law against perpetuities of latter state.—Whitney vs. Dodge, 105 Cal. 192, 198, 38 Pac. Rep. 636.

68. TRUST OF REAL ESTATE DETERMINED by law of situs.—Penfield vs. Tower, 1 N. D. 216, 46 N. W. Rep. 413.

V. CONSTRUCTION OF CONSTITUTION AND CODE.

69. CODE CONSTRUED AS APPLYING—To instruments which "by any possibility may suspend" the absolute power of alienation beyond continuance of lives in being.—In re Estate Steele, 124 Cal. 533, 537, 57 Pac. Rep. 564.

70. Applies to trusts in personal property, as well as real.—In re Estate Walkerly, 108 Cal. 627, 652, 49 Am. St. Rep. 97, 41 Pac. Rep. 772.

71. As not applying to trust where it cannot continue longer than the lives in being.—In re Estate Steele, 124 Cal. 533, 537, 57 Pac. Rep. 564.

72. Where there are persons in being by whom an absolute interest in possession can be conveyed.—Blakeman vs. Miller, 136 Cal. 123, 141, 39 Am. St. Rep. 120, 68 Pac. Rep. 587.

73. Same—As meaning that estate must vest during the existence of living persons and simply shortening the common-law period.—In re Estate Hinckley, 58 Cal. 457, 474.

74. Same—As permitting property to be held inalienable provided power of alienation is not suspended beyond existence of lives in being.—In re Estate Hendy, 118 Cal. 656, 658, 50 Pac. Rep. 753.

75. Suspension of power with restriction that it shall not continue beyond stipulated period.—Toland vs. Toland, 123 Cal. 140, 142, 55 Pac. Rep. 681.

76. Not permitting court to wait development of events which may show no ultimate perpetuity resulting from suspension.—In re Estate Steele, 124 Cal. 533, 537, 57 Pac. Rep. 564.

77. Same—As shortening the common-law period to lives in being.—In re Estate Walkerly, 108 Cal. 627, 647, 49 Am. St. Rep. 97, 41 Pac. Rep. 772.

78. Same—As forbidding only the suspension of power of alienation.—Toland vs. Toland, 123 Cal. 140, 142, 55 Pac. Rep. 681.

79. As not intended to prohibit all limitations of estates by which power of alienation is suspended.—Toland vs. Toland, 123 Cal. 140, 143, 55 Pac. Rep. 681.

80. CHARITIES, against which can be urged none of objections, so pregnant of evil, which have been made against permanent settlements on families.—In re Estate Hinckley, 58 Cal. 457, 482.

81. As not properly speaking against perpetuities, but as prohibiting restraint on alienation.—In re Estate Cavarly, 119 Cal. 406, 409, 51 Pac. Rep. 629.

82. CONSTITUTION—Construed according to common-law definition to ascertain meaning of expression "no perpetuity shall be allowed" as used therein, in absence of legislation adopting it.—In re Estate Hinckley, 58 Cal. 457, 472.

83. Language construed as simply declaratory of common-law rules.—In re Estate Hinckley, 58 Cal. 457, 472.

84. CONSTITUTIONAL EXCEPTION "for eleemosynary purposes" not construed to enlarge meaning of prohibitory clause.—In re Estate Hinckley, 58 Cal. 457, 472.

VI. SUSPENSION—1. VALID.

85. ALIENATION—Undue restraint—Agreement by lessor to sell real estate after fifteen years and within term, not valid as suspension of power of alienation, as there are lives in

being who may convey absolute interest in possession.—*Blakeman vs. Miller*, 136 Cal. 138, 141, 89 Am. St. Rep. 120, 68 Pac. Rep. 587.

86. **BEQUEST OF MONEY TO BE PAID ABSOLUTELY**, within or upon the expiration of specified time after testator's death, creating in legatee vested interest in fee, which is merely postponed in enjoyment.—*Williams vs. Williams*, 73 Cal. 99, 103, 14 Pac. Rep. 394.

87. **To foster religion are valid**.—In re Estate Hinckley, 53 Cal. 457, 512.

See par. 52 this note.

88. **CONDITION IN MORTGAGE OF RELIGIOUS INSTITUTION** that if property is alienated, or abandoned or not used for purposes for which money loaned, mortgage to become due.—*Board Church Erect. Fund etc. vs. First Presb. Church*, 19 Wash. 455, 53 Pac. Rep. 671, 673.

89. **DIRECTION IN THE INSTRUMENT** to make the sale or other alienation of land after designated period, provided instrument does not forbid prior alienation.—*Toland vs. Toland*, 123 Cal. 140, 142, 55 Pac. Rep. 681.

90. **By direction to executors to collect income and pay expenses** for term of two years, and to sell at expiration of that period and divide proceeds.—In re Estate Pforr (*Thornagel vs. Pforr*), 144 Cal. 121, 77 Pac. Rep. 825.

91. **EXECUTOR REQUIRING TIME TO EXECUTE POWER OF SALE** not measured by lives, for conversion of estate.—In re Estate Pforr (*Thornagel vs. Pforr*), 144 Cal. 121, 77 Pac. Rep. 825; *Deegan vs. Wade*, 144 N. Y. 573, 576, 39 N. E. Rep. 692.

92. **PROVISION FOR EXERCISE OF POWER AT FUTURE TIME** except exercise itself is suspended beyond limited period.—*Toland vs. Toland*, 123 Cal. 140, 142, 55 Pac. Rep. 681; In re Estate Pforr (*Thornagel vs. Pforr*), 144 Cal. 121, 77 Pac. Rep. 825.

93. **By provision in will directing sale and distribution** "as soon as the leases on rented lands are canceled," no restraint on alienation.—*Toland vs. Toland*, 123 Cal. 140, 142, 55 Pac. Rep. 681.

94. **By provision in will not to sell real estate devised in equal shares until youngest son attains majority, and in case of death of any without heirs, the survivors take his portion equally, does not create perpetuity**.—*Coleman vs. Coleman*, 68 Kans. (April 9, 1904), 76 Pac. Rep. 439.

95. **TRUST CREATED—By deed to daughter as trustee and cestui que trust, giving her control of income for life and at death to her children and their issue until her youngest attained twenty-five, with provision giving daughter or her survivors no power to alienate except to lease for five years**.—*Nellis vs. Rickard*, 133 Cal. 617, 618, 621, 85 Am. St. Rep. 227, 66 Pac. Rep. 32 (decision carried further than authority relied on would seem to warrant it, and thought to be questionable).

96. **Trust for payment of income in certain proportions to nephews and nieces during life and to their surviving husbands and wives until remarriage, and afterwards to children by first marriage on becoming of age or**

marrying.—*Goldtree vs. Thompson*, 79 Cal. 613, 615, 625, 22 Pac. Rep. 50.

97. **Trust for payment of income for niece for life and at "her death the same to be construed to hear two children" until they are twenty-five, when principal to be paid**.—*Estate Hendy*, 118 Cal. 656, 657, 659, 50 Pac. Rep. 753.

98. **Trust to pay interest to wife until death and then to children "until they are each twenty-five years of age"**.—In re Estate Hendy, 118 Cal. 656, 659, 50 Pac. Rep. 753.

99. **Trust of part of income to wife for life; part to children during minority, certain amount at majority, further amount at twenty-five, and other sums between majority and age of twenty-five, and balance of income and principal to children equally at death of wife**.—In re Estate Steele, 124 Cal. 533, 535, 541, 57 Pac. Rep. 564.

100. **Trust of real property conveyed to son as trustee, or within ten months after death of grantor, proceeds to be divided among children of the grantor, including trustee**.—*Nichols vs. Emery*, 109 Cal. 323, 330, 50 Am. St. Rep. 43, 41 Pac. Rep. 1089.

101. **Trust to sell after death of grantor, divide portion of proceeds, invest balance, and pay same over to daughter during husband's life, and upon his death to her absolutely, with gift over to issue upon her death**.—*Nichols vs. Emery*, 109 Cal. 323, 330, 50 Am. St. Rep. 43, 41 Pac. Rep. 1089.

102. **Trust to sell and distribute the proceeds as soon as leases of rented lands are canceled**.—*Toland vs. Toland*, 123 Cal. 140, 142, 55 Pac. Rep. 681.

103. **Same—To secure debts providing for reconveyance upon payment and power of sale in default not invalid as within provisions of code**.—*Sacramento Bank vs. Alcorn*, 121 Cal. 379, 385, 53 Pac. Rep. 813; *Camp vs. Land*, 122 Cal. 167, 170, 54 Pac. Rep. 839; *Toland vs. Toland*, 123 Cal. 140, 142, 55 Pac. Rep. 681; *Balfour-Guthrie Inv. Co. vs. Woodworth*, 124 Cal. 169, 174, 56 Pac. Rep. 891; *Staacke vs. Bell*, 125 Cal. 309, 315, 57 Pac. Rep. 1012.

104. **Same—Not continuing beyond lives in being, and it matters not whether by expressed terms or by necessary construction that lives in being measure duration of a trust**.—In re Estate Hendy, 118 Cal. 656, 659, 50 Pac. Rep. 753.

105. **Where all the persons in interest and in being, including trustee, can convey an absolute title in premises**.—*Williams vs. Williams*, 73 Cal. 90, 103, 14 Pac. Rep. 394; *Toland vs. Toland*, 123 Cal. 140, 143, 55 Pac. Rep. 681; *Balfour-Guthrie Inv. Co. vs. Woodworth*, 124 Cal. 169, 174, 56 Pac. Rep. 891.

VII. SUSPENSION—2. INVALID.

106. **ALIENATION IS UNDULY SUSPENDED BY ANY LIMITATION OR CONDITION** which may take away or suspend absolute power of alienation for period beyond continuance of lives in being.—*Goldtree vs. Thompson*, 79 Cal. 613, 622, 22 Pac. Rep. 50; In re Estate Walkerly, 108 Cal. 627, 647, 49 Am. St. Rep. 97, 41 Pac. Rep. 772; *Crew vs. Pratt*, 119 Cal. 139, 146, 51 Pac. Rep. 38; *Toland vs. To-*

land, 123 Cal. 140, 142, 55 Pac. Rep. 681; In re Estate Steele, 124 Cal. 533, 537, 57 Pac. Rep. 564; Blakeman vs. Miller, 136 Cal. 138, 141, 39 Am. St. Rep. 120, 68 Pac. Rep. 587. See Penfield vs. Tower, 1 N. D. 216, 46 N. W. Rep. 413; Douglas vs. Cruger, 80 N. Y. 15.

107. BEQUEST OF PERSONALTY payable at a certain date after testator's decease, with further proviso restraining the right to alienate for an indefinite period, is contrary to statutory provisions.—Williams vs. Williams, 73 Cal. 99, 103, 14 Pac. Rep. 394.

108. Bequest providing for permanent care, beautifying of private burial-place and of monument is void at common law as creating perpetuity.—In re Estate Gay, 138 Cal. 552, 557, 94 Am. St. Rep. 70, 71 Pac. Rep. 707. See Bates vs. Bates, 134 Mass. 110, 45 Am. Rep. 305; Morse vs. Natick, 176 Mass. 510, 57 N. E. Rep. 996.

109. COVENANT FOR RENEWAL OF LEASE indefinitely at option of lessee, as against policy of law.—Morrison vs. Rosignol, 5 Cal. 64, 65. See Piggot vs. Mason, 1 Paige Ch. (N. Y.) 412, 415; Carr vs. Ellison, 20 Wend. (N. Y.) 178, 179; Syms vs. Mayor etc. of New York, 105 N. Y. 153, 11 N. E. Rep. 369.

110. Contra: Brush vs. Beecher, 110 Mich. 597, 64 Am. St. Rep. 378, 68 N. W. Rep. 420.

111. POWER OF SALE GIVEN TO TRUSTEES will not save the trust provisions where proceeds are to be held in violation of law.—In re Estate Hinckley, 58 Cal. 457, 581; In re Estate Walkerly, 108 Cal. 627, 656, 49 Am. St. Rep. 97, 41 Pac. Rep. 772. See Hawley vs. James, 16 Wend. (N. Y.) 61, 150; Haynes vs. Sherman, 117 N. Y. 433, 22 N. E. Rep. 938.

112. PROVISION IN WILL RESTRAINING LEGATEE of an absolute vested estate in personalty from alienating same.—Williams vs. Williams, 73 Cal. 99, 103, 14 Pac. Rep. 394.

113. In this case the court uses the word "fee" as expressing an absolute right or interest in the corpus of personal property. It is submitted that this is an improper use of the word for "absolute vested estate"; the word "fee" applies only to estates in realty; indeed the origin of the word shows that it never had any application to personal property.—See Brainerd vs. Cowdrey, 16 Conn. 1; Hetfield vs. Fowler, 60 Ill. 45, 47; Bates vs. Sparrell, 10 Mass. 323.

See post § 762.

114. PROVISIONS REPUGNANT TO THE INTEREST CREATED and to provisions of the section of code.—Murray vs. Green, 64 Cal. 363, 366, 28 Pac. Rep. 118; Prey vs. Stanley, 110 Cal. 423, 426, 42 Pac. Rep. 908.

115. By any trust or future estate which extends beyond existing lives.—In re Estate Walkerly, 108 Cal. 627, 647, 49 Am. St. Rep. 97, 41 Pac. Rep. 772; In re Estate Hendy, 118 Cal. 656, 658, 50 Pac. Rep. 753; Sacramento

Bank vs. Alcorn, 121 Cal. 379, 382, 53 Pac. Rep. 318; Crew vs. Pratt, 119 Cal. 139, 147, 51 Pac. Rep. 38. See Penfield vs. Tower, 1 N. D. 216, 46 N. W. Rep. 413.

116. TRUST FOR CERTAIN PERSONS, and at end of a given number of years, or, if widow should then be living, after her death to sell and divide among living persons and their descendants.—In re Estate Walkerly, 108 Cal. 627, 647, 49 Am. St. Rep. 97, 41 Pac. Rep. 772.

117. By trust for sale of real property at expiration of twenty-five years unduly restrains alienation.—In re Estate Walkerly, 108 Cal. 627, 647, 656, 49 Am. St. Rep. 97, 41 Pac. Rep. 772.

118. By trust of net income of residue to children in equal shares until youngest son should, if living, reach age of thirty, and then to divide among those then living and issue of those dead.—In re Estate Cavarly, 119 Cal. 406, 408, 51 Pac. Rep. 629.

119. By trust to apply income to certain uses, and after twenty-five years, or if widow then alive, at her death to sell and divide among specified persons then living and issue of those dead.—In re Estate Walkerly, 108 Cal. 627, 646, 49 Am. St. Rep. 97, 41 Pac. Rep. 772. See note 49 Am. St. Rep. 116-138.

120. By trust to convey to parties who might be living at time of conveyance after termination of trust to testator's children.—In re Estate Fair, 132 Cal. 523, 538, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

121. "TRUST UNTIL 'YOUNGEST CHILD NOW LIVING SHALL ARRIVE AT AGE OF twenty-one years, or would arrive at that age if living," as fixing absolute period not depending upon existing lives.—In re Estate Hendy, 118 Cal. 656, 658, 50 Pac. Rep. 753; Haynes vs. Sherman, 117 N. Y. 433, 22 N. E. Rep. 938.

122. Homestead cannot be alienated by voluntary act of one or both parties contrary to statute.—Lies vs. Diablar, 12 Cal. 327; Flège vs. Garvey, 47 Cal. 371, 376; Gagliardo vs. Dumont, 54 Cal. 496, 499.

123. Power of alienation restricted only so far as necessary to protect homestead.—Gee vs. Moore, 14 Cal. 472; Bowman vs. Norton, 16 Cal. 218, 217.

124. Restraint upon alienation by husband is right personal to wife.—Bowman vs. Norton, 16 Cal. 218, 217.

125. RIGHTS OF MINOR CHILDREN cannot be alienated by husband and father when homestead occupied by all at his death.—Kleimann vs. Gieselmann, 114 Mo. 437, 35 Am. St. Rep. 761, 21 S. W. Rep. 796.

As to power of sale not saving trust provision, see ante par. 110 this note.

Trusts.—See pars. 23-25 and post 95-102, 116-121 this note.

§ 716. FUTURE INTERESTS VOID, WHICH SUSPEND POWER OF ALIENATION. Every future interest is void in its creation which, by any possibility, may suspend the absolute power of alienation for a longer period than is pre-

vs. King, 162 N. Y. 184, 76 Am. St. Rep. 302, 56 N. E. Rep. 515.

As to accumulations, see monographic notes 49 Am. St. Rep. 117, 127, 133; 73 Am. St. Rep. 413, 440; also notes by Robert Desty in 1 L. R. A. 453, 454; 3 L. R. A. 145-149; 4 L. R. A. 140, 141; 11 L. R. A. 85-89.

Same—Liability for debts,—as to, see post § 559 and note.

Same—Ownership of undisposed of,—as to, see post § 733 and note.

Annuities,—as to, see post §§ 1357, 1366 and notes.

Beneficiary's interest.—As to restraint upon disposition of, see post § 859 and note.

Income.—As to bequest of, see post §§ 1357, 1366 and notes.

4. PERPETUITY MEANS, IN LAW, an estate so settled that it cannot be used or made void.—In re Estate of Hinckley, 58 Cal. 457, 475. See Griffin vs. Graham, 1 Hawks (N. C.) 96, 9 Am. Dec. 619.

II. CONSTRUCTION OF SECTION.

5. CONSTRUED—As fixing the period within which accumulations can be made.—Blakeman vs. Miller, 136 Cal. 133, 142, 39 Am. St. Rep. 120, 68 Pac. Rep. 537.

6. As relating to and prohibiting accumulations of income from real and personal property.—In re Estate of Hinckley, 58 Cal. 457, 481.

7. As not applying to accumulations of income on any invested fund.—Goldtree vs. Thompson, 79 Cal. 613, 624, 22 Pac. Rep. 50.

8. As not prohibiting an accumulation of income which is merely incidental to the performance of the trust.—In re Estate of Sanford, 136 Cal. 97, 103, 68 Pac. Rep. 494.

III. CREATION, NATURE, AND EXTENT OF ACCUMULATION.

9. ACCUMULATIONS OF INCOME ARISE WHEN rents, dividends, or other income treated by trustees as capital and invested, making new capital.—In re Estate of Steele, 124 Cal. 533, 541, 57 Pac. Rep. 564.

10. DO NOT ARISE WHERE ENTIRE NET INCOME is distributed annually.—In re Estate of Steele, 124 Cal. 533, 541, 57 Pac. Rep. 564.

11. NATURE—Are lawful when in accordance with the sections of the code.—Goldtree vs. Thompson, 79 Cal. 613, 623, 22 Pac. Rep. 50.

12. Merely incidental to performance of the trust are not prohibited.—In re Estate of Sanford, 136 Cal. 97, 103, 68 Pac. Rep. 494.

13. ON AN INVESTED FUND, which tend to perpetuity, are not forbidden.—Goldtree vs. Thompson, 79 Cal. 613, 624, 22 Pac. Rep. 50.

14. OF REAL AND PERSONAL ESTATE are within the rule against perpetuity.—Goldtree vs. Thompson, 79 Cal. 613, 624, 22 Pac. Rep. 50; Manice vs. Manice, 43 N. Y. 303; Cochrane vs. Schell, 140 N. Y. 516, 35 N. E. Rep. 971.

15. EXTEND TO PROFITS DERIVED FROM PERSONAL PROPERTY as included within the meaning of the section along with accumulations of the rents arising out of real estate.—Estate of Hinckley, 58 Cal. 457, 480.

16. EXTEND TO TRUSTS TO PAY INCOME FOR ADULTS as not creating or tending to create a perpetuity.—Goldtree vs. Thompson, 79 Cal. 613, 624, 22 Pac. Rep. 50. See Thellusson vs. Woodford, 4 Ves. 227, 11 Ves. 112, 1 Bos. & P. (N. R.) 357, 4 Rev. Rep. 205, 8 Id. 104.

17. EXTEND TO TRUSTS OF INCOME FOR MINORS ending with their minority or marriage.—Goldtree vs. Thompson, 79 Cal. 613, 624, 22 Pac. Rep. 50.

IV. EFFECT ON ESTATES OF VIOLATION OF RULE.

18. TRUST IN WILL OFFENSIVE AS AGAINST PERPETUITIES CREATES AN INTESTACY on failure of bequest.—In re Estate of Walkerly, 108 Cal. 627, 660, 49 Am. St. Rep. 97, 41 Pac. Rep. 772; Estate of Hendy, 118 Cal. 656, 658, 50 Pac. Rep. 753; Crew vs. Pratt, 119 Cal. 139, 147, 51 Pac. Rep. 38; Estate of Cavarly, 119 Cal. 406, 407, 409, 51 Pac. Rep. 629; Estate of Fair, 132 Cal. 523, 528, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000; More vs. More, 133 Cal. 489, 494, 65 Pac. Rep. 1044. See Andrews vs. Lincoln, 95 Me. 541, 50 Atl. Rep. 398, 56 L. R. A. 103.

19. Property descends to the heirs living at the testator's death, upon failure of a trust by reason of violating law against perpetuities.—In re Estate of Walkerly, 108 Cal. 627, 660, 49 Am. St. Rep. 97, 41 Pac. Rep. 772; Firebaugh vs. Burbank, 121 Cal. 136, 138, 53 Pac. Rep. 560; Estate of Matheny, 121 Cal. 267, 269, 53 Pac. Rep. 800; Estate of Young, 123 Cal. 337, 344, 55 Pac. Rep. 1011; Estate of Fair, 132 Cal. 523, 528, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000; Estate of Sanford, 136 Cal. 97, 101, 68 Pac. Rep. 494; Estate of Pichoir, 139 Cal. 682, 685, 73 Pac. Rep. 604, 606. See Hardwick vs. Black, 128 Cal. 672, 674, 61 Pac. Rep. 381; Estate of Levy, 141 Cal. 646, 648, 99 Am. St. Rep. 92, 75 Pac. Rep. 301; Andrews vs. Lincoln, 95 Me. 541, 50 Atl. Rep. 398, 56 L. R. A. 103.

See monographic note of H. P. Farnham in 20 L. R. A. 509-517, which was written before the decision in re Estate of Walkerly, supra, which exhausted the decisions on the point at the time when written.

V. TRUSTS FOR ACCUMULATION OF INCOME.

20. MAY BE SO FRAMED AS TO BE FREE FROM CONTROL OF CREDITORS, by implication, and valid.—Seymour vs. McAvoy, 121 Cal. 433, 444, 53 Pac. Rep. 946, 41 L. R. A. 544.

21. In this case Temple, J., rendered a dissenting opinion, holding that the decision was at variance with the opinion delivered by the court in Estate of Cavarly, 119 Cal. 406, 51 Pac. Rep. 629. It is submitted, however, that the cases are clearly distinguishable; the latter case holding that the term therein created "until" his youngest son "shall, or would if living, reach the age of thirty years, and at the expiration of such time, to divide and distribute," might by some possibility suspend the power of alienation beyond the prescribed period. The Cavarly case followed the holding in Estate of Walkerly, 108 Cal. 627, 637, 47 Am. St. Rep. 93, 41 Pac. Rep. 772, which was also a term case. These latter cases were, more-

over, decided under the provisions of the code, while the principal case was decided upon facts which arose before the code came into force. But even so, as stated in the opinion in chief in that case, the great weight of authority in this country would appear to have settled the law in favor of trusts providing that the interest of the cestui que trust shall not be assignable or subject to the claims of creditors.

22. TRUSTS OF PERSONAL ESTATE

§ 725. OTHER DIRECTIONS, WHEN VOID IN PART. If in either of the cases mentioned in the last section the direction for an accumulation is for a longer term than during the minority of the beneficiaries, the direction only, whether separable or not from other provisions of the instrument, is void as respects the time beyond such minority.

History: Enacted March 21, 1872.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Estate Hinckley, 58 Cal. 457, 481 (construed).

2. COMMISSIONERS' NOTE appended to this section says: "The clause from 'only' to 'instru-

ment' is sustained by Williams vs. Williams, 8 N. Y. 425; Kilpatrick vs. Johnson, 15 N. Y. 322. See, however, King vs. Rundle, 15 Barb. (N. Y.) 139-145."

As to accumulation for benefit of adults, see par. 16 this note.

As to accumulation for minors, see par. 17 this note.

As to trust in respect to personal property, see note § L. R. A. 145-149; 11 L. R. A. 85-89.

ment' is sustained by Williams vs. Williams, 8 N. Y. 425; Kilpatrick vs. Johnson, 15 N. Y. 322. See, however, King vs. Rundle, 15 Barb. (N. Y.) 139-145."

See ante § 724 and note.

§ 726. APPLICATION OF INCOME TO SUPPORT, ETC., OF MINOR. When a minor for whose benefit an accumulation has been directed is destitute of other sufficient means of support and education, the proper court, upon application, may direct a suitable sum to be applied thereto out of the fund.

1. Applied, cited, construed, referred to, etc., in: Estate Hinkley, 58 Cal. 457, 481.

2. Probate court has no jurisdiction to order guardian to pay income, or apply it, or make advancement for infant's benefit.—Swift vs.

Swift, 40 Cal. 456, 458 (decided before code took effect).

See Code of Civil Procedure §§ 1771, 1792 and notes.

CHAPTER III.

RIGHTS OF OWNERS.

§ 732. Increase of property.

§ 733. In certain cases, who entitled to income of property.

§ 732. INCREASE OF PROPERTY. The owner of a thing owns also all its products and accessions.

History: Enacted March 21, 1872.

§ 733. IN CERTAIN CASES, WHO ENTITLED TO INCOME OF PROPERTY. When, in consequence of a valid limitation of a future interest, there is a suspension of the power of alienation or of the ownership during the continuation of which the income is undisposed of, and no valid direction for its accumulation is given, such income belongs to the persons presumptively entitled to the next eventual interest.

History: Enacted March 21, 1872.

CHAPTER IV.

TERMINATION OF OWNERSHIP.

§ 739. Future interests, when defeated.

§ 742. Same. [Contingency happening, how future interest takes effect.]

§ 740. Same. [How defeated.]

§ 741. Future interests, when not defeated.

§ 739. **FUTURE INTERESTS, WHEN DEFEATED.** A future interest, depending on the contingency of the death of any person without successors, heirs, issue, or children, is defeated by the birth of a posthumous child of such person, capable of taking by succession.

History: Enacted March 21, 1872.

§ 740. **SAME. [HOW DEFEATED.]** A future interest may be defeated in any manner or by any act or means which the party creating such interest provided for or authorized in the creation thereof; nor is a future interest, thus liable to be defeated, to be on that ground adjudged void in its creation.

History: Enacted March 21, 1872.

§ 741. **FUTURE INTERESTS, WHEN NOT DEFEATED.** No future interest can be defeated or barred by any alienation or other act of the owner of the intermediate or precedent interest, nor by any destruction of such precedent interest by forfeiture, surrender, merger, or otherwise, except as provided by the next section, or where a forfeiture is imposed by statute as a penalty for the violation thereof.

History: Enacted March 21, 1872.

§ 742. **SAME. [CONTINGENCY HAPPENING, HOW FUTURE INTEREST TAKES EFFECT.]** No future interest, valid in its creation, is defeated by the determination of the precedent interest before the happening of the contingency on which the future interest is limited to take effect; but should such contingency afterwards happen, the future interest takes effect in the same manner and to the same extent as if the precedent interest had continued to the same period.

History: Enacted March 21, 1872.

TITLE III.

GENERAL DEFINITIONS.

§ 748. Income, what.

§ 749. Time of creation, what.

§ 748. **INCOME, WHAT.** The income of property, as the term is used in this part of the code, includes the rents and profits of real property, the interest of money, dividends upon stock, and other produce of personal property.

History: Enacted March 21, 1872.

§ 749. **TIME OF CREATION, WHAT.** The delivery of the grant, where a limitation, condition, or future interest is created by grant, and the death of the testator, where it is created by will, is to be deemed the time of the creation of the limitation, condition, or interest, within the meaning of this part of the code.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Suspension of power of alienation.
3. Time of creation of trust.

1. Applied, cited, construed, referred to, etc., in: Goldtree vs. Thompson, 79 Cal. 618, 622, 22 Pac. Rep. 50 (cited), In re Estate Walkerly, 108 Cal. 627, 647, 49 Am. St. Rep. 87, 41 Pac. Rep. 772 (cited); Toland vs. Toland, 128 Cal. 140, 142, 143, 55 Pac. Rep. 681 (referred to);

In re Estate Steele, 124 Cal. 533, 537, 57 Pac. Rep. 564 (applied).

2. Suspension of power of alienation.—See ante § 715 and note.

3. Time of creation of trust by will is deemed to be death of testator.—In re Estate Steele, 124 Cal. 533, 537, 57 Pac. Rep. 564. See Goldtree vs. Thompson, 79 Cal. 618, 622, 22 Pac. Rep. 50.

PART II.

REAL OR IMMOVABLE PROPERTY.

TITLE I. GENERAL PROVISIONS, § 755.

II. ESTATES IN REAL PROPERTY, §§ 761-811.

III. RIGHTS AND OBLIGATIONS OF OWNERS, §§ 818-843

IV. USES AND TRUSTS, §§ 847-871.

V. POWERS, §§ 878-940. [REPEALED.]

TITLE I.

GENERAL PROVISIONS.

§ 755. Real property, how governed.

§ 755. REAL PROPERTY, HOW GOVERNED. Real property within this state is governed by the law of this state, except where the title is in the United States.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 218.

1. Applied, cited, construed, referred to, etc.
2. Declaratory of common laws.
3. Finding as to foreign law.
4. Territorial jurisdiction—Limitation on.

1. Applied, cited, construed, referred to, etc., in: Tolman vs. Smith, 85 Cal. 280, 282, 24 Pac. Rep. 743 (cited).

2. Declaratory of common law.—See 22 Am. & Eng. Encyc. of L. (2d ed.) 1321.

3. Finding as to law of foreign state.—In an action to foreclose mortgage made in Ne-

braska upon property in California to secure debt payable in Illinois, it would seem that court need not find what was law of Nebraska and Illinois; but where court, after stating that no evidence was introduced as to law of those states, "finds that law of said states is same as law of this state," finding is sufficient.—Tolman vs. Smith, 85 Cal. 280, 282, 24 Pac. Rep. 743.

4. Territorial jurisdiction—Limitation on.—See Political Code, §§ 33, 34.

TITLE II.

ESTATES IN REAL PROPERTY.

Chapter I. ESTATES IN GENERAL, §§ 761-781.

II. TERMINATION OF ESTATES, §§ 789-793.

III. SERVITUDES, §§ 801-811.

CHAPTER I.

ESTATES IN GENERAL.

- § 761. Enumeration of estates.
- § 762. What estate a fee simple.
- § 763. Conditional fees and estates tail abolished.
- § 764. Certain remainders valid.
- § 765. Freeholds. Chattels real. Chattel interests.
- § 766. Estate for life of a third person, when a freehold, etc.
- § 767. Future estates, what.
- § 768. Reversions.
- § 769. Remainders.
- § 770. Suspended ownership.
- § 771. Suspension by trust.

- § 772. Contingent remainder in fee.
- § 773. Remainders, future and contingent estates, how created.
- § 774. Limitation of successive estates for life.
- § 775. Remainder upon estates for life of third person.
- § 776. Contingent remainder on a term of years.
- § 777. Remainder of estates for life.
- § 778. Remainder upon a contingency.
- § 779. Heirs of a tenant for life, when to take as purchasers.
- § 780. Construction of certain remainders.
- § 781. Effect of power of appointment.

§ 761. **ENUMERATION OF ESTATES.** Estates in real property, in respect to the duration of their enjoyment, are either:

1. Estates of inheritance or perpetual estates;
2. Estates for life;
3. Estates for years; or,
4. Estates at will.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Commissioners' note—Estate by sufferance.
3. Dual character of estate for years.
4. Lease is estate.
5. Tenancy at will.

1. Applied, cited, construed, referred to, etc., in: *McDonald vs. Hanlon*, 79 Cal. 442, 443, 21 Pac. Rep. 861 (applied); *Summerville vs. Stockton Mill Co.*, 142 Cal. 529, 76 Pac. Rep. 243 (referred to).

2. Commissioners say: "Estates by suffer-

ance' are included in the phrase 'estates at will.'"

3. Dual character of estate for years, for, although a chattel for certain purposes, it is classed as lease of estate in real property.—*Summerville vs. Stockton Mill Co.*, 142 Cal. 529, 539, 76 Pac. Rep. 243.

4. Lease is estate in real property.—*Castro vs. Barry*, 79 Cal. 443, 21 Pac. Rep. 946.

5. Tenancy at will—See post § 761 and note.

§ 762. **WHAT ESTATE A FEE SIMPLE.** Every estate of inheritance is a fee, and every such estate, when not defeasible or conditional, is a fee simple or an absolute fee.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 218; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 322, held unconstitutional, see history, § 4 ante.

1. Commissioners' note—"Simple" defined.
2. Fee simple postponed—Construction of will.
3. Words of inheritance not essential.

1. Commissioners say: "The word 'simple' does not add any significance. It is used merely to mark more fully distinction between an unqualified fee and fee tail, or any class of conditional estates."

2. Fee simple postponed—Construction of will—Where will provides that there shall be vested absolutely in fee "property or money, \$50,000," and that such money given P. "is intended to vest in him absolutely, but re-

mainder of estate is only intended for use and benefit of children during their respective lives, with remainder in fee to those herein named, except \$50,000 absolutely given P.," interest of P. in such devise is "vested" interest in fee postponed merely in enjoyment, as under § 1241 law favors vesting of interests, and every interest will be presumed to be vested unless contrary intention is clearly manifested.—*Williams vs. Williams*, 73 Cal. 99, 100-102, 14 Pac. Rep. 394.

3. Words of inheritance not essential.—See post § 1073 and note.

§ 763. **CONDITIONAL FEES AND ESTATES TAIL ABOLISHED.** Estates tail are abolished, and every estate which would be at common law adjudged to be a fee tail is a fee simple; and if no valid remainder is limited thereon, is a fee simple absolute.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Commissioners' note.
3. Fee tail is fee simple under code.
4. Shelley's case—Rule in.

1. Applied, cited, construed, referred to, etc., in: *Barnett vs. Barnett*, 104 Cal. 298, 302, 37 Pac. Rep. 1049 (construed).

2. Commissioners' note.—The commissioners say: "An inheritable estate which will descend to certain classes of heirs is called an 'estate in fee tail,' or an 'estate tail.' The words 'heirs

of the body of,' etc., were the proper words creating such an estate."

3. Fee tail is fee simple under code.—Every instrument which at common law would be construed to create an estate tail shall not be construed to create fee simple, but "estate" which would be adjudged fee tail is fee simple.—*Barnett vs. Barnett*, 104 Cal. 298, 302, 37 Pac. Rep. 1049.

4. Shelley's case—Rule in.—See 25 Am. & Eng. Encyc. of L. (2d ed.) 689.

§ 764. **CERTAIN REMAINDERS VALID.** Where a remainder in fee is limited upon any estate, which would by the common law be adjudged a fee tail,

such remainder is valid as a contingent limitation upon a fee, and vests in possession on the death of the first taker, without issue living at the time of his death.

History: Enacted March 21, 1872.

As to remainders, conversions, and executory interest, see 34 Am. & Eng. Encyc. of L. (2d ed.) 374.

§ 765. FREEHOLDS. CHATTELS REAL. CHATTEL INTERESTS. Estates of inheritance and for life are called estates of freehold; estates for years are chattels real; and estates at will are chattel interests, but are not liable as such to sale on execution.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Common-law distinction.
3. Conveyance of estate for years.
4. Estates for years are chattels real.
5. Execution not leviable.
6. Real property defined.
7. Remedies of tenant.

1. Applied, cited, construed, referred to, etc. in: *Jeffers vs. Easton*, 113 Cal. 345, 353, 45 Pac. Rep. 680 (applied); *Summerville vs. Stockton Mill. Co.*, 142 Cal. 529, 533, 76 Pac. Rep. 243 (cited).

2. Common-law distinction is declared by this section.—*Jeffers vs. Easton*, 113 Cal. 345, 353, 45 Pac. Rep. 680.

3. Conveyance of estate for years is not governed by the rules applicable to conveyances of real property, but by those which apply to sales, and the relation of seller and buyer exists between the parties.—*Jeffers vs. Easton*, 113 Cal. 345, 353, 45 Pac. Rep. 680.

4. Estates for years are chattels real, the section being re-enactment of common law.—*Averill vs. Taylor*, 8 N. Y. 44; *Pugsley vs.*

Aiken, 11 N. Y. 494, 498 (cases cited in Commissioners' note).

5. Execution not leviable upon estates at will.—*Bigelow vs. Finch*, 11 Barb. (N. Y.) 498; *Dickinson vs. Smith*, 25 Barb. (N. Y.) 103 (cases cited in Commissioners' note).

6. Real property defined as being coextensive with lands, tenements, and hereditaments.—*Summerville vs. Stockton Mill. Co.*, 142 Cal. 529, 533, 76 Pac. Rep. 243.

See ante § 14, subds. 2, 3, and note; and Code Civ. Proc., § 17, subds. 2, 3.

7. Remedies of tenant.—One who is tenant, although not owner in fee, has exclusive right to possession and use of property and all its appurtenances, and has right to maintain an action for any injury which interferes with his possession or use and enjoyment of property; e. g. where water is diverted to injury of tenant he may maintain action for damages and for injunction.—*Hellbron vs. Kings R. & F. Canal Co.*, 76 Cal. 11, 16, 17 Pac. Rep. 933. See *Lux vs. Haggin*, 69 Cal. 255, 436, 10 Pac. Rep. 674.

§ 766. ESTATE FOR LIFE OF THIRD PERSON, WHEN A FREEHOLD, ETC. An estate during the life of a third person, whether limited to heirs or otherwise, is a freehold.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 218.

1. Definition of life estate.
2. Estate per autre vie.

1. Definition of life estate is "freehold in land, the duration of which is confined to the life or lives of some particular person or per-

sons, or to the happening or not happening of some uncertain event."—19 Am. & Eng. Encyc. of L. (2d ed.) 38.

2. Estate per autre vie, as declared in Commissioners' note which cites *Mosher vs. Yost*, 23 Barb. (N. Y.) 277.

§ 767. FUTURE ESTATES, WHAT. A future estate may be limited by the act of the party to commence in possession at a future day, either without the intervention of a precedent estate, or on the termination, by lapse of time or otherwise, of a precedent estate created at the same time.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Commissioners' note.
3. Defeat of future interest by act of owner, forfeiture, surrender, merger, not permitted.
4. Delivery to depositary—Title relates back.
5. Estate in futuro must be dependent upon particular estate.

6. Prospective operation.
7. Technical rule abolished.

1. Applied, cited, construed, referred to, etc. in: *Bury vs. Young*, 98 Cal. 446, 451, 35 Am. St. Rep. 186, 33 Pac. Rep. 323 (applied); *Blake-man vs. Miller*, 136 Cal. 133, 141, 39 Am. St. Rep. 120, 63 Pac. Rep. 537 (cited).

2. Commissioners' note.—The commissioners say: "The definition in this section comprehends every species of expectant estates created by act of party; remainders, strictly so called, future uses and executory devises. The words 'with or without intervention of precedent estate' embraces what are technically known as estates in future. The words 'lapse of time or otherwise' provide for contingent limitations operating to abridge or defeat prior estate.—*Nicoll vs. New York & E. R. Co.*, 12 N. Y. 121, 139. 'Expectant estates,' says Chancellor Walworth, 'include every present right and interest, either vested or contingent, which may by possibility vest at a future day.'—*Lawrence vs. Bayard*, 7 Paige Ch. (N. Y.) 70."

3. Defeat of future interest by act of owner, forfeiture, surrender, merger, not permitted.—See ante § 741 and note.

4. Delivery to depositary.—Title relates back.—Where deed is given to depositary with instructions not to record it, but to deliver it to grantee upon grantor's death, and grantor dies without recalling it, depositary is trustee of grantee and delivery by depositary after death of grantor relates back to first delivery

for purpose of carrying title.—*Bury vs. Young*, 98 Cal. 446, 451, 452, 35 Am. St. Rep. 186, 33 Pac. Rep. 338. See *Wittenbrock vs. Cass*, 110 Cal. 1, 6, 42 Pac. Rep. 300; *Ruiz vs. Dow*, 113 Cal. 490, 496, 45 Pac. Rep. 867; *Brown vs. Westerfield*, 47 Neb. 399, 407, 52 Am. St. Rep. 532, 66 N. W. Rep. 439.

5. Estate in future must be dependent upon particular estate.—Common-law rule that "estate of freehold cannot be granted to commence in futuro, without creation, at same time, of particular estate, which vests in immediate possession in some other person," which was of feudal origin, has been abrogated by this section.—*Hawes vs. Stebbins*, 49 Cal. 369, 372, 374.

6. Prospective operation.—Statute does not apply to deeds executed before adoption of code.—*Hawes vs. Stebbins*, 49 Cal. 369, 372, 374. See *Chandler vs. Chandler*, 55 Cal. 267, 270.

7. Technical rule abolished.—This section and § 773 abolished technical rule against creation of future estates.—*Blakeman vs. Miller*, 136 Cal. 138, 141, 39 Am. St. Rep. 130, 68 Pac. Rep. 587.

See post § 773 and note.

§ 768. REVERSIONS. A reversion is the residue of an estate left by operation of law in the grantor or his successors, or in the successors of a testator, commencing in possession on the determination of a particular estate granted or devised.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Substitution of legatee in will.

1. Applied, cited, construed, referred to, etc. in: *In re Estate Bennett*, 134 Cal. 320, 322, 66 Pac. Rep. 370 (referred to).

2. Substitution of legatees in will.—Where testator provides in will that in case of death of any legatee before distribution portion bequeathed to such legatee shall "revert" to chil-

dren of such legatee, the word "revert" is not used in its technical or legal sense, and it is not testator's intention that in contingency named his bequest should fall into his general estate.—*In re Estate Bennett*, 134 Cal. 320, 321, 322, 66 Pac. Rep. 370. See *Mass. Bates vs. Dewson*, 128 Mass. 334, 335. *N. J. Beatty vs. Cory Unvers. Soc.*, 39 N. J. Eq. (12 Stew.) 454, 462. *Va. Jiggetts vs. Davis*, 1 Leigh 368.

§ 769. REMAINDERS. When a future estate, other than a reversion, is dependent on a precedent estate, it may be called a remainder, and may be created and transferred by that name.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Defeat of future interest—How effected.
3. Duration of contingency.

1. Applied, cited, construed, referred to, etc. in: *Jewell vs. Pierce*, 120 Cal. 79, 84, 52 Pac. Rep. 132 (applied with other sections).

2. Defeat of future interest—How effected.—See ante §§ 739-741 and notes.

3. Duration of contingency.—Future estate described in this section is contingent under § 695 while "event upon which it is limited and to take effect remains uncertain."—*Jewell vs. Pierce*, 120 Cal. 79, 84, 52 Pac. Rep. 132.

See ante § 695 and note.

§ 770. SUSPENDED OWNERSHIP. The absolute ownership of a term of years cannot be suspended for a longer period than the absolute power of alienation can be suspended in respect to a fee.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 218.

As to restraint on alienation, see ante § 715 and note.

§ 771. SUSPENSION BY TRUST. The suspension of all power to alienate the subject of a trust, other than a power to exchange it for other property to be

held upon the same trust, or to sell it and reinvest the proceeds to be held upon the same trust, is a suspension of the power of alienation, within the meaning of section seven hundred and fifteen.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Distinction between trusts in personal and real property.
3. Exchange of land.
4. Law of foreign state governs—Trust in personalty.
5. Lives in being constitute limit of suspension.
6. Perpetuity in guise of trust not permitted.
7. Power of sale immaterial.

1. Applied, cited, construed, referred to, etc., in: *In re Estate Hinckley*, 58 Cal. 457, 481 (construed); *In re Estate Walkerly*, 108 Cal. 627, 648, 656, 49 Am. St. Rep. 97, 41 Pac. Rep. 772 (construed and applied); *Sacramento Bank vs. Alcorn*, 121 Cal. 379, 382, 58 Pac. Rep. 813 (cited); *In re Estate Steele*, 124 Cal. 533, 537, 57 Pac. Rep. 533 (referred to).

2. Distinction between trusts in personal and real property.—See post §§ 852, 857, 2220, 2242 and notes.

3. Exchange of land.—“Mere power to exchange lands, whether such exchange is made directly or by means of sale and new purchase, is not power to alien estate,” within intent and meaning of provisions of statute, and consequently such power will not obviate objection as to alienability within rule as to perpetuity.—*Hawley vs. James*, 5 Paige Ch. (N. Y.) 318, 444; *Belmont vs. O'Brien*, 12 N. Y. 394, 402. See *In re Estate Hinckley*, 58 Cal. 457, 481.

4. Law of foreign state governs with re-

spect to trust created in personal property where owner who creates trust is domiciled in foreign state.—*Whitney vs. Dodge*, 105 Cal. 192, 197, 198, 38 Pac. Rep. 636. See *In re Estate Apple*, 66 Cal. 432, 436, 437, 6 Pac. Rep. 7.

5. Lives in being constitute limit of suspension.—Measure of period of suspension is lives in being, and law does not permit suspension for any fixed period or term of years not depending upon duration of life, and suspense for term of years, however short, or when dependent in part upon life and in part upon fixed period of time, is not permitted.—*In re Estate Walkerly*, 108 Cal. 627, 651, 49 Am. St. Rep. 97, 41 Pac. Rep. 772. See *Crew vs. Pratt*, 119 Cal. 139, 146, 147, 51 Pac. Rep. 38; *In re Estate Cavarly*, 119 Cal. 406, 411, 51 Pac. Rep. 629; *Hone vs. Van Schaick*, 20 Wend. (N. Y.) 564, 568 (said to be leading case); *Field vs. Field*, 4 Sand. Ch. (N. Y.) 528.

6. Perpetuity in guise of trust not permitted.—Section is mere re-enactment of familiar rule that perpetuity will not be tolerated in guise of trust.—*In re Estate Walkerly*, 108 Cal. 627, 648, 49 Am. St. Rep. 97, 41 Pac. Rep. 772.

7. Power of sale immaterial, and, regardless of time when sale is to be made, does not save provisions of trust where proceeds of sale are to be held in violation of section.—*In re Estate Walkerly*, 108 Cal. 627, 656, 49 Am. St. Rep. 97, 41 Pac. Rep. 772.

§ 772. CONTINGENT REMAINDER IN FEE. A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined before they attain majority.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. After-born children born during testator's life.
3. Charitable trusts are not within statute.
4. Exception contained in statute is exclusive.

1. Applied, cited, construed, referred to, etc., in: *In re Estate Hinckley*, 58 Cal. 457, 474, 476 (construed and applied); *Crew vs. Pratt*, 119 Cal. 139, 146, 51 Pac. Rep. 38 (construed); *In re Estate Steele*, 124 Cal. 533, 537, 57 Pac. Rep. 564 (cited); *Estate Willey*, 128 Cal. 1, 9, 60 Pac. Rep. 471 (cited).

2. After-born children born during testator's life.—See ante § 29 and note and post § 1837 and note.

3. Charitable trusts are not within statute, purpose of legislature, as declared in this section and § 715, being merely to prohibit limitations or conditions which may suspend power of alienation beyond “the lives of persons.”—*In re Estate Hinckley*, 58 Cal. 457, 474. See *In re Estate Robinson*, 63 Cal. 620, 621.

4. Exception contained in statute is exclusive, and absolute power of alienation cannot be suspended by any limitation or condition whatever for longer period than during continuance of lives of persons in being at creation of limitation or condition, except in such single case mentioned.—*Goldtree vs. Thompson*, 79 Cal. 613, 623, 22 Pac. Rep. 50.

See ante § 715 and note.

§ 773. REMAINDERS, FUTURE AND CONTINGENT ESTATES, HOW CREATED. Subject to the rules of this title, and of part one of this division, a freehold estate, as well as a chattel real, may be created to commence at a future day; an estate for life may be created in a term of years, and a remainder limited

thereon; a remainder of a freehold or chattel real, either contingent or vested, may be created, expectant on the determination of a term of years; and a fee may be limited on a fee, upon a contingency, which, if it should occur, must happen within the period prescribed in this title.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Common law abrogated.
3. Distinction between executory devise and contingent remainder at common law.
4. Future estate dependent upon precedent estate.
5. Remainders in technical sense only included.
6. Remainder limited on contingency.

1. Applied, cited, construed, referred to, etc., in: *Jewell vs. Pierce*, 120 Cal. 79, 84, 52 Pac. Rep. 132 (applied); *In re Estate Willey*, 128 Cal. 1, 9, 60 Pac. Rep. 471 (referred to); *Blakeman vs. Miller*, 136 Cal. 138, 141, 89 Am. St. Rep. 120, 68 Pac. Rep. 587 (construed and applied).

2. Common law abrogated.—Many of intricacies which attended creation of estates at common law have been swept away by this and succeeding sections.—*In re Estate Willey*, 128 Cal. 1, 9, 60 Pac. Rep. 471.

3. Distinction between executory devise and

contingent remainder at common law was that contingent remainder could not be created upon fee, when owner had once granted fee, whether absolute or qualified, but for purpose of carrying into effect will of testator when he had devised fee to one person, but qualified this disposition by giving estate over to another upon happening of contingency or breach of condition, his disposition was upheld as an executory devise, which rule, however, has been changed by this section and § 778.—*Jewell vs. Pierce*, 120 Cal. 79, 84, 52 Pac. Rep. 132.

See post § 778 and note.

4. Future estate dependent upon precedent estate.—See ante § 695 and note.

5. Remainders in technical sense are only ones which are included in this and cognate sections.—*Blakeman vs. Miller*, 136 Cal. 138, 141, 89 Am. St. Rep. 120, 68 Pac. Rep. 587.

6. Remainder limited on contingency.—See post § 778 and note.

§ 774. LIMITATION OF SUCCESSIVE ESTATES FOR LIFE. Successive estates for life cannot be limited, except to persons in being at the creation thereof, and all life estates subsequent to those of persons in being are void; and upon the death of those persons, the remainder, if valid in its creation, takes effect in the same manner as if no other life estate had been created.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 219.

Applied, cited, construed, referred to, etc., in: *In re Estate Willey*, 128 Cal. 1, 9, 60 Pac. Rep. 471 (referred to).

§ 775. REMAINDER UPON ESTATES FOR LIFE OF THIRD PERSON. No remainder can be created upon successive estates for life, provided for in the preceding section, unless such remainder is in fee; nor can a remainder be created upon such estate in a term for years, unless it is for the whole residue of such term.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 219.

Applied, cited, construed, referred to, etc., in: *In re Estate Willey*, 128 Cal. 1, 9, 60 Pac. Rep. 471 (referred to).

§ 776. CONTINGENT REMAINDER ON A TERM OF YEARS. A contingent remainder cannot be created on a term of years, unless the nature of the contingency on which it is limited is such that the remainder must vest in interest during the continuance or at the termination of lives in being at the creation of such remainder.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Lessee's interest.

1. Applied, cited, construed, referred to, etc., in: *In re Estate Willey*, 128 Cal. 1, 9, 60 Pac. Rep. 471 (referred to); *Blakeman vs. Miller*, C. C.—44

136 Cal. 138, 141, 89 Am. St. Rep. 120, 68 Pac. Rep. 587 (cited and construed).

2. Lessee's interest, when lessee has by agreement with lessor an option to purchase realty after specified period and within term

of lease for amount specified therein, is not remainder, contingent upon term of years, nor is it fee limited on fee, nor is it void on account of remoteness as being interest which

may not vest within time prescribed by statute.—*Blakeman vs. Miller*, 136 Cal. 138, 141, 89 Am. St. Rep. 120, 68 Pac. Rep. 587.

§ 777. REMAINDER OF ESTATES FOR LIFE. No estate for life can be limited as a remainder on a term of years, except to a person in being at the creation of such estate.

History: Enacted March 21, 1872.

Applied, cited, construed, referred to, etc., in: *In re Estate Willey*, 128 Cal. 1, 9, 60 Pac. Rep. 471 (referred to).

§ 778. REMAINDER UPON A CONTINGENCY. A remainder may be limited on a contingency which, in case it should happen, will operate to abridge or determine the precedent estate; and every such remainder is to be deemed a conditional limitation.

History: Enacted March 21, 1872.

Applied, cited construed, referred to, etc., in: 132 (referred to); *In re Estate Willey*, 128 Cal. Jewell vs. Pierce, 120 Cal. 79, 84, 52 Pac. Rep. 1, 9, 60 Pac. Rep. 471 (referred to).

§ 779. HEIRS OF A TENANT FOR LIFE, WHEN TO TAKE AS PURCHASERS. When a remainder is limited to the heirs, or heirs of the body, of a person to whom a life estate in the same property is given, the persons who, on the termination of the life estate, are the successors or heirs of the body of the owner for life, are entitled to take by virtue of the remainder so limited to them, and not as mere successors of the owner for life.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Life estate conveyed—Construction of deed.
3. Shelley's case—Rule in abolished.

1. Applied, cited, construed, referred to, etc., in: *Barnett vs. Barnett*, 104 Cal. 298, 299, 302, 37 Pac. Rep. 1049 (construed and applied); *In re Estate Willey*, 128 Cal. 1, 9, 60 Pac. Rep. 471 (referred to).

2. Life estate conveyed—Construction of deed.—Deed of realty which purports to "give, grant, alien, and confirm unto said party of second part and to his heirs all those certain lots, etc., to have and to hold, all and singular,

said premises unto said party of second part, for and during his natural life, and to the issue and heirs of body of said party of second part," conveys to immediate grantee only life estate.—*Barnett vs. Barnett*, 104 Cal. 298, 302, 37 Pac. Rep. 1049.

3. Shelley's case—Rule in abolished.—Effect of this section is to abrogate rule in Shelley's case, and, with other sections of code, to furnish rules by which estate or interest in lands taken by virtue of grant are to be determined.—*Barnett vs. Barnett*, 104 Cal. 298, 299, 37 Pac. Rep. 1049.

§ 780. CONSTRUCTION OF CERTAIN REMAINDERS. When a remainder on an estate for life or for years is not limited on a contingency defeating or avoiding such precedent estate, it is to be deemed intended to take effect only on the death of the first taker, or the expiration, by lapse of time, of such term of years.

History: Enacted March 21, 1872.

Applied, cited, construed, referred to, etc., in: *In re Estate Willey*, 128 Cal. 1, 9, 60 Pac. Rep. 471 (referred to).

§ 781. EFFECT OF POWER OF APPOINTMENT. A general or special power of appointment does not prevent the vesting of a future estate limited to take effect in case such power is not executed.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Regulation of effect of power.

1. Applied, cited, construed, referred to, etc., in: *In re Estate Willey*, 128 Cal. 1, 9, 60 Pac.

Rep. 471 (referred to); *in re Estate Fair*, 132 Cal. 523, 558, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000 (construed).

2. Regulation of effect of power.—By this

section, "power of appointment does not prevent future estate limited to take effect in case such power is not executed. This does not authorize any power, but regulates effect. It does not state purpose of supposed power ex-

cept that it must refer to power to convey land."—In re Estate Fair, 182 Cal. 528, 558, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

CHAPTER II.

TERMINATION OF ESTATES.

- § 789. Tenancy at will may be terminated by notice.
 § 790. Effect of notice.
 § 791. Re-entry, when and how to be made.
 § 792. Summary proceedings in certain cases provided for.
 § 793. Notice not necessary before action.

§ 789. TENANCY AT WILL MAY BE TERMINATED BY NOTICE. A tenancy or other estate at will, however created, may be terminated by the landlord's giving notice in writing to the tenant, in the manner prescribed by section eleven hundred and sixty-two of the Code of Civil Procedure, to remove from the premises within a period of not less than one month, to be specified in the notice.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Custodian of property not tenant at will.
3. Definition of "tenant at will."
4. Demand before commencing action.
5. Effect of notice.
6. Election of remedies by lessor—Ejectment or unlawful detainer.
7. Emblements—Right of tenant to.
8. Entry under void contract or lease—Tenancy at will results.
9. Holding over without consent of lessor.
10. Pleading—Complaint must allege notice.
11. Possession under void contract to acquire title.
12. Right of re-entry after notice.
13. Tenants at will only within statute.
14. Transfer of title does not affect lease.
15. Same—Recognition of lease by grantee.
16. Unlawful detainer—When commences.
17. Waiver of notice by disclaiming lessor's title.
18. Where relation of landlord and tenant does not exist—Notice unnecessary.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Martin vs. Splivalo*, 56 Cal. 128, 129 (applied); *Perine vs. Teague*, 66 Cal. 446, 447, 6 Pac. Rep. 84 (applied); *Groome vs. Almstead*, 101 Cal. 425, 428, 85 Pac. Rep. 1021 (applied); *Macdonough vs. Starbird*, 105 Cal. 15, 19, 38 Pac. Rep. 510 (applied); *McCarthy vs. Brown*, 113 Cal. 15, 19, 45 Pac. Rep. 14 (applied); *Vance vs. Anderson*, 113 Cal. 532, 540, 45 Pac. Rep. 316 (held not applicable); *Carteri vs. Roberts*, 140 Cal. 164, 167, 73 Pac. Rep. 818 (applied).

2. CUSTODIAN OF PROPERTY IS NOT TENANT AT WILL.—Agent or servant having care of real estate is not tenant at will of his principal or master.—*Mitchell vs. Davis*, 30 Cal. 45, 47.

3. DEFINITION OF "TENANT AT WILL."—"Tenant at will is where lands or tenements are let by one man to another, to have and to hold to him at will of lessor, by force of which lease lessee is in possession. In this case

lessee is called tenant at will, because he hath no certain or sure estate; for lessor may put him out at what time it pleaseth him."—*Blum vs. Robertson*, 24 Cal. 127, 145 (quoting *Littleton* § 68).

4. Demand before commencing action.—See post § 791 and note.

5. EFFECT OF NOTICE is to change possession and rights of parties to lease and after such notice tenant holds over.—*Martin vs. Splivalo*, 56 Cal. 128, 129.

See post § 790 and note.

6. ELECTION OF REMEDIES.—Ejectment or unlawful detainer.—After terminating tenancy by giving notice lessor may either maintain ejectment or institute action of unlawful detainer.—*Martin vs. Splivalo*, 56 Cal. 128, 129.

7. Emblements—Right of tenant to.—See post § 819 and note.

8. ENTRY UNDER VOID PAROL CONTRACT or under void lease, or pending unexecuted negotiations for written lease, results in tenancy at will, and entitles party in possession to notice.—*Carteri vs. Roberts*, 140 Cal. 164, 167, 73 Pac. Rep. 818. See *Jones vs. Shay*, 50 Cal. 508, 509; *McLeran vs. Benton*, 73 Cal. 329, 338, 2 Am. St. Rep. 814, 14 Pac. Rep. 879.

9. HOLDING OVER WITHOUT CONSENT OF LESSOR.—Where tenant, upon expiration of term, refuses to surrender possession and holds over against consent of lessor, there is no tenancy at will, and thirty days' notice is not required.—*Perine vs. Teague*, 66 Cal. 446, 447, 6 Pac. Rep. 84.

10. PLEADING.—Complaint must allege termination of tenancy by giving notice required by statute.—*Martin vs. Splivalo*, 56 Cal. 128, 130. See *Fish vs. Benson*, 71 Cal. 428, 436, 12 Pac. Rep. 454.

11. POSSESSION UNDER VOID CONTRACT TO ACQUIRE TITLE.—Where contract is made between partners whereby one agrees to acquire patent to land and convey such land

to partnership, such contract being void, partner in possession under it is not tenant at will, and is not entitled, under § 819, to harvest and remove emblements on theory that his tenancy would not be terminated otherwise than by giving him thirty days' notice.—*Groome vs. Almstead*, 101 Cal. 425, 428, 429, 35 Pac. Rep. 1021.

12. RIGHT OF RE-ENTRY ACCRUES TO LESSOR when he terminates tenancy at will by giving notice.—*Martin vs. Splivalo*, 56 Cal. 128, 129.

13. TENANTS AT WILL ONLY ARE WITHIN STATUTE and entitled to notice in writing before institution of an action in ejectment.—*Vance vs. Anderson*, 118 Cal. 532, 540, 45 Pac. Rep. 816.

14. TRANSFER OF TITLE DOES NOT AFFECT LEASE or in any way change or modify it, but grantee simply takes place of his grantor and becomes landlord of tenant.—*Macdonough vs. Starbird*, 105 Cal. 15, 19, 38 Pac. Rep. 510.

15. Recognition of lease by grantee.—Where grantee does not give notice as provided by § 827, and makes no attempt to terminate lease or change its terms, but accepts customary rent and allows occupancy to continue, there is recognition of lease and not

taking of new one.—*Macdonough vs. Starbird*, 105 Cal. 15, 19, 38 Pac. Rep. 510.

16. UNLAWFUL DETAINER DOES NOT COMMENCE, when month's notice is given, until after expiration of month, after which there must be demand in writing.—*King vs. Connolly*, 51 Cal. 181, 183; *Martin vs. Splivalo*, 56 Cal. 128, 129; *Smith vs. Hill*, 63 Cal. 51, 52.

17. WAIVER OF NOTICE BY DISCLAIM-ING LESSOR'S TITLE.—Where in ejectment by landlord against tenant at will allegations of complaint of seizin and right of possession of plaintiff are denied in answer and a distinct claim of ownership by defendant is made, tenant cannot invoke his right and insist that no notice to quit was given.—*McCarthy vs. Brown*, 118 Cal. 15, 19, 45 Pac. Rep. 14. See *Smith vs. Ogg Shaw*, 16 Cal. 88, 90; *Dodge vs. Walley*, 22 Cal. 224, 229, 38 Am. Dec. 61; *Bolton vs. Landers*, 27 Cal. 104, 105; *Simpson vs. Applegate*, 75 Cal. 342, 345, 17 Pac. Rep. 237; *Von Glahn vs. Brennan*, 81 Cal. 261, 264, 22 Pac. Rep. 596; *Jackson vs. Deyo*, 3 John. (N. Y.) 422; *Jackson vs. Wheeler*, 6 John. (N. Y.) 272.

18. WHERE RELATION OF LANDLORD AND TENANT DOES NOT EXIST doctrine of notice to quit does not apply.—*Blum vs. Robertson*, 24 Cal. 127, 145.

§ 790. EFFECT OF NOTICE. After such notice has been served, and the period specified by such notice has expired, but not before, the landlord may re-enter, or proceed according to law to recover possession.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Effect of notice—Tenant holds over.
3. Unlawful detainer—When commences.

1. Applied, cited, construed, referred to, etc., in: *Perine vs. Teague*, 66 Cal. 446, 447, 6

Pac. Rep. 84 (referred to); *Carteri vs. Roberts*, 140 Cal. 164, 167, 73 Pac. Rep. 818 (applied).

2. Effect of notice—Tenant holds over.—See ante § 789 and note par. 5.

3. Unlawful detainer—When commences.—See ante § 789 and note par. 16.

§ 791. RE-ENTRY, WHEN AND HOW TO BE MADE. Whenever the right of re-entry is given to a grantor or lessor in any grant or lease, or otherwise, such re-entry may be made at any time after the right has accrued, upon three days' notice, as provided in sections eleven hundred and sixty-one and eleven hundred and sixty-two, Code of Civil Procedure.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Complaint must allege that notice was given.
3. Right of re-entry—Nature of.
4. Statute is mandatory.
5. Termination of lease during term.
6. Waiver of notice not permitted.

1. Applied, cited, construed, referred to, etc., in: *Martin vs. Splivalo*, 56 Cal. 128, 129, 130 (applied); *Smith vs. Hill*, 63 Cal. 51, 52 (applied); *Perine vs. Teague*, 66 Cal. 446, 447, 6 Pac. Rep. 84 (referred to); *Earl Orchard Co. vs. Fava*, 138 Cal. 76, 79, 70 Pac. Rep. 1073 (construed and applied).

2. Complaint must allege that notice was given in an action of unlawful detainer, otherwise it will be demurrable.—*Smith vs. Hill*, 63 Cal. 51, 52.

3. Right of re-entry—Nature of.—Right of re-entry is not right of entry (or re-entry, as sometimes mentioned) which landlord has where lease is for fixed period and term has expired by limitation, but has reference to some provision of lease for its termination by landlord on default of tenant, such as failure to pay rent due, committing or permitting waste, or some other breach of express provisions of lease.—*Earl Orchard Co. vs. Fava*, 138 Cal. 76, 78, 70 Pac. Rep. 1073.

4. Statute is mandatory, and re-entry can be made only upon three days' notice.—*Martin vs. Splivalo*, 56 Cal. 128, 129, 130; *Smith vs. Hill*, 63 Cal. 51, 52.

5. Termination of lease during term.—Where lease is given for term of years lessor

cannot during term terminate it at his own pleasure, but his right to re-enter can come only from some breach of covenant by lessee which, by terms of lease or operation of law, works forfeiture and gives right of re-entry.—*Smith vs. Schultz*, 89 Cal. 526, 538, 26 Pac. Rep. 1087.

6. Waiver of notice not permitted.—In ac-

tion of unlawful detainer plaintiff cannot recover unless three days' notice required by statute was given, even though defendant had served notice upon plaintiff in writing that he would not surrender possession to him; non constat but that if notice had been given defendant would have surrendered possession.—*Martin vs. Splivalo*, 56 Cal. 128, 129, 130.

§ 792. SUMMARY PROCEEDINGS IN CERTAIN CASES PROVIDED FOR.

Summary proceedings for obtaining possession of real property forcibly entered, or forcibly and unlawfully detained, are provided for in sections eleven hundred and fifty-nine to eleven hundred and seventy-five, both inclusive, of the Code of Civil Procedure.

History: Enacted March 21, 1872.

§ 793. NOTICE NOT NECESSARY BEFORE ACTION. An action for the possession of real property leased or granted, with a right of re-entry, may be maintained at any time, after the right to re-enter has accrued, without the notice prescribed in section seven hundred and ninety-one.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 892, held unconstitutional, see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXXVIII, p. 599.

1. Applied, cited, construed, referred to, etc.
2. Notice of increased rent.
3. Right of re-entry upon breach of covenant.
4. Same—Non-payment of rent.
5. Same—Same—Acceptance of rent as waiver of forfeiture.
6. Tenant for fixed term not entitled to notice.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Heywood vs. Berkeley L. & T. L. Assoc.* (Cal. May 26, 1886), 11 Pac. Rep. 246, 247 (applied); *McKissick vs. Ashby*, 98 Cal. 422, 425, 38 Pac. Rep. 729 (applied).

2. NOTICE OF INCREASED RENT, where lease is for term, given during term, if rejected by tenant, does not inure to his benefit; and notwithstanding such notice, when lease expires by its own limitation no notice is necessary in order to entitle lessor to recover premises.—*Canning vs. Fibush*, 77 Cal. 196, 198, 19 Pac. Rep. 376.

3. RIGHT OF RE-ENTRY UPON BREACH OF COVENANT.—Where lease stipulates that it shall be forfeited and become void and that lessor shall have right to re-enter if lessee fails to keep and perform covenants of lease, upon breach of covenant lessor has right to re-enter and maintain ejectment without giving notice.—*Heywood vs. Berkeley L. & T. L.*

Assoc. (Cal. May 26, 1886), 11 Pac. Rep. 246, 247.

4. Non-payment of rent.—Demand of rent upon or after day when it becomes due is essential to give lessor right of re-entry.—*Sauer vs. Meyer*, 87 Cal. 34, 37, 25 Pac. Rep. 152.

5. Same—Acceptance of rent as waiver of forfeiture.—To make acceptance of rent waiver of forfeiture in case where lease provides for re-entry in event of breach of obligation, it must appear that landlord had knowledge of fact that condition was broken at time he accepted rent, and it must further appear that rent which he accepted became due after breach was committed by tenant.—*Silva vs. Campbell*, 84 Cal. 420, 422, 24 Pac. Rep. 316.

6. TENANT FOR FIXED TERM NOT ENTITLED TO NOTICE.—Action of ejectment may be maintained against tenant for fixed term upon expiration of term without previous notice or demand, and notice that plaintiff will not renew and that defendant must give up possession is not only sufficient but more than is necessary.—*McKissick vs. Ashby*, 98 Cal. 422, 425, 38 Pac. Rep. 729. See *Canning vs. Fibush*, 77 Cal. 196, 198, 19 Pac. Rep. 376.

CHAPTER III.

SERVITUDES.

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| § 801. Servitudes attached to land. | § 807. Apportioning easements. |
| § 802. Servitudes not attached to land. | § 808. Rights of owner of future estate. |
| § 803. Designation of estates. | § 809. Actions by owner and occupant of dominant tenement. |
| § 804. By whom grantable. | § 810. Actions by owner of servient tenement. |
| § 805. By whom held. | § 811. How extinguished. |
| § 806. Extent of servitudes. | |

§ 801. **SERVITUDES ATTACHED TO LAND.** The following land burdens, or servitudes upon land, may be attached to other land as incidents or appurtenances, and are then called easements:

1. The right of pasture;
2. The right of fishing;
3. The right of taking game;
4. The right of way;
5. The right of taking water, wood, minerals, and other things;
6. The right of transacting business upon land;
7. The right of conducting lawful sports upon land;
8. The right of receiving air, light, or heat from or over, or discharging the same upon or over land;
9. The right of receiving water from or discharging the same upon land;
10. The right of flooding land;
11. The right of having water flow without diminution or disturbance of any kind;
12. The right of using a wall as a party-wall;
13. The right of receiving more than natural support from adjacent land or things affixed thereto;
14. The right of having the whole of a division fence maintained by a coterminous owner;
15. The right of having public conveyances stopped, or of stopping the same on land;
16. The right of a seat in church;
17. The right of burial.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 392, held unconstitutional, see history, § 4 ante.

I. In General.

1. Applied, cited, construed, referred to, etc.
- 2-13. Acquisition or creation of easement or servitude—Grant—Implication—Prescription.
14. Same—Presumption of grant.
15. Same—Transfer of land—Incidental easement.
16. Same—Writing necessary.
- 17, 18. Assignment of easement.
- 19, 20. Conveyance of easement.
- 21, 22. Executed parol license—Revocation.
- 23-27. Nature of appurtenances, easements, and servitudes.
28. Right of entry to protect easement.

II. Right to Fish.

29. In ocean.
30. In rivers.

III. Right of Way.

- 31-33. Condemnation by city—Alley—Complaint—Proof of necessity.
- 34, 35. Convenience not alone sufficient.
36. Conveyance—Writing necessary.
- 37, 38. Same—Description in deed.
39. Easement and right of way distinguished.
40. Essential—Two tenements necessary.
- 41, 42. Evidence—Admissions—Parol evidence of contract.
43. Obstruction of way—Dedication need not be proved.
44. Same—Right of access must not be impeded.
45. On mining stream—Equal rights of miners.
46. Over leased premises.
47. Purchaser without notice of way.
48. Way of necessity—When arises.

49. Same—Building on another's land.
- IV. Water-Rights.
50. Easement appurtenant to land.
51. Same—Right acquired by contract.
- 52-54. Flowage—Homestead right—Prescription.
- 55, 56. Same—Injunction against diversion—Pleading license.
- 57, 58. Riparian rights—Nature of—Taking for public use.
- 59, 60. Surface water—Discharge on adjoining land.
- V. Lateral Support.
- 61-64. Excavations—Damages—Notice to adjoining landowner.
- 65, 66. Nature and acquisition of right—Easement of adjoining landowner.
- VI. Light and Air.
67. Abolition of doctrine of ancient lights.
68. Acquisition or creation of easement.
69. Landlord liable to tenant for obstructing light.
70. Obstruction of adjoining landowner's light.
- VII. Party-Walls.
71. Creation of easement—Contract.
72. Increasing height.
73. Location and ownership.
74. Nature of easement.

I. IN GENERAL

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Farmer vs. Ukiah Water Co.*, 56 Cal. 11, 13 (applied); *Lux vs. Haggin*, 69 Cal. 255, 293, 10 Pac. Rep. 674 (construed and applied); *McDaniel vs. Cummings*, 83 Cal. 515, 517, 518, 23 Pac. Rep. 795, 3 L. R. A. 575 (construed and applied); *Dorris vs. Sullivan*, 90 Cal. 279, 286, 27 Pac. Rep. 216; *Painter vs. Pasadena L. & W. Co.*, 91 Cal. 74, 84, 27 Pac. Rep. 539 (construed and applied); *Kennedy vs. Burnap*, 120 Cal. 488, 490, 493, 53 Pac. Rep. 843, 40 L. R. A. 476 (construed and applied); *Los Angeles Term. L. Co. vs. Southern Pac. R. Co.*, 136 Cal. 36, 48, 50, 63 Pac. Rep. 308 (construed and applied).

2. ACQUISITION OR CREATION OF EASEMENT OR SERVITUDE—IN GENERAL.—Section is mere definition of easements appurtenant, and does not prescribe or regulate manner of acquiring them.—*McDaniel vs. Cummings*, 83 Cal. 515, 517, 23 Pac. Rep. 795, 3 L. R. A. 575.

3. By grant or prescription.—An easement or servitude may be created by grant or prescription.—*American Co. vs. Bradford*, 27 Cal. 360, 361, 367; *Wagner vs. Hanna*, 33 Cal. 111, 116, 99 Am. Dec. 354.

4. Erection of building wholly in one's own lot invades no right of coterminous owner, and can create no easement or servitude upon his property.—*Sullivan vs. Zeiner*, 93 Cal. 346, 350, 23 Pac. Rep. 209, 20 L. R. A. 730.

5. By necessary implication.—When an owner of lands divides his property into two parts, one of which is conveyed, he is taken by implication to have included in his grants all such easements in and servitudes upon remaining property as may be necessary for

reasonable enjoyment of part conveyed.—*Cave vs. Crafts*, 53 Cal. 135, 140.

6. Prescription.—Title by prescription may be acquired by exclusive and uninterrupted use of water for statutory period.—*American Co. vs. Bradford*, 27 Cal. 360, 361, 367, 368.

7. Same—Against government.—Prescriptive easement cannot be acquired against United States, and can be acquired only by one claimant against another private individual.—*Smith vs. Hawkins*, 110 Cal. 122, 126, 43 Pac. Rep. 453.

8. Same—Distinguished from appropriation.—Appropriator of water conveyed by means of ditch across land of government, while land which he subjects to his necessary uses continues to be part of public domain, is licensee of general government; but when such part of public domain passes into private ownership it is burdened by easement granted by United States to appropriator who holds his rights against this land on express grant. In this essential respect, that is to say, in origin of title under which servient tenement is subjected to use, one holding water-rights by such appropriation differs from one who holds water-rights by prescription.—*Smith vs. Hawkins*, 110 Cal. 122, 125, 42 Pac. Rep. 453.

9. Same—Grant presumed.—Prescription supposes grant before time of legal memory, and is founded on immemorial use of way by claimant and his ancestors or grantors.—*Kripp vs. Curtis*, 71 Cal. 62, 66, 12 Pac. Rep. 879.

10. Same—Open and adverse use.—Right of use of water gained by reason of adverse use for more than five years must be so gained by open and presumably adverse use; for if there is any act done by other owners that operates as interruption, however slight, it prevents acquisition of right by such use.—*Cave vs. Crafts*, 53 Cal. 135, 138.

11. Same—Lapse of time.—Use of easement for five years unexplained will be presumed to be under claim or assertion of right, and adverse, and not by leave or favor of owner of servient tenement.—*Kripp vs. Curtis*, 71 Cal. 62, 66, 11 Pac. Rep. 879.

12. Same—Parol license.—Use of a way which began under parol license may ripen into perfect title to such right by prescription; but in such event user must have exercised for period of time prescribed by code for statute of limitations under claim of right.—*Barbour vs. Pierce*, 42 Cal. 657, 662.

13. Same—Question of fact.—Jury, or court sitting as such, must determine question as to user for sufficient length of time and whether circumstances are of such character as to constitute right by prescription.—*Kripp vs. Curtis*, 71 Cal. 62, 66, 11 Pac. Rep. 879.

14. Presumption of a grant of an easement, when indulged, is because of conduct of other party, in submitting to use for such length of time, without objection, cannot be accounted for by any other hypothesis; acts done by party claiming benefit of presumption, and his predecessors in estate, must however have been in themselves such as other party, having

right to object to, or complain of, did neither, but submitted to them without objection or challenge.—*Hanson vs. McCue*, 42 Cal. 303, 310, 10 Am. Rep. 299.

15. Transfer of land passes with it an easement attached to land right to use other land of grantor in same manner as such property was obviously and permanently used by him.—*Kennedy vs. Burnap*, 120 Cal. 488, 493, 52 Pac. Rep. 843, 40 L. R. A. 476.

16. Writing is necessary to create easement; it cannot be created by verbal contract.—*Dorris vs. Sullivan*, 90 Cal. 279, 286, 289, 27 Pac. Rep. 216.

17. ASSIGNABILITY.—Reservation of right to use water on surface of swamp lands granted is mere servitude in gross and not capable of being granted over.—*Painter vs. Pasadena L. & W. Co.*, 91 Cal. 74, 84, 27 Pac. Rep. 539.

18. Right reserved in a deed to develop and explore tract of marsh-land, and to take away water therefrom for use or profit, may be transferred, as such reservation is not repugnant to estate granted.—*Painter vs. Pasadena L. & W. Co.*, 91 Cal. 74, 83, 27 Pac. Rep. 539.

19. CONVEYANCE OF EASEMENT.—Easement or servitude passes by conveyance of dominant estate attached to servient estate, subjecting latter to benefit of former.—*American Co. vs. Bradford*, 27 Cal. 360, 367.

20. Word "appurtenances" is not necessary to conveyance of an easement.—*Cave vs. Crafts*, 53 Cal. 135, 140.

21. Executed parol license may become easement upon land of another and may impose servitude on one tenant or estate in favor of another dominant estate.—*Nowlin vs. Whipple*, 120 Ind. 596, 22 N. E. Rep. 669, 6 L. R. A. 159.

22. Parol license cannot be revoked, without placing licensee in statu quo, after it has been executed and acted upon, and expense incurred in perfecting easement over land of another in reliance on license.—*Nowlin vs. Whipple*, 120 Ind. 596, 22 N. E. Rep. 669, 6 L. R. A. 159.

23. NATURE OF APPURTENANCE, EASEMENT, AND SERVITUDE.—"Appurtenance is something belonging to another thing more important or worthy."—*Crooker vs. Benton*, 93 Cal. 365, 370, 23 Pac. Rep. 953.

24. Easement proper is species of incorporeal hereditament, and consists of right in owner of one parcel of land by reason of such ownership to use the land of another for a special purpose without profit.—*Wood vs. Truckee Turnp. Co.*, 24 Cal. 474, 479.

25. Easement to real estate granted is "a privilege off and beyond local boundaries of lands or tenement conveyed."—*Cave vs. Crafts*, 53 Cal. 135, 140.

26. Servitudes enumerated in this section are real servitudes imposed for benefit of estate to which right belongs, and resting upon estate on which obligation is imposed.—*Painter vs. Pasadena L. & W. Co.*, 91 Cal. 74, 84, 27 Pac. Rep. 539.

27. Servitude cannot exist where there is no easement.—*Los Angeles Term. L. Co. vs. Southern Pac. R. Co.*, 136 Cal. 36, 48, 68 Pac. Rep. 308.

28. Right of entry to land upon which one owns easement is given to such owner to enable him to keep easement in repair, but aside from this and analogous purposes he has no right of entry.—*Fitzell vs. Leaky*, 72 Cal. 477, 482, 14 Pac. Rep. 198. See also *San Francisco vs. Calderwood*, 31 Cal. 585, 91 Am. Dec. 542; *Pico vs. Collinas*, 32 Cal. 578.

II. RIGHT TO FISH.

29. IN OCEAN.—Right to fish in waters of ocean, whether in open sea or where waters ebb and flow over tide-lands, is public right which may be exercised by any citizen.—*Pacific S. W. Co. vs. Alaska P. Assoc.*, 138 Cal. 632, 636, 72 Pac. Rep. 161.

30. IN RIVERS.—Right to use shores of river between high and low water mark for fishing purposes is common to people of state.—*Heckman vs. Swett*, 99 Cal. 303, 310, 33 Pac. Rep. 1099.

III. RIGHT OF WAY.

31. CONDEMNATION OF BY CITY.—City's right to condemn easement for an alley through property of individual is derived from statute, and is given in interest of general public.—*City Santa Ana vs. Brunner*, 132 Cal. 234, 236, 64 Pac. Rep. 287.

32. Complaint in action by municipality to condemn right of way through private property to be used as alley need not show that city possessed any previous right to easement, nor any previous user or servitude.—*City Santa Ana vs. Brunner*, 132 Cal. 234, 236, 64 Pac. Rep. 287.

33. Proof of necessity.—City or town having determined that alley is desirable, and instituted proceedings in condemnation for right of way therefor, is only required to prove that taking of property sought to be condemned is necessary for purposes stated.—*City Santa Ana vs. Brunner*, 132 Cal. 234, 237, 64 Pac. Rep. 287.

34. CONVENIENCE DOES NOT CONFER.—Right of way does not originate in mere convenience, but rather springs from express grant, or from implied reservation, or from user for length of time sufficient to create prescription.—*Carey vs. Rae*, 58 Cal. 159, 162.

35. Impassability of road gives to user thereof no right to an easement; it may confer personal temporary right which he has, in common with traveling public, to pass over land of another where established road is impassable; but that is not right which is incident or appurtenant to his estate.—*Carey vs. Rae*, 58 Cal. 159, 163.

36. CONVEYANCE OF—STATUTE OF FRAUDS.—Right of way is interest in land, and can be conveyed only by written instrument.—*Wagner vs. Hanna*, 38 Cal. 111, 116, 99 Am. Dec. 354.

37. Description in deed.—Conveyance of a right of way must be by written instrument, which must describe interest thereby con-

vayed; if it is appurtenant to another tract of land, it must be so described in conveyance, for that fact could not be added to instrument by parol evidence, without violating statutory rule.—*Wagner vs. Hanna*, 38 Cal. 111, 117, 99 Am. Dec. 854.

38. Description of dominant estate in conveyance of right of way is as essential as that of servient estate.—*Wagner vs. Hanna*, 38 Cal. 111; 117, 99 Am. Dec. 854.

39. EASEMENT AND RIGHT OF WAY IN GROSS differ in that in former there is dominant tenement and in latter there is not.—*Wagner vs. Hanna*, 38 Cal. 111, 116, 99 Am. Dec. 854.

40. ESSENTIALS.—Two tenements are necessary to creation of right of way amounting to easement; dominant to which right of way belongs and servient upon which obligation rests.—*Wagner vs. Hanna*, 38 Cal. 111, 116, 99 Am. Dec. 854.

41. EVIDENCE.—Declaration of owner of servient tenement relating to designation of line of necessity, is admissible, he having primary right to designate portion of his land over which way should pass.—*Kripp vs. Curtis*, 71 Cal. 62, 67, 11 Pac. Rep. 879.

42. Parol evidence that agreement existed between tenants in common, whereby one of parties was, after partition of land, to be entitled to right of way, is admissible.—*Peterson vs. Lauretzen*, 68 Cal. 19, 21, 8 Pac. Rep. 607.

43. OBSTRUCTIONS ON.—Dedication need not be proved.—In action to procure abatement of obstruction to way of necessity, plaintiff need not show that road had been formally laid out or dedicated so as to make it public highway.—*Cheney vs. O'Brien*, 69 Cal. 199, 201, 10 Pac. Rep. 479.

44. Right of access of owner of property cannot be impaired by obstructions in street in front of or near his abutting property, and action for damages for injury sustained will lie.—*Brakken vs. Minneapolis & St. L. R. Co.*, 29 Minn. 41, 11 N. W. Rep. 124.

45. ON MINING STREAM.—Each person mining in same stream has right to use, in proper and reasonable manner, both channel of stream and water flowing therein. Injury resulting to one claim from reasonable use of another is *damnum absque injuria*.—*Esmond vs. Chew*, 15 Cal. 137, 143.

46. OVER LEASED PREMISES.—Where lessor reserves part of leased premises and can gain access to reserved portion without going upon leased portion, he must do so. He has no implied right of way over leased premises.—*Ramirez vs. McCormick*, 4 Cal. 245.

47. PURCHASE WITHOUT NOTICE.—Purchase of land without notice of existence of agreement as to right of way over such land between grantor and third party, does not bind grantees.—*Barbour vs. Pierce*, 42 Cal. 657, 662.

48. "WAY OF NECESSITY" arises in favor of grantee over land of grantor, when grant of land is made which is wholly surrounded by other land of grantor, or partly by those and partly by land of stranger.—*Taylor vs.*

Warnaky, 55 Cal. 350, 351; *Barnard vs. Lloyd*, 35 Cal. 131, 133, 24 Pac. Rep. 658.

49. Building on another's land.—There can be no right of way by necessity to go upon land of another and erect buildings and other structures thereon.—*Esmond vs. Chew*, 15 Cal. 137, 143.

IV. WATER-RIGHTS.

50. AS EASEMENT IN GENERAL.—Right of water to be conveyed through pipe running over real estate, which water is used for irrigation and domestic purposes, for benefit of said lands, is easement under provisions of this section, and passes with premises as appurtenant thereto.—*Farmer vs. Ukiah W. Co.*, 56 Cal. 11, 13.

51. Right to water acquired by contract, and depending for its continuance upon contract obligations of third persons, passes as appurtenant to land.—*Crooker vs. Benton*, 93 Cal. 365, 370, 28 Pac. Rep. 953. See *Farmer vs. Ukiah W. Co.*, 56 Cal. 11; *Fitzell vs. Leaky*, 72 Cal. 477, 14 Pac. Rep. 198.

52. FLOWAGE.—Right to have natural watercourse flow, subject to such diminution as results necessarily from reasonable use by superior riparian proprietor, is included as among "lands burdened, or servitudes upon land," and are enumerated "the right of receiving water from land" and "the right of having water flow without diminution or disturbance of any kind."—*Lux vs. Haggin*, 69 Cal. 255, 293, 10 Pac. Rep. 674.

53. Part of homestead.—Water flowing over homestead is portion of such homestead.—*Fitzell vs. Leaky*, 72 Cal. 477, 482, 14 Pac. Rep. 198.

54. Prescription.—Right to flow of water through watercourse by artificial means can be acquired by prescription.—*Murchie vs. Gates*, 78 Me. 300, 4 Atl. Rep. 698.

55. Proceedings to prevent diversion of.—In suit prosecuted to obtain a decree enjoining defendant from diverting waters of river from flowing down natural watercourse, which, if not diverted, would continue so to flow, it is necessary for plaintiff to show that he was entitled to flow of stream, or to some part of it, at commencement of action.—*Lux vs. Haggin*, 69 Cal. 255, 294, 10 Pac. Rep. 674.

56. Same.—Pleading license.—Defendant in action brought to enjoin him from diverting waters of river, thereby depriving plaintiff of use thereof, is not bound to plead license given and executed prior to commencement of suit, but burden devolves upon such defendant of proving that plaintiff had assented to acts of defendant which permanently deprived plaintiff of all water. It is by such an assent only that plaintiff could estop himself from claiming the benefit of any of water.—*Lux vs. Haggin*, 69 Cal. 255, 291, 10 Pac. Rep. 674.

57. RIPARIAN RIGHTS.—Right of riparian proprietor to use of water is designated "property," an "incident of property in land inseparably annexed to the soil," as part and parcel thereof, and such rights "are incorporeal hereditaments appertaining to the land."—*Lux vs. Haggin*, 69 Cal. 255, 300, 10 Pac. Rep. 674.

58. Taking for public use.—Owners of land by or through which watercourse naturally and usually flows have right of property in waters of stream, but such property may be taken for public use, just compensation being first made, or paid into court.—*Lux vs. Haggin*, 69 Cal. 255, 264, 10 Pac. Rep. 674.

59. SURFACE WATER—Discharge on adjoining land.—This section does not give owner of higher land right to discharge surface water upon lower land of an adjoining owner.—*McDaniel vs. Cummings*, 83 Cal. 515, 517, 23 Pac. Rep. 795, 3 L. R. A. 575.

60. Compens.: *Ogburn vs. Connor*, 46 Cal. 346.

V. LATERAL SUPPORT.

61. EXCAVATIONS AND THE DAMAGES THEREFOR.—Adjoining owner making an excavation is liable for all resulting damage, irrespective of question of negligence, in making excavation.—*Green vs. Berge*, 105 Cal. 52, 58, 45 Am. St. Rep. 25, 38 Pac. Rep. 539.

62. Negligence not in question.—Excavation by coterminous landowner, resulting in injury to adjoining tract, entitles owner of dominant tenement to legal remedy against party by whom mischief has been done. This does not depend upon negligence, but upon violation of right of property.—*Schultz vs. Bower*, 57 Minn. 493, 47 Am. St. Rep. 630, 59 N. W. Rep. 631. See, also, in support of doctrine, *Myer vs. Hobbs*, 57 Ala. 175, 29 Am. Rep. 719; *Roath vs. Driscoll*, 20 Conn. 533, 52 Am. Dec. 352; *Nevens vs. Peoria*, 41 Ill. 502, 39 Am. Dec. 392; *Lasala vs. Holbrook*, 4 Paige (N. Y.) 169, 25 Am. Dec. 524; *Tunstall vs. Christian*, 80 Va. 1, 56 Am. Rep. 581.

63. Notice of intention to excavate.—Coterminous landowner, when excavating for purpose of building, is not required to sustain adjacent land upon which a building has been placed unless building has been in existence for at least five years. By conducting work of excavating in such manner that soil of adjoining property, without weight of edifice thereon, would not have fallen, and by giving due notice of his intention to excavate, such coterminous landowner performs his whole duty.—*Aston vs. Nolan*, 63 Cal. 269, 273.

64. Question for jury.—Damages for injury done owner of dominant tenement by careless excavation on servient tenement by owner thereof is one of fact for jury.—*Conboy vs. Dickinson*, 92 Cal. 600, 605, 28 Pac. Rep. 809.

65. NATURE AND ACQUISITION OF RIGHT.—Right of lateral support from the adjacent soil is absolute right of property.—*Shultz vs. Bower*, 57 Minn. 493, 47 Am. St. Rep. 630, 59 N. W. Rep. 631.

66. Easement of adjoining owner.—Owner of building which has been erected for period of five years has acquired species of easement in his neighbor's land—right to lateral support of his building as well as soil.—*Aston vs. Nolan*, 63 Cal. 269, 273. See *Green vs. Berge*, 105 Cal. 52, 58, 45 Am. St. Rep. 25, 38

Pac. Rep. 539; *Vannest vs. Fleming*, 79 Iowa 638, 18 Am. St. Rep. 327, 44 N. W. Rep. 906, 3 L. R. A. 277.

VI. LIGHT AND AIR.

67. ABOLITION OF DOCTRINE OF ANCIENT LIGHTS.—Doctrine that proprietor may by user acquire an easement over adjoining land for passage of light and air does not prevail.—*Western G. & M. Co. vs. Knickerbocker*, 103 Cal. 111, 113, 37 Pac. Rep. 192; *Ingwerson vs. Barry*, 118 Cal. 342, 343, 50 Pac. Rep. 536; *Kennedy vs. Burnap*, 120 Cal. 488, 490, 52 Pac. Rep. 348, 40 L. R. A. 476.

68. ACQUISITION OR CREATION OF EASEMENT.—Easement for light and air, under code, can be acquired only by express grant, and when property is sold, without any grant of passage for air and light over adjoining property retained by grantor, privilege seized, and owner of such adjoining property could have immediately built thereon in such manner as to entirely close up and darken windows in house on property claiming to be dominant tenement.—*Kennedy vs. Burnap*, 120 Cal. 488, 494, 52 Pac. Rep. 343, 40 L. R. A. 476. See *Western G. & M. Co. vs. Knickerbocker*, 103 Cal. 111, 37 Pac. Rep. 192.

69. LANDLORD IS LIABLE TO TENANT OF upper floors for wrongful obstruction of light and air from well or open space in building.—*Case vs. Minot*, 158 Mass. 577, 33 N. E. Rep. 700, 22 L. R. A. 536.

70. OBSTRUCTION OF ADJOINING LAND-OWNER'S LIGHT.—While landowner may erect any kind of structure on his own land, notwithstanding fact that it shuts out his neighbor's light, he could not erect division fence, or wall partly on his land and partly on his neighbor's, which would have that effect.—*Western M. & G. Co. vs. Knickerbocker*, 103 Cal. 111, 117, 37 Pac. Rep. 192.

VII. PARTY-WALLS.

71. CREATION OF EASEMENT.—In this state party-wall is always such by agreement.—*Western G. & M. Co. vs. Knickerbocker*, 103 Cal. 111, 116, 37 Pac. Rep. 192.

72. INCREASING HEIGHT.—Each owner may increase height of wall when it can be done without injury to adjoining building and without impairing value of cross easements to which adjoining owner is entitled.—*Tate vs. Fratt*, 112 Cal. 613, 618, 44 Pac. Rep. 1061.

73. LOCATION AND OWNERSHIP.—Party-wall may stand half on each adjoining parcels of land or wholly upon one and may or may not be common property of two proprietors.—*Tate vs. Fratt*, 112 Cal. 613, 618, 44 Pac. Rep. 1061.

74. NATURE OF EASEMENT.—Each party owns half of wall which is upon his land subject to easement in other. This easement is merely to use wall as party-wall between two buildings.—*McCarthy vs. Mutual R. Assoc.*, 81 Cal. 584, 586, 22 Pac. Rep. 933.

§ 802. SERVITUDES NOT ATTACHED TO LAND. The following land burdens, or servitudes upon land, may be granted and held, though not attached to land:

1. The right to pasture, and of fishing and taking game.
2. The right of a seat in church.
3. The right of burial.
4. The right of taking rents and tolls.
5. The right of way.
6. The right of taking water, wood, minerals, or other things.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 219.

1. Applied, cited, construed, referred to, etc.
2. Definition and kinds of servitude.
3. Assignment of servitudes.
- 5, 6. Mining right—Nature of—Partition.
7. Presumption against personal easement.
8. Right to take toll.
9. Way over land.
10. Same—Ejectment does not lie to recover.
11. Water-ditch not servitude.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc.,** in: *Smith vs. Cooley*, 65 Cal. 46, 48, 2 Pac. Rep. 880 (applied); *Lux vs. Haggin*, 69 Cal. 255, 223, 10 Pac. Rep. 674 (cited); *Painter vs. Pasadena L. & W. Co.*, 91 Cal. 74, 84, 27 Pac. Rep. 539 (cited); *Kellett vs. Clayton*, 99 Cal. 210, 212, 33 Pac. Rep. 885 (applied); *Fudickar vs. East Riverside Irr. Dist.*, 109 Cal. 29, 37, 41 Pac. Rep. 1024 (applied); *Dixon vs. Schermeier*, 110 Cal. 582, 585, 42 Pac. Rep. 1091 (construed).

2. **DEFINITION AND KINDS OF SERVITUDES.**—Commissioners' note is, in part, as follows: "A servitude is defined to be a right whereby one thing is subject to another thing, or person, for use or convenience, contrary to the common right.—Ayl. Pand. 306; Ersk. Inst. 354. Servitudes which affect land are divided into two kinds, real and personal. The servitudes enumerated in section 801 are real servitudes, imposed for the benefit of the estate to which the right belongs, and resting upon the estate on which the obligation is imposed. The servitudes enumerated in section 802 are personal; they are not attached to a dominant estate, but to the person for whose benefit they are imposed. Though the terms easements and servitudes are often used by common-law writers indiscriminately, it will be seen from the definitions given that a servitude may exist and yet two elements necessary to constitute an easement be wanting, viz.: 1. Benefit to corporeal property; and 2. The dominant estate. Servitudes in which these elements are wanting are classed by the common-law writers under the head of rights in gross.—Washb. on Easem. 8; Burton Real Prop. §1116."

3. **ASSIGNABILITY.**—Servitudes named in this section are personal, not attached to any dominant estate, and therefore not assignable.

§ 803. **DESIGNATION OF ESTATES.** The land to which an easement is attached is called the dominant tenement; the land upon which a burden or servitude is laid is called the servient tenement.

History: Enacted March 21, 1872.

Applied, cited, construed, referred to, etc., in: *Smith vs. Cooley*, 65 Cal. 46, 48, 2 Pac. Rep. 880 (referred to).

—*Painter vs. Pasadena L. & W. Co.*, 91 Cal. 74, 84, 27 Pac. Rep. 539.

4. Servitudes merely in gross which at common law were not assignable, under §§ 654, 802, and 1044 of the code may be transferred.—*Fudickar vs. East Riverside Irr. Dist.*, 109 Cal. 29, 37, 41 Pac. Rep. 1024.

5. **MINING RIGHT** on certain premises is one which is usufructuary in its nature and character, and entitles owner thereof to use of land for profits which may be derived from its rents, or from quarrying and digging it for ores, and is subject to general rules which govern enjoyment of real property, but it is not in its nature capable of partition.—*Smith vs. Cooley*, 65 Cal. 46, 48, 2 Pac. Rep. 880.

6. **Grant of undivided interest in mining ground**, together with water-rights, reservoirs, and tail-race belonging to same, but with express provision that the instrument shall convey no other rights, except mining right, creates an estate or incorporeal hereditament, known in law as a servitude in gross or personal servitude, imposed upon land for benefit of person or persons owning right, irrespective of ownership of the land.—*Smith vs. Cooley*, 65 Cal. 46, 48, 2 Pac. Rep. 880.

7. **PRESUMPTION AGAINST PERSONAL EASEMENT.**—An easement is never presumed to be attached to person of grantee when it can fairly be construed to be appurtenant to some other estate.—*Hopper vs. Barnes*, 113 Cal. 636, 639, 45 Pac. Rep. 874.

8. **RIGHT TO TAKE TOLL** is called an easement.—*Kellett vs. Clayton*, 99 Cal. 210, 212, 33 Pac. Rep. 885.

9. **WAY OVER LAND.**—A way is easement, and consists in the right of passing over another's ground. It is servitude imposed upon corporeal property and not part of it.—*Wood vs. Truckee Turnp. Co.*, 24 Cal. 474, 488.

10. **Ejectment will not lie to recover a road or right of way.**—*Wood vs. Truckee Turnp. Co.*, 24 Cal. 474, 478.

11. **WATER DITCH** which is the property of owner of land for which it is used, there being unity of title, cannot be considered servitude.—*Dixon vs. Schermeier*, 110 Cal. 582, 585, 42 Pac. Rep. 1091.

§ 804. BY WHOM GRANTABLE. A servitude can be created only by one who has a vested estate in the servient tenement.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Allegation that agreement was in writing unnecessary.
1. Applied, cited, construed, referred to, etc., in: *Smith vs. Cooley*, 65 Cal. 46, 48, 2 Pac. Rep. 880 (referred to).

2. Allegation that agreement was in writing.—Party setting up easement by agreement need not allege that agreement was in writing.—*Emerson vs. Bergin*, 76 Cal. 197, 202, 18 Pac. Rep. 264.
3. If denied must produce the writing.—*Ibid*.

§ 805. BY WHOM HELD. A servitude thereon cannot be held by the owner of the servient tenement.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Extinguishment of servitude.
1. Applied, cited, construed, referred to, etc., in: *Smith vs. Cooley*, 65 Cal. 46, 48, 2 Pac. Rep. 880 (referred to); *Dixon vs. Schermeler*, 110 Cal. 582, 585, 42 Pac. Rep. 1091 (applied).

2. Servitude is extinguished during continuance of unity of title to dominant and servient estates.—*Dixon vs. Schermeler*, 110 Cal. 582, 585, 42 Pac. Rep. 1091.
- See also post § 811 subd. 1.
- Extinguishing, how.—1 L. R. A. 214, brief 10 Id. 569.

§ 806. EXTENT OF SERVITUDES. The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Alteration in mode of using easement.
3. Determination of extent—Necessary incidents.
4. Highways within statute.
5. Mutual rights of parties.
6. Partition of easement—Undue enlargement.
7. Prescription—Implied grant defines right.
8. Water-rights—Covering pipes.
9. Same—Location of pipes.

Pac. Rep. 393. See Pol. Code § 2631 and cases cited in note.

5. MUTUAL RIGHTS OF PARTIES.—Both parties have right to insist that easement shall remain substantially same, regardless of question as to relative benefit and damage that would ensue to parties by reason of change in mode and manner of its enjoyment.—*Allen vs. San Jose L. & W. Co.*, 92 Cal. 138, 141, 28 Pac. Rep. 215, 15 L. R. A. 93.

6. PARTITION AS UNDUE ENLARGEMENT.—The partition of easement in gross, e. g. mining right would enlarge original grant beyond intention of grantor and prove greater charge than was originally intended by owner of soil.—*Smith vs. Cooley*, 65 Cal. 46, 48, 2 Pac. Rep. 880.

7. PRESCRIPTION—Implied grant defines right.—Easement acquired by prescription is acquired by implied grant which limits and defines rights of holder as fully and strictly as though grant were express.—*Allen vs. San Jose L. & W. Co.*, 92 Cal. 138, 141, 28 Pac. Rep. 215, 15 L. R. A. 93.

8. WATER-RIGHT—Covering pipes.—Easement to carry water in open ditch over property of another, does not include right to carry same quantity in covered pipes laid in closed ditch, against the will of owner of servient tenement, although change might be beneficial to both parties.—*Allen vs. San Jose L. & W. Co.*, 92 Cal. 138, 142, 28 Pac. Rep. 215, 15 L. R. A. 93.

9. Location of pipes.—Water-pipe once laid under grant to lay it that is indefinite determines location so definitely that it cannot be removed to any other place, under easement.—*Onthank vs. Lake Shore & M. S. R. Co.*, 71 N. Y. 194, 27 Am. Rep. 30.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Smith vs. Cooley*, 65 Cal. 46, 48, 2 Pac. Rep. 880 (cited); *McRose vs. Bottyer*, 81 Cal. 122, 125, 22 Pac. Rep. 393 (cited); *Allen vs. San Jose L. & W. Co.*, 92 Cal. 138, 141, 142, 28 Pac. Rep. 215, 15 L. R. A. 93 (construed and applied); *Schwerdtle vs. Placer Co.*, 108 Cal. 589, 596, 41 Pac. Rep. 448 (referred to).

2. ALTERATION IN MODE OF USING EASEMENT which is of such substantial character as to be beyond terms of implied grant results in creation of new and different servitude.—*Allen vs. San Jose L. & W. Co.*, 92 Cal. 138, 142, 28 Pac. Rep. 215, 15 L. R. A. 93.

3. DETERMINATION OF EXTENT.—Necessary incidents for reasonable and proper enjoyment of easement, which is right of way and limitations thereby imposed on use of realty by owner depends upon terms of grant and purposes for which it was made, nature and situation of property subject to easement, and manner in which it has been used and occupied.—*Smith vs. Worn*, 93 Cal. 206, 215, 28 Pac. Rep. 944.

4. HIGHWAYS WITHIN STATUTE.—Section is made applicable to public easements such as highways by § 2631 of Political Code.—*McRose vs. Bottyer*, 81 Cal. 122, 125, 126, 22

§ 807. APPORTIONING EASEMENTS. In case of partition of the dominant tenement the burden must be apportioned according to the division of the dominant tenement, but not in such a way as to increase the burden upon the servient tenement.

History: Enacted March 21, 1872.

1. Easement inures to owner of any part of dominant estate—Commissioners' note.
2. Mining right not capable of being partitioned.

1. Easement inures to owner of any part of dominant estate.—Commissioners' note says: "If dominant estate is divided, easement will inure to benefit of owner of any part of it.—Washb. Easem., 58; 2 Washb. Real Prop. 32; 3 Kent Com. 440; Barrow vs. Richard, 8 Paige Ch. (N. Y.) 351, 35 Am. Dec. 713; Hills vs. Miller, 3 Paige Ch. (N. Y.) 254, 24 Am. Dec. 218. Provided, however, that no additional burden

is cast upon servient estate.—Whitney vs. Lee, 33 Mass. (1 Allen) 198, 79 Am. Dec. 727; Underwood vs. Carney, 55 Mass. (1 Cush.) 285; Watson vs. Bioren, 1 Serg. & R. (Pa.) 227, 7 Am. Dec. 617; Codling vs. Johnson, 9 Barn. & C. 933, 17 Eng. C. L. 524, 33 Rev. Rep. 375; Staple vs. Haydon, 6 Mod. 1."

2. Mining right not capable of being partitioned, it being incorporeal hereditament, because division of right would enlarge original grant beyond intention of grantor.—Smith vs. Cooley, 65 Cal. 46, 48, 2 Pac. Rep. 880.

§ 808. RIGHTS OF OWNER OF FUTURE ESTATE. The owner of a future estate in a dominant tenement may use easements attached thereto for the purpose of viewing waste, demanding rent, or removing an obstruction to the enjoyment of such easements, although such tenement is occupied by a tenant.

History: Enacted March 21, 1872.

1. Beneficial use to which dominant owner is entitled.
2. Common-law rule.
3. Duty of making repairs rests on owner of easement.
4. Grantee of easement not entitled to possession.
5. Herbage belongs to owner of land.
6. Owner of easement has right of entry, etc.
7. Pleading—Justification must be alleged in answer.
8. "Secondary easements" defined.
9. Trespass on servient tenement not permitted.
10. Unreasonable exercise of right.
11. Same—Increasing burden on servient estate.

1. **BENEFICIAL USE TO WHICH DOMINANT OWNER IS ENTITLED.**—Where land is subject to easement owner of dominant estate "has still all beneficial use which he can have consistently with other's enjoyment of that easement. If easement is right of way, this consists in right to use surface of soil, for purpose of passing and repassing, and incidental right of properly fitting surface for that use; but owner of soil has all rights and benefits of ownership consistent with such easement."—Atkins vs. Bordman, 43 Mass. (2 Met.) 457, 467, 37 Am. Dec. 100. See San Francisco vs. Calderwood, 31 Cal. 535, 590, 91 Am. Dec. 542; Adams vs. Emerson, 23 Mass. (6 Pick.) 57, 58. See note 91 Am. Dec. 542.

2. **COMMON-LAW RULE** is that "while tenement is occupied by tenant, the landlord may use way to view waste, or demand rent, or to remove an obstruction."—Proud vs. Holman, 1 Barn. & C. 8, 8 Eng. C. L. 4 (cited in Commissioners' note). See Pico vs. Collmas, 23 Cal. 578, 581; Watkins vs. Peck, 13 N. H. 360, 380, 40 Am. Dec. 156.

3. **DUTY OF MAKING REPAIRS RESTS ON OWNER OF EASEMENT.**—Where owner of mill has easement in land of another for pas-

sage of water from his mill, duty of making repairs and labor necessary for keeping water-course in state fit for use rests upon claimant of such easement; "and, as general rule, easements impose no obligation upon those whose lands are thus placed in servitude to do anything."—Durfee vs. Garvey, 78 Cal. 546, 551, 21 Pac. Rep. 302. See Prescott vs. Williams, 46 Mass. (5 Met.) 429, 435, 39 Am. Dec. 688 (citing Taylor vs. Whitehead, 2 Doug. 745).

4. **GRANTEE OF EASEMENT NOT ENTITLED TO POSSESSION.**—"Grantee of easement has no right of entry upon, nor has he any right to possess land as such."—San Francisco vs. Calderwood, 31 Cal. 535, 539, 91 Am. Dec. 542.

5. **HERBAGE BELONGS TO OWNER OF LAND** which is subject to servitude or easement, and owner of soil can maintain trespass for removal of herbage by party having easement.—Adams vs. Emerson, 23 Mass. (6 Pick.) 57, 58; Cole vs. Drew, 44 Vt. 49, 8 Am. Rep. 363.

6. **OWNER OF EASEMENT HAS RIGHT OF ENTRY, ETC.**—Owner of mill privilege having easement which entitles him to flow water from his mill upon land below, independently of any right acquired by compact or by prescription, has right to enter upon land below and in reasonable and proper manner to do all acts necessary to secure enjoyment of his easement; but this right "is one doubtless to be held to strictest and narrowest limits compatible with enjoyment of principal easement."—Durfee vs. Garvey, 78 Cal. 546, 551, 21 Pac. Rep. 302. See Prescott vs. Williams, 46 Mass. (5 Met.) 429, 433, 39 Am. Dec. 688.

7. **PLEADING.**—Justification must be alleged in answer, in action of trespass, and it is not sufficient to aver that defendant has easement, but it must be alleged that defendant's enjoyment of easement was impeded and that entry was made for purpose of removing

obstruction and that nothing was done except what was necessary to accomplish that result.—*Pico vs. Collimas*, 32 Cal. 578, 581.

8. "SECONDARY EASEMENT" DEFINED.—Right of owner of easement to enter upon servient tenement and make repairs and to do such things as are necessary for full exercise of his right is called secondary easement.—*Joseph vs. Ager*, 108 Cal. 517, 520, 41 Pac. Rep. 422.

9. TRESPASS ON SERVIENT TENEMENT NOT PERMITTED.—Right to take water from land of another for use on premises of person taking it does not give owner of easement right to commit trespass upon servient tenement or to exercise easement after any manner which happens to suit his pleasure.—*Joseph vs. Ager*, 108 Cal. 517, 520, 41 Pac. Rep. 422.

§ 809. ACTIONS BY OWNER AND OCCUPANT OF DOMINANT TENEMENT. The owner of any estate in a dominant tenement, or the occupant of such tenement, may maintain an action for the enforcement of an easement attached thereto.

History: Enacted March 21, 1872.

1. Commissioners' note.
2. Damnum absque injuria—Doctrine inapplicable.
3. Injunction maintainable by owner of easement.
4. Reversioner may maintain action.
5. Trespass—Is maintainable by owner of easement.
6. Same—Owner of fee may sue owner of easement in trespass.
7. Same—Tenant at will of passageway may maintain.

1. Commissioners' note cites in support of this section *Brouwer vs. Jones*, 23 Barb. (N. Y.) 153.

2. DAMNUM ABSQUE INJURIA—Doctrine inapplicable.—In action by owner of easement, whenever invasion of plaintiff's right is proved, law infers damage; and although it be merely nominal, it is not regarded as damnum absque injuria, because it is founded on an infringement of the legal title of the plaintiff.—*Hastings vs. Livermore*, 73 Mass. (7 Gray) 194, 197.

3. INJUNCTION IS MAINTAINABLE BY OWNER OF EASEMENT where such easement consists of right to carry water over another's land and interference with such right will cause irreparable injury to plaintiff's crops.—*Mesnager vs. Engelhardt*, 108 Cal. 68, 72, 41 Pac. Rep. 20. See *Stallard vs. Cushing*, 76

10. AN UNREASONABLE EXERCISE OF RIGHT will not be permitted, and ownership of easement does not give right to enter at will, or irrespective of occasion.—*Pico vs. Collimas*, 32 Cal. 578, 581; *Burris vs. People's D. Co.*, 104 Cal. 248, 252, 37 Pac. Rep. 922; *Hargrave vs. Cook*, 108 Cal. 72, 81, 41 Pac. Rep. 18, 30 L. R. A. 390; *Joseph vs. Ager*, 108 Cal. 517, 520, 41 Pac. Rep. 422.

11. Increasing burden of servient estate.—"It is well settled that owner of easement cannot change its character, or materially increase burden upon servient estate, or injuriously affect rights of other persons, but within limits named he may make repairs, improvements, or changes that do not affect its substance."—*Burris vs. People's D. Co.*, 104 Cal. 248, 252, 37 Pac. Rep. 922.

Cal. 472, 474, 18 Pac. Rep. 427 (injunction against obstruction of private way).

4. REVERSIONER MAY MAINTAIN ACTION.—Owner of land leased at will for purposes of pasturage may maintain action for obstruction of right to drain land through ancient watercourse, but can only recover for injury thereby occasioned to reversion.—*Hastings vs. Livermore*, 73 Mass. (7 Gray) 194, 198. See *Tinsman vs. Belvidere D. R. Co.*, 25 N. J. L. (1 Dutch.) 255, 64 Am. Dec. 415; *Shadwell vs. Hutchinson*, 3 Car. & P. 615, 14 Eng. C. L. 484.

5. TRESPASS—Is maintainable by owner of easement to recover damages for wrongful interference, and it is sufficient for plaintiff to allege ownership of easement without averring that he is in possession of it.—*Cave vs. Crafts*, 53 Cal. 135, 141. See *Hastings vs. Livermore*, 73 Mass. (7 Gray) 194, 197; *Foley vs. Wyeth*, 84 Mass. (3 Allen) 135, 136; *Smith vs. Wiggin*, 48 N. H. 109.

6. Owner of fee may sue owner of easement in trespass where latter uses servient estate for purposes not within terms of easement.—*Ganley vs. Looney*, 96 Mass. (14 Allen) 40, 42; *Brown vs. Bowen*, 30 N. Y. 519, 533, 86 Am. Dec. 406.

7. Tenant at will of passageway may maintain trespass where he is unlawfully deprived of use of way.—*Foley vs. Wyeth*, 84 Mass. (3 Allen) 135, 136.

§ 810. ACTIONS BY OWNER OF SERVIENT TENEMENT. The owner in fee of a servient tenement may maintain an action for the possession of the land, against any one unlawfully possessed thereof, though a servitude exists thereon in favor of the public.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Abatement of injury by owner of servient tenement.
3. Trespass upon servient tenement cannot be committed by owner of easement.

1. Applied, cited, construed, referred to, etc. in: *Cross vs. Kitts*, 69 Cal. 217, 221, 58 Am. Rep. 558, 10 Pac. Rep. 409 (referred to).

2. Abatement of injury by owner of servient tenement.—Where owner of easement attempts

to change servitude in improper manner by extending ditch without right, servient owner, as in other cases of nuisance, may take remedy into his own hands and fill up such extension of ditch.—*Joseph vs. Ager*, 108 Cal. 517, 521,

41 Pac. Rep. 422, following *Wise vs. Walker*, 70 Cal. 591, 14 Pac. Rep. 475.

3. Trespass upon servient tenement cannot be committed by owner of easement.—See ante § 808 and note par. 9.

§ 811. HOW EXTINGUISHED. A servitude is extinguished:

1. By the vesting of the right to the servitude and the right to the servient tenement in the same person;
2. By the destruction of the servient tenement;
3. By the performance of any act upon either tenement, by the owner of the servitude, or with his assent, which is incompatible with its nature or exercise; or,
4. When the servitude was acquired by enjoyment, by disuse thereof by the owner of the servitude for the period prescribed for acquiring title by enjoyment.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Abandonment or disuse.
3. Same—Incidental rights abandoned.
4. Same—Time when abandonment complete.
5. Same—Water-right acquired on public land.
6. Acts authorized by owner of dominant estate.
7. Acts of third persons.
8. Constitutionality of statute.
9. Destruction of servient estate by charging use.
10. Incompatible act of owner.
- 11, 12. Intention—Clear intent to abandon necessary—Question of fact.
13. Non-use without intention to abandon.
14. Resumption of abandoned easement.
15. Vesting of both estates in same person.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Lux vs. Haggin*, 69 Cal. 255, 292, 10 Pac. Rep. 674 (applied); *Smith vs. Worn*, 93 Cal. 206, 213, 28 Pac. Rep. 944 (construed and applied); *Smith vs. Hawkins*, 110 Cal. 122, 126, 42 Pac. Rep. 453 (construed and applied); *Dixon vs. Schermeier*, 110 Cal. 582, 585, 42 Pac. Rep. 1091 (applied); *Los Angeles vs. Pomeroy*, 125 Cal. 420, 425, 58 Pac. Rep. 69 (construed and applied).

2. **ABANDONMENT OR DISUSE**.—Cessation of use of easement for ditch acquired by adverse user for period prescribed for acquiring title by prescription operates to extinguish easement.—*Los Angeles vs. Pomeroy*, 125 Cal. 420, 427, 58 Pac. Rep. 69. See *Smith vs. Hawkins*, 110 Cal. 122, 127, 42 Pac. Rep. 453.

3. **INCIDENTAL RIGHTS ABANDONED**.—Cessation of appropriator's right to use water occurring after continuous non-user for five years, rights of way for ditches and like, which are incidental to primary right to use, would fall also at that time, and servient tenement would be thus at same time relieved from servitude.—*Smith vs. Hawkins*, 110 Cal. 122, 127, 42 Pac. Rep. 453.

4. **TIME WHEN ABANDONMENT COMPLETE**.—Appropriator of easement to use water abandons his right moment abandonment itself is complete, and it would not matter for how long

time he had ceased to use water; his rights would cease and determine at precise time at which he had in fact abandoned such rights.—*Smith vs. Hawkins*, 110 Cal. 122, 126, 42 Pac. Rep. 453.

5. **WATER-RIGHT ACQUIRED ON PUBLIC LAND**.—Section cannot in strictness be applied to rights under appropriation of water on land forming part of public domain for reason that there is no period prescribed for acquiring title to such rights.—*Smith vs. Hawkins*, 110 Cal. 122, 126, 42 Pac. Rep. 453.

6. **ACTS AUTHORIZED BY OWNER OF DOMINANT ESTATE**.—If owner of dominant estate authorize owner of servient estate to do that which prevents dominant estate from longer enjoying easement, it is extinguished.—*Lux vs. Haggin*, 69 Cal. 255, 292, 10 Pac. Rep. 674.

7. **ACTS OF THIRD PERSONS**.—Incorporeal hereditaments are not lost to owner thereof by acts of strangers to title.—*Smith vs. Worn*, 93 Cal. 206, 213, 28 Pac. Rep. 944.

8. **CONSTITUTIONALITY OF STATUTE**.—Legislature had as much power to make this enactment as to pass statute of frauds.—*Lux vs. Haggin*, 69 Cal. 255, 294, 10 Pac. Rep. 674.

9. **DESTRUCTION OF SERVIENT ESTATE BY CHANGING USE**.—Easement to conduct water in open ditch is so substantially altered by placing covered pipe line in ground in lieu of ditch as to extinguish easement.—*Allen vs. San Jose L. & W. Co.*, 92 Cal. 138, 142, 28 Pac. Rep. 215, 15 L. R. A. 93.

10. **INCOMPATIBLE ACT BY OWNER**.—Section is recognition and statutory regulation of rule that if owner of dominant estate do acts thereon which permanently prevent his enjoyment of easement, same is extinguished.—*Lux vs. Haggin*, 69 Cal. 255, 292, 10 Pac. Rep. 674.

11. **INTENTION**.—Clear intent to abandon must be shown.—Acts of owner of dominant tenement in case of non-user or to prevent him from claiming easement acquired by grant, must be of character so decisive and conclusive as to indicate clear intent to abandon easement.—*Smith vs. Worn*, 93 Cal. 206, 213, 28 Pac. Rep. 944. See *Hayford vs. Spokesfield*,

100 Mass. 494; *Smyles vs. Hastings*, 22 N. Y. 217, 224.

12. **Question of fact.**—Where non-user is evidence of abandonment of right, question is one of intention, depending upon circumstances, and this is question of fact to be determined by court or jury.—*Smith vs. Worn*, 93 Cal. 206, 213, 28 Pac. Rep. 944.

13. **NON-USER WITHOUT INTENTION TO ABANDON.**—Easement acquired by deed is not lost by mere non-user; there must be accompaniment of expressed or implied intention of abandonment, and owner of servient estate, acting upon intention of abandonment and actual non-user upon his own estate, must have incurred expenses.—*Smith vs. Worn*, 93 Cal. 206, 212, 28 Pac. Rep. 944.

14. **RESUMPTION OF ABANDONED EASEMENT.**—Grantee will not be permitted to resume easement, where his acts have led other persons to treat servient estate as free from servitude, because he cannot do so without doing injustice to those who acted upon appearances of abandonment.—*Smith vs. Worn*, 93 Cal. 206, 213, 28 Pac. Rep. 944. See *Hayford vs. Spokesfield*, 100 Mass. 494; *Smyles vs. Hastings*, 22 N. Y. 217, 224.

15. **VESTING OF BOTH ESTATES IN SAME PERSON.**—Servitude is extinguished during continuance of unity of title in dominant and servient estate.—*Dixon vs. Schermeier*, 110 Cal. 582, 585, 42 Pac. Rep. 1091.

Owner of servient tenement cannot hold servitude.—See ante § 805.

TITLE III.

RIGHTS AND OBLIGATIONS OF OWNERS.

CHAPTER I. RIGHTS OF OWNERS, §§ 811-834.

II. OBLIGATIONS OF OWNERS, §§ 840-843.

CHAPTER I.

RIGHTS OF OWNERS.

Article I. Incidents of Ownership, §§ 818-827.

II. Boundaries, §§ 829-834.

ARTICLE I.

INCIDENTS OF OWNERSHIP.

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| § 818. Rights of tenant for life. | § 823. Rights of lessees and their assignees, etc. |
| § 819. Rights of tenant for years, etc. | § 824. Remedy on leases for life. |
| § 820. Same. | § 825. Rent dependent on life. |
| § 821. Rights of grantees of rents and reversion. | § 826. Remedy of reversioners, etc. |
| § 822. Assignee of lessee, remedies of lessor against. | § 827. Leases, change of terms. [Notice.] |

§ 818. **RIGHTS OF TENANT FOR LIFE.** The owner of a life estate may use the land in the same manner as the owner of a fee simple, except that he must do no act to the injury of the inheritance.

History: Enacted March 21, 1872.

1. Adverse possession—Life tenant cannot have.
2. Deed by life tenant—Right of possession conveyed.
3. Forfeiture—Absence from land does not work.
4. Same—Not worked by conveyance or fee.
5. Improvements and repairs by life tenant.
6. Injunction lies against waste.
- 7, 8. Mines, quarries, etc.—Right of life tenant to work.
9. Possession—Life tenant is entitled to.
10. Proceedings to have estate declared terminated by both.
11. Receiver to redeem land from tax sale.
12. Tearing down dwelling-house.
13. Waste—Definition of.
14. Same—Treble damages recoverable for.

1. **ADVERSE POSSESSION BY LIFE TENANT.**—Life tenant cannot build up title by adverse possession in opposition to title of remainderman.—*Menger vs. Carruthers*, 57 Kan. 425, 46 Pac. Rep. 712.

2. **DEED OF LIFE TENANT** conveys right of possession to grantee during life tenant's life.—*Cowell vs. South Denver R. E. Co.*, 16 Colo. App. 108, 63 Pac. Rep. 991.

3. **FORFEITURE.**—Absence of life tenant from land does not work forfeiture.—*Goodman vs. Malcolm*, 9 Kan. App. 887, 53 Pac. Rep. 564.

4. **Not worked by conveyance of fee.**—The making of conveyance purporting to convey fee by life tenant does not work forfeiture of life tenancy.—*Goodman vs. Malcolm*, 5 Kan. App. 285, 48 Pac. Rep. 439.

5. **IMPROVEMENTS AND REPAIRS BY LIFE TENANT.**—As general proposition, if tenant for life makes improvements upon premises, he cannot claim compensation therefor from reversioner or remainderman, although he is under no obligation to do more than keep the premises in repair, and generally he cannot make repairs or permanent improvements at expense of inheritance.—*Moore vs. Simonson*, 27 Oreg. 117, 39 Pac. Rep. 1105. See *Datesman's Appeal*, 127 Pa. St. 348, 359, 17 Atl. Rep. 1086, 1100; *Van Bibber vs. Williamson*, 37 Fed. Rep. 756, 759.

6. **INJUNCTION IS PROPER REMEDY** against commission of waste by life tenant.—*Dooly vs. Stringham*, 4 Utah 107, 7 Pac. Rep. 405.

7. **MINES, QUARRIES, ETC., PREVIOUSLY OPENED, MAY BE WORKED.**—Tenant for life is entitled to work mine, quarry, coal pit, or sand pit which has been opened and used by former owner.—*Mass. Billings vs. Taylor*, 27 Mass. (10 Pick.) 460, 462, 20 Am. Dec. 533. *N. J. Rockwell vs. Morgan*, 13 N. J. Eq. (2 Beas.) 234, 339; *Reed vs. Reed*, 16 N. J. Eq. (1 C. E. Gr.) 242, 249, 250; *Gaines vs. Green Pond I. M. Co.*, 32 N. J. Eq. (5 Stew.) 86, 100, 102. *N. Y. Coates vs. Cheever*, 1 Cow. 460, 474. *Pa. Neel vs. Neel*, 19 Pa. St. 323, 327-329; *Eley's Appeal*, 103 Pa. St. 300, 307.

8. **Abandoned mine.**—"A distinction is made as to abandoned mines. Those which have been abandoned merely for want of market for time being for minerals, may be worked

by tenant for life, but where abandonment has been long continued and took place with view to advantaging estate thereby, he cannot work them."—*Gaines vs. Green Pond I. M. Co.*, 32 N. J. Eq. (5 Stew.) 86, 100.

9. **POSSESSION.**—Life tenant is entitled to during his life.—*Cowell vs. South Denver R. E. Co.*, 16 Colo. App. 103, 63 Pac. Rep. 991.

10. **Procedure to have life estate declared terminated by death.**—See Code Civ. Proc. § 1723 and note.

11. **RECEIVER—REDEMPTION OF LAND FROM TAX SALE.**—Remainderman has right to have a receiver appointed against tenant for life, who permits estate to be sold for taxes, to receive rents and profits to redeem land from such tax sale; and such right is not mere matter of discretion of court, and it is error to refuse it.—*Goodman vs. Malcolm*, 5 Kan. App. 285, 48 Pac. Rep. 439.

12. **TEARING DOWN DWELLING-HOUSE** by life tenant is waste, notwithstanding fact that life tenant has professed object of replacing same with better building and alleges that dwelling-house is unfit for use.—*Dooly vs. Stringham*, 4 Utah 107, 7 Pac. Rep. 405.

13. **WASTE.**—Defined.—"Waste is substantial damage to the reversion, done by one having an estate of freehold or for years, during the continuance of the estate."—*Dooly vs. Stringham*, 4 Utah 107, 7 Pac. Rep. 405.

14. **Treble damages recoverable for.**—See Code Civ. Proc. § 732 and note.

§ 819. **RIGHTS OF TENANT FOR YEARS, ETC.** A tenant for years or at will, unless he is a wrong-doer by holding over, may occupy the buildings, take the annual products of the soil, work mines and quarries open at the commencement of his tenancy.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Annual products of soil belong to tenant for years.
3. Life tenants—Rights of.
4. Waste—Treble damages recoverable for.

1. Applied, cited, construed, referred to, etc., in: *Groome vs. Olmstead*, 101 Cal. 425, 428, 35 Pac. Rep. 1021 (referred to); *Marshall vs. Luis*, 115 Cal. 622, 625, 47 Pac. Rep. 597 (construed and applied).

2. Annual products of soil belong to tenant for years under this section unless this right is withheld from him by some provision of instrument creating life estate.—*Marshall vs. Luis*, 115 Cal. 622, 625, 47 Pac. Rep. 597.

3. Life tenants—Rights of.—See ante § 818 and note.

4. Waste—Treble damages recoverable for.—See Code Civ. Proc. § 732 and note.

§ 820. **SAME.** A tenant for years or at will has no other rights to the property than such as are given to him by the agreement or instrument by which his tenancy is acquired, or by the last section.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Remedy for interference with possession.
3. Removal of buildings not permissible.

1. Applied, cited, construed, referred to, etc., in: *West Coast Lumber Co. vs. Apfield*, 86 Cal. 335, 339, 24 Pac. Rep. 993 (applied).

2. **Remedy for interference with possession.**—Tenants, although not owners in fee, have right to exclusive possession and use of property and all its appurtenances, and have right to maintain an action for any injury which interferes with their possession or use

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and enjoyment of property.—*Heilbron vs. Kings R. & F. C. Co.*, 76 Cal. 11, 16, 17 Pac. Rep. 933. See *Lux vs. Haggin*, 69 Cal. 255, 436, 10 Pac. Rep. 674.

3. **Removal of buildings is not permissible** unless that right is expressly granted or reserved in instrument creating tenancy or unless buildings are such or are so erected as not to partake of realty.—*West Coast L. Co. vs. Apfield*, 86 Cal. 335, 339, 24 Pac. Rep. 993.

As to removal of buildings, see ante § 660 note pars. 65-79.

§ 821. RIGHTS OF GRANTEES OF RENTS AND REVERSION. A person to whom any real property is transferred or devised, upon which rent has been reserved, or to whom any such rent is transferred, is entitled to the same remedies for recovery of rent, for non-performance of any of the terms of the lease, or for any waste or cause of forfeiture, as his grantor or deviser might have had.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Ejectment maintainable by assignee of lease.
3. Grant or lease of mortgaged premises.
4. Lease—In presenti for term of years within statute.
5. Same—Not affected by transfer of title.
6. Notice to tenant of grant of rent, etc., necessary.
7. Parol alteration of lease.
8. Purchaser at execution sale.
9. Tenant's right of possession not disturbed.
10. Unlawful detainer maintainable.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *McDonald vs. Hanlon*, 79 Cal. 442, 443, 21 Pac. Rep. 861 (applied).

2. **EJECTMENT IS MAINTAINABLE BY ASSIGNEE OF LEASE** in like manner and to same extent as such remedy could be resorted to by his assignor.—See *Enos vs. Cook*, 65 Cal. 175, 178, 8 Pac. Rep. 632.

3. **GRANT OR LEASE OF MORTGAGED PREMISES**.—Lessor to whose title another succeeds under foreclosure sale is not entitled to rent accruing, or to value of use and occupation of property, subsequent to sale under judgment of foreclosure, unless such lessor effected redemption from sale; and this is because of well-established rule that subsequent grant or lease of mortgaged premises is subject to prior mortgage, if purchaser or lessee has either actual or constructive notice of such mortgage.—*Harris vs. Foster*, 97 Cal. 292, 295, 33 Am. St. Rep. 187, 32 Pac. Rep. 426.

4. **LEASE**—In presenti for term of years within statute, and lessee is entitled to same remedies against tenant in possession from

month to month as lessor could have resorted to, such lease being "real property" within statute.—*McDonald vs. Hanlon*, 79 Cal. 442, 443, 21 Pac. Rep. 861.

5. **Not affected by transfer of title**, but grantee simply takes the place of his grantor and becomes landlord of lessee.—*Macdonough vs. Starbird*, 105 Cal. 15, 19, 38 Pac. Rep. 510.

6. **Notice to tenant of grant of rent, etc., necessary**.—See post § 1111 and note.

7. **PAROL ALTERATION OF LEASE** by agreement between lessor and lessee is not binding upon grantee of lessor where such parol agreement is not acted upon until after conveyance by lessor.—*Taylor vs. Soldati*, 68 Cal. 27, 28, 8 Pac. Rep. 518.

8. **PURCHASER AT EXECUTION SALE** is within rule and is entitled to recover rent from tenant of judgment-debtor.—*Reynolds vs. Lathrop*, 7 Cal. 43, 46. See *McDevitt vs. Sullivan*, 8 Cal. 592, 597; *Harris vs. Reynolds*, 13 Cal. 514, 517, 73 Am. Dec. 600; *Walker vs. McCusker*, 71 Cal. 594, 596, 12 Pac. Rep. 723; *Clement vs. Shipley*, 2 N. D. 430, 51 N. W. Rep. 414.

9. **TENANT'S RIGHT OF POSSESSION NOT DISTURBED** by assignment of lease, and such assignment does not give assignee right to possession, but merely right to receive rent.—*Reay vs. Cotter*, 29 Cal. 168, 170. See *Martel vs. Meehan*, 63 Cal. 47, 50.

10. **UNLAWFUL DETAINER IS MAINTAINABLE** by lessor's successor in interest in like manner as lessor could have resorted to such remedy.—*McDonald vs. Hanlon*, 79 Cal. 442, 443, 21 Pac. Rep. 861.

§ 822. ASSIGNEE OF LESSEE, REMEDIES OF LESSOR AGAINST. Whatever remedies the lessor of any real property has against his immediate lessee for the breach of any agreement in the lease, or for recovery of the possession, he has against the assignees of the lessee, for any cause of action accruing while they are such assignees, except where the assignment is made by way of security for a loan, and is not accompanied by possession of the premises.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 220; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 393, held unconstitutional, see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXXXIX, p. 599.

1. Applied, cited, construed, referred to, etc.
2. Mortgagee of growing crop—Tenant in common with lessor.
3. Sale of crop by lessee.

1. **Applied, cited, construed, referred to**, etc., in: *Sunol vs. Molloy*, 63 Cal. 369, 370 (applied).

2. **Mortgagee of a growing crop, in possession**, succeeds to contract of his mortgagor

with lessor of premises held by mortgagor as lessee, and only interest of mortgagor being undivided interest in common with lessor of premises, mortgagee in possession, therefore, with lessor, is tenant in common of crop; and if he repudiates relationship, and refuses to deliver to lessor his share of crop, he is guilty of conversion, and liable for value of lessor's share in crop.—*Sunol vs. Molloy*, 63 Cal. 369, 370.

2. Sale of crop by lessee of farming land, who has agreed to pay lessor part of said crop as rent, and to give lessor possession of entire

crop until rent as aforesaid is paid, does not pass title to crop as against lessor.—*Wentworth vs. Miller*, 53 Cal. 9, 10.

§ 823. RIGHTS OF LESSEES AND THEIR ASSIGNEES, ETC. Whatever remedies the lessee of any real property may have against his immediate lessor, for the breach of any agreement in the lease, he may have against the assigns of the lessor, and the assigns of the lessee may have against the lessor and his assigns, except upon covenants against encumbrances or relating to the title or possession of the premises.

History: Enacted March 21, 1872.

Applied, cited, construed, referred to, etc., in: *Bailey vs. Richardson*, 66 Cal. 416, 421, 5 Pac. Rep. 910 (applied).

§ 824. REMEDY ON LEASES FOR LIFE. Rent due upon a lease for life may be recovered in the same manner as upon a lease for years.

History: Enacted March 21, 1872.

§ 825. RENT DEPENDENT ON LIFE. Rent dependent on the life of a person may be recovered after as well as before his death.

History: Enacted March 21, 1872.

§ 826. REMEDY OF REVERSIONERS, ETC. A person having an estate in fee, in remainder or reversion, may maintain an action for any injury done to the inheritance, notwithstanding an intervening estate for life or years, and although, after its commission, his estate is transferred, and he has no interest in the property at the commencement of the action.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Diversion of natural water—Injury to inheritance.

1. Applied, cited, construed, referred to, etc., in: *Hellbron vs. Last Chance W. D. Co.*, 75 Cal. 117, 121, 17 Pac. Rep. 65 (applied).

2. Diversion of natural water from land

is "an injury done to inheritance," and consequently any interference with such natural flow is actionable by owner of fee-simple of land, although premises be in actual possession of tenant for years.—*Hellbron vs. Last Chance W. D. Co.*, 75 Cal. 117, 121, 17 Pac. Rep. 65. See *Strohburg vs. Jones*, 78 Cal. 331, 332, 20 Pac. Rep. 705.

§ 827. LEASE, CHANGE OF TERM. [NOTICE.] In all leases of lands or tenements, or of any interest therein, from month to month, the landlord may, upon giving notice in writing at least fifteen days before the expiration of the month, change the terms of the lease, to take effect at the expiration of the month. The notice, when served upon the tenant, shall of itself operate and be effectual to create and establish as a part of the lease, the terms, rent, and conditions specified in the notice, if the tenant shall continue to hold the premises after the expiration of the month.

History: Enacted March 30, 1874, Code Amdts. 1873-4, p. 220.

1. Applied, cited, construed, referred to, etc.
2. Effect of failure to give notice.

1. Applied, cited, construed, referred to, etc., in: *Corson vs. Berson*, 86 Cal. 433, 439, 25 Pac. Rep. 7 (referred to); *Macdonough vs. Starbird*, 105 Cal. 15, 19, 20, 33 Pac. Rep. 510 (applied).

2. Effect of failure to give notice.—Notice not being given, by grantee of transfer of title to real property, to tenant of premises pur-

suant to this and § 789, and no attempt being made by grantee to terminate lease from month to month, or in any way to alter terms thereof, he the while accepting customary rent and allowing occupancy by tenant to continue for full year, there is a recognition by grantee of old lease which exists between his grantor and tenant, and such lease is continued thereby, and new landlord cannot enjoin tenant from removing office building considered as trade fixture, during continuance of lease

from month to month, on ground that he was ignorant of agreement for such removal having existed between his tenant and his grantor.—*Macdonough vs. Starbird*, 105 Cal. 15, 19, 20,

38 Pac. Rep. 510. See *Canning vs. Fibush*, 77 Cal. 196, 197, 19 Pac. Rep. 376.

Presumption of notice.—See ante § 19 and note. See ante § 789 and note.

ARTICLE II.

BOUNDARIES.

- § 829. Rights of owner.
- § 830. Boundaries by water.
- § 831. Boundaries by ways.
- § 832. Lateral and subjacent support.

- § 833. Trees whose trunks are wholly on land of one.
- § 834. Line trees.

§ 829. **RIGHTS OF OWNER.** The owner of land in fee has the right to the surface and to everything permanently situated beneath or above it.

History: Enacted March 21, 1872.

1. Aerolite belongs to owner of soil.
2. Commissioners' note.
3. Comprehensiveness of word "land."
4. Fence built on boundary-line is common property.
5. Ownership upward usque ad cœlum.
6. Trespass by thrusting hand or arm across boundary.

1. Aerolite belongs to owner of soil upon which it falls from sky and not to one who first finds it and takes it away.—*Goddard vs. Winchell*, 36 Iowa 71, 41 Am. St. Rep. 481, 53 N. W. Rep. 1134, 17 L. R. A. 733, *Milburn Curious Cas.* 41.

2. Commissioners' note says: "The term 'land' comprehends any ground, soil, or earth, as meadows, woods, waters, pastures, marshes, furze, and heath. It has an indefinite extent upwards as well as downwards, and includes all houses and other buildings, standing or built, upon it, and whatever is in a direct line between the surface and the center of the earth.—2 Black. Com. 18; 1 Cruise Real Prop. 53."

3. Comprehensiveness of word "land."—"The word land . . . is term of art, and most comprehensive one that could be applied to subject of grant. Lord Coke says that it is nomen generalissimum; that it includes every

thing fixed to ground, and every thing above or below surface of it; that it comprehends castles, houses, and other buildings; and that, not only the soil, but everything in it or on it, passes by it. It, therefore, distinctly includes a mansion, when its generality is not restrained by the context."—*Brockett vs. Ohio & P. R. Co.*, 14 Pa. St. 241, 243, 53 Am. Dec. 534.

4. Fence built on boundary line is common property of two adjoining landowners, by whomsoever it was built, so that it is not trespass as against one landowner for other to touch fence or hang ladder upon it.—*Hannabalsen vs. Sessions*, 116 Iowa 457, 93 Am. St. Rep. 250, 90 N. W. Rep. 93.

5. Ownership upward usque ad cœlum.—It is one of oldest rules of property known to law that title of owner of soil extends not only downward, to center of earth, but upward usque ad cœlum.—*Hannabalsen vs. Sessions*, 116 Iowa 457, 93 Am. St. Rep. 250, 90 N. W. Rep. 93.

6. Trespass by thrusting hand or arm across boundary.—Person commits trespass by thrusting his hand or arm across boundary so that such hand or arm will be over another's land even though there be no entry with feet or rest of person upon such other's land.—*Hannabalsen vs. Sessions*, 116 Iowa 457, 93 Am. St. Rep. 250, 90 N. W. Rep. 93.

§ 830. **BOUNDARIES BY WATER.** Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on tide-water, takes to ordinary high-water mark; when it borders upon a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream, at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 220; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 393, held unconstitutional, see history, § 4 ante.

1. Adverse possession—Beach cannot be acquired by.
2. Same—Inclosure of land by fence and water.
3. Bridges over navigable streams—How must be constructed.

4. Common law declared.
- 5-7. Conflicting calls—Meander of stream—Courses and distances.
8. Ebb and flow of tide not test of navigability.
9. Flotation of logs as test of navigability.

10. High-water mark—Grant by sovereign goes only to.
11. Same—Grant by private person owning bed of stream.
12. Same—Highway between high and low water marks.
- 13-18. Same—How determined—Rivers and sea—Extraordinary floods and droughts.
19. Islands not included in grant.
20. Marsh may be boundary.
- 21-23. Meanders—Stream and bank distinguished.
24. Middle of non-navigable stream.
25. Same—Exclusion of bed not presumed.
- 26, 27. Same—Monument on bank.
28. Mouth of creek—What is.
- 29, 30. Navigable and non-navigable waters—Definitions and distinctions.
31. Navigation must not be interfered with.
- 32, 33. Nuisance in river not permitted.
34. Ownership on both sides of stream.
35. "Parallel" lines to river.
- 36, 37. Presumptions on appeal—High-water mark as boundary—Navigability.
38. Public ferries and toll-bridges.
39. Public ways—Navigable waters are.
40. Qualified ownership between high and low water mark.
41. Wharves, chutes, and piers—Acts governing.
42. Same—Nuisance not permitted.
43. Same—Right of riparian proprietor.

1. ADVERSE POSSESSION—BEACH CAN NOT BE ACQUIRED BY.—Adverse possession of beach extending on seashore between low-water mark and high-water mark does not give title as against people.—See *Long Beach L. & W. Co. vs. Richardson*, 70 Cal. 206, 209, 11 Pac. Rep. 695.

2. Inclosure of land by fence and tide-waters.—Where land is inclosed on three sides by fence and on other side it abuts on tide-waters of bay, with beach in front of it on which public is free to land and which public can use for any legitimate purpose, there is "complete inclosure" in legal sense, and where person uses such land so inclosed for pasture there may be said to be *possessio pedis* as respects entire tract inclosed.—*Brumagim vs. Bradshaw*, 39 Cal. 24, 42, 43.

3. BRIDGES OVER NAVIGABLE STREAMS—How must be construed.—See *Pol. Code* § 2875 and note.

4. COMMON LAW DECLARED.—Conveyance of land bordering upon tidal stream, in absence of express intention so to do, is not construed to pass title to any land below high-water mark, and this section and § 670 are merely declaratory of law as it previously existed.—*Wright vs. Seymour*, 69 Cal. 122, 127, 10 Pac. Rep. 323.

See ante § 670 and note.

5. CONFLICT BETWEEN COURSES AND DISTANCES AND MEANDERS.—Where courses and distances on non-navigable creek or river are given and on examination it is found that they do not closely follow stream, courses and distances are to be disregarded and meanders of stream will control.—*Ball vs. Slack*, 2 Whart. (Pa.) 508, 538, 30 Am. Dec. 278.

6. CONFLICT BETWEEN RIVER AS MONUMENT AND CALLS FOR DISTANCE.

Where river is used as monument and there is conflict between such calls and calls for distance, river as monument will control; but this rule is not applicable unless it plainly appears that river was intended as natural monument, and where line does not stop at river, but crosses over and goes away beyond, and before reaching river strikes natural monument which may plausibly be considered as marking termination of line, river will not be regarded as monument which will control calls for distance.—*Hostetter vs. Los Angeles T. R. Co.*, 108 Cal. 38, 43, 44, 41 Pac. Rep. 330.

7. COURSES AND DISTANCES NOT CONTROLLING.—Where navigable creek is boundary of land conveyed by private grant, and thread of creek is true boundary, the courses and distances, being only approximate estimates of direction and length of boundary, must yield to actual line of creek. When meandering stream is boundary it is impractical for surveyor to fix monuments in channel of water, or to define actual line of its windings and courses; and in attempting to define its bank it would be impossible for two surveyors to give courses and lengths of its several meanders alike.—*Freeman vs. Bellegarde*, 108 Cal. 179, 185, 49 Am. St. Rep. 76, 41 Pac. Rep. 289. See III. *Middleton vs. Pritchard*, 4 Ill. (3 Scam.) 510, 38 Am. Dec. 112. *N. Y. Yates vs. Van de Bogert*, 56 N. Y. 527. *Fed. St. Paul & P. R. Co. vs. Schurmeier*, 74 U. S. (7 Wall.) 272, bk. 19 L. ed. 74.

8. EBB AND FLOW OF TIDE NOT ONLY TEST OF NAVIGABILITY.—Although the ebb and flow of tide was, at common law, the most usual test of navigability, yet it was not necessarily the only one; term navigable embraces idea that waters can be navigated in fact, and also idea of publicity, so that saying waters are public is equivalent, in legal sense, to saying they are navigable; navigability in fact was leading idea and was ground of their publicity.—*McManus vs. Carmichael*, 3 Iowa 1, 26-54 (leading American case; holding Mississippi river navigable regardless of ebb and flow of tide; contains an able and exhaustive review of early cases, and learned discussion of whole subject, and may be profitably referred to by all who desire instruction on these points, and are anxious to reconcile contradictory dicta and decisions which discussion of them has called forth); *Propeller Genesee Chief vs. Fitzhugh*, 53 U. S. (12 How.) 443, 451-460, bk. 13 L. ed. 1058 (holding Great Lakes navigable and subject to admiralty and maritime jurisdiction of United States courts). See Cal. *American River W. Co. vs. Amsden*, 6 Cal. 443, 446. *N. Y. People vs. Canal Appraisers*, 33 N. Y. 461, 471, 472; *Hooker vs. Cummings*, 20 John. 90, 11 Am. Dec. 249. *N. C. Collins vs. Benbury*, 3 Ired. 277, 38 Am. Dec. 722. *S. C. Cates vs. Wadlington*, 1 McC. 580, 10 Am. Dec. 699. *Eng. Lynn vs. Turner*, Cowp. 86 (wherein Lord Mansfield said: "Ex facto oritur jus. How does it appear that this is a navigable river? The flowing and reflowing of tide does not make it so; for there are many places into which tide flows that are not navigable rivers").

For notes collecting other authorities upon this subject, see 10 Am. Dec. 387; 19 Am. St. Rep. 227-229; 53 Am. St. Rep. 292.

8. Flotation of logs—Test of navigability.—Enumeration of streams.—See Pol. Code § 2349 and note.

10. HIGH-WATER MARK—Grant by sovereign.—Title to beds of tidal streams is ordinarily vested in sovereign, and in such case grant from sovereign which is bounded by tidal waters will be construed to extend only to high-water mark.—Long Beach L. & W. Co. vs. Richardson, 70 Cal. 206, 208, 209, 11 Pac. Rep. 695. See Freeman vs. Bellegarde, 103 Cal. 179, 185, 49 Am. St. Rep. 76, 41 Pac. Rep. 289; Stover vs. Jack, 60 Pa. St. 339, 343, 100 Am. Dec. 566.

11. Grant by private person.—Where call in mortgage is to mouth of creek and such creek is tidal stream, if grantor is owner of bed of such stream thread of creek is taken as boundary, and not high-water mark, as would be case if grant were by sovereign.—Freeman vs. Bellegarde, 103 Cal. 179, 184, 185, 49 Am. St. Rep. 76, 41 Pac. Rep. 289.

12. Highway between high and low water marks.—Between low-water mark and high-water mark is common highway. It seems agreed that between low water and ordinary high water of ocean, and wherever tide ebbs and flows, is part of common highway, over which all citizens and aliens may sail. In England, this is said to be vested in king; here it is in state. There and here, originally, goods might be landed anywhere, on permission from owner of adjacent land; now in both countries, on account of revenue, ports of entry are established, at which alone certain goods can be legally landed, except in case of storm or distress.—Ball vs. Slack, 3 Whart. (Pa.) 508, 539, 30 Am. Dec. 278.

13. How determined.—In case of fresh-water rivers and lakes in which there is no ebb and flow of tide, but which are subject to irregular changes of height without fixed quantity or time, except that they are periodical, recurring with wet or dry seasons of year, high-water mark as line between riparian owner and public is to be determined by examining bed and banks and ascertaining where presence and action of water are so common and usual and so long continued in all ordinary years as to mark upon soil of bed character distinct from that of banks in respect to vegetation as well as respects soil itself. The effect of water upon vegetation must be principal test in determining location of line; and regard is not to be had either to unusual and extreme heights which water reaches or to extremely low lines which water may reach.—Iowa. Houghton vs. Chicago D. & M. R. Co., 47 Iowa 370, 371-374. Minn. In re Minnetonka Lake Improvement, 56 Minn. 513, 521-523, 45 Am. St. Rep. 494, sub nom. Carpenter vs. Board of Comrs. of Hennepin County, 58 N. W. Rep. 295. N. H. Dow vs. Electric Co., 69 N. H. 498, 76 Am. St. Rep. 189, 45 Atl. Rep. 350. Pa. Stover vs. Jack, 60 Pa. St. 339, 100 Am. Dec. 566.

14. Same.—In case of sea or rivers where tide ebbs and flows high water is marked by

periodical flow of tide, excluding advance of water above line; in case of sea, by winds and storms; and in case of river, by floods and freshets.—In re Minnetonka Lake Impr., 56 Minn. 513, 521, 522, 45 Am. St. Rep. 494, sub nom. Carpenter vs. Board of Comrs. Hennepin County, 58 N. W. Rep. 295. See Howard vs. Ingersoll, 54 U. S. (13 How.) 381, 415-417, bk. 14 L. ed. 189.

15. Same—Change of high-water mark.—Patent to swamp lands granted to state by act of Congress conveys to high-water mark on bank of river, where river is designated as boundary, as such high-water mark existed at date of patent, or as thereafter changed by washing or cutting away by action of water or by accretions added by same agency.—Heckman vs. Swett, 99 Cal. 303, 308, 33 Pac. Rep. 1039.

16. Same—Freshets do not determine in case of fresh water rivers but by height to which stream ordinarily rises so as to destroy vegetation.—Dow vs. Electric Co., 69 N. H. 498, 76 Am. St. Rep. 189, 45 Atl. Rep. 350; Stover vs. Jack, 60 Pa. St. 339, 343, 100 Am. Dec. 566.

17. Navigable river as boundary.—Where land granted is bounded by river which is navigable grantee's title extends no farther than to edge of stream, and does not extend to thread of stream so as to include island therein.—Packer vs. Bird, 71 Cal. 134, 135, 11 Pac. Rep. 873. See People vs. Gold Run D. & M. Co., 68 Cal. 133, 146, 147, 56 Am. Rep. 80, 4 Pac. Rep. 1152; Lux vs. Haggin, 69 Cal. 255, 316-326, 10 Pac. Rep. 674.

18. Seashore as boundary.—Where land is granted as being bounded by seashore it extends only to high-tide line and portions of sea will not be included.—More vs. Massini, 37 Cal. 432, 436. See Heckman vs. Swett, 99 Cal. 303, 307, 33 Pac. Rep. 1039.

19. ISLANDS NOT INCLUDED.—In grant of public land, navigable water being given as boundary, grantee takes no title to islands lying in stream.—Packer vs. Bird, 71 Cal. 134, 135, 11 Pac. Rep. 873. See Stover vs. Jack, 60 Pa. St. 339, 343, 100 Am. Dec. 566.

See post § 1016 and note.

20. MARSH AS BOUNDARY.—Marsh may be so sharply defined where it meets upland as accurately to mark boundary.—Brumagim vs. Bradshaw, 39 Cal. 24, 43.

21. MEANDERS—Natural meanderings of navigable river control.—Margin of navigable river and not meander lines run by surveyor must control in determining what amount of land grantee takes where public land bordering on navigable stream is granted, and meander lines cannot limit grant in patent.—Hendricks vs. Feather R. Canal Co., 133 Cal. 423, 425, 426, 71 Pac. Rep. 496. See Houck vs. Yates, 32 Ill. 179; Fuller vs. Dauphin, 124 Ill. 542, 7 Am. St. Rep. 383, 16 N. E. Rep. 917; Schurmeier vs. St. Paul & P. R. Co., 10 Minn. 82, 88 Am. Dec. 59 (affirming sub nom. St. Paul & P. R. Co. vs. Schurmeier, 74 U. S. (7 Wall.) 272, bk. 19 L. ed. 74).

22. Reduction of meanders of river to straight line.—Where description gives starting point on non-navigable river and then

directs line to be run in given course for quantity, without stating length of lines, "a straight line is to be run corresponding with general course of river within survey designated distance, if given; if not given, far enough to constitute one side of square containing given quantity;" and side-lines are to be drawn at right angles from extremities and then fourth line to be drawn at sufficient distance from river to include required quantity between it and river. Such construction must be put upon the calls as will harmonize quantity called for with extent and direction of lines, and distance on third line must be made to harmonize with river's meanderings, upon same principles that distance is measured on river boundary, which is parallel with it.—*Hicks vs. Coleman*, 25 Cal. 122, 143, 144, 85 Am. Dec. 103. See *Van Gorden vs. Jackson*, 5 John. (N. Y.) 440, 441; *Williams vs. Jackson*, 5 John. (N. Y.) 489, 506; *Keith vs. Reynolds*, 3 Me. (3 Greenl.) 936.

23. **Stream and not bank intended.**—Where call is for post on bank of creek and "thence down the same," and along several meanders thereof to place of beginning, words "down the same" and "along the meanders thereof" are descriptive of windings of stream and not of irregularities or sinuosities of bank. The word "meander" is derived from winding river in Asia Minor, known by that name in classic history, and we say that stream meanders, but we never speak thus of shore, and to speak of meandering shore would be to use an inapt expression.—*Seneca Nation of Indians vs. Knight*, 23 N. Y. 498, 500.

24. **MIDDLE OF A NON-NAVIGABLE STREAM.**—A grant of land, bounded on stream not navigable, carries exclusive right and title of grantee to center of stream unless terms of grant clearly denote intention to stop at edge or margin.—*Mass. Cold Spring Iron Works vs. Tolland*, 63 Mass. (9 Cush.) 492, 495, 496. N. Y. *Seneca Nation of Indians vs. Knight*, 23 N. Y. 498, 500; *People vs. Canal Appraisers*, 33 N. Y. 461, 469; *Mott vs. Mott*, 68 N. Y. 247, 252; *Luce vs. Curley*, 24 Wend. 451, 453, 35 Am. Dec. 637; *Comrs. of Canal Fund vs. Kempshall*, 26 Wend. 404, 414. Pa. *Ball vs. Slack*, 2 Whart. 508, 538, 30 Am. Dec. 278. Fed. *Tolland vs. Ingersoll*, 54 U. S. (13 How.) 381, 415, bk. 14 L. ed. 189. Eng. *Carter vs. Murcott*, 5 Burr. 2162, per Lord Mansfield.

25. **Intent to exclude bed of stream not presumed**, where non-navigable stream is given as boundary, but such intent must appear from terms of deed as interpreted and illustrated by surrounding circumstances.—*Mott vs. Mott*, 68 N. Y. 247, 253.

26. **Monuments described as standing on margin or bank of stream do not vary rule and are not regarded as disclosing intention to exclude bed of non-negotiable watercourse.**—*Cold Spring Iron Works vs. Tolland*, 63 Mass. (9 Cush.) 492, 496; *Noble vs. Cunningham*, 1 McMull. Eq. (S. C.) 289.

27. **Monuments marking place of intersection with stream are never located in fact or in description in channel of stream, and where both first and last monuments are placed on**

same shore most obvious mode of indicating center of stream as dividing line is to draw last course but one to same bank on which first monument stands and it is not material whether stream has not been previously crossed at all or whether bank was reached by recrossing it on return course.—*Seneca Nation of Indians vs. Knight*, 23 N. Y. 498, 501.

28. **MOUTH OF CREEK.**—What is.—Where creek discharges its waters into river and call is for mouth of such creek, call means place where creek discharges its waters into river and does not mean point beyond which tide does not stop its current, or swell beyond its bank, such point being mile from place of discharge.—*Ball vs. Slack*, 2 Whart. (Pa.) 508, 538, 30 Am. Dec. 278.

29. **"NAVIGABLE STREAMS" DEFINED.**—Words do not include all streams that can be navigated in times of high water or any streams other than such as have been declared navigable by legislature, or are generally navigable in fact; i. e. during ordinary stages of water.—*Cardwell vs. Sacramento Co.*, 79 Cal. 347, 349, 350, 21 Pac. Rep. 763. See *American River W. Co. vs. Amsden*, 6 Cal. 443, 446.

30. **Navigable and non-navigable rivers distinguished.**—"There are two kinds of rivers, navigable and not navigable; that every navigable river, so high as sea ebbs and flows in it, is a royal river, and belongs to the king, by virtue of his prerogative; but in every other river, and in fishery of such other river, terre-tenants on each side have interest of common right, reason for which is, that so high as sea ebbs and flows, it participates of nature of the sea, and is said to be a branch of the sea so far as it flows."—*Wright vs. Seymour*, 69 Cal. 122, 124, 10 Pac. Rep. 323 (quoting *Royal Fishery in River Banne*, Davies 149). See *People vs. Canal Appraisers*, 33 N. Y. 461, 469, 470.

31. **Navigation must not be interfered with.**—Sovereign may grant soil of tide-waters to an individual, yet grantee cannot so exercise his right to property as to injure paramount right of navigation.—*Mobile vs. Esalava*, 9 Port. (Ala.) 577, 38 Am. Dec. 325.

32. **NUISANCE IN A NON-NAVIGABLE RIVER not permitted.**—*People vs. Canal Appraisers*, 33 N. Y. 461, 469.

33. **Obstruction of navigable waters.**—See post § 3479 and note.

34. **OWNERSHIP ON BOTH SIDES OF NON-NAVIGABLE STREAM.**—"If a man be owner of land of both sides, in common presumption he is owner of whole river, and hath right of fishing according to extent of his land in length."—*People vs. Canal Appraisers*, 33 N. Y. 461, 469 (quoting Lord Hale, *De Jure Maris*, ch. 1).

35. **"PARALLEL" LINES TO RIVER.**—Where call is that line shall be run "parallel" with non-navigable river, line must be run parallel with river in all its meanderings and not parallel with its general course.—*Fratt vs. Woodward*, 32 Cal. 219, 226-229, 91 Am. Dec. 573. See *Hicks vs. Coleman*, 25 Cal. 122, 142, 143, 85 Am. Dec. 103; *Hall vs. Shotwell*, 66 Cal. 379, 381, 5 Pac. Rep. 683; *Hostetter vs.*

Los Angeles T. R. Co., 103 Cal. 33, 42, 41 Pac. Rep. 330.

36. PRESUMPTION ON APPEAL—High-water mark as boundary.—Presumption on appeal in absence of evidence in record is that land extended no farther seaward than ordinary high-water mark.—Long Beach L. & W. Co. vs. Richardson, 70 Cal. 206, 209, 11 Pac. Rep. 695.

37. That river is navigable.—On appeal, in absence of evidence court will, if necessary, in support of judgment and findings of trial court, presume that river is navigable.—Hendricks vs. Feather R. Canal Co., 138 Cal. 423, 425, 71 Pac. Rep. 496.

38. PUBLIC FERRIES AND TOLL-BRIDGES.—See Political Code §§ 2842-2895 and notes.

39. PUBLIC WAYS—Navigable waters are.—See Political Code §§ 2348-2349 and notes.

40. QUALIFIED OWNERSHIP BETWEEN HIGH AND LOW WATER MARK.—Title of riparian owner on navigable or public waters extends to ordinarily low-water mark, but his title is not absolute except to ordinary high-water mark, and as to the intervening space title of riparian owner is qualified or limited by public right. The state may not only use it for purposes connected with navigation without compensation, but may protect it from

any use of it, even by owner of the land, that would interfere with navigation.—In re Minnetonka Lake Impr., 56 Minn. 513, 520, 521, 45 Am. St. Rep. 494, sub nom. Carpenter vs. Board of Comrs. Hennepin County, 58 N. W. Rep. 295.

See ante § 670 and note.

41. WHARVES, CHUTES, AND PIERS—Provisions governing.—See Political Code §§ 2906-2921 and notes; and as to wharves, chutes, or piers constructed by corporation, see ante § 528 and note.

42. Nuisance in navigable waters cannot be maintained by one who builds wharf on water front.—Shirley vs. Bishop, 67 Cal. 543, 546, 8 Pac. Rep. 82.

See post § 3479 and note.

43. Right to riparian proprietor.—Whether title of owner of land bounded by navigable river extends beyond dry land or not, he is entitled to rights of riparian proprietor whose land is bounded by navigable stream; and among those rights are accesses to navigable part of river from front of his lot, right to make landing, wharf, or pier for his own use or for use of public, subject to such general rules and regulations as legislature may see proper to impose for protection of rights of public, whatever those may be.—Yates vs. Milwaukee, 77 U. S. (10 Wall.) 497, bk. 19 L. ed. 384.

§ 831. BOUNDARIES BY WAYS. An owner of land bounded by a road or street is presumed to own to the center of the way, but the contrary may be shown.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Grant giving highway as boundary.
3. Waters as boundaries.

1. Applied, cited, construed, referred to, etc., in: Weyl vs. Sonoma V. R. Co., 69 Cal. 202, 206, 10 Pac. Rep. 510 (construed and applied); Alameda Macad. Co. vs. Williams, 70 Cal. 534, 540, 12 Pac. Rep. 530 (applied); Fraser vs. Ott, 95 Cal. 661, 665, 30 Pac. Rep. 793 (applied); Bigelow vs. Ballerino (Cal. July 31, 1895), 41 Pac. Rep. 14 (applied); Lar-

abee vs. Cloverdale, 131 Cal. 96, 99, 63 Pac. Rep. 143 (cited).

2. Grant giving highway as boundary.—This section and § 1112 afford one of the many instances where codifiers have made fragmentary provisions relating to same subject. The similarity of two sections renders it unnecessary and impracticable to annotate each separately.—See post § 1112 and note for full annotation of subject.

3. Waters as boundaries.—See ante § 830 and note.

§ 832. LATERAL AND SUBJACENT SUPPORT. Each coterminous owner is entitled to the lateral and subjacent support which his land receives from the adjoining land, subject to the right of the owner of the adjoining land to make proper and usual excavations on the same for purposes of construction, on using ordinary care and skill, and taking reasonable precautions to sustain the land of the other, and giving previous reasonable notice to the other of his intention to make such excavations.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 221. This section as originally enacted was taken from proposed Civil Code of New York.—Sullivan vs. Zeiner, 98 Cal. 346, 348, 33 Pac. Rep. 209, 20 L. R. A. 730.

South Dakota Comp. Laws, § 2784, an exact copy of this section.—See Novotny vs. Danforth, 9 S. D. 412, 69 N. W. Rep. 585.

Utah Comp. Laws, § 2784, is substantially the same as this section, except that it omits the words "in its natural condition" and also the words "when improved."—Ulrick vs. Dakota L. & T. Co., 2 S. D. 285, 49 N. W. Rep. 1054.

1. Applied, cited, construed, referred to, etc.
2. Buildings—Adjacent support—No right to.
3. Same—Immateriality of building—Fall of soil.
4. Same—Right of support implied in grant.
5. Civil-law doctrine.
6. Common-law rule.
7. Compromise agreement after fall of building—Complaint in action on.
8. Contract to pay damages—Consideration.
9. Contributory negligence—As respects fall of building.
10. Same—Correlative duties of adjoining landowners.
11. Damages—Diminution of value of property is proper measure of.
12. Same—Mental anguish.
13. Same—Negligent injury to building.
14. Declaratory statute—Enactment of common-law rule.
15. Eminent domain—Compensation must be made.
16. Independent contractor—Fall of soil after completion of work.
- 17-20. Same—Liability of owner for acts of—Negligence after performance of contract.
21. Injunction lies against injury.
22. Same—Remedy at law inadequate.
23. Malice—Liability not dependent on.
- 24, 25. Mining land—Doctrine not applicable to.
26. Negligence—Gives rise to liability for building.
27. Same—Injury to soil—Liability not dependent on negligence.
28. Same—Notice does not excuse negligence.
29. Same—Question of fact for jury.
30. Same—Requisite degree of care—Ordinary or reasonable care.
- 31-37. Same—Same—Various facts considered.
38. Notice—Must be given if land improved.
39. Same—Need not be given if adjoining landowner has knowledge.
40. Same—Object of notice.
- 41-45. Same—Sufficiency—Form—Writing not necessary.
46. Same—Tenant may be notified.
47. Party-walls—Rights of adjoining owners.
- 48, 49. Prescriptive right to support of building—Cannot be acquired.
50. Property right—Right to support is.
51. Qualification of owner's right to use property.
- 52-55. Servient tenants—Mutual rights of several owners—Repairs.
- 56-59. Shoring up walls—Duties and rights of respective owners.
- 60, 61. Sic utere tuo, etc.—Application of principle.
- 62, 63. Street improvements—Municipal corporation liable—Instruction.
64. Wall may be pulled down.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Aston vs. Nolan*, 63 Cal. 269, 271, 272, 273, 276 (construed and applied); *First Nat. Bank vs. Villegra*, 92 Cal. 96, 98, 33 Pac. Rep. 97 (applied); *Conboy vs. Dickinson*, 92 Cal. 600, 603, 604, 28 Pac. Rep. 809 (construed); *Dunton vs. Niles*, 95 Cal. 494, 499, 30 Pac. Rep. 762 (construed); *Sullivan vs.*

Zeiner, 98 Cal. 346, 348, 349, 33 Pac. Rep. 209, 20 L. R. A. 730 (construed and applied); *Green vs. Berge*, 105 Cal. 52, 57, 45 Am. St. Rep. 25, 38 Pac. Rep. 539 (applied); *Nippert vs. Warneke*, 128 Cal. 501, 503, 61 Pac. Rep. 96 (applied).

2. BUILDINGS—Adjacent support of—No right to.—Right to support of land by adjoining land applies only to land in natural state, and rule does not apply to buildings or other artificial structures which create additional weight.—*Sullivan vs. Zeiner*, 98 Cal. 346, 349, 33 Pac. Rep. 209, 20 L. R. A. 730. See *Aston vs. Nolan*, 63 Cal. 269, 271, 272. *Ala. Moody vs. McClelland*, 39 Ala. 45, 84 Am. Dec. 770. *Mass. Thurston vs. Hancock*, 12 Mass. 220, 221, 7 Am. Dec. 57; *Gilmore vs. Driscoll*, 122 Mass. 199, 23 Am. Rep. 812. *Minn. Schultz vs. Bower*, 57 Minn. 493, 47 Am. St. Rep. 630, 59 N. W. Rep. 631. *Mo. Charles vs. Rankin*, 22 Mo. 566, 66 Am. Dec. 642. *N. Y. Ketcham vs. Newman*, 141 N. Y. 205, 36 N. E. Rep. 197, 24 L. R. A. 102; *Farrand vs. Marshall*, 19 Barb. 380; *Panton vs. Holland*, 17 John. 92, 8 Am. Dec. 369; *Lasala vs. Holbrook*, 4 Paige Ch. 169, 25 Am. Dec. 524. *Fed. Northern Trans. Co. vs. Chicago*, 99 U. S. 635, bk. 25 L. ed. 336. *Eng. Wyatt vs. Harrison*, 3 Barn. & Ad. 371, 23 Eng. C. L. 205 (wherein rule is stated by Lord Tenterden, C. J.); *Partridge vs. Scott*, 3 Mees. & W. 220.

See notes 66 Am. Dec. 649; 47 Am. St. Rep. 632.

Negligence renders excavator liable.—See par. 26 this note.

Prescriptive right to support of building cannot be acquired.—See pars. 48, 49 this note.

3. Immateriality of building.—Where for aught that appears the soil would have fallen notwithstanding superincumbent building, existence of such building is immaterial as respects liability for fall of soil.—*Aston vs. Nolan*, 63 Cal. 269, 271, 272; *Conboy vs. Dickinson*, 92 Cal. 600, 604, 28 Pac. Rep. 809. See *Dunton vs. Niles*, 95 Cal. 494, 498, 30 Pac. Rep. 762; *Gildersleeve vs. Hammond*, 109 Mich. 431, 67 N. W. Rep. 519; 33 L. R. A. 46.

4. Right of support supplied in grant.—Where two or more houses, so constructed as to require mutual support, are conveyed to different owners, right of support, as incident to property, passes by conveyance to each grantee, unless excluded by terms of grant.—*Pierce vs. Dyer*, 109 Mass. 374, 376, 12 Am. Rep. 716 (citing *Richards vs. Rose*, 9 Exch. 218).

5. CIVIL-LAW DOCTRINE.—Principle that owner of land is entitled to support is borrowed from civil law, and accordingly it was recognized and protected in Roman law by specific regulation, and similar provisions have been introduced into Civil Code of France, to wit, Civil Code France, Art. 614.—See *Moody vs. McClelland*, 39 Ala. 45, 84 Am. Dec. 770; *Charles vs. Rankin*, 22 Mo. 566, 66 Am. Dec. 642.

6. COMMON-LAW RULE.—"It seems that man who has land next adjoining to my land cannot dig his land so near to my land that thereby my land shall fall into the pit, and for

this, if an action were brought it would lie."—2 Rolle Abr. 565 (quoted in *Aston vs. Nolan*, 63 Cal. 269, 272). See *Cal. Conboy vs. Dickinson*, 92 Cal. 600, 604, 28 Pac. Rep. 809; *Sullivan vs. Zeiner*, 98 Cal. 346, 348, 33 Pac. Rep. 209, 20 L. R. A. 780. *Ala. Moody vs. McClelland*, 39 Ala. 45, 84 Am. Dec. 770. *Conn. Bradley vs. New York & N. H. R. Co.*, 21 Conn. 294; *Trowbridge vs. True*, 52 Conn. 190, 52 Am. Rep. 579. *Ill. City of Quincy vs. Jones*, 76 Ill. 231, 20 Am. Rep. 243. *Ind. Moellering vs. Evans*, 121 Ind. 195, 23 N. E. Rep. 989, 6 L. R. A. 449. *Mass. Thurston vs. Hancock*, 12 Mass. 220, 7 Am. Dec. 57; *Foley vs. Wyeth*, 84 Mass. (2 Allen) 131, 79 Am. Dec. 771; *Gilmore vs. Driscoll*, 122 Mass. 199, 23 Am. Rep. 312. *Mich. Richards vs. Peter*, 70 Mich. 286, 38 N. W. Rep. 278; *Talley vs. Courter*, 93 Mich. 473, 53 N. W. Rep. 621; *Richter vs. Harper*, 95 Mich. 221, 54 N. W. Rep. 768. *Minn. Schultz vs. Bower*, 57 Minn. 493, 47 Am. St. Rep. 630, 59 N. W. Rep. 631. *Mo. Charless vs. Rankin*, 22 Mo. 566, 66 Am. Dec. 642; *Larson vs. Metropolitan St. R. Co.*, 110 Mo. 234, 33 Am. St. Rep. 439, 19 S. W. Rep. 416, 16 L. R. A. 330. *N. J. McGuire vs. Grant*, 25 N. J. L. (1 Dutch.) 356, 67 Am. Dec. 49. *N. Y. Hay vs. Cohoes Co.*, 2 N. Y. 159, 51 Am. Dec. 279; *Austin vs. Hudson River R. Co.*, 25 N. Y. 334; *Panton vs. Holland*, 17 John. 92, 8 Am. Dec. 369; *Lasala vs. Holbrook*, 4 Paige Ch. 169, 25 Am. Dec. 524. *Pa. Carlin vs. Chappel*, 101 Pa. St. 348, 47 Am. Rep. 722. *S. D. Ulrick vs. Dakota L. & T. Co.*, 2 S. D. 285, 49 N. W. Rep. 1054. *Vt. Richardson vs. Vermont Central R. Co.*, 25 Vt. 465, 60 Am. Dec. 283. *Fed. Northern Trans. Co. vs. Chicago*, 99 U. S. 635, bk. 25 L. ed. 336. *Eng. Humphries vs. Brogden*, 12 Ad. & E. (N. S.) 739, 1 Eng. L. & E. 241, 20 L. J. Rep. (N. S.) Q. B. 10, 15, Jur. 124, 64 Eng. C. L. 738 (in which instructive case Lord Campbell, C. J., says that rule is one "long settled by law of England"); *Wyatt vs. Harrison*, 3 Barn. & Ad. 871, 23 Eng. C. L. 205; *Peyton vs. Mayor of London*, 9 Barn. & C. 725, 3 Car. & P. 363, 4 Man. & R. 625, 17 Eng. C. L. 483, 33 Rev. Rep. 311; *Massey vs. Goyner*, 4 Car. & P. 158, 161, 19 Eng. C. L. 321; *Walters vs. Pfeil*, 1 Moo. & M. 362, 22 Eng. C. L. 334.

See note 66 Am. Dec. 647, 648.

7. COMPROMISE AGREEMENT AFTER FALL OF BUILDING—Complaint—Joinder of causes of action.—Where excavator, in violation of contract with adjoining landowner, causes fall of building and injury to goods stored in it, and thereafter the parties make compromise agreement by which excavator promises to pay for several distinct items of loss, in action for breach of such compromise agreement complaint setting out matters of inducement as to excavation and several items included in contract is not open to objection that it is uncertain or that it sets up several distinct causes of action.—*Dunton vs. Niles*, 95 Cal. 494, 498, 30 Pac. Rep. 762.

8. CONTRACT BETWEEN EXCAVATOR AND ADJOINING LANDOWNER TO PAY DAMAGES—Consideration.—Where excavator promises adjoining landowner, who has building with goods stored in it to move such goods and do everything necessary to prevent

injury and inconvenience, and adjoining landowner authorizes excavator to dig under building and remove one of its walls and erect wall on line for party-wall, there is sufficient consideration for promise on part of excavator, and if he fails to stop work at point of danger and building falls he is liable for resulting damages, notwithstanding failure of the owner of building to take precautions for its safety.—*Dunton vs. Niles*, 95 Cal. 494, 499, 30 Pac. Rep. 762.

9. CONTRIBUTORY NEGLIGENCE—As respects care of building by owner thereof, when he is notified of intended excavation, e. g. his failure to shore it up, will preclude him from recovery if it falls.—*Lasala vs. Holbrook*, 4 Paige Ch. (N. Y.) 169, 25 Am. Dec. 524.

10. Correlative duties of adjoining landowners—By giving notice coterminous proprietors are relegated to their common-law rights and duties. Their duties are correlative. The object of notice is that owner of building may have his attention called to work, and if necessary shore up his wall or strengthen his foundation.—*Aston vs. Nolan*, 63 Cal. 269, 272.

Duty to shore up wall, etc.—See para. 56, 59 this note.

11. DAMAGES—Diminution of value of property.—Measure of damages where injury to adjoining property has been done by excavating in diminution of value of property injured as direct and legitimate result of excavator's acts, and not cost of restoring premises to their former condition.—*Mass. Gilmore vs. Driscoll*, 122 Mass. 199, 23 Am. Rep. 312. *N. J. McGuire vs. Grant*, 25 N. J. L. (1 Dutch.) 356, 67 Am. Dec. 49. *S. D. Ulrick vs. Dakota L. & T. Co.*, 2 S. D. 285, 49 N. W. Rep. 1054, 3 S. D. 44, 51 N. W. Rep. 1023.

See note 66 Am. Dec. 649.

12. Mental anguish—Under ordinary circumstances removal of lateral and subjacent support is mere injury to property, and gives no right to damages for mental anguish or wounded feelings.—*White vs. Dresser*, 135 Mass. 150, 46 Am. Rep. 454 (distinguishing *Meagher vs. Driscoll*, 99 Mass. 231, 96 Am. Dec. 759, which was trespass for breaking and entering plaintiff's close, which was burial place of his deceased child).

13. Negligent injury to building—Same rule of damages.—Where, in consequence of added element of negligence in making excavation, damages recoverable extend to buildings as well as soil, rule of damages should be same, to wit, the diminished value of property injured, and not cost of repairing it.—*Ulrick vs. Dakota L. & T. Co.*, 2 S. D. 285, 49 N. W. Rep. 1056.

Question of fact for jury—Question as to what damage was done to adjoining lot by excavator is one of fact for jury.—*Conboy vs. Dickinson*, 92 Cal. 600, 603, 28 Pac. Rep. 809.

14. DECLARATORY OF COMMON LAW—Section is merely declaratory of common law. It imposes no additional duty or liability upon one who excavates his land, unless, perhaps, duty to give notice.—*Aston vs. Nolan*, 63 Cal. 269, 272, 274, 276; *Conboy vs. Dickinson*, 92 Cal.

600, 604, 28 Pac. Rep. 809; *Sullivan vs. Zeiner*, 98 Cal. 346, 348, 33 Pac. Rep. 209, 20 L. R. A. 730; *Green vs. Berge*, 105 Cal. 52, 58, 45 Am. St. Rep. 25, 38 Pac. Rep. 539. See *Conn. Trowbridge vs. True*, 52 Conn. 190, 52 Am. Rep. 579. *Minn. Schultz vs. Bower*, 57 Minn. 493, 47 Am. St. Rep. 630, 59 N. W. Rep. 631. *N. Y. Lasala vs. Holbrook*, 4 Paige Ch. 169, 25 Am. Dec. 524. *S. D. Ulrick vs. Dakota L. & T. Co.*, 2 S. D. 285, 49 N. W. Rep. 1054.

15. EMINENT DOMAIN—Compensation for must be made.—Railroad exercising right of eminent domain cannot infringe right of adjoining landowner to lateral and subjacent support without making compensation.—*Bradley vs. New York & N. H. R. Co.*, 21 Conn. 294.

As to municipal improvements, see pars. 62, 63 this note.

16. INDEPENDENT CONTRACTOR—Fall of soil after completion of work.—Independent contractor is liable if he does not take reasonable precautions, as required by statute, even though soil of adjoining land does not cave in until after he has completed work and it has been accepted.—*Green vs. Berge*, 105 Cal. 52, 57, 45 Am. St. Rep. 25, 38 Pac. Rep. 539.

17. Landowner not liable for discretionary acts of.—Where work is done by independent contractor and is not done in lawful manner, he alone, and not the landowner who employed him, is liable for his acts and acts of his servant, where the mode and manner of doing work was not expressly agreed upon; and landowner is not liable for reason that he did not cause to be inserted in contract an express clause to effect that work should be so conducted and finished as not to disturb the soil of adjoining lot, because when contract with independent contractor provides for doing thing it may be, and generally is, done in lawful manner, and if it is silent as to mode of doing it, it is to be construed as requiring it to be done in lawful manner.—*Aston vs. Nolan*, 63 Cal. 269, 274, 275. See *Clark vs. Fry*, 8 Ohio St. 358, 72 Am. Dec. 590.

18. Compare: *Green vs. Berge*, 105 Cal. 52, 57, 58, 45 Am. St. Rep. 25, 38 Pac. Rep. 539; *Ketcham vs. Newman*, 141 N. Y. 205, 36 N. E. Rep. 197, 24 L. R. A. 102.

19. Negligence of excavator after completion of work by contractor renders excavator liable, and in such case question whether excavator is liable for acts of independent contractor does not rise.—*Ulrick vs. Dakota L. & T. Co.*, 2 S. D. 285, 49 N. W. Rep. 1054.

20. Owner's plans carried out.—Owner of land excavated is liable where work was negligently done, but was done precisely as ordered in exercise of discretion or judgment vested in supervising authority.—*Larson vs. Metropolitan St. R. Co.*, 110 Mo. 234, 33 Am. St. Rep. 439, 19 S. W. Rep. 416, 16 L. R. A. 330.

21. INJUNCTION LIES to prevent anticipated or threatened violation of right to lateral support.—*Trowbridge vs. True*, 52 Conn. 190, 52 Am. Rep. 579.

See *Kerr Injunctions* 366; note 66 Am. Dec. 643.

22. Adequacy of remedy at law.—Injunction will be granted against injury to city lot

although at time of awarding writ injury has been slight and is found to have caused only \$5 damage; such case being one where injury is liable to be irreparable and where money cannot compensate for it.—See *Phillips vs. Borden*, 86 Mass. (4 Allen) 147; *Davis vs. Londgreen*, 8 Neb. 43, 47.

23. MALICE NOT IN QUESTION.—Right to lateral and subjacent support is property right, and if adjoining landowner removes soil so as to disturb such right he is liable regardless of any question of malice.—*White vs. Dresser*, 135 Mass. 150, 46 Am. Rep. 454.

24. MINING LAND—Doctrine inapplicable to.—Owners of adjoining mining claims which are what are known as "deep diggings," and which are such as are worked by hydraulic process, are not governed by doctrine of lateral support, because very purpose of locating ground on part of respective owners is to tear down the ground and wash it away, and its only value consists in mineral which it contains, and application of doctrine would to a great extent defeat purposes for which claims were located.—*Hendricks vs. Spring Valley M. & I. Co.*, 58 Cal. 190, 192, 41 Am. Rep. 257. See *Offerman vs. Starr*, 2 Pa. St. 394, 44 Am. Dec. 211.

25. Compare: *Yandes vs. Wright*, 66 Ind. 319, 32 Am. Rep. 109 (quoting from *Humphries vs. Brogden*, 12 Ad. & E. (N. S.) 739, 1 Eng. L. & Eq. 241, 20 L. J. Rep. (N. S.) Q. B. 10, 15, Jur. 124, 64 Eng. C. L. 738 as follows: "It appeared that company had taken coals under plaintiff's closes, without leaving any sufficient pillars to support surface, whereby closes has swagged and sunk, and had been considerably injured; but that supposing surface and minerals to have belonged to same person, these operations had not been conducted carelessly or negligently or contrary to custom of country. The jury found that company had worked carefully and according to custom of country, but without leaving sufficient pillars or supports; and verdict was entered for plaintiff for one hundred and ten pounds damages, with leave to enter verdict for defendant, if court should be of opinion that under circumstances action was not maintainable").

26. NEGLIGENCE—Gives rise to liability for building.—As to building recently erected it would seem that adjacent owner is liable for excavating upon his own land so as to injure or impair foundations of such building, if injury results from negligent, unskilful, and improper manner in which it was done.—*Aston vs. Nolan*, 63 Cal. 269, 273. See *Ala. Moody vs. McClelland*, 39 Ala. 45, 84 Am. Dec. 770. *Ill. City of Quincy vs. Jones*, 76 Ill. 231, 241. *Ky. Shrieve vs. Stokes*, 8 B. Mon. 453, 48 Am. Dec. 401. *Mass. Foley vs. Wyeth*, 84 Mass. (2 Allen) 131, 79 Am. Dec. 771. *Mo. Charless vs. Rankin*, 22 Mo. 566, 66 Am. Dec. 642. *N. Y. Dorrity vs. Rapp*, 72 N. Y. 307; *Ketcham vs. Newman*, 141 N. Y. 205, 36 N. E. Rep. 197, 24 L. R. A. 102; *Lasala vs. Holbrook*, 4 Paige Ch. 169, 25 Am. Dec. 524. *S. D. Ulrick vs. Dakota L. & T. Co.*, 2 S. D. 285, 49 N. W. Rep. 1054.

See note 66 Am. Dec. 649, 650.

27. Injury to soil—Liability independently of negligence.—In order to maintain action for injury to adjoining land in consequence of excavation made by adjacent owner, no negligence is necessary. Every man is entitled to enjoyment of his land in its natural state, and any removal of it by excavating adjoining land is wrong, per se, for which law gives damages.—*Mass. White vs. Dresser*, 135 Mass. 150, 46 Am. Rep. 454. *Mich. Gildersleeve vs. Hammond*, 109 Mich. 431, 67 N. W. Rep. 519, 33 L. R. A. 46. *Minn. Schultz vs. Bower*, 57 Minn. 493, 47 Am. St. Rep. 630, 59 N. W. Rep. 631.

28. Notice does not excuse negligence.—By giving notice person excavating on his own land cannot relieve himself of any portion of prudent care with which he must have conducted work in absence of statutory provision requiring notice.—*Aston vs. Nolan*, 63 Cal. 269, 273. See *Conboy vs. Dickinson*, 92 Cal. 600, 604, 23 Pac. Rep. 809; *Ulrick vs. Dakota L. & T. Co.*, 2 S. D. 285, 49 N. W. Rep. 1054 (construing essentially similar statute).

29. Question of fact.—Question of negligence where building has been injured is one of fact for jury under instructions from court as to law.—*Ulrick vs. Dakota L. & T. Co.*, 2 S. D. 285, 49 N. W. Rep. 1054.

30. Requisite degree of care.—Care required of excavator is that of man of ordinary prudence in circumstances of particular situation, or reasonable care.—*Green vs. Berge*, 105 Cal. 52, 57, 45 Am. St. Rep. 25, 38 Pac. Rep. 539. See *Kann. Leavenworth Lodge L. O. O. F. vs. Byers*, 54 Kans. 323, 38 Pac. Rep. 261. *Mass. Callender vs. Marsh*, 13 Mass. (1 Pick.) 418. *Mo. Larson vs. Metropolitan St. R. Co.*, 110 Mo. 234, 33 Am. St. Rep. 439, 19 S. W. Rep. 416. *N. Y. Ketcham vs. Newman*, 141 N. Y. 205, 36 N. E. Rep. 197, 24 L. R. A. 102. *Oreg. Hummell vs. Seventh St. Terrace Co.*, 20 Oreg. 401, 26 Pac. Rep. 277.

31. Depth of excavation considered.—Where excavation is made to a depth of forty feet, during month of March, when heavy rains are to be expected, and only precaution which excavator took was to stop his excavation four feet from line between himself and adjoining landowner, and bank is left with steep slope and earth at top is twelve or fourteen feet deep, court will declare as matter of law that reasonable precautions were not taken.—*Conboy vs. Dickinson*, 92 Cal. 600, 605, 28 Pac. Rep. 809. See *Larson vs. Metropolitan St. R. Co.*, 110 Mo. 234, 33 Am. St. Rep. 439, 19 S. W. Rep. 416, 16 L. R. A. 330.

32. Extra expense—Efforts to avoid immaterial.—In such case excavator is none the less liable because removal of earth in sections would have involved additional expense.—*Larson vs. Metropolitan St. R. Co.*, 110 Mo. 234, 33 Am. St. Rep. 439, 19 S. W. Rep. 416, 16 L. R. A. 330. See *Beauchamp vs. Saginaw Min. Co.*, 50 Mich. 163, 45 Am. Rep. 30, 15 N. W. Rep. 65.

33. Nature of soil considered in determining question.—If soil is adhesive, so that it will remain in its natural position with lateral support removed, obviously excavator may

excavate as deep as he pleases,—even close to boundary line. If in such case his neighbor's land caves in by reason of pressure of superstructure upon it, it is *damnum absque injuria*. But the rule is otherwise where the soil is sandy or gravelly.—*Gildersleeve vs. Hammond*, 109 Mich. 431, 67 N. W. Rep. 519, 33 L. R. A. 46.

34. Nearness of excavation to adjoining land.—Landowner has right to have his land preserved unbroken, and adjoining owner excavating on his own land is subject to restriction that he must not remove earth so near to land of his neighbor that his neighbor's soil will crumble away of its own weight and fall away from his own land.—*Northern Trans. Co. vs. Chicago*, 99 U. S. 635, bk. 25 L. ed. 336.

35. Neglect to furnish support is only neglect necessary to give cause of action under statute.—*Green vs. Berge*, 105 Cal. 52, 53, 45 Am. St. Rep. 25, 38 Pac. Rep. 539.

36. Same—Rainfalls must be anticipated.—Where landowner undertakes to construct retaining wall on his own land which materially increases risk of adjoining property to land-slides, he is bound to exercise his right in way not to expose adjoining property to any risks which might be provided against by exercise of ordinary diligence, and he is required to take into account or anticipate such storms or rainfalls as might reasonably be expected to occur.—*Hummell vs. Seventh St. Terrace Co.*, 20 Oreg. 401, 26 Pac. Rep. 277.

37. Same—Water permitted to flow from street into cellar.—It is negligence for excavator, after excavation had been made, to allow water to flow from street into excavation so as to undermine adjoining premises.—*Ulrick vs. Dakota L. & T. Co.*, 2 S. D. 285, 49 N. W. Rep. 1054.

38. NOTICE—Must be given to escape liability for injury to building.—It would seem that by neglecting to give statutory notice person excavating his own lot will become liable for injuries caused by caving which would not have occurred except for superincumbent weight of his neighbor's building.—*Aston vs. Nolan*, 63 Cal. 269, 273.

39. Need not be given when adjoining landowner has knowledge that work is contemplated, as law does not require vain acts.—See *Dunton vs. Niles*, 95 Cal. 494, 498, 30 Pac. Rep. 762; *Schultz vs. Byers*, 53 N. J. L. (3 Dick.) 442, 26 Am. St. Rep. 435, 22 Atl. Rep. 514; *Ulrick vs. Dakota L. & T. Co.*, 2 S. D. 44, 51 N. W. Rep. 1023; *Novotny vs. Danforth*, 9 S. D. 301, 68 N. W. Rep. 749.

40. Object of notice is to give adjoining landowner opportunity to protect his property from possible injury if he desires to do so and it does not impose upon him any duty to excavator to prevent his property from falling.—*First Nat. Bank vs. Villegra*, 92 Cal. 96, 99, 28 Pac. Rep. 97. See *Ulrick vs. Dakota L. & T. Co.*, 2 S. D. 285, 49 N. W. Rep. 1054.

41. Sufficiency.—For form of notice which was held sufficient, see *Nippert vs. Warneke*, 128 Cal. 501, 503, 504, 61 Pac. Rep. 96.

42. **Particular form not required.**—As statute does not prescribe manner of giving notice, any notice that brings to knowledge of other party that coterminous owner intends to excavate his lot, in time to enable party notified to make needed preparation to protect his property, would seem to be sufficient.—*Novotny vs. Danforth*, 9 S. D. 301, 63 N. W. Rep. 749.

43. **Reasonable notice sufficient.**—"Manner of giving notice may be only such as is reasonable under the circumstances."—*Schultz vs. Byers*, 53 N. J. L. (8 Dick.) 442, 36 Am. St. Rep. 435, 22 Atl. Rep. 514.

44. **Specifying particular place where excavation will be made.**—Notice which informs adjoining landowner that excavations are about to be made "directly adjoining your lot, to depth somewhat below your foundation," is sufficient to cover intention to excavate the lot generally, and does not refer merely to excavations immediately adjoining premises of adjoining landowner.—*Nippert vs. Warneke*, 128 Cal. 501, 503, 504, 61 Pac. Rep. 96.

45. **Written notice undoubtedly would be better practice, but as statute does not in terms require written notice, verbal notice or such acts of preparation for building as to clearly apprise adjoining owner that coterminous owner is about to excavate his lot, in time to enable adjoining owner to make all necessary preparation to protect his property, is sufficient.**—*Novotny vs. Danforth*, 9 S. D. 301, 63 N. W. Rep. 749 (decided under essentially similar statute).

46. **Tenant or occupant may be given notice if there be difficulty in finding or serving notice on owner.**—*Schultz vs. Byers*, 53 N. J. L. (8 Dick.) 442, 36 Am. St. Rep. 435, 22 Atl. Rep. 514 (decided in absence of statute requiring notice).

47. **Party-wall—Right to use.**—See ante §801, subd. 12 and note.

Respective rights and liabilities of adjoining owners in respect to party-walls.—See note 19 L. R. A. 240.

48. **PRESCRIPTIVE RIGHT TO SUPPORT OF BUILDING CANNOT BE ACQUIRED** by lapse of time where building rests wholly upon soil of its owner because owner of building does no injury to adjoining landowner upon which latter could base an action, and it cannot be said that such adjoining landowner sleeps on his rights by allowing building to stand and by delaying excavation.—*Sullivan vs. Zelner*, 98 Cal. 346, 349-352, 33 Pac. Rep. 209, 20 L. R. A. 730 (wherein it is declared that, obiter expression to the contrary in *Aston vs. Nolan*, 63 Cal. 269, 272 "was doubtless suggested by some of many authorities which support that proposition, but without consideration of analogous cases in this court which conclusively settle question other way"). See *Hanson vs. McCue*, 42 Cal. 303, 310, 10 Am. Rep. 299 (involving different facts but precise question, viz., prescriptive right to waters from spring). *Ga. Mitchell vs. Mayor of Rome*, 49 Ga. 19, 25, 15 Am. Rep. 669. *Mass. Gilmore vs. Driscoll*, 123 Mass. 199, 207, 23 Am. Rep. 313. *S. C. Napier vs. Bulwinkle*, 5 Rich. L. (S. C.) 311.

49. **Contra: *Lasala vs. Holbrook***, 4 Paige Ch. (N. Y.) 169, 25 Am. Dec. 524 (citing *Story vs. Odin*, 12 Mass. 157, 7 Am. Dec. 46; *Palmer vs. Fleshees*, 1 Sid. 167; *Cox vs. Mathews*, 1 Vent. 237, 239; *Brown vs. Windsor*, 1 Crompt. & J. 20). See *Gildersleeve vs. Hammond*, 109 Mich. 431, 67 N. W. Rep. 519, 33 L. R. A. 46.

Right by prescription for lateral support of buildings.—See monographic note by B. A. Rich in 20 L. R. A. 730, 731.

50. **PROPERTY RIGHT—Incident of ownership.**—Right of lateral support for land which is in its natural condition, and is not subject to artificial pressure, is property right—one which is incidental to ownership of land.—*Green vs. Berge*, 105 Cal. 52, 57, 45 Am. St. Rep. 25, 38 Pac. Rep. 539. See *Ala. Moody vs. McClelland*, 39 Ala. 45, 84 Am. Dec. 770. *Conn. Trowbridge vs. True*, 52 Conn. 190, 52 Am. Rep. 579. *Mass. Foley vs. Wyeth*, 84 Mass. (3 Allen) 131, 79 Am. Dec. 771. *Minn. Schultz vs. Bower*, 57 Minn. 493, 47 Am. St. Rep. 630, 59 N. W. Rep. 631. *N. Y. Pantan vs. Holland*, 17 John. 92, 8 Am. Dec. 369. *S. D. Ulrick vs. Dakota L. & T. Co.*, 2 S. D. 285, 49 N. W. Rep. 1054.

51. **QUALIFICATION OF OWNER'S ABSOLUTE DOMINION OVER PROPERTY.**—Right of owner to use his own land in any way he desires, or to take down or change any foundation or wall or other improvement, without being answerable for the consequent injury to his neighbor's house, is subject to qualification that he must exercise due care and skill—and that he will be liable in damages if injury to his neighbor is occasioned by negligent and unskilful manner in which work is performed.—*Leavenworth Lodge I. O. O. F. vs. Byers*, 54 Kans. 323, 38 Pac. Rep. 261.

52. **SERVIENT TENEMENTS.**—**Mutual rights of several owners.**—Where several portions of one dwelling become vested in different owners, right of support passes to each grantee unless excluded by terms of grant.—*Pierce vs. Dyer*, 109 Mass. 374, 376, 12 Am. Rep. 716 (citing *Richards vs. Rose*, 9 Exch. 218).

53. **Easement of repair.**—Civil-law rule is that there is an easement to compel owner of servient tenements to repair, as distinguished from ordinary easement of support; but additional obligation to repair can only arise from express stipulation, or by proof of prescriptive right to easement of repair as well as support.—*Pierce vs. Dyer*, 109 Mass. 374, 377, 12 Am. Rep. 716 (citing *Gale Easements*, 4th ed. 312).

54. **Presumption of obligation to repair not indulged, and without such obligation action cannot be maintained.**—*Pierce vs. Dyer*, 109 Mass. 374, 376, 12 Am. Rep. 716 (following *Peyton vs. London*, 9 Barn. & C. 725, 3 Car. & P. 363, 17 Eng. C. L. 483, 33 Rev. Rep. 311).

55. **Repair of roof.**—Owner of lower part of store cannot bring action on case against owner of upper part and roof to recover damages for suffering roof to be out of repair.—*Cheeseborough vs. Green*, 10 Conn. 318, 26 Am. Dec. 396 (court suggested that remedy is in equity).

56. **SHORING UP WALLS—Duty of owner upon receipt of notice.**—After owner of land

with building on it has received notice from adjoining landowner that he intends to excavate it is duty of owner of building, if necessary, for his own protection to shore up his wall.—*Aston vs. Nolan*, 63 Cal. 269, 273.

Contributory negligence of owner of building.—See par. 9 this note.

57. Obligation of adjoining landowner to excavator.—Upon receipt of notice adjoining landowner is under no obligation to excavator to shore up building on his premises, and if excavator, for his own benefit and his own advantage and in order to prevent building from falling upon his own premises, expends money in support of adjoining walls, he has no right of action against adjoining landowner to whom he gave notice.—*First Nat. Bank vs. Villegra*, 92 Cal. 96, 99, 23 Pac. Rep. 97.

58. Representations of excavator as to how work will be done.—Where excavator represents to adjoining landowner that he intends to remove dirt in sections and wall it up as he goes along, and he fails to do so, and it appears in evidence that course indicated by ordinary prudence and one pursued by uniform custom of builders in locality is to remove earth in sections, adjoining landowner has right to rely upon such representation of excavator, and even though adjoining landowner takes no steps to protect building on his premises excavator is liable for collapse of building.—*Larson vs. Metropolitan St. R. Co.*, 110 Mo. 234, 33 Am. St. Rep. 439, 19 S. W. Rep. 416. See *Gilder-sleeve vs. Hammond*, 109 Mich. 431, 67 N. W. Rep. 519, 33 L. R. A. 46.

59. Right of entry not in excavator.—Excavator has no right to enter upon adjoining premises for purpose of shoring up wall, and if given permission to do so is not under necessity of taking such steps.—*Ketcham vs. Newman*, 141 N. Y. 205, 36 N. E. Rep. 197, 24 L. R. A. 102.

60. SIC UTERE TUO, ETC.—Applicable.—Principle "stands on natural justice, and is essential to protection and enjoyment of property in soil. Although it places restraint on what man may do with his own property it is in accordance with precept sic utere tuo ut alienum non ladas."—*Humphries vs. Brogden*, 12 Ad. & E. N. S. (12 Q. B.) 739, 20 L. J. Rep. (N. S.) Q. B. 10, 15 Jur. 124, 64 Eng. C. L. 738, 1 Eng. L. & Eq. 241, per Lord Campbell, C. J.

61. Doctrine not applied literally.—*Damnum absque injuria*.—Maxim sic utere tuo ut alienum non ladas is not to be taken literally.

On contrary, general principle is, that every proprietor has absolute dominion over his own property; and that loss or damage to one person, arising from use made by another of his own property, is *damnum absque injuria*, and affords no ground of action, unless party injured has previously acquired legal right in nature of easement, curtailing absolute dominion of owner over his property, and limiting him in the use he may make of it.—*Moody vs. McClelland*, 39 Ala. 45, 84 Am. Dec. 770. See *Me. Gerrish vs. Proprietors U. W.*, 26 Me. 384, 46 Am. Dec. 568. *Mass. Pierce vs. Dyer*, 109 Mass. 374, 376, 12 Am. Rep. 716. *Mo. Charles vs. Rankin*, 22 Mo. 566, 66 Am. Dec. 642. *N. Y. Auburn & C. Pl. R. Co. vs. Douglass*, 9 N. Y. 444, 445 (wherein it was observed: "Interpreted literally it [the maxim] would enjoin a man against any use of his own property, which in its consequences might injuriously affect the interests of others; but no such legal principle ever existed").

62. STREET IMPROVEMENTS, ETC.—Will render municipal corporation liable, even for injury to improvements, etc.—*Parke vs. Seattle*, 5 Wash. 1, 34 Am. St. Rep. 839, 31 Pac. Rep. 310, 20 L. R. A. 68 (sharply criticizing overruled case *City of St. Louis vs. Gurno*, 12 Mo. 414, and citing as leading case establishing doctrine that municipal corporations are liable *Pumpelly vs. Green Bay Co.*, 80 U. S. (13 Wall.) 166, bk. 20 L. ed. 557). See note 66 Am. Dec. 648.

63. Instruction approved as correctly stating rule.—In action against city, court instructed jury to following effect: If they were satisfied from evidence that sinking of wall, or rather cracking of wall, was due to weight of wall upon selva or portion of earth which was left, and not to removal of material which was taken out of street, that is from plt. defendants were not liable. If they were satisfied that if wall had not stood upon plaintiff's lot where it did there would have been no change in level which caused deflection of wall, was due to weight of wall resting upon earth after excavation was made, then defendant was not liable for that. It was held that such instruction properly propounded law.—*Northern Trans. Co. vs. Chicago*, 99 U. S. 635, bk. 25 L. ed. 336.

64. WALL MAY BE PULLED DOWN.—One may pull down his own wall although vaults of his neighbor be thereby destroyed.—*Chadwick vs. Trower*, 6 Bing. N. C. 1, 37 Eng. C. L. 256.

§ 833. TREES WHOSE TRUNKS ARE WHOLLY ON LAND OF ONE. Trees whose trunks stand wholly upon the land of one owner belong exclusively to him, although their roots grow into the land of another.

History: Enacted March 21, 1872.

1. Common law declared by statute.
2. Fruit on overhanging branches belongs to owner of tree.
3. Nuisance—Abatement of branches.
4. Same—Line of trees along boundary.
5. Ownership of soil upwards usque ad cælum.
6. Roots projecting into adjoining owner's soil—Abatement.

1. DECLARATORY OF COMMON LAW.—Section merely states rule which had been judicially announced previously.—*Dubois vs. Beaver*, 25 N. Y. 123, 126, 32 Am. Dec. 326.

2. FRUIT ON OVERHANGING BRANCHES BELONGS TO OWNER OF TREE.—If tree, trunk of which stands on land of A, extend some of its branches over, and some of its

roots into, land of B, A and B are not joint owners or tenants in common of such tree; but it is, with such overhanging branches and fruit thereof, sole property of A; and if B gather fruit from such overhanging branches and appropriate it to his own use, he is liable in trespass to A.—*Lyman vs. Hale*, 11 Conn. 177, 182-185, 27 Am. Dec. 728; *Hoffman vs. Armstrong*, 48 N. Y. 201, 8 Am. Rep. 537.

See *Dubois vs. Beaver*, 25 N. Y. 123, 33 Am. Dec. 326.

Rights of adjoining proprietor where tree grows on or near boundary line.—See monographic note 82 Am. Dec. 330, 331.

2. NUISANCE—Abatement of overhanging branches.—Overhanging branches constitute nuisance which may be cut down or abated by injured owner, but he has no right to cut down tree itself.—*Grandona vs. Lovdal*, 70 Cal. 161, 162, 11 Pac. Rep. 623. See *Grandona vs. Lovdal*, 78 Cal. 611, 12 Am. St. Rep. 121, 21 Pac. Rep. 366; *Commonwealth vs. Blaisdell*, 107 Mass. 234,

235; *Commonwealth vs. McDonald*, 16 Serg. & R. (Pa.) 390, 396-401.

4. Line of trees standing along boundary so near to plaintiff's land that branches overhang it and trunks crowd division fence over and upon plaintiff's land, do not constitute nuisance so as to entitle plaintiff to injunction and damages where it appears that his enjoyment of his land is not lessened and that he has never attempted to use his land for purpose which would be interfered with by the trees.—*Grandona vs. Lovdal*, 78 Cal. 611, 617, 618, 12 Am. St. Rep. 121, 21 Pac. Rep. 366.

5. Ownership of soil upwards usque ad coelum.—See ante § 329 and note.

6. ROOTS PROJECTING INTO SOIL—Abatement of nuisance.—It would seem owner of soil may abate roots projecting into his soil from tree on adjoining land if actual damage is suffered thereby.—*Grandona vs. Lovdal*, 70 Cal. 161, 162, 11 Pac. Rep. 623.

§ 834. **LINE TREES.** Trees whose trunks stand partly on the land of two or more coterminous owners, belong to them in common.

History: Enacted March 21, 1872.

1. Common law declared by statute.
2. Overhanging branches—Fruit belongs to owner of tree.
3. Rights of adjoining landowners.

1. **Declaratory of common law.**—Section merely states rule which had been judicially

announced previously.—See *Dubois vs. Beaver*, 25 N. Y. 123, 126, 127, 32 Am. Dec. 326.

2. **Overhanging branches—Fruit belongs to owner of tree.**—See ante § 332 note par. 2.

3. **Rights of adjoining proprietor where tree grows on or near boundary line.**—See monographic note 82 Am. Dec. 330, 331.

CHAPTER II.

OBLIGATIONS OF OWNERS.

- § 840. Duties of tenant for life.
- § 841. Monuments and fences.
- § 842. Owners of ditches, flumes, etc. Liability to each other.

§ 843. Neglect to pay proportion of expenses; liability in action.

§ 840. **DUTIES OF TENANT FOR LIFE.** The owner of a life estate must keep the buildings and fences in repair from ordinary waste, and must pay the taxes and other annual charges, and a just proportion of extraordinary assessments benefiting the whole inheritance.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Common-law rule declared—Commissioners' note.
3. Improvements—Allowance to life tenant for.
4. Rights of tenant for life.
5. Taxes—Payment by remainderman gives no right of action against tenant.
6. Same—Remainderman's equitable relief.
7. Same—Title cannot be acquired by life tenant under tax sale.
8. Termination of life estate by death—Decree declaring.
- 9, 10. Waste—Definition of—Treble damages for.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in:** *Huddleston vs. Wash-*

ington, 136 Cal. 514, 518, 69 Pac. Rep. 148 (applied).

2. COMMON-LAW RULE DECLARED—Commissioners' note.—Section is merely declaratory of common-law rules previously recognized in judicial decisions as appears from Commissioners' note, which cites: *Sarles vs. Sarles*, 3 Sandf. Ch. (N. Y.) 601, 607 (duty to keep buildings, etc., in repair); *Fleet vs. Dorland*, 11 How. Pr. (N. Y.) 489, and *Graham vs. Dunigan*, 2 Bosw. (N. Y.) 516 (duty to pay taxes); *Moseley vs. Marshall*, 22 N. Y. 200 (duty to pay charges, viz., interest on mortgage); *Stillwell vs. Doughty*, 2 Bradf. (N. Y.) 311 (duty to pay proportion of extraordinary charges).

3. IMPROVEMENTS—Allowance to life

tenant for.—See monographic note 81 Am. St. Rep. 132.

4. Rights of tenant for life.—See ante § 818 and note.

5. TAXES—Payment by remainderman gives no right of action against tenant.—Where tenant in remainder voluntarily has property assessed in his name against wish and without authority of life tenant and pays such taxes, he has no right of action against life tenant to recover them back, even though life tenant interposes no objection, rule being that "no man can be a debtor for money paid, unless it was at his request."—Huddleston vs. Washington, 136 Cal. 514, 518, 519, 69 Pac. Rep. 146 (quoting Curtis vs. Parks, 55 Cal. 106, 108).

6. Remainderman's equitable relief.—If life tenant in disobedience of statute fails to pay taxes, and they become delinquent, and property is about to be sold, thus endangering the remainderman's estate, latter may invoke the aid of equity to have rents applied to protec-

tion of property.—Huddleston vs. Washington, 136 Cal. 514, 518, 69 Pac. Rep. 146 (citing 2 Desty Tax. 938).

7. Title cannot be acquired by life tenant under tax sale.—If, during life of life tenant, premises are sold for taxes and he purchases he acquires no title as against owners of the fee.—Menger vs. Carruthers, 57 Kan. 425, 46 Pac. Rep. 712 (court saying: "No one else was under slightest obligation to pay taxes while he enjoyed the rents and profits, and clearly he could not obtain a valid title based on his own failure to pay taxes justly chargeable to him alone").

8. Termination of life estate by death—Decree declaring.—See Code Civil Procedure § 1723 and note.

9. Waste—Definition of.—See ante § 818 and note par. 13.

10. Same—Tresble damages recoverable.—See Code Civil Procedure § 732 and note.

§ 841. MONUMENTS AND FENCES. Coterminous owners are mutually bound equally to maintain:

1. The boundaries and monuments between them;
2. The fences between them, unless one of them chooses to let his land lie without fencing; in which case, if he afterwards incloses it, he must refund to the other a just proportion of the value, at that time, of any division fence made by the latter.

History: Enacted March 21, 1872. This section is apparently based on 1 Rev. St. N. Y. 350, § 30.—See Ryan vs. Rochester & S. R. Co., 9 How. Pr. (N. Y.) 453, 455. As to lawful fence in counties named, see Act 1850, as amended by Act April 3, 1860 (Stats. 1860, p. 141).—Gonzales vs. Wasson, 51 Cal. 295, 297. See HENNING'S GENERAL LAWS, tit. Fences.

1. Applied, cited, construed, referred to, etc.
 2. Acquiescence in boundary line—Prescription.
 3. Agreed boundary line.
 - 4, 5. Same—Frauds, statute of, not applicable.
 6. Same—Parol evidence is admissible.
 7. Animals—Duty of owner to keep on his own premises.
 8. Common-law rule respecting duty to erect fence.
 9. Same—Statute supplants common law.
 10. Constitutionality of statute.
 11. Contractual liability to contribute for fence.
 12. Counties in which statute obtains.
 13. Damages when division fence wrongfully removed.
 14. Same—Escaping live stock.
 15. Same—Punitive damages are recoverable.
 16. Dispute over boundary line—Contribution must be made for fence.
 17. Division fence—Duty to adjoining landowner only.
 18. Election to allow land to lie open.
 19. Inclosure of land—Using existing fence.
 20. Equitable jurisdiction when boundaries confused.
 21. Estate in land—Statute applies regardless of nature of estate.
 22. Gate is part of fence.
 23. Lawful fence—What constitutes.
 24. Limitations—Action for contribution.
 25. "Maintain"—Includes rebuilding.
 26. Non-compliance with statute—Relegation of parties to common-law rule.
 27. Object of lawful fence.
 28. "Owners" defined.
 29. "Partition fence" defined.
 30. Party-walls—Provisions as to.
 31. Prescriptive duty to maintain fence.
 32. Railroad fence.
 33. Remedies to enforce contribution to partition fence.
 34. Removal—Right barred by limitation.
 35. Right to fence on own land—Constitutional law.
 36. Set-off of demand for contribution.
 37. Statutes formerly in force preserved.
 38. Waiver of rights.
 39. Waters as boundaries.
 40. Ways as boundaries.
1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Gonzales vs. Wasson, 51 Cal. 295, 297, 298 (construed); Meade vs. Watson, 67 Cal. 591, 593, 8 Pac. Rep. 311 (construed); Bliss vs. Sneath, 103 Cal. 43, 45, 36 Pac. Rep. 1029 (construed and applied); Bliss vs. Sneath, 119 Cal. 526, 527, 51 Pac. Rep. 848 (construed and applied).
2. ACQUIESCENCE IN BOUNDARY LINE—Prescription.—When owners of adjoining lands have acquiesced for considerable time in location of division line between their lands, although it may not be true line according to

calls of their deeds, they are thereafter precluded from saying it is not true line. The better opinion is that considerable time mentioned in cases must at least equal length of time prescribed by statute of limitations to bar right of entry.—*Sneed vs. Osborn*, 25 Cal. 619, 626; *Columbet vs. Pacheco*, 48 Cal. 395, 397; *Burris vs. Fitch*, 76 Cal. 395, 398, 18 Pac. Rep. 864. See *N. Y. Jackson ex dem. Goodrich vs. Ogden*, 7 John. 238; *Jackson ex dem. Livingston vs. Freer*, 17 John. 29; *McCormick vs. Barnum*, 10 Wend. 104; *Dibble vs. Rogers*, 13 Wend. 536; *Adams vs. Rockwell*, 16 Wend. 285; *Van Wyck vs. Wright*, 18 Wend. 157. Pa. Perkins vs. Gay, 3 Serg. & R. 327; *Hagey vs. Detweiler*, 35 Pa. St. 412. Fed. *Boyd vs. Graves*, 17 U. S. (4 Wheat.) 513, bk. 4 L. ed. 628.

2. AGREED BOUNDARY LINE.—Adjoining landowners, when true boundary line is uncertain and indefinite, may establish and mark line as boundary between their tracts, and such agreed boundary line will be controlling upon them; and it is not necessary in such cases that there should be actual dispute as to true boundary.—*Silvarer vs. Hansen*, 77 Cal. 579, 586, 587, 20 Pac. Rep. 136. See *Garthe vs. Hart*, 73 Cal. 541, 544, 15 Pac. Rep. 93; *White vs. Spreckels*, 75 Cal. 610, 17 Pac. Rep. 715; *Burris vs. Fitch*, 76 Cal. 395, 398, 18 Pac. Rep. 864; *Helm vs. Wilson*, 76 Cal. 476, 18 Pac. Rep. 604; *Helm vs. Wilson*, 89 Cal. 593, 596, 26 Pac. Rep. 1103. Ill. *Fisher vs. Bennehoff*, 121 Ill. 426, 435, 13 N. E. Rep. 150. Mich. *Smith vs. Hamilton*, 20 Mich. 433, 4 Am. Rep. 398; *Jones vs. Pashby*, 67 Mich. 459, 11 Am. St. Rep. 589, 35 N. W. Rep. 152. Mo. *Blair vs. Smith*, 16 Mo. 273. N. H. *Orr vs. Hadley*, 36 N. H. 575. N. Y. *Laverty vs. Moore*, 32 Barb. 347. Tenn. *Houston vs. Matthews*, 1 Yerg. 118. Tex. *Houston vs. Sneed*, 15 Tex. 307.

See notes 68 Am. Dec. 626-628; 11 Am. St. Rep. 592.

4. Frauds, statute of, not applicable.—Such agreements need not be in writing, as they are not regarded as conveyances, but merely as establishing limits to which title of each extends.—*White vs. Spreckels*, 75 Cal. 610, 616, 17 Pac. Rep. 715; *Cavanaugh vs. Jackson*, 91 Cal. 580, 583, 27 Pac. Rep. 931. See Ill. *Fisher vs. Bennehoff*, 121 Ill. 426, 435, 13 N. E. Rep. 150. Mich. *Cronin vs. Gore*, 38 Mich. 381, 384. Mo. *Blair vs. Smith*, 16 Mo. 273. N. H. *Orr vs. Hadley*, 36 N. H. 575. N. Y. *Laverty vs. Moore*, 32 Barb. 347. Tenn. *Houston vs. Matthews*, 1 Yerg. 118. Tex. *Houston vs. Sneed*, 15 Tex. 307.

See note 11 Am. St. Rep. 592.

5. Compare: *Garthe vs. Hart*, 73 Cal. 541, 544, 15 Pac. Rep. 93 (decided under § 1091, which requires writing for transfer of mining claims).

See post § 1091 and note.

6. Parol evidence is admissible to establish such agreed line, and it may be proved by acts, situation, acquiescence, and relations of parties.—See *Helm vs. Wilson*, 89 Cal. 593, 596, 26 Pac. Rep. 1103.

7. ANIMALS.—Duty of owner to keep on his own premises.—At common law it is duty of owner to keep his cattle and other animals on his own premises at his peril; and where same

stray upon premises of another, and are injured or lost, owner cannot complain of failure to fence unless he and such other were adjoining landowners.—See *Meade vs. Watson*, 67 Cal. 591, 593, 8 Pac. Rep. 311. Ind. *Myers vs. Dodd*, 9 Ind. 290, 68 Am. Dec. 624. Mass. *Rust vs. Low*, 6 Mass. 90; *Stackpole vs. Healy*, 16 Mass. 33, 3 Am. Dec. 121. N. Y. *Clark vs. Syracuse & U. R. Co.*, 11 Barb. 112; *Ryan vs. Rochester & S. R. Co.*, 9 How. Pr. 453, 455. Eng. *Ricketts vs. East & W. I. D. & B. J. R. Co.*, 12 Eng. L. & Eq. 520, 524.

8. COMMON-LAW RULE RESPECTING DUTY TO ERECT FENCE.—By common law no man was bound to erect fences either to protect his possession or to entitle himself to remedy against trespasses or encroachments of others. Every man was bound to keep his animals within his own inclosures, or be liable to pay damages for such trespasses as they might commit on lands of others, whether inclosed or not.—See *Meade vs. Watson*, 67 Cal. 591, 593, 8 Pac. Rep. 311. Ala. *Moore vs. Levert*, 24 Ala. 310. Ill. *D'Arcy vs. Miller*, 36 Ill. 102, 29 Am. Rep. 11. Ind. *Williams vs. New Albany & S. R. Co.*, 5 Ind. 111; *Lafayette & L. R. Co. vs. Shriner*, 6 Ind. 141; *Paige vs. Hollingsworth*, 7 Ind. 317; *Myers vs. Dodd*, 9 Ind. 290, 68 Am. Dec. 624. Mass. *Rust vs. Low*, 6 Mass. 90; *Stackpole vs. Healy*, 16 Mass. 33, 3 Am. Dec. 121. N. Y. *Ryan vs. Rochester & S. R. Co.*, 9 How. Pr. 453, 455. Vt. *Hurd vs. Rutland & B. R. Co.*, 35 Vt. 116. Eng. *Ricketts vs. East & W. I. D. & B. J. R. Co.*, 12 Eng. L. & Eq. 520, 524; *Pomfret vs. Ricroft*, 1 Saund. 321.

See notes 68 Am. Dec. 626; 12 Am. & Eng. Encyc. of L. (3d ed.) 1039, 1040.

9. Statute supplants common law.—"Whole duty of erecting division and boundary fence in absence of agreement or prescription, is regulated by statute, and . . . lawful fences may consist either of specific structures enumerated, or of any other barrier 'which, by reliable evidence, shall be declared as strong, substantial, and as well suited to the protection of inclosures as either of above described.'"—*Meade vs. Watson*, 67 Cal. 591, 593, 8 Pac. Rep. 311.

10. CONSTITUTIONALITY OF STATUTE.—Laws retained in force by Political Code, § 19 par. 23, are not subject to objection of being special legislation and therefore obnoxious to constitution, because they were in force before adoption of present constitution, and hence it would follow that section is likewise free from such objection.—*Meade vs. Watson*, 67 Cal. 591, 595, 8 Pac. Rep. 311.

11. CONTRACTUAL LIABILITY TO CONTRIBUTE FOR FENCE.—See para. 24, 36 this note.

12. COUNTIES IN WHICH STATUTE OBTAINS.—Political Code, § 19 par. 23, retains in force the provisions of all acts in relation to lawful fences. When that code was adopted there was in force statute concerning lawful fences, viz., Act April 3, 1860 (Stats. 1860, p. 141), amendatory of Act 1850, but Act 1860 was in force in only part of counties of the state. Accordingly, in order to give effect, if possible, to both provisions, section to which this note

is appended applies only in counties not named in Act 1860.—*Gonzales vs. Wasson*, 51 Cal. 295, 297; *Meade vs. Watson*, 67 Cal. 591, 593, 3 Pac. Rep. 311.

As to local statutes governing lawful fences, see *HENNING'S GENERAL LAWS*, tit. Fences.

13. DAMAGES WHERE DIVISION FENCE WRONGFULLY REMOVED.—When division fence is improperly removed by one owner, adjoining owner may recover actual damages and also expense of making new fence.—*Richardson vs. McDougall*, 11 Wend. (N. Y.) 46.

14. Escaping live stock.—Extent of liability for permitting another's live stock to escape from pasture by failure to keep party division fence.—See note by A. P. Will, 20 L. R. A. 479.

15. Punitive damages are recoverable where fence was removed against protest and by force.—*Fitts vs. Howard*, 13 Ky. L. Rep. 302.

16. DISPUTE OVER BOUNDARY LINE.—Contribution must be made for fence, notwithstanding dispute over the boundary line.—*Stephens vs. Shriver*, 25 Pa. St. 78. See *Stoner vs. Hunsicker*, 47 Pa. St. 514.

17. DIVISION FENCE.—Duty to adjoining landowner only.—No one but adjoining owner or possessor has any interest in duty or obligation of another to build or maintain division fence.—*Ryan vs. Rochester & S. R. Co.*, 9 How. Pr. (N. Y.) 453, 455. See *Bronk vs. Becker*, 17 Wend. (N. Y.) 320, 322; *Ricketts vs. East & W. I. D. & B. J. R. Co.*, 12 Eng. L. & Eq. 520, 524; *Pomfret vs. Ricroft*, 1 Saund. 321.

18. ELECTION TO ALLOW LAND TO LIE OPEN.—If one owner chooses to let his land lie without fencing he is under no liability to contribute to fence erected by other owner.—*Boyd vs. Lammert*, 13 Ill. App. 632.

19. INCLOSURE OF LAND.—Using existing fence.—Where one coterminous owner builds fence on boundary line and other owner thereafter incloses his land, using such fence as part of his inclosure, he thereby becomes indebted for one half the value of such fence.—*Bliss vs. Sneath*, 103 Cal. 43, 45, 36 Pac. Rep. 1029.

20. EQUITABLE JURISDICTION WHEN BOUNDARIES CONFUSED.—"The relief which equity affords in the case of confusion of boundaries is referable to the head of accident. When lands have become mixed or confounded without fault of plaintiff, equity will appoint commission to settle boundaries."—*Beatty vs. Dixon*, 56 Cal. 619, 623 (quoting *Willard Eq. Jur.* 56).

21. ESTATE IN LAND.—Statute applies regardless of nature of estate.—Any person occupying land adjoining that of another, and interested in building and maintaining division fence, in order to secure full enjoyment of uses of his premises, is entitled to benefit of statute without regard to particular estate which he has in such land.—*Bronk vs. Becker*, 17 Wend. (N. Y.) 320, 321 (construing similar statute).

22. GATE IS PART OF FENCE within meaning of statute and must be maintained by coterminous owners.—*Estes vs. Atlantic &*

St. L. R. Co., 63 Mo. 308. See *Beach vs. Crain*, 2 N. Y. 86, 49 Am. Dec. 369.

23. LAWFUL FENCE.—What constitutes, under Act April 3, 1860 (Stats. 1860, p. 141), amendatory of Act April 27, 1855 (Stats. 1855, p. 154).—See *HENNING'S GENERAL LAWS*, tit. Fences.

24. LIMITATIONS.—Action for contribution.—Liability is statutory, as to statute of limitations, and consequently is not barred until lapse of three years.—*Bliss vs. Sneath*, 119 Cal. 526, 529, 530, 51 Pac. Rep. 848.

25. "MAINTAIN"—Includes rebuilding.—Where statute requires fence to be maintained it is to be construed as requiring not only that fence shall be repaired, but also that it shall be rebuilt where it is burned down.—*Rhodes vs. Mummery*, 48 Ind. 216.

26. NON-COMPLIANCE WITH STATUTE.—Relegation of parties to common-law rule.—Where parties fail to maintain fence they stand upon their respective common-law rights, e. g. each coterminous owner is bound to keep his cattle on his own premises, and is liable for any trespass committed by same.—*Myers vs. Dodd*, 9 Ind. 290, 68 Am. Dec. 624.

As to common-law rule, see par. 8 this note.

27. OBJECT OF LAWFUL FENCE.—"Ultimate object of a lawful fence is to so inclose land as to prevent ingress and egress of such domestic animals as are usually nurtured and confined thereon, and to protect premises inclosed from unlawful encroachment."—*Meade vs. Watson*, 67 Cal. 591, 593, 3 Pac. Rep. 311.

28. "OWNER" DEFINED.—Term "owner" does not necessarily mean person possessing fee or any other particular estate in land; nor is it appropriate language to convey such meaning; but, from generality of expression, may properly include any person having interest of any description in adjoining lot. He may be considered owner to extent of such interest.—*Bronk vs. Becker*, 17 Wend. (N. Y.) 320, 322.

29. Partition fence defined.—See note 68 Am. Dec. 626.

30. Party walls.—Provisions as to.—See ante § 301 and note.

31. Prescriptive duty to maintain fence.—Landowner may be bound by prescription to maintain whole or part of partition fence between his own land and that of adjoining proprietor.—See note 68 Am. Dec. 628, 629.

See 12 Am. & Eng. Encyc. of L. (2d ed.) 1049, 1050; note 53 L. R. A. 901.

32. RAILROAD FENCE.—For full discussion of duty of railroads to maintain fence along their rights of way, see 12 Am. & Eng. Encyc. of L. (2d ed.) 1061-1085.

33. Remedies to enforce contribution to partition fence.—See note 68 Am. Dec. 634-637.

34. REMOVAL.—Right barred by limitation.—Where one owner builds fence for one part of its length and other owner builds other portion, and fence remains for length of time which, in case of adverse possession, would give title, either owner has right to remove particular portion which he built.—*Stoner vs. Hunsicker*, 47 Pa. St. 514.

35. RIGHT TO FENCE ON OWN LAND—Constitutional law.—If fence is not placed on boundary line, but along boundary line upon premises of builder, legislature has no power to make any regulations in reference thereto; as every owner has right to use his own land and fences thereon, as he may think proper, so he does no injury to other parties; but fence built wholly on land of one owner may by contract become division fence in such sense as to give rights to adjoining owner.—Jeffries vs. Burgin, 57 Mo. 327, 329.

**36. SET-OFF OF DEMAND FOR CONTRI-
BUTION.**—Liability of one coterminous owner to contribute for fence built by other is contractual, and therefore may be set-off in an action for rent.—Bliss vs. Sneath, 103 Cal. 43,

45, 46, 36 Pac. Rep. 1029. See Id., 119 Cal. 526, 529, 530, 51 Pac. Rep. 848.

37. Statutes formerly in force preserved.—See Pol. Code § 19 par. 23 and note.

For compilation of special laws which obtain in certain counties, see HENNING'S GENERAL LAWS, tit. Fences.

38. WAIVER OF RIGHTS.—Parties may by mutual consent or by acquiescence waive their rights and duties respecting maintenance of fence.—Milligan vs. Wehinger, 68 Pa. St. 235.

39. Waters as boundaries.—See ante § 330 and note.

40. Ways as boundaries.—See ante § 331 and note.

§ 842. OWNERS OF DITCHES, FLUMES, ETC. LIABILITY TO EACH OTHER. When two or more persons are associated by agreement in the use of a ditch, flume, pipe-line or other conduit for the conveyance of water, or who are using such ditch, flume, pipe-line or other conduit, or any part thereof, for the irrigation of land or for any other lawful purpose, to the construction of which they or their grantors have contributed, he is liable to the others for the reasonable expenses of maintaining and repairing the same, and of distributing such water in proportion to the share to which he is entitled in the use of the water.

History: Proposed by Code Commission and enacted March 16, 1901, Stats. Amdts. 1900-1, p. 393, held unconstitutional, see history, § 4 ante; re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXL, p. 600.

§ 843. NEGLIGENCE TO PAY PROPORTION OF EXPENSES; LIABILITY IN ACTION. If any one of them neglects, after demand in writing, to pay his proportion of such expenses, he is liable therefor in an action for contribution, and in any judgment obtained against him interest from the time of such demand must be included. The action authorized by this section must be brought by any or all of the parties who have contributed more than his or their just proportion of such expenses, and may be joint or several, and therein plaintiff may recover as costs, reasonable counsel fees, to be fixed by the court.

History: Proposed by Code Commission and enacted March 16, 1901, Stats. and Amdts. 1900-1, p. 393, held unconstitutional, see history, § 4 ante; re-enacted March 21, 1905, Stats. and Amdts. 1905, s. CDXL, p. 600.

TITLE IV.

USES AND TRUSTS.

- § 847. What uses and trusts may exist.
- § 848. Right to possession of land creates legal ownership (repealed).
- § 849. Certain trusts unaffected (repealed).
- § 850. Trustees of estate for use of another take no interest (repealed).
- § 851. Preceding sections qualified (repealed).
- § 852. Trust must be in writing.
- § 853. Transfer to one for money paid by another. [Trust presumed.]
- § 854. Rights of creditors (repealed).
- § 855. Section eight hundred and fifty-three qualified (repealed).
- § 856. Purchasers protected.
- § 857. For what purposes express trusts may be created.
- § 858. Vesting of mortgage powers.
- § 859. Profits of land liable to creditors in certain cases.
- § 860. Exercise of vested power.
- § 861. Creation of certain powers not prohibited (repealed).
- § 862. Land, etc., to descend to persons entitled (repealed).
- § 863. Trustees of express trusts to have whole estate.
- § 864. Author of trust may devise, etc.
- § 865. Title of grantor of trust property.
- § 866. Interests remaining in grantor of express trust.
- § 867. Restraining disposition of trusts.
- § 868. Powers over trust of party interested (repealed).
- § 869. Effect of omitting trust in conveyance.
- § 870. Certain sales, etc., by trustees, void.
- § 871. When estate of trustee to cease.

§ 847. **WHAT USES AND TRUSTS MAY EXIST.** Uses and trusts in relation to real property are those only which are specified in this title.

History: Enacted March 21, 1872. See history to § 857 post.

I. In General.

- 1. Applied, cited, construed, referred to, etc.
- 2-9. Construed as to its application.
- 10-14. Same—As to character and limits.
- 15-22. Same—With reference to its nature—Intention.
- 23, 24. Trusts—Defined.
- 25-27. Same—Nature of—Distinguished from power.
- 28, 29. Same—Personal estate—Statutory restriction.
- 30. Same—Restraining alienation.

II. Charitable Trusts.

- 31, 32. Highly favored—Liberal construed.
- 33, 34. How established and constituted.
- 35-38. Certainty requisites.
- 39-45. How created, etc.
- 46. Equitable jurisdiction over.

I. IN GENERAL.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Estate of Hinckley*, 58 Cal. 457, 478 (construed and applied in connection with § 857); *Simpson vs. Simpson*, 80 Cal. 237, 242, 22 Pac. Rep. 167 (applied); *Morffew vs. San Francisco & S. R. R. Co.*, 107 Cal. 587, 595, 40 Pac. Rep. 810 (applied in connection with other sections); *Wittfield vs. Forster*, 124 Cal. 418, 421, 57 Pac. Rep. 219 (applied); In *Matter of Estate of Fair*, 132 Cal. 523, 527, 551, 557, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000 (construed and applied in connection with § 857); In *Matter of Estate of Pichoir*, 139 Cal. 632, 684, 73 Pac. Rep. 604, 606 (applied in connection with § 857); *McCurdy vs. Otto*, 140 Cal. 48, 51, 73 Pac. Rep. 748 (construed and applied in connection with § 857).

As to charitable uses and trusts, see ante § 715 and note pt. III.

As to definition of passive and special trusts, see note 93 Am. Dec. 355.

As to evidence to establish trust, see note 6 L. R. A. 47.

As to restraint upon alienation, see ante §§ 715-718 and notes.

As to simple effect of a trust, see note 93 Am. Dec. 355.

As to trusts for the accumulation of income, see ante §§ 722-726 and notes.

2. **CONSTRUED** with § 857 as determining what trusts in relation to real property may be created in this state.—*Bennalack vs. Richards*, 116 Cal. 405, 409, 48 Pac. Rep. 622; *Wittfield vs. Forster*, 124 Cal. 413, 421, 57 Pac. Rep. 219.

3. As applying to private trusts only.—*Estate of Hinckley*, 58 Cal. 457, 481.

4. As applying to trusts created by deed as well as to trusts created by will.—*McCurdy vs. Otto*, 140 Cal. 48, 53, 73 Pac. Rep. 748.

5. As applying to declaration of trust in will to "transfer and convey" real estate to beneficiaries void as contravening the provisions of the code.—*Estate of Walkerly*, 108 Cal. 627, 656, 49 Am. St. Rep. 97, 41 Pac. Rep. 772; *Bennalack vs. Richards*, 116 Cal. 405, 406, 48 Pac. Rep. 622.

6. As applying to a "power in trust to convey," as trust to convey within the meaning of article.—*Estate of Fair*, 132 Cal. 523, 538, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

7. As applying to a "power in trust to convey," as not being within any category of valid trusts within the sections of the article, and forbidden thereby.—*Estate of Fair*, 132 Cal. 523, 538, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

8. As not applying to trust to convey real estate, except only as incident to trust to sell real property and apply or dispose of the proceeds in accordance with instrument creating

trust.—*McCurdy vs. Otto*, 140 Cal. 48, 53, 73 Pac. Rep. 748.

9. As not preventing creation of permanent trust for charitable uses.—*Estate of Hinckley*, 58 Cal. 457, 481.

10. As conclusive as to character of valid trusts which may be created in the estate.—*McCurdy vs. Otto*, 140 Cal. 48, 53, 73 Pac. Rep. 748.

11. As determining what kind of trusts shall be permitted and no others can be legally created.—*McCurdy vs. Otto*, 140 Cal. 48, 53, 73 Pac. Rep. 748.

12. As confining trusts within very narrow limits, and to allow them only in a few instances where they might be specially used to subserve proper and necessary purposes.—*Estate of Fair*, 132 Cal. 523, 527, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000; *McCurdy vs. Otto*, 140 Cal. 48, 51, 73 Pac. Rep. 748.

13. As not conferring upon any one power to create uses and trusts; sole purpose of its provisions is to limit powers of owners of real property in that regard (dis. op.).—*Estate of Fair*, 132 Cal. 523, 557, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

14. As not including trust to convey real estate, except only as it may be an incident to the "trust to sell real property and apply or dispose of the proceeds in accordance with the instrument creating the trust."—*Estate of Fair*, 132 Cal. 523, 538, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

15. As declaring the law by its provisions and leaving no room for construction.—*McCurdy vs. Otto*, 140 Cal. 48, 53, 73 Pac. Rep. 748.

16. As suppletory and correlative to provisions of code which relate to creation of legal estates, not violative of rule against perpetuities, except so far as § 757 still further limits period during which beneficial interests may be enjoyed.—*In re Estate of Hinckley*, 58 Cal. 457, 482.

17. As not retroactive in its nature, so as to divest rights of beneficiaries vested before it took effect.—*Seymour vs. McAvoy*, 121 Cal. 438, 442, 53 Pac. Rep. 946, 41 L. R. A. 544.

18. As taking away power of English statute of uses in this state.—*McCurdy vs. Otto*, 140 Cal. 48, 53, 73 Pac. Rep. 748.

19. As intended to abolish the common-law rule and establish simple and restricted system as to manner of creating trusts and purpose for which they might be created.—*McCurdy vs. Otto*, 140 Cal. 48, 53, 73 Pac. Rep. 748.

20. Same.—Whether English statute of uses was adopted in this state as portion of common law not decided, and questioned.—*Chandler vs. Chandler*, 55 Cal. 267, 271.

21. As intended to abolish and did abolish trusts to convey real estate to beneficiaries, although such trust was recognized at common law.—*Estate of Fair*, 132 Cal. 523, 528, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000; *McCurdy vs. Otto*, 140 Cal. 48, 53, 73 Pac. Rep. 748.

22. As intended to avoid the intricacies, frauds, and concealments which were possible under the old system of trusts and uses,

whereby the title to real property was allowed to be in one person and beneficial use in another to such an extent that confusion following was intolerable.—*Estate of Fair*, 132 Cal. 523, 527, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000; *McCurdy vs. Otto*, 140 Cal. 48, 51, 73 Pac. Rep. 748.

23. TRUSTS DEFINED.—Enforceable trust is one in which some person or class of persons have right to all or part of designated fund, and can demand its conveyance to them, and in case such demand is refused may sue trustee in court of equity and compel compliance with demand.—*Tilden vs. Green*, 130 N. Y. 29, 27 Am. St. Rep. 487, 28 N. E. Rep. 880, 14 L. R. A. 33.

24. Trust implies two estates or interests—one equitable, the other legal, one person trustee holding legal estate, while another, as cestui que trust, has the beneficial interest.—*Hospes vs. Northwestern Mfg. & Car Co.*, 43 Minn. 174, 31 Am. St. Rep. 637, 50 N. W. Rep. 1117, 15 L. R. A. 470.

25. Trusts are always imperative, and equity will not suffice it to fail through trustee's negligence, but will compel trustees to execute them.—*Kidwell vs. Brummagin*, 32 Cal. 436, 437, 443; *Morfevs vs. San Francisco & S. R. R. Co.*, 107 Cal. 587, 595, 40 Pac. Rep. 810; *Estate of Fair*, 132 Cal. 523, 538, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

26. And obligatory upon conscience of party intrusted.—*Estate of Fair*, 132 Cal. 523, 538, 84 Am. St. Rep. 70, 60 Pac. Rep. 442; 64 Id. 1000.

27. DISTINCTION BETWEEN POWER AND TRUST is that trust is and power is not imperative.—*Estate of Fair*, 132 Cal. 523, 538, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

28. TRUSTS IN PERSONAL ESTATES ARE SUBJECT TO NO STATUTORY RESTRICTIONS; in other words, legislature has never attempted to define or enumerate lawful occasions for creating such trusts.—*Estate of Hinckley*, 58 Cal. 457, 482; *Gilman vs. Reddington*, 24 N. Y. 9, 12.

See also post § 852 note para. 44-47.

29. Personal estates, not being subject to any statutory restrictions in regard to trusts, stand as common law, subject only to statutory rule of § 715 and to direction against accumulations.—*Estate of Hinckley*, 58 Cal. 457, 482.

30. TRUSTS RESTRAINING ALIENATION.—Limitation upon suspension, power of alienation expressed in § 715 of this code applies directly to all trusts, whether of real or personal property.—*Estate of Walkerly*, 108 Cal. 627, 656, 49 Am. St. Rep. 97, 41 Pac. Rep. 772.

II. CHARITABLE USES AND TRUSTS.

As to the necessity of writing to create a charitable trust, see post § 852 and note.

As to certainty in charitable trusts, see note 64 Am. St. Rep. 756, 762; note by Robert Desty, 4 L. R. A. 699.

As to trusts for religious purposes, see note 65 Am. St. Rep. 118, 121; note by Robert Desty, 3 L. R. A. 145, 149, and 5 L. R. A. 104-109.

As to trusts for masses, see note by Irwin Taylor in 25 L. R. A. 360, and in 40 L. R. A. 717-722.

As to secret trusts for charity, see monographic note by Ernest Watts, 29 L. R. A. 465-477.

As to what are public charities, see notes by Robert Desty, 1 L. R. A. 417; 3 L. R. A. 145; 5 L. R. A. 33, 104; 6 L. R. A. 34; 12 L. R. A. 414.

As to charitable trusts in general, see note by Robert Desty, 4 L. R. A. 699, brief in principal case, also note 6 L. R. A. 511.

As to when devises and bequests for charity are valid or void for uncertainty, see note 1 Am. St. Rep. 415, and monographic note by Robert Desty, 4 L. R. A. 699.

As to validity of bequest for superstitious or religious uses, see note 39 Am. Rep. 738-741, 748-750.

As to restrictions on power to devise to charitable institutions, see post § 1313 and note.

31. CHARITABLE USES AND TRUSTS ARE HIGHLY FAVORED by courts and special care is taken to enforce them.—White vs. Howard, 38 Conn. 342, 386; Woodruff vs. Marsh, 63 Conn. 125, 38 Am. St. Rep. 346, 26 Atl. Rep. 846; Bascom vs. Albertson, 34 N. Y. 584, 609; Cottman vs. Grace, 112 N. Y. 299, 19 N. E. Rep. 839; 3 L. R. A. 145.

32. CONSTRUED MOST LIBERALLY in order to carry out and accomplish intent of donor.—Woodruff vs. Marsh, 63 Conn. 125, 38 Am. St. Rep. 346, 26 Atl. Rep. 846.

33. Trusts for charitable purposes may be established and carried into effect where, if not of charitable nature, they could not be supported.—Coit vs. Comstock, 51 Conn. 352, 50 Am. Rep. 29; Woodruff vs. Marsh, 63 Conn. 125, 136, 38 Am. St. Rep. 346, 26 Atl. Rep. 846. See Comm. White vs. Fisk, 22 Conn. 31, 52, 54; White vs. Howard, 38 Conn. 342, 362. Pa. Frazier vs. St. Luke's Church, 147 Pa. St. 256, 23 Atl. Rep. 442. Fed. Trustees of Philadelphia Bapt. Assoc. vs. Hart, 17 U. S. (4 Wheat.) 1, bk. 4 L. ed. 499; Vidal vs. Girard, 43 U. S. (2 How.) 127, 146, bk. 11 L. ed. 205; Perin vs. Carey, 65 U. S. (24 How.) 465, 508, bk. 16 L. ed. 701; Ould vs. Washington Hosp. for Foundlings, 95 U. S. 303, 309, bk. 24 L. ed. 450; Russell vs. Allen, 107 U. S. 163, 167, bk. 27 L. ed. 397.

34. Public benefit open to indefinite and vague number is necessary to constitute good trust for charitable use.—Estate of Hinckley, 58 Cal. 457, 488.

35. CERTAINTY IN—Maxim, id certum est quod certum reddi potest, applies to bequests in trust for charitable purposes.—Bull vs. Bull, 8 Conn. 47, 50, 20 Am. Dec. 86; Brewster vs. McCall, 15 Conn. 274, 292; Coit vs. Comstock, 51 Conn. 352, 50 Am. Rep. 29. See Eutaw Place Bapt. Church vs. Shively, 67 Md. 493, 1 Am. St. Rep. 412, 10 Atl. Rep. 244.

36. Where bequest in trust for charitable purpose requires executor to hold property until act of incorporation may be obtained in order to carry out charitable donations, it is not so uncertain as to be obnoxious to statute against perpetuities.—Coit vs. Comstock, 51 Conn. 352, 50 Am. Rep. 29.

37. Uncertainty as to objects of charitable bequest is not shown in will bequeathing certain sum to church, and income, interest, and

proceeds thereof being applied to Sunday-school belonging to or attached to such church where Sunday-school is shown to be integral part of church organization and is therefore embraced within scope of corporate function and work of church.—Eutaw Place Bapt. Church vs. Shively, 67 Md. 493, 1 Am. St. Rep. 412, 10 Atl. Rep. 244.

38. Uncertainty reduced to certainty if definite class of beneficiaries is described and modes provided for selection of particular objects of bounty.—Coit vs. Comstock, 51 Conn. 352, 50 Am. Rep. 29.

39. CREATED BY GIFTS FOR ERECTION, creation, maintenance, and enjoyment of free public library, as they fall within definition of charitable uses.—Crerar vs. Williams, 145 Ill. 625, 34 N. E. Rep. 467, 21 L. R. A. 454n; Dascomb vs. Marston, 80 Me. 223, 13 Atl. Rep. 888. See Heuser vs. Harris, 42 Ill. 425; Donoghue's Appeal, 86 Pa. St. 306.

40. By bequest of sum to be expended in erection of branch church, which when erected is to be conveyed to designated church organization as parent church of which testator was member.—Crisp vs. Crisp, 65 Md. 422, 5 Atl. Rep. 421.

41. By bequests and trusts of sum to be divided among certain charitable institutions as trustees shall deem wise.—Howe vs. Wilson, 91 Mo. 45, 60 Am. Rep. 226, 3 S. W. Rep. 390. See for extensive illustrations note 60 Am. Rep. 230.

42. By devise to trustees to be held for erection of hospital for foundlings, until any society or institution may be hereafter incorporated by act of Congress for such hospital.—Ould vs. Washington Hosp. for Foundlings, 95 U. S. 303, bk. 24 L. ed. 450.

43. By trust for founding an institution for aged, indigent, sick, lame, infirm, destitutes of certain class, or of certain territory.—Coit vs. Comstock, 51 Conn. 352, 50 Am. Rep. 29.

44. GIFTS TO INDIVIDUALS OR PERSONS IN THEIR PRIVATE CAPACITY are not charitable.—Estate of Hinckley, 58 Cal. 457, 488. See Thomber vs. Wilson, 3 Drew 245, 4 Drew 350, 357; Doe vs. Copestake, 6 East 323, 2 Smith 495 (cited by Lord Davey in Hunter vs. Attorney-General (1899), A. C. 309, 321); Doe vs. Aldridge, 4 Durnf. & E. (4 T. R.) 264, 2 Rev. Rep. 379; Morice vs. Durham, 9 Ves. 399, 10 Ves. 521, 7 Rev. Rep. 232; Hunter vs. Attorney-General (1899), A. C. 309, 323-324.

45. Burial lots and monuments thereon do not come within definition of charitable uses. Hence trust for their maintenance cannot be created.—Johnson vs. Hollifield, 79 Ala. 423, 58 Am. Rep. 596; Coit vs. Comstock, 51 Conn. 352, 50 Am. Rep. 29; Bates vs. Bates, 134 Mass. 110, 45 Am. Rep. 305.

46. EQUITY COURTS HAVE JURISDICTION derived from English common law, independent of statute of Elizabeth, to establish and enforce charities when trustees competent to take legal estate are named, and class to be benefited and individuals to be designated by trustees are capable of ascertainment.—Estate of Hinckley, 58 Cal. 457, 504; Coit vs. Comstock, 51 Conn. 352, 50 Am. Rep. 29.

§ 848. RIGHT TO POSSESSION OF LAND CREATES LEGAL OWNERSHIP (repealed).

History: Enacted March 21, 1872; repealed March 30, 1874, Code Amdts. 1873-4, p. 221.

§ 849. CERTAIN TRUSTS UNAFFECTED (repealed).

History: Enacted March 21, 1872; repealed March 30, 1874, Code Amdts. 1873-4, p. 221.

§ 850. TRUSTEES OF ESTATE FOR USE OF ANOTHER TAKE NO INTEREST (repealed).

History: Enacted March 21, 1872; repealed March 30, 1874, Code Amdts. 1873-4, p. 221.

§ 851. PRECEDING SECTIONS QUALIFIED (repealed).

History: Enacted March 21, 1872; repealed March 30, 1874, Code Amdts. 1873-4, p. 221.

§ 852. TRUST MUST BE IN WRITING. No trust in relation to real property is valid unless created or declared:

1. By a written instrument, subscribed by the trustee, or by his agent thereto authorized by writing;
2. By the instrument under which the trustee claims the estate affected; or,
3. By operation of law.

History: Enacted March 21, 1872.

TRUSTS—EXPRESS AND BY OPERATION OF LAW.

I. In General.

1. Applied, cited, construed, referred to, etc.
- 2, 3. Common law—How far adopted, etc.
- 4-12. Construed as to its nature, effect, and extent.
13. Distinguished from English statute.

II. Creation—1. Essential Elements.

- 14-21. Certainty—Necessity—Nature and degree of.
- 22-28. Consideration — Necessity and sufficiency of.
- 29-31. Determined by courts—How.
- 32-35. Estate in trustee—Meaning, necessity.
- 36-38. Fiduciary relation—Necessity of.
- 39-46. Intention—Ascertainment, nature and proof of.
- 47-60. Writing—General rules as to, nature and sufficiency of.
- 61-82. Same—Held sufficient to create.
- 83-99. Same—Held insufficient to create.

III. Same—2. Parol Trust in Land.

- 100, 101. Nature of parol trust in land.
- 102-110. Not created by independent parol agreement.
- 111, 112. How created.

IV. Acceptance—1. By Trustee.

- 113-121. Necessity, effect and reason of.
- 122-129. What acts amount to.

V. Same—2. By Beneficiary.

- 130-133. Express, implied, or presumed.
- 134-136. Effect and sufficiency of.

VI. Evidence.

- 137, 138. Burden of proof—Creation within code.
- 139-148. Nature and extent—Writing necessary.
- 149-155. Parol evidence—General rule against.
- 156-169. Same—When and for what purposes admitted.

VII. Precatory Trusts—1. Creation.

- 170-185. General rules governing—Form, intention, language, persons, situation, etc.
- 186-195. How created.
- 196-222. Not created.
- 223-229. Limitation in subsequent clause—Effect of.
- 230-244. Words—Meaning of "desire," "recommendation," etc.

VIII. Same—2. Construction.

- 245-253. Construed as to circumstances, meaning, nature, and use of words.
- 254-263. Same—With reference to intention, situation, etc.

IX. Trusts by Operation of Law—1. In General.

- 264-267. Code and statute of frauds not applicable.
 - 268-279. Nature, source, and execution of.
- X. Same—2. Constructive Trusts.**
- 280-282. Defined and distinguished.
 - 283-298. How and purpose for which created.
 - 299-301. Not created.
 - 302-304. Party in whose favor and against whom enforced.

XI. Same—3. Resulting Trusts.

- 305-308. Nature of resulting trusts.
- 309-329. How and when they arise or are created.
- 330-346. When not created.

347-359. Parties in whose favor created.

360-365. Same—Not created.

XII. Same—4. Government Grants—Mining Claims.

366-373. How and when created.

374-381. Parties in whose favor created.

382-386. Reasons and grounds of creation.

XIII. Same—5. Evidence and Burden of Proof.

387-394. Burden of proof and quality of evidence.

395-397. Parol evidence—General rule as to admission.

398-407. Same—Purposes of admission.

409-411. Same—When not admitted.

I. IN GENERAL.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Estate of Hinckley*, 53 Cal. 457, 483 (construed and applied); *Hellman vs. McWilliams*, 70 Cal. 449, 452, 11 Pac. Rep. 659 (construed and applied in connection with other sections); *Mallagh vs. Mallagh* (Cal. Feb. 4, 1888), 16 Pac. Rep. 535, 537 (construed and applied); *Brison vs. Brison*, 75 Cal. 525, 526, 7 Am. St. Rep. 139, 17 Pac. Rep. 689 (construed and applied); *Barr vs. O'Donnell*, 76 Cal. 469, 471, 9 Am. St. Rep. 242, 18 Pac. Rep. 429 (construed and applied in connection with other sections); *Roach vs. Caraffa*, 85 Cal. 436, 446, 25 Pac. Rep. 22 (construed and applied with § 553); *Garnsey vs. Gothard*, 90 Cal. 608, 607, 27 Pac. Rep. 516 (construed and applied); in re *Estate of Groome*, 94 Cal. 69, 72, 29 Pac. Rep. 487 (construed); *Baker vs. Baker* (Cal. Nov. 10, 1892), 31 Pac. Rep. 355, 357 (construed and applied); *Hayne vs. Hermann*, 97 Cal. 259, 261, 32 Pac. Rep. 171 (construed and applied in connection with other sections); *Doran vs. Doran*, 99 Cal. 311, 314, 33 Pac. Rep. 929 (applied); in re *Estate of Walkerly*, 103 Cal. 627, 656, 49 Am. St. Rep. 97, 41 Pac. Rep. 772 (referred to in discussion); *Wittenbrock vs. Cass*, 110 Cal. 1, 5, 42 Pac. Rep. 300 (referred to); *Lynch vs. Rooney*, 112 Cal. 279, 284, 44 Pac. Rep. 565 (construed and applied); *Nougues vs. Newlands*, 118 Cal. 102, 107, 50 Pac. Rep. 336 (applied); *Smith vs. Mason*, 122 Cal. 426, 427, 55 Pac. Rep. 143 (applied); *Wittfield vs. Forster*, 124 Cal. 418, 421, 57 Pac. Rep. 219 (construed and applied with other sections); *Sheehan vs. Sullivan*, 126 Cal. 139, 192, 58 Pac. Rep. 543 (construed and applied); *Barker vs. Hurley*, 132 Cal. 21, 27, 63 Pac. Rep. 1071 (construed and applied); *Banta vs. Wise*, 135 Cal. 277, 279, 67 Pac. Rep. 129 (referred to in discussion); *Faylor vs. Faylor*, 136 Cal. 92, 96, 68 Pac. Rep. 482 (construed and applied); *Keogh vs. Noble*, 136 Cal. 153, 155, 68 Pac. Rep. 579 (applied); *Kimball vs. Tripp*, 136 Cal. 631, 634, 69 Pac. Rep. 423 (construed).

As to creation of express trusts, see notes by Robert Desty, 1 L. R. A. 327; 11 L. R. A. 456; 12 L. R. A. 667; and notes 31 Am. Rep. 453-455; 34 Am. St. Rep. 216; 32 Am. St. Rep. 513.

As to necessity of consideration in creation of trusts, see note by Robert Desty, 11 L. R. A. 456.

As to admissibility of parol evidence in express or resulting trusts, see notes 10 L. R. A. 401; 24 Am. Dec. 413-417; 26 Am. Dec. 60; 36

Am. Dec. 182; 38 Am. Dec. 182; 43 Am. Dec. 624; 63 Am. Dec. 42; 70 Am. Dec. 258; 90 Am. Dec. 270; 82 Am. St. Rep. 517.

As to manifestation of fact of creation and of nature of trust by writing, see para. 144, 145 this note.

See post §§ 2215-2217 and notes.

2. **COMMON LAW OF ENGLAND NEVER ADOPTED** as "a rule of decision," except in so far as it is not repugnant to laws of the state.—*Chandler vs. Chandler*, 55 Cal. 267, 271. See Pol. Code § 4468 and note para. 1-7.

3. **Common-law doctrine of uses and trusts**, with its severalties and refinements, was well known and appreciated when provisions of code were adopted.—*McCurdy vs. Otto*, 140 Cal. 48, 53, 73 Pac. Rep. 748.

4. **CONSTRUED**—As abolishing common-law doctrine and rule which established simple and restricted system of creating trusts.—*McCurdy vs. Otto*, 140 Cal. 48, 53, 73 Pac. Rep. 748.

5. **As abolishing English statute of uses**, if it ever had any application in this state.—*McCurdy vs. Otto*, 140 Cal. 48, 53, 73 Pac. Rep. 748.

6. **As avoiding intricacies, frauds, and concealments possible under old system of trusts and uses**, leaving title and real property in one person and beneficial use in another, to such extent that confusion following was intolerable.—*McCurdy vs. Otto*, 140 Cal. 48, 53, 73 Pac. Rep. 748.

7. **As conclusion of character of valid trusts which may be created in this state**.—*McCurdy vs. Otto*, 140 Cal. 48, 53, 73 Pac. Rep. 748.

8. **As declaring the law as to trusts and leaving no room for construction**.—*McCurdy vs. Otto*, 140 Cal. 48, 53, 73 Pac. Rep. 748.

9. **As determining what kind of trusts shall be permitted, and no others can be legally created**.—*McCurdy vs. Otto*, 140 Cal. 48, 53, 73 Pac. Rep. 748.

10. **As not applying to trust arising from fraud, either actual or constructive**.—*Hays vs. Gloster*, 88 Cal. 560, 565, 26 Pac. Rep. 367.

As to trusts arising from fraud, etc., see post § 2224 and note.

11. **Repugnant to system of conveyances prevailing in state**, and it is doubtful whether under 27 Hen. VIII, ch. 10, a trust to convey, which is void by statute, can be upheld as a use.—In re *Estate of Fair*, 132 Cal. 523, 533-536, 34 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

12. **As not retroactive or as divesting rights of beneficiaries which vested before its enactment**.—*Seymour vs. McAvoy*, 121 Cal. 438, 442, 52 Pac. Rep. 946, 41 L. R. A. 544.

13. **English statute of uses**—Distinction between and our statute is that former must be proved by some writing signed by the party, etc., and the statute fully complied with by establishing trust by written evidence, while our statute requires that every trust shall be created by deed in writing, or by operation of law.—*Osborne vs. Endicott*, 6 Cal. 149, 154, 65 Am. Dec. 498.

II. CREATION—1. ESSENTIAL ELEMENTS OF TRUSTS.

14. **CERTAINTY IS NECESSARY** to create trust before court of equity will decree it.—

Simpson vs. Simpson, 30 Cal. 237, 240, 241, 22 Pac. Rep. 167. See *In re Estate of Hinckley*, Myr. Prob. Rep. (Cal.) 139.

15. Reasonable extent of, must exist in material terms of declaration of trust, whether written or oral.—*Burling vs. Newlands*, 112 Cal. 476, 496, 44 Pac. Rep. 810.

As to declarations of trusts, see post § 2253 and note.

16. Includes the subject-matter of property embraced within trust, the beneficiaries, the nature and quality of their interests, and manner of performance.—*Burling vs. Newlands*, 112 Cal. 476, 496, 44 Pac. Rep. 810; *Barker vs. Hurley*, 132 Cal. 21, 28, 63 Pac. Rep. 1071. See *Ill. Mills vs. Newberry*, 112 Ill. 123, 54 Am. Rep. 213 (subject-matter); *Roth vs. Michalis*, 125 Ill. 325, 17 N. E. Rep. 309 (property or subject-matter). *Mass. Chamberlain vs. Stearns*, 111 Mass. 267 (beneficiary); *O'Rourke vs. Beard*, 151 Mass. 9, 23 N. E. Rep. 576 (beneficiary). *Minn. Atwater vs. Russell*, 49 Minn. 57, 51 N. W. Rep. 629, 52 Id. 36 (subject-matter). *N. Y. Read vs. Williams*, 125 N. Y. 560, 21 Am. St. Rep. 748, 28 N. E. Rep. 730 (beneficiary); *Tilden vs. Green*, 130 N. Y. 29, 27 Am. St. Rep. 487, 28 N. E. Rep. 830, 14 L. R. A. 33 (beneficiary). *R. I. Taft vs. Dimond*, 16 R. I. 584, 18 Atl. Rep. 183 (terms). *W. Va. Brown vs. Caldwell*, 23 W. Va. 187, 48 Am. Rep. 376 (beneficiary). *Wis. Sydnor vs. Palmer*, 29 Wis. 226, 241 (beneficiary).

17. Trust must be coeval with deed, or it cannot exist at all.—*Botsford vs. Burr*, 2 John. Ch. (N. Y.) 405; *Bowen vs. Hughes*, 5 Wash. 442, 33 Pac. Rep. 98.

18. Description of parties by names unnecessary in order to give effect to trust.—*Sydnor vs. Palmer*, 29 Wis. 226, 241.

19. Description by which they may be identified sufficient.—*Sydnor vs. Palmer*, 29 Wis. 226, 241.

20. Description of parties sufficient from which court and jury, with aid of surrounding facts and circumstances, can say with certainty that some and what particular persons intended.—*Sydnor vs. Palmer*, 29 Wis. 226, 241.

21. Mistakes in names may be shown and corrected, or disregarded, by proof of extrinsic facts and circumstances.—*Sydnor vs. Palmer*, 29 Wis. 226, 241.

22. CONSIDERATION IMMATERIAL in a voluntary trust without power of revocation giving the trustee absolute control.—*Kopp vs. Gunther*, 95 Cal. 63, 30 Pac. Rep. 301. See *Me. Dwinel vs. Veasie*, 36 Me. 509. *Md. Lloyd vs. Brooks*, 34 Md. 27; *Swan vs. Fricke*, 34 Md. 139. *N. Y. Van Cott vs. Prentice*, 104 N. Y. 45, 10 N. E. Rep. 257.

23. Valuable not necessary in equity where there is clear, explicit declaration duly executed and intended to be final and binding by party making himself trustee.—*Estate of Webb*, 49 Cal. 541, 545.

24. Not necessary where intention to hold in trust is shown.—*Williamson vs. Yager*, 91 Ky. 232, 34 Am. St. Rep. 184, 15 S. W. Rep. 660.

25. Equitable obligation is sufficient consideration to support trust.—*Mohn vs. Mohn*, 112 Ind. 235, 13 N. E. Rep. 859.

26. Personal convenience of grantor is sufficient consideration.—*Townsend vs. Allen*, 126 N. Y. 646, 27 N. E. Rep. 853.

27. Parental affection and duty is only consideration requisite to create valid trust and voluntary settlement for settler's children.—*Nichols vs. Emery*, 109 Cal. 323, 332, 50 Am. St. Rep. 43, 41 Pac. Rep. 1089; *Lines vs. Lines*, 142 Pa. St. 149, 24 Am. St. Rep. 487, 21 Atl. Rep. 809.

28. Subsequent declaration of trustee upon sale of land by him under parol trust in agreement to convert it into money being supported by prior agreement to hold premises in trust furnishes sufficient consideration for enforcement of declaration.—*Mohn vs. Mohn*, 112 Ind. 235, 13 N. E. Rep. 859; *Cooper vs. Thomason*, 30 Ore. 161, 45 Pac. Rep. 296; *Wiseman vs. Baylor*, 69 Tex. 63, 6 S. W. Rep. 743.

As to parol trust of in land, see post pars. 100-112 this note.

29. DETERMINED BY COURT by looking at purposes or objects for which it was intended to be created.—*Estate of Webb*, 49 Cal. 541, 545.

30. With regard to, and so as to give effect to, the situation and of parties and nature and situation of property.—*Estate of Webb*, 49 Cal. 541, 545.

31. Question whether trust is perfectly created or not is one of fact in each case.—*Estate of Webb*, 49 Cal. 541, 545.

32. ESTATE IN TRUSTEE—Estate means whole of such estate as is necessary to performance of trust.—*In re Estate Walkerly*, 103 Cal. 627, 648, 48 Am. St. Rep. 97, 41 Pac. Rep. 772; *Estate of Reith*, 144 Cal. 314, 321, 77 Pac. Rep. 942. See *Nichols vs. Emery*, 109 Cal. 323, 330, 50 Am. St. Rep. 43, 41 Pac. Rep. 1089.

33. Must pass immediately where instrument creating trust is other than will in order to create express trust.—*Nichols vs. Emery*, 109 Cal. 323, 330, 50 Am. St. Rep. 43, 41 Pac. Rep. 1089.

34. Estate vests in trustee by implication where from nature of duties to be performed, taking of estate is necessary.—*Estate of Reith*, 144 Cal. 314, 320, 77 Pac. Rep. 942; *Fay vs. Taft*, 66 Mass. (12 Cush.) 448.

35. Trustee only takes such estate as is necessary for performance of trust.—*Estate of Reith*, 144 Cal. 314, 320, 77 Pac. Rep. 942; *Fay vs. Taft*, 66 Mass. (12 Cush.) 448.

As to estate taken by trustee, see post § 863 and note.

36. FIDUCIARY RELATION MUST EXIST in order to create trust.—*Feeney vs. Howard*, 79 Cal. 525, 529, 13 Am. St. Rep. 162, 21 Pac. Rep. 934, 4 L. R. A. 326.

37. Trustee and cestui que trust necessary to create trust.—*Simpson vs. Simpson*, 30 Cal. 237, 242, 22 Pac. Rep. 167.

38. Trusts imply confidential relation between trustor and trustee.—*Fatjo vs. Swasey*, 111 Cal. 628, 635, 44 Pac. Rep. 225.

39. INTENTION TO CREATE TRUST must be clear.—*Burling vs. Newlands*, 112 Cal. 476, 496, 44 Pac. Rep. 810, 816.

As to intention in the creation of precatory trusts, see para. 354-359 this note.

See post § 2221 note para. 25-28.

40. Ascertained from instrument creating trust.—Tyler vs. Granger, 48 Cal. 259, 268.

41. Ascertained from documents creating trusts which fixes and controls rights and duties with reference to trust estate.—Tyler vs. Granger, 48 Cal. 259, 268.

42. Fixes and controls rights and duties of parties with reference to trust estate, as ascertained from documents creating trust.—Tyler vs. Granger, 48 Cal. 259, 268.

43. Governs in determining whether there is direct grant of remainders or mere trust to convey at future time, so that no estate is to vest until execution of conveyance.—In re Estate Fair, 132 Cal. 523, 533, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

44. Must be effectuated, and court of equity in construing provisions of trust deed must be guided solely by intention of trustor, as evidenced by deed.—Floyd vs. Davis, 98 Cal. 591, 601, 33 Pac. Rep. 746.

45. Must be shown before court of equity will decree trust.—Simpson vs. Simpson, 80 Cal. 237, 240, 241, 22 Pac. Rep. 167.

46. Sufficiently shown by instrument showing express provision that one party shall hold legal title and other beneficial interest.—Luco vs. De Toro, 91 Cal. 405, 417, 27 Pac. Rep. 1082.

47. WRITING NECESSARY TO CREATION of express trust in real estate.—Burt vs. Wilson, 28 Cal. 632, 633, 87 Am. Dec. 142; Ward vs. McNaughton, 43 Cal. 159, 160; Gallagher vs. Mars, 50 Cal. 23, 25; Hellman vs. McWilliams, 70 Cal. 449, 452, 11 Pac. Rep. 659; Barr vs. O'Donnell, 76 Cal. 469, 471, 9 Am. St. Rep. 242, 18 Pac. Rep. 429; Sheehan vs. Sullivan, 126 Cal. 189, 192, 58 Pac. Rep. 543, 1115. Colo. Farrand vs. Beshoar, 9 Colo. 291, 12 Pac. Rep. 196. Ind. Fouty vs. Fouty, 34 Ind. 433. Kan. Ingham vs. Burnell, 31 Kan. 333, 2 Pac. Rep. 804; Gee vs. Thrallkill, 45 Kan. 173, 25 Pac. Rep. 588. Mass. Walker vs. Locke, 59 Mass. (5 Cush.) 90; Slack vs. Black, 109 Mass. 496. S. D. Murphy vs. Cook, 11 S. D. 47, 75 N. W. Rep. 387. Utah. Meyers vs. Adams, 9 Utah 8, 33 Pac. Rep. 222. Vt. Bickford vs. Bickford, 68 Vt. 525, 527, 35 Atl. Rep. 471.

See post § 2253 and note.

48. Creation of trust in real property by simple verbal declaration of its owner, is forbidden by statute of frauds.—Sherman vs. Sandell, 106 Cal. 373, 375, 39 Pac. Rep. 797.

49. Agreements, not written, no force otherwise than admission tending to destroy or confirm inference deducible from facts of consideration and deed to third party.—Warren vs. Adams, 19 Colo. 515, 36 Pac. Rep. 604; Blodgett vs. Hildreth, 103 Mass. 484.

50. Language or rule of technical nature is not necessary to creation of trust either by deed or will.—Estate of Reith, 144 Cal. 314, 318, 77 Pac. Rep. 942; Lee vs. Enos, 97 Mich. 276, 281, 56 N. W. Rep. 550, 552; Stace vs. Bumgardner, 89 Va. 418, 421, 16 S. E. Rep. 252; Colton vs. Colton, 127 U. S. 800, 810, bk. 82 L. ed. 138, 8 Sup. Ct. Rep. 1164.

As to language in precatory trusts, see para. 178-181 this note.

51. Form of words need not be precise to create trust.—Burling vs. Newlands, 112 Cal. 476, 496, 44 Pac. Rep. 810.

52. Indicating with reasonable certainty intention to create a trust, subject, purpose and beneficiary of trust, instrument sufficient to create trust as to trustor and beneficiary.—Barker vs. Hurley, 132 Cal. 31, 26, 63 Pac. Rep. 1071.

53. Informal in its nature, is sufficient to satisfy provisions of code.—Baker vs. Baker (Cal. Nov. 10, 1892), 31 Pac. Rep. 355, 357.

54. Particular form of expression is not necessary in order to create valid and binding express trust.—Tenney vs. Simpson, 37 Kans. 579, 15 Pac. Rep. 512; Schmucker's Estate vs. Reel, 61 Mo. 592, 596; Noe vs. Kern, 93 Mo. 367, 3 Am. St. Rep. 544, 6 S. W. Rep. 239; Murphy vs. Carlin, 113 Mo. 112, 35 Am. St. Rep. 699, 20 S. W. Rep. 786; Estate of Smith, 144 Pa. St. 428, 27 Am. St. Rep. 641, 22 Atl. Rep. 916.

55. Particular form of words or language unnecessary in gift, to create trust.—Jones vs. Jones, 124 Ill. 254, 15 N. E. Rep. 751.

56. Simultaneously executed document sufficient to satisfy provisions of code.—Baker vs. Baker (Cal. Nov. 10, 1892), 31 Pac. Rep. 355, 357.

57. Subsequently executed document sufficient to satisfy code.—Baker vs. Baker (Cal. Nov. 10, 1892), 31 Pac. Rep. 355, 357.

58. Subscribed by trustee, no matter of what kind, in which fiduciary relation between parties can be clearly read, is sufficient.—Baker vs. Baker (Cal. Nov. 10, 1892), 31 Pac. Rep. 355, 357.

59. Statute of frauds does not require that trust should be created by writing, but there must be evidence in writing proving an expressed trust.—Waterbury vs. Fisher, 5 Colo. App. 362, 33 Pac. Rep. 846. See Denton vs. Davies, 18 Ves. 499, 503; Smith vs. Matthews, 8 De Gex. F. & J. 139.

60. Terms and conditions need not be declared in writing in order to create express trust.—Tenney vs. Simpson, 37 Kans. 579, 15 Pac. Rep. 512.

61. TRUST CREATED BY AGREEMENT TO PURCHASE REAL ESTATE and share net profits in specified amounts, one of parties to receive percentage of moneys advanced by him and to contribute certain commissions in consideration of disclosing certain valuable information increasing value of such property.—Green vs. Brooks, 81 Cal. 328, 332, 22 Pac. Rep. 849.

As to trusts created in favor of party paying purchase money, see post § 553 note.

62. Agreement for reconveyance creates express trust.—Hearst vs. Pujol, 44 Cal. 330, 235.

63. Agreement executed by conveyance in trust where nothing remains to be done by grantor or donor to complete transfer of title.—Estate of Webb, 49 Cal. 541, 545.

64. Agreement by parties to become equal owners of franchise which is to be obtained

by one of them for construction of road.—*Miles vs. Thorne*, 38 Cal. 335, 338, 99 Am. Dec. 384.

65. Agreement by parties, whereby one is to purchase property for least price for benefit of parties concerned.—*King vs. Wise*, 43 Cal. 628, 633.

66. Agreement in writing by husband and wife, pending suit for divorce, by which wife conveyed her interest in community property to husband upon consideration of monthly payments to be made to wife upon understanding that husband should look after property and immediately after sale thereof pay wife one half net proceeds, where husband deceived wife in settling account.—*Keogh vs. Noble*, 126 Cal. 153, 155, 63 Pac. Rep. 579.

67. Answer verified and filed by father in action for specific performance of contract.—*Garnsey vs. Gothard*, 90 Cal. 603, 607, 27 Pac. Rep. 516.

68. Assignment by debtor to party under agreement to pay his creditors.—*Lockwood vs. Canfield*, 20 Cal. 126, 130.

69. Assignment of note as security for sureties upon bond with clause "first deducting and paying out of any money that may be realized all charges for costs and attorney's fees."—*Tyler vs. Mayre* (Cal. June 30, 1891), 27 Pac. Rep. 160, 161, 30 Pac. Rep. 196.

70. Authority by husband to bank to change deposits to wife's name and transfer over and drawing of money therefrom by wife in his lifetime.—*Sprague vs. Walton*, 145 Cal. 233, 78 Pac. Rep. 645.

71. Deed by father to daughter securing income of trust property to her for life.—*Nellis vs. Rickard*, 133 Cal. 617, 619, 85 Am. St. Rep. 227, 66 Pac. Rep. 32.

72. Deed not probated, but referred to in will.—*In re Estate of Willey*, 128 Cal. 1, 7, 60 Pac. Rep. 471.

73. Deposition made by son in suit involving trust estate that he held in trust for his brothers and sisters.—*Baker vs. Baker* (Cal. Nov. 10, 1892), 31 Pac. Rep. 355.

74. Devise to executors of real and personal estate in trust to sell and convert into money and dispose of proceeds as directed by will.—*Fatjo vs. Swasey*, 111 Cal. 628, 635, 44 Pac. Rep. 225.

75. Letter declaring trust is written instrument such as will satisfy this section.—*Lynch vs. Rooney*, 112 Cal. 279, 284, 44 Pac. Rep. 565.

76. Letter written recognising mistake of law and fact may create trust.—*Lynch vs. Rooney*, 112 Cal. 279, 285, 44 Pac. Rep. 565.

77. Letter written by grandchild, appointed administrator and holding his grandparent's estate under mistake as to death, where grandparent subsequently dies and letter is written after hearing of actual death.—*Lynch vs. Rooney*, 112 Cal. 279, 285, 44 Pac. Rep. 565.

78. Letters of administration taken out.—*Meeker vs. Gardella* (Wash. Ter. Feb. 4, 1887), 13 Pac. Rep. 709.

79. Memorandum of transaction describing the property and admitting receipt of money as part of purchase price, may declare trust

and taking of title, although it does not state cost nor portion that amount paid bore to whole purchase price, is sufficient to create express trust.—*Waterbury vs. Fisher*, 5 Colo. App. 362, 33 Pac. Rep. 346.

80. Note given to assume indebtedness for funeral expenses which, on last illness of holder, is handed back to maker with expression, "Here is something for you."—*Bedell vs. Scoggins* (Cal. June 27, 1895), 40 Pac. Rep. 954.

81. Writing embraced in several papers where they are so referred to and connected as to clearly show that they relate to same transaction and point out nature and purpose of trust clearly.—*Tenney vs. Simpson*, 37 Kans. 579, 15 Pac. Rep. 512.

82. Use of the word "trustee" in deed after grantee's name where deed is accepted and grantee afterwards affixes word "trustee" to his signature.—*Johnson vs. Calnan*, 19 Colo. 168, 41 Am. St. Rep. 224, 34 Pac. Rep. 905.

83. EXPRESS TRUST NOT CREATED BY CONVEYANCE OF PROPERTY, held under homestead law, to minor son by warranty deed expressing verbal consideration, which is afterwards reconveyed to father, who gives note to son and afterwards mortgages for business purposes.—*Beavers vs. McKinley*, 50 Kan. 602, 32 Pac. Rep. 363.

84. Declarations of parties, oral in their nature, will not create trust in executed absolute conveyance of lands.—*Sherman vs. Sandell*, 106 Cal. 373, 375, 39 Pac. Rep. 797.

85. Declarations, oral in their nature and subsequently made, not sufficient to create trust of lands held under absolute conveyance.—*Sherman vs. Sandell*, 106 Cal. 373, 374, 39 Pac. Rep. 797.

86. Deed absolute executed in good faith for valuable consideration, whereby grantee promises to pay debt.—*Saunderson vs. Broadwell* (Cal. Dec. 19, 1889), 23 Pac. Rep. 36.

87. Deed absolute on its face showing consideration executed by partners closing out partnership affairs of embarrassed firm for purpose of enabling partner to whom deed was executed to raise money by mortgage to pay debts.—*Burt vs. Wilson*, 28 Cal. 632, 636, 37 Am. Dec. 142.

88. Deed undelivered does not constitute a written declaration of trust, where such deed is reconveyance to grantor and non-delivery of deed and its retention are due to settlement between parties.—*Hasshagen vs. Hasshagen*, 80 Cal. 514, 517, 22 Pac. Rep. 294.

As to what constitutes declaration of trust, see post § 2253 and note.

89. Deed in trust to hold rents, income, and profits of property for sole use and behoof of grantor during life, and to sell at his request and pay to his use and to deal with proceeds as he directs.—*Carpenter vs. Cook*, 132 Cal. 621, 624, 84 Am. St. Rep. 113, 123, 64 Pac. Rep. 997.

As to trust in partnership real estate, see post § 853 and note.

90. Devise of proceeds of real estate to devisees absolutely, with directions to invest proceeds derived from sale until youngest child should attain majority, and appointing

same parties executors, creates no other trust than that mentioned in will, which arises out of office of executor, words "to invest the proceeds" being in form of direction only.—*McCloud vs. Hewlett*, 135 Cal. 361, 367, 67 Pac. Rep. 333.

91. Direction to receive rents without direction to pay or apply same to use of any other person or to accumulate them for any purpose.—*Toland vs. Toland*, 123 Cal. 140, 144, 55 Pac. Rep. 681.

92. Document, "received. . . Three Hundred Sixty Eight and fifty-hundredths Dollars being his proportion of his tax and outside land assessments to be paid by him to . . . tax collector, the land known as the . . . tract."—*Hunt vs. Friedman*, 63 Cal. 510, 513.

93. Grant, conditional to reconvey, as where grantee promises to reconvey upon being paid what was owing to him by grantor, has some tendency to show verbal agreement that property should be held in trust, but it is not trust declared in writing, even though such verbal understanding is testified to and taken down in writing.—*Haashagen vs. Haashagen*, 80 Cal. 514, 517, 22 Pac. Rep. 294.

94. Language so vague, general, or equivocal that any of necessary elements of trust are left in uncertainty.—*Burling vs. Newlands*, 112 Cal. 476, 496, 44 Pac. Rep. 810, 816.

As to language to create a trust, see para. 50-58 this note.

95. Power given executors to execute conveyances such as may be necessary to dispose of property, as same is merely incidental to power conferred upon him.—*Bennalack vs. Richards*, 116 Cal. 405, 410, 48 Pac. Rep. 622.

96. Promise made by daughter to father after death of brother who made will but subsequently withdrew money from bank, handed it to her with no directions as to carrying out will, although she fulfilled intention as to her brother.—*Barker vs. Hurley*, 133 Cal. 21, 28, 63 Pac. Rep. 1071.

97. Statement of account given by debtor to vendor of his creditor, and which is nothing more than statement showing amount of debtor's indebtedness.—*Haashagen vs. Haashagen*, 80 Cal. 514, 518, 22 Pac. Rep. 294.

98. Statement of letter written to party stating that assignment of property has been made for his benefit.—*Estate of Webb*, 49 Cal. 541, 545.

99. Writing executed by brother at time his sister agreed to let him have money which she had in bank, showing amount of money deposited with interest and balance in bank.—*Preston vs. Brennan*, 135 Cal. 55, 58, 66 Pac. Rep. 981.

III. SAME—2. PAROL TRUST IN LANDS.

As to parol trust and requirement of writing, see 28 Am. & Eng. Encyc. of L. (3d ed.) 869, 877.

As to how far parol trusts are within the statute of frauds, see note by Robert Desty, 10 L. R. A. 401.

100. PAROL TRUST IN LAND IS NOT ABSOLUTELY VOID; only at the election of the trustee.—*Cooper vs. Thomason*, 30 Oreg.

161, 45 Pac. Rep. 296; *Karr vs. Washburn*, 56 Wis. 303, 14 N. W. Rep. 133.

101. EXECUTED OR NOT BY THE TRUSTEE as he chooses.—*Cooper vs. Thomason*, 30 Oreg. 161, 45 Pac. Rep. 296; *Karr vs. Washburn*, 56 Wis. 303, 14 N. W. Rep. 133.

102. EXPRESS TRUST CANNOT BE CREATED BY PAROL AGREEMENT INDEPENDENT of instrument creating estate, as court has no jurisdiction or power to carve out trust independent of such instrument.—*McCloud vs. Hewlett*, 135 Cal. 361, 368, 67 Pac. Rep. 333. See *Burt vs. Wilson*, 28 Cal. 632, 637, 87 Am. Dec. 142; *Gallagher vs. Mars*, 50 Cal. 23; *Barr vs. O'Donnell*, 76 Cal. 469, 471, 9 Am. St. Rep. 242, 18 Pac. Rep. 429; *Fouty vs. Fouty*, 34 Ind. 433; *Movan vs. Hays*, 1 John. Ch. (N. Y.) 339.

103. EXPRESS TRUST CANNOT BE CREATED by mere parol agreement.—*Ingham vs. Burnell*, 31 Kans. 333, 2 Pac. Rep. 804.

104. Agreement by parol between mother and son whereby, in consideration of his paying taxes, insuring and repairing property and furnishing her with all necessary care and board, etc., for life, she promises to convey to him, deed to be effectual at her death.—*Whittenbrock vs. Cass*, 110 Cal. 1, 6, 42 Pac. Rep. 300.

105. Agreement by parol between parties to warranty deed absolute on its face, that grantee should sell and obtain funds for grantor whenever he might so desire.—*Gee vs. Thrailkill*, 45 Kans. 173, 25 Pac. Rep. 533.

106. Agreement by parol by partner after filing land claim that same should become partnership property.—*Estate of Groome*, 94 Cal. 69, 29 Pac. Rep. 437.

As to trusts in partnership real estate, see post § 853 and note.

107. Agreement by parol by tenants in common in making division of property by deeds absolute, one having greater portion should hold in trust to convey to make portions equal.—*Barr vs. O'Donnell*, 76 Cal. 469, 9 Am. St. Rep. 242, 18 Pac. Rep. 429.

As to trusts where one has more than his share, see post § 853 and note.

108. Agreement by parol to hold in trust for specific purpose at time legal title is taken, unless it is clearly shown that title was fraudulently acquired.—*Von Trotha vs. Bamberger* (Colo. March 28, 1890), 24 Pac. Rep. 833.

As to trusts obtained by fraud, etc., see post § 2224 and note.

109. Agreement by parol under which party takes possession and has control of land of certain persons and holds proceeds of sale for their benefit.—*Ingham vs. Burnell*, 31 Kan. 333, 2 Pac. Rep. 804.

110. Contract by parol for the purchase of real estate by one with his own money, to be held in trust for another.—*Donohoe vs. Mariposa L. & Min. Co.*, 66 Cal. 317, 327, 5 Pac. Rep. 495.

111. CREATED BY PAROL AGREEMENT WITH PURCHASER from party holding in trust to pay creditors.—*Scrivner vs. Dietz*, 34 Cal. 295, 297, 24 Pac. Rep. 171.

112. Parol trust in mortgage may be executed by agreement between mortgager and mortgagee to hold for benefit of latter and another for whose benefit trust was created, because mortgage conveys no estate in land, but simply creates lien.—*Tapia vs. Demartini*, 77 Cal. 383, 388, 11 Am. St. Rep. 288, 19 Pac. Rep. 641. See *Hubbell vs. Blakeslee*, 71 N. Y. 63, 69; *Wood vs. Weimar*, 104 U. S. 786, bk. 26 L. ed. 779.

IV. ACCEPTANCE—1. BY TRUSTEE.

As to trustee's acceptance of trust, see monographic note 34 Am. St. Rep. 214, and note 89 Am. Dec. 187; 28 Am. & Eng. Encyc. of L. (2d ed.) 896.

113. ACCEPTANCE OF TRUST.—Acceptance of trust or assumption of duties by clear implication must be shown in order to impose voluntary or express trust upon any person.—*Brandon vs. Carter*, 119 Mo. 572, 41 Am. St. Rep. 673, 24 S. W. Rep. 1085; *Taylor vs. Holmes*, 14 Fed. Rep. 498, 509. See *Hearst vs. Pujol*, 44 Cal. 230, 235 (wherein court seem to hold, but not decide, that there must be an acceptance).

114. Not necessary to validity of trust deed.—*Smith vs. Davis*, 90 Cal. 25, 33, 25 Am. St. Rep. 92, 27 Pac. Rep. 26. See *Hearst vs. Pujol*, 44 Cal. 230, 235.

See par. 113 this note.

115. Not necessary to validity of trust when voluntary trust properly created.—*N. Y. King vs. Donnelly*, 5 Paige Ch. 46; *Holland vs. Alcock*, 108 N. Y. 312, 2 Am. St. Rep. 420, 16 N. E. Rep. 305. Pa. *Elliott's Appeal*, 50 Pa. St. 75, 38 Am. Dec. 525. R. L. *Stone vs. King*, 7 R. L. 358, 84 Am. Dec. 557. Tenn. *Furman vs. Fisher*, 4 Cold. 626, 94 Am. Dec. 210; *Field vs. Arrow-smith*, 3 Humph. 442, 446, 39 Am. Dec. 185. Fed. *Adams vs. Adams*, 38 U. S. (31 Wall.) 185, bk. 22 L. ed. 504. Eng. *Tierney vs. Wood*, 19 Beav. 330.

116. Not necessary under perfect voluntary trust, so far as settler is concerned.—*Minot vs. Tilton*, 64 N. H. 371, 10 Atl. Rep. 683.

117. Not necessary under implied, resulting, or constructive trust, law holding person liable to performance whether willing or unwilling to accept.—*Taylor vs. Holmes*, 14 Fed. Rep. 498, 509.

118. "The law does not require the taking of an oath by a trustee" on accepting appointment of office.—*Cauhape vs. Barnes*, 135 Cal. 107, 110, 67 Pac. Rep. 55.

119. Consent is consideration for the enforcement of trust.—*Egerton vs. Carr*, 94 N. C. 648, 54 Am. Rep. 680.

120. Consent alone does not render it enforceable when not fully executed.—*Cotton vs. Graham*, 84 Ky. 673, 2 S. W. Rep. 647.

121. Consent of trustee to hold title for benefit of cestui que trust, or agreement to do so in case of resulting trust, will not change its character.—*Warren vs. Adams*, 19 Colo. 515, 36 Pac. Rep. 604.

122. May be shown by express acts or by implication.—*Cauhape vs. Barnes*, 135 Cal. 107, 110, 67 Pac. Rep. 55.

123. Acceptance of trust may be shown

otherwise than in writing.—*Daly vs. Bernstein*, 6 N. M. 380, 28 Pac. Rep. 764.

124. Acts or words of trustee of any kind indicating, with reasonable certainty, his acceptance or acknowledgment upon sufficient consideration, and subject, purpose, and beneficiary of trust, is sufficient to create trust as to trustee.—*Barker vs. Hurley*, 132 Cal. 21, 26, 68 Pac. Rep. 1071.

125. Acts showing acceptance of deed and actions under it by grantee in pursuance of trusts sufficient where land is conveyed by one person to another to be held in trust and re-conveyed to grantor.—*Hearst vs. Pujol*, 44 Cal. 230, 235. See *Hitz vs. National Metropolitan Bank*, 111 U. S. 723, bk. 28 L. ed. 577, 4 Sup. Ct. Rep. 618.

126. Acknowledgment of receipt of sum of money, "being amount devised by will of said deceased," signed by executors and guardians of imbecile, amounts to acceptance of trust.—*Elizalde vs. Elizalde*, 137 Cal. 634, 636, 66 Pac. Rep. 369, 70 Id. 861.

127. Delivery and retention of bank pass-book.—*Hellman vs. McWilliams*, 70 Cal. 449, 452, 11 Pac. Rep. 659.

128. Indorsement upon instrument.—*Laclede F. Mfg. Co. vs. Williams*, 14 Colo. 37, 23 Pac. Rep. 458.

129. Possession taken of trust property by a trustee.—*Daly vs. Bernstein*, 6 N. M. 380, 28 Pac. Rep. 764.

V. SAME—2. BY BENEFICIARY.

As to acceptance of trust by beneficiary, see monographic note 46 Am. Dec. 81; 34 Am. St. Rep. 214; 28 Am. & Eng. Encyc. of L. (2d ed.) 895.

As to designation of beneficiaries, see note 61 Am. St. Rep. 623.

As to notification of beneficiaries, see 28 Am. & Eng. Encyc. of L. (2d ed.) 895.

130. ACCEPTANCE BY BENEFICIARY.—Beneficiary need not be informed of the trust.—*Booth vs. Oakland Bank of Sav.*, 122 Cal. 19, 25, 54 Pac. Rep. 370.

See post § 2221 and note.

131. Express acceptance not necessary under provisions of code.—*Booth vs. Oakland Bank of Sav.*, 122 Cal. 19, 25, 54 Pac. Rep. 370.

132. Acceptance of beneficiary implied where gift is otherwise complete and beneficial to donee.—*Beaver vs. Beaver*, 117 N. Y. 421, 15 Am. St. Rep. 531, 22 N. E. Rep. 940, 6 L. R. A. 403; *Stone vs. King*, 7 R. L. 358, 84 Am. Dec. 557.

133. Presumed where gift is beneficial to cestui que trust.—Ind. *Devol vs. Dye*, 123 Ind. 821, 24 N. E. Rep. 246, 7 L. R. A. 439; *Plaut vs. Storey*, 131 Ind. 46, 30 N. E. Rep. 886. Iowa. *Darland vs. Taylor*, 52 Iowa 503, 35 Am. Rep. 285, 8 N. W. Rep. 510; *Hogan vs. Sullivan*, 114 Iowa 456, 87 N. W. Rep. 447. Ky. *Williamson vs. Yager*, 91 Ky. 282, 84 Am. St. Rep. 184, 15 S. W. Rep. 660. N. H. *Blasdel vs. Locke*, 52 N. H. 238, 244. N. Y. *Cumberland vs. Codrington*, 3 John. Ch. 229, 261, 8 Am. Dec. 492; *Shepherd vs. McEvers*, 4 John. Ch. 186, 187, 8 Am. Dec. 561; *Van Cott vs. Prentice*, 104 N. Y. 45, 10 N.

E. Rep. 357. *R. L. Stone vs. King*, 7 R. I. 353, 84 Am. Dec. 557, 559; *Grieves vs. Keane*, 23 R. I. 136, 49 Atl. Rep. 501. *Tenn. Stockard vs. Stockard*, 7 Humph. 303, 46 Am. Dec. 79; *Trowell vs. Carraway*, 10 Heisk. 104. *Vt. Connecticut R. Sav. Bank vs. Albee*, 64 Vt. 471, 33 Am. St. Rep. 944, 25 Atl. Rep. 487. *Va. Skipwith vs. Cunningham*, 8 Leigh 271, 31 Am. Dec. 642. *Eng. Stirling vs. Vaughan*, 11 East 619, 623, 2 Camp. 225, 11 Rev. Rep. 276; *Garnons vs. Knight*, 5 Barn. & C. 671, 8 Dowl. & Ry. 348, 4 L. J. K. B. 161, 29 Rev. Rep. 355.

134. Same—Acceptance by beneficiary makes trust complete beyond mere presumption.—*Grieves vs. Keane*, 23 R. I. 136, 49 Atl. Rep. 501.

135. Same—Sufficiently shown by beneficiaries' action to compel execution of trust.—*Booth vs. Oakland Bank of Sav.*, 122 Cal. 19, 25, 54 Pac. Rep. 370.

136. Same—Demand made by beneficiaries may be sufficient acceptance on their part.—*Booth vs. Oakland Bank of Sav.*, 122 Cal. 19, 25, 54 Pac. Rep. 370.

VI. EVIDENCE TO CREATE.

As to parol evidence to prove express trusts, see notes 24 Am. Dec. 413; 26 Am. Dec. 60; 36 Am. Dec. 182; 38 Am. Dec. 182; 43 Am. Dec. 624; 63 Am. Dec. 42; 65 Am. Dec. 501; 70 Am. Dec. 258; 90 Am. Dec. 270-277; 82 Am. St. Rep. 517.

137. BURDEN OF PROOF IS ON PLAINTIFF to show express trust, when he alleges it.—*Gunter vs. Janes*, 9 Cal. 643, 655; *Prevost vs. Gratz*, 19 U. S. (6 Wheat.) 481, 494, bk. 5 L. ed. 311; *Hopkins vs. Grimshaw*, 165 U. S. 343, 352, bk. 41 L. ed. 739, 17 Sup. Ct. Rep. 401 (clear proof required in equity).

Circumstantial evidence,—as to, see par. 141 this note.

138. EVIDENCE MUST SHOW TRUST CREATED BY OPERATION OF LAW, or by conveyance or other instrument in writing, in order to satisfy provisions of code.—*Hasshagen vs. Hasshagen*, 80 Cal. 514, 518, 22 Pac. Rep. 294. See *Donohoe vs. Mariposa L. & Min. Co.*, 66 Cal. 317, 327, 5 Pac. Rep. 495; *Hellman vs. McWilliams*, 70 Cal. 449, 452, 11 Pac. Rep. 659; *Barr vs. O'Donnell*, 76 Cal. 469, 471, 9 Am. St. Rep. 242, 18 Pac. Rep. 429; *Feeney vs. Howard*, 79 Cal. 525, 528, 12 Am. St. Rep. 162, 21 Pac. Rep. 984, 4 L. R. A. 826.

139. EVIDENCE MUST SHOW ALL THAT IS ESSENTIAL to exhibit equity of cestui que trust in clear and unclouded light.—*First Nat. Bank vs. Campbell*, 2 Colo. App. 271, 30 Pac. Rep. 357.

140. Must show an express trust as alleged, where plaintiff alleges such trust.—*Gunter vs. Janes*, 9 Cal. 643, 655.

141. Circumstantial admissible and sufficient for purpose of proving express trust.—*Gunter vs. Janes*, 9 Cal. 643, 655.

142. Proof and pleading must correspond.—*Gunter vs. Janes*, 9 Cal. 643, 655.

143. Relation, although confused and contradictory, will not be regarded as insufficient to sustain finding of trial court that such relation existed, where it cannot be said that there

was no evidence to sustain finding.—*Alaniz vs. Casenave*, 91 Cal. 41, 47, 27 Pac. Rep. 521.

144. Writing.—Fact that trust of lands is created must be manifested and proved by writing properly executed.—*Burling vs. Newlands*, 112 Cal. 476, 496, 44 Pac. Rep. 810.

145. Same—Manifestation and proof of nature of trust must be shown by the writing.—*Burling vs. Newlands*, 112 Cal. 476, 496, 44 Pac. Rep. 810.

146. Same—Letters and informal documents admissible to prove trust.—*Burt vs. Wilson*, 28 Cal. 632, 633, 87 Am. Dec. 142; *Baker vs. Baker* (Cal. Nov. 10, 1892), 31 Pac. Rep. 355, 357; *Lynch vs. Rooney*, 112 Cal. 279, 285, 44 Pac. Rep. 565; *Waterbury vs. Fisher*, 5 Colo. App. 362, 38 Pac. Rep. 846, 850; *Forster vs. Hale*, 3 Ves. 696, 707, 5 Ves. 308, 4 Rev. Rep. 123; *Smith vs. Matthews*, 3 De G. F. & J. 139.

147. Same—Letters written to beneficiaries informing them of what deceased had done in making bank deposit payable so that "either one of her sisters could draw it after her death," and fixing bank account so that money could be drawn without estate being probated generally, and what they could do and where they could obtain the pass-book.—*Booth vs. Oakland Bank of Sav.*, 122 Cal. 19, 25, 54 Pac. Rep. 370.

148. Signature as trustee in rendering account is evidence of existence of trust between parties.—*Gunter vs. Janes*, 9 Cal. 643, 657.

149. PAROL EVIDENCE IS NOT ADMISSIBLE to prove existence of direct or express trust under statute of frauds.—*Von Trotha vs. Bamberger*, 15 Colo. 1, 24 Pac. Rep. 833; *Johnson vs. Calnan*, 19 Colo. 168, 41 Am. St. Rep. 224, 34 Pac. Rep. 905; *Bowler vs. Curlier*, 21 Nev. 158, 37 Am. St. Rep. 501, 26 Pac. Rep. 226.

150. Where the statute of frauds is relied upon as objection.—*Von Trotha vs. Bamberger*, 15 Colo. 1, 24 Pac. Rep. 833.

151. Contradict terms of instrument creating estate.—*McDermith vs. Voorhees*, 16 Colo. 402, 25 Am. St. Rep. 286, 27 Pac. Rep. 250; *White vs. Carpenter*, 2 Paige Ch. (N. Y.) 217, 238.

152. Control, rebut, or defeat trust resulting by force of written instrument.—*McDermith vs. Voorhees*, 16 Colo. 402, 25 Am. St. Rep. 286, 27 Pac. Rep. 250.

153. Deed absolute on its face was given in trust for benefit of grantor in absence of fraud, accident, or mistake.—*Donohoe vs. Mariposa L. & M. Co.*, 66 Cal. 317, 327, 5 Pac. Rep. 495; *Barr vs. O'Donnell*, 76 Cal. 469, 9 Am. St. Rep. 242, 18 Pac. Rep. 429; *Feeney vs. Howard*, 79 Cal. 525, 528, 12 Am. St. Rep. 162, 21 Pac. Rep. 984, 4 L. R. A. 826; *Doran vs. Doran*, 99 Cal. 311, 314, 33 Pac. Rep. 923; *Sheehan vs. Sullivan*, 126 Cal. 189, 192, 58 Pac. Rep. 543. *Ill. Perry vs. McHenry*, 13 Ill. 227; *Lawson vs. Lawson*, 117 Ill. 98, 7 N. E. Rep. 34. *Ind. Fouty vs. Fouty*, 34 Ind. 33. *Iowa. Ratliff vs. Ellis*, 2 Iowa 59, 63 Am. Dec. 471; *Burden vs. Sheridan*, 36 Iowa 125, 14 Am. Rep. 505. *Kan. Morrall vs. Waterson*, 7 Kan. 199. *Mass. Boyd vs. Stone*, 11 Mass. 342, 347; *Walker vs. Locke*, 59 Mass. (5 Cush.) 90, 92; *Titcomb vs.*

Morrill, 92 Mass. (10 Allen) 15, 16. Miss. Metcalf vs. Brandon, 58 Miss. 842. N. Y. Sturtevant vs. Sturtevant, 20 N. Y. 39, 75 Am. Dec. 371; Wheeler vs. Reynolds, 66 N. Y. 227. N. C. Benhan vs. Craig, 80 N. C. 224. Oreg. Cooper vs. Thomason, 30 Oreg. 161, 45 Pac. Rep. 296. Wis. Rasdell vs. Rasdell, 9 Wis. 379.

As to trusts created by fraud, etc., see post § 2224 and note.

154. Oral promise to reduce to writing verbal agreement declaring trust in land and its breach in order to establish trust unless other evidence, shows fraudulent conduct in acquisition of title.—Von Trotha vs. Bamberger, 15 Colo. 1, 24 Pac. Rep. 883.

155. Understanding between the parties, where there is no ambiguity in words used in the instrument.—Donohoe vs. Mariposa L. & M. Co., 66 Cal. 317, 329, 5 Pac. Rep. 495.

156. ADMITTED—Trusts created and proved by parol evidence prior to passing of English statute and after statute resulting trust or trust by operation of law were excepted from operation of rule.—Osborne vs. Endicott, 6 Cal. 149, 155.

157. Rule prohibiting parol does not apply after trust has been executed.—Polk vs. Boggs, 122 Cal. 114, 116, 54 Pac. Rep. 536.

158. Clear and unequivocal evidence necessary when it is sought to create trust by parol evidence.—Hellman vs. McWilliams, 70 Cal. 449, 451, 452, 11 Pac. Rep. 659.

159. Assignment of accounts which on its face is absolute and unconditional may be shown by parol to have been in trust.—Lockwood vs. Canfield, 20 Cal. 126, 129, 130.

160. Consideration, notwithstanding recitals in the deed of personalty, was meant to create a trust.—Lockwood vs. Canfield, 20 Cal. 126, 130.

As to necessity of consideration, see para. 22-26 this note.

161. Consideration inserted by fraud in fact or by mistake, in order to show a trust.—Burt vs. Wilson, 28 Cal. 632, 633, 87 Am. Dec. 142.

As to trusts created through fraud, see post § 2224 and note.

162. Declarations made by party of character in which he holds property, in corroboration of other testimony proving a trust, although not of itself competent for the purpose of proving the trust.—Hayne vs. Hermann, 97 Cal. 259, 32 Pac. Rep. 171.

163. Deed absolute on its face was given in trust where fraud, accident, or mistake is shown.—Cooper vs. Thomason, 30 Oreg. 161, 45 Pac. Rep. 296.

164. Misapprehension as to effect of the instrument to show a trust.—Burt vs. Wilson, 28 Cal. 632, 633, 87 Am. Dec. 142.

As to trusts created through fraud, etc., see post § 2224 and note.

165. Party and purpose for which a party becomes a trustee under a deed using word "trustee" after the name of the party.—Johnson vs. Calnan, 19 Colo. 163, 41 Am. St. Rep. 224, 34 Pac. Rep. 905; McBlair vs. Gibbs, 58 U. S. (17 How.) 232, bk. 15 L. ed. 132; Brooks vs. Martin, 69 U. S. (3 Wall.) 70, bk. 17 L. ed.

732; Duncan vs. Jaudon, 82 U. S. (15 Wall.) 165, bk. 21 L. ed. 142; Union Pac. R. Co. vs. Durant, 95 U. S. 576, bk. 24 L. ed. 391.

166. Situation of parties and their relation to each other and to subject-matter and to circumstances leading and attending execution and delivery, admissible for purpose of explaining meaning and applying it to persons and subject-matter intended, in cases of doubt.—Ind. Fletcher vs. Mansur, 5 Ind. 267. N. Y. Connolly vs. Pardon, 1 Paige Ch. 291. Vt. Morse vs. Carpenter, 19 Vt. 613. Wis. Staak vs. Sigelkow, 12 Wis. 234, 239; Ganson vs. Madigan, 15 Wis. 144, 153-156, 32 Am. Dec. 659; Sydnor vs. Palmer, 29 Wis. 226, 241. Eng. Miller vs. Travers, 8 Bing. 244, 1 Moore & Scott 342, 1 L. J. N. S. Ch. 157, 21 Eng. C. L. 288, 34 Rev. Rep. 703; Smith vs. Doe, 7 Price 379, 3 Bligh 290, 2 Brod. & B. 473, 5 Moore 332, 6 Eng. C. L. 235, 244, 22 Rev. Rep. 19.

167. TRUTH OF TRANSACTION, where there is some written evidence of existence of express trust.—Bohn vs. Bohn, 9 Colo. 106, 10 Pac. Rep. 790; Johnson vs. Calnan, 19 Colo. 163, 41 Am. St. Rep. 224, 34 Pac. Rep. 905.

168. Trust by parol arising from agreement between mortgager, mortgagee, and party for whose benefit trust created; and is not objectionable on ground that it varies written contract, as mortgage and agreement accompanying such mortgage are two separate and distinct contracts.—Tapia vs. Demartini, 77 Cal. 383, 388, 389, 11 Am. St. Rep. 283, 19 Pac. Rep. 641.

169. Trust of property conveyed by parent to child subject to parol agreement to deal with same in certain manner.—Jerome vs. Bohm, 21 Colo. 322, 40 Pac. Rep. 570.

VII. PRECATORY TRUSTS—1. CREATION OF.

As to precatory trusts, see monographic note 5 Prob. Rep. An. 144, 148; monographic note by Robert Desty, 6 L. R. A. 354; 44 Am. Dec. 364; 48 Am. Rep. 494, 499.

See also 22 Am. & Eng. Encyc. of L. (2d ed.) 1162-1171.

As to when precatory trust arises in favor of children, see monographic note 48 Am. Rep. 494, 499.

As to what words do or do not create precatory trust, see monographic notes 44 Am. Dec. 372, 379; 38 Am. Rep. 293; 48 Am. Rep. 494, 499, and monographic note by Robert Desty, 6 L. R. A. 354.

As to certainty in the subject-matter of precatory trusts, see monographic note 44 Am. Dec. 372, 376.

As to certainty of the objects or persons to be benefited by precatory words, see monographic note 44 Am. Dec. 372, 377.

For the earlier American cases on the subject of precatory trusts, see monographic note 44 Am. Dec. 372, 377.

For the later American and English cases on precatory trusts, see monographic note 44 Am. Dec. 372, 379.

170. GENERAL RULES.—Arbitrary rules laid down by the earlier decisions with regard to what would constitute precatory trust are relaxed, or at least not extended by more recent

decisions.—*Hess vs. Singler*, 114 Mass. 56, 59; *Lambe vs. Eames*, L. R. 10 Eq. 267, 6 Ch. Ap. 597.

171. Form immaterial where instrument plainly directed to those who should have possession and control of property, and it has the essential elements of being disposition of property to take effect after death.—*Appeal of Knox*, 131 Pa. St. 220, 18 Atl. Rep. 1021, 6 L. R. A. 353.

172. Intention governs the question whether words constitute limitation of bequest or are advisory or recommendatory only.—*Riker vs. Leo*, 133 N. Y. 519, 523, 30 N. E. Rep. 598, 599.

As to intention in express trusts, see para. 39-46 this note.

173. Same—Ascertained by taking all words in their ordinary and natural signification unless upon consideration of whole instrument it appears that different meaning is intended.—*Eberhardt vs. Perolin*, 48 N. J. Eq. (3 Dick.) 592, 597, 23 Atl. Rep. 501.

174. Same—Ascertained from the general purposes and scope of instrument, as no general rule can be stated as to when whole beneficial estate will pass or when it will be construed trust.—*Estate of Reith*, 144 Cal. 314, 318, 77 Pac. Rep. 942; *Colton vs. Colton*, 127 U. S. 300, bk. 32 L. ed. 138, 8 Sup. Ct. Rep. 1164.

175. Same—Must appear from the whole will or instrument when considered in all its parts under circumstances of particular case, when consistent with rules of law.—In re *Estate Whitcomb*, 86 Cal. 265, 273, 24 Pac. Rep. 1028; In re *Estate Marti*, 132 Cal. 666, 669, 61 Pac. Rep. 964, 64 Id. 1071; *Estate of Reith*, 144 Cal. 314, 318, 77 Pac. Rep. 942. Ill. *Jones vs. Jones*, 124 Ill. 254, 15 N. E. Rep. 751; *Randall vs. Randall*, 135 Ill. 398, 25 Am. St. Rep. 373, 25 N. E. Rep. 780. Md. *Nunn vs. O'Brien*, 83 Md. 198, 34 Atl. Rep. 244. Mass. *Aldrich vs. Aldrich*, 172 Mass. 101, 51 N. E. Rep. 449. Mo. *Noe vs. Kern*, 93 Mo. 367, 6 S. W. Rep. 239; *Murphy vs. Carlin*, 113 Mo. 112, 35 Am. St. Rep. 699, 20 S. W. Rep. 786. N. Y. *Riker vs. Leo*, 133 N. Y. 519, 30 N. E. Rep. 598. Pa. *Hopkins vs. Glunt*, 111 Pa. St. 287, 2 Atl. Rep. 183; *Good vs. Ficht-horn*, 144 Pa. St. 287, 27 Am. St. Rep. 630, 22 Atl. Rep. 1032; *Boyle vs. Boyle*, 152 Pa. St. 108, 34 Am. St. Rep. 629, 25 Atl. Rep. 494. Tenn. *Hadley vs. Hadley*, 100 Tenn. 446, 452, 45 S. W. Rep. 342; *Jones vs. Hunt*, 96 Tenn. 369, 372, 34 S. W. Rep. 698. W. Va. *Seamonds vs. Hodge*, 36 W. Va. 304, 32 Am. St. Rep. 854. Fed. *Toms vs. Owen*, 52 Fed. Rep. 417, 421; *Smith vs. Bell*, 31 U. S. (6 Pet.) 68, 75, bk. 8 L. ed. 322; *Colton vs. Colton*, 127 U. S. 300, 309, bk. 32 L. ed. 138, 8 Sup. Ct. Rep. 1164.

176. Same—Must exist and be shown in order to create trust by means of precatory words.—*Williams vs. Williams*, L. R. 2 Ch. Div. 12; *Hills vs. Hills*, L. R. 1 Q. B. D. 483; In re *Hamilton*, L. R. 2 Ch. Div. 370.

177. Same—Shown where testator accompanies bequest with desire that property shall be applied in certain way or for benefit of another, either by coupling same as directing clause of sentence by which bequest is made or by specific reference thereto.—In re *Estate Marti*, 132 Cal. 666, 670, 61 Pac. Rep. 964, 64

Id. 1071. See Mass. *Warner vs. Bates*, 98 Mass. 274. N. J. *Eddy vs. Hartshorne*, 34 N. J. Eq. (7 Stew.) 419. N. Y. *Campbell vs. Beaumont*, 91 N. Y. 465. Wis. *Knox vs. Knox*, 59 Wis. 172, 48 Am. Rep. 487, 18 N. W. Rep. 155. Fed. *Colton vs. Colton*, 127 U. S. 300, bk. 32 L. ed. 138, 8 Sup. Ct. Rep. 1164.

178. Language.—In order to create trust and to make party trustee, it must appear that party intended to impose imperative obligation on him, and, for that purpose, used words which exclude exercise of discretion or option in inference to the act in question.—In re *Estate Marti*, 132 Cal. 666, 669, 61 Pac. Rep. 964, 64 Id. 1071.

As to use of technical language, see para. 50 this note.

179. Same—Must be imperative, and not merely an expression of a wish or desire.—Ill. *Jones vs. Jones*, 124 Ill. 254, 15 N. E. Rep. 751. Md. *Williams vs. Worthington*, 49 Md. 572, 33 Am. Rep. 286. Mass. *Hess vs. Singler*, 114 Mass. 56, 59. Miss. *Lucas vs. Lockhart*, 10 Smedes & M. 466, 48 Am. Dec. 766. Fed. *Colton vs. Colton*, 127 U. S. 300, bk. 32 L. ed. 138, 8 Sup. Ct. Rep. 1164. Eng. *Williams vs. Williams*, L. R. 2 Ch. Div. 12; *Hills vs. Hills*, L. R. 1 Q. B. D. 483; In re *Hamilton*, L. R. 2 Ch. Div. 370.

180. Same—Must be obligatory in its imposition of the trust.—*Aldrich vs. Aldrich*, 172 Mass. 101, 51 N. E. Rep. 449. See Ill. *Randall vs. Randall*, 135 Ill. 398, 25 Am. St. Rep. 373, 25 N. E. Rep. 780. Md. *Nunn vs. O'Brien*, 83 Md. 198, 34 Atl. Rep. 244. N. Y. *Clay vs. Wood*, 153 N. Y. 134, 47 N. E. Rep. 274. Pa. *Estate of Pennock*, 20 Pa. St. 268, 59 Am. Dec. 718.

181. Same—Must show a positive intent to govern conduct of party to whom it is addressed.—*Anderson vs. Hammond*, 2 Lea (Tenn.) 281, 31 Am. Rep. 612.

182. Persons beneficially interested must be reasonably ascertained.—*Estate of Reith*, 144 Cal. 314, 318, 77 Pac. Rep. 942.

183. Situation of testator at time he framed provisions must be considered.—*Colton vs. Colton*, 127 U. S. 300, bk. 32 L. ed. 138, 8 Sup. Ct. Rep. 1164.

184. Subject-matter and purposes of trust must be reasonably ascertained.—*Estate of Reith*, 144 Cal. 314, 318, 77 Pac. Rep. 942; *Williams vs. Worthington*, 49 Md. 572, 33 Am. Rep. 286.

185. Terms in their entirety of holding of devisee and use must be construed together and as whole.—*Clark vs. Hill*, 98 Tenn. 300, 39 S. W. Rep. 339.

186. HOW CREATED.—Created where gift or bequest is accompanied with desire that property shall be applied in certain way or for benefit of certain person and acceptance of property.—In re *Estate Marti*, 132 Cal. 666, 670, 61 Pac. Rep. 964, 64 Id. 1071. N. J. *Eddy vs. Hartshorne*, 34 N. J. Eq. (7 Stew.) 419. N. Y. *Campbell vs. Beaumont*, 91 N. Y. 465. Fed. *Colton vs. Colton*, 127 U. S. 300, bk. 32 L. ed. 138, 8 Sup. Ct. Rep. 1164.

As to when express trusts are created, see para. 61-82 this note.

187. By devise absolute with request or wish or "recommend" that specified part of estate be applied for named purposes where no discretionary power is given.—*Eberhardt vs. Perolin*, 48 N. J. Eq. (3 Dick.) 592, 597, 605, 28 Atl. Rep. 507.

188. Devise "during my wife's widowhood she is to have entire use, profits, and control of my estate, and to her discretion do I intrust education and maintenance of my children during that time."—*Lucas vs. Lockhart*, 10 Smedes & M. (Miss.) 466, 48 Am. Dec. 766.

189. Devise to wife with recommendation to her of the care and protection of testator's mother and sister and request to make such gift and provision for them as in her judgment will be best.—*Colton vs. Colton*, 127 U. S. 300, bk. 32 L. ed. 138, 8 Sup. Ct. Rep. 1164.

190. Devise to wife in fee simple with wish and desire that she "continue to provide for care, comfort, and education of [adopted child] . . . and to make suitable provision for him in case of her death, provided he continues to be dutiful child to her and shows himself worthy of such consideration."—*Murphy vs. Carlin*, 113 Mo. 112, 35 Am. St. Rep. 699, 20 S. W. Rep. 786.

191. Devise to wife of residue of estate with "will and desire" that she should pay certain sum to heir for education annually until he becomes of age.—*Anderson vs. Hammond*, 3 Lea (Tenn.) 281, 31 Am. Rep. 612.

192. Devise "with full faith and credit."—A bequest with words, "I make this bequest in full faith that my husband will properly provide for two children of my deceased brother, whom we have undertaken to raise and educate."—*Noe vs. Kern*, 93 Mo. 367, 6 S. W. Rep. 233.

193. Instrument showing intention of parties that property should be held or dealt with for benefit of another.—In re Estate Reith, 144 Cal. 314, 318, 77 Pac. Rep. 942; *Colton vs. Colton*, 127 U. S. 300, bk. 32 L. ed. 138, 8 Sup. Ct. Rep. 1164.

194. Letter of trustor informing cestui que trust of what he had done, and what he could do, and where he could find things.—*Booth vs. Oakland Bank of Sav.*, 122 Cal. 19, 25, 54 Pac. Rep. 370.

As to letters admitted to prove trust, see para. 146, 147 this note.

As to letters not sufficient to create, see para. 211 this note.

195. Words of authority given to trustees to provide for nephews and nieces in case of want, the discretion vested only applying to time when amounts were to be paid.—*Ingraham vs. Ingraham*, 169 Ill. 432, 48 N. E. Rep. 561, 573. See *Conn. Bronson vs. Strouse*, 57 Conn. 147, 17 Atl. Rep. 699. *Ill. Hunt vs. Fowler*, 121 Ill. 269, 12 N. E. Rep. 331, 17 Id. 491. *W. Va. Johnson vs. Billups*, 23 W. Va. 685. *Fed. Colton vs. Colton*, 127 U. S. 300, bk. 32 L. ed. 138, 8 Sup. Ct. Rep. 1164.

196. NOT CREATED BY DEVISE OF ABSOLUTE ESTATE WITH PRECATORY WORDS, unless it appears that such words were intended to be imperative.—In re Estate

Byers, 186 Pa. St. 404, 40 Atl. Rep. 524; *Toms vs. Owen*, 52 Fed. Rep. 417.

197. Belief in devise to wife of residue of property "that she will manage it judiciously and perfectly satisfied that she will make fair distribution of it among our children at her death."—*Cheston vs. Cheston*, 89 Md. 465, 43 Atl. Rep. 768.

198. Clause in absolute devise to wife during natural life "any remainder at her decease to be disposed of by her as she may think just and right among my children."—*Boyle vs. Boyle*, 152 Pa. St. 108, 113, 34 Am. St. Rep. 629, 25 Atl. Rep. 494.

199. Condition in devise to wife that personal estate remaining at her death is to be divided among children.—*McKenzie's Appeal*, 41 Conn. 607, 19 Am. Rep. 525.

200. Confidence in absolute devise to wife that she will deal fairly, justly, and equitably with children as mere material application alone is raised, and no interest created in property in favor of children or burden imposed upon absolute estate given to wife.—*Orth vs. Orth*, 145 Ind. 184, 195, 42 N. E. Rep. 277, 57 Am. St. Rep. 185, 32 L. R. A. 293.

201. Confidence expressed that wife will manage with good discretion and fidelity and that when she shall no longer need property it will be equally divided among children or other representatives.—*Aldrich vs. Aldrich*, 172 Mass. 101, 51 N. E. Rep. 449.

202. Desire attached to devise to wife, "sole executrix, with full power over estate vested in her absolutely, that she should leave certain portion of it to his relatives after her death."—*Estate of Marti*, 132 Cal. 666, 671, 61 Pac. Rep. 964, 64 Id. 1071.

203. Desire attached to devise to wife of real and personal property, that at her death residue shall be divided among sons.—*Bills vs. Bills*, 80 Iowa 269, 20 Am. St. Rep. 413, 45 N. W. Rep. 748, 3 L. R. A. 696.

204. Desire in absolute devise to wife that she should not dispose of estate by will in such way that what would remain at her death should go out of family and blood relation.—In re *Gardner*, 140 N. Y. 122, 35 N. E. Rep. 439.

205. Desire and request in devise to wife of all real and personal estate to give certain amount to party named, but provision in favor of such party in no way to interfere with wife's enjoyment, and property to be hers, to dispose of as she sees proper, and gift only to be made if there is more than will be necessary for her wants and needs.—*Clark vs. Hill*, 98 Tenn. 300, 39 S. W. Rep. 339.

206. Distinguishing, *Anderson vs. McCullough*, 3 Head (Tenn.) 614, wherein property was given to wife for life with directions to distribute, matter of distribution being left to her discretion. See *Bradley vs. Carnes*, 94 Tenn. 27, 27 S. W. Rep. 1007.

207. Desire and request in gift absolute to husband that he should convey portion of it for lodge and burial purposes does not create trust.—*Kauffman vs. Gries*, 141 Cal. 295, 300, 74 Pac. Rep. 846.

208. Discretionary power given in will or

other instrument showing no imperative duty or intention to create more than discretion.—In *re Estate Whitcomb*, 86 Cal. 265, 273, 24 Pac. Rep. 1028; In *re Estate Marti*, 132 Cal. 666, 669, 61 Pac. Rep. 964, 64 Id. 1071; In *re Estate Reith*, 144 Cal. 814, 318, 77 Pac. Rep. 942.

209. Enjoinment and direction, in devise to wife to make and publish her last will and testament that after her decease all rest and residue not consumed, used, and sold by her should be divided.—*Good vs. Fichthorn*, 144 Pa. St. 237, 22 Atl. Rep. 1032. See *Merkel's Appeal*, 109 Pa. St. 235; *Hopkins vs. Glunt*, 111 Pa. St. 287, 2 Atl. Rep. 183; *Cox vs. Sims*, 125 Pa. St. 522, 17 Atl. Rep. 456.

210. Evidence showing transfer of property was meant to be absolute sale and is not in any way contradicted.—*Sloan vs. Woodward*, 25 Oreg. 223, 35 Pac. Rep. 450.

211. Letter written by husband to wife, "I should like very much and hope you will, as soon as you find you can safely do it, make deed to my granddaughter," where testator makes an absolute devise by will to wife.—*Orth vs. Orth*, 145 Ind. 184, 195, 42 N. E. Rep. 277, 57 Am. St. Rep. 185, 32 L. R. A. 298.

As to letters admitted to prove trust, see para. 146, 147 this note.

As to letters sufficient to create precatory trust, see par. 194 this note.

212. Opinions and understanding in devise to wife, "she will not have power to sell but may leave same to her children," word "may" not being imperative.—*McIntyre vs. McIntyre*, 123 Pa. St. 323, 16 Atl. Rep. 783.

213. Parol promise made by wife to deceased husband or to parties mentioned in letter written by husband and addressed to her requesting her to make deed to granddaughter.—*Orth vs. Orth*, 145 Ind. 184, 195, 42 N. E. Rep. 277, 57 Am. St. Rep. 185, 32 L. R. A. 298.

As to parol trust in land, see para. 100-112 this note.

214. Provision in devise to son that "property he dies possessed of I will," etc.—*Jackson vs. Bull*, 10 John. (N. Y.) 19, 20.

215. Recommendation to leave portion of property contained in devise to nephew to certain persons if alive, or if not, to Harvard College.—In *re Estate Whitcomb*, 86 Cal. 265, 271, 274, 24 Pac. Rep. 1028.

216. Request in absolute devise to wife of real and personal estate that if at time of her decease any of personal property should remain undisposed of it should be given to children of son and daughter.—*Fullenwider vs. Watson*, 113 Ind. 18, 14 N. E. Rep. 571.

217. Request in devise to wife "in her own right in fee simple" with request "and only as request, for I feel that her own kind heart and good judgment will prompt her to do so without, viz., that in event she should marry again she will see that interests of our children in such property are protected."—*Sale vs. Thornberry*, 86 Ky. 266, 5 S. W. Rep. 468.

218. Distinguishing *Bohon vs. Barrett*, 79 Ky. 378, in which case, although devise was

absolute, and request made not as condition upon which devisee was to take estate, the whole instrument showed that devisee was to be paid in discretion of trustee, and although it was insisted that devise was made absolute and unconditional, testator, in first clause of will, directed executor, who claimed to be sole devisee, to consult with certain persons as to sale of estate, and to hand over legacy upon certain conditions being complied with, although this was left to trustee's discretion, trustee "being fully advised of my wishes concerning said [daughter] and also concerning said sum."

The case of *Bohon vs. Barrett*, supra, was cited and relied upon by court in *Noe vs. Kern*, 93 Mo. 367, 6 S. W. Rep. 239, as supporting doctrine that where devise is absolute recommendation or wish or desire will be held a trust if, upon whole, words are so used as to be construed imperative, and subject and object are certain.

219. Request in absolute devise to wife that at her death "she will so divide what she may have among our daughters" . . . children, share and share alike.—*Hopkins vs. Glunt*, 111 Pa. St. 287, 2 Atl. Rep. 183.

220. Where power to follow out testator's desire or wish is merely discretionary.—*Toms vs. Owen*, 52 Fed. Rep. 417.

221. Where previous expressions are nullified and repugnancy created by such construction.—*Clay vs. Wood*, 153 N. Y. 134, 47 N. E. Rep. 274, 276.

222. Where subsequent words do no more than show that maintenance of children was real question in testator's mind.—*Seamonds vs. Hodge*, 36 W. Va. 304, 32 Am. St. Rep. 854, 15 S. E. Rep. 156.

223. A LIMITATION IN A SUBSEQUENT CLAUSE.—Absolute estate conveyed in one clause of will cannot be cut down or limited by subsequent words in order to create trust except such as indicate as clear intention as would words used in creating estate.—In *re Estate Whitcomb*, 86 Cal. 265, 271, 274, 24 Pac. Rep. 1028; In *re Estate Marti*, 132 Cal. 666, 672, 61 Pac. Rep. 964, 64 Id. 1071; *Kauffman vs. Gries*, 141 Cal. 295, 299, 74 Pac. Rep. 846; *Estate of Granniss*, 143 Cal. 1, 6, 75 Pac. Rep. 324.

224. Absolute and unlimited devise or bequest of property will not be defeated or estate or interest in property limited by subsequent clause expressing wish, desire, or direction for its disposition after death of devisee or legatee.—*Bills vs. Bills*, 80 Iowa 269, 20 Am. St. Rep. 418, 45 N. W. Rep. 748, 3 L. R. A. 696. See *Conn. McKenzie's Appeal*, 41 Conn. 607, 19 Am. Rep. 525. *Ind. Fullenwider vs. Watson*, 113 Ind. 18, 14 N. E. Rep. 571. *Iowa. Williams vs. Allison*, 33 Iowa 278; *Benkert vs. Jacoby*, 36 Iowa 273; *Rona vs. Meier*, 47 Iowa 607, 29 Am. Rep. 493; *Alden vs. Johnson*, 63 Iowa 124, 18 N. W. Rep. 696; In *re Estate of Burbank*, 69 Iowa 378, 28 N. W. Rep. 648. *Me. Ramsdell vs. Ramsdell*, 21 Me. 288; *Jones vs. Bacon*, 68 Me. 34, 28 Am. Rep. 1; *Mitchell vs. Morse*, 77 Me. 423, 52 Am. Rep. 781. *Md. Williams vs. Worthington*, 49 Md. 572, 33 Am. Rep. 286. *Mass. Harris vs. Knapp*, 88 Mass. (21 Pick.) 412; *Fiske vs. Cobb*, 73 Mass. (6

Gray) 144; *Lynde vs. Estabrook*, 89 Mass. (7 Allen) 68; *Gifford vs. Choate*, 100 Mass. 343; *Hess vs. Singler*, 114 Mass. 56, 59. N. J. *Hoxsey vs. Hoxsey*, 37 N. J. Eq. (10 Stew.) 21, 22. N. Y. *Jackson vs. Bull*, 10 John. 19, 20; *Foose vs. Whitmore*, 82 N. Y. 405, 37 Am. Rep. 572; *Clarke vs. Leupp*, 88 N. Y. 228; *Campbell vs. Beaumont*, 91 N. Y. 465; *Freeman vs. Coit*, 96 N. Y. 63; In re *Estate Gardner*, 140 N. Y. 122, 35 N. E. Rep. 439; *Clay vs. Wood*, 153 N. Y. 134, 47 N. E. Rep. 274. Ohio. *Anderson vs. Cary*, 36 Ohio St. 506, 38 Am. Rep. 602. Pa. *Seibert vs. Wise*, 70 Pa. St. 147. S. C. *Moore vs. Sanders*, 15 S. C. 440, 40 Am. Rep. 703; *Canedy vs. Jones*, 19 S. C. 297, 45 Am. Rep. 777.

225. Absolute devise or bequest must stand and other clause must be regarded as presenting precatory language.—*Bills vs. Bills*, 80 Iowa 269, 20 Am. St. Rep. 418, 45 N. W. Rep. 748, 8 L. R. A. 696.

226. Trust will not be lightly imposed upon mere words of recommendation and confidence where there is absolute gift of property without restriction.—Mass. *Warner vs. Bates*, 98 Mass. 274, 277; *Spooner vs. Lovejoy*, 108 Mass. 529, 534. N. J. *Van Duyne vs. Van Duyne*, 14 N. J. Eq. (1 McC.) 397, 401. Pa. *Estate of Pennoek*, 20 Pa. St. 268, 59 Am. Dec. 718. Eng. *Knight vs. Knight*, 3 Beav. 148, 172, 43 Eng. Ch. 147, sub nom. *Knight vs. Boughton*, 11 Cl. & Fin. 513; *Lambe vs. Eames*, L. R. 10 Eq. 267, 6 Ch. Ap. 597.

227. Words merely raising doubt or suggesting an inference will not affect estate absolutely conveyed, and any doubt which may be suggested by such subsequent words must be resolved in favor of estate first conveyed.—*Estate of Granniss*, 142 Cal. 1, 6, 75 Pac. Rep. 324.

228. Words merely expressive of desire, recommendation, and confidence not sufficient to convert absolute devise or bequest into trust.—*Estate of Pennoek*, 20 Pa. St. 268, 59 Am. Dec. 718; *Hopkins vs. Glunt*, 111 Pa. St. 287, 2 Atl. Rep. 183.

229. Whether the precatory words in will shall be accorded such force as to deprive donee of absolute right of disposal, and thereby qualify beneficial interest in gift, must be determined in connection with what may be gathered from rest of will as intention which would be reconcilable with idea of trust imposed upon legal estate.—*Clay vs. Wood*, 153 N. Y. 134, 47 N. E. Rep. 274, 276.

230. WORDS—All expressions in will indicative of testator's wish or will are commands.—In re *Estate of Byers*, 186 Pa. St. 404, 40 Atl. Rep. 524.

As to language or words necessary to create an express trust, see pars. 50-55 this note.

231. "Desire" does not import trust in the ordinary use of English language.—*Estate of Marti*, 132 Cal. 666, 669, 671, 61 Pac. Rep. 964, 64 Id. 1071; *Kauffman vs. Gries*, 141 Cal. 295, 300, 74 Pac. Rep. 846. Iowa. *Bills vs. Bills*, 80 Iowa 269, 20 Am. St. Rep. 418, 45 N. W. Rep. 748, 8 L. R. A. 696. Mass. *Hess vs. Singler*, 114 Mass. 56, 59. N. C. *Batchelor vs. Macon*, 69 N. C. 546. Pa. *Pennoek's Estate*, 20 Pa. St. 268, 59 Am. Dec. 718; *Hopkins vs. Glunt*,

111 Pa. St. 287, 2 Atl. Rep. 183; In re *Estate of Bellas*, 176 Pa. St. 122, 34 Atl. Rep. 1003. Eng. *Shaw vs. Lawless*, 5 Cl. & Fin. 129; In re *Hutchinson & Tenant*, L. R. 8 Ch. Div. 540; In re *Adams & K. Vestry*, L. R. 27 Ch. Div. 394, 410.

232. Words "desire" and "request" no not import trust or charge.—*Estate of Marti*, 132 Cal. 666, 671, 61 Pac. Rep. 964, 64 Id. 1071; *Kauffman vs. Gries*, 141 Cal. 295, 299, 74 Pac. Rep. 846.

233. Words "desire" and "request" should be understood in their usual sense to be found in those portions of will which contain apt language to create trust enforceable in courts.—*Kauffman vs. Gries*, 141 Cal. 295, 300, 74 Pac. Rep. 846; *Williams vs. Williams*, L. R. 2 Ch. Div. 12.

234. Entreaty, recommendation, or wish addressed to devisee or legatee will not create trust wherever clear discretion or choice to act or not to act is given and where prior disposition of property imports absolute and uncontrollable ownership.—*Maught vs. Getzendanner*, 65 Md. 527, 528, 57 Am. Rep. 352, 5 Atl. Rep. 471; *McClernan vs. McClernan*, 73 Md. 283, 284, 20 Atl. Rep. 908; *Nunn vs. O'Brien*, 83 Md. 198, 34 Atl. Rep. 244.

235. Entreaty, recommendation, or wish addressed by testator to devisee or legatee will make him trustee for person or persons in whose favor such expressions are used, provided testator has pointed out with clearness and certainty objects of trust and subject-matter on which it is to attach and from which it is to arise and be demonstrated.—*Maught vs. Getzendanner*, 65 Md. 527, 528, 57 Am. Rep. 352, 5 Atl. Rep. 471; *McClernan vs. McClernan*, 73 Md. 283, 284, 20 Atl. Rep. 908; *Nunn vs. O'Brien*, 83 Md. 198, 34 Atl. Rep. 244.

236. Expressions of desire or wish as to specific disposition standing by themselves alone may constitute valid devise or bequest.—*Hopkins vs. Glunt*, 111 Pa. St. 287, 2 Atl. Rep. 183.

237. Precatory words used in will equally with direct fiduciary expressions are frequently sufficient to create trust by application.—*Jones vs. Jones*, 124 Ill. 254, 15 N. E. Rep. 751.

238. Recommendation, request, entreaty, wish, or expectation addressed to legatee or devisee will make him trustee for person or persons in whose favor testator has pointed out with sufficient clearness and certainty both subject-matter and objects of intended trust.—*Schmucker's Estate vs. Reel*, 61 Mo. 592, 596; *Noe vs. Kern*, 93 Mo. 367, 3 Am. St. Rep. 544, 6 S. W. Rep. 239.

239. Recommendation, confidence, entreaty, hope, or desire have been held sufficient where such construction was supposed to carry out intention of testator.—*Aldrich vs. Aldrich*, 172 Mass. 101, 51 N. E. Rep. 449.

240. "Request" does not necessarily import an option to refuse and exclude idea of obedience as corresponding duty.—*Colton vs. Colton*, 127 U. S. 300, 310, bk. 32 L. ed. 138, 3 Sup. Ct. Rep. 1164. See *Shields vs. McAuley*, 37 Fed. Rep. 302, 303.

241. "Request" in will may imply a duty.—*Hutton vs. Hutton*, 41 N. J. Eq. (14 Stew.) 267.

§ Atl. Rep. 332; In re Estate Byers, 136 Pa. St. 404, 40 Atl. Rep. 524.

242. "Request" according to its context and manifest use will often raise expression of desire or wish equivalent to positive direction, where that is evident meaning and purpose of testator.—Shields vs. McAuley, 37 Fed. Rep. 302, 303; Colton vs. Colton, 127 U. S. 314, 319, bk. 32 L. ed. 138, 8 Sup. Ct. Rep. 1164.

243. Request or expression of hope or confidence or expectation does not prima facie import command.—Estate of Marti, 132 Cal. 666, 669, 671, 61 Pac. Rep. 964, 64 Id. 1071.

244. Words "upon trust" or "trustee" not necessary if creation of trust is otherwise sufficiently evident.—Estate of Reith, 144 Cal. 314, 318, 77 Pac. Rep. 942; Colton vs. Colton, 127 U. S. 300, bk. 32 L. ed. 138, 8 Sup. Ct. Rep. 1164. See Tobias vs. Ketchum, 32 N. Y. 319.

VIII. SAME—2. CONSTRUCTION OF.

245. CONSTRUED TO CREATE OR NOT CREATE A TRUST, according as words are used.—Estate of Marti, 132 Cal. 666, 669, 61 Pac. Rep. 964, 64 Id. 1071.

246. All the words which are used must be considered so as to arrive at their true effect and intention of testator as expressed in his will in order to create trust by use of mere precatory words.—Estate of Marti, 132 Cal. 666, 670, 61 Pac. Rep. 964, 64 Id. 1071. *Mass.* Hess vs. Singler, 114 Mass. 56, 59. *N. Y.* Foote vs. Whitmore, 82 N. Y. 405, 37 Am. Rep. 572. *Eng.* In re Diggles, Gregory vs. Edmondson, L. R. 39 Ch. Div. 253; In re Adams & K. Vestry, L. R. 27 Ch. Div. 394; *Mussorie Bank vs. Raynor*, L. R. 7 App. Cas. 321.

247. Each case must depend upon its own circumstances and in some degrees upon sentiments and prepossessions of individual judges in determining whether precatory words create a trust.—Estate of Marti, 132 Cal. 666, 669, 61 Pac. Rep. 964, 64 Id. 1071.

248. Each case must depend upon construction of particular will under consideration.—Noe vs. Kern, 93 Mo. 367, 3 Am. St. Rep. 544, 6 S. W. Rep. 239.

249. Ordinary and natural import of words used will be followed unless clear intention to use them in another sense can be collected and that other can be ascertained.—Estate of Marti, 132 Cal. 666, 669, 61 Pac. Rep. 964, 64 Id. 1071; Kauffman vs. Gries, 141 Cal. 295, 299, 74 Pac. Rep. 846. *Mass.* Hess vs. Singler, 114 Mass. 56, 59. *Pa.* Estate of Pennock, 30 Pa. St. 268, 59 Am. Dec. 718. *Eng.* Shaw vs. Lawless, 5 Cl. & Fin. 129; Williams vs. Williams, L. R. 2 Ch. Div. 12.

250. Question for determination is whether devisee or legatee is beneficiary or merely trustee for others in considering whether precatory words create a trust.—Estate of Marti, 132 Cal. 666, 669, 61 Pac. Rep. 964, 64 Id. 1071.

251. Question whether precatory words create trust must be determined by question whether wish or desire or recommendation expressed by testator is meant to govern conduct of party to whom addressed, or whether it is merely an indication of what he thinks

would be reasonable exercise of discretion of that party, leaving it to party to exercise his own discretion.—Estate of Marti, 132 Cal. 666, 669, 61 Pac. Rep. 964, 64 Id. 1071; Williams vs. Williams, 1 Sim. N. S. 358.

252. So as to invest in devisee or legatee fee-simple title of land and absolute property in subject of bequest.—Bills vs. Bills, 80 Iowa 269, 20 Am. St. Rep. 418, 45 N. W. Rep. 748, 3 L. R. A. 696.

253. With reference to imperative nature of the expressions used, and whether they are to prevail in any particular case, is question of construction upon whole will.—Williams vs. Worthington, 49 Md. 572, 33 Am. Rep. 286. See Chase vs. Plumer, 17 Md. 165.

254. With reference to intention of testator, which is polar star that guides construction of wills.—Spooner vs. Lovejoy, 103 Mass. 529, 533; Smith vs. Bell, 31 U. S. (6 Pet.) 68, 75, 84, bk. 3 L. ed. 322.

As to intention in the creation of trusts, see para. 39-46 this note.

255. With reference to intention as ascertained from all words of will, taking into view when necessary or appropriate circumstances under which it was made.—Estate of Marti, 132 Cal. 666, 670, 61 Pac. Rep. 964, 64 Id. 1071; Kauffman vs. Gries, 141 Cal. 295, 299, 74 Pac. Rep. 846; Riker vs. Leo, 133 N. Y. 519, 523, 30 N. E. Rep. 598, 599.

256. With reference to intention as ascertained by taking all the words in their ordinary and natural signification, unless upon consideration of whole will it appears that different meaning was intended.—Eberhardt vs. Perolin, 48 N. J. Eq. (3 Stew.) 592, 597, 23 Atl. Rep. 507.

257. With reference to intention as ascertained from general purposes and scope of instrument.—Estate of Reith, 144 Cal. 314, 318, 77 Pac. Rep. 942; Colton vs. Colton, 127 U. S. 300, bk. 32 L. ed. 138, 8 Sup. Ct. Rep. 1164.

258. With reference to intention of testator derived from terms of will and its particular provisions.—Williams vs. Worthington, 49 Md. 572, 33 Am. Rep. 286.

259. With reference to surrounding circumstances which ought to be taken into consideration in looking into such intention.—Noe vs. Kern, 93 Mo. 367, 6 S. W. Rep. 239, 3 Am. St. Rep. 544.

As to intention to create, see para. 172-181 this note.

260. Words used for purpose of creating trust dependent upon construction to be given to instrument.—In re Estate Marti, 132 Cal. 666, 669, 61 Pac. Rep. 964, 64 Id. 1071.

261. Word "trust" not being used, is circumstance to be alluded to, but nothing more.—Estate of Reith, 144 Cal. 314, 318, 77 Pac. Rep. 942; Colton vs. Colton, 127 U. S. 300, bk. 32 L. ed. 138, 8 Sup. Ct. Rep. 1164.

262. Same—Precatory words not construed as creating trust where object of property is not certain, or definite or clear discretion and choice to act is given, or whenever prior dispositions impart uncontrollable ownership.—

Clark vs. Hill, 38 Tenn. 300, 39 S. W. Rep. 339.

262. Same—Not as imperative, unless it is plain from context that testator so intended.—Estate of Marti, 132 Cal. 666, 669, 61 Pac. Rep. 964, 64 Id. 1071.

IX. TRUSTS BY OPERATION OF LAW— 1. IN GENERAL.

As to the creation of resulting trusts, see note 2 L. R. A. 146.

As to trusts implied to effectuate the purpose of a contract when its terms cannot be given effect to, see note by C. W. Phillips, 58 L. R. A. 115.

As to when constructive trusts arise, see note by Robert Desty, 5 L. R. A. 189.

As to trust in deposit in insolvent bank, see monographic note by H. P. Farnham, 34 L. R. A. 532-537.

As to when real estate will be considered partnership property and as to when resulting and implied trusts are created in the purchase of such property, see monographic note by Ernest Watts, 27 L. R. A. 449-497.

As to effect of depositing money in bank in trust for third person, see monographic note by H. P. Farnham, 32 L. R. A. 373-375, and notes 33 L. R. A. 700; 39 L. R. A. 800; 44 L. R. A. 205.

As to resulting trusts in favor of purchaser or person paying purchase money, see post § 1953 and note.

As to resulting trusts arising from fraud, undue influence, etc., see post § 2224 and note.

264. "AGREED TRUSTS come under the head of express trusts and must be created by writing."—Los Angeles & Bakersfield Oil & Development Co. vs. Occidental Oil Co., 144 Cal. 528, 534, 78 Pac. Rep. 25, 28.

265. Contra: Pars. 278, 279 post.

266. CODE REQUIRING TRUST TO BE IN WRITING does not apply to trust created by operation of law.—Kimball vs. Tripp, 136 Cal. 631, 634, 69 Pac. Rep. 428. See Wittenbrook vs. Cass, 110 Cal. 1, 5, 42 Pac. Rep. 800.

267. STATUTE OF FRAUDS HAS NO APPLICATION to the creation of trusts arising from operation of law or implied or constructive trusts, and such trusts are not required to be in writing.—Millard vs. Hathaway, 27 Cal. 119, 139; Walton vs. Karnes, 67 Cal. 255, 7 Pac. Rep. 676; Brison vs. Brison, 75 Cal. 525, 530, 7 Am. St. Rep. 189, 17 Pac. Rep. 689; Brison vs. Brison, 90 Cal. 323, 336, 27 Pac. Rep. 186; Hayne vs. Hermann, 97 Cal. 259, 32 Pac. Rep. 171; Woodside vs. Hewel, 109 Cal. 481, 485, 42 Pac. Rep. 152; Sayward vs. Houghton, 119 Cal. 545, 550, 51 Pac. Rep. 553. Ala. Barrell vs. Henrick, 42 Ala. 71, 72. Kan. Rose vs. Hayden, 35 Kan. 106, 57 Am. Rep. 145, 10 Pac. Rep. 554; Barlow vs. Barlow, 47 Kan. 676, 28 Pac. Rep. 607; Rayl vs. Rayl, 58 Kan. 585, 50 Pac. Rep. 501. Pa. Hoge vs. Hoge, 1 Watts 163, 26 Am. Dec. 52. Utah. Chambers vs. Emery, 13 Utah 374, 45 Pac. Rep. 192.

268. TRUST BY OPERATION OF LAW CANNOT EXIST where there is an express trust declared by the parties, evidenced by written declaration of such express trust.—

Tripp vs. Duane, 74 Cal. 85, 91, 15 Pac. Rep. 439; Leggett vs. Dubois, 5 Paige Ch. (N. Y.) 114, 28 Am. Dec. 413.

As to declarations of trust, see post § 2253 and note.

269. Carry no implication of actual intention to create trust.—Kayser vs. Maugham, 8 Colo. 232, 6 Pac. Rep. 803.

270. Mere creatures of equity as resulting use is of law.—Baylies vs. Baxter, 22 Cal. 575, 580; Tripp vs. Duane, 74 Cal. 85, 91, 15 Pac. Rep. 349; Leggett vs. Dubois, 5 Paige Ch. (N. Y.) 114, 117, 28 Am. Dec. 413.

271. EXECUTION OF TRUST WHICH THE LAW IMPLIES cast upon person holding confidential relation and thereby obtaining advantage.—Hayne vs. Hermann, 97 Cal. 259, 32 Pac. Rep. 171.

272. Expressly excepted from requirement that a trust can only be created by instrument in writing.—Brison vs. Brison, 90 Cal. 323, 336, 27 Pac. Rep. 186; Hayne vs. Hermann, 97 Cal. 259, 32 Pac. Rep. 171.

273. Founded upon mere implication or operation of law by reason of transactions of parties.—Russ vs. Mebius, 16 Cal. 350, 356; McCue vs. Gallagher, 23 Cal. 51, 53; Thomas vs. Jameson, 77 Cal. 91, 19 Pac. Rep. 177; Kayser vs. Maugham, 8 Colo. 232, 6 Pac. Rep. 803.

274. Founded upon natural equity, springing into life from fraudulent or inequitable advantages obtained by means of agreements express or implied accompanying acts of parties.—Kayser vs. Maugham, 8 Colo. 232, 6 Pac. Rep. 803.

As to trusts arising from fraud, etc., see post § 2224 and note.

275. Notice of knowledge of circumstances which would create trust is necessary to charge resulting trust.—Stratton vs. California L. & T. Co., 86 Cal. 353, 359, 24 Pac. Rep. 1065.

276. PAROL AGREEMENT TO DO WHAT LAW COMPELS one to do makes trust none less one created by operation of law.—Baylies vs. Baxter, 22 Cal. 575, 578.

277. Result from acts and not from agreement of parties, or rather from acts accompanied by agreements.—Hidden vs. Jordan, 21 Cal. 93, 100; Millard vs. Hathaway, 27 Cal. 119, 139; Lundy vs. Hanson, 16 Colo. 267, 26 Pac. Rep. 816; Warren vs. Adams, 19 Colo. 515, 36 Pac. Rep. 604. Ill. Reynolds vs. Sumner, 126 Ill. 53, 9 Am. St. Rep. 523, 19 N. E. Rep. 334, 1 L. R. A. 327. N. Y. Boyd vs. McLean, 1 John. Ch. 582.

See ante par. 268 this note.

278. Result or grow out of facts existing at time of conveyance, and cannot grow out of mere parol agreement that purchase shall be for benefit of another.—Roberts vs. Ware, 40 Cal. 634, 637; Hunt vs. Friedman, 63 Cal. 510, 513; Steere vs. Steere, 5 John. Ch. (N. Y.) 1, 9 Am. Dec. 256.

See ante par. 268 this note.

279. Result from original transaction at time it takes place and at no other time.—Woodside vs. Hewel, 109 Cal. 481, 485, 42 Pac.

Rep. 153; Botsford vs. Burr, 2 John. Ch. (N. Y.) 405.

See par. 245 this note.

X. SAME—2. CONSTRUCTIVE TRUSTS.

220. CONSTRUCTIVE TRUSTS ARE THOSE TRUST upon party contrary to his intention or contemplation of parties in making contract or performing acts by which they are construed.—*Kayser vs. Maugham*, 8 Colo. 232, 6 Pac. Rep. 803; *Kroll vs. Coach* (Oreg.), 78 Pac. Rep. 397, 400.

221. DISTINCTION BETWEEN CONSTRUCTIVE AND EXPRESS, IMPLIED, OR RESULTING TRUSTS is that former do not rest upon intention expressed by contract of parties or reasonably implied or presumed, as legal makeshift to do justice from such contracts, coupled with relations and acts of parties; for essence seems to be fraud, deceit, or bad faith.—*Kayser vs. Maugham*, 8 Colo. 232, 6 Pac. Rep. 803.

As to trusts created by fraud, etc., see post § 2224 and note.

222. Differ from other trusts in that they are not within intention or contemplation of parties at time contract was made from which they are construed by court.—*Kroll vs. Coach* (Oreg.), 78 Pac. Rep. 397, 400.

223. CONSTRUCTIVE TRUSTS ARISE or are created by operation of law.—*Wittenbrock vs. Cass*, 110 Cal. 1, 5, 42 Pac. Rep. 300.

224. Arise by operation of law upon transaction of parties.—*Kayser vs. Maugham*, 8 Colo. 232, 6 Pac. Rep. 803.

225. Arise by parol promise made without any intention of performing it.—*Brison vs. Brison*, 75 Cal. 525, 529, 7 Am. St. Rep. 189, 17 Pac. Rep. 689.

226. Arise from presumed intention of parties indicated by their acts, although not expressly declared, and those arising from application of some settled principle of equity to situation.—*Bowler vs. Curlier*, 21 Nev. 158, 37 Am. St. Rep. 501, 26 Pac. Rep. 226.

227. From principles of equity which raise constructive trust whereby party taking property cannot be permitted to enjoy it without violating some principle of equity, and as applicable to cases where there are fiduciary relations between parties.—*Brison vs. Brison*, 75 Cal. 525, 529, 7 Am. St. Rep. 189, 17 Pac. Rep. 689; *Feeney vs. Howard*, 79 Cal. 525, 12 Am. St. Rep. 162, 21 Pac. Rep. 984, 4 L. R. A. 826; *Alaniz vs. Casenave*, 91 Cal. 41, 46, 27 Pac. Rep. 521; *Kimball vs. Tripp*, 136 Cal. 631, 634, 69 Pac. Rep. 428.

228. When the acquisition of legal estate is tainted with fraud either actual or constructive.—*Springer vs. Young*, 14 Oreg. 280, 12 Pac. Rep. 400.

As to trusts arising from fraud, etc., see post § 2224 and note.

229. When circumstances of transaction are such that person taking title to property cannot be permitted to enjoy it in whole or in part without violating some principle of equity.—*Mandeville vs. Solomon*, 38 Cal. 33, 43; *Kimball vs. Tripp*, 136 Cal. 631, 634, 69 Pac. Rep. 428.

229. Whenever equitable steps are necessary to obtain justice, even though there may be remedy at law.—*Kroll vs. Coach* (Oreg.), 78 Pac. Rep. 397, 400.

221. When fiduciary relation exists between parties under general doctrine of equity.—*Brison vs. Brison*, 75 Cal. 525, 529, 7 Am. St. Rep. 189, 17 Pac. Rep. 689.

222. Same—When fraud exists in statement of consideration to be paid for property, and party is thereby induced to join with others in purchase of such property.—*Kroll vs. Coach* (Oreg.), 78 Pac. Rep. 397, 399.

As to trusts created by fraud, etc., see post § 2224 and note.

223. When legal title to property is obtained from actual fraud, misrepresentation, concealments, or similar means which make it unconscionable to holder to enjoy beneficial interest.—*Kroll vs. Coach* (Oreg.), 78 Pac. Rep. 397, 400. See *Bowler vs. Curlier*, 21 Nev. 158, 37 Am. St. Rep. 501, 26 Pac. Rep. 226.

224. When parol promise to reconvey is means used to obtain absolute deed without consideration from one to whom grantee stands in fiduciary relation, even though at time of promise there was no intention not to perform.—*Feeney vs. Howard*, 79 Cal. 525, 529, 12 Am. St. Rep. 162, 21 Pac. Rep. 984, 4 L. R. A. 826; *Alaniz vs. Casenave*, 91 Cal. 41, 46, 27 Pac. Rep. 521.

225. When parties stand in confidential relation and one conveys property to another without consideration under agreement that it is to be held for grantor's benefit.—*Bowler vs. Curlier*, 21 Nev. 158, 37 Am. St. Rep. 501, 26 Pac. Rep. 226.

226. When trust depends upon some general equitable rule independently of existence of fraud.—*Springer vs. Young*, 14 Oreg. 280, 12 Pac. Rep. 400.

227. CONSTRUCTIVE TRUSTS EXIST AND ARE ENFORCEABLE IN EQUITY in order to prevent fraud.—*Bowler vs. Curlier*, 21 Nev. 158, 37 Am. St. Rep. 501, 26 Pac. Rep. 226.

228. Exist in equity for purpose of working out right and justice where there is no intention to create relationship between parties and they are often contradictory to one holding legal title.—*Springer vs. Young*, 14 Oreg. 280, 12 Pac. Rep. 400. See *Bowler vs. Curlier*, 21 Nev. 158, 37 Am. St. Rep. 501, 26 Pac. Rep. 226.

229. CONSTRUCTIVE TRUST IS NOT CREATED by oral agreement between mother and son to purchase and build property in her own name with her own money sufficient to accommodate her and her son's family, son to pay taxes, insurance, and repairs, and to furnish her with necessities for remainder of her natural life, in return for deed of premises as escrow until her death, will devising property to him.—*Wittenbrock vs. Cass*, 110 Cal. 1, 6, 42 Pac. Rep. 300.

300. By purchase by executrix of trustee or party occupying confidential relation holding title and managing mining interests and so becoming trustee for plaintiff where there was fair and open dealing, free from fraud

and for full value.—*Lake vs. Owens* (Cal. Jan. 25, 1905), 79 Pac. Rep. 589, 590.

As to trusts arising from government grants, mining claims, see pars. 366-386 this note.

301. TRUST DOES NOT ARISE UNDER QUITCLAIM DEED EXECUTED BY ONE WHO HAS NO INTEREST but his possession; e. g. gift by husband to wife where they both live upon property and husband enters under United States homestead laws and commutes entry, makes proof and payment and receives patent, and purchases in his own name.—*Brannock vs. Monroe*, 65 Cal. 491, 492, 4 Pac. Rep. 483.

302. CONSTRUCTIVE TRUST ARISES IN FAVOR OF EQUITABLE OWNER where party wrongfully obtains legal title to land which in equity and good conscience belongs to another, whether he acts in good faith or otherwise.—*Salmon vs. Symonds*, 30 Cal. 301, 307; *Wilson vs. Castro*, 31 Cal. 420, 436; *Bludworth vs. Lake*, 33 Cal. 255, 263. *Nev. South End Min. Co. vs. Tinney*, 22 Nev. 19, 35 Pac. Rep. 89. *Fed. Hardy vs. Harbin*, 4 Sawy. C. C. 536, 549, 11 Fed. Cas. 510; *Hunt vs. Patchin*, 13 Sawy. C. C. 304, 35 Fed. Rep. 316.

303. In favor of party entitled in equity to beneficial enjoyment.—*Mandeville vs. Solomon*, 33 Cal. 38, 43; *Kimball vs. Tripp*, 136 Cal. 631, 634, 69 Pac. Rep. 428.

304. As against party obtaining legal title by acts of fraud or by virtue of confidential relation and influence in cases where equity of such property in trust for another.—*Kroll vs. Coach* (Oreg.), 78 Pac. Rep. 397, 400.

As to trusts arising from fraud, etc., see post § 2224 and note.

XI. SAME—3. RESULTING TRUSTS.

305. RESULTING TRUST IS HERE CREATED BY EQUITY.—*Tripp vs. Duane*, 74 Cal. 85, 91, 15 Pac. Rep. 439; *Leggett vs. Dubois*, 5 Paige Ch. (N. Y.) 117, 78 Am. Dec. 413.

306. RESULTING TRUSTS SPRING FROM ORIGINAL TRANSACTION.—*Jackson vs. Moore*, 6 Cow. (N. Y.) 706; *Bowen vs. Hughes*, 5 Wash. 442, 32 Pac. Rep. 98; *Olcott vs. Bynum*, 34 U. S. (17 Wall.) 44, bk. 21 L. ed. 570.

307. RESULTING TRUST is inconsistent with express trust.—*Tripp vs. Duane*, 74 Cal. 85, 91, 15 Pac. Rep. 439; *Leggett vs. Dubois*, 5 Paige Ch. (N. Y.) 117, 78 Am. Dec. 413.

308. Result at time title vests to create resulting trust, and must be declared because at time of vesting of title cestui que trust had equitable interest in property.—*Bowen vs. Hughes*, 5 Wash. 442, 32 Pac. Rep. 98.

309. RESULTING TRUSTS ARISE BY REASON OF CONFIDENTIAL RELATION existing and reposed in one and accepted by another.—*Taylor vs. Kelly*, 103 Cal. 178, 182, 37 Pac. Rep. 216.

310. Confidential position whereby party is intrusted with property and takes title in his own name where such party on cross-examination admits that he acted in matter as agent.—*Hunt vs. Swiney*, Sharp Intervener (Cal. Aug. 16, 1893), 33 Pac. Rep. 854.

311. Confidential relation is not recognized by law in every case where parties trust

each other.—*Brison vs. Brison*, 75 Cal. 525, 528, 7 Am. St. Rep. 189, 17 Pac. Rep. 689; *Taylor vs. Kelly*, 103 Cal. 178, 182, 37 Pac. Rep. 216; *Doyle vs. Murphy*, 22 Ill. 502, 74 Am. Dec. 165; *Steele vs. Clark*, 77 Ill. 471, 474; *Weer vs. Gand*, 88 Ill. 490, 492, 494.

See par. 313 this note.

312. By contract or agreement between attorney and client whereby client agrees to grant the attorney certain interests in property in consideration of services.—*Hoffman vs. Vallejo*, 45 Cal. 564, 572; *Luco vs. De Toro*, 91 Cal. 405, 417, 27 Pac. Rep. 1082.

313. By betrayal of confidence independent of any element of actual fraud.—*Brison vs. Brison*, 75 Cal. 525, 529, 7 Am. St. Rep. 189, 17 Pac. Rep. 689.

See pars. 310, 311 this note.

314. Equitable construction independently of intention from dealings by trustees or quasi trustees with trust property.—*Bowler vs. Currier*, 21 Nev. 158, 37 Am. St. Rep. 501, 26 Pac. Rep. 226.

315. By parol promise to reconvey made in bad faith and with intent to deceive, whereby one obtains deed from another without consideration.—*Brison vs. Brison*, 75 Cal. 525, 527, 7 Am. St. Rep. 189, 17 Pac. Rep. 689; *Feeney vs. Howard*, 79 Cal. 525, 529, 12 Am. St. Rep. 162, 21 Pac. Rep. 984, 4 L. R. A. 826.

316. By parol promise to reconvey, made by one standing in confidential relation and obtaining deed without consideration, even where there is no averment of intent to deceive.—*Brison vs. Brison*, 75 Cal. 525, 528, 7 Am. St. Rep. 189, 17 Pac. Rep. 689.

317. From presumption that purchase intended for benefit of grantor, where conveyance was made without consideration, express or implied, or any distinct use or trust stated.—*Russ vs. Mebius*, 16 Cal. 350, 355.

318. On sheriff's sale under execution where party attends sale at another's request and purchases property and amount paid is credited on execution under agreement.—*Currey vs. Allen*, 34 Cal. 254, 257.

319. Where agent has funds placed in his hands for purchase of property or for purpose of trade and he invests them in his own name.—*Robles vs. Clarke*, 25 Cal. 317, 327.

320. When the circumstances are such that person who takes legal estate in property cannot also enjoy beneficial interest without violating some established principles of equity and fasten it upon conscience of legal owner so as to convert him into trustee of parties who are in equity entitled to beneficial enjoyment.—*Springer vs. Young*, 14 Oreg. 280, 12 Pac. Rep. 400.

321. When evidence shows confidential relation between parties; where one conveys property to another upon request with understanding that it shall be held for grantor, law implying an agreement to reconvey upon request.—*Butler vs. Hyland*, 89 Cal. 575, 26 Pac. Rep. 1108.

322. When executors, guardians, etc., charged with management of funds belonging to others, invest them in their own name for

objects not contemplated by will or instrument.—*Robles vs. Clarke*, 25 Cal. 317, 327.

As to right to use of trust property as his own, and mingling with his own, see post §§ 2229, 2236 and notes.

323. When express trust declared by parties and evidenced by written declaration.—*Tripp vs. Duane*, 74 Cal. 85, 91, 15 Pac. Rep. 439; *Leggett vs. Dubois*, 5 Paige Ch. (N. Y.) 114, 117, 28 Am. Dec. 413.

As to declarations of trust, see post § 2253 and note.

324. When legal estate is disposed of or acquired, not fraudulently or in violation of any fiduciary duty, but the intent, in theory of equity, appears or is inferred or assumed from accompanying facts and circumstances, that beneficial interest is not to go with legal title.—*Springer vs. Young*, 14 Oreg. 280, 12 Pac. Rep. 400.

325. When purchase is made with money of cestui que trust and deed is not taken in his name.—*Robles vs. Clarke*, 25 Cal. 317, 327; *Woodside vs. Hewel*, 109 Cal. 481, 485, 42 Pac. Rep. 152.

As to right to follow trust funds, see post §§ 2229, 2236 and notes.

326. When purchase is made by husband and wife with wife's money and title is taken under United States homestead laws and entry made in husband's name, wife furnishing all money, consideration and expenses, and making all improvements, real intention being that property is to be hers, husband agreeing to convey as soon as patent issues, wife furnishing home for him as long as he lives, where husband dies intestate shortly after final proof is made.—*Barlow vs. Barlow*, 47 Kan. 676, 28 Pac. Rep. 607.

327. When subscription funds received in answer to advertisements calling for same, as against proprietor of newspaper receiving same for purposes of private charity.—*Hallinan vs. Hearst*, 133 Cal. 645, 648, 66 Pac. Rep. 17, 55 L. R. A. 216.

328. When title is procured to trust estate by trustee or agent for his own advantage and against interest and without consent of cestui que trust.—*Wells vs. Francis*, 7 Colo. 396, 4 Pac. Rep. 49; *Ringo vs. Binns*, 35 U. S. (10 Pet.) 269, 280, bk. 9 L. ed. 420; *Bush vs. Marshall*, 47 U. S. (6 How.) 284, 291, bk. 12 L. ed. 440; *Thredgill vs. Pintard*, 53 U. S. (12 How.) 24, 38, bk. 13 L. ed. 877.

329. Where wife's property is intrusted husband for management and sold and converted into personality in another state, proceeds reinvested in state in which parties then reside, and conveyance is made in name of husband without wife's consent, although understanding was that conveyance should be made to party paying consideration.—*Howard vs. Howard*, 52 Kan. 469, 34 Pac. Rep. 1114.

330. RESULTING TRUST NOT CREATED BY AGREEMENT BY PAROL that another shall be interested in purchase.—*Taylor vs. Kelly*, 103 Cal. 178, 184, 37 Pac. Rep. 216; *Bland vs. Talley*, 50 Ark. 71.

As to parol trust in land, see pars. 100-112 this note.

331. Assignment of debts to attorney who is to bring suit in his own name and to pay costs out of proceeds collected.—*Robles vs. Clarke*, 25 Cal. 317, 327.

332. Consideration, though nominal, where no uses are declared in deed, will not raise resulting trust for use of grantor.—*Russ vs. Mebius*, 16 Cal. 350, 356.

333. Consideration in part consisting of funds traced out of land into hands of legatees in execution of trust with compound interest for same.—*In re Ricker's Estate*, 14 Mont. 153, 35 Pac. Rep. 960, 29 L. R. A. 622.

334. By deed absolute on its face and executed by both trustee and cestui que trust conveying both legal and equitable titles.—*Schultz vs. McLean* (Cal. Dec. 20, 1890), 25 Pac. Rep. 427.

335. Deed absolute on its face expressing consideration executed between partners closing out partnership affairs of embarrassed firm conveying property to one partner for purpose of raising money by mortgage to pay off firm debts where such partner borrows money.—*Burt vs. Wilson*, 28 Cal. 632, 636, 87 Am. Dec. 142.

See pars. 341, 342 this note.

336. By deed or instrument vesting title under deed absolute upon its face for which grantee pays money consideration executed and delivered by holder of legal title, who holds it as trustee and agent of plaintiff, and who, in executing it, acts pursuant to his trust and within scope of his authority, which deed is also executed by the owners of equitable estate.—*Schultz vs. McLean* (Cal. Dec. 20, 1890), 25 Pac. Rep. 427.

337. Deed by a father to son as same is presumed to be advancement.—*Beavers vs. McKinley*, 50 Kan. 602, 32 Pac. Rep. 363, 33 Id. 359.

See pars. 340, 341, 357 this note.

338. Promise to pay, standing alone, in absence of evidence showing that purchase money was furnished by party claiming trust.—*Motherwell vs. Taylor*, 2 Idaho 232, 10 Pac. Rep. 304.

As to trusts in favor of party advancing purchase money, see post § 853 and note.

339. Fr purchase by administratrix on her own credit by reason of subsequent misappropriation of trust funds.—*Bowen vs. Hughes*, 5 Wash. 442, 32 Pac. Rep. 98.

340. Purchase by parent in name of child in favor of parent or person paying purchase money as advancement presumed.—*Russ vs. Mebius*, 16 Cal. 350, 356; *Sidmouth vs. Sidmouth*, 2 Beav. 447.

See pars. 337, 357 this note.

341. By purchase by partner with partnership funds of real estate in absence of fraud and good faith.—*Kayser vs. Maugham*, 8 Colo. 339, 7 Pac. Rep. 286.

342. By purchase of property on determination of partnership existing for special purposes.—*Kayser vs. Maugham*, 8 Colo. 332, 6 Pac. Rep. 803.

See par. 335 this note.

343. Recitals in deed which are conclusive

upon grantor and raise no trust in his favor in opposition to express terms in absence of fraud or mistake.—*Russ vs. Meblus*, 16 Cal. 350, 357; *Leman vs. Whitley*, 4 Rus. 423.

As to trusts arising from fraud, etc., see post § 2224 and note.

344. Recital of consideration, as same cannot be contradicted for purpose of raising resulting trust.—*Russ vs. Meblus*, 16 Cal. 350, 356, 357; *Brisson vs. Brisson*, 75 Cal. 525, 532, 7 Am. St. Rep. 189, 17 Pac. Rep. 689.

345. By subsequent misappropriation of trust funds in purchase of property by trustee for his own use, as trust must arise at time title vests.—*Wash. Bowen vs. Hughes*, 5 Wash. 442, 32 Pac. Rep. 98. See *Me. Buck vs. Swazey*, 35 Me. 41, 56 Am. Dec. 681. *N. Y. Jackson vs. Moore*, 6 Cow. 706. *Fed. Olcott vs. Bynum*, 84 U. S. (17 Wall.) 44, bk. 21 L. ed. 570. See pars. 278, 279 this note.

346. Where there is an express trust declared by parties and evidenced by written declaration.—*Tripp vs. Duane*, 74 Cal. 85, 91, 15 Pac. Rep. 439; *Leggett vs. Dubois*, 5 Paige Ch. (N. Y.) 114, 23 Am. Dec. 413; *Bowler vs. Curlier*, 21 Nev. 153, 37 Am. St. Rep. 501, 26 Pac. Rep. 226.

347. RESULTING TRUSTS ARISE IN FAVOR OF BENEFICIARIES OR OTHERS reposing confidence in another, as where one has been trustee for father and mother, and administrator of both of their estates, and, as friend of family, beneficiaries put their trust in him by virtue of which he had possession of property.—*Meeker vs. Gardella* (Wash. Ter. Feb. 4, 1887), 13 Pac. Rep. 709.

348. Client, as between attorney and client when attorney receives property consideration for which is furnished by client, parties occupying confidential relations.—*Broder vs. Conklin*, 77 Cal. 330, 338, 19 Pac. Rep. 513.

349. Corporation, where conveyance is taken in name of party for use and benefit of stockholders.—*Fisk vs. Patton*, 7 Utah 399, 27 Pac. Rep. 1.

350. Creator of the trust, where property is not used for purposes for which it was intended.—*Schlessinger vs. Mallard*, 70 Cal. 326, 333, 11 Pac. Rep. 723.

351. Grantor, upon failure of consideration upon which land has been conveyed.—*Russ vs. Meblus*, 16 Cal. 350, 355.

352. Grantor for purchase money, unless he has taken security for his payment, as his lien is in nature of resulting trust.—See *Tripp vs. Duane*, 74 Cal. 85, 91, 92, 15 Pac. Rep. 439. See pars. 361-363 this note.

353. Heirs of decedent, as against agent to whom deceased has given special power over property, terminating upon death.—*Kimball vs. Tripp*, 136 Cal. 631, 634, 69 Pac. Rep. 423.

354. Party contributing labor in carrying on farm, raising crops, and caring for live stock, contributing more than enough to pay proposed portion as against party taking title.—*Rayl vs. Rayl*, 58 Kan. 585, 50 Pac. Rep. 501.

As to trust in favor of party paying purchase money, see post § 353 and note.

355. Principal and agent, as occupying relation from which trust may result.—*Alaniz vs. Casenave*, 91 Cal. 41, 46, 27 Pac. Rep. 521.

356. Principal where agent obtains title to property of his principal with knowledge of flaw in title.—*Hardenbergh vs. Bacon*, 33 Cal. 356, 377.

357. Son, under contract by father to make will in his favor in consideration of son's conveying property to father.—*Russ vs. Meblus*, 16 Cal. 350, 355.

See pars. 337, 340, 341 this note.

358. Wife, where husband receives money from her mother to be invested in land for wife and takes title in his name.—*Murphy vs. Clayton*, 113 Cal. 153, 158, 45 Pac. Rep. 267; *Lord vs. Bishop*, 101 Ind. 334.

359. RESULTING TRUST DOES NOT EXIST in favor of father purchasing lands in his children's name where deed is made to children, as law presumes it to be an advancement.—*Beavers vs. McKinley*, 50 Kan. 602, 32 Pac. Rep. 363; *Moore vs. Jordan*, 65 Miss. 229, 7 Am. St. Rep. 641, 3 So. Rep. 737.

See pars. 337, 340, 341, 357 this note.

360. Grantor under conveyance upon valuable consideration as payment of purchase price shows intention to benefit grantee.—*Feeney vs. Howard*, 79 Cal. 525, 530, 12 Am. St. Rep. 162, 21 Pac. Rep. 984, 4 L. R. A. 826; *Coffin vs. City of Portland*, 16 Oreg. 77, 17 Pac. Rep. 580.

361. Grantor, by reason of fraudulent representations made to agent of innocent grantee not disclosed to either party.—*Schultz vs. McLean*, 93 Cal. 329, 356, 357, 28 Pac. Rep. 1053.

See pars. 351, 352 this note.

362. Grantor, in opposition to expressed terms of conveyance.—*Russ vs. Meblus*, 16 Cal. 350, 357; *Squire vs. Harder*, 1 Paige Ch. (N. Y.) 494, 19 Am. Dec. 446.

363. Grantor, where his conveyance is made for colorable, illegal, or fraudulent purpose.—*First Nat. Bank vs. Campbell*, 2 Colo. App. 271, 30 Pac. Rep. 357; *Owens vs. Owens*, 23 N. J. Eq. (3 C. E. Gr.) 60.

364. Mother, where evidence as to whether purchase money belonged to her or to her son is conflicting where deed was made to the son and she neglected for over twenty years to claim property.—*Snider vs. Johnson*, 25 Oreg. 323, 35 Pac. Rep. 846.

365. Wife, upon purchase by husband of personal chattels with wife's money lent to him for purpose, and subsequent exchange of part of them for real estate, title of which he takes in his own name, and publicly carries on business thereon, pays taxes, and mortgages same in his own name and redeems mortgage, for period of over nine years.—*Culver vs. Graham*, 3 Wyo. 211, 21 Pac. Rep. 694.

XII. SAME—4. GOVERNMENT GRANTS—MINING CLAIMS.

366. TRUSTS ARE CREATED AND ARISE WITH RESPECT TO MINING CLAIMS, government grants, by reason of entry at United States land office, and patent issued in pursuance thereof is burdened with trust and enforceable against any person claiming under

patent.—*Suessenbach vs. First Nat. Bank*, 5 Dak. 477, 499, 41 N. W. Rep. 662; *South End Min. Co. vs. Tinney*, 22 Nev. 19, 35 Pac. Rep. 89. See *Hermocilla vs. Hubbell*, 89 Cal. 5, 10, 26 Pac. Rep. 611; *Chism vs. Price*, 54 Ark. 251, 258, 15 S. W. Rep. 883.

367. Wherever legal title in government lands has passed from United States to one party when in equity and by laws of Congress it ought to go to another.—*South End Min. Co. vs. Tinney*, 22 Nev. 19, 35 Pac. Rep. 89; *Rector vs. Gibbon*, 111 U. S. 276, 291, bk. 28 L. ed. 427, 4 Sup. Ct. Rep. 605. See *Johnson vs. Towsley*, 80 U. S. (13 Wall.) 72, bk. 20 L. ed. 485; *St. Louis Smelt. & Ref. Co. vs. Kemp*, 104 U. S. 636, bk. 26 L. ed. 875; *Hamilton vs. Southern Nev. G. & S. Min. Co.*, 13 Sawy. C. C. 113, 32 Fed. Rep. 562.

368. When confirmer presenting claim, acts as agent or trustee or guardian or in any other fiduciary capacity, no matter whether presentation was made by confirmer in his own name in good faith or with intent to defraud.—*Estrada vs. Murphy*, 19 Cal. 248, 272, 274; *Hardy vs. Harbin*, 4 Sawy. C. C. 536, 11 Fed. Cas. 510.

369. When grantor of land from Mexican government dies intestate, and one, mistakably believing himself to be heir, sells to grantees, who obtain confirmation and patent from United States.—*Wilson vs. Castro*, 31 Cal. 420, 432; *South End Min. Co. vs. Tinney*, 22 Nev. 19, 35 Pac. Rep. 89.

370. When one, by false affidavit made in land office, obtains patent to piece of land upon which another has settled and which equitably belongs to him.—*South End Min. Co. vs. Tinney*, 22 Nev. 19, 35 Pac. Rep. 89; *Sanford vs. Sanford*, 139 U. S. 642, bk. 35 L. ed. 290, 11 Sup. Ct. Rep. 666.

371. When party obtains patent in government lands previously located by parties as real parties in interest, no matter whether fraud was committed or not.—*Bludworth vs. Lake*, 33 Cal. 255, 263.

372. When party takes title in his own name under patent from United States of land of which he knows another was in possession under claim filed by him and property was obtained by fraud.—*Sanford vs. Sanford* (Oreg. March 16, 1887), 13 Pac. Rep. 602.

373. Not destroyed or rights of the parties affected by fact that the heirs of deceased patentee had notice of proceedings taken by patentee to obtain confirmation of grant and patent for same, although such heirs did not intervene or protect their rights.—*Wilson vs. Castro*, 31 Cal. 420, 433; *South End Min. Co. vs. Tinney*, 22 Nev. 19, 35 Pac. Rep. 89.

374. TRUST ARISES OF LEGAL TITLE IN FAVOR OF GRANTEE under conveyance from one having state certificate of purchase as against subsequent taker with notice.—*Jackson vs. Hyde*, 91 Cal. 463, 464, 27 Pac. Rep. 759.

375. Heirs of a deceased holder of government grant as against purchaser or patentee issuing proceedings for confirmation of their claim, even though they were not aware of occupying to heirs at law or for successors in

interest their relation as trustees.—*Wilson vs. Castro*, 31 Cal. 420, 436.

376. Party locating mining claim and entitled to present possession, as until patent issues, government holds in trust for locators or for vendees.—*South End Min. Co. vs. Tinney*, 22 Nev. 19, 35 Pac. Rep. 89. See *Cole-Seymour vs. Fisher*, 16 Colo. 188, 27 Pac. Rep. 240. *Fed. Belk vs. Meagher*, 104 U. S. 279, 283, bk. 26 L. ed. 735; *Bohall vs. Dilla*, 114 U. S. 47, bk. 29 L. ed. 61, 5 Sup. Ct. Rep. 572; *Gwillim vs. Donnellan*, 115 U. S. 45, 49, bk. 29 L. ed. 348, 5 Sup. Ct. Rep. 1110; *Sparks vs. Pierce*, 115 U. S. 408, bk. 29 L. ed. 428, 6 Sup. Ct. Rep. 102; *Noyes vs. Mantle*, 127 U. S. 348, 353, bk. 32 L. ed. 168, 8 Sup. Ct. Rep. 1132.

377. Party to whom government grant is made where patent is taken in name of wrong person, no matter for what reason.—*Salmon vs. Symonds*, 30 Cal. 301, 306.

378. Party who abandons a mining patent and afterwards relocates same as against party fraudulently obtaining claim with notice.—*South End Min. Co. vs. Tinney*, 22 Nev. 19, 35 Pac. Rep. 89.

379. Settler and actual occupant cultivating and improving land in good faith as against party acquiring legal title by undue influence or fraud and without notice or hearing.—*Crosby vs. Clark*, 132 Cal. 1, 5, 63 Pac. Rep. 1022.

380. Equity will control operation of the legal title for benefit of cestui que trust where trust exists in his favor at time of issuance of patent under mining grant to another party.—*Estrada vs. Murphy*, 19 Cal. 248, 272, 274; *Clark vs. Lockwood*, 21 Cal. 220; *Emeric vs. Penniman*, 26 Cal. 119, 124; *Salmon vs. Symonds*, 30 Cal. 301, 307; *Bludworth vs. Lake*, 33 Cal. 255, 263; *O'Connor vs. Irvine*, 74 Cal. 435, 440, 16 Pac. Rep. 236; *Brush vs. Ware*, 40 U. S. (15 Pet.) 93, bk. 10 L. ed. 672; *Castro vs. Hendricks*, 64 U. S. (23 How.) 438, 442, bk. 16 L. ed. 576; *Hardy vs. Harbin*, 4 Sawy. C. C. 536, 11 Fed. Cas. 510, 514. See *Rico vs. Spence*, 21 Cal. 504, which would seem inferential to hold same doctrine.

381. Not arise in equity as against grantee from government in respect to title in favor of one not authorized by law to acquire title from government.—*Brannock vs. Monroe*, 65 Cal. 491, 492, 4 Pac. Rep. 488.

382. RESULTING TRUST ARISES ON GROUND OF FRAUD where party obtains patent to government land upon which another has settled.—*South End Min. Co. vs. Tinney*, 22 Nev. 19, 35 Pac. Rep. 89.

383. Upon theory that title which passed from United States inures in equity to benefit of party settling, court giving effect to this equity according to its forms in several ways.—*South End Min. Co. vs. Tinney*, 22 Nev. 19, 35 Pac. Rep. 89; *Silver vs. Ladd*, 74 U. S. (7 Wall.) 219, 228, bk. 19 L. ed. 138. See *Lee vs. Johnson*, 116 U. S. 48, bk. 29 L. ed. 570, 6 Sup. Ct. Rep. 249.

384. Land in equity and good conscience belongs to settler although no fiduciary relation exists between parties.—*South End Min. Co. vs. Tinney*, 22 Nev. 19, 35 Pac. Rep. 89.

385. Purchasers of equitable interests take at their peril and acquire property burdened with every prior equity charged upon it.—Shoufe vs. Griffiths, 4 Wash. 161, 31 Am. St. Rep. 910, 30 Pac. Rep. 93; Shirras vs. Caig, 11 U. S. (7 Cr.) 34, bk. 3 L. ed. 260; Vattier vs. Hinde, 32 U. S. (7 Pet.) 252, bk. 3 L. ed. 675; Boone vs. Chiles, 35 U. S. (10 Pet.) 177, bk. 9 L. ed. 388.

386. State holds legal title in government lands for purchaser until patent is issued.—Bludworth vs. Lake, 33 Cal. 255, 262; South End Min. Co. vs. Tinney, 22 Nev. 19, 35 Pac. Rep. 89.

XIII. SAME—5. EVIDENCE AND BURDEN OF PROOF.

387. BURDEN OF PROOF RESTS IN CESTUI QUE TRUST where it is sought to establish trust by parol.—Hasshagen vs. Hasshagen, 80 Cal. 514, 518, 22 Pac. Rep. 294.

388. Bare preponderance of parol evidence is not sufficient.—Chambers vs. Emery, 13 Utah 374, 45 Pac. Rep. 192.

389. EVIDENCE TO PROVE A RESULTING TRUST must be clear, certain, and conclusive.—Mullen vs. McKim, 22 Colo. 463, 45 Pac. Rep. 416.

390. Must be clear, definite, unequivocal, and conclusive.—Chambers vs. Emery, 13 Utah 374, 45 Pac. Rep. 192.

391. Must be clear, full, and convincing.—Parker vs. Snyder, 31 N. J. Eq. (4 Stew.) 164; Boyd vs. McLean, 1 John. Ch. (N. Y.) 582; Clark vs. Pratt, 15 Oreg. 304, 14 Pac. Rep. 418; Snider vs. Johnson, 25 Oreg. 328, 35 Pac. Rep. 846.

392. Must be unquestionable.—First Nat. Bank vs. Campbell, 2 Colo. App. 271, 30 Pac. Rep. 357.

393. Must be such as will leave no doubt as to facts necessary to create resulting trust.—Chambers vs. Emery, 13 Utah 374, 45 Pac. Rep. 192.

394. Sufficient when clear and certain although plaintiff's witnesses are squarely contradicted as to character of deed creating trust and existence of trust, where court believed the witnesses.—Mullen vs. McKim, 22 Colo. 463, 45 Pac. Rep. 416.

395. PAROL EVIDENCE ADMITTED AT COMMON LAW to prove resulting, implied, or constructive trust.—Osborne vs. Endicott, 6 Cal. 149, 154, 65 Am. Dec. 498.

396. Code does not change common-law rule admitting parol evidence to prove resulting trusts.—Osborne vs. Endicott, 6 Cal. 149, 154, 65 Am. Dec. 498; Lockwood vs. Canfield, 20 Cal. 126, 129, 130; Hidden vs. Jordan, 21 Cal. 92, 93, 100, 102; Bayles vs. Baxter, 22 Cal. 575, 580; Roberts vs. Ware, 40 Cal. 634, 637; Tripp vs. Duane, 74 Cal. 85, 91, 15 Pac. Rep. 489; Brison vs. Brison, 75 Cal. 525, 533, 7 Am. St. Rep. 189, 17 Pac. Rep. 689; Broder vs. Conklin, 77 Cal. 330, 338, 19 Pac. Rep. 513; Polk vs. Boggs, 122 Cal. 114, 116, 54 Pac. Rep. 536. Colo. Knox vs. McFarren, 4 Colo. 586, 597; Lipscomb vs. Nichols, 6 Colo. 290, 292; Kayser vs. Maugham, 8 Colo. 232, 6 Pac. Rep. 803; Meagher vs. Reed, 14 Colo. 335, 24 Pac. Rep. 681; Waterbury vs.

Fisher, 5 Colo. App. 362, 38 Pac. Rep. 846. Nev. Bowler vs. Curler, 21 Nev. 158, 37 Am. St. Rep. 501, 26 Pac. Rep. 226. N. Y. Botsford vs. Burr, 2 John. Ch. 406. Utah. Chambers vs. Emery, 13 Utah 374, 45 Pac. Rep. 192. Fed. Morris vs. Nixon, 12 U. S. (1 How.) 118, bk. 11 L. ed. 69; Jenkins vs. Eldredge, 3 Story C. C. 181, 18 Fed. Cas. 462. Eng. Bellasis vs. Compton, 2 Vern. 294.

397. May be proved by parol evidence and also defeated by parol proof of agreement to different trust from that which would be implied by law. In other words, it sustains well established principle that resulting trust may be defeated as well as established by parol evidence.—Bayles vs. Baxter, 22 Cal. 575, 580; Bellasis vs. Compton, 2 Vern. 294.

398. PAROL EVIDENCE ADMISSIBLE TO PROVE CONSTRUCTIVE TRUSTS between parties standing in confidential relations to each other.—Brison vs. Brison, 75 Cal. 525, 533, 7 Am. St. Rep. 189, 17 Pac. Rep. 689; Bowler vs. Curler, 21 Nev. 158, 37 Am. St. Rep. 501, 26 Pac. Rep. 226.

399. Constructive trust arising from undue influence, alleged fraudulent acts out of which constructive trust arises.—Hays vs. Gloster, 88 Cal. 560, 26 Pac. Rep. 367.

400. Condition of party, and advantage taken of mental weakness, and undue influence, evidence of real consideration of transaction and condition of property and circumstances, are admissible to prove trust arising from fraudulent acts.—Hays vs. Gloster, 88 Cal. 560, 26 Pac. Rep. 367.

401. Consideration for dealings of parties.—Hays vs. Gloster, 88 Cal. 560, 563, 26 Pac. Rep. 367. Colo. Kayser vs. Maugham, 8 Colo. 232, 6 Pac. Rep. 803; Von Trotha vs. Bamberger (Colo. March 28, 1890), 24 Pac. Rep. 883. Conn. Todd vs. Munson, 53 Conn. 579, 4 Atl. Rep. 99.

402. Exercise of ownership by grantor, such as the collecting of rents, is evidence tending to show verbal understanding that property should be held in trust for benefit of grantor.—Hasshagen vs. Hasshagen, 80 Cal. 514, 518, 22 Pac. Rep. 294.

403. Facts and circumstances creating resulting trust.—Thomas vs. Jameson, 77 Cal. 91, 93, 19 Pac. Rep. 177; Hayes vs. Gloster, 88 Cal. 560, 565, 26 Pac. Rep. 367.

404. Facts and circumstances from which trust results even though it may tend to contradict conveyance wrongfully made.—Howard vs. Howard, 52 Kan. 469, 34 Pac. Rep. 1114.

405. Fraudulent acts out of which alleged constructive trust arises.—Hays vs. Gloster, 88 Cal. 560, 565, 26 Pac. Rep. 367.

406. Raise trust in cases of actual or constructive trust, fraud.—Isenhoot vs. Chamberlain, 59 Cal. 630, 637; Brison vs. Brison, 75 Cal. 525, 533, 7 Am. St. Rep. 189, 17 Pac. Rep. 689.

407. Special agreement existing between parties raising trust by operation of law and resulting from actual agreements of parties.—Bayles vs. Baxter, 22 Cal. 575, 579.

408. Not admissible to create resulting trust in opposition to the recitals of the deed.—Russ vs. Meblus, 16 Cal. 350, 356.

406. Exercise of ownership is not sufficient evidence to show trust by operation of law as distinguished from trust declared in writing.—*Hasshagen vs. Hasshagen*, 80 Cal. 514, 518, 22 Pac. Rep. 294.

See par. 403 this note.

410. Father having title in himself and con-

vying directly to child cannot show intended resulting trust to himself.—*Annis vs. Wilson*, 15 Colo. 236, 25 Pac. Rep. 304.

411. Grantee, to show prior intention at time of conveyance to infant child contradicting his intention as expressed in deed.—*Annis vs. Wilson*, 15 Colo. 236, 25 Pac. Rep. 304.

§ 853. **TRANSFER TO ONE FOR MONEY PAID BY ANOTHER. [TRUST PRESUMED.]** When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdt. 1873-4, p. 221.

I. In General.

1. Applied, cited, construed, referred to, etc.
2. Illustrations of implied trusts.
- 4, 5. Foundation of—Upon what lies, etc.
- 6-10. Necessity of intention, consideration, etc.
- 11-15. Necessity of showing extent of interest, title, etc.
- 16-18. Equitable interference—Grounds for, etc.
- 19-24. Presumptions from payment, etc.
- 25, 26. Rest upon equitable principles.
- 27, 28. Public policy—Contravention of.

II. When Created by Conveyance.

29. Between grantee and party paying whole.
- 30-33. Same—And party paying proportion.
- 34-39. By agreements, payments, etc.
- 40-49. Parties on whose favor created—Interest.
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- 66-69. By contract, conveyance, declaration.
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- 71-77. Parties in whose favor created—Husband and wife, etc.
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81. Provisions as to express trusts do not apply.
- 82-85. Burden of proof.
86. Corroborated, disproved, etc., by oral or written testimony.
- 87-98. Nature, quality, and sufficiency of.
- 99-103. Same—Admissions, declarations—Husband—Wife, etc.
- 104, 105. Same—What insufficient.
106. Preponderance necessary.
107. Statute of frauds—Provisions of do not apply.
- 108-114. Parol evidence—When and for what purposes admissible.
- 115, 116. Same—When not admitted.
- 117, 118. Presumptions arising from proof.

L. IN GENERAL.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Walton vs. Karnes*, 67

Cal. 255, 256, 7 Pac. Rep. 676 (applied); *Tryon vs. Huntoon*, 67 Cal. 325, 327, 7 Pac. Rep. 741 (construed and applied); *Barrollhet vs. Ans-pacher*, 68 Cal. 116, 122, 8 Pac. Rep. 804 (applied); *Tripp vs. Duane*, 74 Cal. 85, 91, 15 Pac. Rep. 439 (applied); *Broder vs. Conklin*, 77 Cal. 330, 338, 19 Pac. Rep. 513 (applied); *Hasshagen vs. Hasshagen*, 80 Cal. 514, 518, 22 Pac. Rep. 294 (applied); *Roach vs. Caraffa*, 85 Cal. 436, 446, 25 Pac. Rep. 22 (construed and applied); *Shanahan vs. Crampton*, 92 Cal. 9, 13, 28 Pac. Rep. 50 (applied); *Polk vs. Boggs*, 122 Cal. 114, 116, 54 Pac. Rep. 536 (applied); *South San Bernardino L. & Impr. Co. vs. San Bernardino Nat. Bank*, 127 Cal. 245, 247, 59 Pac. Rep. 699 (construed and applied); *Barker vs. Hurley*, 132 Cal. 21, 28, 63 Pac. Rep. 1071 (applied); *Hamilton vs. Hubbard*, 134 Cal. 603, 605, 65 Pac. Rep. 321, 66 Id. 860 (applied); *Faylor vs. Faylor*, 136 Cal. 92, 95, 96, 68 Pac. Rep. 482 (construed and applied); *Richards vs. Fraser*, 136 Cal. 460, 463, 69 Pac. Rep. 83 (applied with other sections); *Bell vs. Solomons*, 142 Cal. 59, 69, 75 Pac. Rep. 649 (referred to); *Merchants Nat. Bk. vs. Escondido Irr. Dist.*, 144 Cal. 329, 334, 77 Pac. Rep. 937 (applied); *Los Angeles & B. O. & D. Co. vs. Occidental Oil Co.*, 144 Cal. 528, 533, 534, 78 Pac. Rep. 25 (construed and applied).

As to agreement to purchase on joint account and enforcement of trust in favor of party paying purchase money, see note by Robert Desty, 2 John. Ch. (N. Y.) 405, bk. 1 L. ed. 428.

As to disproving payment of consideration to create resulting trust in favor of grantor, see note 90 Am. Dec. 277.

As to exception of implied trust from statute of frauds, see note 9 Am. St. Rep. 530.

As to nature of evidence to prove resulting trust, see note 98 Am. Dec. 311.

As to parol evidence to prove resulting trust, see monographic note by Robert Desty, 2 John. Ch. (N. Y.) 404, bk. 1 L. ed. 426.

As to parol evidence to show resulting trust, see note 65 Am. Dec. 182.

As to presumption arising from payment of purchase money, see notes 50 Am. Dec. 624, 51 Am. Dec. 753.

As to resulting trusts arising from purchase by partner of real estate in his own name with partnership funds, see monographic note by Ernest Watts, 27 L. R. A. 449-497.

As to resulting trusts from advancing pur-

chase money, conveyance without consideration or part payment of consideration, see note 51 Am. Dec. 752-753.

As to resulting trusts in general, see ante § 852 and note.

As to resulting trust from purchase agent, see monographic note by Robert Desty, 2 John. Ch. (N. Y.) 404, bk. 1 L. ed. 426.

As to resulting trust from purchase in name of wife or son, see note 51 Am. Dec. 754.

As to resulting trust in land purchased by another, see monographic note by Robert Desty, 2 John. Ch. (N. Y.) 404, bk. 1 L. ed. 426.

As to resulting trust in purchase with partnership funds, see monographic note by Robert Desty, 2 John. Ch. (N. Y.) 404, bk. 1 L. ed. 426, and monographic note by Ernest Watts, 27 L. R. A. 449-497.

As to resulting trusts where land is purchased by an agent and deed taken in his own name, see note 9 Am. St. Rep. 530.

As to resulting trusts where several persons furnish purchase money, see note 50 Am. Dec. 724.

See post § 2217 and note.

2. RESULTING TRUSTS AT COMMON LAW ARISING from payment of purchase money or when trust is not declared or is declared only in part or for any reason fails, are illustrations of implied trusts.—*Bowler vs. Curlier*, 21 Nev. 158, 37 Am. St. Rep. 501, 26 Pac. Rep. 226.

3. Foundation of trust lies in proof of payment, which must be clearly established.—*Plass vs. Plass*, 122 Cal. 3, 5, 14, 54 Pac. Rep. 372.

4. Founded on trust money paid in purchase thereof.—In re *Ricker's Estate*, 14 Mont. 153, 35 Pac. Rep. 960, 29 L. R. A. 622. See *Muller vs. Buyck*, 12 Mont. 354, 30 Pac. Rep. 386; *Ducle vs. Ford*, 138 U. S. 537, bk. 34 L. ed. 1091, 11 Sup. Ct. Rep. 417.

5. Must arise at time of conveyance or not at all.—*McCue vs. Gallagher*, 23 Cal. 51, 53. See *Hidden vs. Jordan*, 21 Cal. 92; *Millard vs. Hathaway*, 27 Cal. 119; *Currey vs. Allen*, 34 Cal. 254; *Hellman vs. Messmer*, 75 Cal. 166, 169, 16 Pac. Rep. 766; *Sherman vs. Sandell*, 106 Cal. 373, 374, 39 Pac. Rep. 797. *N. Y. Botsford vs. Burr*, 2 John. Ch. 406. *Oreg. Taylor vs. Miles*, 19 Oreg. 550, 25 Pac. Rep. 143. *Vt. Pinnock vs. Clough*, 16 Vt. 500, 42 Am. Dec. 521.

6. Intention at time of conveyance must control.—*McCue vs. Gallagher*, 23 Cal. 51, 53.

7. Consideration may consist of money or other property.—*Currey vs. Allen*, 34 Cal. 254, 257.

8. Must move from the plaintiff.—*Los Angeles & B. O. & D. Co. vs. Occidental Oil Co.*, 144 Cal. 528, 534, 78 Pac. Rep. 25.

9. Money expended in land must be distinctly traced and clearly proved to have been invested in land.—*Woodside vs. Hewel*, 109 Cal. 481, 486, 42 Pac. Rep. 152; *Ferris vs. Van Vechten*, 73 N. Y. 113, 119.

10. Non-payment of consideration by nominal purchaser need not be shown affirmatively on face of deed in order to create trust.—*Osborne vs. Endicott*, 6 Cal. 149, 155, 65 Am. Dec. 493.

11. INTEREST OF PARTY CLAIMING MUST BE MEASURABLE as to its value, or as to its fractional dimensions, where it is claimed as part of whole tract divided or undivided.—*Los Angeles & B. O. & D. Co. vs. Occidental Oil Co.*, 144 Cal. 528, 534, 78 Pac. Rep. 25.

12. Equitable title sufficient to enable court to declare trust in favor of party advancing purchase money.—*Lynch vs. Herrig* (Mont. March 31, 1905, 80 Pac. Rep. 240. See *Currence vs. Ward*, 43 W. Va. 367, 27 S. E. Rep. 329.

13. SPECIFIC STATEMENT AS TO PROPORTION of interest to be held by parties advancing part of purchase money not absolutely necessary, as same may be shown by facts and circumstances sufficient to satisfy statute.—*Faylor vs. Faylor*, 136 Cal. 92, 95, 68 Pac. Rep. 482.

14. Uncertainty as to proportion of property to which trust extends must not exist.—*Woodside vs. Hewel*, 109 Cal. 481, 486, 42 Pac. Rep. 152; *Olcott vs. Bynum*, 84 U. S. (17 Wall.) 44, 59 bk. 21 L. ed. 570. See also *Me. Baker vs. Vining*, 30 Me. 121, 50 Am. Dec. 617. *Mass. McGowan vs. McGowan*, 80 Mass. (14 Gray) 119, 74 Am. Dec. 668. *N. Y. White vs. Carpenter*, 2 Paige Ch. 217, 240. *Ohio. Reynolds vs. Morris*, 17 Ohio St. 510.

15. LEGAL TITLE MUST HAVE PASSED to party against whom it is sought to enforce trust.—*Lynch vs. Herrig* (Mont. March 31, 1905), 80 Pac. Rep. 240.

16. Equity will convert party violating confidence reposed in him into trustee whenever necessary to protect interests of confiding party.—*Robles vs. Clarke*, 25 Cal. 317, 327.

17. Equity will decree trust, and declare party acquiring and holding title trustee, where fraud is shown in its acquisition, for benefit of party having subsisting valuable interest.—*Von Trotha vs. Bamberger* (Colo. March 28, 1890), 24 Pac. Rep. 833.

18. Equity will interfere to prevent consummation of fraud whether trust arises from dealings and transactions of parties, or whether it is proper to prevent consummation of fraud.—*Lynch vs. Herrig* (Mont. March 31, 1905), 80 Pac. Rep. 240.

19. PRESUMPTION THAT PARTY SUPPLYING PURCHASE MONEY means purchase to be for his own benefit rather than that of another.—*Plass vs. Plass*, 122 Cal. 3, 5, 7, 54 Pac. Rep. 372.

20. PRESUMPTION IS THAT RESULTING TRUST ARISES IN FAVOR of party paying purchase money.—*Parker vs. Newitt*, 18 Oreg. 274, 23 Pac. Rep. 246; *Snider vs. Johnson*, 25 Oreg. 323, 35 Pac. Rep. 346.

21. Applies only when transaction is between strangers, where there is no natural or legal obligation on purchaser to pay consideration for another.—*Taylor vs. Miles*, 19 Oreg. 550, 25 Pac. Rep. 143.

22. Arises where conveyance is made to one and consideration paid by another, exists only in transactions between strangers.—*Hamilton vs. Hubbard*, 134 Cal. 602, 605, 65 Pac. Rep. 321, 66 Id. 360.

22. PRESUMPTION THAT PARTY SUPPLYING MONEY MEANT PURCHASE to be for his own benefit cannot aid or produce presumption that money belonged to and was furnished by person claiming as beneficiary.—*Plass vs. Plass*, 122 Cal. 3, 5, 12, 54 Pac. Rep. 372.

24. No presumption in favor of trust when purchase taken in name of wife, equity considering same was intended as advancement or gift.—*Taylor vs. Miles*, 19 Oreg. 550, 25 Pac. Rep. 143.

25. RESULTING TRUSTS REST UPON EQUITABLE PRINCIPLES that property belongs to him who advanced purchase money, or that beneficial ownership follows consideration.—*Taylor vs. Miles*, 19 Oreg. 550, 25 Pac. Rep. 143.

26. Spring from presumption of law for reason that alleged cestui que trust has paid money, but it may be attended with no uncertainty.—*Plass vs. Plass*, 122 Cal. 3, 5, 14, 54 Pac. Rep. 372. See *Baker vs. Vining*, 30 Me. 121, 50 Am. Dec. 617.

27. Public policy is not contravened by fact that party equitably entitled to real estate permits legal title to remain in another and law recognizes resulting trust; every one is presumed to know the law.—*San Francisco Gas Co. vs. Brickwedel*, 62 Cal. 641, 642; *Murphy vs. Clayton*, 113 Cal. 153, 162, 45 Pac. Rep. 267; *Clarke vs. Dutcher*, 9 Cow. (N. Y.) 674, 681, 684. See authorities next paragraph.

28. As every one is presumed to know the law—*Murphy vs. Clayton*, 113 Cal. 153, 162, 45 Pac. Rep. 267. See *San Francisco Gas Co. vs. Brickwedel*, 62 Cal. 641, 642; *Clarke vs. Dutcher*, 9 Cow. (N. Y.) 674, 681. See authorities preceding paragraph.

II. WHEN CREATED BY CONVEYANCE IN NAME OF ANOTHER.

29. TRUST CREATED WHERE ONE PARTY PAYS THE WHOLE CONSIDERATION for purchase of real estate, and conveyance is made to another, latter holding in trust for the former.—*Osborne vs. Endicott*, 6 Cal. 149, 153, 65 Am. Dec. 498. See *Wells, F. & Co. vs. Robinson*, 18 Cal. 133, 141; *Russ vs. Meblus*, 16 Cal. 350, 356; *Lockwood vs. Canfield*, 20 Cal. 126; *Hidden vs. Jordan*, 21 Cal. 92, 99; *Bayles vs. Baxter*, 22 Cal. 575, 578; *Simson vs. Eckstein*, 22 Cal. 580, 593; *Millard vs. Hathaway*, 27 Cal. 119, 140, 142; *Currey vs. Allen*, 34 Cal. 254, 257; *Sandfoss vs. Jones*, 35 Cal. 481; *Roberts vs. Ware*, 40 Cal. 634, 637; *Walton vs. Karnes*, 67 Cal. 255, 256, 7 Pac. Rep. 676; *Somers vs. Overhulser*, 67 Cal. 237, 7 Pac. Rep. 645; *Breeze vs. Brooks*, 71 Cal. 169, 9 Pac. Rep. 670, 11 Id. 385; *Ward vs. Matthews*, 73 Cal. 13, 16, 14 Pac. Rep. 604; *Tripp vs. Duane*, 74 Cal. 85, 91, 15 Pac. Rep. 439; *Hellman vs. Messmer*, 75 Cal. 166, 169, 16 Pac. Rep. 766; *Thomas vs. Jameson*, 77 Cal. 91, 19 Pac. Rep. 177; *Grant vs. Heverin*, 77 Cal. 263, 265, 19 Pac. Rep. 493; *Broder vs. Conklin*, 77 Cal. 330, 333, 19 Pac. Rep. 513; *Carter vs. Hopkins*, 79 Cal. 82, 84, 21 Pac. Rep. 549; *Ward vs. Matthews*, 80 Cal. 343, 345, 22 Pac. Rep. 187; *Riley vs. Martinelli*, 97 Cal. 575, 580, 33 Am. St. Rep. 209, 32 Pac. Rep.

579, 21 L. R. A. 33; *Campbell vs. Freeman*, 99 Cal. 546, 34 Pac. Rep. 113; *Fulton vs. Jansen*, 99 Cal. 587, 591, 34 Pac. Rep. 331; *Sayward vs. Houghton*, 119 Cal. 545, 550, 51 Pac. Rep. 533, 52 Id. 44; *South San Bernardino L. & I. Co. vs. San Bernardino Nat. Bank*, 127 Cal. 245, 247, 59 Pac. Rep. 699; *Faylor vs. Faylor*, 136 Cal. 92, 95, 68 Pac. Rep. 482; *White vs. Costigan*, 138 Cal. 564, 569, 72 Pac. Rep. 173; *Los Angeles & Bakersfield O. & D. Co. vs. Occidental D. Co.*, 144 Cal. 523, 533, 78 Pac. Rep. 25. See *Ala. Carter vs. Challen*, 83 Ala. 135, 3 So. Rep. 313. *Colo. Lipscomb vs. Nichols*, 6 Colo. 290, 292; *Lundy vs. Hanson*, 16 Colo. 267, 26 Pac. Rep. 816; *Warren vs. Adams*, 19 Colo. 515, 522, 36 Pac. Rep. 604; *Campbell vs. First Nat. Bank of Denver*, 22 Colo. 177, 43 Pac. Rep. 1007. *Idaho. Motherwell vs. Taylor*, 2 Idaho 232, 10 Pac. Rep. 304. *Ill. Harris vs. McIntyre*, 118 Ill. 275, 8 N. E. Rep. 182; *Donlin vs. Bradley*, 119 Ill. 412, 10 N. E. Rep. 11; *Reynolds vs. Sumner*, 126 Ill. 53, 9 Am. St. Rep. 523, 14 N. E. Rep. 661, 18 Id. 334, 1 L. R. A. 327. *Ky. Bedford vs. Graves*, 8 Ky. L. R. 1 S. W. Rep. 534; *Craig vs. Turley*, 86 Ky. 636, 6 S. W. Rep. 648. *N. Y. Boyd vs. McLean*, 1 John. Ch. 582. *Oreg. Springer vs. Young*, 14 Oreg. 280, 12 Pac. Rep. 400; *Parker vs. Newitt*, 18 Oreg. 274, 23 Pac. Rep. 246; *Taylor vs. Miles*, 19 Oreg. 550, 25 Pac. Rep. 143; *Puckett vs. Benjamin*, 21 Oreg. 370, sub nom. *Puckett vs. Puckett*, 23 Pac. Rep. 65. *Pa. Bigley vs. Jones*, 114 Pa. St. 510, 7 Atl. Rep. 54. *Tex. Smith vs. Brown*, 66 Tex. 543, 1 S. W. Rep. 573. *Utah. Chambers vs. Emery*, 13 Utah 374, 45 Pac. Rep. 192.

30. Resulting trust exists in favor of party paying proportion of the purchase money, pro tanto, as representing an aliquot part of consideration.—*Osborne vs. Endicott*, 6 Cal. 149, 154, 65 Am. Dec. 498. See *Hidden vs. Jordan*, 21 Cal. 92, 99; *Millard vs. Hathaway*, 27 Cal. 119, 140, 142; *Sandfoss vs. Jones*, 35 Cal. 481; *Dikeman vs. Norrie*, 36 Cal. 94, 101; *Case vs. Coddling*, 38 Cal. 191, 193; *Davis vs. Baugh*, 59 Cal. 568, 573; *Somers vs. Overhulser*, 67 Cal. 237, 7 Pac. Rep. 645; *Hellman vs. Messmer*, 75 Cal. 166, 16 Pac. Rep. 766; *Thomas vs. Jameson*, 77 Cal. 91, 19 Pac. Rep. 177; *Fulton vs. Jansen*, 99 Cal. 587, 591, 34 Pac. Rep. 331; *Woodside vs. Hewel*, 109 Cal. 481, 484, 42 Pac. Rep. 152; *Murphy vs. Clayton*, 113 Cal. 153, 157, 45 Pac. Rep. 267; *Polk vs. Boggs*, 122 Cal. 114, 116, 54 Pac. Rep. 536; *Faylor vs. Faylor*, 136 Cal. 92, 95, 68 Pac. Rep. 482. *Colo. Lipscomb vs. Nichols*, 6 Colo. 290, 292. *Me. Buck vs. Swazey*, 35 Me. 41, 48, 56 Am. Dec. 681. *Mont. Lynch vs. Herrig* (Mont. March 31, 1905), 80 Pac. Rep. 240. *N. Y. Boyd vs. McLean*, 1 John. Ch. 582; *Botsford vs. Burr*, 2 John. Ch. 405. *Utah. Rogers vs. Donnellan*, 11 Utah 103, 39 Pac. Rep. 494; *Chambers vs. Emery*, 13 Utah 374, 45 Pac. Rep. 192. *Fed. Olcott vs. Bynum*, 84 U. S. (17 Wall.) 44, bk. 21 L. ed. 570.

31. Party paying purchase money or proportionate part thereof entitled in equity to compel conveyance of legal title from any one succeeding to title of trustee, with notice as well as from trustee himself.—*Case vs. Coddling*, 38 Cal. 191, 193; *Murphy vs. Clayton*, 113

Cal. 153, 157, 45 Pac. Rep. 267; *South San Bernardino L. & I. Co. vs. San Bernardino Nat. Bank*, 127 Cal. 245, 247, 59 Pac. Rep. 699.

32. PRIVATE BENEFIT TOUCHING COMMON RIGHT of parties interested together by mutual agreement for purchase of real estate will make party holding it trustee for benefit of all.—*Jenkins vs. Frink*, 30 Cal. 586, 594, 39 Am. Dec. 134; *Van Horne vs. Fonda*, 5 John. Ch. (N. Y.) 383, 406; *Armour vs. Alexander*, 10 Paige Ch. (N. Y.) 571, 572; *Burhans vs. Van Zandt*, 7 N. Y. 523.

33. Trust exists between parties interested together by mutual agreement and purchase in name of one is made agreeable thereto.—*Jenkins vs. Frink*, 30 Cal. 586, 594, 39 Am. Dec. 134. See *Ill. Switzer vs. Skiles*, 3 Gilm. 529, 44 Am. Dec. 723. *Ky. Venable vs. Beauchamp*, 3 Dana 321, 23 Am. Dec. 74. *N. Y. Van Horne vs. Fonda*, 5 John. Ch. 383, 406; *Armour vs. Alexander*, 10 Paige Ch. 571, 572; *Burhans vs. Van Zandt*, 7 N. Y. 523. *Pa. Rupp vs. Ofr*, 31 Pa. St. 517. *Fed. Flagg vs. Mann*, 2 Sumn. C. C. 486, 9 Fed. Cas. 203; *Rothwell vs. Dewees*, 67 U. S. (2 Black.) 613, 618, bk. 17 L. ed. 309.

34. By agreement to sell and convey in consideration of stock delivered with no conveyance executed.—*Scadden Flat G. Min. Co. vs. Scadden*, 121 Cal. 33, 39, 53 Pac. Rep. 440.

35. By parol agreement to furnish money under joint enterprise and adventure in favor of party furnishing such money, where title is taken in name of third person.—*Chambers vs. Emery*, 13 Utah 374, 45 Pac. Rep. 192.

36. From payment of purchase money, or part thereof, where property taken in name of another, enforceable as against personal representatives of party holding.—*Murphy vs. Clayton*, 113 Cal. 153, 158, 45 Pac. Rep. 267.

37. Under agreement made by creditors upon purchase of debtor's property at sheriff's sale under execution in favor of debtor.—*Sandfoss vs. Jones*, 35 Cal. 481, 487.

38. Where one furnishes money and other skill, and deed is taken in name of one.—*Osborne vs. Endicott*, 6 Cal. 149, 154, 65 Am. Dec. 498.

39. Where property is purchased for benefit of unincorporated church organized for benefit of congregation, improved, and possession retained by it, although title is in another, even though trust is not in writing.—*Fink vs. Umscheid*, 40 Kan. 271, 19 Pac. Rep. 623, 2 L. R. A. 146.

40. EXIST IN FAVOR OF ANOTHER ALTHOUGH CONSIDERATION BE NOT MONEY, provided it is something of value.—*Taylor vs. Miles*, 19 Oreg. 550, 25 Pac. Rep. 143.

41. Exists in favor of party where he has never had opportunity to pay amount owing, and no demand for payment has been made or statement of amount furnished him, when asked for, and payment has been refused, which he was always willing to make.—*Ward vs. Matthews*, 73 Cal. 13, 16, 14 Pac. Rep. 604.

42. Exists in favor of party finding expenses of locating mine, as against party in whose name title is taken.—*Campbell vs. First Nat. Bank*, 22 Colo. 177, 43 Pac. Rep. 1007.

43. Exists in favor of parties paying purchase money in equal portions, as against holder of title, where land is subsequently partitioned between parties.—*Rogers vs. Donnellan*, 11 Utah 103, 33 Pac. Rep. 494.

44. Exists in favor of party paying part purchase money, and gives him proportionate equitable estate to amount paid.—*South San Bernardino L. & I. Co. vs. San Bernardino Nat. Bank*, 127 Cal. 245, 247, 59 Pac. Rep. 699.

45. RESULTING TRUST IN FAVOR OF PARTY PAYING THE PURCHASE MONEY may arise by party taking title advancing money as loan to other party.—*Hidden vs. Jordan*, 21 Cal. 92, 99; *Millard vs. Hathaway*, 27 Cal. 119, 140, 142; *Sandfoss vs. Jones*, 35 Cal. 481, 488; *Somers vs. Overhulser*, 67 Cal. 287, 7 Pac. Rep. 645; *Hellman vs. Messmer*, 75 Cal. 166, 16 Pac. Rep. 766; *Thomas vs. Jameson*, 77 Cal. 91, 19 Pac. Rep. 177; *Boyd vs. McLean*, 1 John. Ch. (N. Y.) 532.

46. Exists in favor of purchaser who takes conveyance in name of his wife for purpose of hindering and delaying creditors, and not for purpose of advancement.—*Taylor vs. Miles*, 19 Oreg. 550, 25 Pac. Rep. 143; *Guthrie vs. Gardner*, 19 Wend. (N. Y.) 414.

47. Interest in property orally agreed to be conveyed will not be looked to under doctrine of resulting trust, but equity will regard that interest or property as held by virtue of resulting trust which was conveyed to one by virtue of consideration emanating from another.—*Los Angeles & Bakersfield Oil & Dev. Co. vs. Occidental Dev. Co.*, 144 Cal. 528, 533, 78 Pac. Rep. 25, 28.

48. RESULTING TRUST ARISES AND ENFORCED AGAINST ADMINISTRATOR and creditors where property purchased in name of deceased, to extent of consideration advanced by claimant.—*Murphy vs. Clayton*, 113 Cal. 153, 157, 45 Pac. Rep. 267.

49. Not enforced against purchaser having no notice of resulting trust and he takes property freed of equity.—*Murphy vs. Clayton*, 113 Cal. 153, 157, 45 Pac. Rep. 267. See *Lehman vs. Lewis*, 62 Ala. 129; *Flynt vs. Hubbard*, 57 Miss. 471; *Bass vs. Wheelless*, 2 Tenn. Ch. 535; *Haggard vs. Benson*, 3 Tenn. 378.

50. HUSBAND AND WIFE.—*Resulting trust arises in favor of wife, as against husband purchasing property with wife's funds.*—*Ingersoll vs. Truebody*, 40 Cal. 603, 611.

51. In favor of wife advancing purchase money, as against husband's creditors.—*Riley vs. Martinelli*, 97 Cal. 575, 580, 33 Am. St. Rep. 209, 32 Pac. Rep. 579, 21 L. R. A. 33.

52. In favor of wife as against husband purchasing in his own name with money received by him from wife's mother for purpose of investment in wife's name.—*See Murphy vs. Clayton*, 113 Cal. 153, 160, 45 Pac. Rep. 267; *Lord vs. Bishop*, 101 Ind. 334; *Brookville Nat. Bank vs. Kimble*, 76 Ind. 195.

53. In favor of wife as against purchaser at execution sale of property purchased by husband with wife's money, unless purchase made in good faith without notice.—*Riley vs. Martinelli*, 97 Cal. 575, 580, 33 Am. St. Rep. 209, 32 Pac. Rep. 579, 21 L. R. A. 33.

54. In favor of wife as against creditor of husband purchasing at sheriff's sale under judgment, who merely credits amount of purchase money on judgment with notice.—*Riley vs. Martinelli*, 97 Cal. 575, 580, 33 Am. St. Rep. 209, 32 Pac. Rep. 579, 21 L. R. A. 33.

55. PARTNERS—Resulting trust arises in favor of partnership where real estate is purchased with partnership funds for partnership purposes in name of one partner.—*Case vs. Seger*, 4 Wash. 492, 30 Pac. Rep. 646.

56. By conveyance to one party in order to facilitate sale of property, under agreement whereby several persons are to share profit from sale of such real estate as partners.—*Soules vs. McLean*, 7 Wash. 451, 35 Pac. Rep. 364.

57. Where one partner takes conveyance to himself in his own name from partnership-debtor in payment of firm debt.—*Roberts vs. Haley*, 65 Cal. 397, 4 Pac. Rep. 385.

58. PRINCIPAL AND AGENT.—A resulting trust arises where agent takes title in his own name, but uses his own funds in purchase thereof, understanding being that he is to purchase for his principal.—*De Mallagh vs. De Mallagh*, 77 Cal. 126, 128, 19 Pac. Rep. 256.

59. Arises by operation of law where real estate agent employed to purchase land purchases in own name and pays for same with own money, where intending purchaser subsequently tenders amount of consideration, and fair remuneration and requests deed to be executed.—*Rose vs. Hayden*, 35 Kan. 106, 57 Am. Rep. 145, 10 Pac. Rep. 554.

60. When agent purchases in his own name in violation of agreement with his principal, and in abuse of confidence imposed in him.—*Kan. Rose vs. Hayden*, 35 Kan. 106, 57 Am. Rep. 145, 10 Pac. Rep. 554. *Minn. Snyder vs. Wolford*, 33 Minn. 175, 53 Am. Rep. 22, 22 N. W. Rep. 254. *N. Y. Burrell vs. Bull*, 3 Sandf. Ch. 15. *Wis. Onson vs. Cown*, 22 Wis. 329, 333.

61. Even though agency is created wholly by parol.—*Rose vs. Hayden*, 35 Kan. 106, 57 Am. Rep. 145, 10 Pac. Rep. 554; *Lees vs. Nuttall*, 1 Russ. & M. 53, 2 Myl. & K. 819, 8 Eng. Ch. 245; *Heard vs. Pilley*, L. R. 4 Ch. Rep. 548, 552.

62. When amount of purchase money was not known, and where no account or statement of purchase money or expenses was ever presented to principal.—*Bryan vs. McNaughton*, 38 Kan. 98, 16 Pac. Rep. 57.

63. Where agent purchases land under authority of his principal, takes title in his own name, and advances the money, which is afterwards repaid to him.—*Hellman vs. Messmer*, 75 Cal. 166, 170, 16 Pac. Rep. 766.

64. Where agent employed to negotiate for purchase of property violates his duty by purchasing for himself and his partner with his own money and takes title thereto in name of his partner.—*Bryan vs. McNaughton*, 38 Kan. 98, 16 Pac. Rep. 57.

65. Where agent furnished with purchase money for purchase of property at tax sale purchases in his own name.—*O'Connor vs. Irvine*, 74 Cal. 435, 439, 16 Pac. Rep. 336.

III. WHEN NOT CREATED ON CONVEYANCE IN NAME OF ANOTHER.

66. RESULTING TRUST DOES NOT ARISE ON CONTRACT, but upon payment of purchase money, and statute of frauds has nothing to do with case.—*Lynch vs. Herrig* (Mont. March 31, 1905), 80 Pac. Rep. 240. See *Bates vs. Kelly*, 80 Ala. 142, *Millard vs. Hathaway*, 27 Cal. 119, 131; *Walton vs. Karnes*, 67 Cal. 255, 7 Pac. Rep. 676.

67. By oral agreement without payments made after title is taken.—*Hellman vs. Messmer*, 75 Cal. 166, 170, 16 Pac. Rep. 766.

68. By conveyance made to another as a mere matter of convenience, the record showing title remaining in grantor after conveyance to purchaser.—*Weygant vs. Bartlett*, 102 Cal. 224, 226, 36 Pac. Rep. 417.

69. By parol declaration by purchaser that he buys for another where there is no advance of money by such party.—*Taylor vs. Kelly*, 103 Cal. 178, 184, 37 Pac. Rep. 216; *Bland vs. Talley*, 50 Ark. 71, 6 S. W. Rep. 234.

70. From presumption that he who pays purchase money intends to purchase for his own benefit.—*McCue vs. Gallagher*, 23 Cal. 51, 53.

71. In favor of grantor where grantee taking for valuable consideration (dictum).—*Chapman vs. Hughes*, 134 Cal. 641, 659, 58 Pac. Rep. 298, 60 Id. 974, 66 Id. 982; *Gibson vs. Armstrong*, 7 B. Mon. (Ky.) 489.

72. In favor of husband on wife's purchase with husband's money where part only of land was conveyed, as against grantor for other portion of land.—*Corbit vs. Kimball*, 107 Cal. 665, 666, 40 Pac. Rep. 1029.

73. In favor of one paying purchase money where there is express trust created by deed, as express trust waives right to claim trust implied by law.—*Tripp vs. Duane*, 74 Cal. 85, 91, 15 Pac. Rep. 429.

74. In favor of party purchasing land and entering into oral contract before deeds are executed whereby land is conveyed to third person, who is to pay purchase money.—*McCue vs. Gallagher*, 23 Cal. 51, 53.

75. IN TRANSACTION BETWEEN FATHER AND SON, father finding purchase money to secure homestead in government lands false representation and perjury to which father was consenting party existing.—*Moore vs. Moore*, 130 Cal. 110, 112, 80 Am. St. Rep. 78, 62 Pac. Rep. 294. See *Berka vs. Woodward*, 125 Cal. 119, 73 Am. St. Rep. 31, 57 Pac. Rep. 777, 45 L. R. A. 420; *Swan vs. Scott*, 11 Serg. & R. (Pa.) 155, 164.

76. On purchase by father in name of child and not trust in favor of party paying purchase money, as same is prima facie advancement, unless purchase money partly advanced by each under agreement to hold for mutual benefit.—*Faylor vs. Faylor*, 136 Cal. 92, 96, 68 Pac. Rep. 482. See *Russ vs. Mobius*, 16 Cal. 350, 355; *Spitler vs. Kaeding*, 133 Cal. 500, 65 Pac. Rep. 1040; *Tryon vs. Huntoon*, 67 Cal. 325, 7 Pac. Rep. 741.

77. Upon payments made in common by one asserting his claim, and grantee in deed, when

consideration is set forth in deed as moving solely from latter, in absence of satisfactory evidence showing portion really property of each, and establishing fact that payment was made for some specific part of estate.—*Woodside vs. Hewel*, 109 Cal. 481, 485, 42 Pac. Rep. 152; *Cutler vs. Tuttle*, 19 N. J. Eq. (4 C. E. Gr.) 549, 561.

78. When money is mere loan for purchase.—*Perry vs. Ross*, 104 Cal. 15, 18, 43 Am. St. Rep. 66, 37 Pac. Rep. 757.

79. Where portion of purchase money furnished by party claiming benefit thereof is not aliquot part of whole.—*Robles vs. Clarke*, 25 Cal. 317, 327.

80. Where conveyance is taken in name of wife or child, or other party paying purchase money is under natural, moral, or legal obligation to provide.—*Hamilton vs. Hubbard*, 134 Cal. 603, 605, 65 Pac. Rep. 321, 66 Id. 860.

IV. EVIDENCE.

81. PROVISION REQUIRING TRUSTS TO BE CREATED IN WRITING have no application after trust is executed.—*Polk vs. Boggs*, 122 Cal. 114, 116, 54 Pac. Rep. 536.

82. BURDEN OF PROVING THAT INSTRUMENT ABSOLUTE ON ITS FACE is really in trust, is upon party claiming such trust.—*Sherman vs. Sandell*, 106 Cal. 373, 39 Pac. Rep. 797.

83. Is on plaintiff to establish by evidence dehors instrument by which party takes in his own name, although acting as agent.—*Clement vs. Clement*, 1 Jones (N. C.) Eq. 184; *Chambers vs. Emery*, 13 Utah 374, 45 Pac. Rep. 192.

84. Rests on nominal purchaser to show party from whom consideration moved did not mean purchase to be in trust for himself, but gift of stranger.—*Plass vs. Plass*, 122 Cal. 3, 5, 12, 54 Pac. Rep. 372. See *Dudley vs. Bosworth*, 10 Humph. (Tenn.) 9, 51 Am. Dec. 690.

85. Rests on parties seeking to establish resulting trust to show necessary facts by clear evidence.—*Plass vs. Plass*, 122 Cal. 3, 5, 12, 54 Pac. Rep. 373. See *Johnson vs. Quarles*, 46 Mo. 423; *Philpot vs. Penn*, 91 Mo. 38, 44, 3 S. W. Rep. 386.

86. TRUST IMPLIED FROM PURCHASE AND PAYMENT OF CONSIDERATION by or for one party in conveyance taken in name of another may be overcome, and disproved or corroborated, by any oral or written testimony showing circumstances of transaction, and expressed or probable intention of parties.—*Warren vs. Adams*, 19 Colo. 515, 36 Pac. Rep. 604; *Blodgett vs. Hildreth*, 103 Mass. 484.

87. EVIDENCE CREATING TRUST IN PROPERTY, title of which stands in another, must be clear, satisfactory, and convincing.—*Henley vs. Hotaling*, 41 Cal. 22; *Mahoney vs. Bostwick*, 96 Cal. 53, 58, 31 Am. St. Rep. 175, 30 Pac. Rep. 1020; *Sherman vs. Sandell*, 106 Cal. 373, 39 Pac. Rep. 797; *Woodside vs. Hewel*, 109 Cal. 481, 42 Pac. Rep. 152; *Plass vs. Plass*, 122 Cal. 3, 54 Pac. Rep. 372; *Harris vs. Harris*, 136 Cal. 379, 384, 69 Pac. Rep. 23. *Colo. Whitsett vs. Kershaw*, 4 Colo. 419. *Me. Baker vs. Vining*, 30 Me. 121, 50 Am. Dec. 617. *N. Y.*

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Ensign vs. Ensign, 120 N. Y. 655, 656, 44 N. E. Rep. 942. *Fed. Coyle vs. Davis*, 116 U. S. 108, bk. 29 L. ed. 583, 6 Sup. Ct. Rep. 314; *Cadman vs. Peter*, 118 U. S. 73, bk. 30 L. ed. 78; 6 Sup. Ct. Rep. 957.

88. Conversion of trust money specifically, as distinct from other money of trustee, in order to charge property with trust, must be clearly shown.—*Woodside vs. Hewel*, 109 Cal. 481, 486, 42 Pac. Rep. 152.

89. Must be such as to trace money into property, and its identity must be certain in changed form.—*First Nat. Bank vs. Campbell*, 2 Colo. App. 271, 30 Pac. Rep. 357.

90. Must show amounts paid by different parties with certainty.—*Sherman vs. Sandell*, 106 Cal. 373, 375, 39 Pac. Rep. 797.

91. Must show existence of trust beyond reasonable controversy, as public policy and safety and security of titles to real estate demand that proof be scrutinized with great caution.—*Chambers vs. Emery*, 13 Utah 374, 45 Pac. Rep. 192.

92. Must show more than mere possession of trust funds by trustee and purchase of property by him, i. e. payment for property generally by trustee does not authorize presumption that purchase was made with trust funds; in order to charge property with trust of money expended therein.—*Woodside vs. Hewel*, 109 Cal. 481, 486, 42 Pac. Rep. 152; *Phillips vs. Overfield*, 100 Mo. 466, 13 S. W. Rep. 705.

93. Must show that money of real and not nominal owner formed consideration for purchase, and became converted into land.—*Plass vs. Plass*, 122 Cal. 3, 12, 54 Pac. Rep. 372. *Colo. First Nat. Bank of Denver vs. Campbell*, 2 Colo. App. 271, 30 Pac. Rep. 357. *Mass. Livermore vs. Aldrich*, 59 Mass. (5 Cush.) 431; *Flickett vs. Durham*, 109 Mass. 419. *N. Y. White vs. Carpenter*, 2 Paige Ch. 217. *Wash. Bowen vs. Hughes*, 5 Wash. 442, 32 Pac. Rep. 93.

94. Must show that money was paid at or before time of execution of conveyance, or that an absolute obligation to pay has been incurred as part of original transaction of purchase.—*Hidden vs. Jordan*, 21 Cal. 92, *Millard vs. Hathaway*, 27 Cal. 119; *Currey vs. Allen*, 34 Cal. 254; *Case vs. Coddington*, 38 Cal. 191, 193; *O'Connor vs. Irvine*, 74 Cal. 435, 439, 16 Pac. Rep. 236; *Hellman vs. Messmer*, 75 Cal. 166, 16 Pac. Rep. 166; *Botsford vs. Burr*, 2 John. Ch. (N. Y.) 405; *Pinnock vs. Clough*, 16 Vt. 500, 42 Am. Dec. 521.

95. Must show that purchaser was acting for plaintiff and that facts are inconsistent with idea that he was acting solely for himself.—*Chambers vs. Emery*, 13 Utah 374, 45 Pac. Rep. 192.

96. Need not show that defendant agreed in formal or express language that he would make purchase and hold for benefit of parties furnishing consideration.—*O'Connor vs. Irvine*, 74 Cal. 435, 439, 16 Pac. Rep. 236.

97. Showing mutual understanding between parties that person purchasing acted on behalf of party finding purchase money is sufficient.

—O'Connor vs. Irvine, 74 Cal. 435, 439, 16 Pac. Rep. 336.

98. Showing sum claimed by plaintiff as his share of purchase money held sufficient, although same conflicting and contradictory to some extent.—Plass vs. Plass, 122 Cal. 3, 5, 7, 54 Pac. Rep. 372.

99. ADMISSION.—By husband that one half consideration for purchase was paid by wife, and to that extent purchase was made by her, proves resulting trust in her favor.—Polk vs. Boggs, 122 Cal. 114, 116, 54 Pac. Rep. 536.

100. Of nominal purchaser will be received and considered with great caution, especially when alleged trustee is dead.—Chambers vs. Emery, 13 Utah 374, 45 Pac. Rep. 192.

101. Of party at time or afterwards, may be given in evidence to prove trust in favor of party paying purchase money.—Warren vs. Adams, 19 Colo. 515, 36 Pac. Rep. 604; Blodgett vs. Hildreth, 103 Mass. 424.

102. Declarations made by wife in reference to ownership of property, made to third parties, not admissible where it is not proposed to bring knowledge of such declarations home to party claiming as against wife.—Riley vs. Martinelli, 97 Cal. 575, 585, 33 Am. St. Rep. 209, 32 Pac. Rep. 579, 21 L. R. A. 33; De Lany vs. Knapp, 111 Cal. 165, 169, 52 Am. St. Rep. 160, 43 Pac. Rep. 598.

103. Fact that money was not furnished by nominal purchaser may be proved by any note or memorandum in writing of nominal purchaser admitting fact even though he plead statute of frauds.—Osborne vs. Endicott, 6 Cal. 149, 154, 65 Am. Dec. 498.

104. Evidence of general character that claimant furnished purchase money, that purchaser impecunious and had no funds save what was furnished by claimant, does not fulfil requirements as to clear, definite, and certain application of claimant's money to requirements of title resting in trustee.—First Nat. Bank vs. Campbell, 2 Colo. App. 271, 30 Pac. Rep. 357.

105. Evidence uncertain, does not show parties who made payments, and amount belonging to one and other is uncertain, will not establish resulting trust.—Plass vs. Plass, 122 Cal. 3, 14, 54 Pac. Rep. 372; Baker vs. Vining, 30 Me. 121, 50 Am. Dec. 617.

106. Preponderance of evidence necessary to declare deed absolute in its terms to be merely in trust.—Brison vs. Brison, 90 Cal. 323, 332, 334, 7 Am. St. Rep. 139, 27 Pac. Rep. 186; Sherman vs. Sandell, 106 Cal. 373, 375, 39 Pac. Rep. 797.

107. STATUTE OF FRAUDS.—Provision of statute of frauds requiring agreements relating to sale of lands to be evidenced by writing does not apply to agreements made between parties where one purchases in his own name, the consideration being made by other, and parol evidence is in such cases admissible to prove resulting trust.—Bayles vs. Baxter, 22 Cal. 575, 579; Millard vs. Hathaway, 27 Cal. 119; Sandfoss vs. Jones, 35 Cal. 481, 487; Walton vs. Karnes, 67 Cal. 255, 256, 7 Pac. Rep. 676; Ward vs. Matthews, 73 Cal. 13, 16, 14 Pac. Rep. 604; Brison vs. Brison, 75 Cal. 525, 7 Am. St.

Rep. 189, 17 Pac. Rep. 689; De Mallagh vs. De Mallagh, 77 Cal. 126, 128, 19 Pac. Rep. 256; Wood vs. Rabe, 96 N. Y. 414, 426, 48 Am. Rep. 640.

108. Parol evidence is admissible to prove facts upon which trust will be implied in favor of person actually paying purchase money.—Bayles vs. Baxter, 22 Cal. 575, 579; Polk vs. Boggs, 122 Cal. 114, 116, 54 Pac. Rep. 536. Colo. First Nat. Bank of Denver vs. Campbell, 2 Colo. App. 271, 30 Pac. Rep. 357. Miss. Soggins vs. Heard, 31 Miss. 426. Tenn. Pritchard vs. Wallace, 4 Sneed 405, 70 Am. Dec. 254.

109. Where any part of purchase money is shown to have been paid by party not holding title.—Hidden vs. Jordan, 21 Cal. 92, 99; Walton vs. Karnes, 67 Cal. 255, 257, 7 Pac. Rep. 676.

110. To establish agreement and trust in favor of party advancing purchase money.—Faylor vs. Faylor, 136 Cal. 92, 94, 68 Pac. Rep. 482.

111. To prove payment of purchase money by party, notwithstanding recital in deed that money paid by grantee.—Brooks vs. Union Trust & R. Co., 146 Cal. —, 79 Pac. Rep. 843. See Hidden vs. Jordan, 21 Cal. 92, 93; Bayles vs. Baxter, 22 Cal. 575; Millard vs. Hathaway, 27 Cal. 119, 142; Chenoweth vs. Lewis, 9 Oreg. 150; Snider vs. Johnson, 25 Oreg. 328, 35 Pac. Rep. 846.

112. To prove that land purchased by husband was purchased with wife's money, so as to make husband trustee for wife.—Ingersoll vs. Truebody, 40 Cal. 603, 611.

113. To prove that part of purchase money was paid by party seeking to enforce trust and establish verbal agreement between parties.—Walton vs. Karnes, 67 Cal. 255, 257, 7 Pac. Rep. 676.

114. To rebut presumption that land purchased by husband was so purchased with common property, by showing same purchased with wife's separate estate so as to create trust in wife's favor.—Ingersoll vs. Truebody, 40 Cal. 603, 611. See Peck vs. Brummagim, 31 Cal. 440, 39 Am. Dec. 195; Higgins vs. Higgins, 46 Cal. 259, 260, 262; Rhine vs. Ellen, 36 Cal. 362; Ramsdell vs. Fuller, 28 Cal. 37, 27 Am. Dec. 103.

115. Not admissible where trust results from payment of consideration, where party claiming to be beneficiary has made no payments, to show that purchase was made for his benefit, as it may involve nothing more than breach of parol agreement to purchase and hold in trust for another.—Taylor vs. Miles, 19 Oreg. 556, 25 Pac. Rep. 143.

116. Verbal agreement by party to purchase land from another may not be given in evidence to establish resulting trust where purchase money has been paid by party purchasing and conveyance taken in his name.—Walton vs. Karnes, 67 Cal. 255, 257, 7 Pac. Rep. 676. See Hidden vs. Jordan, 21 Cal. 92.

117. Presumption arises upon proof of facts upon which it is predicated without further proof as to real intention of parties.—Tryon vs. Huntoon, 67 Cal. 325, 327, 7 Pac. Rep. 741.

118. Such presumption may be removed or overcome by proof showing that between party advancing money and grantees no trust

was intended in favor of former.—Tryon vs. Huntoon, 67 Cal. 325, 327, 7 Pac. Rep. 741.

§ 854. RIGHTS OF CREDITORS (repealed).

History: Enacted March 21, 1872; repealed March 30, 1874, Code Amdts. 1873-4, p. 221.

1. Resulting trust valid as against creditors.
2. Estoppel in pais.

1. Resulting trust valid as against creditors of trustee.—See Breeze vs. Brooks, 71 Cal. 169, 9 Pac. Rep. 670, 11 Id. 885; 97 Cal. 72, 31 Pac. Rep. 742, 22 L. R. A. 256.

2. ESTOPPEL IN PAIS of equitable owner

does not arise in favor of creditors of trustee, from latter's unauthorized statements unknown to equitable owner.—Breeze vs. Brooks, 71 Cal. 169, 182, 9 Pac. Rep. 670, 11 Id. 885. See Riley vs. Martinelli, 97 Cal. 584, 33 Am. St. Rep. 214, 32 Pac. Rep. 579; Murphy vs. Clayton, 113 Cal. 161, 45 Pac. Rep. 267.

§ 855. SECTION EIGHT HUNDRED AND FIFTY-THREE QUALIFIED (repealed).

History: Enacted March 21, 1872; repealed March 30, 1874, Code Amdts. 1873-4, p. 221.

§ 856. PURCHASERS PROTECTED. No implied or resulting trust can prejudice the rights of a purchaser or encumbrancer of real property for value and without notice of the trust.

History: Enacted March 21, 1872.

I. In General.

1. Applied, cited, construed, referred to, etc.
- 2, 3. Construed with reference to application.
4. Cestui que trust allowing trustee to appear as owner—Position of.
5. Deed—When voidable.
6. Party in possession without right—Position of.
7. Purchaser—Meaning of.
8. Trust—When admitted in answer of purchaser.
9. Words—Purchaser, meaning of.

II. Bona Fide Purchaser—Who Is.

- 10-14. Who are bona fide purchasers.
- 15-20. Who are not bona fide purchasers.

III. Consideration Must Be Shown.

- 21, 22. Consideration—What must be shown.
23. Same—Effect of want of.
24. Same—Want of, as resulting trust.

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25. Caveat emptor—Application of rule.
- 26-28. Knowledge of agent, etc., as notice.
29. Lis pendens—How far notice.
- 30-33. Purchaser—When put upon inquiry—Record, etc.

V. Same—2. What Not Sufficient.

34. Constructive notice of unrecorded deed not sufficient.
35. Facts not sufficient—Land patent certificate.
36. Same—Quitclaim deed.
- 37-40. Lis pendens—How far notice.
- 41, 42. Patent—How far presumptive evidence of notice.
43. Purchaser—Quitclaim deed as notice.
44. Quitclaim deed—Effect of as notice.
45. Recitals—How far notice.
46. Unrecorded deed—How far notice.

VI. Purchaser—1. When Protected.

- 47-49. General rule—Resulting trust cannot defeat purchaser without notice, etc.
50. Judgment creditor—How far purchase protected.
51. Purchaser—How far subject to affected by equities.
- 52, 53. Same—Averments and proof necessary to protect.
- 54-59. Same—Position of various shown.
60. Same—How far bound by judgment enforcing trust.

VII. Same—2. When Not Protected.

61. General rule—Notice charges purchasers.
62. Purchaser—Creditors of trustee as.
63. Same—Upon exchange.
64. Same—When consideration unsatisfactory.

VIII. Position of Purchaser with Notice.

65. Assignee from trustee for creditors—Takes subject.
66. Assignee under land grant subsequent to original grant.
67. Purchaser with notice charged with trust.
- 68-70. Same—Trust enforced against, in equity.
71. Same—Liability not affected by agreement with trustee.
72. Same—At execution sale gets debtor's title.
73. Same—From trustee procuring title by third party.
74. Trust enforced against representatives of purchaser.

IX. Evidence and Burden of Proof.

- 75-78. Burden of proof of notice—Upon whom cast.
- 79, 80. Same—Consideration, upon whom cast.
- 81, 82. Consideration—What sufficient to prove.
83. Possession—How far evidence of ownership.

I. IN GENERAL.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Tripp vs. Duane*, 74 Cal. 85, 91, 15 Pac. Rep. 439 (construed and applied); *Warnock vs. Harlow*, 96 Cal. 298, 307, 31 Am. St. Rep. 209, 31 Pac. Rep. 166 (construed and applied with other sections); *Marshall vs. Farmers' Bank*, 115 Cal. 330, 335, 42 Pac. Rep. 418, 47 Id. 52 (construed and applied); *Chapman vs. Blankman*, 128 Cal. 362, 365, 60 Pac. Rep. 925 (construed and applied).

As to application of maxim caveat emptor, see note 61 Am. Dec. 353, 90 Am. Dec. 424.

As to conveyance by trustee and its effect, see note 64 Am. Dec. 199.

As to how far bona fide purchaser from trustee is protected, see note 47 Am. Dec. 637.

As to position of purchasers from trustees with or without notice of trust, see note 63 Am. St. Rep. 469, and post § 869 and note.

As to receiving trust property with notice, see monographic note by Robert Desty, 2 L. R. A. 481.

As to sales and conveyances by trustees, see 19 Am. St. Rep. 266.

As to when purchaser of trust property is chargeable with trust, see note 32 Am. Dec. 705, 40 Am. Dec. 210, 212.

As to when sales or transfers by trustee are void, see post § 870 and note.

2. **CONSTRUED**—As applying to mechanics' liens filed against mining property in course of administration in probate, parties having no notice of trust or proceedings.—*Chapman vs. Blankman*, 128 Cal. 362, 365, 60 Pac. Rep. 925.

3. As applying to purchaser under conveyance by wife holding in trust for husband.—*Warnock vs. Harlow*, 96 Cal. 298, 307, 31 Am. St. Rep. 209, 31 Pac. Rep. 166.

4. **CESTUI QUE TRUST ALLOWING OR ENCOURAGING TRUSTEE** to appear as true owner or as having full power of disposition, and thus causing innocent third party to act and deal with such trustee as apparent owner, must bear consequences.—*Cauhape vs. Barnes*, 135 Cal. 107, 112, 67 Pac. Rep. 55.

5. **DEED MADE TO ONE TAKING WITH NOTICE** of trust is voidable at instance of cestui que trust.—*Chapman vs. Hughes*, 134 Cal. 641, 645, 58 Pac. Rep. 298, 60 Id. 974, 66 Id. 982.

6. **PARTY IN POSSESSION** without legal or equitable right fraudulently deprived of possession, without, however, depriving him of any right of possession at law resulting from his actual prior possession, and then wrongdoer purchases legal title from lawful owner, cannot be compelled to convey.—*Scott vs. Umbarger*, 41 Cal. 410, 420.

7. **Purchaser**—Meaning of.—See pars 9, 10-20.

8. **TRUST ADMITTED, BY ANSWER** in action to compel performance of resulting trust created through fraud, admitting that pretended sale was fictitious, and made for purposes mentioned in complaint, but denying conspiracy to defraud, and aver purchase in good faith for valuable consideration, without

any knowledge or suspicion of unfair dealings, but denying he became trustee.—*Scott vs. Umbarger*, 41 Cal. 410, 418.

9. **WORD "PURCHASER,"** as used in statute, must be interpreted in sense in which understood in equity.—*Wood vs. Robinson*, 22 N. Y. 564, 567. See *Matter of Howe*, 1 Paige Ch. (N. Y.) 124, 19 Am. Dec. 395; *Arnold vs. Patrick*, 6 Paige Ch. (N. Y.) 310.

II. BONA FIDE PURCHASER—WHO IS.

10. **GRANTEE UNDER QUITCLAIM** takes in character of bona fide purchaser.—*Nidever vs. Ayers*, 33 Cal. 39, 43, 23 Pac. Rep. 192. See *Chapman vs. Simms*, 53 Miss. 168, 169.

11. **Judgment creditor purchasing** at his own sale without notice is bona fide purchaser.—*Riley vs. Martinelli*, 97 Cal. 575, 583, 33 Am. St. Rep. 209, 32 Pac. Rep. 579, 21 L. R. A. 33. See *Hunter vs. Watson*, 12 Cal. 363, 377, 73 Am. Dec. 543.

12. **Party claiming under quitclaim deed** in chain of title bona fide purchaser.—*Nidever vs. Ayers*, 33 Cal. 39, 43, 23 Pac. Rep. 192. See *Chapman vs. Simms*, 53 Miss. 168, 169.

13. **Party purchasing land held by wife** in trust for husband, before husband's action, is bona fide purchaser, even if deed not recorded until after action.—*Warnock vs. Harlow*, 96 Cal. 298, 306, 31 Am. St. Rep. 209, 31 Pac. Rep. 166.

14. **Party taking mortgage** to secure pre-existing debt is purchaser for valuable consideration.—*Chapman vs. Hughes*, 134 Cal. 641, 658, 58 Pac. Rep. 298, 60 Id. 974, 66 Id. 982. See *Frey vs. Clifford*, 44 Cal. 335; *Connecticut Life Ins. Co. vs. McCormick*, 45 Cal. 580.

See ante § 14 note par. 9.

15. **Grantee or party taking security** in conveyance made in consideration of antecedent debt, is not a bona fide purchaser.—*Wood vs. Robinson*, 22 N. Y. 564, 567. See *Matter of Howe*, 1 Paige Ch. (N. Y.) 124, 19 Am. Dec. 395; *Arnold vs. Patrick*, 6 Paige Ch. (N. Y.) 310.

16. **Party examining record** prior to purchasing not bona fide purchaser.—*Eversdon vs. Mayhew*, 65 Cal. 163, 167, 3 Pac. Rep. 641.

17. **Party having notice** at any moment of time before payment of purchase money, is not bona fide purchaser.—*Scott vs. Umbarger*, 41 Cal. 410, 418; *Eversdon vs. Mayhew*, 65 Cal. 163, 167, 3 Pac. Rep. 641. See *Ala. Wells vs. Morrow*, 38 Ala. 128. *Ark. Fearce vs. Foreman*, 29 Ark. 568. *N. Y. Taylor vs. Ranney*, 4 Hill 619, 624. *Fed. Boone vs. Chiles*, 35 U. S. (10 Pet.) 177, 210, 213, bk. 9 L. ed. 338. *Eng. Wallwyn vs. Lee*, 9 Ves. 24, 7 Rev. Rep. 142.

18. **Party not bona fide purchaser** where consideration is unsatisfactory, and cannot be fully shown.—*Chapman vs. Hughes*, 134 Cal. 641, 645, 58 Pac. Rep. 298, 60 Id. 974, 66 Id. 982.

19. **Purchaser at execution sale** under judgment against husband bona fide for valuable consideration without notice.—*Riley vs. Martinelli*, 97 Cal. 575, 580, 33 Am. St. Rep. 209, 32 Pac. Rep. 579, 21 L. R. A. 33.

20. **Party must prove ignorance of facts** at time of purchase and when money paid to

be bona fide purchaser.—*Scott vs. Umbarger*, 41 Cal. 410, 419; *Murphy vs. Clayton*, 118 Cal. 153, 158, 45 Pac. Rep. 267.

III. CONSIDERATION MUST BE SHOWN.

21. **CONSIDERATION MUST BE SHOWN** to be valuable in order to protect purchaser against equities arising from resulting trust.—*Davis vs. Baugh*, 59 Cal. 588, 576.

22. **Not sufficient where it is not satisfactory**, and not clearly shown.—*Chapman vs. Hughes*, 134 Cal. 641, 645, 58 Pac. Rep. 298, 60 Id. 974, 66 Id. 982.

23. **GRANTEE OR ENCUMBRANCER** not advancing anything at time of purchase takes interest subject to prior equities.—*Wood vs. Robinson*, 22 N. Y. 564, 567. See *Matter of Howe*, 1 Paige Ch. (N. Y.) 124, 19 Am. Dec. 395; *Arnold vs. Patrick*, 6 Paige Ch. (N. Y.) 310.

24. **TRUST DOES NOT RESULT** to grantor merely because there is no consideration.—*Tillaux vs. Tillaux*, 115 Cal. 663, 668, 47 Pac. Rep. 691. See *Burt vs. Wilson*, 28 Cal. 632, 87 Am. Dec. 142. *Md. Groff vs. Rohrer*, 85 Md. 27. *N. Y. Sturtevant vs. Sturtevant*, 20 N. Y. 39, 75 Am. Dec. 871. *Eng. Young vs. Peachy*, 2 Atk. 257; *Lloyd vs. Spillet*, 2 Atk. 150; *Cook vs. Fountain*, 3 Swanst. 585.

IV. NOTICE—WHAT SUFFICIENT TO CHARGE PURCHASER.

25. **CAVEAT EMPTOR IS RULE** in all purchases as to title in absence of stipulation to contrary.—*Watson vs. Sutro*, 86 Cal. 500, 525, 24 Pac. Rep. 172, 25 Id. 64.

26. **Knowledge by notice to attorney, counsel, or agent acquired during negotiations for purchase**, is constructive notice to principal.—*Watson vs. Sutro*, 86 Cal. 500, 516, 24 Pac. Rep. 172, 25 Id. 64. See *Connelly vs. Peck*, 6 Cal. 348; *May vs. Borel*, 12 Cal. 91; *Stanley vs. Green*, 12 Cal. 148; *Hunter vs. Watson*, 12 Cal. 363, 78 Am. Dec. 548; *Bierce vs. Red Bluff Hotel Co.*, 31 Cal. 160; *Donald vs. Beals*, 57 Cal. 399; *Bank of U. S. vs. Davis*, 2 Hill (N. Y.) 451; *Williamson vs. Brown*, 15 N. Y. 354; *Harrington vs. United States (The Distilled Spirits)*, 78 U. S. (11 Wall.) 356, bk. 20 L. ed. 167.

As to constructive notice, see ante § 19 and note para. 26, 27.

27. **Knowledge of agent of purchaser chargeable to principal in transaction managed wholly by him within scope of his authority**, situation being that of trustee conveying land to one taking with notice.—*Chapman vs. Hughes*, 134 Cal. 641, 645, 58 Pac. Rep. 298, 60 Id. 974, 66 Id. 982.

28. **Facts showing that husband of grantee was partner in business, and knew conditions of title and of contracts and trusts existing between parties, and acted as agent of grantee**, is sufficient to charge grantee with notice of trust.—*Chapman vs. Hughes*, 134 Cal. 641, 645, 58 Pac. Rep. 298, 60 Id. 974, 66 Id. 982.

29. **Lis pendens.—How far notice.**—See para. 36-39 this note.

30. **Possession excites inquiry with reference to title, and operates as effectually to notify purchaser of any other circumstances,**

knowledge of which may be brought home to him.—*Petrain vs. Kiernan*, 23 Oreg. 455, 32 Pac. Rep. 158.

31. **Purchaser chargeable with notice of existence of trust where he might have discovered existence of recorded deed upon making slight inquiries.**—*Eversdon vs. Mayhew*, 85 Cal. 1, 9, 21 Pac. Rep. 431, 24 Id. 382. See *Long vs. Dollarhide*, 24 Cal. 227; *Shotwell vs. Harrison*, 22 Mich. 410, 419.

As to duty to make inquiry, see ante § 19 and note para. 10-27.

32. **Examining record of title before purchasing of has knowledge or means of knowledge, and not purchaser without notice.**—*Eversdon vs. Mayhew*, 85 Cal. 163, 167, 3 Pac. Rep. 641.

33. **Put upon inquiry upon deed recorded under assumed name in fraud of rights of cestui que trust.**—*Eversdon vs. Mayhew*, 85 Cal. 1, 9, 21 Pac. Rep. 431, 24 Id. 382. See *Long vs. Dollarhide*, 24 Cal. 227; *Shotwell vs. Harrison*, 22 Mich. 410, 419.

V. NOTICE—WHAT NOT SUFFICIENT.

34. **CONSTRUCTIVE NOTICE** of unrecorded decree of final distribution of intestate's estate does not bind bona fide purchaser of estate subject to secret or resulting trust.—*Nidever vs. Ayers*, 83 Cal. 39, 42, 28 Pac. Rep. 192.

See par. 46 this note.

As to constructive notice, see ante § 19 and note.

35. **Fact that land and patents could only be issued upon certificates of purchase establishes no more than that land was public and salable as provided by law, and is not sufficient to charge purchaser with notice that patent was issued fraudulently, so as to create trust.**—*Marshall vs. Farmers' Bank*, 115 Cal. 330, 336, 42 Pac. Rep. 418, 47 Id. 52. See *People vs. Swift*, 96 Cal. 165, 31 Pac. Rep. 16.

36. **Mere fact that deed is merely quitclaim deed not sufficient to charge purchaser with notice, or put him upon inquiry.**—*Nidever vs. Ayers*, 83 Cal. 39, 42, 28 Pac. Rep. 192. See *Graff vs. Middleton*, 43 Cal. 341; *Chapman vs. Simms*, 53 Miss. 168, 169.

37. **Lis pendens.—Filing of lis pendens will not operate as prior recording of subsequent conveyance, so as to make deed executed to purchaser of trust estate for valuable consideration relate back to commencement of action.**—*Warnock vs. Harlow*, 96 Cal. 298, 304, 306, 31 Am. St. Rep. 209, 31 Pac. Rep. 166.

38. **Mere pendency of suit relating to trust estate does not, as matter of law, charge subsequent purchaser with notice.**—*Warnock vs. Harlow*, 96 Cal. 298, 304, 31 Am. St. Rep. 209, 31 Pac. Rep. 166.

39. **Operation of lis pendens as constructive notice does not depend upon fact that deed of prior purchaser remains unrecorded.**—*Warnock vs. Harlow*, 96 Cal. 298, 304, 31 Am. St. Rep. 209, 31 Pac. Rep. 166.

40. **Purchaser from wife of property conveyed by husband to her in trust, prior action taken by husband to enforce trust does not charge purchaser with notice of pending ac-**

tion.—*Warnock vs. Harlow*, 96 Cal. 298, 204, 306, 31 Am. St. Rep. 209, 31 Pac. Rep. 166.

41. Patent presumptive evidence that redemption of lands from judgment was made by party in his own right, and does not charge him with notice of resulting trust.—*Marshall vs. Farmers' Bank*, 115 Cal. 330, 336, 42 Pac. Rep. 418, 47 Id. 52.

42. Purchaser of land acquired by patent in government grant not bound to peer behind patent to see whether registrar had not erred or been duped when he made patent to patentee.—*Marshall vs. Farmers' Bank*, 115 Cal. 330, 336, 42 Pac. Rep. 418, 47 Id. 52. See *Schnee vs. Schnee*, 28 Wis. 377, 99 Am. Dec. 183.

43. Purchaser from trustee not put upon inquiry by mere fact that deed conveying estate to him was mere quitclaim deed.—*Nidever vs. Ayers*, 83 Cal. 39, 43, 23 Pac. Rep. 192.

44. Quitclaim deed.—See para. 35, 42 this note.

45. Recitals in deed to purchaser not sufficient to put him upon inquiry, or charge him with notice.—*Nidever vs. Ayers*, 83 Cal. 39, 42, 23 Pac. Rep. 192.

46. Unrecorded decree in suit brought to enforce trust does not work constructive notice or put purchaser upon inquiry.—*Nidever vs. Ayers*, 83 Cal. 39, 43, 23 Pac. Rep. 192.

See par. 34 this note.

VI. PURCHASER—WHEN PROTECTED.

47. RESULTING TRUST BEING PURELY **EQUITABLE INTEREST**, cut off and destroyed as against equities of cestui que trust against all bona fide purchasers or mortgagees for valuable consideration without notice.—*Nidever vs. Ayers*, 83 Cal. 39, 42, 23 Pac. Rep. 192; *Murphy vs. Clayton*, 113 Cal. 153, 158, 45 Pac. Rep. 267; *Tillaux vs. Tillaux*, 115 Cal. 663, 675, 47 Pac. Rep. 491. See *Ala. Lehman vs. Lewis*, 62 Ala. 129. *Miss. Blynt vs. Hubbard*, 57 Miss. 471. *Tenn. Bass vs. Wheelless*, 2 Tenn. Ch. 535; *Haggard vs. Benson*, 3 Tenn. Ch. 278.

48. Cannot defeat title of purchaser for valuable consideration without notice.—*Murphy vs. Clayton*, 113 Cal. 153, 157, 45 Pac. Rep. 267.

49. Cannot prejudice rights of purchasers or encumbrancers for value without notice.—*Tripp vs. Duane*, 74 Cal. 85, 91, 15 Pac. Rep. 439; *Marshall vs. Farmers' Bank*, 115 Cal. 330, 335, 42 Pac. Rep. 418, 47 Id. 52.

50. Judgment creditor purchasing at his own sale equally with third person, making purchase under execution, is protected against latent equity of which he has no notice.—*Riley vs. Martinelli*, 97 Cal. 575, 583, 33 Am. St. Rep. 209, 32 Pac. Rep. 579, 21 L. R. A. 33. See *Vitio vs. Hamilton*, 86 Ind. 137; *Carnahan vs. Yerkes*, 87 Ind. 62; *Gower vs. Doheney*, 33 Iowa 36.

51. **PURCHASER TAKES SUBJECT TO ALL EQUITIES** affecting property, in absence of evidence showing that he purchased in good faith and without actual or constructive notice of existence of equities in favor of another.—*Riley vs. Martinelli*, 97 Cal. 575, 580, 33 Am. St. Rep. 209, 32 Pac. Rep. 579, 21 L. R. A. 33.

52. Must aver and prove possession of his grantor, purchase of premises, taking of pur-

chaser in good faith and without notice, actual or constructive, prior and down to time of payment of purchase money and conveyance of estate.—*Scott vs. Umbarger*, 41 Cal. 410, 418; *Eversdon vs. Mayhew*, 65 Cal. 163, 167, 3 Pac. Rep. 641. See *Ala. Dufphey vs. Frenage*, 5 Stew. & P. 242; *Wells vs. Morrow*, 33 Ala. 128. *Ark. Byers vs. Fowler*, 12 Ark. 218, 54 Am. Dec. 271, 288; *Pearce vs. Foreman*, 29 Ark. 568. *Ga. Herndon vs. Kimball*, 7 Ga. 432, 50 Am. Dec. 406; *Jordan vs. Pollock*, 14 Ga. 160; *Mackey vs. Bowles*, 98 Ga. 730, 733, 25 S. E. Rep. 834. *Ill. Choteau vs. Jones*, 11 Ill. 300, 50 Am. Dec. 460. *Iowa. Sillyman vs. King*, 36 Iowa 207, 214; *Kitteridge vs. Chapman*, 36 Iowa 348, 350; *Cox Shoe Co. vs. Adams*, 105 Iowa 402, 409, 75 N. W. Rep. 316. *Ky. Blight vs. Banks*, 6 T. B. Mon. 193, 17 Am. Dec. 136, 157. *Md. Hoffman Coal Co. vs. Cumberland Co.*, 16 Md. 479. *Miss. Perkins vs. Swank*, 43 Miss. 358. *Mo. Halsa vs. Halsa*, 8 Mo. 303, 309; *Chouteau vs. Burlando*, 20 Mo. 482; *Paul vs. Fulton*, 25 Mo. 156; *Aubuchon vs. Bender*, 44 Mo. 560; *Bishop vs. Schneider*, 46 Mo. 472, 2 Am. Rep. 533; *Arnholz vs. Hartwig*, 73 Mo. 485, 488; *Dougherty vs. Cooper*, 77 Mo. 523, 532; *Greenlee vs. Marquis*, 49 Mo. App. 290, 294. *N. Y. Taylor vs. Ranney*, 4 Hill 619, 624; *Jewett vs. Palmer*, 7 John. Ch. 65, 11 Am. Dec. 401; *People vs. Open Board of S. B. Co.*, 92 N. Y. 98, 103; *Niver vs. Crane*, 98 N. Y. 40, 47. *N. O. Barnes vs. Meeds*, 3 Ired. L. 292, 49 Am. Dec. 390. *Utah. Wells, F. & Co. vs. Smith*, 2 Utah 39, 52. *W. Va. Hoult vs. Donohue*, 21 W. Va. 300; *Winans vs. Winans*, 22 W. Va. 692. *Fed. Merrill vs. Dawson*, Hemp. 563, 17 Fed. Cas. 36; *Wood vs. Mann*, 1 Sumn. C. C. 506, 30 Fed. Cas. 444; *Hurst vs. McNeil*, 1 Wash. C. C. 70, 75, 12 Fed. Cas. 1038; *Wilson vs. Mason*, 5 U. S. (1 Cr.) 45, bk. 2 L. ed. 29; *Wormley vs. Wormley*, 21 U. S. (8 Wheat.) 421, 450, bk. 5 L. ed. 651; *Potter vs. Gardner*, 25 U. S. (12 Wheat.) 498, 502, bk. 6 L. ed. 706; *Mechanics Bank vs. Seton*, 26 U. S. (1 Pet.) 299, bk. 7 L. ed. 152; *Sheppard vs. Taylor*, 30 U. S. (5 Pet.) 675, bk. 8 L. ed. 269; *Boone vs. Chiles*, 35 U. S. (10 Pet.) 177, 211, 212, bk. 9 L. ed. 388, 400; *Fowler vs. Merrill*, 52 U. S. (11 How.) 375, bk. 13 L. ed. 736, 744; *Lytle vs. Lansing*, 147 U. S. 59, 70, bk. 37 L. ed. 78, 13 Sup. Ct. Rep. 254. *Eng. Harrison vs. Southcope*, 1 Atk. 538; *Wigg vs. Wigg*, 1 Atk. 384; *Story vs. Windsor*, 2 Atk. 630; *Hardingham vs. Nicholls*, 3 Atk. 304; *Head vs. Egerton*, 3 P. Wms. 280, 281; *Jones vs. Thoms*, 3 P. Wms. 243; *Wallwyn vs. Lee*, 9 Ves. 24, 32, 7 Rev. Rep. 142.

53. Must show ignorance or **any specifically** knowledge of alleged facts or any facts which would put him upon inquiry, not only at time of purchase but at any time before he paid purchase money or received deeds.—*Scott vs. Umbarger*, 41 Cal. 410, 419.

54. **PURCHASER AT EXECUTION SALE UNDER JUDGMENT RECOVERED AGAINST HUSBAND**, bona fide for valuable consideration without notice, takes freed from resulting trust in favor of wife.—*Riley vs. Martinelli*, 97 Cal. 575, 580, 33 Am. St. Rep. 209, 32 Pac. Rep. 579, 21 L. R. A. 33.

55. **RESULTING TRUST MUST GIVE WAY** to creditor purchasing at execution sale under provisions of state statute.—*Murphy vs. Clay-*

ton, 113 Cal. 153, 158, 45 Pac. Rep. 267. See *Catherwood vs. Watson*, 65 Ind. 576.

56. **FROM PARTY HAVING LEGAL TITLE** for valuable consideration without notice of trust protected against trust.—*Nidever vs. Ayers*, 83 Cal. 39, 43, 23 Pac. Rep. 192.

57. **From trustee in actual possession**, for valuable consideration, with no notice, takes good title.—*Griffin vs. Blanchar*, 17 Cal. 70, 74.

58. **From trustee under deed of trust with power to sell and apply proceeds in payment of debt**, takes legal title, although rents received from property sufficient to pay debt, as such purchaser not bound to examine trustee's accounts.—*Thompson vs. McKay*, 41 Cal. 221, 231.

59. **From wife, of land held in trust for husband prior to action by husband to enforce trust not regarded as purchaser with notice**, even though conveyance not recorded until after action.—*Warnock vs. Harlow*, 96 Cal. 298, 306, 31 Am. St. Rep. 209, 31 Pac. Rep. 166.

60. **PURCHASER NOT BOUND BY JUDGMENT IN ACTION TO ENFORCE TRUST** to which he is not party, as judgment is conclusive only between parties and their successors in interest by title subsequent to commencement of action.—*Warnock vs. Harlow*, 96 Cal. 298, 307, 31 Am. St. Rep. 209, 31 Pac. Rep. 166.

VII. PURCHASER—WHEN NOT PROTECTED.

61. **PURCHASER NOT PROTECTED** as against resulting trusts where he purchases with notice of sale either actual or constructive.—*Griffin vs. Blanchar*, 17 Cal. 70, 74; *Thompson vs. McKay*, 41 Cal. 221, 231; *Scott vs. Umbarger*, 41 Cal. 410, 418; *Sharp vs. Goodwin*, 51 Cal. 219, 221; *Eversdon vs. Mayhew*, 65 Cal. 163, 167, 3 Pac. Rep. 641; *Tripp vs. Duane*, 74 Cal. 85, 91, 15 Pac. Rep. 439; *Nidever vs. Ayers*, 83 Cal. 39, 42, 23 Pac. Rep. 192; *Warnock vs. Harlow*, 96 Cal. 298, 306, 31 Am. St. Rep. 209, 31 Pac. Rep. 166; *Riley vs. Martinelli*, 97 Cal. 575, 583, 33 Am. St. Rep. 209, 32 Pac. Rep. 679, 21 L. R. A. 33; *Murphy vs. Clayton*, 113 Cal. 153, 45 Pac. Rep. 267; *Tillaux vs. Tillaux*, 115 Cal. 663, 675, 47 Pac. Rep. 691; *Marshall vs. Farmers' Bank*, 115 Cal. 330, 335, 42 Pac. Rep. 418, 47 Id. 52. Ill. *Swift vs. Castle*, 23 Ill. 132, 151. N. J. *Nicholls vs. Peak*, 12 N. J. Eq. (1 Beas.) 69, 73. Tenn. *Cardwell vs. Cheetham*, 2 Head 20. Va. *Lamar vs. Hale*, 79 Va. 153. Fed. *Wormley vs. Wormley*, 21 U. S. (8 Wheat.) 421, bk. 5 L. ed. 651; *Gardner vs. Gardner*, 3 Mason C. C. 173, 221, 9 Fed. Cas. 1167.

62. **CREDITORS OF DECEASED TRUSTEE NOT PURCHASERS** entitled to protection against beneficiary.—*Murphy vs. Clayton*, 113 Cal. 153, 157, 45 Pac. Rep. 267.

63. **EXCHANGE OF PROPERTIES MADE BY TRUSTEE**, who charges himself with consideration as if it were cash paid, when in fact no cash was paid, is not sale, and purchaser is not protected against trust.—*Chapman vs. Hughes*, 134 Cal. 641, 645, 58 Pac. Rep. 298, 60 Id. 974, 66 Id. 932.

64. **PURCHASER UNDER DEED**, father-in-law trustee, not protected against claims of cestui que trust, where evidence as to con-

sideration is unsatisfactory, and it is impossible to say what consideration was paid, books of account showing gift, other evidence that consideration was paid by settlement of accounts.—*Chapman vs. Hughes*, 134 Cal. 641, 645, 58 Pac. Rep. 298, 60 Id. 974, 66 Id. 932.

VIII. POSITION OF PURCHASER WITH NOTICE.

65. **ASSIGNEE OF TRUSTEE** holding under deed of trust for benefit of creditors takes subject to trust.—*Sharp vs. Goodwin*, 51 Cal. 219, 221.

66. **ASSIGNEE UNDER LAND CERTIFICATE** taken subsequent to grant from original grantor with notice, holds in trust for original grantor.—*Jackson vs. Hyde*, 91 Cal. 463, 464, 27 Pac. Rep. 759.

67. **PURCHASER TAKING TRUST PROPERTY** with knowledge of trust stands in the same position as trustee, and chargeable therewith.—*Price vs. Reeves*, 38 Cal. 457, 460; *Cavagnaro vs. Don*, 63 Cal. 227, 231; *Eversdon vs. Mayhew*, 65 Cal. 163, 166, 3 Pac. Rep. 641; *Cannon vs. Handley*, 72 Cal. 133, 143, 13 Pac. Rep. 315; *Scrivner vs. Dietz*, 84 Cal. 295, 297, 24 Pac. Rep. 171; *Jones vs. Jones*, 140 Cal. 587, 591, 74 Pac. Rep. 143.

68. **Equity enforces trust against purchaser with knowledge of trust in same manner as against original trustee**.—*Scrivner vs. Dietz*, 84 Cal. 295, 297, 24 Pac. Rep. 171. See *Lathrop vs. Bampton*, 31 Cal. 17, 39 Am. Dec. 141.

69. **Enforce trust against all persons who, with notice thereof, come into possession of trust property, in same manner and with like force and effect as against original trustee**.—*Lathrop vs. Bampton*, 31 Cal. 17, 21, 39 Am. Dec. 141.

70. **Follows estate into hands of party in whom it becomes vested at law and treats him as trustee for execution of trust**.—*Cauhape vs. Barnes*, 135 Cal. 107, 111, 67 Pac. Rep. 55.

71. **Liability of purchaser with notice of trust cannot be affected by any agreement made by him as trustee**.—*Scrivner vs. Dietz*, 84 Cal. 295, 297, 24 Pac. Rep. 171.

72. **Purchaser at execution sale gets no title except that of judgment debtor**.—*Murphy vs. Clayton*, 113 Cal. 153, 162, 45 Pac. Rep. 267.

73. **Purchaser from trustee who procured sale to himself through third party, takes subject to trust of which he has notice**.—*Scott vs. Umbarger*, 41 Cal. 410, 415, 419.

74. **Resulting trust enforceable against administrators and creditors of party in whose name conveyance taken**.—*Murphy vs. Clayton*, 113 Cal. 153, 157, 45 Pac. Rep. 267.

IX. EVIDENCE.

75. **BURDEN OF PROOF OF WANT OF NOTICE** on party setting it up discussed but not decided.—*Eversdon vs. Mayhew*, 65 Cal. 1, 9, 21 Pac. Rep. 431, 24 Id. 382. See *Long vs. Dollard*, 24 Cal. 218, 227; *Shotwell vs. Harrison*, 22 Mich. 410, 419.

76. **BURDEN OF PROOF THAT PARTY BONA FIDE PURCHASER** without notice, not upon defendant in action to enforce trust, where plaintiff expressly alleges notice that

proof on plaintiff's part is devoid of any fact tending to show such notice and nothing on record to put him upon inquiry.—Wyrick vs. Weck, 68 Cal. 8, 10, 8 Pac. Rep. 522.

77. **BURDEN OF PROOF ON PLAINTIFF** alleging that defendant's whole legal title derived through deed of patentee, to show that such purchaser took with notice of plaintiff's equities, especially where there is nothing of record to put purchasers upon inquiry.—Wyrick vs. Weck, 68 Cal. 8, 10, 8 Pac. Rep. 522.

78. Where matters in pais tending to show notice of his right at time of purchase was charged in complaint, as without such proof title will remain where plaintiff alleges it to be, i. e. in defendant.—Wyrick vs. Weck, 68 Cal. 8, 10, 8 Pac. Rep. 522.

79. **BURDEN OF PROOF UPON GRANTEE** from trustee to prove that he was purchaser for valuable consideration without notice.—Warnock vs. Harlow, 96 Cal. 298, 307, 308, 31 Am. St. Rep. 209, 31 Pac. Rep. 166.

80. **BURDEN OF PROOF IS ON PARTY SETTING UP PAYMENT** to prove value.—Eversdon vs. Mayhew, 85 Cal. 1, 9, 21 Pac. Rep.

431, 24 Id. 332. See Long vs. Dollarhide, 24 Cal. 213, 227; Shotwell vs. Harrison, 22 Mich. 410, 419.

81. Evidence of grantor showing that deed was gift to daughter, subsequently modified by his testifying that there was "quite a consideration," as his firm was indebted to his daughter-in-law, and that on account of deed she canceled some indebtedness, and that there was "kind of a settlement," not showing how indebtedness was canceled or how settlement was had, does not disclose satisfactory consideration.—Chapman vs. Hughes, 134 Cal. 641, 645, 58 Pac. Rep. 298, 60 Id. 974, 66 Id. 982.

82. Evidence of witness that party had admitted holding property in trust, admissible in action to enforce trust, and to show that no valuable consideration paid therefor.—Duff vs. Duff, 101 Cal. 1, 6, 35 Pac. Rep. 437.

83. Possession, although prima facie evidence of ownership, not conclusive as against trust deed showing legal title in another.—Harrigan vs. Mowry, 84 Cal. 456, 467, 22 Pac. Rep. 658, 24 Id. 48. See Sepulveda vs. Sepulveda, 39 Cal. 13, 17.

§ 857. FOR WHAT PURPOSES EXPRESS TRUSTS MAY BE CREATED.

Express trusts may be created for any of the following purposes:

1. To sell real property, and apply or dispose of the proceeds in accordance with the instrument creating the trust.
2. To mortgage or lease real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon.
3. To receive the rents and profits of real property, and pay them to or apply them to the use of any person, whether ascertained at the time of the creation of the trust or not, for himself or for his family, during the life of such person, or for any shorter term, subject to the rules of title two of this part; or,
4. To receive the rents and profits of real property, and to accumulate the same for purposes and within the limits prescribed by the same title.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdt. 1873-4, pp. 221-222.

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I. IN GENERAL.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Estate of Hinckley, 53 Cal. 457, 478, 481 (construed and applied with other sections); Oglesby vs. Hollister, 78 Cal. 136, 144, 9 Am. St. Rep. 177, 18 Pac. Rep. 146

(construed and applied); *Simpson vs. Simpson*, 30 Cal. 237, 242, 22 Pac. Rep. 167 (construed and applied); *Ward vs. Waterman*, 85 Cal. 488, 506, 24 Pac. Rep. 930 (applied with other sections); *Morfev vs. San Francisco & S. R. R. Co.*, 107 Cal. 587, 596, 40 Pac. Rep. 810 (construed and applied with other sections); *In re Estate Walkerly*, 108 Cal. 627, 644, 646, 648, 656, 49 Am. St. Rep. 97, 41 Pac. Rep. 772 (applied with other sections); *Nichols vs. Emery*, 109 Cal. 323, 330, 50 Am. St. Rep. 43, 41 Pac. Rep. 1089 (applied with other sections); *Sacramento Bank vs. Alcorn*, 121 Cal. 379, 385, 53 Pac. Rep. 813 (applied with other sections); *Toland vs. Toland*, 123 Cal. 140, 144, 55 Pac. Rep. 681 (applied); *Wittfield vs. Forster*, 124 Cal. 418, 421, 57 Pac. Rep. 219 (applied with other sections); *Estate of Lorenz*, 124 Cal. 495, 497, 57 Pac. Rep. 381 (referred to in discussion); *Escondido H. S. Dist. vs. Escondido Sem.*, 130 Cal. 128, 134, 62 Pac. Rep. 401 (construed and applied); *In Matter Estate Fair*, 132 Cal. 523, 527, 528, 559, 564, 567, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000 (construed and applied with other sections); *Blackburn vs. Webb*, 133 Cal. 420, 423, 65 Pac. Rep. 952 (construed and applied); *Banta vs. Wise*, 135 Cal. 277, 279, 67 Pac. Rep. 129 (construed and applied with other sections); *In Matter Estate Sanford*, 136 Cal. 97, 102, 68 Pac. Rep. 494 (construed and applied); *Keogh vs. Noble*, 136 Cal. 153, 155, 68 Pac. Rep. 579 (construed and applied with other sections); *In Matter Estate Piohoir*, 139 Cal. 682, 685, 73 Pac. Rep. 604, 606 (construed and applied).

As to trusts for creditors, see note 34 Am. St. Rep. 219.

2. COMPARED WITH NEW YORK STATUTE—First subdivision of section reads like New York law prior to amendment of 1874, second subdivision being substantially the same, while third subdivision of New York statute was changed by inserting words "pay them to," "whether ascertained at the time of the trust or not," and "for himself or his family," none of the changes altering the meaning of third subdivision of section.—*In re Estate Hinckley*, 58 Cal. 457, 479.

2. CONSTRUED AS APPLYING AND AUTHORIZING TRUSTS given as security for loans.—*Sacramento Bank vs. Alcorn*, 121 Cal. 379, 385, 53 Pac. Rep. 813.

4. As applying to case of written contract containing an express trust, whereby trustee received legal title in trust to convey in case of sales by mutual consent, or that within year "afterwards" he would take beneficial interest himself on payment of half purchase money.—*Oglesby vs. Hollister*, 76 Cal. 136, 144, 9 Am. St. Rep. 177, 18 Pac. Rep. 146.

5. As applying to devise in trust to collect and receive rents and profits, and use them in payment of mortgage and legacies, and residue to one for natural life.—*In re Estate Dolan*, 79 Cal. 65, 67, 21 Pac. Rep. 545.

6. As giving power and authorizing trust for purpose of sale and distribution of property upon death of trustor.—*Nichols vs. Emery*, 109 Cal. 323, 331, 50 Am. St. Rep. 43, 41 Pac. Rep. 1089.

7. As giving power to create trust to re-

ceive rents and profits and to accumulate within limits prescribed by code.—*Blackburn vs. Webb*, 133 Cal. 420, 423, 65 Pac. Rep. 952.

8. As including and being read with § 15, which, although it takes its place in title II of the first part, is referred in § 771, which is to be read with § 15.—*In re Estate Hinckley*, 58 Cal. 457, 481.

9. As not applying to trust created by decree in divorce proceedings, that "homestead property . . . be held in trust for her [wife's] support and for that of the children."—*Simpson vs. Simpson*, 80 Cal. 237, 242, 22 Pac. Rep. 167.

10. As pointing out and defining trusts and purposes for which they may be created in real estate.—*Bennalack vs. Richards*, 116 Cal. 405, 409, 48 Pac. Rep. 622.

11. As showing that references in provision of section which relate to creation of estates to vest in persons or individuals in being, and to the accumulation of income for benefit of such persons.—*In re Estate Hinckley*, 58 Cal. 257, 481, 482.

12. Except so far as § 757 limits period during which beneficial interest may be enjoyed, as showing that title treating of uses and trusts is but supplementary and correlative to provisions of code, relating to creation of legal estates not violative of rule against perpetuities.—*In re Estate Hinckley*, 58 Cal. 457, 482.

13. More broadly than to point out erroneous references, and as including design to prove that § 847 applicable only to private trusts, and not to prevent creation of permanent trusts for charitable uses.—*In re Estate Hinckley*, 58 Cal. 457, 481.

14. With reference in subdivision 3 to "the rules of title II of this part," as sufficiently clear and applicable to rules found in that chapter relating to creation of estates.—*In re Estate Hinckley*, 58 Cal. 457, 481.

15. With reference to title II of part II in fourth subdivision of section looked upon as mistake, as there is nothing in title which in terms treats of accumulation of rents and profits by real estate, and real reference is to provision which relates to accumulations of incomes from real estate which is given force and effect to by applying it to §§ 722-726 in title two of the first part.—*In re Estate Hinckley*, 58 Cal. 457, 481.

16. DISTINCTION BETWEEN TRUST OVER AND TRUST TO CONVEY is that the property vests in the case of the trust over, upon contingency arising, and added provision if any that conveyance shall be made amounts to nothing more than assurance of title, whereas in case of trust to convey no title vests until deed has been executed.—*Hofsas vs. Cummings*, 141 Cal. 525, 528, 75 Pac. Rep. 110.

17. Essential elements in trust under subdivision 1 are imperative duty to sell and equally imperative duty to apply or dispose or proceeds in accordance with instrument creating trust.—*Carpenter vs. Cook*, 132 Cal. 621, 624, 84 Am. St. Rep. 118, 123, 64 Pac. Rep. 997.

18. EXCLUSIVENESS OF STATUTE.—Express trusts in land, except those enumerated in statute, cannot exist.—*In re Estate Fair*.

132 Cal. 523, 523, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000. See *Gilman vs. Reddington*, 24 N. Y. 9, 15; *Townshend vs. Frommer*, 125 N. Y. 446, 458, 459, 26 N. E. Rep. 805.

19. Intention of parties must be ascertained from instruments creating trust, and when so ascertained rights of parties are fixed and controlled thereby.—*Tyler vs. Granger*, 48 Cal. 259, 268.

II. TO SELL AND DISPOSE OF.

20. TRUST FOR PURPOSES OF SALE must be imperative, not merely discretionary.—*Morfev vs. San Francisco & S. R. R. Co.*, 107 Cal. 587, 595, 40 Pac. Rep. 310. See *Kidwell vs. Brummagim*, 32 Cal. 436, 443; *Cooke vs. Platt*, 93 N. Y. 35.

21. TRUSTEE UNDER WILL DIRECTING HIM TO SELL property has power so to do without any order of court.—*In re Estate Delaney*, 49 Cal. 76, 84.

22. TRUST CREATED BY CONVEYANCE AND AGREEMENT made between husband and wife conveying her interest in community property to husband, husband to pay monthly allowance, keep property in repair, pay taxes, and pay half to wife on sale of same.—*Keogh vs. Noble*, 136 Cal. 153, 155, 68 Pac. Rep. 579.

23. By conveyance by beneficiaries to trustee in trust to manage and sell for best price attainable, rents, profits, and proceeds of sales, less costs and expenses, to be divided between beneficiaries in proportions mentioned.—*Ward vs. Waterman*, 85 Cal. 483, 498, 506, 24 Pac. Rep. 930.

24. By conveyance by wife to husband of her interest in community property, under agreement, made pending divorce proceedings, securing her certain allowance and half of property when same sold by husband.—*Keogh vs. Noble*, 136 Cal. 153, 155, 68 Pac. Rep. 579. See *Janes vs. Throckmorton*, 57 Cal. 368; *King vs. Wise*, 43 Cal. 628.

25. By conveyance to trustee of real estate upon trust to sell within ten months after grantor's death, divide proceeds among children as directed, with power of revocation expressly reserved although grantor remains in possession, and trustee takes vested interest thereunder.—*Nichols vs. Emery*, 109 Cal. 323, 330, 50 Am. St. Rep. 43, 41 Pac. Rep. 1089.

26. By deed executed simultaneously with note by husband and wife to third party upon trust to secure payment of such note, giving power of sale to trustee in case of default, and to execute to purchaser good and sufficient deed, and to apply proceeds in satisfaction of debt and expenses. Such deed not mortgage requiring judicial foreclosure and sale in order to vest title in purchaser.—*Koch vs. Briggs*, 14 Cal. 256, 261-262, 73 Am. Dec. 651.

27. By grant to trustees "to rent or sell . . . property altogether or in such separate lots or parcels and at such time or times, and at either public or private sale . . . as he in his own judgment may deem most expedient and to apply proceeds . . . toward payment of debts."—*Thompson vs. McKay*, 41 Cal. 221, 230.

28. NOT CREATED BY DEED OF GRANT TO TRUSTEE IN TRUST OF ASCERTAINED LODGE "all the property I now own, both real

and personal, and of whatever kind and nature or description, wherever situated—to hold unto said trustee, his successors and assigns forever," as same is not within provision of §§ 847-857 of the code and therefore void.—*Wittfield vs. Forster*, 124 Cal. 418, 419, 421, 57 Pac. Rep. 219.

29. By devise of real estate to testator's children, appointing executor and vesting him with "complete power" to dispose of property "as to him shall seem best for benefit of our children and without responsibility."—*Augulsola vs. Arnaz*, 51 Cal. 435, 439.

30. By devise of residue to executors, with power after two years to sell any portion of estate at public auction or private sale without any order of court, or without being required to account to any court, as same is not a devise in trust for sale for purposes of will, and creates no valid trust in relation to land or any other trust than such as pertains to office of executor.—*Bennalack vs. Richards*, 116 Cal. 405, 409, 48 Pac. Rep. 622.

31. NOT CREATED BY PROVISION IN WILL that "upon sale of the property of my estate I desire that all legacies then unpaid be paid at once in full," as same does not direct executors to make any application or disposition of proceeds of sale of real estate, and only fixes time for payment of legacies then unpaid; neither does it direct or empower them to apply or dispose of proceeds in payment of legacies.—*Bennalack vs. Richards*, 116 Cal. 405, 409, 48 Pac. Rep. 622.

32. In homestead or community property by court by decree in absence of statutory authority.—*Simpson vs. Simpson*, 80 Cal. 237, 242, 22 Pac. Rep. 167.

33. Trust to convey to beneficiaries is void under provisions of code.—*Escondido H. S. Dist. vs. Escondido Sem.*, 130 Cal. 123, 135, 62 Pac. Rep. 401; *In re Estate Fair*, 132 Cal. 523, 528, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000; *Estate Sanford*, 136 Cal. 97, 100, 68 Pac. Rep. 494; *Estate of Pichoir*, 139 Cal. 682, 685, 73 Pac. Rep. 604, 606; *McCurdy vs. Otto*, 140 Cal. 48, 53, 73 Pac. Rep. 748; *Hofsas vs. Cummings*, 141 Cal. 525, 527, 529, 75 Pac. Rep. 110; *Estate of Dixon*, 143 Cal. 511, 513, 77 Pac. Rep. 412; *Johnson vs. Miner*, 144 Cal. 785, 786, 78 Pac. Rep. 240; *Gardiner vs. Cord*, 145 Cal. 157, 163, 78 Pac. Rep. 544.

34. TRUST TO HOLD LAND "IN TRUST," and to dispose of income until beneficiary should attain age of twenty-five years, "whereupon they [the trustees] shall convey the same" to beneficiaries, is void.—*In re Estate Sanford*, 136 Cal. 97, 98, 101, 68 Pac. Rep. 494; *In re Estate Fair*, 132 Cal. 523, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Pac. Rep. 1000.

35. POWER IN TRUST TO CONVEY has no application in this state.—*Estate of Fair*, 132 Cal. 523, 537, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000; *McCurdy vs. Otto*, 140 Cal. 48, 53, 73 Pac. Rep. 734.

36. REASON FOR PROHIBITING EXPRESS TRUST TO CONVEY is "an intent to avoid the intricacies, frauds, and concealments which were possible under old system of

trusts and uses, whereby title to real property is allowed to be in one person, and benefits in others, to such extent that confusion following was intolerable."—In re Estate Fair, 132 Cal. 523, 527, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

37. **TRUST TO CONVEY BEING INVALID** under state statute, statutes of uses, even if in force, will not execute.—Estate of Fair, 132 Cal. 523, 527, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000; McCurdy vs. Otto, 140 Cal. 48, 53, 73 Pac. Rep. 784.

38. **Real estate vests in heirs under invalid trust to convey real estate.**—Estate of Pichoir, 139 Cal. 682, 685, 73 Pac. Rep. 604, 606.

39. **TRUST TO HOLD PROPERTY** is not trust to sell and dispose of proceeds.—Carpenter vs. Cook, 132 Cal. 621, 624, 84 Am. St. Rep. 118, 123, 64 Pac. Rep. 997.

40. **Power to exchange land**, whether such exchange is made directly or by means of sale and new purchase, is not power to alien estate, within intent and meaning of the statute or provisions.—In re Estate Hinckley, 58 Cal. 457, 481. See Hawley vs. James, 5 Paige Ch. (N. Y.) 318, 444; Belmont vs. O'Brien, 12 N. Y. 394, 402.

41. **TRUSTS FOR CREDITORS.**—Trusts have been frequently used as securities for loans, and their validity has been upheld in numerous cases since adoption of code, and such cases have been uniform, establishing conclusion which has become rule of property, and even though erroneous should not be disturbed.—Sacramento Bank vs. Alcorn, 121 Cal. 379, 382, 53 Pac. Rep. 813. See Bateman vs. Burr, 57 Cal. 480; Durkin vs. Burr, 60 Cal. 360; Carey vs. Brown, 62 Cal. 373; Savings & L. Soc. vs. Deering, 66 Cal. 281, 5 Pac. Rep. 353; More vs. Calkins, 95 Cal. 435, 29 Am. St. Rep. 128, 30 Pac. Rep. 583; Savings & L. Soc. vs. Burnett, 106 Cal. 514, 528, 3 Pac. Rep. 922.

42. **Deed authorizing trustees to sell and convey** upon default in payment of promissory notes and interest, is trust and not mortgage requiring judicial foreclosure.—Koch vs. Briggs, 14 Cal. 256, 78 Am. Dec. 651; Grant vs. Burr, 54 Cal. 298, 300; Bateman vs. Burr, 57 Cal. 480, 483; Herbert Kraft Co. vs. Bryan, 140 Cal. 73, 79, 73 Pac. Rep. 745.

43. **Personal property may be held by creditors** under absolute transfer, in trust for debtor, with power in creditor to sell and reimburse advances made, or to provide funds to meet additional demands of debtor.—Hyatt vs. Argenti, 8 Cal. 151, 159.

44. **Trust created by debtor by assignment of personal estate**, trustee to sell and distribute proceeds among creditors, good as against attaching creditor where creditors consent, and trustee is in position with lien upon it, and proceeds superior to that acquired by subsequent levy of process.—Handley vs. Pfister, 39 Cal. 288, 286, 2 Am. Rep. 449.

45. **Trust to effect an immediate sale** for benefit of creditors whose debts are due may also be security for debts while sale is being made.—Sacramento Bank vs. Alcorn, 121 Cal. 379, 384, 53 Pac. Rep. 813.

46. **Trust under deed of assignment** for benefit of creditors with power to sell and apply proceeds for payment of debts and pay over surplus to debtor, continues while debt subsists.—Handley vs. Pfister, 39 Cal. 288, 287, 2 Am. Rep. 449.

III. TO MORTGAGE OR LEASE.

47. **DISTINCTION BETWEEN TRUSTEE AND MORTGAGEE** is that "an ordinary trustee is a person who sustains but one character, and has no lien upon trust funds except for his own compensation; while mortgagee let into possession of mortgaged property, is both creditor and trustee."—Gunter vs. Janes, 9 Cal. 643, 658.

48. **DEED EXECUTED TO SECURE PAYMENT OF MONEY**, evidenced by promissory note with power of sale "if default be made in payment of said sums of principal or interest when due," gives trustee right to sell without decree of foreclosure, same being deed of trust and not mortgage.—Bateman vs. Burr, 57 Cal. 480, 483.

See ante para. 41-46 this note.

49. **RELATION BETWEEN GRANTOR OR HIS ASSIGNS** under deed executed by him to trustee with power to sell at end of limited period, but reserving right in grantor to sell or mortgage for purposes of trust before absolute sale and conveyance by trustee pursuant to such deed, is similar to that of mortgagor or his assigns and mortgagee with absolute power of sale, and passes no right, legal or equitable, to beneficial sale or possession to trustee as such.—Tyler vs. Granger, 48 Cal. 259, 270.

50. **TRUST TO HOLD AND LEASE DURING LIFE OF PARTY** named and at his death to convey to his children, and falling them to children of another, void.—Johnson vs. Miner, 144 Cal. 785, 786, 78 Pac. Rep. 240.

IV. TO RECEIVE RENTS AND PAY AND APPLY.

51. **TRUST CREATED IN SUBDIVISION 3 IS PRIMARILY "TO HOLD** property and its rents and income" to sole use and behoof of settler.—Carpenter vs. Cook, 132 Cal. 621, 624, 84 Am. St. Rep. 118, 123, 64 Pac. Rep. 997.

52. **Trustee referred to in subdivision 3** is not trust referable to any one or more of specified class.—Carpenter vs. Cook, 132 Cal. 621, 624, 84 Am. St. Rep. 118, 123, 64 Pac. Rep. 997.

53. **TRUST TO HOLD RENTS AND PROFITS** to sole use and behoof of person is not trust to receive rents and profits and pay them or apply them to use of any person, but is mere passive trust, and, it not being specified by § 857, is void.—Carpenter vs. Cook, 132 Cal. 621, 624, 84 Am. St. Rep. 118, 64 Pac. Rep. 997. See Verdin vs. Slocum, 71 N. Y. 345.

54. **Essential elements under subdivision 3** are that duty of applying, distributing, and apportioning rents and profits in accordance with directions of trust should be imposed upon trustee.—Carpenter vs. Cook, 132 Cal. 621, 624, 84 Am. St. Rep. 118, 123, 64 Pac. Rep. 997.

55. **Trust created by devise in trust to collect and receive rents and profits**, apply them

to paying off mortgage, payment of legacies and residue to another during natural life.—In re Estate Dolan, 79 Cal. 65, 67, 21 Pac. Rep. 545.

56. Trust created by devise trustees in trust to hold, invest, and manage for benefit of son as they shall judge best for his interest until he arrives at thirty years of age and then to pay him property and interest, if in trustee's judgment he should be competent to have control and management of his own property, but if not of that opinion, to retain and manage same for his benefit, duration of trust not exceeding son's lifetime with possibility of terminating sooner.—Cutter vs. Hardy, 48 Cal. 568, 571.

57. NOT CREATED BY BEQUEST IN TRUST TO RECEIVE RENTS, issues, and profits and apply net income to such extent and at such times as trustees, in their judgment, may deem proper until party attains age of twenty-five and then to convey, as same is invalid and void as not being imperative.—Estate of Sanford, 136 Cal. 97, 100, 68 Pac. Rep. 494.

58. By desire that party receive all rents and commencing all minor details to them, as there is no direction to pay or apply them to use of any one, or to accumulate same.—Toland vs. Toland, 123 Cal. 140, 144, 55 Pac. Rep. 681.

59. In decree in divorce "in trust for her [wife's] support and for that of children of parties," not express or clearly implied as to

application of rents and profits.—Simpson vs. Simpson, 80 Cal. 337, 342, 23 Pac. Rep. 167.

60. Deed executed to trustee to hold rents and profits in trust for one for natural life and after decease to turn estate over to heirs, executors, or administrators of trustee as same may in and by law be proper and provided, construed as not casting remainder in heirs of deceased, as intention was that on termination of trust trustee should turn property over to heirs, executors, or administrators "as the same may in and by law be proper and provided."—Heints vs. Hoover, 138 Cal. 372 374, 71 Pac. Rep. 447.

61. ENJOYMENT OF CESTUI QUE TRUST may be made to commence in future, and its commencement upon termination of existing life or lives or of intermediate estate, under § 707.—Nichols vs. Emery, 109 Cal. 323, 330, 50 Am. St. Rep. 43, 41 Pac. Rep. 1089.

V. TO RECEIVE RENTS AND ACCUMULATE.

As to trusts for accumulation of income, see ante § 724 and note.

62. TRUST TO RECEIVE RENTS AND PROFITS and to accumulate same valid within limits prescribed by code.—Blackburn vs. Webb, 133 Cal. 420, 423, 65 Pac. Rep. 902.

63. Rents, dividends, or other income treated by trustee as capital and invested, making new capital, constitute accumulations.—In re Estate Steele, 124 Cal. 533, 541, 57 Pac. Rep. 564.

§ 558. VESTING OF MORTGAGE POWERS. Where a power to sell real property is given to a mortgagee, or other encumbrancer, in an instrument intended to secure the payment of money, the power is to be deemed a part of the security, and vests in any person who, by assignment, becomes entitled to the money so secured to be paid, and may be executed by him whenever the assignment is duly acknowledged and recorded.

History: Enacted March 21, 1872; original provision repealed and above provision substituted therefor by Act March 30, 1874, Code Amds. 1873-4, p. 222. The above section a re-enactment of section 895 post (repealed).—In re Estate Fair, 132 Cal. 523, 557, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

1. Applied, cited, construed, referred to, etc.
- 2-5. Construed as to its extent, identity, meaning, etc.
6. Power to sell—Creation of, still authorized.
7. Same—Construed as to intention.
- 8-10. Same—Distinguished from trusts.
11. Same—Legislative recognition.
12. Same—Deed containing passes no right to possession.
13. Trustee—Entitled to surplus.
14. Same—Right to file declaration of homestead.
- 15-17. Trusts and powers—Blended—Upheld.
1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Sacramento Bank vs. Alcorn, 121 Cal. 379, 384, 53 Pac. Rep. 813 (construed and applied with other sections); In re Estate Fair, 132 Cal. 523, 557, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000 (construed and applied in dis. op. with other sections)
2. CONSTRUED—As almost identical with § 895 in regard to power to sell, contained in mortgage.—Sacramento Bank vs. Alcorn, 121 Cal. 379, 384, 53 Pac. Rep. 813.
3. As being only section of code, as it now exists, where any power is expressly authorized (dis. op.).—In re Estate Fair, 132 Cal. 523, 557, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.
4. As declaring exception to rule and policy of state in regard to mortgages, which gives mortgager, whatever form of his contract may be, right to redemption (dis. op.).—In re Estate Fair, 132 Cal. 523, 558, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.
5. As showing that right to create power would be forbidden without section by policy of state with regard to mortgages, which is that mortgager shall have, whatever form of his contract may be, right of redemption.—In re Estate Fair, 132 Cal. 523, 557, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

6. **POWER TO SELL.**—Creation of power to sell, vested in mortgagee or other encumbrancer, still authorized by code, although title in regard to powers was repealed.—*Sacramento Bank vs. Alcorn*, 121 Cal. 379, 384, 53 Pac. Rep. 813.

7. **CONSTRUED ACCORDING TO INTENTION OF PARTIES**, gathered from the whole instrument.—*In re Estate Fair*, 132 Cal. 523, 538, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

8. **DISTINGUISHED FROM TRUSTS.**—Powers are never imperative, and leave the acts to be done at will of party to whom given, while trusts are always imperative and obligatory upon conscience of party intrusted.—*In re Estate Fair*, 132 Cal. 523, 538, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

9. Mere naked power can be express or not at will of holder, but if exercise of it be imperative it is trust.—*In re Estate Fair*, 132 Cal. 523, 537, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

10. **DISTINCTION EXISTS BETWEEN TRUST TO CONVEY AND POWER** in trust to convey, as an operation of title IV, which declares what trusts in relation to real property may and may not be created.—*In re Estate Fair*, 132 Cal. 523, 537, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

11. **LEGISLATURE RECOGNIZES DEEDS OF TRUST** with power of sale as existing mode of securing loans.—*Sacramento Bank vs. Alcorn*, 121 Cal. 379, 384, 53 Pac. Rep. 813.

12. **DEED TO TRUSTEES WITH POWER OF SALE** for purpose of payment of and to secure debt passes legal title, but conveys no right of possession, and trustor may remain in possession until execution of trust.—*Sacramento Bank vs. Alcorn*, 121 Cal. 379, 383, 53 Pac. Rep. 813. See *Tyler vs. Granger*, 48 Cal. 259.

13. **TRUSTER ENTITLED TO SURPLUS PROCEEDS** after payment of mortgage or other encumbrances or debts out of trust fund.—*Germond vs. Jones*, 2 Hill (N. Y.) 570.

14. **TRUSTER MAY FILE DECLARATION OF HOMESTEAD** and hold against creditors not secured by deed or valid lien.—*Sacramento Bank vs. Alcorn*, 121 Cal. 379, 383, 53 Pac. Rep. 813. See *King vs. Gotz*, 70 Cal. 236, 11 Pac. Rep. 656.

15. **TRUSTS AND POWERS MAY BE BLENDED**; one may be intrusted with trust to be effective by execution of power which is imperative, and if he refuses to execute it, equity will carry trust into execution.—*In re Estate Fair*, 132 Cal. 523, 538, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

16. **TRUST DEEDS AS SECURITY FOR LOANS** with power of sale generally upheld.—*Sacramento Bank vs. Alcorn*, 121 Cal. 379, 382, 53 Pac. Rep. 813.

See ante § 857, pars. 41-46.

17. **FOR BENEFIT OF CREDITORS WITH POWER TO SELL OR MORTGAGE** and apply proceeds to pay debts, valid.—*Darling vs. Rogers*, 22 Wend. (N. Y.) 483.

§ 859. PROFITS OF LAND LIABLE TO CREDITORS IN CERTAIN CASES.

Where a trust is created to receive the rents and profits of real property, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created, is liable to the claims of the creditors of such person, in the same manner as personal property which cannot be reached by execution.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 394, held unconstitutional, see history, § 4 ante. This section is taken from 1 N. Y. Rev. Stats. 729, § 57, which has received construction in *Kilroy vs. Wood*, 42 Hun (N. Y.) 636.—See *Magner vs. Crooks*, 139 Cal. 640, 642, 73 Pac. Rep. 585.

1. Applied, cited, construed, referred to, etc.
- 2, 3. Necessary income—General rule as to.
- 4-7. Same—How arrived at.
- 8, 9. Same—Surplus only attachable.
10. Surplus must be alleged in complaint.
11. Trust fund—Exempted from creditors by will.
12. Same—Right to assign and subject to debts.
- 13, 14. Wife's separate estate—Liability of.
15. Trustor's estate—Liability to execution.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Magner vs. Crooks*, 139 Cal. 640, 641, 73 Pac. Rep. 585 (construed and applied).

As to inalienability of trust estates, see note by Robert Desty, 1 Barb. Ch. (N. Y.) 34, bk. 5 L. ed. 283.

As to power of married woman to charge separate estate created for her benefit, see

note by Robert Desty, 1 Barb. Ch. (N. Y.) 34, bk. 5 L. ed. 283.

As to right of creditor to her surplus income of judgment debtor, see note by Robert Desty, 2 Barb. Ch. (N. Y.) 79, bk. 5 L. ed. 564.

As to validity of trusts to pay over rents and profits and rights of creditors to reach same, see note by Robert Desty, 3 Paige Ch. (N. Y.) 83, bk. 4 L. ed. 353.

2. **INCOME FROM TRUST ESTATE CANNOT BE TAKEN FOR BENEFIT OF CREDITORS** of cestui que trust, where same is not more than sufficient for support of himself and family, and having reference to condition in health of himself and wife, increased expenditure of living occasioned by such condition.—*Magner vs. Crooks*, 139 Cal. 640, 642, 73 Pac. Rep. 585.

3. **INTEREST OR INCOME NECESSARY FOR SUPPORT AND MAINTENANCE** cannot be reached even

though beneficiary may be otherwise able to support himself.—*Clute vs. Bool*, 3 Paige Ch. (N. Y.) 83.

4. Order will not be made upon income of cestui que trust in favor of judgment creditor, where, taking into consideration mode of life which he has lived, and that of his family, manner in which he has been brought up, habits acquired by him, and his inability by reason of application to contribute personally to support, net income of trust estate is not too large for support of himself and those depending upon him.—*Magner vs. Crooks*, 139 Cal. 640, 643, 73 Pac. Rep. 585.

5. Proper amount to be allowed for expenditure of cestui que trust as against claim of judgment creditor, arrived at by considering manner in which he has been brought up, habits acquired by him, and his ability to take care of his property.—*Magner vs. Crooks*, 139 Cal. 640, 642, 73 Pac. Rep. 585. See *Kilroy vs. Wood*, 42 Hun (N. Y.) 636.

6. NECESSARY SUPPORT OF DEBTOR and those dependent upon him, must be taken into consideration as must also the manner in which they had been accustomed to live.—*Williams vs. Thorn*, 70 N. Y. 270.

7. Surplus cannot be reached by receiver in supplementary proceedings.—*Campbell vs. Foster*, 35 N. Y. 361.

8. JUDGMENT CREDITOR ENTITLED TO PROPORTION OF INCOME beyond what is necessary for suitable support and maintenance of cestui que trust and those depending upon him.—*Magner vs. Crooks*, 139 Cal. 640, 642, 73 Pac. Rep. 585. See *Sillick vs. Mason*, 2 Barb. Ch. (N. Y.) 79; *Kilroy vs. Wood*, 42 Hun (N. Y.) 636; *Gaff vs. Bonnett*, 31 N. Y.

9, 88 Am. Dec. 236; *Clute vs. Bool*, 3 Paige Ch. (N. Y.) 83; *Arsbacher vs. Mayer*, 53 Wis. 380, 10 N. W. Rep. 440.

9. Where execution against debtor's other property has been returned nulla bona.—*Williams vs. Thorn*, 70 N. Y. 270.

10. Complaint must aver existence of surplus, over and above what is sufficient for maintenance and support of beneficiary.—*Gaff vs. Bonnett*, 31 N. Y. 9, 88 Am. Dec. 236.

11. TRUST FUND MAY BE EXEMPT FROM RIGHTS OF CREDITORS of beneficiary by provision in will causing beneficiary's estate to cease in case judgment recovered against him.—*Bramhall vs. Ferris*, 14 N. Y. 41, 67 Am. Dec. 113.

12. Future income from trust fund cannot be assigned, disposed of, mortgaged, or pledged or subjected to lien by cestui que trust.—*L'Amoureux vs. Van Rensselaer*, 1 Barb. Ch. (N. Y.) 34.

13. SEPARATE ESTATE.—Property settled to separate use of married woman might be charged with payment of her debts prior to passing of New York Rev. Stats.—*Noyes vs. Blakeman*, 3 Sandf. (N. Y.) 531; affirmed 6 N. Y. 567.

14. SURPLUS RENTS OF PROPERTY settled to separate use of married woman, not liable for her debts since passing of New York Rev. Stats.—*Noyes vs. Blakeman*, 3 Sandf. (N. Y.) 531; affirmed 6 N. Y. 567.

15. TRUSTER'S ESTATE.—Estate left in trust is subject to execution under judgment.—*Kennedy vs. Nunan*, 52 Cal. 326, 331. See *Janes vs. Throckmorton*, 57 Cal. 368, 384; *Fish vs. Fowle*, 58 Cal. 378, 376.

§ 860. EXERCISE OF VESTED POWER. Where a power is vested in several persons, all must unite in its execution; but, in case any one or more of them is dead, the power may be executed by the survivor or survivors, unless otherwise prescribed by the terms of the power.

History: Enacted March 21, 1872; original section repealed and above provision substituted therefor by Act March 30, 1874, Code Amends. 1873-4, p. 222. The above section a verbatim re-enactment of section 900 post (repealed).—In re Estate Fair, 132 Cal. 523, 557, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

1. Applied, cited, construed, referred to, etc.
2. Repeal of old section—Reasons for.
3. Construed as to its provision in case of death.
- 4, 5. Conveyance by one trustee—Effect of, etc.

As to conveyance by one of several, see note 64 Am. Dec. 201.

As to when majority of trustees may act, see note 11 Am. Dec. 674.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: In re Estate Fair, 132 Cal. 523, 557, 558, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000 (construed with other sections).

2. ORIGINAL SECTION, WHICH DECLARED that where express provision was created for any purpose not enumerated in preceding section, trust vested no estate in trustees, was repealed, the commissioners fol-

lowing the line adopted by New York codifiers to simplify cumbersome system growing out of common-law rule, under which powers were abstruse and full of uncertainty.—In re Estate Fair, 132 Cal. 523, 537, 552, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

3. CONSTRUED AS PROVIDING FOR EVENT OF DEATH of one of several trustees or donees of power.—In re Estate Fair, 132 Cal. 523, 557, 558, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

4. CONVEYANCE BY ONE OF SEVERAL TRUSTEES while others are acting as such, passes no legal title to premises.—*Learned vs. Welton*, 40 Cal. 349, 350. See *Welton vs. Palmer*, 39 Cal. 456.

5. All trustees must unite in conveyance, otherwise it is not well executed.—*Learned vs. Welton*, 40 Cal. 349, 350. See *Welton vs. Palmer*, 39 Cal. 456.

§ 861. CREATION OF CERTAIN POWERS NOT PROHIBITED (repealed).

History: Enacted March 21, 1872; repealed March 30, 1874, Code Amdts. 1873-4, p. 222.

§ 862. LAND, ETC., TO DESCEND TO PERSONS ENTITLED (repealed).

History: Enacted March 21, 1872; repealed March 30, 1874, Code Amdts. 1873-4, p. 222.

§ 863. TRUSTEES OF EXPRESS TRUSTS TO HAVE WHOLE ESTATE. Except as hereinafter otherwise provided, every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust.

History: Enacted March 21, 1872.

I. In General.

1. Applied, cited, construed, referred to, etc.
- 2, 3. Construed with reference to estates taken.
- 4, 5. Same—With reference to section 867.
6. Distinction between executor and executor in trust.
- 7-11. Estate in trustee necessary.
- 12-14. Trust instruments—How construed, etc.
15. Same—Legislative recognition of, as securities.
- 16, 17. Trustees—Rights and duties, how determined or limited.
- 18, 19. Trustee—Right to devise, etc.

II. Trustee—1. Title of.

- 20, 21. Legal title in trustee—Joint tenancy.
- 22-24. Same—Under deed or will to sell, lease, convert, etc.
25. Same—Benefit of beneficiaries.
- 26-31. Quantity of estate—Adequate fee, legal and equitable, necessary.
- 32-38. Same—When take whole—Illustrations.
- 39, 40. Vests—By implication—Subject to declared trust.
- 41-44. When no legal estate passes—Illustrations.
- 45, 46. New trustees—Take upon appointment, etc.
- 47, 48. Trustee appointed executor—Title of.
49. Value and extent, not affected by rule as to quantity.
- 50-52. When not divested by renunciation—Court—Possession.

III. Same—2. When Not Entitled to Possession.

- 53-55. Possession, when not in trustee—Trust as security.
56. Same—Ejectment does not lie to recover.
- 57, 58. Same—Truster's right to.

IV. Beneficiaries' Estates.

- 59-64. Extent of beneficiary's estate—Possession, etc.
- 65, 66. How not affected or alienated.
- 67, 68. Rights upon termination—Possession.

V. Courts—Jurisdiction of.

- 69, 70. Conflict of laws—Foreign trust in personalty enforceable.
71. District court—Jurisdiction of.
- 72-77. Equity—Extent of jurisdiction in.

78. Probate court—Jurisdiction of.

79-82. Decree—Effect of—Limitation—Conveyance under.

VI. Enforcement—In General.

- 83-85. Account—Right to—Object of—Fraud.
- 86-90. Same—Extent of right to.
- 91, 92. Beneficiaries must join—Prove trust.
93. Demand and refusal—When necessary.
94. Extent of enforcement.
95. Judgment—Conclusiveness of limitation in.
96. Public trust—Power of authorities to enforce.

VII. Nature of Remedy.

97. Action for damages—Negligence.
98. Action to compel trustee to stop waste, trespass.
- 99, 100. Same—To enforce trust—When not proper.
- 101, 102. Same—To quiet title—When not proper.
- 103, 104. Attachment—Ejectment—When not proper.
105. Equity—Suit in—When proper.

VIII. Who May Enforce.

106. Administrator of beneficiary—When proper party.
- 107-112. Beneficiaries—Extent of right to enforce.
113. Divorced wife—Right to enforce against husband, etc.
114. Foreign trustee—Right to enforce.
- 115, 116. Party not interested has no right.
117. Same—Under divorce proceedings has right.
118. Same—Promised estate in consideration of forfeiting rights, etc.
119. Same—To whom right assigned.
120. Wife—When may enforce.

IX. Against Whom Exists.

- 121-123. Trustee not fully accounting—Taking advantage.
124. Husband as trustee—Deceiving wife.
- 125, 126. Purchaser with notice—Agreement.
- 127-130. Representatives of trustee.
- 131, 132. When does not lie against trustee—Representative.

X. Defenses—1. In General.

133. Bare trustee—How far can dispute beneficiaries' rights.

134. Trustee—Right to invoke provisions of code.
 135. Same—Right to dispute interest of party.
- XI. Same—2. Adverse Possession.
 136. General rule—Possession of trustee.
 137. Adverse holding—None from payment of taxes.
 138-140. Trustee—When holding or not holding adversely.
- XII. Same—3. Laches.
 141, 142. Doctrine of laches—When applied.
 143-145. How shown—Design, unwarrantable injustice.
 146-149. Not shown—Forbearance—Imputation.
- XIII. Same—4. Statute of Limitations.
 150. Favored by law—Rule of property, etc.
 151. Not apply to trusts as creatures of equity.
 152-154. In cases of resulting trusts—Fraud.
 155, 156. In cases of express trusts—Demand notice.
 157-164. Same—Doctrine of repudiation.
 165, 166. When statute does not run—Illustrations.
 167-173. When statute will run—Time—Party, etc.

I. IN GENERAL.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in *Schlessinger vs. Mallard*, 70 Cal. 326, 331, 11 Pac. Rep. 728 (applied with other sections); In re *Estate Dolan*, 79 Cal. 65, 68, 21 Pac. Rep. 545 (applied); *Ward vs. Waterman*, 85 Cal. 488, 506, 24 Pac. Rep. 930 (construed and applied); *Wilhoit vs. Cunningham*, 87 Cal. 453, 456, 25 Pac. Rep. 675 (construed and applied with other sections); *Kopp vs. Gunther*, 95 Cal. 63, 74, 30 Pac. Rep. 301 (applied with other sections); *Le Breton vs. Cook*, 107 Cal. 410, 419, 40 Pac. Rep. 552 (applied); *Morfev vs. San Francisco & S. R. Co.*, 107 Cal. 587, 596, 40 Pac. Rep. 810 (construed and applied); In re *Estate Walkerly*, 108 Cal. 627, 648, 49 Am. St. Rep. 97, 41 Pac. Rep. 772 (construed and applied with other sections); *Fatjo vs. Swasey*, 111 Cal. 628, 637, 44 Pac. Rep. 225 (applied); In re *Estate Steele*, 124 Cal. 533, 538, 57 Pac. Rep. 564 (cited in discussion); In re *Estate Willey*, 128 Cal. 1, 9, 60 Pac. Rep. 471 (applied); In re *Estate Fair*, 132 Cal. 523, 536, 539, 84 Am. St. Rep. 70, 60 Pac. Rep. 443, 64 Id. 1000 (construed and applied); *Blackburn vs. Webb*, 133 Cal. 420, 422, 65 Pac. Rep. 952 (construed and applied).

As to enforcement of voluntary executory trust, see monographic note by Robert Desty, 11 L. R. A. 456.

As to equitable jurisdiction over trusts, see notes 66 Am. Dec. 502; 67 Am. Dec. 100; 73 Am. Dec. 553.

As to garnishment of claim of cestui que trust against trustee, see monographic note by L. B. Bacon, 59 L. R. A. 335-337.

As to right to enforce trust against property with which it has been mingled by trustee, see post § 2236 and note.

As to statute of limitations in its application to trusts, see notes 34 Am. Dec. 725; 42 Am.

Dec. 447; 44 Am. Dec. 159; 60 Am. Dec. 212, and monographic note by Robert Desty, 8 L. R. A. 480, 647, and monographic note 8 Prob. Rep. Anno. 436-439.

As to when legal title vests in beneficiaries, see note 86 Am. Dec. 512, 518.

As to whom property passes on trustee's death, see monographic note by Robert Desty, 1 L. R. A. 334.

2. CONSTRUED—As declaring beneficiary takes no estate or interest in trust property.—*Fatjo vs. Swasey*, 111 Cal. 628, 637, 44 Pac. Rep. 225.

3. As giving devisees of real estate subject to trust the legal estate.—*Fatjo vs. Swasey*, 111 Cal. 628, 638, 44 Pac. Rep. 225.

4. As not irreconcilably in conflict with § 867.—*Fatjo vs. Swasey*, 111 Cal. 628, 637, 44 Pac. Rep. 225.

5. As not repealed by § 867.—*Fatjo vs. Swasey*, 111 Cal. 628, 637, 44 Pac. Rep. 225.

6. DISTINCTION EXISTS BETWEEN MERE EXECUTOR and an executor to whom lands are devised in trust to carry into effect provisions of will, former possessing power to sell, latter taking fee or any less estate testator may devise; former having indicated authority, latter having authority coupled with interest; freehold remaining in heir in first case until sale by executors, freehold vesting at once in executors in latter case.—In re *Estate Delaney*, 49 Cal. 76, 84. See *Me. Knight vs. Loomis*, 30 Me. 204; *Deering vs. Adams*, 37 Me. 264. *Mass. Larned vs. Bridge*, 34 Mass. (17 Pick.) 339. *N. Y. Jackson ex d. Bogert vs. Schaubert*, 7 Cow. 188, 194; *Judson vs. Gibbons*, 5 Wend. 224, 226; *Conklin vs. Egerton*, 21 Wend. 430, 432.

7. ESTATE OR INTEREST OF SOME NATURE must be conveyed to trustee in order to create express trust.—*Nichols vs. Emery*, 109 Cal. 323, 330, 50 Am. St. Rep. 43, 41 Pac. Rep. 1089.

8. Must pass immediately to trustee when instrument creating trust is other than will.—*Nichols vs. Emery*, 109 Cal. 323, 330, 50 Am. St. Rep. 43, 41 Pac. Rep. 1089.

9. POSSESSION OF TRUSTEES.—Each trustee is entitled to possession to same extent, and character of possession of each is like that of copartners, joint tenants, or tenants in common.—*Goldschmidt vs. Maier* (Cal. Sept. 14, 1903), 73 Pac. Rep. 984, 985. See *Balch vs. Jones*, 61 Cal. 234.

10. Possession of one trustee is possession of all.—*Goldschmidt vs. Maier* (Cal. Sept. 14, 1903), 73 Pac. Rep. 984, 985.

11. TAKEN BY TRUSTEE UNDER TRUST is possession of cestui que trust, no matter whether trust is expressed or implied.—*Warren vs. Adams*, 19 Colo. 515, 36 Pac. Rep. 604.

12. TRUST INSTRUMENT CONSTRUED MOST STRONGLY AGAINST TRUSTEE and as favorable to beneficiary as language permits.—*Sprague vs. Edwards*, 48 Cal. 339, 247-248.

13. Cannot be added to by declarations of trustee.—*Burling vs. Newlands*, 112 Cal. 476, 492, 44 Pac. Rep. 310.

14. Not affected by fact no disposition is made of interest and estate intervening, in time and enjoyment, between date of deed and death of settlor.—*Nichols vs. Emery*, 109 Cal. 323, 330, 50 Am. St. Rep. 43, 41 Pac. Rep. 1089.

15. LEGISLATURE RECOGNIZES TRUST DEEDS given as security for loans as existing mode of securing loans.—*Sacramento Bank vs. Alcorn*, 121 Cal. 379, 384, 53 Pac. Rep. 813.

16. RIGHTS AND DUTIES DETERMINED BY STRICT ADHERENCE OF INTENTION OF parties at time of execution of deed and declaration of trust.—*Tyler vs. Granger*, 48 Cal. 259, 269.

17. Limited and fixed by declaration of trust executed by him at same time that property conveyed to him by his grantor where there is no ambiguity as to intention of parties.—*Tyler vs. Granger*, 48 Cal. 259, 268.

18. TRUSTER UNDER TRUST DEED GIVEN AS SECURITY for loan may devise or transfer property subject to trust.—*Sacramento Bank vs. Alcorn*, 121 Cal. 379, 383, 53 Pac. Rep. 813.

19. May file declaration of homestead and hold premises against all creditors in security upon trust deed, or same valid lien.—*Sacramento Bank vs. Alcorn*, 121 Cal. 379, 383, 53 Pac. Rep. 813. See *King vs. Gotsz*, 70 Cal. 236, 11 Pac. Rep. 656.

II. TRUSTEE—1. TITLE OF.

20. TRUSTEE TAKES LEGAL TITLE and may bring action in his own name for injuries to real estate.—*Anson vs. Townsend*, 73 Cal. 415, 419, 15 Pac. Rep. 49. See *Walker vs. McCusker*, 71 Cal. 594, 12 Pac. Rep. 723.

21. Takes legal title as joint tenant with co-trustees and not as tenant in common with them in case of doubt in trust instrument.—*Saunders vs. Schmaelzle*, 49 Cal. 59, 64.

22. Takes legal estate under deed to sell or lease, and apply proceeds in payment of debts.—*Thompson vs. McKay*, 41 Cal. 221, 230; *Savings & L. Soc. vs. Burnett*, 106 Cal. 514, 528, 39 Pac. Rep. 922; *Camp vs. Zand*, 122 Cal. 167, 170, 54 Pac. Rep. 833.

23. Takes legal estate under will directing conversion of land into money or money into land.—*Fatjo vs. Swasey*, 111 Cal. 628, 638, 44 Pac. Rep. 225.

24. Not affected by direction to convert land into money or money into land.—*Fatjo vs. Swasey*, 111 Cal. 628, 638, 44 Pac. Rep. 225. See *Estep vs. Armstrong*, 91 Cal. 659, 27 Pac. Rep. 1091.

25. Takes legal title for benefit of beneficiaries, and transfer thereof to another is violation of trust.—*Bateman vs. Burr*, 57 Cal. 480, 483; *Eversdon vs. Mayhew*, 65 Cal. 163, 166, 3 Pac. Rep. 641.

26. QUANTITY OF ESTATE PASSING TO TRUSTEE in case of express trust is commensurate with necessities of his office.—In re Estate Pichoir, 139 Cal. 682, 688, 73 Pac. Rep. 606. See *Morffew vs. San Francisco & S. R. R. Co.*, 107 Cal. 587, 40 Pac. Rep. 810; *Hawley vs. James*, 5 Paige Ch. (N. Y.) 318; *Cochrane vs. Schell*, 140 N. Y. 516, 35 N. E. Rep. 971.

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27. Takes estate adequate to execution of trust, no more and no less, no matter what terms in instrument creating trust may be.—*Wittfield vs. Forster*, 124 Cal. 418, 419, 57 Pac. Rep. 219. See *Morffew vs. San Francisco & S. R. R. Co.*, 107 Cal. 587, 595, 40 Pac. Rep. 810; *Estate of Lorenz*, 124 Cal. 495, 497, 57 Pac. Rep. 381. *Mass. Nichols vs. Allen*, 130 Mass. 211, 212, 39 Am. Rep. 445. *N. M. Daly vs. Bernstein*, 6 N. M. 380, 28 Pac. Rep. 764. *Fed. Young vs. Bradley*, 101 U. S. 782, 787, bk. 25 L. ed. 1044.

28. Estate in fee simple, if necessary to enable him to perform the duties imposed upon him, although such estate is not in terms given him by instrument creating trust.—*Morffew vs. San Francisco & S. R. R. Co.*, 107 Cal. 587, 595, 40 Pac. Rep. 810; In re Estate Pichoir, 139 Cal. 682, 688, 73 Pac. Rep. 606; *Hawley vs. James*, 5 Paige Ch. (N. Y.) 318; *Cochrane vs. Schell*, 140 N. Y. 516, 35 N. E. Rep. 971.

29. Legal and equitable title vests in trustees under deed of trust giving trustees property with power to manage and sell and dispose of proceeds among parties named.—*Ward vs. Waterman*, 85 Cal. 488, 506, 24 Pac. Rep. 930.

30. Takes only such estate as is necessary for performance of trust.—In re Estate Reith, 144 Cal. 314, 320, 77 Pac. Rep. 942.

31. Takes whole estate necessary for purposes of trust, all else remaining in grantors.—*Nichols vs. Emery*, 109 Cal. 323, 331, 50 Am. St. Rep. 43, 41 Pac. Rep. 1089.

32. Whole legal title under express trust vests.—*Ward vs. Waterman*, 85 Cal. 488, 506, 24 Pac. Rep. 930.

33. Whole estate by creation of trust subject only to its execution.—*Blackburn vs. Webb*, 133 Cal. 420, 423, 65 Pac. Rep. 952.

34. TAKES WHOLE ESTATE—Under deed executed in trust to secure indebtedness, and deed does not merely create lien as mortgage to be foreclosed.—*Herbert Kraft Co. vs. Bryan*, 140 Cal. 73, 79, 73 Pac. Rep. 745. See *Koch vs. Briggs*, 14 Cal. 256, 73 Am. Dec. 651; *Grant vs. Burr*, 54 Cal. 298; *Savings & L. Soc. vs. Burnett*, 106 Cal. 514, 39 Pac. Rep. 922.

35. Under devise "to have and to hold said property, and whole thereof, and to manage same until youngest of said children shall have attained his majority, at which event said property shall vest absolutely in said four children" with right to rents and profits.—*Blackburn vs. Webb*, 133 Cal. 420, 423, 65 Pac. Rep. 952.

36. Under grant "to rent or sell . . . property altogether or in such separate lots or parcels, and at such time or times, and at either public or private sale . . . as he in his own judgment may deem most expedient and to apply the proceeds . . . toward payment of debts," and trustee has power, in execution of such trust, to transmit legal title to purchaser.—*Thompson vs. McKay*, 41 Cal. 221, 222, 230.

37. Under will devolving property to them for investment and management for benefit of son until arriving at certain age, with dis-

cretionary power to hand over same to him at that age if in their opinion he is capable of managing same, otherwise to hold for his benefit.—*Cutter vs. Hardy*, 48 Cal. 568, 571.

38. Under will devising property in trust for children "and such trustee to have and to hold said property and the whole thereof, and to manage the same until the youngest of said children shall have attained his majority, at which event said property shall vest absolutely in said four children."—*Blackburn vs. Webb*, 133 Cal. 420, 423, 65 Pac. Rep. 952.

39. Vests in trustees by implication where from nature of duties to be performed, taking of such estate is necessary to performance of duties.—In re Estate Reith, 144 Cal. 314, 320, 77 Pac. Rep. 942. See *Fay vs. Taft*, 66 Mass. (12 Cush.) 448.

40. Vests in trustee subject only to declared trust.—In re Estate Willey, 123 Cal. 1, 9, 60 Pac. Rep. 471.

41. TAKE NO LEGAL ESTATE OR TITLE—Under bequest to children of all real estate and business interests, share and share alike, appointing trustees for whole estate to protect it so that children receive one half at certain age, and remaining half upon attaining an advanced age, trustees to receive small commission, as legal title vests in children as direct testamentary gift to them subject only to trust, trustees taking only such estate as is necessary to performance of their duties.—In re Estate Reith, 144 Cal. 314, 320, 77 Pac. Rep. 942. See In re Estate Walkerly, 108 Cal. 627, 648, 49 Am. St. Rep. 97, 41 Pac. Rep. 772.

42. Under will containing no words of devise to trustees, or other words equivalent thereto, only words used being "trust" and "convey," no real estate being disposed of to trustees, means of vesting being unlawful and forbidden.—In re Estate Pichoir, 139 Cal. 632, 635, 73 Pac. Rep. 606. See In re Estate Fair, 136 Cal. 79, 68 Pac. Rep. 306.

43. Takes no estate or there is resulting trust to grantor or his heirs, where trusts declared in instrument are illegal or for any reason void, under authorities of code.—*Wittfield vs. Forster*, 124 Cal. 418, 419, 57 Pac. Rep. 219.

44. In their own names under deed whereby real estate is to be acquired and improved for charitable purposes, third persons being called in to acquire and hold the title, and direct the expenditure of the money, where the only duty imposed upon trustee is to furnish the funds.—*Floyd vs. Rankin*, 86 Cal. 159, 163, 24 Pac. Rep. 936.

45. NEW TRUSTEES—Take legal estate upon appointment by court, where original trustees have resigned or been removed.—*Fatjo vs. Swasey*, 111 Cal. 628, 635, 44 Pac. Rep. 225.

46. Take subject to all rights, duties, and responsibilities of predecessors.—*Fatjo vs. Swasey*, 111 Cal. 628, 636, 44 Pac. Rep. 225.

47. TRUSTEE ALSO APPOINTED EXECUTOR takes property in same manner and capacity as trustee would, had land been devised to him.—In re Estate Delaney, 49 Cal. 76, 84.

48. Executors take legal title under devise

to them in trust for purposes named in will.—In re Estate Delaney, 49 Cal. 76, 84.

49. VALUE AND EXTENT OF PROPERTY ITSELF NOT AFFECTED by rule that trustee takes only such estate as is necessary to discharge of trust, as rule refers only to quantity of estate where instrument creating trust conveys or transfers to trustee whole of property without limitation.—In re Estate Pichoir, 139 Cal. 632, 633, 73 Pac. Rep. 606.

50. How divested—Trustee's right in fee in remaining portion of estate devised to him in trust for purposes of will is not divested by renunciation by widow of right under will and order of probate court giving her portion of property as common property.—In re Estate Delaney, 49 Cal. 76, 84.

51. To any portion of estate cannot be divested by the court.—*Morrison vs. San Francisco & S. R. R. Co.*, 107 Cal. 587, 594, 40 Pac. Rep. 810; *Hawley vs. James*, 5 Paige Ch. (N. Y.) 318; *Cochrane vs. Schell*, 140 N. Y. 516, 35 N. E. Rep. 971.

52. POSSESSION OF BENEFICIARY, although fact showing prima facie evidence of ownership rebutted or entirely overcome by trust deed, show legal title in trustee.—*Harrigan vs. Mowry*, 84 Cal. 456, 457, 22 Pac. Rep. 653, 24 Id. 48. See *Sepulveda vs. Sepulveda*, 39 Cal. 13, 17.

III. SAME—2. WHEN NOT ENTITLED TO POSSESSION.

53. TRUSTEE HAS NO RIGHT TO USE OR POSSESSION of premises under deed and declaration of trust vesting title in trust for payment of specific debt with power to sell and convey at end of specified period, unless, within that time, grantor sells or mortgages and raises money sufficient to pay debt, and which binds trustee to convey to such purchaser, if found.—*Tyler vs. Granger*, 48 Cal. 259, 269.

54. No right to possession under trust given for security of loans which passes legal title.—*Sacramento Bank vs. Alcorn*, 121 Cal. 379, 383, 53 Pac. Rep. 313.

55. Takes title without any incidents of ownership attached, except that he is deemed to have estate which he can convey.—*Sacramento Bank vs. Alcorn*, 121 Cal. 379, 384, 53 Pac. Rep. 313.

56. Cannot maintain ejectment against grantor or his assigns, as such instrument gives him no right to possession in order to carry out and complete execution of trust.—*Tyler vs. Granger*, 48 Cal. 259, 270.

57. TRUSTEE HAS RIGHT TO REMAIN IN POSSESSION under trust deed given as security for loan.—*Sacramento Bank vs. Alcorn*, 121 Cal. 379, 383, 53 Pac. Rep. 313.

58. Has right to recover possession until execution of trust, even though trust deed is silent upon subject of possession.—*Sacramento Bank vs. Alcorn*, 121 Cal. 379, 383, 53 Pac. Rep. 313. See *Tyler vs. Granger*, 48 Cal. 259.

IV. BENEFICIARIES' ESTATES.

59. BENEFICIARY TAKES NO ESTATE OR INTEREST in property, and can only en-

force performance.—In re Estate Delaney, 49 Cal. 76. See In re Estate Dolan, 79 Cal. 65, 67, 31 Pac. Rep. 545; In re Estate Walkerly, 103 Cal. 627, 49 Am. St. Rep. 97, 41 Pac. Rep. 772; Williams vs. Marx, 124 Cal. 32, 56 Pac. Rep. 608; In re Estate Steele, 124 Cal. 533, 537, 57 Pac. Rep. 564; Blackburn vs. Webb, 133 Cal. 420, 423, 65 Pac. Rep. 952.

60. Has only right to receive share under deed of trust vesting legal and equitable estate in trustees, giving them power to sell and dispose of proceeds among specified parties.—Ward vs. Waterman, 85 Cal. 488, 507, 24 Pac. Rep. 930.

61. Takes no estate by reason of failure of trustees to sell under power of sale in will, by which they are to exercise their own judgment as to when sale shall be made.—Fatjo vs. Swasey, 111 Cal. 628, 636, 44 Pac. Rep. 225.

62. Takes no estate or right to possession under devise to trustee in trust to pay residue of estate to him during his natural life.—In re Estate Dolan, 79 Cal. 65, 67, 31 Pac. Rep. 545. See In re Estate Delaney, 49 Cal. 76.

63. Takes no interest enforceable against trustee under devise to trustees in trust to manage for his benefit until arriving at certain age, with condition to pay over to him at that age, if in discretion of trustees his habits are such as to render it prudent to do so, but in case they were not then trustees to retain same and hold for benefit of son.—Cutter vs. Hardy, 48 Cal. 563, 571.

64. Under will giving trustees power to convert and vesting legal estate in them, does not extend to power to mortgage or create lien upon estate.—Fatjo vs. Swasey, 111 Cal. 628, 636-638, 44 Pac. Rep. 225.

65. Not affected, neither are his rights estopped, by attachment or interpleader proceedings in action instituted against trustee to which he is not party and of which it does not appear that he ever had any knowledge.—Hovey vs. Bradbury, 112 Cal. 620, 624, 44 Pac. Rep. 1077.

66. Not alienated by mere exchange of one piece of property for another by trustee under valid power of trust.—Belmont vs. O'Brien, 12 N. Y. 394.

67. UPON TERMINATION OF TRUST.—Beneficiary entitled to immediate possession and enjoyment of trust estate as against all trustees upon termination of trust created to manage and hold property for benefit of another during limited period.—Birmingham vs. Wilcox, 120 Cal. 467, 474, 53 Pac. Rep. 322.

68. Possession and enjoyment of beneficiary upon termination of trust cannot be postponed for purpose of determining rights of trustees as between themselves.—Birmingham vs. Wilcox, 120 Cal. 467, 474, 53 Pac. Rep. 322.

V. COURTS—JURISDICTION OF.

69. CONFLICT OF LAWS.—As respects personal property, trust which is created in another state, and there valid, is enforceable in California, although if it had been created in latter state it would not have been valid.—Whitney vs. Dodge, 105 Cal. 192, 197-200, 33

Pac. Rep. 636. See Cross vs. United States T. Co., 131 N. Y. 330, 27 Am. St. Rep. 597, 30 N. E. Rep. 125, 15 L. R. A. 606.

70. Where trust property situated in another state is sold and possession of proceeds is obtained in such state, question whether trust of those lands was duly created, and enforceable under laws of that state, becomes immaterial where proceeds are subsequently invested in lands in another state in which parties reside and in which action relating to such real property is brought.—Howard vs. Howard, 53 Kan. 469, 34 Pac. Rep. 1114.

71. DISTRICT COURTS HAVE JURISDICTION of action against executors and administrators to declare and enforce trust in respect to real estate, but probate courts have exclusive jurisdiction of accounts of executors and administrators and of final distribution of decedent's estate.—Auguisola vs. Arnaz, 51 Cal. 435, 438. See In re Estate Bowen, 34 Cal. 632; Gurnee vs. Maloney, 33 Cal. 35, 99 Am. Dec. 352; Bush vs. Lindsey, 44 Cal. 121; Haverstick vs. Trudel, 51 Cal. 431.

72. EQUITY HAS JURISDICTION to construe the various provisions of trust deed and to enforce same.—Floyd vs. Davis, 98 Cal. 591, 601, 23 Pac. Rep. 746.

73. To enforce trust which is fully executed and contingency has arisen upon which trust depends and is to be performed.—Sandfoss vs. Jones, 35 Cal. 481, 487. See Love vs. Watkins, 40 Cal. 547, 6 Am. Rep. 624; Hearst vs. Pujol, 44 Cal. 230; In re Estate Webb, 49 Cal. 541; Jones vs. Throckmorton, 57 Cal. 368; Bostwick vs. McEvoy, 63 Cal. 496, 501; Brison vs. Brison, 75 Cal. 525, 7 Am. St. Rep. 139, 17 Pac. Rep. 689, 90 Cal. 323, 27 Pac. Rep. 136; Thomas vs. Jameson, 77 Cal. 91, 19 Pac. Rep. 177; Feeney vs. Howard, 79 Cal. 525, 12 Am. St. Rep. 163, 31 Pac. Rep. 984, 4 L. R. A. 526; Adams vs. Lombard, 80 Cal. 426, 435, 23 Pac. Rep. 180.

74. Regardless of situation of property.—Smith vs. Davis, 90 Cal. 25, 32, 25 Am. St. Rep. 92, 27 Pac. Rep. 26.

75. Will execute trust where trustee refuses to act or is unable to comply with statute, or dies.—Smith vs. Davis, 90 Cal. 25, 32, 25 Am. St. Rep. 92, 27 Pac. Rep. 26.

76. Will order absent beneficiaries brought in and refuse to proceed until they appear.—Allison vs. Goldtree, 117 Cal. 545, 547, 49 Pac. Rep. 571.

77. Will not enforce mere voluntary contract or agreement for creation of trust.—In re Estate Webb, 49 Cal. 541, 545.

78. PROBATE COURT HAS JURISDICTION OVER EXECUTOR, with power to sell and dispose of property where he is wasting estate or is about to do so, even though will may contain clause that no tribunal of state should intermeddle in any manner in respect of properties.—Auguisola vs. Arnaz, 51 Cal. 435, 438.

79. DECREE DOES NOT AFFECT LEGAL TITLE existing in trustee before conveyance to cestui que trust.—Murphy vs. Hopcroft, 142 Cal. 43, 46, 75 Pac. Rep. 567.

80. Enforcing trust does not alter legal position of parties until consummated by conveyance.—*Murphy vs. Hopcroft*, 142 Cal. 43, 46, 75 Pac. Rep. 567; *Tardy vs. Morgan*, 3 MoL. C. C. 358, 23 Fed. Cas. 700. See *Proctor vs. Ferebee*, 1 Ired. (N. C.) Eq. 143, 36 Am. Dec. 34.

81. Enforcing trust may limit time within which acts must be performed by those seeking to enforce same.—*Cosby vs. Superior Court*, 110 Cal. 45, 50, 42 Pac. Rep. 460.

82. Conveyance executed under decree compelling performance of trust operates by force of conveyance and not of decree.—*Murphy vs. Hopcroft*, 142 Cal. 43, 46, 75 Pac. Rep. 567.

VI. ENFORCEMENT—1. IN GENERAL.

As to the enforceability of the express trust, see note 11 L. R. A. 331.

83. ACCOUNT.—Beneficiary entitled to have account as well as amount of estate in hands of trustees settled and determined upon termination of trust.—*Birmingham vs. Wilcox*, 120 Cal. 467, 474, 52 Pac. Rep. 323.

84. Object of account is to ascertain how much has been realized and expended so as to determine whether cestui que trust is entitled to payment.—*Green vs. Brooks*, 31 Cal. 323, 323, 22 Pac. Rep. 349.

85. Fraud need not be alleged in action by beneficiary against trustee for account.—*Green vs. Brooks*, 31 Cal. 323, 323, 22 Pac. Rep. 349.

86. Right to account does not rest upon fraud.—*Green vs. Brooks*, 31 Cal. 323, 323, 22 Pac. Rep. 349.

87. Exists notwithstanding attachment or interpleader proceedings in action against trustee of which beneficiary has no notice and to which he was not party.—*Hovey vs. Bradbury*, 112 Cal. 620, 624, 44 Pac. Rep. 1077.

88. Is not affected by judgment showing cestui que trust not entitled to recover personal judgment when trustee denies trust.—*Green vs. Brooks*, 31 Cal. 323, 323, 22 Pac. Rep. 349.

89. Is not barred by reason of action in ejectment brought by beneficiary, as acts are essentially different.—*O'Connor vs. Irvine*, 74 Cal. 435, 440, 16 Pac. Rep. 236.

90. Is not estopped from maintaining action for relief to which he is entitled upon the facts by reason of his previously mistaking his remedy and maintaining action to which he was not entitled.—*South San Bernardino Nat. Bank, L. & I. Co. vs. South San Bernardino Nat. Bank*, 127 Cal. 245, 248, 59 Pac. Rep. 699. See *O'Connor vs. Irvine*, 74 Cal. 435, 16 Pac. Rep. 236; *Von Drachenfels vs. Doolittle*, 77 Cal. 295, 19 Pac. Rep. 518; *Harrigan vs. Mowry*, 84 Cal. 456, 457, 22 Pac. Rep. 658, 24 Id. 48; *Shanahan vs. Crampton*, 92 Cal. 9, 23 Pac. Rep. 50.

91. BENEFICIARIES MUST ALL join to declare and enforce trust.—*Jenkins vs. Frink*, 30 Cal. 536, 595, 39 Am. Dec. 134; *Reynolds vs. Lincoln*, 71 Cal. 183, 187, 9 Pac. Rep. 176, 12 Id. 449; *Allison vs. Goldtree*, 117 Cal. 545, 547, 49 Pac. Rep. 571.

92. Seeking to enforce trust must show that trust was created or declared by instrument in writing, or by operation of law.—

Hasshagen vs. Hasshagen, 80 Cal. 514, 518, 22 Pac. Rep. 294. See *Donohue vs. Mariposa L. & M. Co.*, 66 Cal. 317, 327, 5 Pac. Rep. 495; *Hellman vs. McWilliams*, 70 Cal. 452, 11 Pac. Rep. 659; *Barr vs. O'Donnell*, 76 Cal. 469, 9 Am. St. Rep. 342, 18 Pac. Rep. 429; *Feeney vs. Howard*, 79 Cal. 525, 12 Am. St. Rep. 162, 21 Pac. Rep. 984, 4 L. R. A. 326; *Los Angeles & B. O. & D. Co. vs. Occidental Oil Co.*, 144 Cal. 528, 534, 78 Pac. Rep. 25.

93. DEMAND AND REFUSAL.—Trustee not liable to action without demand and refusal where money deposited by express trust to expend for use and benefit of depositor from time to time as directed, laid out, and expended prior to his death for his use and benefit, with exception of small amount, does not render trustee liable without demand and refusal to comply or to pay balance even after death of depositor.—*Millet vs. Bradbury*, 109 Cal. 170, 177, 41 Pac. Rep. 865.

94. EXTENT OF ENFORCEMENT.—Right of beneficiary under deed of trust vesting legal and equitable estate in trustee and giving beneficiaries merely proceeds of estate extends only to enforcement of the trust.—*Ward vs. Waterman*, 35 Cal. 433, 507, 24 Pac. Rep. 930.

95. JUDGMENT.—Limitation contained in judgment in action to enforce trust specifying limit within which certain acts are to be performed is conclusive upon parties.—*Cosby vs. Superior Court*, 110 Cal. 45, 50, 42 Pac. Rep. 460.

96. PUBLIC TRUST—POWER OF AUTHORITIES.—Property affected by trust for public purposes in hands of those who hold it subject to trust is subject to intervention of public through crown by its proper officers for purpose asserting on behalf of public, public interest, and right.—*People ex rel. Ellert vs. Cogswell*, 113 Cal. 139, 137, 45 Pac. Rep. 270, 35 L. R. A. 269. See *Parker vs. May*, 59 Mass. (5 Cush.) 336; *Attorney-General vs. Compton*, 1 Younge & C. 417, 20 Eng. Ch. 416.

VII. NATURE OF REMEDY.

97. ACTION FOR DAMAGES LIES FOR NEGLIGENCE IN MANAGEMENT OF estate in not maintaining action relating to same, thus causing right to be barred by statute.—*McLeran vs. Benton*, 73 Cal. 329, 342-343, 2 Am. Rep. 814, 14 Pac. Rep. 879.

98. ACTION LIES TO COMPEL TRUSTEE TO PREVENT WASTE or trespass of trust estate.—*Tyler vs. Houghton*, 25 Cal. 26, 27, ..

99. ACTION TO ENFORCE TRUST NOT PROPER REMEDY against representative of trustee commingling trust fund so as to be wholly unidentifiable.—*Orcutt vs. Gould*, 117 Cal. 315, 316, 49 Pac. Rep. 188.

100. ACTION TO ENFORCE TRUST NOT PROPER REMEDY against executor of party with whom infant has resided, who persuades infant from time to time to draw money out of bank until all has passed into hands of such party, where such property has been mixed and cannot be clearly identified.—*Orcutt vs. Gould*, 117 Cal. 315, 316, 49 Pac. Rep. 188. See *Lathrop vs. Bampton*, 31 Cal. 17, 39 Am. Dec. 141; *McGrath vs. Carroll*, 110 Cal. 79, 42 Pac. Rep. 466; *Byrne vs. Byrne*, 113 Cal. 294, 45 Pac. Rep. 336.

101. ACTION TO QUIET TITLE NOT PROPER REMEDY as against trustee holding legal title.—Harrigan vs. Mowry, 84 Cal. 456, 467, 22 Pac. Rep. 658, 24 Id. 48. See *Learneu vs. Welton*, 40 Cal. 349; *Brewer vs. Houston*, 53 Cal. 245; *Von Drachenfels vs. Doolittle*, 77 Cal. 295, 19 Pac. Rep. 518; *Shanahan vs. Cramp-ton*, 92 Cal. 9, 13, 28 Pac. Rep. 50.

102. To compel conveyance of legal title by trustee to beneficiary.—Harrigan vs. Mowry, 84 Cal. 456, 467, 22 Pac. Rep. 658, 24 Id. 48. See *Learneu vs. Welton*, 40 Cal. 349; *Brewer vs. Houston*, 53 Cal. 245; *Von Drachenfels vs. Doolittle*, 77 Cal. 295, 19 Pac. Rep. 518; *Frost vs. Spitley*, 121 U. S. 552, bk. 30 L. ed. 1010, 7 Sup. Ct. Rep. 1129.

103. ATTACHMENT NOT PROPER REMEDY to enforce right of beneficiary under trust giving trustees legal and equitable estate and beneficiaries mere right to the proceeds.—*Ward vs. Waterman*, 85 Cal. 480, 507, 24 Pac. Rep. 930. See *O'Rourke vs. O'Connor*, 39 Cal. 442; *De Celis vs. Porter*, 59 Cal. 464.

104. EJECTMENT IS NOT PROPER REMEDY against parties holding possession as involuntary trustees where they have been repaid advances made by them in purchase of property.—*White vs. Costigan*, 138 Cal. 564, 568, 72 Pac. Rep. 178.

105. SUIT IN EQUITY TO COMPEL CONVEYANCE PROPER REMEDY by parties claiming to enforce resulting trust against representative of party who has been repaid purchase money advanced by him, as action to enforce trust and compel conveyance.—*White vs. Costigan*, 138 Cal. 564, 568, 72 Pac. Rep. 178.

VIII. WHO MAY ENFORCE.

106. ADMINISTRATOR OF BENEFICIARY is proper party plaintiff, to maintain action to enforce trust.—*Sayward vs. Houghton*, 119 Cal. 545, 550, 51 Pac. Rep. 853, 52 Pac. Rep. 44, explaining *Janes vs. Throckmorton*, 57 Cal. 368, 387.

See Code Civ. Proc. § 1582 and note. See Civil Code § 852 and note.

107. BENEFICIARIES, WHEN THEY ARE THE ONLY PARTIES interested, under no disability, have right to have trust modified or extinguished, and to arrest its specific performance.—*Eakle vs. Ingram*, 142 Cal. 15, 16, 100 Am. St. Rep. 99, 75 Pac. Rep. 566. See *Morffew vs. San Francisco & S. R. R. Co.*, 107 Cal. 587, 595, 40 Pac. Rep. 810; *Young vs. Bradley*, 101 U. S. 782, 787, bk. 25 L. ed. 1044.

108. BENEFICIARY IN WHOSE FAVOR TRUST EXISTS has right of action to compel performance of trust and to have legal title in property conveyed to him upon expiration of trust.—Harrigan vs. Mowry, 84 Cal. 456, 467, 22 Pac. Rep. 658, 24 Id. 48.

109. May maintain action against trustee who takes advantage of cestui que trust's absence to present false and fraudulent petition to court for settlement of trust estate and accounting to enforce claim.—*Aldrich vs. Barton*, 138 Cal. 220, 223, 94 Am. St. Rep. 43, 71 Pac. Rep. 169. See *Sohler vs. Sohler*, 135 Cal. 323, 37 Am. St. Rep. 98, 67 Pac. Rep. 282.

110. May maintain action to compel trustee to prevent waste or trespass and to recover possession of estate.—*Tyler vs. Houghton*, 35 Cal. 26, 27, 29.

111. May maintain action for damages against estate for negligence of latter in management of trust estate and in not maintaining action relating thereto, causing statute of limitations to run against estate.—*McLeran vs. Benton*, 78 Cal. 329, 342, 343, 2 Am. Rep. 814, 14 Pac. Rep. 879.

112. Cannot bring action against lessee under lease made by trustee to recover rents due before conveyance by trustee to cestui que trust.—*Murphy vs. Hopcroft*, 142 Cal. 43, 46, 75 Pac. Rep. 567.

113. DIVORCED WIFE PURCHASING AT RECEIVER'S SALE property purchased by agents of husband in their own name to whom husband had repaid advance money during lifetime may enforce trust.—*White vs. Costigan*, 138 Cal. 564, 569, 72 Pac. Rep. 178.

See pars. 117, 120 this note.

114. FOREIGN TRUSTEE AGAINST CO-TRUSTEE FOR MONEYS IN HIS HANDS since death of testator, as mortgagee indirectly and on application of rule of equitable estoppel.—*Fox vs. Tay*, 89 Cal. 329, 350, 23 Am. St. Rep. 474, 24 Pac. Rep. 855, 26 Id. 897. See *Brown vs. San Francisco Gas L. Co.*, 58 Cal. 426; *Barton vs. Higgins*, 41 Md. 546; *Hall vs. Harrison*, 21 Mo. 227, 64 Am. Dec. 225.

115. PARTY HAVING NO INTEREST IN TRUST ESTATE CANNOT MOVE COURT to require an account.—*McAdoo vs. Sayre*, 145 Cal. 344, 346, 78 Pac. Rep. 874.

116. PARTY HAVING NO INTEREST IN TRUST HAS NO STANDING IN COURT to assail account of trustee.—*McAdoo vs. Sayre*, 145 Cal. 344, 346, 78 Pac. Rep. 874.

117. PARTY INTERESTED UNDER TRUST CREATED BY AGREEMENT between husband and wife in divorce proceedings to pay wife monthly allowances, and pay her share of profits on sale of community property assigned to husband, has right to demand account of rents and profits.—*Keogh vs. Noble*, 136 Cal. 153, 155, 68 Pac. Rep. 579. See *King vs. Wise*, 43 Cal. 628; *Janes vs. Throckmorton*, 57 Cal. 368.

See pars. 113, 120 this note.

118. PARTY PROMISED ESTATE AS CONSIDERATION OF HIS CHANGING POSITION, giving up rights, moving to foreign country, and increasing trustee's business interests and estates by his diligence, may enforce constructive trust.—*McCabe vs. Healy*, 138 Cal. 81, 84, 70 Pac. Rep. 1008.

119. PARTY TO WHOM RIGHT IN PROPERTY HAS BEEN ASSIGNED is real party in interest to enforce trust.—*O'Connor vs. Irvine*, 74 Cal. 435, 440, 16 Pac. Rep. 236.

120. WIFE MAY ENFORCE TRUST where husband purchases her property through another at foreclosure sale under mortgage of same for husband's debt, as against purchaser from husband put upon inquiry by registration of conveyance to wife.—*Hassey vs. Wilke*, 55 Cal. 525, 528. See *Fitch vs. Cotheal*, 2 Sand.

Ch. (N. Y.) 29; *Bank of Albion vs. Burns*, 48 N. Y. 170; *Nelson vs. Allen*, 1 Yerg. (Tenn.) 860. See para. 118, 117 this note.

IX. AGAINST WHOM EXISTS.

121. RIGHT OF ACTION TO ENFORCE TRUST LIES AGAINST TRUSTEE until he has fully accounted for, and disposed of, the entire estate, and until court having jurisdiction has declared account correct and trust fully executed.—*McAdoo vs. Sayre*, 145 Cal. 344, 348, 78 Pac. Rep. 874.

122. Against trustee having possession or control of trust property to extent of whole of estate committed to his hands.—*McAdoo vs. Sayre*, 145 Cal. 344, 348, 78 Pac. Rep. 874.

123. Against trustee taking advantage of absent cestui que trust to present fraudulent petition for winding up estate.—*Aldrich vs. Barton*, 138 Cal. 220, 223, 94 Am. St. Rep. 43, 71 Pac. Rep. 169. See *Sohler vs. Sohler*, 135 Cal. 323, 87 Am. St. Rep. 98, 67 Pac. Rep. 282.

124. Against husband as trustee where he deceives wife as to amounts due her under agreement relating to dealings of property made in divorce proceedings.—*King vs. Wise*, 43 Cal. 628; *Keogh vs. Noble*, 136 Cal. 153, 155, 68 Pac. Rep. 579.

125. Against purchaser with notice or fraudulent transferee.—*Lathrop vs. Bampton*, 31 Cal. 17, 21, 89 Am. Dec. 141; *Scrivner vs. Dietz*, 84 Cal. 295, 297, 24 Pac. Rep. 171; *Smith vs. Bowen*, 35 N. Y. 83; *Holden vs. New York & Erie Bank*, 72 N. Y. 286; *Douglass vs. Ireland*, 73 N. Y. 100. See *Shanahan vs. Crampton*, 92 Cal. 9, 13, 23 Pac. Rep. 50, where grantor held adversely.

126. Against purchaser from trustee with verbal agreement to hold subject to trust.—*Scrivner vs. Dietz*, 84 Cal. 295, 297, 24 Pac. Rep. 171. See *Lathrop vs. Bampton*, 31 Cal. 17, 89 Am. Dec. 141.

127. Against representatives of deceased trustee without presentation of claim against estate, when identical trust property or its product in new form can be traced into estate, and so into possession of representatives.—*McGrath vs. Carroll*, 110 Cal. 79, 83, 42 Pac. Rep. 466. See *Lathrop vs. Bampton*, 31 Cal. 17, 24, 89 Am. Dec. 141.

128. Commingling trust funds.—*McGrath vs. Carroll*, 110 Cal. 79, 83, 42 Pac. Rep. 466. See post § 2236 and note.

129. Although action may not be brought for over two years from trustee's death where notice of repudiation of trust was not brought home to him until after death and failure to obtain satisfactory settlement.—*Hovey vs. Bradbury*, 113 Cal. 620, 627, 44 Pac. Rep. 1077.

130. DOES NOT LIE AGAINST REPRESENTATIVES or persons standing in place of trustee not to reach specific property where such action cannot lie against their predecessor.—*Lathrop vs. Bampton*, 31 Cal. 17, 21, 89 Am. Dec. 141.

131. Against trustee under deed of trust providing that upon decease of truster he should turn estate over to "heirs, executors, or administrators as the same may in and by law be proper and provided," also appointed

executor, not liable to action of account by heirs.—*Heintz vs. Hoover*, 138 Cal. 372, 374, 71 Pac. Rep. 447.

132. Against administrator of deceased trustee for account of fund held by decedent as guardian in trust where no representation of claim was made to administrator and trust funds do not come into his hands, and account was never presented for allowance.—*Gillespie vs. Winn*, 65 Cal. 429, 430, 4 Pac. Rep. 411.

X. DEFENSES—1. IN GENERAL.

133. BARE TRUSTEE WITHOUT INTEREST HAS NO STANDING IN COURT to dispute right of beneficiaries to dissolve trust and release trustee.—*Eakle vs. Ingram*, 142 Cal. 15, 17, 100 Am. St. Rep. 99, 75 Pac. Rep. 566. See *Slater vs. Hurlbut*, 146 Mass. 308, 314, 15 N. E. Rep. 790.

134. TRUSTEE MAY INVOKE PROVISIONS OF THE CODE declaring that trust must be in writing in order to show that there was no trust.—*Polk vs. Boggs*, 122 Cal. 114, 116, 54 Pac. Rep. 536.

135. TRUSTEE CALLED UPON FOR ACCOUNT, or whose account objected to, has right to make preliminary objection that party seeking account has no interest in property.—*McAdoo vs. Sayre*, 145 Cal. 344, 347, 78 Pac. Rep. 874.

XI. SAME—ADVERSE POSSESSION.

136. GENERAL RULE.—Possession of trust property taken by trustee under trust, is possession of cestui que trust, whether trust be express or implied, and cannot be adverse until trust is openly disavowed or denied to knowledge of cestui que trust.—*Warren vs. Adams*, 19 Colo. 515, 36 Pac. Rep. 604. See *Harrigan vs. Mowry*, 34 Cal. 456, 467, 22 Pac. Rep. 658, 24 Id. 48.

137. Adverse holding and repudiation of trust by trustee does not arise from payment of taxes and redemption of land from tax sales.—*Warren vs. Adams*, 19 Colo. 515, 36 Pac. Rep. 604.

138. TRUSTEE CANNOT CLAIM ADVERSELY and so ripen title under statute of limitations.—*Schlessinger vs. Mallard*, 70 Cal. 326, 332, 11 Pac. Rep. 728.

139. Cannot remain in possession after repudiating trust and claiming adversely.—*Schlessinger vs. Mallard*, 70 Cal. 326, 332, 11 Pac. Rep. 728.

140. Must denude himself of trust by assuming to hold for himself, and notify cestui que trust of his intentions in order to create adverse holding.—*Luco vs. De Toro*, 91 Cal. 405, 418, 27 Pac. Rep. 1082. See *Wright vs. Ross*, 36 Cal. 414; *Haynie vs. Hall*, 5 Humph. (Tenn.) 290, 42 Am. Dec. 427.

XII. SAME—LACHES.

141. DOCTRINE OF LACHES APPLIED ONLY WHEN CESTUI QUE TRUST is shown to have knowledge, actual or imputable, of facts which should have prompted choice either to diligently seek equitable relief or thereafter be content with remedies afforded him at law.—*Colo. Warren vs. Adams*, 19 Colo. 515, 36 Pac. Rep. 604. *Mich. Ripley vs. Seligman*, 82 Mich.

177, 59 N. W. Rep. 142. *Minn. Bausman vs. Kelley*, 38 Minn. 197, 8 Am. St. Rep. 661, 36 N. W. Rep. 323. *Oreg. Neppach vs. Jones*, 20 Oreg. 491, 23 Am. St. Rep. 145, 26 Pac. Rep. 569, 249.

See ante §19 and note.

142. Where one with knowledge that his rights had been invaded, and his trust repudiated, has submitted to unconscionable delay, and another's rights have arisen, founded upon his silence and acquiescence.—*Hovey vs. Bradbury*, 112 Cal. 620, 625, 44 Pac. Rep. 1077.

143. LACHES MUST BE SHOWN ON PART of cestui que trust and they must be such as to show that he is blamable therefor in contemplation of equity.—*Warren vs. Adams*, 19 Colo. 515, 36 Pac. Rep. 604.

144. Not designed to be check upon right of person to impose confidence and trust in another.—*Hovey vs. Bradbury*, 112 Cal. 620, 625, 44 Pac. Rep. 1077. See *Lindsay Petroleum Co. vs. Hurd*, L. R. 5 C. P. 221, 239.

145. Only imputable to cestui que trust where his own acts, if allowed, would work unwarrantable injustice.—*Hovey vs. Bradbury*, 112 Cal. 620, 625, 44 Pac. Rep. 1077.

146. Not be permitted to be invoked for purpose of aiding a faithless trust in consummating his wrong.—*Hovey vs. Bradbury*, 112 Cal. 620, 625, 44 Pac. Rep. 1077.

147. Mere forbearance to call trustee to strict account cannot be taken advantage of by him in his lifetime.—*Hovey vs. Bradbury*, 112 Cal. 620, 627, 44 Pac. Rep. 1077.

148. Will not avail his representatives after his death.—*Hovey vs. Bradbury*, supra.

149. Will not be imputed to cestui que trust where his mental and physical condition are such as would exempt him from operation of statute of limitations, as applied to insane persons.—*Warren vs. Adams*, 19 Colo. 515, 36 Pac. Rep. 604; *Stephens vs. Martin*, 85 Tenn. 273, 3 S. W. Rep. 206; *Martin vs. Neblett*, 36 Tenn. 282, 7 S. W. Rep. 123.

XIII. STATUTE OF LIMITATIONS.

150. STATUTES OF LIMITATION HAVE BECOME RULES OF PROPERTY and are vital to welfare of society and favored by law.—*Nichols vs. Randall*, 136 Cal. 426, 432, 69 Pac. Rep. 26.

151. STATUTES OF LIMITATION DO NOT APPLY to trusts which are mere creatures of equity and not within the cognizance of court of law.—*Warren vs. Adams*, 19 Colo. 515, 36 Pac. Rep. 604; *Kane vs. Bloodgood*, 7 John. Ch. (N. Y.) 90, 11 Am. Dec. 417.

152. STATUTES OF LIMITATION WILL NOT RUN in case of resulting trusts so long as trust relation is admitted and there is no adverse holding by the trustee.—*Love vs. Watkins*, 40 Cal. 547, 565, 6 Am. Rep. 624. See *Butler vs. Hyland*, 89 Cal. 575, 26 Pac. Rep. 1108. *Cole. Warren vs. Adams*, 19 Colo. 515, 36 Pac. Rep. 604. *Iowa. Murphy vs. Murphy*, 30 Iowa 740, 45 N. W. Rep. 914. *Fed. Riddle vs. Whitehill*, 135 U. S. 621, bk. 34 L. ed. 282, 10 Sup. Ct. Rep. 924.

153. Do not run in case of resulting trust

created through fraud, misrepresentations, or deceit.—*Wormouth vs. Johnson*, 58 Cal. 621, 624. See *Love vs. Watkins*, 40 Cal. 547, 6 Am. Rep. 624; *Gerdas vs. Moody*, 41 Cal. 335.

154. Do not run as against fraud by trustee, until same is known to beneficiary.—*Currey vs. Allen*, 34 Cal. 254, 257.

155. STATUTES OF LIMITATION DO NOT BEGIN TO RUN against beneficiary or in favor of trustee until demand and refusal.—*Baker vs. Joseph*, 16 Cal. 173, 177; *White vs. Costigan*, 128 Cal. 564, 569, 72 Pac. Rep. 178.

156. Until after demand and action taken within reasonable time thereafter.—*White vs. Costigan*, 128 Cal. 564, 569, 72 Pac. Rep. 178.

157. Until trustee repudiates trust by clear and unequivocal acts or words, and claims estate as his own, and such repudiation is brought to knowledge of cestui que trust.—*Hearst vs. Pujol*, 44 Cal. 230, 235; *Fox vs. Tay*, 89 Cal. 339, 349, 23 Am. St. Rep. 474, 24 Pac. Rep. 855, 26 Id. 897. See *Janes vs. Throckmorton*, 57 Cal. 368, 388; *Broder vs. Conklin*, 77 Cal. 330, 339, 19 Pac. Rep. 513; *Odell vs. Moss*, 130 Cal. 352, 359, 62 Pac. Rep. 555; *Bacon vs. Rives*, 106 U. S. 99, bk. 27 L. ed. 69, 1 Sup. Ct. Rep. 3.

158. REPUDIATION.—Until trustee repudiates in some unequivocal way.—*McGrath vs. Carroll*, 110 Cal. 79, 83, 42 Pac. Rep. 466. See *Miles vs. Thorne*, 38 Cal. 335, 338, 99 Am. Dec. 384; *Love vs. Watkins*, 40 Cal. 547, 6 Am. Rep. 624; *Hearst vs. Pujol*, 44 Cal. 230, 235.

159. Brought home to knowledge of beneficiary.—*Roach vs. Caraffa*, 85 Cal. 436, 446, 25 Pac. Rep. 22. See *Ord vs. De La Guerra*, 18 Cal. 67; *Schroeder vs. Jahns*, 27 Cal. 274, 280; *Miles vs. Thorne*, 38 Cal. 335, 338, 99 Am. Dec. 384; *Love vs. Watkins*, 40 Cal. 547, 6 Am. Rep. 624; *Hearst vs. Pujol*, 44 Cal. 230; *Hoffman vs. Vallejo*, 45 Cal. 564, 572; *Janes vs. Throckmorton*, 57 Cal. 368; *Zuck vs. Culp*, 59 Cal. 142; *Odell vs. Moss*, 130 Cal. 352, 359, 62 Pac. Rep. 555; *Speidel vs. Henrici*, 120 U. S. 377, 386, bk. 30 L. ed. 718, 7 Sup. Ct. Rep. 610.

160. Clearly and unequivocally brought to knowledge of cestui que trust.—*Hovey vs. Bradbury*, 112 Cal. 620, 625, 44 Pac. Rep. 1077.

161. Actual possession of vendor or non-possession of vendee must be considered in determining whether there has been repudiation of trust and notice thereof. It is not, however, controlling.—*Luco vs. De Toro*, 91 Cal. 405, 421, 27 Pac. Rep. 1082. See *Speidel vs. Henrici*, 120 U. S. 377, bk. 30 L. ed. 718, 7 Sup. Ct. Rep. 610.

162. May exist without knowledge or notice being brought home to beneficiary.—*Miles vs. Thorne*, 38 Cal. 335, 338, 99 Am. Dec. 384. See *Luco vs. De Toro*, 91 Cal. 405, 418, 27 Pac. Rep. 1082; *Bennett vs. Morrison*, 120 Pa. St. 390, 6 Am. St. Rep. 711, 14 Atl. Rep. 264.

163. Mere failure of trustee to account will not amount to repudiation of trust, especially where each failure is followed by express acknowledgment of trust and admission of default and promise to repair.—*Hovey vs. Bradbury*, 112 Cal. 620, 626, 44 Pac. Rep. 1077.

164. Not necessary in order to set statute

in motion in case of an implied trust.—Hecht vs. Slaney, 72 Cal. 363, 366, 14 Pac. Rep. 33. See *Luco vs. De Toro*, 91 Cal. 405, 413, 27 Pac. Rep. 1082; *Nougues vs. Newlands*, 113 Cal. 102, 106, 50 Pac. Rep. 386; *Broder vs. Conklin*, 121 Cal. 282, 288, 53 Pac. Rep. 699; *Barker vs. Hurley*, 132 Cal. 21, 26, 63 Pac. Rep. 1071.

165. Where trustee voluntarily assumes continuing trust, especially where the relation has never been repudiated.—*Love vs. Watkins*, 40 Cal. 547, 565, 6 Am. Rep. 624; *Butler vs. Hyland*, 89 Cal. 575, 36 Pac. Rep. 1108.

166. Where suit not started until two years after trustee's death, eight years after beneficiary's marriage, sixteen years after she had obtained majority, and nineteen years and eleven months after deed had been executed and recorded, other evidence showing that cestui que trust was member of trustee's family who stood in position of loco parentis.—*Love vs. Watkins*, 40 Cal. 547, 565, 6 Am. Rep. 624.

167. STATUTE OF LIMITATIONS WILL RUN AS AGAINST CESTUI QUE TRUST in possession at time he was ousted.—*Love vs. Watkins*, 40 Cal. 547, 569, 6 Am. Rep. 624; *McCauley vs. Harvey*, 49 Cal. 497; *Altschul vs. Polack*, 55 Cal. 632; *Gilbert vs. Sleeper*, 71 Cal. 290, 12 Pac. Rep. 173; *Snider vs. Johnson*, 25 Oreg. 328, 35 Pac. Rep. 846; *Lakin vs. Mining Co.*, 25 Fed. Rep. 337, 347.

168. Against resulting trust, or, more properly speaking, constructive trust initiated by and originated through wrongful conduct of

trustee.—*Warren vs. Adams*, 19 Colo. 515, 36 Pac. Rep. 604.

169. As soon as it is openly disavowed by trustee insisting upon adverse right and interest clearly and unequivocally made known to cestui que trust.—*Luco vs. De Toro*, 91 Cal. 405, 417, 27 Pac. Rep. 1082. See *Spedel vs. Henrich*, 120 U. S. 377, bk. 30 L. ed. 713, 7 Sup. Ct. Rep. 610.

170. From time he has notice or knowledge of repudiation of trust by trustee and his claim to hold estate as his own.—*United States vs. Taylor*, 104 U. S. 216, bk. 26 L. ed. 721. See *Kane vs. Bloodgood*, 7 John. Ch. (N. Y.) 90, 11 Am. Dec. 417; *Baker vs. Whiting*, 3 Sumn. C. C. 475, 486, 3 Fed. Cas. 495.

171. In favor of defendant chargeable as trustee of implied or constructive trust, and it is not necessary that he should have denied or disputed trust.—*Hecht vs. Slaney*, 72 Cal. 363, 14 Pac. Rep. 33; *Nougues vs. Newlands*, 113 Cal. 102, 106, 50 Pac. Rep. 386; *Broder vs. Conklin*, 121 Cal. 282, 288, 53 Pac. Rep. 699; *Barker vs. Hurley*, 132 Cal. 21, 26, 63 Pac. Rep. 1071.

172. In favor of representatives of deceased trustee from time of publication of notice of claims.—*McGrath vs. Carroll*, 110 Cal. 79, 33, 43 Pac. Rep. 466.

173. Where trustee denies right of cestui que trust and possession becomes adverse.—*Warren vs. Adams*, 19 Colo. 515, 36 Pac. Rep. 604; *Kane vs. Bloodgood*, 7 John. Ch. (N. Y.) 90, 11 Am. Dec. 417.

§ 864. AUTHOR OF TRUST MAY DEVISE, ETC. Notwithstanding anything contained in the last section, the author of a trust may, in its creation, prescribe to whom the real property to which the trust relates shall belong, in the event of the failure or termination of the trust, and may transfer or devise such property, subject to the execution of the trust.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
- 2-18. Construed with reference to its application, power, meaning, etc.
19. Example of provision bringing case within code.
- 20, 21. Purchaser—Position of.
- 22-24. Truster—Right to possession, reconveyance.
25. Same—Husband's right to homestead.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *King vs. Gots*, 70 Cal. 236, 240, 11 Pac. Rep. 656 (construed and applied with other sections); *Schlessinger vs. Mallard*, 70 Cal. 326, 331, 11 Pac. Rep. 723 (construed and applied with other sections); *Wilhoit vs. Cunningham*, 87 Cal. 453, 456, 35 Pac. Rep. 675 (construed and applied with other sections); *Fatjo vs. Swasey*, 111 Cal. 628, 638, 44 Pac. Rep. 225 (construed and applied with other sections); *Sacramento Bank vs. Alcorn*, 121 Cal. 379, 383, 53 Pac. Rep. 313 (construed and applied with other sections); *In re Estate Fair*, 132 Cal. 523, 547, 563, 576, 84 Am. St. Rep. 70, 64 Pac. Rep. 1000 (construed and applied with other sections); *In re Estate Fair* (concurring opinion not offi-

cially reported), 60 Pac. Rep. 442, 451, 455 (construed and applied); *In re Estate Sanford*, 136 Cal. 97, 105, 63 Pac. Rep. 494 (construed and applied).

2. CONSTRUED—As applying to trust for benefit of creditors.—*Wilhoit vs. Cunningham*, 87 Cal. 453, 456, 35 Pac. Rep. 675.

3. As empowering truster to confer right on trustee, at expiration of trust to transfer and convey to designated parties (dis. op.).—*In re Estate Fair*, 132 Cal. 523, 563, 84 Am. St. Rep. 70, 64 Pac. Rep. 1000.

4. As giving author of trust power to "prescribe" in trust instrument party to whom trust real estate "shall belong" upon termination of trust.—*In re Estate Sanford*, 136 Cal. 97, 105, 63 Pac. Rep. 494.

5. As giving author of trust "right in its creation" to prescribe to whom property shall belong in event of failure or termination.—*In re Estate Fair* (concurring opinion, Beatty, C. J., not officially reported), 60 Pac. Rep. 451.

6. As giving truster, not having provided any creation of trust to whom property shall belong upon failure or termination thereof.

power to transfer property to purchaser.—*Schlessinger vs. Mallard*, 70 Cal. 326, 331, 11 Pac. Rep. 723.

7. As giving truster of deed of trust to secure indebtedness power to devise or transfer subject to trust.—*Sacramento Bank vs. Alcorn*, 121 Cal. 379, 383, 53 Pac. Rep. 813.

8. As giving truster power at any subsequent time to convey or devise subject to trust where he does not exercise the privilege of prescription given to him by code in the creation of trust.—In re *Estate Fair* (concurring opinion, *Beatty, C. J.*, not officially reported), 60 Pac. Rep. 451.

9. As giving truster power to prescribe future ownership by other means than by grant or devise, for reason that if legislature intended it as only means of transfer it would have been sufficient to say that author of trust at time of creation or at any subsequent time might convey devised property subject to trust.—In re *Estate Fair* (concurring opinion, *Beatty, C. J.*, not officially reported), 60 Pac. Rep. 452.

10. As leaving it for court to determine upon consideration of language used by truster whether it was his intention that "real property to which trust relates" should be left in him or his successors, or whether he has "prescribed" any other person to whom it shall belong.—In re *Estate Sanford*, 136 Cal. 97, 105, 63 Pac. Rep. 494.

11. As not applying to cases in which truster has made no attempt to prescribe to whom property shall belong in event of failure or termination of trust.—In re *Estate Fair*, 132 Cal. 523, 547-548, 84 Am. St. Rep. 70, 60 Pac. Rep. 443, 64 Pac. Rep. 1000.

12. As not declaring mode in which truster may limit the terms expressing his desire.—In re *Estate Sanford*, 136 Cal. 97, 105, 63 Pac. Rep. 494.

13. As not declaring mode in which truster shall "prescribe" persons to whom he desires property to belong.—In re *Estate Sanford*, 136 Cal. 97, 105, 63 Pac. Rep. 494.

14. As not making it imperative on truster to use term "prescribe" or "shall belong" to show desire to dispose of estate not embraced in the trust in order to make his purpose effective (dis. op.).—In re *Estate Fair*, 132 Cal. 523, 576, 84 Am. St. Rep. 70, 64 Pac. Rep. 1000.

15. As not meaning that trust provided for by instrument being void, language creating it will be treated and deemed prescription mentioned in section and therefore that property will pass as if valid.—In re *Estate Fair*, 132 Cal. 523, 547-548, 84 Am. St. Rep. 70, 64 Pac. Rep. 1000.

16. As showing intention that estate "shall belong" to those persons and thus to have "otherwise disposed of" estate where truster incorporates in instrument intelligible designation of persons he wishes to enjoy estate upon termination of trust (dis. op.).—In re *Estate Fair*, 132 Cal. 523, 576, 84 Am. St. Rep. 70, 64 Pac. Rep. 1000.

17. With § 863 as giving devisee of real estate legal estate subject to trust.—*Fatjo vs. Swasey*, 111 Cal. 628, 633, 44 Pac. Rep. 225.

18. With § 865 as modifying § 863 by making truster of express trust, except as to his trustee and those holding under him, holder of legal title.—*King vs. Gotz*, 70 Cal. 236, 240-241, 11 Pac. Rep. 656.

19. PROVISION THAT TRUST CREATED IN TRUSTEES TO TRANSFER and convey should not be valid trust, and for that reason should fail, "then I direct that this property shall pass," etc., would bring case within section (dictum).—In re *Estate Fair*, 132 Cal. 523, 547, 84 Am. St. Rep. 70, 64 Pac. Rep. 1000.

20. PURCHASER FROM TRUSTER HOLDS SUBJECT TO TRUST, and stands in position which his grantor would have occupied but for transfer.—*Schlessinger vs. Mallard*, 70 Cal. 326, 331, 11 Pac. Rep. 723.

21. Takes subject to trust, even though deed is merely quitclaim deed.—*Schlessinger vs. Mallard*, 70 Cal. 326, 331-332, 11 Pac. Rep. 723.

22. TRUSTER UNDER TRUST DEED SECURING INDEBTEDNESS has right to possession, and may maintain action to recover possession when trust deed silent upon subject.—*Sacramento Bank vs. Alcorn*, 121 Cal. 379, 383, 53 Pac. Rep. 813. See *Tyler vs. Granger*, 48 Cal. 359; *King vs. Gotz*, 70 Cal. 236, 11 Pac. Rep. 656.

23. Under trust deed for benefit of creditors divested of all right except the reconveyance of residue after satisfaction of creditors' claims.—*Wilhoit vs. Cunningham*, 37 Cal. 453, 456, 25 Pac. Rep. 675; *Wilhoit vs. Lyons*, 38 Cal. 409, 412, 33 Pac. Rep. 325. See *Bryant vs. Langford*, 80 Cal. 542, 543, 22 Pac. Rep. 219; *Savings & L. Soc. vs. Burnett*, 106 Cal. 514, 523, 39 Pac. Rep. 922.

24. ENTITLED TO RECONVEYANCE when purposes of trust abandoned.—*Schlessinger vs. Mallard*, 70 Cal. 326, 334, 11 Pac. Rep. 723.

25. Husband residing with family upon community property has right to declare homestead thereon notwithstanding prior trust deed for creditors.—*King vs. Gotz*, 70 Cal. 236, 241, 11 Pac. Rep. 656. See *Spencer vs. Geissman*, 37 Cal. 96, 99 Am. Dec. 243; *Brooks vs. Hyde*, 37 Cal. 366.

§ 865. TITLE OF GRANTOR OF TRUST PROPERTY. The grantee or devisee of real property subject to a trust acquires a legal estate in the property, as against all persons except the trustees and those lawfully claiming under them.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Construed as to grantee's estate.

3. Same—As to modification of § 863.
- 4, 5. Devisee—Nature and quantity of estate of.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *King vs. Gots*, 70 Cal. 336, 240, 11 Pac. Rep. 555 (construed and applied with other sections); *Sacramento Bank vs. Alcorn*, 121 Cal. 379, 383, 53 Pac. Rep. 813 (construed and applied with other sections).

2. CONSTRUED AS GIVING GRANTEE from trustee legal title except as against trustee and those lawfully claiming under him.—*King vs. Gots*, 70 Cal. 336, 240, 11 Pac. Rep. 555; *Sacramento Bank vs. Alcorn*, 121 Cal. 379, 383, 53 Pac. Rep. 813.

3. With § 864 as modifying § 863 and as making the trustee of express trust, except as

to his trustee and those holding under him, holder of legal title.—*King vs. Gots*, 70 Cal. 336, 240, 11 Pac. Rep. 555. See *Kennedy vs. Nunan*, 52 Cal. 326.

4. DEVISEE OF REAL ESTATE SUBJECT TO TRUST acquires legal estate in the property.—*Fatjo vs. Swasey*, 111 Cal. 623, 633, 44 Pac. Rep. 225.

5. DEVISEE OR GRANTEE OF TRUSTER of trust given as security for loan acquires legal estate against all persons except trustee and person lawfully claiming under him.—*Sacramento Bank vs. Alcorn*, 121 Cal. 379, 383, 53 Pac. Rep. 813.

§ 866. INTERESTS REMAINING IN GRANTOR OF EXPRESS TRUST.

Where an express trust is created in relation to real property, every estate not embraced in the trust, and not otherwise disposed of, is left in the author of the trust or his successors.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
- 2-8. Construed with reference to application—Grantor's interest, etc.
9. Estate in grantor not affected by power to revoke.
- 10-14. Grantor—When trust does or does not result to.
15. Trustee—Interest of, subject to execution.
16. Same—Entitled to reconveyance.
17. Same—Right of action to recover balance.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Schlessinger vs. Mallard*, 70 Cal. 326, 331, 11 Pac. Rep. 733 (construed and applied with other sections); *Nichols vs. Emery*, 109 Cal. 323, 331, 50 Am. St. Rep. 43, 41 Pac. Rep. 1089 (construed and applied with other sections); *Wittfield vs. Forster*, 124 Cal. 418, 420, 57 Pac. Rep. 219 (construed and applied with other sections); *In re Estate Fair*, 132 Cal. 523, 576, 84 Am. St. Rep. 70, 60 Pac. Rep. 442 (construed and applied with other sections); *In re Estate Sanford*, 136 Cal. 97, 105, 63 Pac. Rep. 494 (construed and applied); *Eakle vs. Ingram*, 142 Cal. 15, 16, 17, 100 Am. St. Rep. 99, 75 Pac. Rep. 566 (construed and applied).

2. CONSTRUED—As applying to parties interested under deed of trust, and as giving them power to call for dissolution of trust where they are only persons beneficially interested.—*Eakle vs. Ingram*, 142 Cal. 15, 16, 100 Am. St. Rep. 99, 75 Pac. Rep. 566. See *Morfevs vs. San Francisco & S. R. R. Co.*, 107 Cal. 587, 595, 40 Pac. Rep. 810; *Young vs. Bradley*, 101 U. S. 782, 787, bk. 25 L. ed. 1044.

3. As leaving property in author of trust, or his successor, subject to execution of trust where no other disposition of same is covered by trust.—*In re Estate Sanford*, 136 Cal. 97, 105, 63 Pac. Rep. 494.

4. As leaving in grantor all the estate not necessary for purposes of trust.—*Nichols vs. Emery*, 109 Cal. 323, 331, 50 Am. St. Rep. 43, 41 Pac. Rep. 1089.

5. With other sections of code as giving the

author of trust right to transfer to purchaser where party to whom property should belong upon failure or termination of trust is not provided for.—*Schlessinger vs. Mallard*, 70 Cal. 326, 331, 11 Pac. Rep. 733.

6. With § 864 as limiting § 863 as not including any estate in property not required for purposes of trust.—*In re Estate Fair*, 132 Cal. 523, 576, 84 Am. St. Rep. 70, 60 Pac. Rep. 442.

7. With § 864 as implying limiting the provisions of § 863 to estate given to trustee for purposes of trust.—*In re Estate Fair*, 132 Cal. 523, 576, 84 Am. St. Rep. 70, 60 Pac. Rep. 442. See *Morfevs vs. San Francisco & S. R. R. Co.*, 107 Cal. 587, 40 Pac. Rep. 810.

8. With § 871 and § 2279 as giving trustees no estate at all, or as producing resulting trust in favor of grantor or his heirs, where trusts declared in instrument are illegal, or for other reasons void.—*Wittfield vs. Forster*, 124 Cal. 418, 420, 57 Pac. Rep. 219.

9. ESTATE LEFT IN GRANTOR NOT AFFECTED by fact that he reserved power to revoke trust.—*Nichols vs. Emery*, 109 Cal. 323, 331, 50 Am. St. Rep. 43, 41 Pac. Rep. 1089.

10. Resulting trust in favor of grantor or his heirs, residuary devisees or legatees, or personal representatives, arises where property is given on trust which is too uncertain, indefinite, and vague in its effect.—*Wittfield vs. Forster*, 124 Cal. 418, 420, 57 Pac. Rep. 219.

11. Where no trust is declared, or by trust to be thereafter declared, but of which no declaration is made.—*Wittfield vs. Forster*, 124 Cal. 418, 420, 57 Pac. Rep. 219.

12. Where trust lapses and there is no other disposition of property.—*Wittfield vs. Forster*, 124 Cal. 418, 419, 57 Pac. Rep. 219.

13. Where trust is illegal and void.—*Wittfield vs. Forster*, 124 Cal. 418, 420, 57 Pac. Rep. 219.

14. Does not arise in favor of grantor where deed expresses consideration, even though nominal.—*Hogan vs. Jaques*, 19 N. J. Eq. (4 C. E. Gr.) 123, 126, 97 Am. Dec. 644.

15. TRUSTER'S INTEREST IN TRUST DEED for benefit of creditors subject to

execution.—Kennedy vs. Nunan, 53 Cal. 326, 331.

16. Trustor under deed of assignment made for purpose of securing debt entitled to reconveyance of surplus estate left in hands of trustee.—Ponce vs. McElvy, 47 Cal. 154, 159.

17. Trustor has right of action against trustee to recover balance in hands of latter after satisfying purposes of trust.—McCollister vs. Willey, 52 Ind. 332. See McDonald vs. McDonald, 24 Ind. 63; Gwaltney vs. Wheeler, 26 Ind. 415; Milliken vs. Ham, 36 Ind. 166.

§ 867. RESTRAINING DISPOSITION OF TRUSTS. The beneficiary of a trust for the receipt of the rents and profits of real property, or for the payment of an annuity out of such rents and profits, may be restrained from disposing of his interest in such trust, during his life or for a term of years, by the instrument creating the trust.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 223.

1. Applied, cited, construed, referred to, etc.
2-6. Construed as amended, as to its application, extent, etc.

7. Beneficiary—Power to transfer rights.
8. Creditors—How barred by donor.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Fatjo vs. Swasey*, 111 Cal. 628, 637, 44 Pac. Rep. 225 (construed and applied with other sections); *Blackburn vs. Webb*, 133 Cal. 420, 422, 65 Pac. Rep. 952 (construed and applied with other sections); *Eakle vs. Ingram*, 142 Cal. 15, 17, 100 Am. St. Rep. 99, 75 Pac. Rep. 566 (construed and applied).

2. **CONSTRUED**—As amended not irreconcilably in conflict with original section.—*Fatjo vs. Swasey*, 111 Cal. 628, 637, 44 Pac. Rep. 225.

3. As giving beneficiary of trust for receipt of rents and profits right to transfer his interest notwithstanding § 863.—*Blackburn vs. Webb*, 133 Cal. 420, 422, 65 Pac. Rep. 952.

4. As not repealing § 863.—*Fatjo vs. Swasey*, 111 Cal. 628, 637, 44 Pac. Rep. 225.

5. As possibly giving court right to refuse discharge of trust in cases coming within provisions of section.—*Eakle vs. Ingram*, 142 Cal. 15, 17, 100 Am. St. Rep. 99, 75 Pac. Rep. 566.

6. As showing that previous to amendment beneficiary's interest in rents and profits could not be transferred, but as being subject to transfer since amendment, unless restrained by trust instrument.—*Fatjo vs. Swasey*, 111 Cal. 628, 637, 44 Pac. Rep. 225.

7. **BENEFICIARY OF TRUST** for receipt of rents and profits may transfer his rights thereto notwithstanding provision of § 863.—*Fatjo vs. Swasey*, 111 Cal. 628, 44 Pac. Rep. 225; *Blackburn vs. Webb*, 133 Cal. 420, 422, 65 Pac. Rep. 952.

8. **CREDITORS MAY BE BARRED** by donor of trust from asserting their claims against interest of beneficiary.—*Seymour vs. McAvoy*, 121 Cal. 438, 442, 53 Pac. Rep. 246, 41 L. R. A. 544.

See 39 L. R. A. 306; 41 Id. 295.

§ 868. POWERS OVER TRUST OF PARTY INTERESTED (repealed).

History: Enacted March 21, 1872; repealed March 30, 1874, Code Amdts. 1873-4, p. 223.

§ 869. EFFECT OF OMITTING TRUST IN CONVEYANCE. Where an express trust is created in relation to real property, but is not contained or declared in the grant to the trustee, or in an instrument signed by him, and recorded in the same office with the grant to the trustee, such grant must be deemed absolute in favor of purchasers from such trustee without notice, and for a valuable consideration.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 223.

1. Applied, cited, construed, referred to, etc.
2. Construed with reference to its application.
3. Conveyance by trustee—When voidable as against purchaser.

1. Applied, cited, construed, referred to, etc., in: *Peiser vs. Griffin*, 125 Cal. 9, 12, 57 Pac. Rep. 690.

As to conveyance by trustee and when same void and voidable, see monographic note 19 Am. St. Rep. 266.

2. Construed as applying to grant by wife of community property conveyed contrary to the trust.—*Peiser vs. Griffin*, 125 Cal. 9, 12, 57 Pac. Rep. 690.

3. Conveyance by trustee in contravention of trust to purchaser with notice voidable at election of beneficiaries.—*Peiser vs. Griffin*, 125 Cal. 9, 12, 57 Pac. Rep. 690.

As to using proceeds of trust property in own business, see 51 L. R. A. 90.

§ 870. CERTAIN SALES, ETC., BY TRUSTEES, VOID. Where a trust in relation to real property is expressed in the instrument creating the estate every transfer or other act of the trustees, in contravention of the trust, is absolutely void.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 394, held unconstitutional, see history, § 4 ante.

1. Applied, cited, construed, referred to, etc.
- 2-4. Construed with reference to its application.
- 5, 6. Acts—When void—Parties with notice.
7. Exchange—When not authorized.
8. Fraudulent transfer void.
- 9-11. Mortgages—When void or valid.
- 12-16. Sales—When and when not void or voidable.
17. Transfer—Effect of void.
18. Same—Exchange, with notice of trust.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in:** Schlessinger vs. Mallard, 70 Cal. 326, 331, 11 Pac. Rep. 728 (cited in applying and construing other sections); Tripp vs. Duane (Cal. May 20, 1887), 13 Pac. Rep. 860, 862 (construed and applied); Savings & L. Soc. vs. Burnett, 106 Cal. 514, 534, 39 Pac. Rep. 922 (construed and applied with other sections); In re Estate Walkerly, 108 Cal. 627, 649, 49 Am. St. Rep. 97, 41 Pac. Rep. 772 (construed and applied); Chapman vs. Hughes, 134 Cal. 641, 645, 657, 53 Pac. Rep. 298, 60 Id. 974, 66 Id. 982 (construed and applied); Callahan vs. James (Cal. Dec. 18, 1902), 71 Pac. Rep. 104, 107 (construed and applied); Gardiner vs. Cord, 145 Cal. 157, 164, 78 Pac. Rep. 544 (construed and applied).

As to conveyances by trustees and the circumstances making same void or voidable, see monographic note 19 Am. St. Rep. 266.

See post § 2243 and note.

2. **CONSTRUED**—As applying to sale made by party paying purchase money and holding as security for loan.—Tripp vs. Duane (Cal. May 20, 1887), 13 Pac. Rep. 860, 862.

3. As making all acts of trustee in contravention of trust void.—Savings & L. Soc. vs. Burnett, 106 Cal. 514, 534, 39 Pac. Rep. 922.

4. With relation to trust expressed in Federal statutes, not expressed otherwise than by reference to legislative regulations of state legislature relating to public lands.—Callahan vs. James (Cal. Dec. 18, 1902), 71 Pac. Rep. 104, 107.

5. **ACTS OF TRUSTEE UNAUTHORIZED** or in contravention of trust, void.—Gilbert vs. Penfield, 124 Cal. 234, 238, 56 Pac. Rep. 1107.

6. Every transfer or act of trustee in contravention of trust is absolutely void as to parties having notice of terms of express trust which are expressed in instrument creating trust.—Chapman vs. Hughes, 134 Cal. 641, 657, 53 Pac. Rep. 298, 60 Id. 974, 66 Id. 982; County of Amador vs. Gilbert, 133 Cal. 51, 52, 65 Pac. Rep. 130.

7. Exchange by trustee under power of sale is not authorized, as word "sale" has well-defined meaning.—Chapman vs. Hughes, 134 Cal. 641, 657, 53 Pac. Rep. 298, 60 Id. 974, 66 Id. 982. See Ringgold vs. Ringgold, 1 Har. & G. (Md.) 11, 18 Am. Dec. 250.

8. Fraudulent transfers by trustee to one who has notice of terms of express trust, which terms are expressed in instrument creating estate, is void under § 870.—Chapman vs. Hughes, 134 Cal. 641, 657, 53 Pac. Rep. 298, 60 Id. 974, 66 Id. 982.

9. **MORTGAGE EXECUTED BY TRUSTEES IN CONTRAVENTION** of trust, void.—Gardiner vs. Cord, 145 Cal. 157, 164, 78 Pac. Rep. 544; County of Amador vs. Gilbert, 133 Cal. 51, 52, 65 Pac. Rep. 130.

10. Although executed in contravention of terms of trust may be valid as between beneficiaries where it is executed in pursuance of agreement between them.—Gardiner vs. Cord, 145 Cal. 157, 164, 78 Pac. Rep. 544.

11. Of real estate held by trustees under will declaring that they should at all times keep premises free from any and all encumbrances other than mortgage in existence, is in contravention of terms of trust and void.—Gardiner vs. Cord, 145 Cal. 157, 164, 78 Pac. Rep. 544.

12. **SALE MADE BY PARTY ADVANCING PURCHASE MONEY** and taking conveyance as security for loan with power of sale, does not contravene section so far as sale related to equitable interest.—Tripp vs. Duane (Cal. May 20, 1887), 13 Pac. Rep. 860, 862.

13. By trustee under power not absolutely void, or even voidable, merely by fact that it is made for amount greater than debt secured.—Savings & L. Soc. vs. Burnett, 106 Cal. 514, 534, 39 Pac. Rep. 922. See Spencer vs. Annan, 4 Minn. 542; Ormsby vs. Tarasoon, 3 Litt. (Ky.) 404.

14. Before time mentioned in trust contravenes same, and is void under section.—In re Estate Walkerly, 108 Cal. 627, 649, 49 Am. St. Rep. 97, 41 Pac. Rep. 772.

15. In payment of his own debt is void upon general equitable principles.—Chapman vs. Hughes, 134 Cal. 641, 645, 53 Pac. Rep. 298, 60 Id. 974, 66 Id. 982. See Frink vs. Roe, 70 Cal. 296, 311, 11 Pac. Rep. 320.

16. With notice voidable at instance of cestui que trust.—Chapman vs. Hughes, 134 Cal. 641, 645, 53 Pac. Rep. 298, 60 Id. 974, 66 Id. 982.

17. **EFFECT OF TRANSFER**—Transfer of property in violation of trust results in grantee holding such property as involuntary trustee under § 2243, unless he purchased in good faith and for valuable consideration.—Chapman vs. Hughes, 134 Cal. 641, 657, 53 Pac. Rep. 298, 60 Id. 974, 66 Id. 982.

18. Exchange by son with father whom he knows to hold in trust merely to sell the property, will be set aside by a court of equity.—Chapman vs. Hughes, supra; Ringgold vs. Ringgold, 1 Har. & G. 11, 18 Am. Dec. 250.

§ 871. WHEN ESTATE OF TRUSTEE TO CEASE. When the purpose for which an express trust was created ceases, the estate of the trustee also ceases.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
- 2-8. Construed with reference to its application, etc.
9. Court—Power to modify, or vary so as to create valid trust.
- 10, 11. Owner—Estate of, not affected by invalid—Adjudicated.
- 12-16. Trustee—Estate and functions—Cessation of.
- 17, 18. Same—Reconveyance by.
- 19, 20. Same—Holds for heirs, etc.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc.**, in: *Weisenberg vs. Truman*, 58 Cal. 63, 72 (construed and applied in dis. op.); *Schlessinger vs. Mallard*, 70 Cal. 326, 333, 11 Pac. Rep. 723 (construed and applied with other sections); *In re Estate Cavarly*, 119 Cal. 406, 409, 51 Pac. Rep. 629 (cited and referred to); *Sacramento Bank vs. Alcorn*, 121 Cal. 379, 384, 53 Pac. Rep. 813 (construed and applied with other sections); *Wittfield vs. Forster*, 124 Cal. 418, 420, 57 Pac. Rep. 219 (construed and applied with other sections); *In re Estate Fair*, 132 Cal. 523, 575, 84 Am. St. Rep. 70, 60 Pac. Rep. 442 (applied); *County of Amador vs. Gilbert*, 133 Cal. 51, 52, 65 Pac. Rep. 130 (erroneously cited for § 870); *Estate of Sanford*, 136 Cal. 97, 105, 63 Pac. Rep. 494 (construed and applied); *Gardiner vs. Cord*, 145 Cal. 157, 163, 73 Pac. Rep. 544 (construed and applied).

As to bequests held void for uncertainty as to purposes of trust and beneficiaries, see monographic note by Robert Desty, 3 L. R. A. 145-149.

As to extinguishment of trusts by reason of failure in part, see post § 2279 and note.

As to when trust is extinguished, see post § 2279 and note.

2. **CONSTRUED**—As applying to conveyance by trustee to purchase with notice in extinguishment of private debt.—*Chapman vs. Hughes*, 134 Cal. 641, 645, 53 Pac. Rep. 298, 60 Id. 974, 66 Id. 982.

3. As applying to sale by superior judge under Act March 2, 1867, relating to vacant and unoccupied lands within town limits.—*County of Amador vs. Gilbert*, 133 Cal. 51, 52, 65 Pac. Rep. 130.

4. As applying to trust to apply income in rents and profits to beneficiaries until certain party arrives at certain age or at prior death, trust terminating at such period.—*In re Estate Sanford*, 136 Cal. 97, 105, 63 Pac. Rep. 494.

5. With other sections of code as showing trustor's right in property subject to trust.—*Schlessinger vs. Mallard*, 70 Cal. 326, 333, 11 Pac. Rep. 723.

6. With reference to estate in trustee.—*In re Estate Fair*, 132 Cal. 523, 575, 84 Am. St. Rep. 70, 60 Pac. Rep. 442.

7. With §§ 864, 865 as showing estate left in trustor and his power over same and cessation of trust upon purposes failing.—*Sacra-*

mento Bank vs. Alcorn, 121 Cal. 379, 384, 53 Pac. Rep. 813.

8. With § 2279 as showing that where trust declared is illegal or for any reason void trustees take no estate or trust results to grantor or his heirs.—*Wittfield vs. Forster*, 124 Cal. 418, 420, 57 Pac. Rep. 219.

9. **COURT HAS NO POWER TO MODIFY OR VARY PLAIN LANGUAGE** of instrument so as to create new and valid trust even where it may be certain that trustor would have adopted court's interpretation had he known that his own attempt was invalid.—*In re Estate Walkerly*, 108 Cal. 627, 659, 49 Am. St. Rep. 97, 41 Pac. Rep. 772. See *Coster vs. Lorillard*, 14 Wend. (N. Y.) 265, 249; *Cottman vs. Grace*, 113 N. Y. 299, 19 N. E. Rep. 339, 3 L. R. A. 145.

10. **ESTATE OF OWNER NOT AFFECTED** where trust invalid from beginning.—*Gardiner vs. Cord*, 145 Cal. 157, 163, 73 Pac. Rep. 544.

11. **Owner's rights adjudicated by court in equity without actual reconveyance** where valid trust has terminated and trustee's estate ceases.—*Gardiner vs. Cord*, 145 Cal. 157, 163, 73 Pac. Rep. 544.

12. **ESTATE OF TRUSTEE IS THAT WHICH IS NECESSARY** to enable him to execute trust, and embraces extent and quantum of interest taken by him, and is determined by consideration of objects and purposes of trust rather than by strict application of legal rules to construction of terms of conveyance by which estate is limited to him.—*In re Estate Fair*, 132 Cal. 523, 575, 84 Am. St. Rep. 70, 60 Pac. Rep. 442. See *Sears vs. Russell*, 74 Mass. (8 Gray) 86; *Doe vs. Field*, 2 Barn. & Ad. 564, 22 Eng. C. L. 142.

13. **Ceases when purpose for which trust created ceases.**—*Sacramento Bank vs. Alcorn*, 121 Cal. 379, 383, 53 Pac. Rep. 813.

14. **Never vests in trustee under trust void under statute as against perpetuities or other statutes.**—*In re Estate Steele*, 134 Cal. 533, 540, 57 Pac. Rep. 564.

15. **In real estate for purposes of cemetery does not** cease by reason that same is no longer used for interment of the dead, where some of bodies still remain therein; trustees' duty and right still calling upon them to protect such bodies.—*Weisenberg vs. Truman*, 58 Cal. 63, 69.

16. **TRUSTEE'S FUNCTIONS CEASE** where purposes of trust are satisfied, although legal title may remain in trustee (dis. op.).—*Weisenberg vs. Truman*, 58 Cal. 63, 72.

17. **TRUSTEE COMPELLED TO RECONVEY** in equity upon cessation of trust (dis. op.).—*Weisenberg vs. Truman*, 58 Cal. 63, 72.

18. **Court will presume that trustee has reconveyed in action at law in ejectment between trustee and cestui que trust or person entitled to estate (dis. op.).**—*Weisenberg vs. Truman*, 58 Cal. 63, 72.

19. **TRUSTEES HOLD ESTATE FOR BENE-**

FIT OF HEIRS at law as resulting trust where purposes of trust have failed or have been completely performed.—In re Estate Steele, 124 Cal. 533, 540, 57 Pac. Rep. 564. See Esterbrooks vs. Tillinghast, 71 Mass. (5 Gray) 17; Packard vs. Marshall, 138 Mass. 301; Cox vs. Parker, 22 Beav. 168; Ackroyd vs. Smithson, 1 Brown Ch. 503.

20. Liable to heirs at law under resulting trust when purposes have failed of being completely performed.—In re Estate Steele, 124 Cal. 533, 540, 57 Pac. Rep. 564. See Esterbrooks vs. Tillinghast, 71 Mass. (5 Gray) 17; Packard vs. Marshall, 138 Mass. 301; Cox vs. Parker, 22 Beav. 168; Ackroyd vs. Smithson, 1 Brown Ch. 503.

TITLE V.

POWERS.

[This title, embracing sections 878 to and including 940 of the original code, was repealed by Act March 30, 1874, Code Amdts. 1873-4, p. 223.]

1. **Purpose of title.**—This title was intended to limit and restrict the power of the owners of real property.—In re Estate Fair, 132 Cal. 523, 557, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

2. **Codes authorize creation of power.**—Notwithstanding repeal of title in regard to powers, "in one respect the creation of a power is still authorized by the codes."—Sacramento Bank vs. Alcorn, 121 Cal. 379, 384, 53 Pac. Rep. 813.

PART III.

PERSONAL AND MOVABLE PROPERTY.

TITLE I. PERSONAL PROPERTY IN GENERAL, §§ 946, 947.

II. PARTICULAR KINDS OF PERSONAL PROPERTY, §§ 953-994.

TITLE I.

PERSONAL PROPERTY IN GENERAL.

§ 946. By what law governed.

§ 947. Future interests in perishable property, how protected.

§ 946. BY WHAT LAW GOVERNED. If there is no law to the contrary, in the place where personal property is situated, it is deemed to follow the person of its owner, and is governed by the law of his domicile.

History: Enacted March 21, 1872; repealed March 30, 1874, Code Amdts. 1873-4, p. 223; re-enacted as above March 9, 1876, Code Amdts. 1875-6, p. 78.

1. Applied, cited, construed, referred to, etc.
2. Common-law rule.
3. Debts are personal property.
4. Distribution of decedent's estate—*Lex loci domicilii*.
5. Trustee removing into state with funds.
6. Wills—*Lex loci domicilii*.

1. Applied, cited, construed, referred to, etc., in: *Whitney vs. Dodge*, 105 Cal. 192, 199, 201, 38 Pac. Rep. 636 (cited).

2. Common-law rule.—Personal property follows the person of its owner at common law.—*Consol. Tank L. Co. vs. Collier*, 148 Ill. 259, 262, 39 Am. St. Rep. 181, 35 N. E. Rep. 756.

3. Debts are personal property.—Debts have no situs or locality, and follow the person to whom they are owing.—*Consol. Tank L. Co. vs. Collier*, 148 Ill. 259, 262, 39 Am. St. Rep. 181, 35 N. E. Rep. 756.

4. Distribution of decedent's estate—*Lex loci domicilii*.—When person dies possessed of

estate in different governments, his personal property is distributed among his heirs or legatees according to law of place in which he had his domicile at time of his death.—*Goodall vs. Marshall*, 11 N. H. 83, 35 Am. Dec. 472. See *Cross vs. United States Trust Co.*, 131 N. Y. 330, 27 Am. St. Rep. 597, 15 L. R. A. 606.

5. Trustee removing into state with funds.—Trustee with trust funds in his hands, received under valid will in another state, cannot defeat his beneficiary by coming into this state and bringing funds with him.—*Whitney vs. Dodge*, 105 Cal. 192, 201, 38 Pac. Rep. 636.

6. Wills—*Lex loci domicilii*.—Will, so far as it pertains to personal property, is governed by *lex loci domicilii*, regardless of public policy of another state touching perpetuities.—*Cross vs. United States T. Co.*, 131 N. Y. 330, 332, 27 Am. St. Rep. 597, 30 N. E. Rep. 125, 15 L. R. A. 606. See *Whitney vs. Dodge*, 105 Cal. 192, 200, 201, 38 Pac. Rep. 636.

§ 947. FUTURE INTERESTS IN PERISHABLE PROPERTY, HOW PROTECTED (repealed).

History: Enacted March 21, 1872; repealed March 30, 1874, Code Amdts. 1873-4, p. 223.

TITLE II.

PARTICULAR KINDS OF PERSONAL PROPERTY.

Chapter I. THINGS IN ACTION, §§ 953, 954.

II. SHIPPING, §§ 960-973.

III. PRODUCTS OF THE MIND, §§ 980-985.

IV. OTHER KINDS OF PERSONAL PROPERTY, §§ 991-994.

CHAPTER I.

THINGS IN ACTION.

§ 953. Things in action defined.

§ 954. Transfer and survivorship.

§ 953. THINGS IN ACTION DEFINED. A thing in action is a right to recover money or other personal property by a judicial proceeding.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 224.

1. Applied, cited, construed, referred to, etc.
2. All debts and torts connected with contracts.
3. Before accrual of right of action.
4. Book accounts, etc., are choses in action.
5. Conversion of chattels.
6. Covenants broken.
7. Definition of chose in action.
8. Same—Blackstone's definition.
9. Same—Distinction between chose in action and chose in possession.
10. Injury to property or person.
11. Judgment is chose in action.
12. Personal tort gives right of action.
13. Possession dependent upon recovery or payment.
14. Set-off—Right not prejudiced by assignment of chose in action.
15. Survivorship.
16. Tortious taking or wrongful detention of chose in action.
- 17, 18. Transfer of chose in action.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Haskins vs. Jordan*, 123 Cal. 157, 161, 55 Pac. Rep. 786 (construed and applied).

2. **ALL DEBTS AND TORTS CONNECTED WITH CONTRACTS**.—Under the comprehensive description "choses in action" are included all debts and all claims for damages for breach of contract or for torts connected with contract.—*Bushnell vs. Kennedy*, 76 U. S. (9 Wall.) 387, bk. 19 L. ed. 786.

3. **BEFORE ACCRUAL OF RIGHT OF ACTION**.—"Note, bond, or other promise not negotiable, is denominated a chose in action, before the promisor or obligor is liable to an action on it, as well as after. Note for money, payable on time, is chose in action, as soon as it is made; and though it be not payable to order or bearer, yet it is immediately assignable, just as note on time, payable to order or bearer, is immediately negotiable."—*Haskell vs. Blair*, 57 Mass. (3 Cush.) 534, 535, 536.

4. **BOOK ACCOUNTS, ETC., ARE CHOSES IN ACTION**.—Book accounts, debts due, bills receivable, etc., are things in action commonly called choses in action.—*Kirk vs. Roberts* (Cal. Dec. 2, 1892), 31 Pac. Rep. 620, 622.

5. **CONVERSION OF CHATTELS** gives rise to right of action which constitutes chose in action.—*Gillet vs. Fairchild*, 4 Den. (N. Y.) 80, 82.

6. **COVENANTS BROKEN** constitute ordinary chose in action.—*Greenby vs. Wilcocks*, 2 John. (N. Y.) 1, 5, 3 Am. Dec. 379.

7. **DEFINITION OF CHOSE IN ACTION** is "a right not reduced into possession."—*Has-*

kell vs. Blair, 57 Mass. (3 Cush.) 534, 535, 536.
8. **Blackstone's definition**, by which the term "chose in action" includes only debts due or damages recoverable for breach of contract, express or implied, is too limited.—*Gillet vs. Fairchild*, 4 Den. (N. Y.) 80, 82 (citing 2 Black. Com. 388, 396, 397).

9. **Distinction between chose in action and chose in possession**.—The term "chose in action" is used in contradistinction to "chose in possession." It includes all rights to personal property not in possession which may be enforced by action; and it makes no difference whether the owner has been deprived of his property by the tortious act of another, or by his breach of contract, express or implied. In both cases, debt or damages of owner is "thing in action."—*Gillet vs. Fairchild*, 4 Den. (N. Y.) 80, 82.

10. **INJURY TO PROPERTY OR PERSON**.—Chose in action taken in its broadest latitude comprehends not only demand arising on contract, but also on wrong or injury to property or person.—*People vs. Tloga* Common Pleas, 19 Wend. (N. Y.) 73, 75.

11. **JUDGMENT IS CHOSE IN ACTION**, there being inherent right to recover money on a judgment.—*Haskins vs. Jordan*, 123 Cal. 157, 161, 55 Pac. Rep. 786. See *Murphy vs. Cochran*, 1 Hill (N. Y.) 339, 342.

12. **PERSONAL TORT GIVES RIGHT OF ACTION**, e. g. assault and battery, slander, or malicious prosecution, but it is not chose in action which can be reached by creditors' bill.—*Hudson vs. Plets*, 11 Paige Ch. (N. Y.) 180, 183.

13. **POSSESSION DEPENDENT UPON RECOVERY OR PAYMENT**.—Money due on bond, note, or other contract, is chose in action, for property in money vests whenever it becomes payable; but there is no possession till recovery by course of law, unless payment be voluntarily made.—*Sallee vs. Arnold*, 33 Mo. 522, 33 Am. Dec. 144.

14. **SET-OFF**.—Right not prejudiced by assignment of chose in action.—See *Code Civ. Proc.* § 368 and note.

15. **Survivorship**.—See post § 954 and note.

16. **TORTIOUS TAKING OR WRONGFUL DETENTION OF CHOSE IN ACTION**.—In case of tortious taking or wrongful detention of chose in action against right or title of assignee injury is one to right of property in thing.—*Deshler vs. Dodge*, 57 U. S. (16 How.) 622, 631, bk. 14 L. ed. 1034.

17. **Transfer of chose in action**.—See post § 954 and note.

18. **Delivery of possession, etc., not necessary**.—See post § 3440 and note.

§ 954. **TRANSFER AND SURVIVORSHIP**. A thing in action, arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner. Upon the death of the owner it passes to his personal representatives, except where, in the cases provided in the Code of Civil Procedure, it passes to his devisees or successor in office.

History: Enacted March 21, 1872. See Practice Act 1851, § 4, and other statutes referred to in brief in *Gray vs. Garrison*, 9 Cal. 325, 327; Act May 15,

1854, § 4, and Act May 7, 1855, *Ryan vs. Maddux*, 6 Cal. 247, 248; Acts 1851, 1854, 1855, and 1864, referred to in *More vs. Massini*, 32 Cal. 590, 593.

South Dakota Comp. Laws, § 2877 is identical.—*Erickson vs. Brookings Co.*, 3 S. D. 434, 53 N. W. Rep. 857.

I. In General.

1. Agency—Authority of agent governed by general rules.
2. Attorneys—Purchase of claim for purpose of suit—Misdemeanor.
3. Bill of lading with draft attached—Liability of assignee.
4. Champerty and maintenance—Not allowed.
5. Same—Stipulation against settling and discontinuing.
6. Commissioners' note.
7. Criterion of assignability—Survival of demand upon death.
8. Definition of "obligation."
9. Effect of assignment as against assignor.
10. Equitable assignments—Common-law rule.
11. General rule as to assignability—Non-assignability rare.
12. Lien waived by transfer of contract.
- 13, 14. Pendente lite assignment—Authority to make—Defense not prejudiced by.
15. Prohibition of assignment by provision in contract.
16. Same—Subletting contract prohibited.
17. Right to assign chose in action—Inherent property right.
18. Verdict rendered does not affect assignability.

II. Enumeration of Choses in Action with Respect to Assignability.

19. Account may be assigned.
20. Same—Mere delivery.
21. Alabama claim is assignable.
22. Bank account is assignable.
23. Breach of contract of sale.
- 24, 25. Carriers—Claim for injury to, and non-delivery of freight.
26. Conversion of personal property—Trove by assignee.
27. Distinction between trespass to personal and real property.
28. Equitable interests—Assignment of.
29. False imprisonment—Right of action not assignable.
- 30, 31. Fraud—Assignment not ordinarily permitted—Exceptions—Judgment tainted with fraud.
32. Gaming—Claim for money lost assignable.
- 33, 34. Good-will—Assignment permitted.
35. Indemnity for capture by foreign government—Claim assignable.
36. Judgment is assignable.
37. Malicious prosecution—Cause of action not assignable.
38. Same—Surviving partner may bring action.
39. Municipal contractor's claim assignable.
40. Non-assignable written contracts for payment of money.
- 41-43. Officer's claim for fees and salary—Unearned salary.
44. Optional contract is assignable.
45. Patents for inventions—Assignment of.
- 46-48. Personal injuries—Claim not assignable—Verdict immaterial.

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49. Tax sale—Right to have money refunded is assignable.
- 50, 51. Trespasses upon land and personal property.
52. Trust—Cause of action arising out of, assignable.
53. Vendor's lien is not assignable.
54. Same—Distinction between executed and unexecuted contracts of sale.
55. Same—Extinguishment of lien by transfer.
56. Same—Judgment recovered by vendor.
57. Same—Waiver of lien by transfer.
58. Warrants—Assignability of.

III. Partial Assignments.

59. As general rule not permitted.
60. Equitable recognition of.
61. Same—Distinction between relief at law and equity abolished.
62. Knowledge and consent of obligor.
63. Parties to assignment precluded by.
64. Public policy as respects claims against municipality.
65. Waiver of objection is permissible.

IV. How Transfer Made—Form and Sufficiency of Assignment.

66. Before maturity assignment may be made.
67. Check as assignment of money in bank.
68. Contract for sale of land—Deed by purchaser operates as assignment.
- 69, 70. Indorsement on account.
71. Insurance policy—How transferred.
72. Order and acceptance—Amount to assignment.
73. Same—Intention to make assignment need not appear.
74. Same—Prior to acceptance no assignment.
75. Partial assignment.
76. Pledge of chose in action—Acknowledgment and recordation.
77. Qualified assignment—Assignment for purpose of collection.
78. Writing is not necessary.

V. Pleading and Practice.

79. Amendment of defective assignment at trial.
80. Amount recoverable by assignee—Assignment as security.
81. Conflict of laws—Priority of assignment over garnishment.
82. Counterclaims not barred by assignment.
83. Notice of assignment to obligor—Necessity for, and requisites of.
84. Parol evidence—Explaining defective assignment.
85. Parties—Assignee is proper party plaintiff.
86. Same—Assignment by way of security.
87. Same—Reassignment necessary to entitle assignor to sue.
88. Pleading—Argumentative allegations in complaint.

89-91. Same—Partial assignment—Averment of defendant's consent—Prayer for account.

92. Revival of action—Substitution of parties.

93, 94. Settlement with assignor—Knowledge of assignment.

I. IN GENERAL.

1. **AGENCY.**—Authority of agent to transfer obligation is governed by ordinary principles of law of agency; e. g. secretary and general manager of corporation has authority to assign chose in action owned by such corporation without any special resolution adopted by the directors authorizing him to make transfer.—*Tuller vs. Arnold*, 93 Cal. 522, 523, 524, 33 Pac. Rep. 445.

2. **ATTORNEYS.**—Purchase of claim for purpose of suit constitute misdemeanor.—See Penal Code § 161 and note.

3. **BILL OF LADING WITH DRAFT ATTACHED.**—Liability of assignee.—See monographic note by J. H. Hill, 49 L. R. A. 679-683.

4. **CHAMPERTY AND MAINTENANCE.**—Agreement between two persons, one an attorney at law, that the other will procure such attorney's employment by litigant and that in consideration of such procurement he is to have from attorney and counselor so employed one third of whatever remuneration attorney receives from litigant, is void as against public policy.—*Alpers vs. Hunt*, 36 Cal. 78, 84-90, 21 Am. St. Rep. 17, 24 Pac. Rep. 846, 9 L. R. A. 483. See *North Chicago St. R. Co. vs. Ackley*, 171 Ill. 100, 49 N. E. Rep. 222, 44 L. R. A. 177; *Kansas Midland R. Co. vs. Brehm*, 54 Kan. 751, 39 Pac. Rep. 690.

As to duty of attorneys to maintain respect due to courts of justice, etc., see Code Civil Procedure § 282; and as to champerty and maintenance consult **KERR'S SYNTHETICAL INDEX** to this work.

5. **Stipulation against settling and discontinuing.**—Any contract whereby a client is prevented from settling or discontinuing his suit is void, as such agreement would foster and encourage litigation.—*North Chicago St. R. Co. vs. Ackley*, 171 Ill. 100, 49 N. E. Rep. 222, 44 L. R. A. 177.

6. **COMMISSIONERS' NOTE**, after pointing out rule that at common law chose in action was not assignable; that in equity all choses in action were assignable except rights arising ex delicto, which were not assignable at law or in equity; that in this state it has been held that right of action for conversion of personal property is assignable and that assignee can recover upon same in his own name (*Lazard vs. Wheeler*, 22 Cal. 139, 142; *More vs. Massini*, 32 Cal. 590, 593); that claim for damages caused by trespass on land is assignable (*More vs. Massini*, 32 Cal. 590); and various other early decisions of courts of this state, concludes with observation that by this section "it is proposed to establish one rule for assignability and the survivorship of things in action."

7. **CRITERION OF ASSIGNABILITY.**—Survival of demand upon death.—Criterion by which to judge of the assignability of things in action is to ascertain whether demand sur-

vives upon the decease of party or dies with him. If all things in action are separated into two classes by this line of division, those embraced in first class are assignable, and those which fall into second are not. In first class may be put claims arising from breach of contract; those arising from torts directly to real or personal property; and frauds, deceit, and other wrong by which estate, real or personal, is injured, diminished, or damaged. In second class are all torts to person or character, when injury and damage are confined to body or feelings of person injured.—*Oreg. Mitchell vs. Taylor*, 37 Oreg. 377, 41 Pac. Rep. 119. *S. D. Erickson vs. Brookings Co.*, 3 S. D. 434, 53 N. W. Rep. 857, 18 L. R. A. 347. *Va. Norfolk & W. R. Co. vs. Read*, 37 Va. 135, 12 S. E. Rep. 395.

8. **Definition of "obligation."**—See post § 1458 and note par. 2.

9. **EFFECT OF ASSIGNMENT AS AGAINST ASSIGNOR.**—After assignment has been made and right has been conferred upon assignee to collect or enforce the claim assigned, it is not competent for assignor to deprive assignee of such right by collecting or enforcing claim or by assignment to another who has knowledge of such previous assignment.—*Works vs. Merritt*, 105 Cal. 467, 469, 38 Pac. Rep. 1109. See *Erickson vs. Brookings Co.*, 3 S. D. 434, 53 N. W. Rep. 857, 18 L. R. A. 347.

10. **EQUITABLE ASSIGNMENTS.**—At common law the courts of equity for long time disregarded rule forbidding transfer of chose in action, and as general rule they permitted assignee of chose in action to sustain suit in his own name, if he could go into equity at all. In some cases of transfer of chose in action device was adopted of allowing assignee to sue in name of assignor.—*Krapp vs. Eldridge*, 33 Kan. 106, 5 Pac. Rep. 372.

11. **GENERAL RULE AS TO ASSIGNABILITY.**—Non-assignability rare.—Assignability of things in action is now rule; non-assignability, exception, and this exception is confined to wrongs done to person, reputation or feelings of injured party, and to contracts of purely personal nature, like promises of marriage.—*Reud vs. Cooper*, 109 Cal. 682, 693, 34 Pac. Rep. 93 (quoting *Meech vs. Stoner*, 19 N. Y. 26).

General rules governing assignment of choses in action.—See note 34 Am. St. Rep. 210-212.

12. **Lien waived by transfer of contract.**—See post § 3047 and note.

13. **Pendente lite assignment.**—Authority to make.—See post § 1459 and note par. 3.

14. **Defense not prejudiced by.**—See Code Civ. Proc. § 368 and note.

15. **PROHIBITION OF ASSIGNMENT BY PROVISION IN CONTRACT.**—Where contract of sale of land contains provision prohibiting its assignment, after such contract has been abandoned or rescinded by parties, purchaser's right of action to recover back instalments of purchase money paid by him is assignable notwithstanding such prohibitory provision, because an action to recover back such instalments is not an action under contract but an action for money had and received.—*Shively vs. Semi-Tropic L. & W. Co.*, 99 Cal. 259, 261, 33 Pac. Rep. 848.

16. **Subletting contract prohibited.**—Where contract for erection of school-house contains clause that interest therein shall not be assigned without consent of trustees and architect having charge of construction, all that is intended is that contract shall not be sublet and assignment of claims for money due under such contract not prohibited.—Board Trustees *vs. Whalen*, 17 Mont. 1, 41 Pac. Rep. 849.

17. **RIGHT TO ASSIGN CHOSE IN ACTION.**—Right to deal with property, including choses in action, and to make qualified or absolute transfer of it, is essential element of ownership, and may be exercised to fullest extent, unless there is some statutory restriction of such right.—*Works vs. Merritt*, 105 Cal. 467, 469, 470, 38 Pac. Rep. 1109.

18. **VERDICT RENDERED DOES NOT AFFECT ASSIGNABILITY.**—Where cause of action is not assignable ordinarily it is not assignable after verdict but before judgment.—*Lawrence vs. Martin*, 22 Cal. 173, 178. See *Mass. Rice vs. Stone*, 33 Mass. (1 Allen) 566. *Minn. Hunt vs. Conrad*, 47 Minn. 557, 50 N. W. Rep. 614, 14 L. R. A. 512. *N. Y. Kellogg vs. Schuyler*, 3 Den. 73; *Crouch vs. Gridley*, 6 Hill 250. *Eng. Ex parte Charles*, 14 East 198.

II. ENUMERATION OF CHOSSES IN ACTION WITH RESPECT TO ASSIGNABILITY.

19. **ACCOUNT MAY BE ASSIGNED.**—There can be no physical possession of open account, but its assignment by instrument of writing will vest assignee with legal right to collect same, whether such assignment be absolute ownership, or for mere purpose of collection, either as agent of assignor, or as security for performance of obligation from assignor to assignee; and in latter case power of collection will be so coupled with interest in account as to prevent the assignor from doing any act to impair rights of assignee to collect account.—*Works vs. Merritt*, 105 Cal. 467, 469, 38 Pac. Rep. 1109. See *Ryan vs. Maddux*, 6 Cal. 247, 248; *Tuller vs. Arnold*, 93 Cal. 522, 523, 33 Pac. Rep. 445; *Krapp vs. Eldridge*, 33 Kan. 106, 5 Pac. Rep. 372; *Clark vs. Wiss*, 34 Kan. 553, 9 Pac. Rep. 231; *Bellingham Bay B. Co. vs. Briscola*, 14 Wash. 173, 44 Pac. Rep. 153.

20. **Mere delivery.**—Such assignment may be by mere delivery.—See *Clark vs. Wiss*, 34 Kan. 553, 9 Pac. Rep. 231.

21. **ALABAMA CLAIM.**—An owner of ship destroyed by The Alabama may assign his claim against United States for such destruction.—*Exchange Bank vs. McLoon*, 73 Me. 493, 40 Am. Rep. 383.

22. **BANK ACCOUNT IS ASSIGNABLE.**—Depositor having bank account may assign same.—*Oppenheimer vs. First Nat. Bank*, 20 Mont. 192, 50 Pac. Rep. 419.

23. **BREACH OF CONTRACT OF SALE BY PURCHASER,** by his failure to purchase as agreed and take the goods, is assignable.—*Colorado Springs Live Stock Co. vs. Godding*, 2 Colo. App. 1, 39 Pac. Rep. 529.

24. **CARRIER'S INJURY TO FREIGHT.**—Where goods are injured while being transported by carrier right of action arises which

is assignable.—*Norfolk & W. R. Co. vs. Read*, 37 Va. 185, 12 S. E. Rep. 395.

25. **Carrier's liability for non-delivery of freight.**—Right of action against common carrier for not delivering goods is assignable.—*Jordan vs. Gillen*, 44 N. H. 424.

26. **CONVERSION OF PERSONAL PROPERTY.**—Right of action for wrongful taking and conversion of personal property is assignable, and under provisions of code assignee can recover upon same in his own name.—*Lazard vs. Wheeler*, 22 Cal. 139, 142. *Mich. Brady vs. Whitney*, 24 Mich. 154. *Mo. Goodger vs. Finn*, 10 Mo. App. 226. *N. Y. McKee vs. Judd*, 12 N. Y. 622, 64 Am. Dec. 515; *McKeage vs. Hanover Fire Ins. Co.*, 81 N. Y. 38, 37 Am. Rep. 471. *Pa. North vs. Turner*, 9 Serg. & R. 244. *S. D. Erickson vs. Brookings Co.*, 3 S. D. 434, 53 N. W. Rep. 357, 18 L. R. A. 347. *Fed. Sarah Ann*, 2 Sumn. C. C. 206, 21 Fed. Cas. 432.

See note 64 Am. Dec. 517.

27. **DISTINCTION BETWEEN TRESPASSES TO PERSONAL AND REAL PROPERTY.**—There can be no tenable distinction taken between trespasses affecting personal and trespasses affecting real estate. Both are torts—the wrong is to property in both cases—right of action survives in both, and under our system argument drawn from doctrine of champerty, which constitutes very basis of non-assignability of choses in action at common law, has no application to assignment of claim falling under either class.—*More vs. Massini*, 33 Cal. 590, 594.

28. **EQUITABLE INTERESTS.**—Assignment of.—See note 34 Am. St. Rep. 203.

29. **FALSE IMPRISONMENT.**—Right of action not assignable.—Right to recover damages for false imprisonment is mere personal right, and not assignable even after verdict, but before judgment.—*Hunt vs. Conrad*, 47 Minn. 557, 50 N. W. Rep. 614, 14 L. R. A. 512.

30. **FRAUD.**—Assignability of right of action for.—General rule is that bare right to sue in equity for fraud committed on assignor is not assignable, and that assignment thereof is void, as against public policy, fraud not being vendible commodity; but rule applies only to cases where assignment does not carry anything which has itself legal existence and value independent of right to sue for fraud, and rule cannot be invoked in case where right to sue for fraud is merely incidental to subsisting substantial property which has been assigned and which is itself intrinsically susceptible of legal enforcement.—*Emmons vs. Barton*, 109 Cal. 662, 665, 666, 42 Pac. Rep. 302. See *Cross vs. Sacramento Sav. Bank*, 66 Cal. 462, 463, 6 Pac. Rep. 94; *Whitney vs. Kelley*, 94 Cal. 146, 153, 23 Am. St. Rep. 106, 29 Pac. Rep. 624, 15 L. R. A. 813; *Crocker vs. Bellangee*, 6 Wis. 645, 70 Am. Dec. 489; *Prosser vs. Edmonds*, 1 Younge & E. Exo. 481.

31. **Action to set aside judgment for fraud** is not maintainable by assignee who is not party to suit in which judgment was rendered but is grantee of defendants in said action.—*Whitney vs. Kelley*, 94 Cal. 146, 147-152, 23

Am. St. Rep. 106, 29 Pac. Rep. 624, 15 L. R. A. 313.

32. GAMING—Assignability of claim for money lost.—Right of action under Const. 1879, art. 4, § 26, for money paid on contracts for sale of stock on margin, is assignable, notwithstanding fact that constitution says that such money may be recovered by "party paying it."—*Reud vs. Cooper*, 109 Cal. 682, 692, 693, 34 Pac. Rep. 93. See *Meech vs. Stoner*, 19 N. Y. 26.

33. GOOD-WILL—Action by assignee of contract.—Where contract respecting good-will is reasonable and proper it is assignable along with business to which it pertains, and assignee may maintain action for violation of covenant not to engage in business in question in locality designated.—*California Steam Nav. Co. vs. Wright*, 6 Cal. 253, 261, 65 Am. Dec. 511, 8 Cal. 585. See *Swanson vs. Kirby*, 98 Ga. 586, 26 S. E. Rep. 71; *Hedge vs. Lowe*, 47 Iowa 137, 141.

34. Compare: *Hillman vs. Shannahan*, 4 Oreg. 163, 18 Am. Rep. 231.

35. INDEMNITY FOR CAPTURE BY FOREIGN GOVERNMENT—Assignability of claim.—Right to compensation for unjust capture by foreign government is assignable.—*Comegys vs. Vasse*, 26 U. S. (1 Pet.) 193, 215, bk. 7 L. ed. 108 (involving claim to money due under treaty between United States and Spain for unlawful seizure).

36. JUDGMENT IS ASSIGNABLE and assignment will confer upon assignee rights of assignor.—*Bellingham Bay B. Co. vs. Briscoe*, 14 Wash. 173, 44 Pac. Rep. 153.

37. MALICIOUS PROSECUTION—Cause of action not assignable.—Assignment of cause of action for malicious prosecution is not good.—*Lawrence vs. Martin*, 22 Cal. 173, 177, 173. See *Berson vs. Ewing*, 34 Cal. 89, 94, 23 Pac. Rep. 1112.

38. Surviving partner may bring action on claim for damages sustained by partnership estate notwithstanding fact that such claim is not assignable.—*Berson vs. Ewing*, 34 Cal. 94, 23 Pac. Rep. 1112 (distinguishing *Lawrence vs. Martin*, 22 Cal. 173, 177, 173).

39. MUNICIPAL CONTRACTOR'S CLAIM ASSIGNABLE—Municipal contractor who has made improvements and the like may assign his rights to assessments, etc.—*Cochran vs. Collins*, 29 Cal. 129; *Diggins vs. Hartshorne*, 108 Cal. 154, 165, 41 Pac. Rep. 233. See *Mo. St. Louis vs. Rudolph*, 36 Mo. 465; *St. Louis vs. Clemens*, 42 Mo. 69. *Ohio. Ernst vs. Kunkle*, 5 Ohio St. 520. *Oreg. Little vs. Portland*, 26 Oreg. 235, 243, 37 Pac. Rep. 911.

40. NON-NEGOTIABLE WRITTEN CONTRACTS FOR PAYMENT OF MONEY—Assignment of.—See post § 1459 and note.

41. OFFICER'S RIGHT TO FEES ASSIGNABLE—Claim of rightful officer against intruder for fees of office received by latter during period of his occupancy is assignable.—*Platt vs. Stout*, 14 Abb. Pr. (N. Y.) 178. See *Birkbeck vs. Stafford*, 14 Abb. Pr. (N. Y.) 285, 23 How. Pr. (N. Y.) 236.

42. Unearned salary not assignable and as-

signment thereof is void as against public policy.—*Bangs vs. Dunn*, 66 Cal. 72, 73, 4 Pac. Rep. 963. See *King vs. Hawkins*, 2 Ariz. 353, 16 Pac. Rep. 434; *Bliss vs. Lawrence*, 53 N. Y. 442, 17 Am. Rep. 273.

See note 41 Am. Dec. 443, 444.

43. Contra: *Brackett vs. Blake*, 43 Mass. (7 Met.) 335, 41 Am. Dec. 442 (holding that where officer's salary is payable quarterly he may during quarter assign salary to become due at end of quarter and that fact that he is removable at will is immaterial); *State ex rel. State Bank vs. Hastings*, 15 Wis. 78.

44. Optional contract is assignable.—See post § 1459 and note pars. 55-57.

45. Patents for inventions—Assignment of.—See Rev. Stats. U. S. § 4921.

As to party plaintiff in actions for infringement of patent, see 16 Encyc. Pl. & Prac. 65-69.

46. PERSONAL INJURIES—On ground of public policy sale or assignment of right of action for injuries to person is void.—*Lawrence vs. Martin*, 22 Cal. 173, 177. See Ill. *North Chicago St. R. Co. vs. Ackley*, 171 Ill. 100, 49 N. E. Rep. 222, 44 L. R. A. 177. *Mass. Rice vs. Stone*, 33 Mass. (3 Allen) 566. *Oreg. Mitchell vs. Taylor*, 27 Oreg. 377, 41 Pac. Rep. 119. *Eng. Howard vs. Crowther*, 3 Mees. & W. 608 (per Lord Abinger).

Assignability of cause of action for personal injury.—See exhaustive monographic note by *Irwin Taylor*, 44 L. R. A. 77-88.

47. Compare: *Vimont vs. Chicago & N. W. R. Co.*, 64 Iowa 513, 17 N. W. Rep. 31, 21 Id. 9, 19 Am. & Eng. R. Cas. 215 (decided under statute).

48. Verdict rendered but not judgment.—After verdict and before judgment cause of action for mere personal tort, which dies with person, cannot be assigned.—*Lawrence vs. Martin*, 22 Cal. 173, 177.

49. TAX SALE—Right to have money refunded is assignable.—Party at wrongful, unlawful, or erroneous tax sale who is entitled to have his money refunded to him may assign such right, and when it is duly assigned assignee has same right and title to money as assignor had himself before assignment, and, in case the proper officer of county refuse to refund money, assignee can maintain an action for its recovery.—*Erickson vs. Brookings Co.*, 3 S. D. 434, 53 N. W. Rep. 357, 23 L. R. A. 347.

50. TRESPASS DE BONIS ASPORTATIS—Cause of action for trespass committed against property is assignable because remedy is one which survives to personal representative by statute.—*North vs. Turner*, 9 Serg. & R. (Pa.) 244, 248.

51. TRESPASS TO LAND—Claim for damages to real estate is assignable.—*More vs. Massini*, 32 Cal. 590, 593, 594. See *Chouteau vs. Broughton*, 100 Mo. 406, 13 S. W. Rep. 877.

52. TRUST—Cause of action arising out of, may be assigned, and assignment thereof will confer equitable right upon assignee to enforce such cause of action.—*O'Connor vs. Irvine*, 74 Cal. 435, 440, 16 Pac. Rep. 236. See *Boyd vs. Blankman*, 29 Cal. 19, 31, 32, 37 Am.

Dec. 146; *Lee vs. Fraternal Mut. Ins. Co.*, 1 Handy (Ohio) 217.

53. VENDOR'S LIEN IS NOT ASSIGNABLE, in absence of statute, because such lien is personal privilege of vendor and is not specific absolute charge upon property, but is simply right to resort to property upon failure of payment by vendee.—*Baum vs. Grigsby*, 21 Cal. 172, 176, 177, 81 Am. Dec. 153; *Lewis vs. Covillaud*, 21 Cal. 178, 189; *Williams vs. Young*, 21 Cal. 227, 228; *Bancroft vs. Cosby*, 74 Cal. 583, 584, 16 Pac. Rep. 504. See *Porter vs. Brooks*, 35 Cal. 199, 204; *Ross vs. Heintzen*, 36 Cal. 313, 321; *Avery vs. Clark*, 37 Cal. 619, 624, 22 Am. St. Rep. 272, 25 Pac. Rep. 919; *Gessner vs. Palmateer*, 39 Cal. 89, 92, 93, 24 Pac. Rep. 608, 18 L. R. A. 187; *Woolley vs. Wickerd*, 97 Cal. 70, 71, 31 Pac. Rep. 733; *Clai-borne vs. Castle*, 98 Cal. 30, 32, 34, 32 Pac. Rep. 307; *Bonney vs. Tilley*, 109 Cal. 346, 350, 42 Pac. Rep. 439.

See note 13 L. R. A. 183.

54. Distinction between executed and unexecuted contracts of sale.—There is marked distinction between lien of vendor after absolute conveyance and lien of vendor where contract of sale is unexecuted. In latter case vendor holds legal estate as security for purchase money. He can assign his contract with conveyance of title; and in such case his assignee will acquire same rights and be subject to same liabilities as himself.—See *Sparks vs. Hess*, 15 Cal. 186; *Taylor vs. McKinney*, 20 Cal. 613; *Baum vs. Grigsby*, 21 Cal. 172, 177, 81 Am. Dec. 153; *Gessner vs. Palmateer*, 39 Cal. 89, 91, 93, 24 Pac. Rep. 608, 18 L. R. A. 187; *Stevens vs. Chadwick*, 10 Kan. 406, 15 Am. Rep. 343.

55. Extinguishment of lien by transfer.—Assignment of vendor's lien does not extinguish it, but merely suspends it, and when vendor, after having assigned note for purchase money, has been forced to take it up lien will be revived.—*Bancroft vs. Cosby*, 74 Cal. 583, 584, 585, 16 Pac. Rep. 504 (declaring that in *Ross vs. Heintzen*, 36 Cal. 321, where the court speaks of lien being "extinguished" by transfer, no such question was before court, and "in all probability it meant only to say that the lien was not assignable").

56. Judgment recovered by vendor.—Where claim for which vendor has lien is assigned pending action and action is continued in his name to judgment such judgment is entitled to priority over subsequent judgment.—*Bonney vs. Tilley*, 109 Cal. 346, 350, 351, 42 Pac. Rep. 439.

57. Waiver of lien by transfer of contract for payment of price.—See post § 3047 and note.

58. WARRANTS—Assignability of.—See post § 1459 and note pars. 49-53.

III. PARTIAL ASSIGNMENTS.

59. AS A GENERAL RULE NOT PERMITTED.—Creditor cannot divide demand into distinct parts and maintain separate actions upon each, and by parity of reason he cannot by assignment enable others to do it; consequently an assignment of part only of entire demand is void at law unless made with consent or ratification of debtor.—*Marsion vs. Pioche*, 3 Cal. 522, 536; *Grain vs. Al-*

drich, 38 Cal. 514, 519, 520, 99 Am. Dec. 423; *Thomas vs. Rock Island G. & S. Min. Co.*, 54 Cal. 578, 579; *Clancy vs. Plover*, 107 Cal. 272, 275, 40 Pac. Rep. 394. See *Cramer vs. Tittle*, 79 Cal. 322, 324, 325, 21 Pac. Rep. 750. *Ala.* *Kansas City M. & B. R. Co. vs. Robertson*, 109 Ala. 296, 299, 19 So. Rep. 432. *Cole. Welch vs. Mayer*, 4 Colo. App. 440, 36 Pac. Rep. 613; *Snedden vs. Harmes*, 5 Colo. App. 477, sub nom. *Snedden vs. Doerfler*, 39 Pac. Rep. 68. *N. Y. Smith vs. Jones*, 15 John. 229; *Willard vs. Sperry*, 16 John. 121. *Oreg.* *Little vs. Portland*, 26 Oreg. 235, 242, 37 Pac. Rep. 911. *Fed.* *Noyes vs. Barnard*, 63 Fed. Rep. 782, 788.

60. EQUITABLE RECOGNITION OF.—In a court of equity there are not same objections to partial assignment as there are in court of law, as in equity interests of all parties can be determined in single suit.—*Grain vs. Aldrich*, 38 Cal. 514, 521, 99 Am. Dec. 423. See *Ga. Daniels vs. Meinhard*, 53 Ga. 359. *Ind.* *Fordyce vs. Nelson*, 91 Ind. 447. *Iowa.* *Des Moines Co. vs. Hinkley*, 62 Iowa 637, 17 N. W. Rep. 915. *Me.* *Exchange Bank vs. McLoon*, 73 Me. 498, 40 Am. Rep. 383 (particularly instructive disquisition on the subject and review of authorities). *Mass.* *James vs. Newton*, 142 Mass. 368, 56 Am. Rep. 692, 3 N. E. Rep. 122. *Minn.* *Canty vs. Latterner*, 31 Minn. 239, 17 N. W. Rep. 385. *N. J.* *Bower vs. Hadden B. S. Co.*, 30 N. J. Eq. (3 Stew.) 171. *N. Y.* *Risley vs. Phenix Bank*, 33 N. Y. 318, 38 Am. Rep. 421. *N. O.* *Etheridge vs. Vernoy*, 74 N. C. 800. *Tenn.* *Gardner vs. Smith*, 5 Heisk. 256. *Fed.* *German Sav. Inst. vs. Adae*, 3 Fed. Rep. 106; *The Elmbank (Price vs. The Elmbank)*, 72 Fed. Rep. 610, 614.

61. Distinction between relief at law and in equity abolished.—Under our system of practice legal and equitable relief are administered in same forum, and according to same general plan; and where partial assignment is made and action is brought by assignee plaintiff will not be sent out of court merely because he is not entitled to relief at law, but merely for want of parties; rule being that all parties interested in subject-matter must be brought before court so as to enable court to decree accounting and apportion funds.—*Grain vs. Aldrich*, 38 Cal. 514, 520, 521, 99 Am. Dec. 423.

62. KNOWLEDGE AND CONSENT OF OB-LIGOR.—If assignment of part of claim is made with knowledge and consent of debtor, assignee may bring his action upon it without making other holders of demand parties. In such cases rights of plaintiff as assignee serve as consideration for new contract, which becomes ground of action. Action is on defendant's promise to plaintiff, and not upon assignment, or upon any right growing out of it.—*Cole. Welch vs. Mayer*, 4 Colo. App. 440, 36 Pac. Rep. 613. *Me.* *Getchell vs. Maney*, 69 Me. 442. *Mass.* *James vs. Newton*, 142 Mass. 368, 56 Am. Rep. 692, 3 N. E. Rep. 122. *Oreg.* *Little vs. Portland*, 26 Oreg. 235, 242, 37 Pac. Rep. 911.

63. PARTIES PRECLUDED BY.—At law partial assignment may be good between parties and if assignor collects money he would in such case hold it as trustee of assignee.—

Exchange Bank vs. McLoon, 78 Me. 498, 40 Am. Rep. 388.

64. THE PUBLIC POLICY AS RESPECTS CLAIMS AGAINST MUNICIPALITY.—Contract of municipal corporation, in accepting and agreeing to pay part of demand against it to assignee is not, in absence of any statute to contrary, to be treated in different manner from contract of private individuals, and is not to be regarded as against public policy.—*Little vs. Portland*, 26 Oreg. 235, 243, 27 Pac. Rep. 911.

65. WAIVER OF OBJECTION IS PERMISSIBLE on part of defendant if he sees proper to do so.—*Grain vs. Aldrich*, 38 Cal. 514, 521, 522, 99 Am. Dec. 423; *Thomas vs. Rock Island G. & S. Min. Co.*, 54 Cal. 578, 579.

IV. HOW TRANSFER MADE—FORM AND SUFFICIENCY OF ASSIGNMENT.

66. BEFORE MATURITY ASSIGNMENT MAY BE MADE.—Assignment of money become due is valid in equity.—See *Norton vs. Whitehead*, 84 Cal. 263, 269, 18 Am. St. Rep. 172, 24 Pac. Rep. 154. *Iowa. Jessup vs. Bridge*, 11 Iowa 572, 575, 79 Am. Dec. 513 (holding that railroad company may mortgage its future earnings); *Sandwich Mfg. Co. vs. Robinson*, 33 Iowa 567, 49 N. W. Rep. 1031, 14 L. R. A. 126. *Kan. Krapp vs. Eldridge*, 33 Kan. 106, 5 Pac. Rep. 372. *N. Y. Field vs. City of New York*, 6 N. Y. 179, 57 Am. Dec. 435. *Utah. Board of Education of Salt Lake City vs. Salt Lake P. B. Co.*, 13 Utah 211, 44 Pac. Rep. 709. See note 41 Am. Dec. 443, 444.

67. CHECK AS ASSIGNMENT OF MONEY IN BANK.—According to the weight of authority a bank check or draft before it is accepted or certified by bank upon which it is drawn does not constitute equitable assignment of amount for which it is drawn; and if on presentation bank refuses to pay it, drawer having at time money in bank sufficient to meet check, holder of check has no right of action against bank.—*Cincinnati H. & D. R. Co. vs. Metropolitan Nat. Bank*, 54 Ohio St. 60, 56 Am. St. Rep. 700, 42 N. E. Rep. 700, 31 L. R. A. 653 (wherein arguments and large number of cases pro and con are given). See *Cashman vs. Harrison*, 90 Cal. 297, 302, 27 Pac. Rep. 282; *Harris vs. Clark*, 3 N. Y. 93, 118, 51 Am. Dec. 352; *Covert vs. Rhodes*, 43 Ohio St. 66, 27 N. E. Rep. 94.

68. CONTRACT TO SELL LAND.—Deed by purchaser operates as assignment.—Where grantor of one-fourth interest in land does not own the land, but has made contract to purchase it, his conveyance operates as assignment of one-fourth interest in contract of sale.—*Brock vs. Pearson*, 87 Cal. 581, 583, 584, 25 Pac. Rep. 963. See *Heinlen vs. Martin*, 53 Cal. 321; *Hilton vs. Young*, 73 Cal. 196, 198, 14 Pac. Rep. 634.

69. INDORSEMENT ON ACCOUNT.—Account may be assigned by written indorsement upon it signed by assignor, in following words: "Assigned to Ryan & Callahan. Jonathan Nutt."—*Ryan vs. Maddux*, 6 Cal. 247, 248.

70. Compare: *Lacey vs. Collins*, 5 N. J. L.

(2 South.) 439 (decided in absence of statute permitting assignment).

71. INSURANCE POLICY—How transferred.—See post §2764 and note; and consult **KERR'S SYNTHETICAL INDEX** to this work.

72. ORDER AND ACCEPTANCE.—Amount to assignment.—Where order is given by one having claim against another and such order is accepted, these acts operate as an assignment of so much of the claim as is represented by the order.—*Hobart vs. Tyrrell*, 68 Cal. 12, 13, 3 Pac. Rep. 525.

73. Intention to make assignment need not appear.—Equitable assignment of specific demand or particular indebtedness may be effected by means of instrument having form of order or bill of exchange drawn by creditor upon debtor for its full amount, when such is intention of drawer and payee, and it is not essential that intention to make such assignment should appear upon face of order or bill of exchange.—*Lawrence Nat. Bank vs. Kowalsky*, 105 Cal. 41, 43, 33 Pac. Rep. 517. See *Wheatley vs. Strobe*, 12 Cal. 92, 73 Am. Dec. 522; *Cashman vs. Harrison*, 90 Cal. 297, 27 Pac. Rep. 282; *Bank of Commerce vs. Bogy*, 44 Mo. 13, 100 Am. Dec. 247.

74. Prior to acceptance no assignment.—Bill of exchange before its acceptance does not operate as an assignment; the principle being firmly established that bill of exchange does not of itself give to holder, either at law or in equity, lien upon funds of creditor in hands of debtor until after acceptance by latter.—*Cashman vs. Harrison*, 90 Cal. 297, 302, 27 Pac. Rep. 282. See *Harris vs. Clark*, 3 N. Y. 93, 118, 51 Am. Dec. 352; *Attorney-General vs. Continental L. Ins. Co.*, 71 N. Y. 325, 27 Am. Rep. 55; *Lunt vs. Bank of North America*, 49 Barb. (N. Y.) 221; *Mandeville vs. Welch*, 18 U. S. (5 Wheat.) 277, 286, bk. 5 L. ed. 87; *Tiernan vs. Jackson*, 30 U. S. (5 Pet.) 530, 597, bk. 3 L. ed. 234.

75. PARTIAL ASSIGNMENT.—It matters not whether partial assignment, to be enforceable in equity, be by parol or by formal instrument or by order of draft upon particular fund. Neither law nor equity observes any difference in kinds or modes of assignment.—*Exchange Bank vs. McLoon*, 78 Me. 498, 40 Am. Rep. 388.

76. PLEDGE OF CHOSE IN ACTION.—Acknowledgment and recordation.—Assignment of chose in action as collateral security is not chattel mortgage and is not within statute requiring mortgages of personal property to be acknowledged and registered.—*Board of Trustees vs. Whalen*, 17 Mont. 1, 41 Pac. Rep. 849. See *Howe vs. Jones*, 57 Iowa 130, 138, 3 N. W. Rep. 451, 10 Id. 299; *Lawrence vs. McKenzie*, 33 Iowa 432, 55 N. W. Rep. 505.

77. QUALIFIED ASSIGNMENT.—Assignment for purpose of collection.—Claim may be assigned to assignee for purpose of having it included in suit which he is about to bring against debtor or obligor, where customary words of assignment are used and money consideration is expressed, and in action on claim so assigned it is no defense that assignment was merely for purpose of collection.—*Hopkins*

va. Contra Costa Co., 106 Cal. 566, 572, 39 Pac. Rep. 923.

78. WRITING IS NOT NECESSARY, and assignment may rest in parol.—*Oppenheimer vs. First Nat. Bank*, 20 Mont. 192, 50 Pac. Rep. 419; *Risley vs. Phenix Bank*, 33 N. Y. 218, 38 Am. Rep. 421.

V. PLEADING AND PRACTICE.

79. AMENDMENT OF DEFECTIVE ASSIGNMENT AT TRIAL.—It would seem that where assignment is defective and fails to name plaintiff as assignee or to name any assignee, plaintiff may, at the trial, have writing amended by his assignor.—*Owen vs. Meade*, 104 Cal. 179, 183, 37 Pac. Rep. 923.

80. AMOUNT RECOVERABLE BY ASSIGNEE—Assignment as security.—If chose in action is transferred by assignment absolute in form, though as security only, for debt less in amount than sum due, or to become due, upon instrument assigned, assignee is not limited in action upon such chose in action, to recover only sum due him from assignor, but may recover whole amount due thereon, being in turn responsible to his assignor for any excess.—*Ginocchio vs. Amador C. & M. Co.*, 67 Cal. 493, 496, 3 Pac. Rep. 29.

81. CONFLICT OF LAWS—Priority of assignment over garnishment.—As debts are personal property, and as such follow person of their owner, question as to priority of assignment of debts over garnishment proceedings must be determined by laws of state in which owner of debts resides.—*Consol. Tank L. Co. vs. Collier*, 148 Ill. 259, 39 Am. St. Rep. 181, 35 N. E. Rep. 756.

As to law governing personal property, see ante § 946 and note.

82. Counterclaim not barred by assignment.—See Code Civ. Proc. § 440 and note.

83. NOTICE OF ASSIGNMENT TO OBLIGOR—Necessity for and requisites of.—See 2 Am. & Eng. Encyc. of L. (2d ed.) 1076-1079; note 36 Am. Dec. 475-477.

84. PAROL EVIDENCE—Explaining defective assignment.—Where written assignment of claim omits to name plaintiff as assignee or to name any assignee, parol evidence is admissible to show that such omission was unintentional and that assignor in fact made oral agreement assigning such claim to plaintiff and that writing produced at trial was intended to effect such assignment.—*Owen vs. Meade*, 104 Cal. 179, 183, 37 Pac. Rep. 923.

85. PARTIES—Assignee is proper party to sue.—Action may be in name of assignee under Code Civ. Proc. § 367, which provides that every action must be prosecuted in name of real party in interest.—*Ryan vs. Maddux*, 6 Cal. 247, 248; *Gray vs. Garrison*, 9 Cal. 325, 328; *O'Connor vs. Irvine*, 74 Cal. 435, 440, 16 Pac. Rep. 236; *Tuller vs. Arnold*, 98 Cal. 522, 523, 33 Pac. Rep. 445; *Works vs. Merritt*, 105 Cal. 467, 469, 38 Pac. Rep. 1109. See *Doll vs. Anderson*, 27 Cal. 248, 251; *Widaman vs. Hubbard*, 88 Fed. Rep. 806, 812 (case arising in California).

See Code Civ. Proc. § 367 and note; consult also **KERR'S SYNTHETICAL INDEX** to this work.

86. Assignment by way of security.—Where street assessment is assigned and in express terms assignee is authorized to "demand, sue for, settle, and compromise same, as in his judgment may be best," assignee may sue notwithstanding fact that assignment was made merely to secure obligation. Assignment is "in nature of power of sale in deed of trust and can be exercised by grantee of power."—*Diggins vs. Hartshorne*, 108 Cal. 154, 165, 41 Pac. Rep. 283. See *Works vs. Merritt*, 105 Cal. 467, 38 Pac. Rep. 1109.

87. Reassignment necessary to entitle assignor to sue.—After assignment has been made assignee is only proper party plaintiff and assignor cannot sue without reassignment.—See *Tuller vs. Arnold*, 98 Cal. 522, 523, 33 Pac. Rep. 445.

88. PLEADING—Argumentative allegations in complaint that draft was drawn for purpose of making assignment to plaintiff of drawer's demand against defendant, although not artificial, is sufficient as against general demurrer.—*Lawrence Nat. Bank vs. Kowalsky*, 105 Cal. 41, 44, 38 Pac. Rep. 517.

89. Partial assignment—Averment of defendant's consent.—In case of partial assignment, assignee must allege in his complaint that debtor agreed to or ratified assignment.—*Thomas vs. Rock Island G. & S. Min. Co.*, 54 Cal. 578, 579.

90. Same—Insufficient allegation.—Where allegation of complaint is, "of which said assignment defendants have had due notice," there is no sufficient averment that defendants knew of assignment at time it was made and assented to it, or that they afterwards did so, but it is merely allegation of notice, which assignee of such demand as that declared on is required to give, in order to stop payment to his assignor, and thus secure himself subject of assignment.—*Grain vs. Aldrich*, 38 Cal. 514, 520, 99 Am. Dec. 423.

91. Same—Prayer for account and apportionment.—Where partial assignment is made all of parties' interest in subject-matter must be brought before court and there must be prayer for account and apportionment of demand due from defendant.—*Grain vs. Aldrich*, 38 Cal. 514, 521, 99 Am. Dec. 423.

92. REVIVAL OF ACTION—Substitution of parties.—See Code Civ. Proc. § 385 and note.

93. SETTLEMENT WITH ASSIGNOR—After knowledge of assignment.—If party against whom claim exists settles with assignor after having been informed of assignment such settlement is not defense in action by assignee.—*McCarthy vs. Mt. Tecarte L. & W. Co.*, 110 Cal. 689, 691, 43 Pac. Rep. 391. See *Gilman vs. Curtis*, 66 Cal. 116, 117, 4 Pac. Rep. 1094; *Works vs. Merritt*, 105 Cal. 467, 469, 38 Pac. Rep. 1109.

94. Secret assignment.—Where, after an assignment has been made, debtor settled with assignor, without notice, actual or constructive, of assignment, such settlement is valid against secret assignee, and his only remedy is against assignor.—*Hogan vs. Black*, 66 Cal. 41, 42, 4 Pac. Rep. 943.

See Code Civ. Proc. §§ 368, 385 and notes.

CHAPTER II.

SHIPPING.

Article I. General Provisions, §§ 960-966.

II. Rules of Navigation, §§ 970-978.

ARTICLE I.

GENERAL PROVISIONS.

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| § 960. Definition of a ship. | § 964. Several owners. |
| § 961. Appurtenances and equipments. | § 965. Owner for voyage. |
| § 962. Foreign and domestic navigation. | § 966. Registry, etc. |
| § 963. Foreign and domestic ships distinguished. | |

§ 960. **DEFINITION OF A SHIP.** The term "ship or shipping," when used in this code, includes steamboats, sailing vessels, canal-boats, barges, and every structure adapted to be navigated from place to place for the transportation of merchandise or persons.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 224.

- 1-6. Ship and vessel—Definitions of.
7. Same—Within admiralty jurisdiction.
- 8, 9. Same—Within statutes for arrest of debt.
- 10-21. Same—Within statutes relating to maritime lien.
22. Same—Within U. S. statutes as to liability of owners.
23. Merchant shipping—How treated.

As to what is a vessel within the maritime lien laws, see note by Robert Desty, 1 L. R. A. 505.

1. **SHIP DEFINED**—As locomotive machine adapted to transportation over rivers, seas, and oceans.—*The Eliza Ladd*, 3 Sawy. C. C. 519, 3 Fed. Cas. 491.

2. As any structure made to float upon water for the purpose of commerce, of war, or whether propelled by wind, steam, or oars.—*Yarnberg vs. Watson*, 13 Oreg. 11, 4 Pac. Rep. 296. See *Chaffe vs. Ludeling*, 27 La. Ann. 611.

3. Defined by Congress as including every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water.—*Bartlett vs. Steam Dredge*, 107 Mich. 74, 61 Am. St. Rep. 314, 64 N. W. Rep. 951.

4. In its broadest sense includes variety of things obviously not intended to be included in the provisions of the lien laws.—*Yarnberg vs. Watson*, 13 Oreg. 11, 4 Pac. Rep. 296. See *Knisely vs. Parker*, 34 Ill. 432, 434.

5. Must be vehicle suitable at least to carry men or goods upon water by whatever means propelled.—*Yarnberg vs. Watson*, 13 Oreg. 11, 4 Pac. Rep. 296.

6. Does not include unfinished boat or vessel wholly unfit for carriage of men or goods on water, or for any purpose for which such a vehicle is intended.—*Commonwealth vs. Francis, Thatcher* Crim. Cas. (Mass.) 240.

7. **BECOMES A SUBJECT OF ADMIRALTY AND MARITIME JURISDICTION** after launch-

ing and is embraced by the element upon which she is intended to float, has been christened and has become an entirety fully capable of being identified.—*The Manhattan*, 46 Fed. Rep. 797, 800. See *The Eliza Ladd*, 3 Sawy. C. C. 519, 3 Fed. Cas. 491; *Revenue Cutter No. 2*, 4 Sawy. C. C. 143, 20 Fed. Cas. 563.

8. **FERRY-BOAT NOT A SHIP OR VESSEL** within meaning of statute authorizing arrest for debts.—*Birkbeck vs. Ferry Boats*, 17 John. (N. Y.) 54.

9. "Ships" or "vessels" usually applied to vessels of larger class, and not to include row-boats, sail-boats, scows, and other small crafts under statutes authorizing arrest for debt.—*Farmers' Delight vs. Lawrence*, 5 Wend. (N. Y.) 564.

10. **BARGES ARE VESSELS** within the admiralty jurisdiction.—*Bartlett vs. Steam Dredge*, 107 Mich. 74, 61 Am. St. Rep. 314, 64 N. W. Rep. 951. See *The Dick Keys*, 1 Biss. C. C. 403, 7 Fed. Cas. 673; *Disbrow vs. The Walsh Bros.*, 36 Fed. Rep. 607.

11. Boat or vessel, as used in maritime lien laws, must be boat that is complete and capable of being used in business of carrying either freight or passengers, and one which had been subject to commercial regulations.—*Northrup & Thompson vs. The Pilot*, 6 Oreg. 297, 299.

12. **CANAL-BOAT IS VESSEL WITHIN MEANING OF STATUTE** provided for collection of demands against ships and vessels.—*Yarnberg vs. Watson*, 13 Oreg. 11, 4 Pac. Rep. 296. See *Crawford vs. Collins*, 45 Barb. (N. Y.) 269; *Fralick vs. Betts*, 13 Hun (N. Y.) 632, 633; *King vs. Greenway*, 71 N. Y. 413.

13. Canal-boat with elevating apparatus for transportation of grain from one vessel to another, not a vessel within the maritime lien laws.—*The Hezekiah Baldwin*, 3 Bon. C. C. 556, 12 Fed. Cas. 93.

14. **FLOATING ELEVATOR** used in harbor of New York held to be vessel within maritime lien laws.—*The Hezekiah Baldwin*, 3 Ben. C. C. 556, 12 Fed. Cas. 93.

15. **HULL OF BOAT WITHOUT OTHER PARTS NECESSARY TO ITS USE**, not a boat within the meaning of the statute creating lien.—*Yarnberg vs. Watson*, 13 Oreg. 11, 4 Pac. Rep. 296. See *Northrup vs. The Pilot*, 6 Oreg. 297, 298.

16. **Lighters** used in conveying lumber to vessels lying in deep water, not.—*Bartlett vs. Steam Dredge*, 107 Mich. 74, 61 Am. St. Rep. 314, 64 N. W. Rep. 951; *The General Cass*, 1 Brown Adm. 334, 10 Fed. Cas. 169.

17. **Old steamboat** with all its machinery removed and fitted up as an excursion boat.—*Bartlett vs. Steam Dredge*, 107 Mich. 74, 61 Am. St. Rep. 314, 64 N. W. Rep. 951; *Mosser vs. City of Pittsburgh*, 45 Fed. Rep. 699.

18. **SEVERAL PIECES OF TIMBER OR IRON OR BOTH** being put together in certain form so as to float upon water and transport or bear up freight or passengers may become ship.—*The Eliza Ladd*, 3 Sawy. C. C. 519, 3 Fed. Cas. 491.

19. **Separate pieces of board or timber or iron or both** become ship at the moment she leaves the ways and her keel strikes element

for which she was originally designed.—*The Eliza Ladd*, 3 Sawy. C. C. 519, 3 Fed. Cas. 491.

20. **All parts of boat**, such as hull, propeller, engine, etc., must be put together to constitute boat or vessel, within meaning of maritime laws.—*Northrup & Thompson vs. The Pilot*, 6 Oreg. 297, 299.

21. **STEAM DREDGE USED SOLELY FOR PURPOSES OF DIGGING**, and not used for navigation, for transportation of passengers or freight, not considered vessel or ship within statutes providing for liens on water crafts.—*Bartlett vs. Steam Dredge*, 107 Mich. 74, 61 Am. St. Rep. 314, 64 N. W. Rep. 951; *Mueller-welss vs. Pile Driver*, 69 Fed. Rep. 1005.

22. **FISHING VESSELS ARE NOT WITHIN** provisions of United States Stats. of 1884, ch. 121, § 18, relating to liability of ship-owners, such statutes relating only to vessels engaged in foreign commerce.—*Simpson vs. Story*, 145 Mass. 497, 1 Am. St. Rep. 480, 14 N. E. Rep. 641.

23. **MERCHANT SHIPPING IS TREATED** as subject distinct from fisheries in legislation and decisions of court.—*Simpson vs. Story*, 145 Mass. 497, 1 Am. St. Rep. 480, 14 N. E. Rep. 641. See *Wait vs. Gibbs*, 21 Mass. (4 Pick.) 298; *The Three Brothers*, 1 Gall. C. C. 142, 23 Fed. Cas. 1162; *Taber vs. United States*, 1 Story C. C. 1, 6, 7, 23 Fed. Cas. 611; *The Swallow*, 1 Ware C. C. 13, 21, 23 Fed. Cas. 494.

§ 961. APPURTENANCES AND EQUIPMENTS. All things, belonging to the owners, which are on board a ship, and are connected with its proper use, for the objects of the voyage and adventure in which the ship is engaged, are deemed its appurtenances.

History: Enacted March 21, 1872.

1. Appurtenances—What included in.
2-17. Specific articles held to be included under.

1. **APPURTENANCE HELD TO INCLUDE WHATEVER** is on board ship for object of voyage and adventure on which she is engaged belonging to owner, who is liable to extent thereof for damage done to other vessels.—*Gale vs. Laurie*, 5 Barn. & C. 156, 7 Dowl. & Ry. 711, 11 Eng. C. L. 187.

2. **APPAREL AND APPURTENANCES OF SHIP** held to include new boat and cordage.—*Shannon vs. Owen*, 1 Man. & Ry. 392, 17 Eng. C. L. 360.

3. **Ash-pan for boiler** held appurtenant in action to recover value and to pass on sale, although delivered but not placed on board.—*Newberry vs. The Fashion*, 1 Newb. C. C. 67, 18 Fed. Cas. 37.

4. **Boat** considered as necessary part of ship's furniture.—*Lenox vs. United Ins. Co.*, 3 John. Cas. (N. Y.) 178.

5. **Boat** considered as appurtenant and necessary part of ship's furniture as between assurer and assured.—*Hall vs. Ocean Ins. Co.*, 38 Mass. (21 Pick.) 472, 481. See *Blackett vs. Royal Exch. Ass. Co.*, 2 Crompt. & J. 244.

6. **Boat** considered appurtenant and as part of ship's furniture under policy upon ship, tackle, apparel, and furniture, or other words equivalent.—*Hall vs. Ocean Ins. Co.*, 38 Mass. (21 Pick.) 472, 482.

7. **Boat, cable, and anchor** considered appurtenances, although subject to attachment when ship at wharf, as not absolutely necessary to her safety.—*Briggs vs. Strange*, 17 Mass. 405, 409.

8. **Fishing stores** not within policy of insurance on ship, tackle, apparel, munition, and furniture employed in fisheries under usage of trade.—*Gale vs. Laurie*, 5 Barn. & C. 156, 7 Dowl. & Ry. 711, 11 Eng. C. L. 187.

9. **Fishing tackle** held not appurtenant so as to be included in insurance upon "ship, tackle, apparel and furniture," by usage of trade.—*Hoskins vs. Pickersgill*, 3 Doug. 222, 26 Eng. C. L. 152.

10. **Kentledge** not considered as part of ship or necessary stores, as common ballast might be used.—*Lane vs. Neale*, 3 Stark. 105, 3 Eng. C. L. 336.

11. **Kentledge** will not pass by instrument conveying the vessel by bill of sale as necessary appurtenance.—*Burchard vs. Tapscott*, 3 Duer (N. Y.) 363.

12. **Loose ballast** is not appurtenance to ship.—*Burchard vs. Tapscott*, 3 Duer (N. Y.) 363.

13. **Provisions sent out in ship** for the use of the crew, considered as appurtenant so as to fall within policy of insurance on ship's furniture.—*Brough vs. Whitmore*, 4 Durnf. & E. (8 T. R.) 206, 2 Rev. Rep. 361.

14. Rudder ordered to be made for ship upon which work is commenced when same is stated to be for party ordering, sufficient to show appropriation of rudder so as to make it appurtenant to ship on bankruptcy of owner.—*Goss vs. Quinton*, 3 Man. & G. 325, 43 Eng. C. L. 430.

15. Rudder and cordage bought by ship-builder are special for ship, considered as parts thereof and appurtenant thereto.—*Woods vs. Russell*, 5 Barn. & Ald. 942, 7 Eng. Com. Law 310.

16. Materials used in construction of ship become appurtenant when actually used and put into corpus.—*Baker vs. Gray*, 17 C. B. 462, 34 Eng. L. & Eq. 387; *Wood vs. Bell*, 6 El. & Bl. 355, 28 Eng. C. L. 354, 26 Eng. L. & Eq. 148.

17. WORD "OUTFIT" IN POLICY ON FISHING VOYAGE includes apparatus and instruments used for taking of seals, etc., and disposing of them so as to bring home the oil, etc., with greatest convenience.—*Hill vs. Patten*, 3 East 273, 9 Rev. Rep. 469.

§ 962. FOREIGN AND DOMESTIC NAVIGATION. Ships are engaged either in foreign or domestic navigation, or in the fisheries. Ships are engaged in foreign navigation when passing to or from a foreign country; and in domestic navigation, when passing from place to place within the United States.

History: Enacted March 21, 1872.

1, 2. Foreign navigation and voyage defined.
3, 4. Foreign navigation—What does not amount to.

1. Foreign navigation means navigation engaged in, in waters outside of those in United States territorial jurisdiction.—*The Lark*, 1 Gall. C. C. 55, 14 Fed. Cas. 1149.

2. Foreign voyage is one in which vessel engages to reach foreign port for purposes of trade and not merely for purpose of reaching foreign port within voyage licensed for fisheries.—*The Three Brothers*, 1 Gall. C. C. 142, 23 Fed. Cas. 1162.

3. Navigation engaged in, in American waters by delivery on British side is not foreign within meaning of the United States forfeiture laws.—*The Atlantic*, 1 Ware C. C. 121, 2 Fed. Cas. 132.

4. Term voyage, as used in the United States maritime laws with reference to vessels in foreign and interstate commerce, does not include a tug not making long voyage but merely plying from one body of water to another by means of short trips to and fro.—*The John Martin*, 2 Abb. U. S. 172, 13 Fed. Cas. 694.

§ 963. FOREIGN AND DOMESTIC SHIPS DISTINGUISHED. A ship in a port of the state to which it belongs is called a domestic ship; in another port it is called a foreign ship.

History: Enacted March 21, 1872.

§ 964. SEVERAL OWNERS. If a ship belongs to several persons, not partners, and they differ as to its use or repair, the controversy may be determined by any court of competent jurisdiction.

History: Enacted March 21, 1872.

§ 965. OWNER FOR VOYAGE. If the owner of a ship commits its possession and navigation to another, that other, and not the owner, is responsible for its repairs and supplies.

History: Enacted March 21, 1872.

1. Charterer—When liable.
2, 3. Master—When liable.
4-7. Owner—When liable.
8. Ship's husband—When liable.

1. Charterer of vessel, chartered in usual manner, either for particular voyage or for period of time, having authority to appoint master and undertaking to victual, man, and navigate her at his own expense, deemed pro hac vice owner, and general owner not personally liable for supplies, or under contract of affreightment.—*Oakland Cotton Mfg. Co. vs. Jennings*, 46 Cal. 175, 133, 13 Am. Rep. 209.

2. Master presumed to have power, in absence of evidence to contrary, to make contracts for supplies in home port so as to bind

owners and render them liable for same.—*Crawford vs. Roberts*, 50 Cal. 235, 241. See *Provost vs. Patchin*, 9 N. Y. 238; *Rich vs. Coe*, Cowp. 636; *Hussey vs. Christie*, 9 East 426, 432, 13 Ves. 594, 9 Rev. Rep. 585; *Hoskins vs. Slayton*, Cas. Temp. Hardw. 360.

3. Duties and relations of master furnish presumed evidence of his authority to furnish supplies so as to bind owners.—*Crawford vs. Roberts*, 50 Cal. 235, 241.

4. Owner liable on contract of affreightment made by master with shippers who have no notice of secret arrangement between master and owner under which owner appoints master upon understanding that he is to have control of vessel and victual and man her and make contract of affreightment and divide gross earnings with the owner.—*Tomlinson vs.*

Holt, 49 Cal. 310, 313; Oakland Cotton Mfg. Co. vs. Jennings, 46 Cal. 175, 183, 13 Am. Rep. 209.

5. Owner letting out to charter hold of vessel, appointing his own master, and sailing her at his expense, responsible on contracts of affreightment made by master with shippers having no notice of charter party.—Oakland Cotton Mfg. Co. vs. Jennings, 46 Cal. 175, 183, 13 Am. Rep. 209. See Sandemann vs. Scurrer, 2 L. R. 86; In re St. Cloud, Brow. & L. 15.

6. Owners responsible for safe carrying of goods where shipper delivers same in ignor-

ance of fact that vessel has been chartered or let to him, and dealing with master as clothed with ordinary authority of master to receive goods and give bills of lading on behalf of owners.—Tomlinson vs. Holt, 49 Cal. 310, 313. See par. 1 this note.

7. Purchases made by captain with knowledge and consent of ship's husband render owner prima facie liable, in absence of evidence showing that exclusive credit was given to ship's husband.—Crawford vs. Roberts, 50 Cal. 235, 241.

8. Ship's husband.—See par. 7 this note.

§ 966. **REGISTRY, ETC.** The registry, enrolment, and license of ships are regulated by acts of Congress.

History: Enacted March 21, 1872.

1. Acts of Congress—Nature of provisions, etc.
2-7. Registration—Effect and nature and purpose of.

8, 9. Vessels must be owned by citizens.
10. Wrecked vessels—Right to register.
11. Place of recording.

1. Acts of Congress declare character of registered and enrolled ships and vessels, and all ships and vessels not brought within provisions of such acts not entitled to benefits and privileges accorded to American vessels.—Crapo vs. Kelly, 83 U. S. (16 Wall.) 610, bk. 21 L. ed. 430.

2. Ships or vessels of United States are creation of legislation of Congress, and none can be denominated such, or entitled to benefits or privileges thereof, except those registered or enrolled according to provisions of act of Congress.—White's Bank vs. Smith, 74 U. S. (7 Wall.) 646, 656, bk. 19 L. ed. 211.

3. Enrolment of vessel is equal to enrolment and registration under Act of March 2, 1831, relating to vessels engaged in navigating waters on northern, northeastern, and northwestern frontiers.—United States vs. Leetzel (The Mohawk), 70 U. S. (3 Wall.) 566, bk. 18 L. ed. 67.

4. Vessels enrolled under act of Congress subject to all rules, regulations, and penalties relating to registered vessels.—United States vs. Leetzel (The Mohawk), 70 U. S. (3 Wall.) 566, bk. 18 L. ed. 67.

5. Enrolment is for purpose of showing national character of vessel and to enable it to procure coasting license.—United States vs.

Leetzel (The Mohawk), 70 U. S. (3 Wall.) 566, bk. 18 L. ed. 67. See Gibbons vs. Ogden, 22 U. S. (9 Wheat.) 1, 214, bk. 6 L. ed. 23.

6. Ships only which have been registered in manner prescribed by acts of Congress can be deemed vessels of United States.—Murray vs. United States (The Merritt), 84 U. S. (17 Wall.) 582, bk. 21 L. ed. 682.

7. Ships and vessels not brought within provisions of act of congress, and not entitled to benefits and privileges secured thereby, are of no value as American vessels.—White's Bank vs. Smith, 74 U. S. (7 Wall.) 646, bk. 19 L. ed. 211.

8. Registered vessels of United States only continue to enjoy benefits and privileges of such vessels so long as they are wholly owned and commanded by citizens of United States.—United States vs. Gillies, Pet. C. C. 159, 3 Wheel. Crim. Cas. 308, 25 Fed. Cas. 1321.

9. Cease to enjoy benefits thereof when owned in whole or in part by citizen of United States residing in foreign country during such residence.—United States vs. Gillies, Pet. C. C. 159, 3 Wheel. Crim. Cas. 308, 25 Fed. Cas. 1321.

10. Wrecked vessels may be registered when purchased and repaired by citizen.—United States vs. Leetzel (The Mohawk), 70 U. S. (3 Wall.) 566, bk. 18 L. ed. 67.

11. Place for recording.—Home port is place for recording mortgage of ship.—White's Bank vs. Smith, 74 U. S. (7 Wall.) 646, bk. 19 L. ed. 211.

ARTICLE II.

RULES OF NAVIGATION.

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| <p>§ 970. Collisions:</p> <ol style="list-style-type: none"> 1. Rules as to ships meeting each other. 2. The rule for sailing vessels. 3. Rules for steamers in narrow channels. 4. Same. [Pass on starboard side.] 5. Rules for steam vessels on different courses. | <ol style="list-style-type: none"> 6. Meeting of steamers. <p>§ 971. Collision from breach of rules.</p> <p>§ 972. Breaches of such rules to imply wilful default.</p> <p>§ 973. Loss, how apportioned.</p> |
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§ 970. **COLLISIONS.** In the case of ships meeting, the following rules must be observed, in addition to those prescribed by that part of the Political Code which relates to navigation:

1. **Rules as to ships meeting each other.** Whenever any ship, whether a steamer or sailing ship, proceeding in one direction, meets another ship, whether a steamer or sailing ship, proceeding in another direction, so that if both ships were to continue their respective courses they would pass so near as to involve the risk of a collision, the helms of both ships must be put to port so as to pass on the port side of each other; and this rule applies to all steamers and all sailing ships, whether on the port or starboard tack, and whether close-hauled or not, except where the circumstances of the case are such as to render a departure from the rule necessary in order to avoid immediate danger, and subject also to a due regard to the dangers of navigation, and, as regards sailing ships on the starboard tack close-hauled, to the keeping such ships under command;

2. **Rules for sailing vessels.** In the case of sailing vessels, those having the wind fair must give way to those on a wind. When both are going by the wind, the vessel on the starboard tack must keep her wind, and the one on the larboard tack bear up strongly, passing each other on the larboard hand. When both vessels have the wind large or abeam, and meet, they must pass each other in the same way on the larboard hand, to effect which two last-mentioned objects the helm must be put to port. Steam vessels must be regarded as vessels navigating with a fair wind, and should give way to sailing vessels on a wind of either tack;

3. **Rules for steamers in narrow channels.** A steamer navigating a narrow channel must, whenever it is safe and practicable, keep to that side of the fairway or mid channel which lies on the starboard side of the steamer;

4. **Same.** [Pass on starboard side.] A steamer when passing another steamer in such channel, must always leave the other upon the larboard side;

5. **Rules for steam vessels on different courses.** When steamers must inevitably or necessarily cross so near that by continuing their respective courses, there would be a risk of collision, each vessel must put her helm to port, so as always to pass on the larboard side of each other;

6. **Meeting of steamers.** The rules of this section do not apply to any case for which a different rule is provided by the regulations for the government of pilots of steamers approaching each other within the sound of the steam-whistle, or by the regulations concerning lights upon steamers, prescribed by or under authority of the laws of the United States.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 394, held unconstitutional, see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXLI, pp. 600-601.

1. Luffing when not course to take.
- 2-8. Steamer and sailing vessel—Duty when approaching.

As to rights and duties of vessels in navigation, see monographic note 75 Am. Dec. 601-612.

As to duty of vessel overtaking another, see monographic note 75 Am. Dec. 601-604.

As to duty of steamer and sailing vessel when approaching each other, see note 45 Am. Dec. 55.

As to duty of sailing vessel to hold her course, see monographic note 75 Am. Dec. 601-604.

1. Luffing into wind is not proper course to pursue where two vessels are about to meet, in absence of special circumstances showing necessity for so doing.—*The Schooner Catharine vs. Dickinson*, 58 U. S. (17 How.) 170, bk. 15 L. ed. 233.

2. Sailing vessel should keep her course in approaching steamer except where the danger is such as to make a change necessary for the purpose of avoiding a collision.—*Miner vs. The Sunnyside (The Sunnyside)*, 51 U. S. 203, bk. 23 L. ed. 302.

3. Schooner close-hauled should keep her course where two meet and other has free

wind.—*The Schooner Catharine vs. Dickinson*, 58 U. S. (17 How.) 170, bk. 15 L. ed. 233.

4. Steamer approaching schooner, or other sailing vessel, in such manner as to invoke collision must keep out of way of schooner, and latter must not embarrass steamer by any change of course, and in such case responsibility of avoiding collision is on steamer.—*Benefactor vs. Mount (The Benefactor)*, 102 U. S. 214, bk. 26 L. ed. 157.

5. Steamer ascending river, under control of pilot, must keep clear of barges floating down same, and propelled by oars only.—*Bigley vs. Williams*, 80 Pa. St. 107.

6. Steamboat must avoid collision with sailing vessel, by altering her course, where such vessel has not use of sails at time of collision.—*Saune vs. Tourne*, 9 La. 428, 29 Am. Dec. 452.

7. Steamboat running down vessel propelled by wind cannot excuse itself on ground that latter was too near shore, and in usual track of steamboats ascending.—*Saune vs. Tourne*, 9 La. 428, 29 Am. Dec. 452.

8. Right of steamboats ascending river to keep along left bank, according to pretended usage, only applies in relation to vessels of same kind descending.—*Saune vs. Tourne*, 9 La. 428, 29 Am. Dec. 452.

§ 971. COLLISION FROM BREACH OF RULES. If it appears that a collision was occasioned by failure to observe any rule of the foregoing section, the owner of the ship by which such rule is infringed cannot recover compensation for damages sustained by the ship in such collision, unless it appears that the circumstances of the case made a departure from the rule necessary.

History: Enacted March 21, 1872.

§ 972. BREACHES OF SUCH RULES TO IMPLY WILFUL DEFAULT. Damage to person or property arising from the failure of a ship to observe any rule of section nine hundred and seventy, must be deemed to have been occasioned by the wilful default of the person in charge of the deck of such ship at the time, unless it appears that the circumstances of the case made a departure from the rule necessary.

History: Enacted March 21, 1872.

§ 973. LOSS, HOW APPORTIONED. Losses caused by collision are to be borne as follows:

1. If either party was exclusively in fault he must bear his own loss, and compensate the other for any loss he has sustained;
2. If neither was in fault, the loss must be borne by him on whom it falls;
3. If both were in fault, the loss is to be equally divided, unless it appears that there was a great disparity in fault, in which case the loss must be equitably apportioned;
4. If it cannot be ascertained where the fault lies, the loss must be equally divided.

History: Enacted March 21, 1872.

I. In General.

- 1, 2. Party seeking recovery must be without fault.
- 3, 4. Party solely at fault—Position of.
- 5-8. When faulty management of one vessel no excuse for other.
9. When party injured may recover against both.

II. Inevitable Accident.

10. Definition—Inevitable or unavoidable accident.
- 11-13. Loss to rest where it falls—When.
14. Same—When not.

III. When Both in Fault.

- 15, 16. Damages equally divided.
- 17, 18. Same—Brig without light and steamer negligently towed, etc.
- 19-24. Same—When not recoverable by either.
- 25, 26. Same—When recoverable.

IV. Damages.

- 27, 28. How ascertained.
29. Character of vessel sunk—When considered.

V. Evidence.

- 30, 31. Burden of proof.
- 32, 33. Negligence—Non-compliance with rules not prima facie.
34. Specific fault—When to be shown.

I. IN GENERAL.

As to burden of proof in case of collision, see monographic note 45 Am. Dec. 54.

As to collision of vessels and the liability of tug and tow, see note by Robert Desty, 3 L. R. A. 234.

As to duty to exhibit lights, see monographic note 45 Am. Dec. 55; 75 Am. Dec. 601-610, 611.

As to inevitable accident or inscrutable fault, see monographic note 45 Am. Dec. 51.

As to liability for injury caused by towed vessel, see note 25 Am. Dec. 354.

As to liability of vessels and others for damages caused by collisions, see monographic note 45 Am. Dec. 51-60.

As to rule where both parties are in fault, see monographic note 45 Am. Dec. 53.

As to rule where one vessel only is in fault, see monographic note 45 Am. Dec. 53.

As to when collisions at sea are deemed the acts of God, see note 45 Am. Dec. 592.

1. PLAINTIFF MUST BE WITHOUT FAULT in order to recover damages.—Griswold vs. Sharpe, 2 Cal. 17, 24.

2. Must show that there was no want of ordinary care on his part, and that injury was solely fault of other vessel.—Lucas vs. The Thomas Swann, 6 McL. C. C. 232, 1 Newb. C. C. 153, 15 Fed. Cas. 1065.

3. PARTY SOLELY AT FAULT—Alone liable for damages resulting from collision.—The James Gray vs. The John Fraser (The John Fraser), 62 U. S. (21 How.) 184, 194, bk. 16 L. ed. 106; Alliance Ins. Co. vs. The Morning Light, 69 U. S. (3 Wall.) 550, bk. 17 L. ed. 362.

4. Must bear loss occasioned by injured vessel as well as her own.—Hopkins vs. The Zeba (Monire vs. The Thomas Morgan), 2

Hughes C. C. 64, 12 Fed. Cas. 493; Union S. S. Co. vs. New York & Va. S. S. Co., 65 U. S. (24 How.) 307, bk. 16 L. ed. 699; Alliance Ins. Co. vs. The Morning Light, 69 U. S. (3 Wall.) 550, bk. 17 L. ed. 362; Shepherd vs. The Clara (The Clara), 102 U. S. 200, bk. 26 L. ed. 145.

5. FAULT IN MANAGEMENT OF ONE BOAT will not excuse other from exercise of reasonable care.—Lucas vs. The Thomas Swann, 6 McL. C. C. 232, 1 Newb. C. C. 153, 15 Fed. Cas. 1065.

6. Mere fact that one vessel strikes another and damages her does not of itself make her liable for injury; collision must in some degree be occasioned by her fault.—The James Gray vs. The John Fraser (The John Fraser), 62 U. S. (21 How.) 184, bk. 16 L. ed. 106.

7. Omission of one vessel to comply with law requiring carrying of lights will not excuse other from exercise of all due and reasonable care to prevent collision.—New York & L. U. S. M. S. Co. vs. Rumball, 62 U. S. (21 How.) 372, 384, bk. 16 L. ed. 144, 148; New Haven Steam Trans. Co. vs. The Continental (The Continental), 81 U. S. (14 Wall.) 345, bk. 20 L. ed. 301.

8. Mere fact that common practice showed neglect to hang out lights is no excuse in action to recover damages for collision where common prudence would require such lights.—Kelly vs. Cunningham, 1 Cal. 365, 367.

9. PARTY INJURED BY FAULT OF BOTH VESSELS has right of action against both.—The Washington & The Gregory vs. Caven (The Washington & The Gregory), 76 U. S. (9 Wall.) 513, bk. 19 L. ed. 787.

II. INEVITABLE ACCIDENT.

10. INEVITABLE OR UNAVOIDABLE ACCIDENT—DEFINED as that which a party charged with the offense could not have possibly prevented by the exercise of ordinary care, caution, and maritime skill.—Lucas vs. The Thomas Swann, 6 McL. C. C. 232, 1 Newb. C. C. 153, 15 Fed. Cas. 1065.

11. EACH VESSEL MUST BEAR ITS OWN LOSS where collision is result of an inevitable accident, such as storm or darkness, arising out of perils of navigation and not attributable to the fault of either.—Stainback vs. Rae, 55 U. S. (14 How.) 532, 533, bk. 14 L. ed. 530.

12. LOSS MUST REST WHERE IT FELL where collision occurs exclusively from natural causes, without negligence or fault of parties.—Union S. S. Co. vs. New York & Va. S. S. Co. (The Steamer Pennsylvania), 65 U. S. (24 How.) 307, 313, bk. 16 L. ed. 699, 701; Alliance Ins. Co. vs. The Morning Light, 69 U. S. (3 Wall.) 550, bk. 17 L. ed. 362.

13. ON PRINCIPLE THAT NO ONE IS RESPONSIBLE for accident produced by causes over which he has no control, neither party entitled to compensation where neither of them is in fault.—Union S. S. Co. vs. New York & Va. S. S. Co., 65 U. S. (24 How.) 307, bk. 16 L. ed. 699; Alliance Ins. Co. vs. The Morning Light, 69 U. S. (3 Wall.) 550, bk. 17 L. ed. 362; Shepherd vs. The Clara (The Clara), 102 U. S. 200, bk. 26 L. ed. 145.

14. Loss will not rest where it falls where

negligence or fault is shown to have been committed by either party.—*Alliance Ins. Co. vs. The Morning Light*, 69 U. S. (2 Wall.) 550, bk. 17. L. ed. 862; *The James Gray vs. The John Fraser* (The John Fraser), 62 U. S. (21 How.) 184, 194, bk. 16 L. ed. 106, 110.

III. WHEN BOTH IN FAULT.

15. **DAMAGES WILL BE EQUALLY APPORTIONED** between offending vessels where both are in fault.—*The Schooner Catharine vs. Dickinson*, 58 U. S. (17 How.) 170, bk. 15 L. ed. 233; *The James Gray vs. The John Fraser* (The John Fraser), 62 U. S. (21 How.) 184, bk. 16 L. ed. 106; *Union S. S. Co. vs. New York & Va. S. S. Co.*, 65 U. S. (24 How.) 307, bk. 16 L. ed. 699; *Alliance Ins. Co. vs. The Morning Light*, 69 U. S. (2 Wall.) 550, 557, bk. 17 L. ed. 862; *New Haven Steam Trans. Co. vs. The Continental* (The Continental), 81 U. S. (14 Wall.) 345, bk. 20 L. ed. 801; *Miner vs. The Sunnyside* (The Sunnyside), 91 U. S. 208, bk. 23 L. ed. 302, 308; *Shepherd vs. The Clara* (The Clara), 102 U. S. 200, bk. 26 L. ed. 145.

16. **COLLISION EVIDENTLY RESULT OF ERROR**, neglect, or want of precaution, not traceable directly to either party, but inscrutable and left by the evidence in state of uncertainty, makes apportionable between parties in equal moieties.—*Lucas vs. The Thomas Swann*, 6 McL. C. C. 282, 1 Newb. C. C. 158, 15 Fed. Cas. 1065.

17. **LOSS EQUALLY DIVIDED** between brig and steamer where former is at anchor without light, and steamboat in tow and negligent in not looking out and not taking means to avoid collision.—*The James Gray vs. The John Fraser* (The John Fraser), 62 U. S. (21 How.) 184, bk. 16 L. ed. 106.

18. **Between schooner at anchor without light and steamer in fault in traveling at excessive speed.**—*Rogers vs. Steamer St. Charles*, 60 U. S. (19 How.) 108, bk. 15 L. ed. 562.

19. **Damages cannot be recovered** where injury is result of negligence of both parties without any intentional wrong on part of defendant.—*Kelly vs. Cunningham*, 1 Cal. 365, 367. *N. Y. Brownell vs. Flagler*, 5 Hill 282. *Pa. Simpson vs. Hand*, 6 Whart. 211, 26 Am. Dec. 231. *Eng. Hill vs. Warren*, 2 Stark. 377, 2 Eng. C. L. 453; *Vanderplank vs. Miller*, 1 M. & M. 169, 22 Eng. C. L. 280. See *Smith vs. Smith*, 19 Mass. (2 Pick.) 621.

20. **Where collision is result of anchoring of vessel at an unsafe or improper place, as such improper anchorage is proximate cause of injury.**—*Lambert vs. Staten Island R. Co.*, 70 N. Y. 104; *The Marola Tribou*, 2 Spr. C. C. 17, 16 Fed. Cas. 701; *The Scioto*, 2 Ware C. C. 360, 366; *Strout vs. Foster*, 42 U. S. (1 How.) 89, bk. 11 L. ed. 58.

21. **Where collision occasioned by negligence of vessel in tow of steamboat.**—*Sprout vs. Hemmingway*, 31 Mass. (14 Pick.) 1, 25 Am. Dec. 250.

22. **Where plaintiff's ship not properly managed, and such management contributed directly in some degree to accident, no matter to what extent, defendant may be in fault.**—

Dowell vs. General Steam Nav. Co., 5 El. & Bl. 195, 85 Eng. C. L. 195.

23. **NOT RECOVERABLE FOR DAMAGES** to goods on board vessel lying at anchor occasioned by reason of collision with steamer in night-time, where such anchored vessel was moored without visible light or watch, and was at fault in not following orders and customary regulations for purposes of avoiding collision.—*Simpson vs. Hand*, 6 Whart. (Pa.) 211, 26 Am. Dec. 231.

24. **For personal injuries to person in charge of anchored vessel resulting from collision not recoverable** where vessel is anchored in unsafe and improper place.—*Lambert vs. Staten Island R. Co.*, 70 N. Y. 104.

25. **RECOVERY OF DAMAGES FOR COLLISION** is not barred by mere fact that plaintiff neglected to observe rule requiring his jib and flying jib-booms to be rigged in, where his default was not cause of collision, although it may have increased injury, presumption being that court considered such default in assessing damages.—*Griswold vs. Sharpe*, 2 Cal. 17, 24.

26. **Vessel moored in harbor in usual track of steamers should set light and watch in order to recover.**—*Innis vs. The Steamer Senator*, 1 Cal. 459, 460, 54 Am. Dec. 305.

IV. DAMAGES.

27. **DAMAGES.**—Inquiry as to damages should be confined to condition of vessel at time of collision in her then state.—*The Schooner Catharine vs. Dickinson*, 58 U. S. (17 How.) 170, bk. 15 L. ed. 233.

28. **Damages cannot be ascertained** by deducting amount that vessel sold for in disabled condition or what she was estimated at in such condition from her sound value.—*The Schooner Catharine vs. Dickinson*, 58 U. S. (17 How.) 170, bk. 15 L. ed. 233.

29. **Evidence of nature and character by witnesses competent to speak as to practicability as to raising and repairing of vessel and expense thereof is admissible** in cases where vessel has been run down and abandoned, and has never been raised and repaired, in order to arrive at proper damages.—*The Schooner Catharine vs. Dickinson*, 58 U. S. (17 How.) 170, bk. 15 L. ed. 233.

V. EVIDENCE.

30. **BURDEN OF PROOF.**—Party seeking to recover damages must prove both care on his own part and want of care on that of defendant.—*Shepherd vs. The Clara* (The Clara), 102 U. S. 200, bk. 26 L. ed. 145.

31. **Upon plaintiff in action to recover damages for injuries to goods on board vessel at anchor by reason of collision with vessel where anchored vessel carried no light, had no watch on deck, and did not do what is customary for purpose of avoiding collision.**—*Simpson vs. Hand*, 6 Whart. (Pa.) 211, 26 Am. Dec. 231.

32. **Non-compliance by vessel at time of collision with statutory or other regulations intended to prevent collisions prima facie evidence of negligence.**—*Lambert vs. Staten Is-*

land R. Co., 70 N. Y. 104. See *Hoffman vs. Union Ferry Co.*, 47 N. Y. 176, 7 Am. Rep. 435; *The Chancellor*, 4 Ben. C. C. 153, 153, 5 Fed. Cas. 439; *The Pennsylvania vs. Troop*, 36 U. S. (19 Wall.) 125, bk. 23 L. ed. 143.

22. EVIDENCE OF NEGLIGENCE—MERE FACT THAT VESSEL injured by collision in night-time did not carry or exhibit lights required by congress not conclusive evidence of negligence so as to preclude recovery.—

Hoffman vs. Union Ferry Co., 47 N. Y. 176, 7 Am. Rep. 435; *Lambert vs. Staten Island R. Co.*, 70 N. Y. 104.

24. Decree of portion of damages where both boats are equally in fault must be supported upon evidence showing specific fault of each occasioning the injury.—*Lucas vs. The Thomas Swann*, 6 McL. C. C. 282, 1 Newb. C. C. 158, 15 Fed. Cas. 1065. See *The Hudson*, 15 Fed. Rep. 162, 167.

CHAPTER III.

PRODUCTS OF THE MIND.

- § 980. How far the subject of ownership.
- § 981. Joint authorship.
- § 982. Transfer.

- § 983. Effect of publication.
- § 984. Subsequent inventor, author, etc.
- § 985. Private writings.

§ 980. HOW FAR THE SUBJECT OF OWNERSHIP. The author of any product of the mind, whether it is an invention, or a composition in letters or art, or a design, with or without delineation, or other graphical representation, has an exclusive ownership therein, and in the representation or expression thereof, which continues so long as the product and the representations or expressions thereof made by him remain in his possession.

History: Enacted March 21, 1872.

- 1. Common law re-enacted.
- 2. Copyright laws do not impair common-law rights.
- 3. Damages—Exemplary damages are recoverable.
- 4, 5. Dramatic composition is within rule.
- 6. Same—Adaptation of old play.
- 7. Effect upon common-law right of procuring copyright.
- 8. Executors and administrators succeed to right.
- 9. Good-will.
- 10, 11. Injunction lies.
- 12. Issue to jury.
- 13, 14. Jurisdiction—Alien may enforce right to literary property.
- 15. Lecture delivered is not abandoned.
- 16. Legal blank is not entitled to protection.
- 17. Multiplication of copies—No right independent of copyright laws.
- 18. Name of plaintiff as author protected against fraudulent use.
- 19. Personal property—Application of ordinary rules.
- 20. Publication—Effect of.
- 21. Public policy—Restraint of trade.
- 22. Scientific investigation by rival permitted.
- 23. Telegrams—Tapping wires enjoined.
- 24. Trade-marks.
- 25. Trade secrets entitled to protection.
- 26. Same—Infringement by employees.
- 27. Usage in regard to renewal.

1. COMMON LAW RE-ENACTED.—Independent of United States copyright laws author has, by common law, exclusive property in his composition until by publication it becomes property of general public.—*Ky. Grigsby vs. Breckinridge*, 3 Bush 480, 92 Am. Dec. 509. *N. Y. Palmer vs. De Witt*, 47 N. Y.

532, 535, 7 Am. Rep. 480; *Tabor vs. Hoffman*, 118 N. Y. 80, 16 Am. St. Rep. 740, 23 N. E. Rep. 12. *Eng. Millar vs. Taylor*, 4 Burr. 2303, 2379. See *Mass. Keene vs. Kimball*, 32 Mass. (16 Gray) 545, 77 Am. Dec. 426; *Peabody vs. Norfolk*, 93 Mass. 452, 96 Am. Dec. 664. *N. J. Aronson vs. Baker*, 43 N. J. Eq. (16 Stew.) 365. *N. Y. Jewelers' Mercantile Agency vs. Jewelers' Weekly Pub. Co.*, 155 N. Y. 241, 63 Am. St. Rep. 666, 49 N. E. Rep. 372, 41 L. R. A. 346; *Hoyt vs. Mackenzie*, 3 Barb. Ch. 320, 49 Am. Dec. 178. *Pa. Dock vs. Dock*, 180 Pa. St. 14, 57 Am. St. Rep. 617, 36 Atl. Rep. 411. *Fed. Wheaton vs. Peters*, 33 U. S. (8 Pet.) 591, bk. 8 L. ed. 1055; *Little vs. Hall*, 59 U. S. (18 How.) 165, bk. 15 L. ed. 328; *Aronson vs. Fleckenstein*, 38 Fed. Rep. 75. *Eng. Prince Albert vs. Strange*, 1 McN. & G. 25.

2. COPYRIGHT LAWS DO NOT IMPAIR COMMON-LAW RIGHTS.—Common-law rights of authors have not been taken away or impaired by copyright laws.—*Palmer vs. De Witt*, 47 N. Y. 532, 536, 7 Am. Rep. 480. See *Press Pub. Co. vs. Monroe*, 73 Fed. Rep. 196, 19 C. C. A. 429, 51 L. R. A. 353.

3. DAMAGES.—Exemplary damages are recoverable where right of property in literary composition is ruthlessly invaded in utter disregard of owner's rights.—*Press Pub. Co. vs. Monroe*, 73 Fed. Rep. 196, 19 C. C. A. 429, 51 L. R. A. 353 (writ of error dismissed 164 U. S. 105, bk. 41 L. ed. 367).

4. DRAMATIC COMPOSITION IS WITHIN RULE.—Where drama remains in manuscript, and is not printed and not published otherwise than by its presentation on the stage, it remains private property, and stage production does not constitute general gift or authority for any purpose of profit or publication by

others. Author retains his right in his manuscript until he relinquishes it by contract, or some unequivocal act indicating intent to dedicate it to the public.—*N. J. Aronson vs. Baker*, 43 N. J. Eq. (16 Stew.) 365, 367, 368. *N. Y. Palmer vs. De Witt*, 47 N. Y. 532, 543, 7 Am. Rep. 480. *Fed. Aronson vs. Fleckenstein*, 23 Fed. Rep. 75. See *Maxwell vs. Goodwin*, 93 Fed. Rep. 665.

5. Compare: *Keene vs. Kimball*, 32 Mass. (16 Gray) 545, 551, 77 Am. Dec. 426.

6. Adaptation of old play is entitled to protection as literary property, if such adaptation has originality.—*Aronson vs. Fleckenstein*, 23 Fed. Rep. 75.

7. EFFECT UPON COMMON-LAW RIGHT OF PROCURING COPYRIGHT.—Statutory copyright operates to divest party of common-law right.—*Keene vs. Kimball*, 32 Mass. (16 Gray) 545, 549, 77 Am. Dec. 426; *Jewelers' Merc. Agency vs. Jewelers' Weekly Pub. Co.*, 155 N. Y. 241, 63 Am. St. Rep. 666, 49 N. E. Rep. 372, 41 L. R. A. 846.

8. EXECUTORS AND ADMINISTRATORS SUCCEED TO RIGHT of original proprietor of such property.—*Peabody vs. Norfolk*, 93 Mass. 452, 461, 96 Am. Dec. 664.

9. GOOD-WILL.—See post §§ 992, 993. And consult *KERR'S SYNTHETICAL INDEX* to this work.

10. INJUNCTION LIES against infringement of rights secured by this section. *Mass. Peabody vs. Norfolk*, 93 Mass. 452, 461, 96 Am. Dec. 664. *N. Y. Jewelers' Merc. Agency vs. Jewelers' Weekly Pub. Co.*, 155 N. Y. 241, 63 Am. St. Rep. 666, 49 N. E. Rep. 372, 41 L. R. A. 846; *Kiernan vs. Manhattan Q. Tel. Co.*, 50 How. Pr. 194. *Fed. Clemens vs. Belford*, 14 Fed. Rep. 728; *Goldmark vs. Krelling*, 25 Fed. Rep. 349; *Drummond vs. Altemus*, 60 Fed. Rep. 338; *Illinois Com. Co. vs. Cleveland Tel. Co.*, 119 Fed. Rep. 301, 56 C. C. A. 205. See *Ky. Grigaby vs. Breckinridge*, 2 Bush 480, 93 Am. Dec. 509. *N. J. Aronson vs. Baker*, 43 N. J. Eq. (16 Stew.) 365. *Fed. Pierpont vs. Fowle*, 2 Woodb. & M. 23, 19 Fed. Cas. 652.

11. Compare: *Newbery vs. James*, 2 Meriv. 446 (wherein Lord Eldon declined to grant injunction, giving as reason that if art and method of preparing composition was secret, court could not, without having it disclosed, ascertain whether it had been infringed. This case was in effect and impliedly overruled in *Yovatt vs. Winyard*, 1 Jac. & W. 394, decided by same learned chancellor).

12. ISSUE TO JURY may be awarded in suit for infringement, but in accordance with general principles of equity practice, verdict or finding of jury is merely advisory and is not binding upon court.—*Maxwell vs. Goodwin*, 93 Fed. Rep. 665.

13. JURISDICTION—Alien may enforce right to literary property.—Courts of state are open to alien friend pursuing his right in literary property and seeking redress from wrong-doer.—*Palmer vs. De Witt*, 47 N. Y. 532, 539, 7 Am. Rep. 480.

14. Compare: *Carte vs. Ford*, 15 Fed. Rep. 439.

15. LECTURE DELIVERED IS NOT ABANDONED.—Public delivery of lecture in presence of those who choose to attend does not constitute dedication to public so that it can be printed and published without lecturer's permission.—*Drummond vs. Altemus*, 60 Fed. Rep. 338. See *Mass. Keene vs. Kimball*, 32 Mass. (16 Gray) 545, 77 Am. Dec. 426. *N. Y. Palmer vs. De Witt*, 47 N. Y. 532, 543, 7 Am. Rep. 480.

16. LEGAL BLANK IS NOT ENTITLED TO PROTECTION, even though copyrighted, where such form has no literary merit, and claim is based solely upon fact alleged that originator of form has put it into "convenient" shape.—*Carlisle vs. Colusa Co.*, 57 Fed. Rep. 979, 980 (case arising in California).

17. MULTIPLICATION OF COPIES—No right independent of copyright laws.—When book is once published it is dedicated to public and author has not, at common law, any exclusive right to multiply copies of it, or to control subsequent issues of it by others. The right of author or proprietor of literary work to multiply copies to exclusion of others is creature of statute.—*Palmer vs. De Witt*, 47 N. Y. 532, 536, 7 Am. Rep. 480.

18. NAME OF PLAINTIFF AS AUTHOR PROTECTED AGAINST FRAUDULENT USE.—Equity will enjoin use of name of author on spurious works purporting to have been written by him, which in fact he did not write.—*Clemens vs. Belford* (The "Mark Twain" Case), 14 Fed. Rep. 728.

19. PERSONAL PROPERTY—Application of ordinary rules.—Property in manuscript which author or proprietor of unpublished literary work has is not distinguishable from any other personal property, and is governed by same rules of transfer and succession, and is protected by same process, and has the same benefit of all remedies accorded to other property, so far as applicable.—*Palmer vs. De Witt*, 47 N. Y. 532, 538, 7 Am. Rep. 480.

20. PUBLICATION—Effect of.—When manuscript is once published with assent of author, it becomes property of world, unless author has secured exclusive rights under copyright laws.—*Palmer vs. De Witt*, 47 N. Y. 532, 539, 7 Am. Rep. 480.

21. PUBLIC POLICY—Restraint of trade.—Secret art is legal subject of property, and bond for conveyance of exclusive right to it is not open to objection of being in restraint of trade, but may be enforced by action at law, and requires obligor not to divulge secret to any other person.—*Peabody vs. Norfolk*, 93 Mass. 452, 460, 96 Am. Dec. 664. See *Vickery vs. Welch*, 36 Mass. (19 Pick.) 523; *Taylor vs. Blanchard*, 95 Mass. (13 Allen) 370, 373, 374, 90 Am. Dec. 203; *Jarvis vs. Peck*, 10 Paige Ch. (N. Y.) 118.

22. SCIENTIFIC INVESTIGATION BY RIVAL PERMITTED.—If knowledge of secret, e. g. constituents of medical compound, is obtained by chemical analysis or series of experiments, rival investigator who discovers ingredients and their proportions is entitled to avail himself of knowledge so obtained (dictum).—*Tabor vs. Hoffman*, 118 N. Y. 30, 16 Am. St. Rep. 740, 23 N. E. Rep. 12.

23. TELEGRAMS.—Tapping wires enjoined, where messages which constitute literary property are being stolen, e. g. market quotations.—*Illinois Com. Co. vs. Cleveland Tel. Co.*, 119 Fed. Rep. 301, 56 C. C. A. 205.

24. Trade-marks.—See post § 991 and note. And consult **KERR'S SYNTHETICAL INDEX** to this work.

25. TRADE SECRETS ENTITLED TO PROTECTION.—Trade secrets and secret formulas are entitled in equity to protection against infringers who surreptitiously or fraudulently obtain knowledge thereof.—*Tabor vs. Hoffman*, 118 N. Y. 30, 16 Am. St. Rep. 740, 23 N. E. Rep. 12 (patterns for making pumps protected).

26. Infringement by employees.—When party who has secret in trade employs persons under contract, express or implied, or under duty, express or implied, such persons cannot gain knowledge of secret and then set it up against employer.—*Morison vs. Moat*, 9 Hare 241, 21 L. J. (N. S.) Ch. 243.

27. USAGE IN REGARD TO RENEWAL.—Usage among booksellers to regard renewed term as passing with first one, if it can apply at all, can apply only among those acquainted with usage, or belonging to fraternity of booksellers.—*Pierpont vs. Fowle*, 3 Woodb. & M. 23, 19 Fed. Cas. 652.

§ 981. JOINT AUTHORSHIP. Unless otherwise agreed, a product of the mind in the production of which several persons are jointly concerned, is owned by them as follows:

1. If the product is single, in equal proportions;
2. If it is not single, in proportion to the contribution of each.

History: Enacted March 21, 1872.

Equity has no jurisdiction when remedy at law exists.—Copartners in copyright and stereotype plates of books will be left to their remedy at law by assumption, and equity will not entertain bill to compel accounting where no discovery is sought, and necessity for invoking equitable relief is not clearly

apparent.—*Carter vs. Bailey*, 64 Me. 453, 18 Am. Rep. 273. See *Vose vs. Singer*, 86 Mass. (4 Allen) 227, 81 Am. Dec. 696 (case involving patent; court saying: "Doctrine of contribution has never been held to apply to use of rights of this character").

§ 982. TRANSFER. The owner of any product of the mind, or of any representation or expression thereof, may transfer his property in the same.

History: Enacted March 21, 1872.

1. Future improvements are assignable.
2. Invalidity of patent.
3. Same—Qualifications of rule.
4. Novelty—Transfer of patent without consideration.
5. Right of assignee to sell.
6. Specific performance of contract to sell secret.

1. FUTURE IMPROVEMENTS ARE ASSIGNABLE.—Owner of formula may assign it, together with future improvements, and such assignment, as respects future improvements, is enforceable in equity.—*McFarland vs. Stanton Mfg. Co.*, 53 N. J. Eq. (8 Dick.) 649, 651, 51 Am. St. Rep. 647, 33 Atl. Rep. 962.

2. INVALIDITY OF PATENT.—In action for purchase price of patent invalidity of such patent is defense on the ground of failure of consideration.—*Jones vs. Burnham*, 67 Me. 93, 24 Am. Rep. 10; *Marston vs. Swett*, 66 N. Y. 206, 212, 23 Am. Rep. 43.

3. Qualifications of rule.—If no fraud attended transfer, and if transferee was not interfered with by one having superior title or otherwise, he is liable to transferrer notwithstanding invalidity of patent.—*Me. Jones*

vs. Burnham, 67 Me. 93, 24 Am. Rep. 10. N. Y. *Marston vs. Swett*, 66 N. Y. 206, 23 Am. Rep. 43. Eng. *Laves vs. Purser*, 6 El. & Bl. 930, 83 Eng. C. L. 929, 930.

4. NOVELTY.—Transfer of patent without consideration.—In action in state court to recover from transferee instalment of price for patent, invalidity of patent for want of novelty is good defense.—*Herzog vs. Heyman*, 151 N. Y. 587, 56 Am. St. Rep. 646, 45 N. E. Rep. 1127; *Rice vs. Garnhart*, 34 Wis. 453, 17 Am. Rep. 448.

5. RIGHT OF ASSIGNEE TO SELL.—Assignment of exclusive right to fabricate and use includes right on part of transferee to sell, such right being included by implication.—*Bellus vs. Hays*, 5 Serg. & R. (Pa.) 427, 444, 9 Am. Dec. 385.

6. SPECIFIC PERFORMANCE OF CONTRACT TO SELL SECRET.—Where trader sells good-will of business and exclusive use of secret, specific performance will be decreed.—*Bryson vs. Whitehead*, 1 Sim. & Stu. 74, 1 Eng. Ch. 74. See *Green vs. Folgham*, 1 Sim. & Stu. 393, 1 Eng. Ch. 393.

§ 983. EFFECT OF PUBLICATION. If the owner of a product of the mind intentionally makes it public, a copy or reproduction may be made public by any person, without responsibility to the owner, so far as the law of this state is concerned.

History: Enacted March 21, 1872.

1. Common law re-enacted.
2. Copyright immaterial.
3. Dedication of product to public.
4. Divulging secret in judicial investigation.
5. Federal question—Commissioners' note.
6. Fraudulent procurement of manuscript, etc.
7. Inspection by internal revenue officer.
8. Lease of book constitutes publication.
9. Telegraphic transmission of news.

1. Common law re-enacted.—This section is merely declaratory of law commonly prevailing.—See *Jewelers' Merc. Agency vs. Jewelers' Weekly Pub. Co.*, 155 N. Y. 241, 63 Am. St. Rep. 666, 49 N. E. Rep. 872, 41 L. R. A. 846.

2. Copyright immaterial.—Publication operates to destroy common-law rights whether copyright be secured or not.—*Jewelers' Merc. Agency vs. Jewelers' Weekly Pub. Co.*, 155 N. Y. 241, 63 Am. St. Rep. 666, 49 N. E. Rep. 872, 41 L. R. A. 846.

3. Dedication of product to public.—If inventor suffers things invented to go into public use he thereby grants or dedicates same to public and loses his exclusive right.—*N. H. Earl vs. Page*, 6 N. H. 477, 479, 26 Am. Dec. 711. See *Fed. Pennock vs. Dialogue*, 27 U. S. (2 Pet.) 1, bk. 7 L. ed. 327; *Whittemore vs. Cutter*, 1 Gall. C. C. 478, 29 Fed. Cas. 1133. *Eng. Wood vs. Zimmer*, 1 Holt N. P. 53, 17 Rev. Rep. 605.

4. Divulging secret in judicial investigation.—Danger of divulging secret in course of judicial investigation affords no reason why court of equity should refuse remedy against wrong-doers.—*Peabody vs. Norfolk*, 98 Mass. 452, 461, 96 Am. Dec. 664.

5. Federal question.—Commissioners' note says: "Protection afforded by act of Congress

is matter of Federal legislation with which the state cannot interfere."

6. Fraudulent procurement of manuscript, etc.—If copy of manuscript, book, or other product of mind is surreptitiously obtained there is no publication such as will interfere with author's rights.—*Jewelers' Merc. Agency vs. Jewelers' Weekly Pub. Co.*, 155 N. Y. 241, 63 Am. St. Rep. 666, 49 N. E. Rep. 872, 41 L. R. A. 846.

7. Inspection by internal revenue officer.—Fact that process is liable to be inspected by assessor of internal revenue or other public officer does not render secret any less entitled to protection and does not constitute publication.—*Peabody vs. Norfolk*, 98 Mass. 452, 461, 96 Am. Dec. 664.

8. Lease of book constitutes publication.—Where author puts book on market for sale and his contract with subscribers provides that book is not sold but is loaned, and no limit is put upon circulation of book, and it is privilege of all who desire to become subscribers to do so, book is published and devoted to public notwithstanding terms of contract.—*Jewelers' Merc. Agency vs. Jewelers' Weekly Pub. Co.*, 155 N. Y. 241, 63 Am. St. Rep. 666, 49 N. E. Rep. 872, 41 L. R. A. 846. See *Ladd vs. Oxnard*, 75 Fed. Rep. 703, 705.

9. Telegraphic transmission of news.—Transmission of news over telegraphic instruments does not constitute general publication, but is analogous in principle to writing and delivery of letters.—*Kiernan vs. Manhattan Q. Tel. Co.*, 50 How. Pr. (N. Y.) 194. See *National Tel. News Co. vs. Western Union Tel. Co.*, 119 Fed. Rep. 294, 56 C. C. A. 198, 60 L. R. A. 805.

§ 984. SUBSEQUENT INVENTOR, AUTHOR, ETC. If the owner of a product of the mind does not make it public, any other person subsequently and originally producing the same thing has the same right therein as the prior author, which is exclusive to the same extent against all persons except the prior author, or those claiming under him.

History: Enacted March 21, 1872.

§ 985. PRIVATE WRITINGS. Letters and other private communications in writing belong to the person to whom they are addressed and delivered; but they cannot be published against the will of the writer, except by authority of law.

History: Enacted March 21, 1872.

1. Author has right to publish letters.
2. Bill of discovery.
3. Common law re-enacted.
4. Death of receiver of letters.
5. Definition of letter.
6. Descent of private letters—Gift causa mortis.
7. Same—Sale for payment of debts.
8. Injunction is maintainable by author.
9. Joint property—Author and recipient do not have.
10. Qualified property of writer.
11. Special property of receiver.
12. Stranger not entitled to injunction.

1. AUTHOR HAS RIGHT TO PUBLISH LETTERS as his property even though they be confidential letters or letters of friendship or

of business.—*Grigsby vs. Breckinridge*, 2 Bush (Ky.) 480, 92 Am. Dec. 509. See *Woolsey vs. Judd*, 4 Duer (N. Y.) 330.

2. BILL OF DISCOVERY.—Bill in equity is maintainable for discovery of letters alleged to be forged and for return of other letters alleged to have been stolen, as remedy at law is neither convenient nor adequate.—*Dock vs. Dock*, 130 Pa. St. 14, 57 Am. St. Rep. 617, 36 Atl. Rep. 411.

3. COMMON LAW RE-ENACTED.—This section is merely declaratory of general principles of law previously prevailing.—*Ky. Grigsby vs. Breckinridge*, 2 Bush 480, 92 Am. Dec. 509. *N. Y. Eyre vs. Higbee*, 22 How. Pr. 198; *Kiernan vs. Manhattan Q. Tel. Co.*, 50

How. Pr. (N. Y.) 194. Pa. Dock vs. Dock, 180 Pa. St. 14, 57 Am. St. Rep. 617, 36 Atl. Rep. 411. Eng. Pope vs. Curl, 2 Atk. 842.

LETTERS—PROPERTY RIGHTS IN—Sender and receiver.—See note 57 Am. St. Rep. 619.

4. DEATH OF RECEIVER OF LETTERS has no effect upon legal rights and obligations of author and receiver. Writer of letters still has same, and only same, right to publish or enjoin publication on ground of his special property, resulting from his right to publish. Author's right to enjoin remains unimpaired, but he has no right to possession.—Grigsby vs. Breckinridge, 2 Bush (Ky.) 480, 92 Am. Dec. 509.

5. DEFINITION OF LETTER—Letter is written or printed message.—United States vs. Britton, 17 Fed. Rep. 731. See United States vs. Bromley, 53 U. S. (12 How.) 38, bk. 18 L. ed. 905; United States vs. Gaylord, 17 Fed. Rep. 438 (cases involving offense against postal laws).

6. DESCENT OF PRIVATE LETTERS—Gift causa mortis.—Where woman on her death-bed gives to daughter by first marriage letters received by her from her first husband, from her second husband, and from others during her girlhood and widowhood and at other times, they do not constitute any portion of her intestate estate, and are not assets in hands of her husband as administrator.—Grigsby vs. Breckinridge, 2 Bush (Ky.) 480, 92 Am. Dec. 509.

7. Sale for payment of debts—Letters in possession of decedent pass to his administrator or executor, but they are not assets which may be sold in course of administration to pay debts.—Eyre vs. Higbee, 22 How. Pr. (N. Y.) 198, 199.

8. INJUNCTION IS MAINTAINABLE BY AUTHOR—Where private letter is sent without any reservation, express or implied, general property, qualified only by right in author to publish and prevent publication by recipient, vests in recipient, but author has right to enjoin publication.—Grigsby vs. Breckinridge, 2 Bush (Ky.) 480, 92 Am. Dec. 509. See Dock vs. Dock, 180 Pa. St. 14, 57 Am. St. Rep. 617, 36 Atl. Rep. 411.

9. JOINT PROPERTY—Author and recipient do not have.—Author and recipient of private letter do not have joint property.—Grigsby vs. Breckinridge, 2 Bush (Ky.) 480, 92 Am. Dec. 509.

10. QUALIFIED PROPERTY OF WRITER—Author of letters retains qualified property in their contents, and he alone has right to publish them.—Grigsby vs. Breckinridge, 2 Bush (Ky.) 480, 92 Am. Dec. 509.

11. SPECIAL PROPERTY OF RECEIVER—Writer of letters, addressed and sent to another, does not part wholly with his property in the literary compositions, nor give the receiver the power of publishing them; at most receiver has only a special property in them, and possibly may have the property of the paper. But this does not give license to any person whatsoever to publish them; and at most the receiver has only joint property with writer.—Pope vs. Curl, 2 Atk. 842. See Gee vs. Pritchard, 2 Swanst. 402.

12. STRANGER NOT ENTITLED TO INJUNCTION—Where wife makes gift causa mortis of letters which were not written by her husband, no one except authors can object to publication by donee, and husband is not entitled to injunction.—Grigsby vs. Breckinridge, 2 Bush (Ky.) 480, 92 Am. Dec. 509.

CHAPTER IV.

OTHER KINDS OF PERSONAL PROPERTY.

§ 991. Trade-marks and signs.
§ 992. Good-will of business.

§ 993. Good-will and name, transfer of.
§ 994. Title deeds.

§ 991. TRADE-MARKS AND SIGNS. One who produces or deals in a particular thing, or conducts a particular business, may appropriate to his exclusive use, as a trade-mark, any form, symbol, or name which has not been so appropriated by another, to designate the origin or ownership thereof; but he cannot exclusively appropriate any designation, or part of a designation, which relates only to the name, quality, or the description of the thing or business, or the place where the thing is produced, or the business is carried on.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amtda. 1873-4, p. 224. See Act 1863.—Derringer vs. Plate, 29 Cal. 292, 294, 87 Am. Dec. 170.

I. In General.

1. Applied, cited, construed, referred to, etc.
2. Criminal prosecution for counterfeiting trade-marks.
3. Destroying or defacing trade-mark—Constitutes misdemeanor.
4. Recordation of trade-marks.

II. Origin, Nature, and Purpose of Trade-marks.

- 5, 6. Common-law origin.
7. Copyrights and patents—Trade-marks not analogous to.
- 8-10. Definition of trade-mark—Commissioners' note—Mark defined.
11. Duration of trade-mark—Expiration of patent.

12, 13. Good-will—In conjunction with trade-mark—Resemblance between good-will and trade-mark.

14. Office of trade-mark—Object of law in protecting.

15. Property right—Trade-mark is.

16. Territorial bounds.

III. Right to Trade-mark and Requisites Thereof.

17. Acquisition of trade-mark—User necessary.

18. Same—Change of trade-mark.

19. Same—Evolution of trade-mark.

20, 21. Same—New business—Trade-mark may be acquired in.

22. Same—Use of other trade names.

23. Advertisements, circulars, price lists not trade-marks.

24. Alien friends may acquire trade-marks.

25. Anticipation of name or device.

26. Any lawful pursuit gives right to trade-mark.

27. Appurtenance—Trade-mark is.

28. Book—Name or title protected.

29. Classification of trade-marks.

30. Color cannot be appropriated as trade-mark.

31. Commendatory assertions embodied in trade-mark.

32. Constituents and essentials of trade-mark.

33. Corporation's name protected.

34. Descriptive words—Are not as general rule adoptable.

35. Same—Combination of descriptive words.

36. Same—Directions for using article.

37. Same—Foreign words.

38-39. Same—Illustrations of what are and what are not descriptive matters.

70. Same—Judicial notice of meaning of words.

71, 72. Same—Numbers, figures, letters, marks, etc., not adoptable unless used arbitrarily.

73, 74. Same—Origination of new name by inventor of compound.

75. Geographical names—Appropriation not permitted as general rule.

76. Same—Combination of geographical name with other matters.

77. Same—Fraudulent use of geographical name by infringer.

78. Same—Private estate—Name of may be adopted.

79. Hotel name is trade-mark.

80. Same—Sign on house unnecessary.

81, 82. Labels—Fraudulent imitation not permitted.

83. Name of manufacturer or distributor may be used.

84. Same—Initials or monograms adoptable.

85, 86. Natural products—Right to acquire trade-mark for.

87. Number of trade-marks permitted—Only one for each article.

88. Originality is necessary.

89. Same—Foreign country—Prior adoption in.

90-111. Same—Illustrations of what is and what is not original.

112. Same—Invention is unnecessary.

113. Origin or ownership of goods must be indicated by trade-mark.

114. Packages are not subject of exclusive appropriation.

115, 116. Sign on place of business may constitute trade-mark.

117. Same—Tenant's right to transfer sign or name.

118. Theatrical troupe—Name entitled to protection.

119, 120. Union label constitutes trade-mark.

IV. Transfers of Trade-marks.

121. Apart from article to which affixed.

122. Business transferred.

123. Chattel mortgage includes trade-mark.

124. Fraudulent use of trade-mark by transferee.

125. Same—Superintendence of manufacture by transferrer.

126. Judicial sale of trade-mark.

V. Infringement of Trade-mark.

127. In general—No hard and fast rule as to what constitutes.

128. Addition of immaterial matter—Infringement notwithstanding.

129, 130. Color—Imitation of.

131. Colorable imitations not allowed.

132. Criterion of infringement—Deception of public.

133. Deception of public by dealers in defendant's commodity.

134. Dress of goods considered.

135. Entire device or design considered.

136. Exact similarity not necessary to constitute infringement.

137. False representation—No infringement without.

138-152. Illustrations of infringements.

153. Names of parties—Defendant may use his own name.

154. Same—Fraudulent use of defendant's name not permitted.

155. Same—Initial as infringement of name.

156. Same—Prefixes.

157. Same—Transfer of name to corporation.

158. Package—Consideration of general appearance of.

159. Partial infringement gives right to relief.

160. Simulation is essential ingredient of infringement.

161. Pictures.

162. Presumption of intent to deceive.

163. Question of fact for jury.

164. Refilling bottles.

165. Removal of lessee of hotel after establishing name.

166. Transfer of trade-mark—Subsequent imitation by transferrer.

167. Transposition of words—Infringement notwithstanding.

168, 169. Unfair business competition—Fraud ground for relief regardless of infringement.

VI. Remedies for Infringement—Pleading and Practice.

170. Common-law remedies not abrogated by statute.

- 171. Costs are recoverable by complainant.
- 172. Criminal prosecution for violation of trade-mark.
- 173. Demand before action unnecessary.
- 174, 175. Injunction—Equity has jurisdiction to grant.
- 176. Same—Clear right to relief must be shown.
- 177. Same—Discretion of court exercised.
- 178, 179. Same—Fraud—Not basis of jurisdiction.
- 180. Same—Same—Plaintiff's fraud—Doctrine of clean hands.
- 181-184. Same—Same—Same—Illustrations—Misrepresentations as to make, ingredients, and origin of goods.
- 185, 186. Same—Ignorance and innocence of infringer immaterial.
- 187. Same—Injunction against injunction not granted.
- 188. Same—Mandatory injunction requiring change of sign.
- 189. Same—Monetary loss not necessary.
- 190. Same—Preliminary injunction.
- 191. Same—Quality of defendant's article immaterial.
- 192. Same—Scope of injunction—Business not enjoined.
- 193. Same—Third persons—Infringement by immaterial.
- 194. Same—Threats to continue wrong need not be shown.
- 195. Jurisdiction—Foreign courts have.
- 196. Laches—Application of equitable principles.
- 197. Same—Accounting denied because of.
- 198. Same—Defense not favored.
- 199. Same—Notice and knowledge of infringement.
- 200. Same—Preliminary injunction denied because of.
- 201. Pleading—Allegations on information and belief.
- 202. Same—Demurrer admits allegation of fraud.
- 203. Same—General requisites of bill of injunction.
- 204. Same—Laches must be pleaded.
- 205. Stay of injunction pending appeal.
- 206. Trespass on the case lies.
- 207. Same—Remedy of purchaser of spurious article.

VII. Damages for Infringement.

- 208. Are recoverable for infringement.
- 209. Exemplary damages—Distinction between actions at law and in equity.
- 210. Nominal damages are recoverable.
- 211-213. Profits are realized by infringer.
- 214. Reputation of plaintiff injured.

I. IN GENERAL.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Eggers vs. Hink*, 63 Cal. 445, 446, 49 Am. Rep. 96 (quoted and applied); *Schmidt vs. Brieg*, 100 Cal. 672, 677, 35 Pac. Rep. 623, 22 L. R. A. 790 (construed and applied); *Castle vs. Siegfried*, 103 Cal. 71, 73, 37 Pac. Rep. 210 (construed and applied); *Hainque vs. Cyclops Iron Works*, 136 Cal. 351, 352, 63 Pac. Rep. 1014 (applied).

2. Criminal prosecution for counterfeiting trade-marks.—See Pen. Code § 351 and note.

3. Destroying or defacing trade-mark—Constitutes misdemeanor.—See Pen. Code § 354½ and note.

4. Recordation of trade-marks.—See KERR'S CYC. POL. CODE §§ 3197, 3198 and notes.

II. ORIGIN, NATURE, AND PURPOSE OF TRADE-MARKS.

5. COMMON-LAW ORIGIN OF TRADE-MARKS.—Right of property in trade-marks does not in any manner depend for its inceptive existence or support upon statutory law, though its enjoyment may be better secured and guarded, and infringements upon rights of proprietor may be more effectually prevented or redressed by aid of statute than at common law.—*Woodward vs. Lazar*, 21 Cal. 448, 451, 82 Am. Dec. 751; *Derringer vs. Plate*, 29 Cal. 292, 295, 87 Am. Dec. 170; *Falkinburg vs. Lucy*, 35 Cal. 52, 64, 92 Am. Dec. 76. *Conn. Bradley vs. Norton*, 33 Conn. 157, 37 Am. Dec. 200. *Iowa. Shaver vs. Shaver*, 54 Iowa 208, 37 Am. Rep. 194, 6 N. W. Rep. 188. *Ky. Metcalfe vs. Brand*, 36 Ky. 331, 9 Am. St. Rep. 282, 5 S. W. Rep. 773. *La. Wolfe vs. Barnett*, 24 La. Ann. 97, 13 Am. Rep. 111. *Me. Symonds vs. Jones*, 82 Me. 302, 17 Am. St. Rep. 485, 19 Atl. Rep. 820, 8 L. R. A. 570. *Neb. Miskell vs. Prokop*, 53 Neb. 628, 79 N. W. Rep. 552. *N. Y. Congress & E. S. Co. vs. High Rock C. S. Co.*, 45 N. Y. 291, 6 Am. Rep. 82; *Gillott vs. Esterbrook*, 48 N. Y. 374, 3 Am. Rep. 553; *Amoskeag Mfg. Co. vs. Spear*, 3 Sandf. 599, 605 (said to be leading American case on question of trade-marks). *Wash. Woodcock vs. Guy*, 33 Wash. 234, 74 Pac. Rep. 358. *Fed. Amoskeag Mfg. Co. vs. Trainer*, 101 U. S. 51, bk. 25 L. ed. 993; *La Croix vs. May*, 15 Fed. Rep. 236, 237; *Macmahon P. Co. vs. Denver Chemical Mfg. Co.*, 113 Fed. Rep. 468, 51 C. C. A. 302 (case arising in Colorado).

6. Contra: *Blanchard vs. Hill*, 2 Atk. 284 (wherein it was doubted whether right to particular trade-mark could be acquired).

7. COPYRIGHTS AND PATENTS—Trade-marks not analogous to.—Property in use of trade-mark, however, bears very little analogy to that which exists in copyrights or in patents for new inventions or discoveries, as they are not required to be new, and may not involve least invention or skill in their discovery or application.—*McLean vs. Fleming*, 96 U. S. 245, 255, bk. 24 L. ed. 828.

8. DEFINITION OF TRADE-MARK.—"A trade-mark is word, symbol, figure, form, or device, or combination thereof, adopted or devised and used by manufacturer or vendor of goods, to designate the origin or ownership of his goods, and is used by him to distinguish his goods from those which are manufactured or sold by others."—*Burke vs. Cassin*, 45 Cal. 467, 478, 13 Am. Rep. 204. See *Derringer vs. Plate*, 29 Cal. 292, 294, 87 Am. Dec. 170. *Ill. Candee S. & Co. vs. Deere & Co.*, 54 Ill. 439, 5 Am. Rep. 125. *Iowa. Shaver vs. Shaver*, 54 Iowa 208, 37 Am. Rep. 194, 6 N. W. Rep. 188. *La. Vonderbank vs. Schmidt*, 44 La. Ann. 264, 32 Am. St. Rep. 336, 10 So. Rep. 616, 15 L. R. A. 462. *Mass. Weener vs. Brayton*, 152 Mass. 101, 25 N. E. Rep. 46, 3 L. R. A. 640. *Minn. Cigar Makers' P. U. vs. Conhaim*, 40 Minn. 243,

12 Am. St. Rep. 736, 41 N. W. Rep. 943, 3 L. R. A. 135. N. Y. Glen & H. Mfg. Co. vs. Hall, 61 N. Y. 226, 19 Am. Rep. 278. Fed. Shaw Stocking Co. vs. Mack, 12 Fed. Rep. 707; Hostetter vs. Fries, 17 Fed. Rep. 620; Moorman vs. Hoge, 2 Sawy. C. C. 78, 17 Fed. Cas. 715 (case arising in California). Eng. Collins Co. vs. Brown, 3 Kay & J. 423.

For other definitions, see KERR'S CYC. PEN. CODE § 353 and note; and Political Code § 2196 and note.

Definition and general characteristics of trade-mark.—See note 47 Am. Dec. 284-286.

9. Commissioners' note says: "The phrase 'trade-mark,' as used in this chapter, includes every description of word, letter, device, emblem, stamp, imprint, brand, printed ticket, label, or wrapper usually affixed by any mechanic, manufacturer, druggist, merchant, or tradesman, to denote any goods to be goods imported, manufactured, produced, compounded, or sold by him, other than any name, word, or expression generally denoting any goods to be of some particular class or description."—Quoted in Eggers vs. Hink, 63 Cal. 445, 447, 49 Am. Rep. 96.

10. "Mark" defined.—Mark is "a visible sign, made or left upon anything; a line, point, stamp, figure, or the line, drawn or impressed, so as to attract the attention, and carry some information, or intimation; and taken; a trace." Some such mark used in connection with, impressed, cut, or stamped upon, or attached to the article manufactured, or sold in the ordinary course of trade, embraces the usual and ordinary idea of a "trade-mark."—Moorman vs. Hoge, 2 Sawy. C. C. 78, 17 Fed. Cas. 715 (case arising in California, quoting Webster's dictionary).

11. **DURATION OF TRADE-MARK**—Expiration of patent.—Where patented article is given distinguishing name and trade-mark is acquired with reference to such name, upon expiration of patent exclusive right to use such name ceases.—Mass. Dover Stamping Co. vs. Fellows, 163 Mass. 191, 47 Am. St. Rep. 448, 40 N. E. Rep. 105, 28 L. R. A. 448. N. Y. Selchow vs. Baker, 93 N. Y. 59, 45 Am. Rep. 169. Fed. Singer Mfg. Co. vs. June Mfg. Co., 163 U. S. 169, bk. 41 L. ed. 118, 16 Sup. Ct. Rep. 1002; Burton vs. Stratton, 12 Fed. Rep. 696, 700; Goodyear R. Co. vs. Day, 23 Fed. Rep. 44; Gally vs. Colt's P. F. A. Mfg. Co., 30 Fed. Rep. 118, 122; Rumford C. W. vs. Muth, 35 Fed. Rep. 524, 527, 528, 1 L. R. A. 44; Fairbanks vs. Jacobus, 14 Blatchf. C. C. 337, 8 Fed. Cas. 951. Eng. Young vs. McCrae, 9 Jur. (N. S.) 322; Edleston vs. Vick, 11 Hare 78; Cheavin vs. Walker, L. R. 5 Ch. Div. 850, 22 Moak Eng. Rep. 513.

12. **GOOD-WILL**—In conjunction with the trade-mark.—There may be in particular business both good-will attending it and trade-mark attached to goods manufactured and sold, each of which is entitled to protection.—Glen & H. Mfg. Co. vs. Hall, 61 N. Y. 226, 19 Am. Rep. 278.

13. **Resemblance between good-will and trade-mark.**—Right to trade-mark in some respects resembles title to good-will of a trade, each right accruing without the aid of the statute.—Derringer vs. Plate, 29 Cal. 292, 295,

87 Am. Dec. 170. See Spieker vs. Lash, 102 Cal. 33, 43-45, 36 Pac. Rep. 362; Weinstock L. & Co. vs. Marks, 109 Cal. 529, 538, 50 Am. St. Rep. 57, 42 Pac. Rep. 142, 30 L. R. A. 182; Gregory vs. Spieker, 110 Cal. 150, 154, 52 Am. St. Rep. 70, 42 Pac. Rep. 576. Ill. Bolander vs. Peterson, 136 Ill. 215, 26 N. E. Rep. 603, 11 L. A. R. 350. La. Vonderbank vs. Schmidt, 44 La. Ann. 264, 32 Am. St. Rep. 336, 10 So. Rep. 616, 15 L. R. A. 462. Me. Symonds vs. Jones, 82 Me. 302, 17 Am. St. Rep. 485, 19 Atl. Rep. 820, 8 L. R. A. 570. Minn. Cigar Makers' P. U. vs. Conhalm, 40 Minn. 243, 12 Am. St. Rep. 726, 41 N. W. Rep. 943, 3 L. R. A. 125. Ohio. Burckhardt vs. Burckhardt, 42 Ohio St. 474, 51 Am. Rep. 842. Wis. Fish Bros. W Co. vs. La Belle W. W., 82 Wis. 546, 33 Am. St. Rep. 72, 52 N. W. Rep. 595, 16 L. R. A. 453; Listman M. Co. vs. William Listman Milling Co., 88 Wis. 334, 43 Am. St. Rep. 907, 60 N. W. Rep. 281. Fed. Celluloid Mfg. Co. vs. Read, 47 Fed. Rep. 712; Keuffel & E. Co. vs. H. S. Crocker Co., 118 Fed. Rep. 187 (case arising in California).

As to good-will, see post §§ 992, 993 and notes.

14. **OFFICE OF TRADE-MARK**—Object of law in protecting.—Object of purpose of law in protecting trade-marks as property is twofold: (1) to secure to him who has been instrumental in bringing into market a superior article of merchandise the fruit of his industry and skill; (2) to protect the community from imposition, and furnish some guaranty that an article purchased as the manufacture of one who has appropriated to his own use a certain name, symbol, or device as a trade-mark, is genuine.—See Eggers vs. Hink, 63 Cal. 445, 446, 49 Am. Rep. 96. Conn. Boardman vs. Meriden Britannia Co., 35 Conn. 402, 95 Am. Dec. 270, 272. Ill. Candee S. & Co. vs. Deere & Co., 54 Ill. 439, 5 Am. Rep. 125. N. Y. Congress E. S. Co. vs. High Rock C. S. Co., 45 N. Y. 291, 6 Am. Rep. 82; Glen & H. Mfg. Co. vs. Hall, 61 N. Y. 226, 19 Am. Rep. 278. Fed. McLean vs. Fleming, 96 U. S. 245, 255, bk. 24 L. ed. 828.

15. **PROPERTY RIGHT**—Trade-mark is property, and owner thereof has right in it which is as complete as that which he possesses in the goods to which he attaches it.—Derringer vs. Plate, 29 Cal. 292, 295, 87 Am. Dec. 170. See Cole. Solis Cigar Co. vs. Pozo, 16 Colo. 388, 25 Am. St. Rep. 279, 26 Pac. Rep. 556. Conn. Bradley vs. Norton, 33 Conn. 157, 87 Am. Dec. 200. Ill. Candee S. & Co. vs. Deere & Co., 54 Ill. 439, 5 Am. Rep. 125. Me. Symonds vs. Jones, 82 Me. 302, 17 Am. St. Rep. 485, 19 Atl. Rep. 820, 8 L. R. A. 570. N. Y. Congress & E. S. Co. vs. High Rock C. S. Co., 45 N. Y. 291, 6 Am. Rep. 82; Glen & H. Mfg. Co. vs. Hall, 61 N. Y. 226, 19 Am. Rep. 278. R. I. Carmichel vs. Latimer, 11 R. I. 395, 23 Am. Rep. 481. Fed. McLean vs. Fleming, 96 U. S. 245, 255, bk. 24 L. ed. 828; La Croix vs. May, 15 Fed. Rep. 236, 237; Hostetter vs. Vowinkle, 1 Dill. C. C. 329, 12 Fed. Cas. 546.

16. **TERRITORIAL BOUNDS.**—Right to trade-mark is not limited in its enjoyment by territorial bounds, and the proprietor thereof may assert and maintain his property right wherever the common law affords remedies for

the wrongs.—Derringer vs. Plate, 29 Cal. 292, 395, 37 Am. Dec. 170.

III. RIGHT TO TRADE-MARK AND REQUISITES THEREOF.

17. ACQUISITION OF TRADE-MARK—User necessary.—Casual use of mark or device is not sufficient to confer right to exclusive use thereof.—Kohler Mfg. Co. vs. Beeshore, 59 Fed. Rep. 572, 576, 8 C. C. A. 315.

18. Change of trade-mark.—Trade-mark must be so clear and well defined as to give notice to others, and should not be deviated from capriciously or whimsically.—Candee S. & Co. vs. Deere & Co., 54 Ill. 439, 5 Am. Rep. 125.

19. Evolution of trade-mark.—Trade-mark may be adopted and acquired by gradually adding to designs or characters.—Regis vs. Jaynes & Co., 185 Mass. 458, 70 N. E. Rep. 480; United States vs. Steffens ("Trade-mark Case"), 100 U. S. 82, bk. 25 L. ed. 550.

20. New business.—Trade-mark may be acquired in.—Trade-mark or designation of one's trade may be attached to new business or to one long existing.—Glen & H. Mfg. Co. vs. Hall, 61 N. Y. 236, 19 Am. Rep. 278.

21. Compare: Macmahon P. Co. vs. Denver Chem. Mfg. Co., 113 Fed. Rep. 468, 471, 473, 51 C. C. A. 302 (wherein it is said: "Word, symbol, or device, to be a valid trade-mark constituting a right of property, must have been used by the owner in connection with the sale of his goods for such length of time, and under such circumstances, as indicates to the trade that the goods in connection with which it appears are his goods, as distinguished from those of other manufacturers or dealers. The mere adoption of such word, symbol, or device, unaccompanied by such a use, is not sufficient to create an exclusive right thereto").

22. Use of other trade names for short period of time in connection with one for which protection is sought is not conclusive on question of abandonment.—Nolan Bros. S. Co. vs. Nolan, 131 Cal. 271, 276, 32 Am. St. Rep. 346, 63 Pac. Rep. 480, 53 L. R. A. 384.

23. ADVERTISEMENTS, CIRCULARS, AND PRICE LISTS NOT TRADE-MARKS.—Is is well settled that no circular, price list, or advertisement, no matter how frequently repeated, can constitute a trade-mark.—Candee vs. Deere, 54 Ill. 439, 5 Am. Rep. 125; Ball vs. Siegel, 116 Ill. 137, 56 Am. Rep. 766; 4 N. E. Rep. 667; Bolander vs. Peterson, 136 Ill. 215, 26 N. E. Rep. 603, 11 L. R. A. 350; Keuffel & E. Co. vs. H. S. Crocker Co., 113 Fed. Rep. 187 (case arising in California).

24. ALIEN FRIENDS MAY ACQUIRE TRADE-MARKS and are entitled to the same protection in the courts of the United States as citizens where their rights are violated.—La Croix vs. May, 15 Fed. Rep. 236, 237; Taylor vs. Carpenter, 3 Story C. C. 453, 23 Fed. Cas. 742. See Collins Co. vs. Brown, 3 Kay & J. 423.

25. Anticipation of name or device.—See para. 33-112 this note.

26. ANY LAWFUL PURSUIT will entitle

one who engages therein to acquire a trade-mark.—Howard vs. Henriques, 3 Sandf. (N. Y.) 725, 727 (hotel proprietor).

27. APPURTENANCE.—Trade-mark is.—Right to trade-mark cannot exist as a mere abstract right independent of a business, but it is in the nature of an appurtenance to the business in connection with which it is used.—Derringer vs. Plate, 29 Cal. 292, 395, 37 Am. Dec. 170. La. Vonderbank vs. Schmidt, 44 La. Ann. 264, 32 Am. St. Rep. 336, 10 So. Rep. 616, 12 L. R. A. 462. Mass. Weener vs. Brayton, 152 Mass. 101, 25 N. E. Rep. 46, 8 L. R. A. 640. Minn. Cigar Makers' P. U. vs. Conhaim, 40 Minn. 243, 13 Am. St. Rep. 726, 41 N. W. Rep. 943, 3 L. R. A. 125. Fed. Morgan vs. Rogers, 19 Fed. Rep. 596, 597; Heinisch's S. Co. vs. Boker, 86 Fed. Rep. 765; Macmahon Pharmacal Co. vs. Denver Chemical Mfg. Co., 113 Fed. Rep. 468, 51 C. C. A. 302.

As to appurtenances, see ante § 662 and note.

As to fixtures, see ante § 660 and note.

28. BOOK.—Name or title will be protected.—A publisher or author has either in title of his work or in application of his name to work, or in the particular marks which designate it, a species of property similar to that which a trader has in his trade-mark, and may like a trader claim the protection of a court of equity against such a use or imitation of the name, marks, or designations as is likely in the opinion of the court to be a cause of damage to him in respect of that property.—Robertson vs. Berry, 50 Md. 591, 33 Am. Rep. 328, 330. See N. Y. Matsell vs. Flanagan, 3 Abb. Pr. N. S. 459. Fed. Estes vs. Worthington, 22 Fed. Rep. 822 (holding that "Chatter Box" as applied to juvenile books is entitled to protection). Eng. Hogg vs. Kirby, 8 Ves. 215, 7 Rev. Rep. 30; Spottiswoode vs. Clark, 10 Jur. 1043.

29. CLASSIFICATION OF TRADE-MARKS.—Trade-marks have been classified as follows: (1) personal; (2) local; (3) symbolical, as figures of animals, etc.; (4) where fancy name is used; and (5) trade-marks compounded more or less of the others.—Carmichel vs. Latimer, 11 R. I. 395, 23 Am. Rep. 481. See Gilman vs. Hunnewell, 123 Mass. 139, 148; Hier vs. Abrahams, 32 N. Y. 519, 37 Am. Rep. 589.

30. COLOR CANNOT BE APPROPRIATED AS TRADE-MARK except in connection with sufficiently complex combination of other things which stamp the appropriator's goods with individuality.—American Waltham W. Co. vs. United States Watch Co., 173 Mass. 85, 78 Am. St. Rep. 263, 53 N. E. Rep. 141, 43 L. R. A. 826. See Ill. Ball vs. Siegel, 116 Ill. 137, 56 Am. Rep. 766, 4 N. E. Rep. 667. Me. Symonds vs. Jones, 82 Me. 302, 17 Am. St. Rep. 485, 19 Atl. Rep. 820, 8 L. R. A. 570. N. Y. Morgan's Sons Co. vs. Troxell, 89 N. Y. 292, 42 Am. Rep. 294. Fed. Harrington vs. Libby, 14 Blatchf. C. C. 128, 11 Fed. Cas. 605; Moorman vs. Hoge, 2 Sawy. C. C. 78, 17 Fed. Cas. 715 (case arising in California).

31. COMMENDATORY ASSERTIONS may be embodied in trade-mark and entitled to protection, and do not transgress any rule of public policy when they do not condemn or asperse the product of others.—Cohn vs. People,

149 Ill. 486, 41 Am. St. Rep. 304, 37 N. E. Rep. 60, 23 L. R. A. 531.

32. CONSTITUENTS AND ESSENTIALS OF TRADE-MARK.—Trade-mark may consist of name, symbol, figure, letter, form, or device. If adopted and used by manufacturer or merchant in order to designate goods manufactured or sold by him; and it must be (1) adopted or used to indicate origin or ownership; (2) it must be used as an incident of a business; and (3) there must be exclusive right to use it.—*Cigar Makers' P. U. vs. Con-halm*, 40 Minn. 243, 12 Am. St. Rep. 726, 41 N. W. Rep. 943, 3 L. R. A. 125; *McLean vs. Fleming*, 96 U. S. 248, 255, bk. 24 L. ed. 528. See *Cole. Solis Cigar Co. vs. Pozo*, 16 Colo. 383, 25 Am. St. Rep. 279, 380, 281, 26 Pac. Rep. 556. *Ky. Parkland Hills B. L. W. Co. vs. Hawkins*, 95 Ky. 502, 44 Am. St. Rep. 254, 26 S. W. Rep. 389. *Wis. Listman M. Co. vs. William Listman M. Co.*, 88 Wis. 334, 43 Am. St. Rep. 907, 60 N. W. Rep. 261. *Fed. Shaw Stocking Co. vs. Mack*, 12 Fed. Rep. 707, 711; *Hostetter vs. Fries*, 17 Fed. Rep. 620.

As to matters which may and which may not be adopted as trade-marks, see note 12 Fed. Rep. 704-706.

33. CORPORATION'S NAME PROTECTED AGAINST UNFAIR IMITATION.—Name of corporation is essential part of its being, and courts, independent of statutory provisions, will protect the corporation in the use of its name, and the controlling principles in such cases are those applicable to trade-marks.—*Hainque vs. Cyclops Iron Works*, 136 Cal. 351, 352, 63 Pac. Rep. 1014. See *Me. State vs. McGrath*, 92 Mo. 355, 357, 5 S. W. Rep. 29. *N. Y. Farmers' L. & T. Co. vs. Farmers' L. & T. Co.*, 1 N. Y. Supp. 44. *Fed. William Rogers Mfg. Co. vs. Rogers & Spurr Mfg. Co.*, 11 Fed. Rep. 495; *Goodyear R. Co. vs. Day*, 23 Fed. Rep. 44; *Celluloid Mfg. Co. vs. Cellonite Mfg. Co.*, 32 Fed. Rep. 94; *Rogers Mfg. Co. vs. Rogers Co.*, 66 Fed. Rep. 56, 57; *Investor Pub. Co. vs. Dobinson*, 73 Fed. Rep. 603 (case arising in California). *Eng. Knott vs. Morgan*, 2 Keen 213, 15 Eng. Ch. 213.

As to right of corporation to have name, see ante § 354 subd. 1 and note.

34. DESCRIPTIVE WORDS.—Are not as general rule adoptable.—Words, phrases, figures, marks, and devices which are in common use as the names of articles of commerce or to designate their grade or quality are common property and cannot be adopted by any one as trade-mark.—*Falkenburg vs. Lucy*, 35 Cal. 52, 62, 65, 95 Am. Dec. 76; *Choynski vs. Cohen*, 39 Cal. 501, 503, 2 Am. Rep. 476; *Burke vs. Cassin*, 45 Cal. 467, 480, 13 Am. Rep. 204; *Schmidt vs. Briege*, 100 Cal. 672, 677, 678, 35 Pac. Rep. 623, 23 L. R. A. 790; *Castle vs. Siegfried*, 103 Cal. 71, 73, 37 Pac. Rep. 210. See *Cole. Solis Cigar Co. vs. Pozo*, 16 Colo. 383, 25 Am. St. Rep. 279, 26 Pac. Rep. 556. *Conn. Boardman vs. Meriden Britannia Co.*, 35 Conn. 403, 95 Am. Dec. 270. *Ga. Larrabee vs. Lewis*, 67 Ga. 561, 44 Am. Rep. 735. *Ill. Candee vs. Deere*, 54 Ill. 439, 5 Am. Rep. 125; *Ball vs. Siegel*, 116 Ill. 137, 56 Am. Rep. 766, 4 N. E. Rep. 667; *Bolander vs. Peterson*, 136 Ill. 215, 26 N. E. Rep. 603, 11 L. R. A. 350.

Ky. Parkland Hills B. L. W. Co. vs. Hawkins, 95 Ky. 502, 44 Am. St. Rep. 254, 26 S. W. Rep. 389. *Me. Symonds vs. Jones*, 82 Me. 302, 17 Am. St. Rep. 485, 19 Atl. Rep. 320, 3 L. R. A. 570. *Mass. Gilman vs. Hunnewell*, 122 Mass. 139; *Regis vs. Jaynes*, 185 Mass. 458, 70 N. E. Rep. 480. *Minn. Watkins vs. Landon*, 52 Minn. 389, 33 Am. St. Rep. 560, 54 N. W. Rep. 193, 19 L. R. A. 236. *Mo. Filley vs. Fassett*, 44 Mo. 169, 100 Am. Dec. 275. *N. J. International Silver Co. vs. Wm. H. Rogers Co.* (N. J. Ch. Feb. 9, 1904), 57 Atl. Rep. 1037 (declaring "it is open to every one to say what his wares are made of"). *N. Y. Caswell vs. Davis*, 58 N. Y. 223, 17 Am. Rep. 233; *Taylor vs. Gillies*, 59 N. Y. 331, 17 Am. Rep. 333; *Popham vs. Cole*, 66 N. Y. 69, 23 Am. Rep. 22; *Selchow vs. Baker*, 93 N. Y. 59, 45 Am. Rep. 169; *Royal Bak. P. Co. vs. Sherrell*, 93 N. Y. 331, 45 Am. Rep. 229; *Koehler vs. Sanders*, 123 N. Y. 65, 25 N. E. Rep. 235, 9 L. R. A. 576; *Cooke & Cobb Co. vs. Miller*, 169 N. Y. 475, 62 N. E. Rep. 582; *Barrett Chemical Co. vs. Stern*, 176 N. Y. 27, 63 N. E. Rep. 65; *Cahn vs. Gottschalk*, 2 N. Y. Supp. 13; *Town vs. Stetson*, 5 Abb. N. S. 213, 3 Daly 53; *Bininger vs. Wattles*, 28 How. Pr. 206, 207; *Booth vs. Jarrett*, 52 How. Pr. 169; *Amoskeag Mfg. Co. vs. Spear*, 2 Sandf. 599, 605 (said to be leading American case on question of trade-marks). *Oreg. Lichtenstein vs. Mellis*, 3 Oreg. 464, 34 Am. Rep. 592. *R. L. Carmichel vs. Latimer*, 11 R. I. 895, 23 Am. Rep. 481. *Tenn. C. F. Simmons Medicine Co. vs. Mansfield Drug Co.*, 93 Tenn. 84, 23 S. W. Rep. 165. *Tex. Alf vs. Radam*, 77 Tex. 530, 19 Am. St. Rep. 792, 14 S. W. Rep. 164, 9 L. R. A. 145. *Fed. Lawrence Mfg. Co. vs. Tennessee Mfg. Co.*, 138 U. S. 537, 546, bk. 34 L. ed. 997, 11 Sup. Ct. Rep. 396; *Brown Chemical Co. vs. Meyer*, 139 U. S. 540, bk. 35 L. ed. 247, 11 Sup. Ct. Rep. 625; *Columbia M. Co. vs. Alcorn*, 150 U. S. 460, bk. 37 L. ed. 1144, 14 Sup. Ct. Rep. 151; *Elgin Nat. W. Co. vs. Illinois W. C. Co.*, 179 U. S. 665, bk. 45 L. ed. 865, 21 Sup. Ct. Rep. 270; *Burton vs. Stratton*, 13 Fed. Rep. 696, 700; *Ginter vs. Kinney Tobacco Co.*, 12 Fed. Rep. 732; *Hostetter vs. Fries*, 17 Fed. Rep. 620; *Carbolic Soap Co. vs. Thompson*, 25 Fed. Rep. 625; *Colgan vs. Danheiser*, 35 Fed. Rep. 150; *Clotworthy vs. Schepp*, 43 Fed. Rep. 62; *Beadleston & W. vs. Cooke Brew Co.*, 74 Fed. Rep. 229, 20 C. C. A. 405; *Harrington vs. Libby*, 14 Blatchf. C. C. 128, 11 Fed. Cas. 605.

35. Combination of descriptive words.—Coupling together in new combination words which have previously been used apart and which have entered into the common or scientific vocabulary does not give right to exclusive use of such combination where it is indicative not of origin, maker, use, and ownership only, but also of quality and other characteristics.—*Caswell vs. Davis*, 53 N. Y. 223, 236, 17 Am. Rep. 233.

36. Directions for using articles are within the rule that mere matters of description are not susceptible of adoption as trade-mark.—*Falkenburg vs. Lucy*, 35 Cal. 62, 69, 92 Am. Dec. 76. See *Ball vs. Siegel*, 116 Ill. 137, 56 Am. Rep. 766, 4 N. E. Rep. 667.

37. Foreign words are within rule, and if

merely descriptive of article to which applied will not be protected.—*Bolander vs. Peterson*, 136 Ill. 215, 26 N. E. Rep. 603, 11 L. R. A. 350 (holding "Svenska Snusmagasinet," meaning "Swedish Snuff Store," not entitled to protection). See *Burke vs. Cassin*, 45 Cal. 467, 479, 13 Am. Rep. 204; *Kaiserbrauerei B. & Co. vs. Balts B. Co.*, 71 Fed. Rep. 695.

38. SAME—ILLUSTRATIONS—A O A, denoting quality, not adoptable.—*Amoskeag Mfg. Co. vs. Trainer*, 101 U. S. 51, bk. 25 L. ed. 993.

39. Acid phosphate, merely descriptive of medicinal preparations.—*Rumford Chemical Works vs. Muth*, 35 Fed. Rep. 524, 527, 528, 1 L. R. A. 44.

40. Aromatic applied to gin, not adoptable.—*Burke vs. Cassin*, 45 Cal. 467, 13 Am. Rep. 204.

41. Compare: *Wolfe vs. Barnett*, 24 La. Ann. 97, 13 Am. Rep. 111.

42. Antiquarian book store, not adoptable.—*Choynski vs. Cohen*, 39 Cal. 501, 503, 504, 3 Am. Rep. 476.

43. Bromo-Caffein, is arbitrary name and not descriptive of contents or ingredients, and is entitled to protection.—*Keasbey vs. Brooklyn Chem. W.*, 142 N. Y. 467, 40 Am. St. Rep. 623, 37 N. E. Rep. 476.

44. Compare: *Caswell vs. Davis*, 58 N. Y. 223, 17 Am. Rep. 233 (holding that name "Ferro-Phosphorated Elixir of Calisaya Bark," is not subject to appropriation, because it is descriptive of ingredient of compound).

45. Charter Oak, is not descriptive of stove, and is adoptable.—*Elley vs. Fassett*, 44 Mo. 169, 100 Am. Dec. 275.

46. Cough remedy, is mere name or description of article.—*Gilman vs. Hunnewell*, 122 Mass. 139, 148.

47. Cramp cure, is mere descriptive name.—*L. H. Harris Drug Co. vs. Stucky*, 46 Fed. Rep. 624, 625.

48. Cresylic, applied to ointment containing cresylic acid, not entitled to protection.—*Carbolic Soap Co. vs. Thompson*, 25 Fed. Rep. 625.

49. Dessicated codfish, not protected.—*Town vs. Stetson*, 5 Abb. N. S. 213, 3 Daly (N. Y.) 53.

50. Elastic, applied to bookcases, not being descriptive or generic, protected.—*Globe-Wernicke Co. vs. Brown*, 121 Fed. Rep. 185, 187.

51. Eureka shirt is fanciful name, entitled to protection.—*Ford vs. Foster*, L. R. 7 Ch. 611.

52. Ferro-phosphorated elixir of calisaya bark, merely indicative of ingredients of medicinal compound, and not protected.—*Caswell vs. Davis*, 58 N. Y. 223, 17 Am. Rep. 233.

53. Compare: *Keasbey vs. Brooklyn Chemical W.*, 142 N. Y. 467, 40 Am. St. Rep. 623, 37 N. E. Rep. 476 (holding otherwise as to Bromo-Caffein).

54. Fruit salt, applied to powder for producing effervescent drink, not protected.—*Eno vs. Dunn*, L. R. 15 App. Cas. 252.

55. Gold medal, merely indicates high degree of merit or quality, and not protected.—

Taylor vs. Gillies, 59 N. Y. 331, 17 Am. Rep. 333.

56. Health preserving corset, not protected.—*Ball vs. Siegel*, 116 Ill. 137, 56 Am. Rep. 766, 4 N. E. Rep. 677.

57. Homeopathy specific, applied to medicine, not protected.—*Humphrey's S. H. M. Co. vs. Wenz*, 14 Fed. Rep. 250, 253.

58. Hygienic underwear, not entitled to protection.—*Jaros H. U. Co. vs. Fleece H. U. Co.*, 65 Fed. Rep. 424, 425.

59. Imperial beer, not protected, imperial denoting grade only.—*Beadleston & Woerz vs. Cooke Brew. Co.*, 74 Fed. Rep. 229, 20 C. C. A. 405.

60. International Banking Co., used in banking business, not protected.—*Koehler vs. Sanders*, 123 N. Y. 65, 25 N. E. Rep. 235, 9 L. R. A. 576.

61. Iron bitters, not capable of monopolization.—*Brown Chemical Co. vs. Meyer*, 139 U. S. 540, 542, bk. 35 L. ed. 247, 11 Sup. Ct. Rep. 625.

62. Liver medicine, not protected.—*C. F. Simmons Medicine Co. vs. Mansfield Drug Co.*, 93 Tenn. 34, 23 S. W. Rep. 165.

63. Microbe killer, not susceptible of exclusive appropriation.—*Alff vs. Radam*, 77 Tex. 530, 19 Am. St. Rep. 792, 14 S. W. Rep. 164, 9 L. R. A. 145; *Radam vs. Capital M. D. Co.*, 31 Tex. 122, 26 Am. St. Rep. 783, 16 S. W. Rep. 990.

64. Pepto-mangan, applied to medicinal compound, is arbitrary and fanciful, and entitled to protection.—*M. J. Breitenbach Co. vs. Spangenberg*, 131 Fed. Rep. 160.

65. Prime leaf lard, not protected.—*Popham vs. Cole*, 66 N. Y. 69, 23 Am. Rep. 22.

66. Rose vanilla, applied to flavoring extract, not protected.—*Clotworthy vs. Schepp*, 42 Fed. Rep. 62.

67. Sarsaparilla and iron, not subject to exclusive use.—*Schmidt vs. Brieg*, 100 Cal. 672, 678, 35 Pac. Rep. 623, 22 L. R. A. 790.

68. "Straight cut" cigarettes, not protected.—*Ginter vs. Kinney T. Co.*, 12 Fed. Rep. 782.

69. Taffy-tolu, applied to chewing gum, not protected.—*Colgan vs. Danheiser*, 35 Fed. Rep. 150, 151.

70. SAME—JUDICIAL NOTICE OF MEANING OF WORDS will be taken in determining whether they are merely descriptive of articles to which applied.—*Taylor vs. Gillies*, 59 N. Y. 331, 17 Am. Rep. 333.

71. Numbers, figures, letters, marks, etc., which are intended to indicate merely the quality or grade of goods, are not susceptible of appropriation to the exclusion of others.—*Lawrence Mfg. Co. vs. Lowell H. Mills*, 129 Mass. 325, 37 Am. Rep. 362.

72. Same—Arbitrary use of figures, letters, marks, etc., will entitle user thereof to protection.—*Gillott vs. Esterbrook*, 48 N. Y. 374, 8 Am. Rep. 553 (involving Gillott's 303 pens). See *Conn. Boardman vs. Meriden Britannia Co.*, 35 Conn. 402, 95 Am. Dec. 270. *Mass. Lawrence Mfg. Co. vs. Lowell H. Mills*, 129 Mass. 325, 37 Am. Rep. 362. *N. Y. Glen & H. Mfg. Co. vs. Hall*, 61 N. Y. 226, 19 Am. Rep.

278. *R. L. American S. L. B. Co. vs. Anthony*, 15 R. I. 333, 2 Am. St. Rep. 393, 5 Atl. Rep. 626. *Fed. Shaw S. Co. vs. Mack*, 12 Fed. Rep. 707, 711; *Humphrey's S. H. M. Co. vs. Wenz*, 14 Fed. Rep. 250; *Kinney vs. Allen*, 1 Hughes C. C. 106, 14 Fed. Cas. 608.

73. **Origination of new name by inventor.**—Where compound or other article is devised or invented, name with which it is christened by inventor is entitled to protection.—*Bradley vs. Norton*, 33 Conn. 157, 203, 37 Am. Dec. 200 (Coe's Super-phosphate of lime); *Celluloid Mfg. Co. vs. Read*, 47 Fed. Rep. 712; *Jaros H. U. Co. vs. Fleece H. U. Co.*, 65 Fed. Rep. 424. See *Derringer vs. Plate*, 29 Cal. 292, 37 Am. Dec. 170 (*Derringer Pistol*).

74. *Contra: Hostetter vs. Fries*, 17 Fed. Rep. 620, 621 (*Hostetter's Bitters*).

75. **GEOGRAPHICAL NAMES**—Appropriation not permitted as general rule.—No exclusive right can be acquired in a geographical name applied to an article of commerce where such name is truly and not fancifully applied.—*Burke vs. Cassin*, 45 Cal. 467, 479, 13 Am. Rep. 204. See *Ill. Candee S. & Co. vs. Deere & Co.*, 54 Ill. 439, 5 Am. Rep. 125. *Ky. Metcalfe vs. Brand*, 86 Ky. 321, 9 Am. St. Rep. 282, 5 S. W. Rep. 773. *Mass. Connell vs. Reed*, 123 Mass. 477, 35 Am. Rep. 397; *American Waltham W. Co. vs. United States W. Co.*, 173 Mass. 35, 73 Am. St. Rep. 263, 53 N. E. Rep. 141, 43 L. R. A. 826. *Neb. Nebraska L. & T. Co. vs. Nine*, 27 Neb. 507, 20 Am. St. Rep. 686, 43 N. W. Rep. 348. *N. Y. Brooklyn White L. Co. vs. Masury*, 25 Barb. 416; *Newman vs. Alvord*, 49 Barb. 588; *Wolfe vs. Goulard*, 13 How. Pr. 64; *Lea vs. Wolf*, 46 How. Pr. 157, 15 Abb. Pr. N. S. 1. *Pa. Glendon Iron Co. vs. Uhler*, 75 Pa. St. 467, 15 Am. Rep. 599 (distinguishing *Wotherspoon vs. Curry*, 23 L. J. Rep. 443). *Wis. Dunbar vs. Glenn*, 42 Wis. 113, 24 Am. Rep. 395. *Fed. Delaware & H. C. Co. vs. Clark*, 80 U. S. (13 Wall.) 311, bk. 20 L. ed. 531; *Goodyear's I. R. G. Mfg. Co. vs. Goodyear R. Co.*, 128 U. S. 593, 602, bk. 33 L. ed. 535, 9 Sup. Ct. Rep. 166; *Brown Chemical Co. vs. Meyer*, 139 U. S. 540, 546, bk. 35 L. ed. 247, 11 Sup. Ct. Rep. 625; *Columbia M. Co. vs. Alcorn*, 150 U. S. 460, bk. 37 L. ed. 1144, 14 Sup. Ct. Rep. 151; *Burton vs. Stratton*, 12 Fed. Rep. 696, 700; *Rumford Chemical Works vs. Muth*, 35 Fed. Rep. 524, 1 L. R. A. 44; *Brown Chemical Co. vs. Frederick S. & Co.*, 37 Fed. Rep. 360, 361; *New York & R. C. Co. vs. Copley C. Co.*, 45 Fed. Rep. 212; *Hoyt vs. J. T. Lovett Co.*, 71 Fed. Rep. 173, 17 C. C. A. 652, 31 L. R. A. 44; *Morgan E. Co. vs. Walton*, 36 Fed. Rep. 605, 30 C. C. A. 383; *Illinois W. C. Co. vs. Elgin N. W. Co.*, 94 Fed. Rep. 667, 35 C. C. A. 237; *Continental Ins. Co. vs. Continental F. Assoc.*, 96 Fed. Rep. 346; *Shaver vs. Heller & Merz Co.*, 108 Fed. Rep. 321, 331, 48 C. C. A. 48; *Allen B. W. Co. vs. Iowa S. Co.*, 122 Fed. Rep. 796, 797; *Osgood vs. Allen*, 1 Holmes C. C. 185, 18 Fed. Cas. 871.

As to use of geographical names as trade-marks, see note by Robert Desty, 9 L. R. A. 145, 146.

76. **Combination of geographical name with other matters.**—Although geographical name is not capable of being appropriated,

yet where it is associated and used in connection with arbitrary words, figures, and symbols, fraudulent simulation of trade-mark of which it is a part will be enjoined.—*American Waltham W. Co. vs. United States W. Co.*, 173 Mass. 35, 73 Am. St. Rep. 263, 53 N. E. Rep. 141, 43 L. R. A. 826 (protecting name "Waltham Watches"). See *El Modelo C. Mfg. Co. vs. Gato*, 25 Fla. 386, 23 Am. St. Rep. 537, 7 So. Rep. 23, 6 L. R. A. 823; *Cahn vs. Gottschalk*, 2 N. Y. Supp. 13; *Newman vs. Alvord*, 51 N. Y. 139, 10 Am. Rep. 588; *Newman vs. Alvord*, 49 Barb. (N. Y.) 588 (holding that "Akron," name of town, may be appropriated).

77. **Fraudulent use of geographical name by infringer.**—Where geographical name has been adopted and claimed as trade-mark and become well-known sign and synonym for superior excellence, its use will not be permitted by imitators residing at other places for the purpose, by fraud and false representation, of appropriating the good-will and business of the original appropriator of such name.—*Pillsbury-Washburn F. M. Co. vs. Eagle*, 86 Fed. Rep. 603, 30 C. C. A. 336, 41 L. R. A. 162; *Francaise vs. Saratoga V. S. Co.*, 107 Fed. Rep. 459, 46 C. C. A. 413; *Van Hoboken vs. Mohns*, 113 Fed. Rep. 523, 530 (case arising in California); *Allen B. W. Co. vs. Iowa S. Co.*, 122 Fed. Rep. 796, 797.

78. **Private estate.**—Name of private estate may be appropriated in constructing trade-mark.—*Wotherspoon vs. Curry*, 23 L. J. Rep. 443.

79. **HOTEL NAME IS TRADE-MARK**, in which proprietor has valuable interest and which equity will protect against infringement.—*Woodward vs. Lazar*, 21 Cal. 443, 451, 32 Am. Dec. 751 ("What Cheer House"). See *Marsh vs. Billings*, 61 Mass. (7 Cush.) 322, 54 Am. Dec. 723 ("Revere House"); *Howard vs. Henriques*, 3 Sandf. (N. Y.) 725, 727 ("Irving House").

80. **Sign on house unnecessary.**—Where name of hotel appears on bills rendered to guests, and cards distributed throughout the country and placed in cabins of steamboats, etc., and use otherwise made, it is a valid trade-mark and entitled to protection, notwithstanding the fact that such name does not appear on the external walls of the house.—*Howard vs. Henriques*, 3 Sandf. (N. Y.) 725, 726, 727.

81. **LABEL**—Fraudulent imitation not permitted.—Label, although not strictly speaking trade-mark, is entitled to protection, and colorable imitation thereof, which constitutes false representation and which is liable to deceive and defraud the public, will be enjoined.—*Burke vs. Cassin*, 45 Cal. 467, 481, 13 Am. Rep. 204 (wherein statements of court are confusing and misleading, but injunction was granted). See *Sperry vs. Percival Mill Co.*, 31 Cal. 252, 258, 259, 22 Pac. Rep. 651; *Spieker vs. Lash*, 102 Cal. 38, 43, 36 Pac. Rep. 362. *Conn. Boardman vs. Meriden Britannia Co.*, 35 Conn. 402, 95 Am. Dec. 270. *Ga. Thedford Med. Co. vs. Curry*, 96 Ga. 89, 22 S. E. Rep. 661. *N. Y. Partridge vs. Menck*, 2 Barb. Ch. 101, 47 Am. Dec. 281; *Blininger vs. Wattles*, 28 How. Pr. 206. *Fed. Cleveland Stone Co. vs. Wallace*, 52

Fed. Rep. 431; Kosterling vs. Seattle Brew. & M. Co., 116 Fed. Rep. 620 (case arising in California; label on beer bottle); **Keuffel & E. Co. vs. H. S. Crocker Co., 118 Fed. Rep. 187** (case arising in California).

82. Compare: Falkinburg vs. Lucy, 35 Cal. 52, 65, 95 Am. Dec. 76; Schmidt vs. Brieg, 100 Cal. 672, 680, 681, 35 Pac. Rep. 623, 22 L. R. A. 790.

83. NAME OF MANUFACTURER OR DISTRIBUTOR MAY BE USED AS TRADE-MARK, so as to entitle him to protection against infringement, except as against others who have same name, and who use such without fraud.—**Derringer vs. Plate, 29 Cal. 292, 295, 296, 87 Am. Dec. 170. See Burke vs. Cassin, 45 Cal. 467, 480, 18 Am. Rep. 204. Ill. Frazer vs. Frazer L. Co., 121 Ill. 147, 2 Am. St. Rep. 73, 13 N. E. Rep. 639. Ky. Metcalfe vs. Brand, 36 Ky. 331, 9 Am. St. Rep. 282, 5 S. W. Rep. 773. Me. Symonds vs. Jones, 82 Me. 302, 17 Am. St. Rep. 485, 19 Atl. Rep. 320, 8 L. R. A. 570. Mass. Lawrence Mfg. Co. vs. Lowell H. Mills, 129 Mass. 325, 37 Am. Rep. 362. N. J. International Silver Co. vs. Wm. H. Rogers Co. (N. J. Ch. Feb. 9, 1904), 57 Atl. Rep. 1037 (protecting Rogers Silver Plated Ware; important case containing painstaking review of authorities). N. Y. Meneely vs. Meneely, 62 N. Y. 427, 20 Am. Rep. 489; Faber vs. Faber, 3 Abb. N. S. 115, 49 Barb. 357. Fed. Singer Mfg. Co. vs. June Mfg. Co., 163 U. S. 169, 188, bk. 41 L. ed. 118, 16 Sup. Ct. Rep. 1002 (where Mr. Justice White says: "Where name is one which has previously thereto come to indicate the source of manufacture of particular devices, the use of such name by another, unaccompanied by any precaution or indication, in itself amounts to an artifice calculated to produce the deception alluded to in the foregoing adjudications"); Croft vs. Day, 7 Beav. 84.**

84. Initials or monograms may be used in like manner and with like effect.—Van Hoboken vs. Mohns, 112 Fed. Rep. 528, 530 (case arising in California).

85. NATURAL PRODUCTS—As general rule trade-mark may be acquired to product.—Owner of peculiar product of nature, such as mineral or mineral water, may deal in the same and may acquire trade-mark with reference to same and the right to the exclusive use of such trade-mark.—Ky. Parkland Hills B. L. W. Co. vs. Hawkins, 95 Ky. 502, 44 Am. St. Rep. 254, 26 S. W. Rep. 389. N. Y. Congress & E. S. Co. vs. High Rock C. S. Co., 45 N. Y. 291, 6 Am. Rep. 82; Glen & H. Mfg. Co. vs. Hall, 61 N. Y. 226, 19 Am. Rep. 278. Wis. Dunbar vs. Glenn, 42 Wis. 118, 24 Am. Rep. 395. Eng. Braham vs. Beachim, L. R. 7 Ch. Div. 848, 47 L. J. Ch. 348, 38 L. T. (N. S.) 640, 26 W. R. 654, 25 Moak Eng. Rep. 55.

86. Organic reproductive articles.—Seeds, plants, vines, etc., which have innate vital powers independently of care, management or ingenuity of man, carry with them when sold right of property in the buyer not only in the article sold but also in the natural increase or products of same when sown or planted, and neither the common law nor the statutes extend the protection of trade names to such articles, and buyer of such stock may

cultivate the same and sell its products under the name of the parent stock.—Hoyt vs. J. T. Lovett Co., 71 Fed. Rep. 173, 173, 17 C. A. 652, 31 L. R. A. 44 (case of first impression).

87. THE NUMBER OF TRADE-MARKS.—It would seem that no more than one trade-mark can be acquired with reference to a given article.—Candee vs. Deere, 54 Ill. 439, 5 Am. Rep. 135.

88. ORIGINALITY IS NECESSARY.—In order that claimant of trade-mark may primarily acquire right of property in it, it must have been originally adopted and used by him—i. e. the assumed name or designation must not be one previously in actual use by others.—Derringer vs. Plate, 29 Cal. 292, 295, 87 Am. Dec. 170; Falkinburg vs. Lucy, 35 Cal. 52, 64, 95 Am. Dec. 76; Burke vs. Cassin, 45 Cal. 467, 479, 18 Am. Rep. 204. See Cole. Solis Cigar Co. vs. Pozo, 16 Colo. 383, 25 Am. St. Rep. 279, 28 Pac. Rep. 556. Mass. Lawrence Mfg. Co. vs. Lowell H. Mills, 129 Mass. 325, 37 Am. Rep. 362. Me. Filley vs. Fassett, 44 Mo. 169, 100 Am. Dec. 275. N. Y. Taylor vs. Gillies, 59 N. Y. 331, 17 Am. Rep. 333; Popham vs. Cole, 66 N. Y. 69, 23 Am. Rep. 22; Van Bell vs. Prescott, 82 N. Y. 630; Town vs. Stetson, 5 Abb. N. S. 218, 3 Daly 53. Oreg. Lichtenstein vs. Mellis, 3 Oreg. 464, 34 Am. Rep. 592. R. L. Carmichel vs. Latimer, 11 R. L. 395, 23 Am. Rep. 481. Wis. Marshall vs. Pinkham, 52 Wis. 573, 38 Am. Rep. 756. Fed. Delaware & H. C. Co. vs. Clark, 80 U. S. (13 Wall.) 811, bk. 20 L. ed. 581; Columbia Mill Co. vs. Alcorn, 150 U. S. 460, bk. 37 L. ed. 1144, 14 Sup. Ct. Rep. 151. La. Republique Francaise vs. Saratoga V. S. Co., 191 U. S. 427, bk. 48 L. ed. 247; Kaiserbrauerei B. Co. vs. Baltz B. Co., 71 Fed. Rep. 695; Globe-Wernicke Co. vs. Brown, 121 Fed. Rep. 185; Harrington vs. Libby, 14 Blatchf. C. C. 128, 11 Fed. Cas. 605; Moorman vs. Hoge, 2 Sawy. C. C. 78, 17 Fed. Cas. 715 (case arising in California).

89. Foreign country—Prior adoption in, will preclude adoption in this country.—Burke vs. Cassin, 45 Cal. 467, 479, 18 Am. Rep. 204 ("Schiedam Schnapps," name for gin in Holland).

90. SAME—ILLUSTRATIONS—Bucket or tin pail in which collars are put up not adoptable.—Harrington vs. Libby, 14 Blatchf. C. C. 128, 11 Fed. Cas. 605.

91. CELLULOID STARCH, is fanciful name and may be monopolized by first adopter.—Celluloid Mfg. Co. vs. Read, 47 Fed. Rep. 712, 716.

92. "Columbia" as applied to flour, being in common use, no one can appropriate it to himself exclusively.—Columbia M. Co. vs. Alcorn, 150 U. S. 460, bk. 37 L. ed. 1144, 14 Sup. Ct. Rep. 151.

93. Compare: United States vs. Steffens, 24 Int. Rev. Rec. 14, 27 Fed. Cas. 1303 (holding that national emblem is adoptable).

94. Cyclops, may be used as name for machine works.—Hainque vs. Cyclops Iron Works, 136 Cal. 351, 352, 68 Pac. Rep. 1014.

95. Fabrice Tobacco, not adoptable, because of anticipation.—Solis C. Co. vs. Pozo, 16 Colo. 383, 25 Am. St. Rep. 279, 281, 26 Pac. Rep. 556.

96. **I X L**, not adoptable, because of previous use.—*Lichtenstein vs. Mellis*, 3 Oreg. 464, 34 Am. Rep. 592.

97. **Kaiser beer**, having been previously adopted, is not susceptible of exclusive appropriation.—*Kaiserbrauerei B. Co. vs. Balts Brew. Co.*, 71 Fed. Rep. 695.

98. **Lightning**, applied to hay-knife, is original and not merely descriptive.—*Hiram Holt Co. vs. Wadsworth*, 41 Fed. Rep. 34, 35, 36.

99. **"Marvel,"** name for flour, is sufficiently original.—*Listman M. Co. vs. Wm. Listman M. Co.*, 38 Wis. 334, 43 Am. St. Rep. 907, 60 N. W. Rep. 261.

100. **"Old London Dock Gin,"** not adoptable.—*Bininger vs. Wattles*, 23 How. Pr. (N. Y.) 206.

101. **"Old Oscar Pepper,"** is entitled to protection as name for whisky.—*Pepper vs. Labrot*, 8 Fed. Rep. 29.

Adulteration destroys right to protection, see par. 180 this note.

102. **"Persian Thread,"** good trade-mark.—*Taylor vs. Carpenter*, 3 Story C. C. 453, 23 Fed. Cas. 742; 2 Woodb. & M. C. C. 1, 23 Fed. Cas. 744.

103. **"Rock and Rye,"** applied to mixture of whisky and white rock-candy, is not susceptible of exclusive appropriation.—*Van Bell vs. Prescott*, 32 N. Y. 630.

104. **"Royal,"** not adoptable, because of prior appropriation.—*Royal Baking P. Co. vs. Sherrell*, 93 N. Y. 331, 45 Am. Rep. 229.

105. **"Sliced Animals,"** name applied to toy, sufficiently arbitrary and original.—*Selchow vs. Baker*, 93 N. Y. 59, 45 Am. Rep. 169.

106. **Star** is adoptable as trade-mark for shirts.—*Morrison vs. Case*, 9 Blatchf. C. C. 548, 17 Fed. Cas. 537.

107. **"Twin Brothers' Dry Hop Yeast,"** has requisite originality.—*Burton vs. Stratton*, 13 Fed. Rep. 696.

108. **"What Cheer House,"** name of hotel, constitutes valid trade-mark.—*Woodward vs. Lazar*, 21 Cal. 448, 449, 451, 452, 32 Am. Dec. 751.

109. **Whisky barrel**, not adoptable as trade-mark, because of lack of originality.—*Moorman vs. Hoge*, 3 Sawy. C. C. 78, 17 Fed. Cas. 715 (case arising in California).

110. **"Yankee,"** may be adopted as trade-mark, to designate shaving soap.—*Williams vs. Adams*, 3 Biss. C. C. 452, 29 Fed. Cas. 1349 (decided by court at time when Yankee was used to a limited extent).

111. **X with initials in angles**.—Where X appears to be common among importers of tea as distinguishing mark for that commodity and it appears that importers are in the habit of putting their initials in the angles of such X, one importer has no exclusive right to make such use of his initials and cannot enjoin another importer from using his own initials in such manner.—*Castle vs. Siegfried*, 103 Cal. 71, 73-74, 37 Pac. Rep. 210.

112. **Same**.—Invention is unnecessary.—Although originality is required, invention is not

necessary in the sense that the maker of the trade-mark must have made discovery in sense that the word is used in law on patents.—See *Osgood vs. Allen*, 1 Holmes C. C. 185, 13 Fed. Cas. 371.

113. **ORIGIN OR OWNERSHIP OF GOODS MUST BE INDICATED** by trade-mark, and it is only to the extent that it does so that it will be protected.—*Falkinburg vs. Lucy*, 35 Cal. 52, 64, 95 Am. Dec. 76; *Castle vs. Siegfried*, 103 Cal. 71, 72, 37 Pac. Rep. 210. See *Comm. Boardman vs. Meriden Britannia Co.*, 35 Conn. 402, 95 Am. Dec. 270. *Ky. Metcalfe vs. Brand*, 86 Ky. 331, 9 Am. St. Rep. 232, 5 S. W. Rep. 773. *Me. Symonds vs. Jones*, 82 Me. 302, 17 Am. St. Rep. 485, 19 Atl. Rep. 820, 3 L. R. A. 570. *Mass. Weener vs. Brayton*, 152 Mass. 101, 25 N. E. Rep. 46, 3 L. R. A. 640. *Minn. Cigar Makers' P. U. vs. Conhalm*, 40 Minn. 243, 12 Am. St. Rep. 726, 41 N. W. Rep. 943, 3 L. R. A. 125. *Mo. Filley vs. Fassett*, 44 Mo. 169, 100 Am. Dec. 275. *N. Y. Newman vs. Alvord*, 51 N. Y. 139, 10 Am. Rep. 588; *Taylor vs. Gillies*, 59 N. Y. 331, 17 Am. Rep. 333; *Hier vs. Abrahams*, 32 N. Y. 519, 37 Am. Rep. 589; *Bininger vs. Wattles*, 23 How. Pr. 206; *Amoskeag Mfg. Co. vs. Spear*, 2 Sandf. 599, 605 (said to be leading American case on question of trade-marks). *Wis. Listman M. Co. vs. William Listman M. Co.*, 38 Wis. 334, 43 Am. St. Rep. 907, 60 N. W. Rep. 261. *Fed. Delaware & H. C. Co. vs. Clark*, 80 U. S. (13 Wall.) 311, bk. 20 L. ed. 581; *Amoskeag Mfg. Co. vs. Trainer*, 101 U. S. 51, bk. 25 L. ed. 993; *Lawrence Mfg. Co. vs. Tennessee Mfg. Co.*, 138 U. S. 537, 546, bk. 34 L. ed. 997, 11 Sup. Ct. Rep. 396; *Columbia M. Co. vs. Alcorn*, 150 U. S. 460, bk. 37 L. ed. 1144, 14 Sup. Ct. Rep. 151; *Burton vs. Stratton*, 12 Fed. Rep. 696, 700; *L. H. Harris Drug Co. vs. Stucky*, 46 Fed. Rep. 624; *Beadleston & Woers vs. Cooke Brewing Co.*, 74 Fed. Rep. 229, 20 C. C. A. 405. *Eng. Wotherspoon vs. Curry*, L. R. 5 Eng. & Ir. App. 508; *Ford vs. Foster*, L. R. 7 Ch. App. 611, 3 Moak Eng. Rep. 538; *McAndrew vs. Bassett*, 10 Jur. (N. S.) 550.

Origin or ownership must be indicated to make trade-mark valid.—See note 47 Am. Dec. 237, 238.

114. **PACKAGES ARE NOT SUBJECT OF EXCLUSIVE APPROPRIATION**.—There can be no exclusive right to put up or sell a commodity, e. g. tea in packages of any particular form or size, or to designate the packages by any particular arrangement of words, which indicate no more than the name, or amount, or quality of the tea, or the place where it is produced or sold.—*Castle vs. Siegfried*, 103 Cal. 71, 73, 37 Pac. Rep. 210. See *Falkinburg vs. Lucy*, 35 Cal. 52, 95 Am. Dec. 76; *Ball vs. Siegel*, 116 Ill. 137, 56 Am. Rep. 766, 4 N. E. Rep. 667; *Philadelphia Novelty Mfg. Co. vs. Rouss*, 40 Fed. Rep. 585.

115. **SIGN ON PLACE OF BUSINESS** may be subject of trade-mark, and adoption of unique and original sign will give right to exclusive use thereof.—*Weinstock L. & Co. vs. Marks*, 109 Cal. 529, 535, 536, 50 Am. St. Rep. 57, 42 Pac. Rep. 142, 30 L. R. A. 182. See *Nolan Bros. Shoe Co. vs. Nolan*, 131 Cal. 271, 277, 32 Am. St. Rep. 246, 63 Pac. Rep. 480, 58 L. R. A. 384; *Armstrong vs. Kleinhans*, 32 Ky. 303, 56

Am. Rep. 894; Miskell vs. Prokop, 58 Neb. 638, 79 N. W. Rep. 553 ("Racket Store" adoptable).

116. Compare: Eggers vs. Hink, 63 Cal. 445, 446, 447, 49 Am. Rep. 96; Bolander vs. Peterson, 136 Ill. 215, 26 N. E. Rep. 603, 11 L. R. A. 850.

117. **Tenant's right to transfer sign or name.**—By giving particular name to building tenant does not thereby make the name a fixture and give his landlord an irrevocable right to use the name or sign in connection with building.—Armstrong vs. Kleinhaus, 82 Ky. 303, 56 Am. Rep. 894.

118. **THEATRICAL TROUPE**—Name entitled to protection.—"Christy's Minstrels" is entitled to protection against infringement.—Christy vs. Murphy, 12 How. Pr. (N. Y.) 77.

119. **UNION LABEL**—Certificate on cigar box that "cigars contained in this box have been made by first-class workman, a member of the Cigar Makers' International Union of America, an organization opposed to inferior, rat shop, coolie, prison, or filthy tenement-house workmanship," etc., is entitled to protection as trade-mark, and does not transgress any rule of morality or public policy.—Cohn vs. People, 149 Ill. 486, 41 Am. St. Rep. 304, 37 N. E. Rep. 60, 23 L. R. A. 321 (decided under statute analogous to Political Code §§ 3200, 3201).

As to labels adopted by trade unions, etc., see Pol. Code, §§ 3200, 3201 and notes.

120. Compare: McVey vs. Brendel, 144 Pa. St. 235, 27 Am. St. Rep. 625, 22 Atl. Rep. 912, 13 L. R. A. 377 (decided in absence of statute). Mass. Weener vs. Brayton, 152 Mass. 101, 25 N. E. Rep. 46, 3 L. R. A. 640. Minn. Cigar Makers' P. U. vs. Conhaim, 40 Minn. 243, 12 Am. St. Rep. 726, 41 N. W. Rep. 943, 3 L. R. A. 125. Fed. Carson vs. Ury, 39 Fed. Rep. 777, 5 L. R. A. 614.

IV. TRANSFER OF TRADE-MARKS.

121. **APART FROM ARTICLE TO WHICH AFFIXED.**—Sale of trade-mark apart from article or business to which it is affixed in connection with which it has been acquired, is not permissible.—Witthaus vs. Braun, 44 Md. 303, 22 Am. Rep. 44; Congress & E. S. Co. vs. High Rock C. S. Co., 45 N. Y. 291, 6 Am. Rep. 82.

122. **BUSINESS TRANSFERRED.**—Trade-mark is capable of being transferred in connection with business of originator thereof, and transferee will be entitled to exclusive use of such trade-mark even as against transferor, provided that the transferee does not make fraudulent use of the trade-mark.—Spieker vs. Lash, 102 Cal. 38, 43, 36 Pac. Rep. 362. See Pierce vs. Guittard, 68 Cal. 68, 72, 58 Am. Rep. 1, 3 Pac. Rep. 645. La. Vonderbank vs. Schmidt, 44 La. Ann. 264, 32 Am. St. Rep. 336, 10 So. Rep. 616, 15 L. R. A. 462. Me. Symonds vs. Jones, 82 Me. 302, 17 Am. St. Rep. 485, 19 Atl. Rep. 820, 3 L. R. A. 570. Md. Witthaus vs. Braun, 44 Md. 303, 22 Am. Rep. 44. Mass. Hoxie vs. Chaney, 143 Mass. 592, 58 Am. Rep. 149. Minn. Cigar Makers' P. U. vs. Conhaim, 40 Minn. 243, 12 Am. St. Rep. 726, 41 N. W. Rep. 943, 3 L. R. A. 125. N. Y. Booth vs. Jarrett, 52 How. Pr. 169, 172, 173 (holding that transfer of Booth's Theater gives right to use

of name as against Booth); Howard vs. Park, 21 Hun 618. Wis. Fish Bros. W. Co. vs. La Belle W. W., 82 Wis. 546, 33 Am. St. Rep. 72, 52 N. W. Rep. 595, 16 L. R. A. 453; Listman M. Co. vs. William Listman M. Co., 88 Wis. 334, 43 Am. St. Rep. 907, 60 N. W. Rep. 261. Fed. Pepper vs. Labrot, 8 Fed. Rep. 29; Morgan vs. Rogers, 19 Fed. Rep. 596, 597; Hill vs. Lockwood, 32 Fed. Rep. 389, 393. Eng. Leather Cloth Co. vs. American Leather Cloth Co., 11 W. R. 931, 1 H. & M. 271, 4 De G. J. & S. 137, 11 H. L. Cas. 523.

See note by Robert Desty, 9 L. R. A. 148, 149.

123. **CHATTEL MORTGAGE INCLUDES TRADE-MARK** where in addition to enumerated articles it contains a clause by which it is made to include "all debts and take accounts, assets, and effects of every kind and nature."—Morgan vs. Rogers, 19 Fed. Rep. 596, 597. See Hegeman vs. Hegeman, 8 Daly (N. Y.) 1.

124. **FALSE REPRESENTATION AS TO MAKER OF ARTICLE.**—Where name of maker of article is used as trade-mark and such trade-mark necessarily constitutes a representation that the person of such name is the maker, such trade-mark is not transferable in the sense that equity will protect the transferee against infringement because the use of such name by the transferee is a fraud upon the public; e. g. where watches are known as "Brindle Watches," being named after Brindle, the original maker of them, and he transfers the right to use such name and the transferee makes and calls them "Brindle Watches," the transferor is not entitled to equitable relief against another who uses such name.—Samuel vs. Berger, 24 Barb. (N. Y.) 163, 164, 4 Abb. Pr. (N. Y.) 88. See N. Y. Partridge vs. Menck, 2 Sandf. Ch. 622, 2 Barb. Ch. 101, 47 Am. Dec. 281. R. I. Carmichel vs. Latimer, 11 R. I. 395, 23 Am. Rep. 481. Eng. Motley vs. Downman, 3 Myl. & C. 1, 14 Eng. Ch. 3.

125. **Superintendence of manufacture by transferor.**—Where transferee using trade name of transferor, but the manufacture of the goods is carried under the supervision of the transferor, the transferee is entitled to equitable protection against infringement.—Meriden Britannia Co. vs. Parker, 39 Conn. 450, 12 Am. Rep. 401.

126. **JUDICIAL SALE OF TRADE-MARK.**—Trade-mark is property which may be sold by order of court.—Glen & H. Mfg. Co. vs. Hall, 61 N. Y. 226, 19 Am. Rep. 278. See Bradbury vs. Dickens, 27 Beav. 53.

V. INFRINGEMENT OF TRADE-MARKS.

127. **IN GENERAL.**—No hard and fast rule capable of being laid down.—Upon question what resemblance constitutes actionable infringement or piracy of trade-mark, it is impossible to lay down any general rule as to what degree of resemblance is necessary to constitute fraudulent or colorable imitation. All that can be done is to ascertain in every case, as it occurs, whether there is such a resemblance as that ordinary purchasers, purchasing with ordinary caution, are likely to be misled.—Robertson vs. Berry, 50 Md. 591, 33

Am. Rep. 328, 330. See *McLean vs. Fleming*, 96 U. S. 245, bk. 24 L. ed. 828.

128. ADDITION OF IMMATERIAL MATTER—Infringement notwithstanding.—Where hotel has name "What Cheer House" which constitutes trade-mark, and rival hotel assumes name "Original What Cheer House," word "original" being painted on sign in smaller letters than residue of title, and disposed in such manner that it is calculated to deceive public into the supposition that it is the same name, infringement is shown.—*Woodward vs. Lazar*, 21 Cal. 449, 451, 82 Am. Dec. 751.

129. COLOR—Imitation is circumstance to be considered in determining question of infringement, and fact that defendant used plaintiff's color so as to deceive public militates against defendant.—*McLean vs. Fleming*, 96 U. S. 245, 255, bk. 24 L. ed. 828. See *Cleveland Stone Co. vs. Wallace*, 52 Fed. Rep. 431.

130. Infringement may occur notwithstanding dissimilarity of color.—In suit for infringement of label if infringement appears in other respects it is no defense that defendant's label is of a different color from that of plaintiff's. The difference in color is a mere probative fact—a circumstance to be considered by the court in determining the ultimate question as to whether defendant's devices so closely resembled the plaintiff's labels as to deceive the public.—*Schmidt vs. Brieg*, 100 Cal. 672, 681, 85 Pac. Rep. 623, 22 L. R. A. 790.

131. COLORABLE IMITATIONS NOT ALLOWED, and imitator of trade-mark will be held accountable if his imitation is calculated to deceive the public, notwithstanding his ingenuity in attempting to contrive simulation which is not exact imitation.—*Burke vs. Cassin*, 45 Cal. 467, 480, 13 Am. Rep. 204.

132. CRITERION OF INFRINGEMENT—Simulation calculated to deceive public.—Two trade-marks are essentially the same in legal contemplation, and one infringes the other, if the imitation is intentionally so close as to deceive an ordinary purchaser. The fact that an attentive inspection will disclose differences in many respects between the two devices will not shield the imitator from liability. The rule is that the fact that its similarity is discoverable on close inspection does not save the simulation from being an infringement.—*Sperry vs. Percival Mill Co.*, 81 Cal. 252, 258, 22 Pac. Rep. 651. See *Falkinburg vs. Lucy*, 35 Cal. 52, 95 Am. Dec. 76; *Burke vs. Cassin*, 45 Cal. 467, 480, 481, 13 Am. Rep. 204; *Whittier vs. Dietz*, 66 Cal. 78, 4 Pac. Rep. 986; *Nolan Bros. Shoe Co. vs. Nolan*, 131 Cal. 271, 278, 82 Am. St. Rep. 346, 63 Pac. Rep. 480, 53 L. R. A. 384. *Iowa. Shaver vs. Shaver*, 54 Iowa 208, 37 Am. Rep. 194, 6 N. W. Rep. 188. *Ky. Metcalfe vs. Brand*, 86 Ky. 331, 9 Am. St. Rep. 282, 5 S. W. Rep. 773. *Md. Robertson vs. Berry*, 50 Md. 591, 33 Am. Rep. 328. *Mass. Gilman vs. Hunnewell*, 123 Mass. 139; *Lawrence Mfg. Co. vs. Lowell H. Mills*, 129 Mass. 325, 37 Am. Rep. 362; *Regis vs. H. A. Jaynes Co.*, 185 Mass. 458, 70 N. E. Rep. 480. *Minn. Watkins vs. Landon*, 52 Minn. 389, 38 Am. St. Rep. 560, 54 N. W. Rep. 198, 19 L. R. A. 236. *Mo. Filley vs. Fassett*, 44 Mo. 169, 100 Am. Dec. 275. *N. Y. Pop-*

ham vs. Cole, 66 N. Y. 69, 23 Am. Rep. 22; *Morgan's Sons Co. vs. Troxell*, 89 N. Y. 292, 42 Am. Rep. 294; *Partridge vs. Menok*, 2 Barb. Ch. 101, 47 Am. Dec. 281; *Lockwood vs. Bostwick*, 2 Daly 521; *Amoskeag Mfg. Co. vs. Spear*, 2 Sand. 599. *Wis. Manitowoc M. Co. vs. Milwaukee M. Co.*, 119 Wis. 543, 97 N. W. Rep. 389. *Fed. Gorham Mfg. Co. vs. White*, 81 U. S. (14 Wall.) 511, bk. 20 L. ed. 731 (wherein it is said: "Two trade-marks are substantially the same in legal contemplation if the resemblance is such as to deceive an ordinary person"); *McLean vs. Fleming*, 96 U. S. 245, bk. 24 L. ed. 828 (wherein it is said: "Where similarity is sufficient to convey false impression to public mind and is of character to mislead and deceive the ordinary purchaser in the exercise of ordinary care and caution in such matters. It is sufficient to give to the injured party right to redress"); *Coats vs. Merrick Thread Co.*, 149 U. S. 562, 565, bk. 37 L. ed. 847, 13 Sup. Ct. Rep. 966; *Coffeen vs. Brunton*, 4 McLean C. C. 516, 519, 5 Fed. Cas. 1184; *Osgood vs. Allen*, 1 Holmes C. C. 185, 18 Fed. Cas. 871; *Kostering vs. Seattle Brew. & M. Co.*, 116 Fed. Rep. 620 (case arising in California). *Eng. American Leather Cloth Co. vs. American Leather Co.*, 11 Jur. (N. S.) 513; *Croft vs. Day*, 7 Beav. 84, 29 Eng. Ch. 84; *Crawshaw vs. Thompson*, 4 Man. & G. 357, 43 Eng. C. L. 189; *Seixo vs. Provesende*, 1 Ch. App. 192; *Cocks vs. Chandler*, L. R. 11 Eq. 446; *Welch vs. Knott*, 4 K. & J. 747.

As to what constitutes infringement of trade-mark, see note 47 Am. Dec. 284-299.

Infringement—Criterion of.—See note by Robert Desty, 9 L. R. A. 150, 151.

133. DECEPTION OF PUBLIC BY DEALERS IN DEFENDANT'S COMMODITY.—As abstract proposition infringer of trade-mark is not liable for the imposition or fraud committed by merchants or shopkeepers in palming off upon the public his goods as those of the plaintiff, but the controlling question is whether or not the defendant has "knowingly put into the hands of the retail dealers the means of deceiving the ultimate purchasers," and if the defendant has done so he is liable.—*N. K. Fairbank Co. vs. Luckel, K. & C. S. Co.*, 102 Fed. Rep. 327, 42 C. C. A. 376. See *N. K. Fairbank Co. vs. R. W. Bell Mfg. Co.*, 77 Fed. Rep. 869, 23 C. C. A. 554.

134. DRESS OF GOODS CONSIDERED.—Cases abound with statement that in determining question of infringement, court will consider "dress of goods," or, in other words, the general "get-up" and appearance of the same. If defendant's goods are put up in such shape and style as to enable dealers to palm them off for plaintiff's, such circumstance will militate strongly against defendant.—*Van Hoboken vs. Mohns*, 112 Fed. Rep. 528 (case arising in California involving bottled gin); *Kostering vs. Seattle Brew. & M. Co.*, 116 Fed. Rep. 620 (case arising in California involving similarity of beer bottles); *Enoch Morgan's Sons Co. vs. Whittier-Coburn & Co.*, 118 Fed. Rep. 657, 661 (case arising in California involving soap wrappers, etc.); *Allen B. W. Co. vs. Iowa S. Co.*, 122 Fed. Rep. 796, 798. See *Howard vs. Henriques*, 2 Sand. (N. Y.) 725.

135. ENTIRE DEVICE OR DESIGN CONSIDERED.—"Much must depend, in every case, upon the appearance and special characteristics of the entire device; but it is safe to declare, as a general rule, that exact similitude is not required to constitute an infringement or to entitle the complaining party to protection. If the form, marks, contents, words, or the special arrangement of the same, or the general appearance of the alleged infringer's device, is such as to be likely to mislead one in the ordinary course of purchasing goods, and induce him to suppose that he was purchasing the genuine article, then the similitude is such as entitles the injured party to equitable protection."—*McLean vs. Fleming*, 96 U. S. 245, bk. 24 L. ed. 828 (quoted with approval in *Sperry vs. Percival Mill. Co.*, 81 Cal. 252, 259, 22 Pac. Rep. 651). See *Lawrence Mfg. Co. vs. Lowell H. Mills*, 129 Mass. 225, 37 Am. Rep. 362; *Lockwood vs. Bostwick*, 2 Daly (N. Y.) 521.

136. EXACT SIMILARITY—Infringement may be accomplished without.—In order to authorize the interference of chancery it is not necessary that the trade-mark should be copied with the fullest accuracy. An imitation which varies from the original, in some particulars, will be restrained. The rule is that if the imitation is calculated to deceive and may be taken for the original its use will be restrained.—*Spieker vs. Lash*, 102 Cal. 38, 45, 46, 36 Pac. Rep. 362; *Weinstock L. & Co. vs. Marks*, 109 Cal. 529, 537, 50 Am. St. Rep. 57, 42 Pac. Rep. 142, 30 L. R. A. 182. See *Nolan Bros. Shoe Co. vs. Nolan*, 131 Cal. 271, 275, 82 Am. St. Rep. 346, 63 Pac. Rep. 480, 53 L. R. A. 384. *Celo. Solis Cigar Co. vs. Pozo*, 16 Colo. 388, 25 Am. St. Rep. 279, 26 Pac. Rep. 556. *Comm. Bradley vs. Norton*, 33 Conn. 157, 203, 87 Am. Dec. 200. *Iowa. Shaver vs. Shaver*, 54 Iowa 208, 37 Am. Rep. 194, 196, 6 N. W. Rep. 188. *Ky. Avery vs. Meikle*, 85 Ky. 435, 7 Am. St. Rep. 604, 3 S. W. Rep. 609; *Metcalf vs. Brand*, 86 Ky. 381, 9 Am. St. Rep. 282, 5 S. W. Rep. 773. *Mass. Lawrence Mfg. Co. vs. Lowell H. Mills*, 129 Mass. 225, 37 Am. Rep. 362. *N. Y. Hier vs. Abrahams*, 82 N. Y. 519, 37 Am. Rep. 589, 591. *Wis. Listman M. Co. vs. William Listman M. Co.*, 88 Wis. 324, 43 Am. St. Rep. 907, 60 N. W. Rep. 261. *Fed. Gorham Mfg. Co. vs. White*, 81 U. S. (14 Wall.) 511, bk. 20 L. ed. 781; *McLean vs. Fleming*, 96 U. S. 245, 255, bk. 24 L. ed. 828; *Liggett & M. T. Co. vs. Hynes*, 20 Fed. Rep. 888, 884; *Glen Cove Mfg. Co. vs. Ludelling*, 22 Fed. Rep. 823, 826; *Moxie Nerve Food Co. vs. Baumbach*, 32 Fed. Rep. 205, 213; *Cleveland Stone Co. vs. Wallace*, 52 Fed. Rep. 431; *Improved Fig Syrup Co. vs. California Fig Syrup Co.*, 54 Fed. Rep. 175, 4 C. C. A. 264; *Kostering vs. Seattle Brew. & M. Co.*, 116 Fed. Rep. 620 (case arising in California); *Enoch Morgan's Sons Co. vs. Whittier-Coburn & Co.*, 118 Fed. Rep. 657, 661 (case arising in California); *Hostetter vs. Vowinkle*, 1 Dill. C. C. 329, 12 Fed. Cas. 546.

137. FALSE REPRESENTATION—No infringement without.—To entitle party to relief, resemblance of simulated to genuine trade-mark must amount to false representation of the facts indicated by genuine mark, that is, of the manufacture or proprietorship of the

article.—*Popham vs. Cole*, 66 N. Y. 69, 23 Am. Rep. 22.

138. ILLUSTRATIONS.—"Apollinaris" and "Apollinia."—The word "Apollinia," is infringement of "Apollinaris" as applied to bottled water.—*Apollinaris Brunnen vs. Somborn*, 14 Blatchf. C. C. 320, 1 Fed. Cas. 1067.

139. "Bovina" and "Bovilline."—The word "Bovina" is infringed by the word "Bovilline."—*Lockwood vs. Bostwick*, 2 Daly (N. Y.) 521.

140. "Chatter Box" and "Chatter Book."—Name "Chatter Book" printed upon defendant's book is infringement of name "Chatter Box" printed upon plaintiff's book.—*Estes vs. Leslie*, 29 Fed. Rep. 91.

141. "Cocoaine" and "Cocoine."—The word "Cocoine" is an infringement of a trade-mark in the word "Cocoaine."—*Burnett vs. Phalon*, 4 Bosw. (N. Y.) 622, 624.

142. "Cottolene" and "Cottoleo."—"Cottoleo" is sufficiently similar to "Cottolene" to infringe it.—*N. K. Fairbank Co. vs. Central L. Co.*, 64 Fed. Rep. 133, 135.

143. "Cyclops Machine Works" and "Cyclops Iron Works."—*Hainque vs. Cyclops Iron Works*, 136 Cal. 351, 352, 68 Pac. Rep. 1014.

144. "Gold Drop" and "Gold Dust."—Gold Dust Washing Powder is infringed by Gold Drop Washing Powder where the packages, etc., are similar.—*N. K. Fairbank Co. vs. Luckel, K. & C. S. Co.*, 102 Fed. Rep. 327, 42 C. C. A. 376 (case arising in Washington). See *N. K. Fairbank Co. vs. Luckel, K. & C. S. Co.*, 116 Fed. Rep. 322, 323 (case arising in Oregon).

145. "Hostetter" and "Hostettler."—The first named of these words is infringed by the latter.—*Hostetter vs. Vowinkle*, 1 Dill. C. C. 329, 12 Fed. Cas. 546.

146. "Lash's Liver & Kidney Bitters."—This trade-mark is infringed by "Web's, the Only Genuine, Liver & Kidney Bitters, manufactured by M. Lash and sold by T. M. Lash & Co." where labels are essentially similar.—*Spieker vs. Lash*, 102 Cal. 38, 45, 46, 36 Pac. Rep. 362. See *Gregory vs. Spieker*, 110 Cal. 150, 154, 52 Am. St. Rep. 70, 42 Pac. Rep. 576.

147. "Mechanical Store" and "Mechanic's Store."—*Weinstock L. & Co. vs. Marks*, 109 Cal. 529, 535, 536, 50 Am. St. Rep. 57, 42 Pac. Rep. 142, 30 L. R. A. 182 (designations of places of business).

148. "New Northwest" and "Northwest News" as name of newspapers, no intentional deception being charged or shown.—*Dunniway Pub. Co. vs. Northwest Print. & Pub. Co.*, 11 Oreg. 322, 3 Pac. Rep. 233. See *Snowden vs. Noah*, 1 Hopk. Ch. (N. Y.) 347, 14 Am. Dec. 547 ("National Advocate" not infringed by "New York National Advocate"); *Osgood vs. Allen*, 1 Holmes C. C. 185, 18 Fed. Cas. 371.

149. "Rainier Beer" and "Rhinegold Beer" in connection with scrolls identical in shape, color, and position.—*Kostering vs. Seattle Brew. & M. Co.*, 116 Fed. Rep. 620 (case arising in California).

150. "Sapelle" and "Sappho," used as trade name of soap, in connection with other simi-

larity in details.—*Enoch Morgan's Sons Co. vs. Whittier-Coburn & Co.*, 118 Fed. Rep. 657, 661 (case arising in California).

151. "Star" and "•".—Where trade-mark of shirts is six-pointed star, it is infringed by "• Shirt" in connection with other similarities in device.—*Morrison vs. Case*, 9 Blatchf. C. C. 548, 17 Fed. Cas. 837.

152. *Wolfe and Wolf*.—*Burke vs. Cassin*, 45 Cal. 467, 480, 13 Am. Rep. 204. See *Wolfe vs. Barnett*, 24 La. Ann. 97, 13 Am. Rep. 111. (Each of these cases involving same trade-mark).

See par. 156 this note.

153. NAMES OF PARTIES.—Defendant may use his own name, although it is same name as that used by plaintiff, if he does not do so fraudulently; the rule being that although person may have right in his own name as a trade-mark as against person of different name, he cannot have such right as against another person of the same name, unless defendant uses a form of stamp or label so like that used by plaintiff as to represent that defendant's goods are of plaintiff's manufacture.—*Spieker vs. Lash*, 103 Cal. 38, 45, 46, 36 Pac. Rep. 362. See *Fla. El Modelo C. Mfg. Co. vs. Gato*, 25 Fla. 886, 23 Am. St. Rep. 537, 7 So. Rep. 23, 6 L. R. A. 823. *Mass. Rogers vs. Taintor*, 97 Mass. 291; *Gilman vs. Hunnewell*, 123 Mass. 139, 148. *N. Y. Meneely vs. Meneely*, 62 N. Y. 427, 20 Am. Rep. 489. *R. I. Carmichel vs. Latimer*, 11 R. I. 395, 23 Am. Rep. 481. *Fed. McLean vs. Fleming*, 96 U. S. 245, bk. 24 L. ed. 828. *Eng. Burgess vs. Burgess*, 3 De Gex M. & G. 896; *Croft vs. Day*, 7 Beav. 84, 29 Eng. Ch. 84; *Holloway vs. Holloway*, 13 Beav. 309.

154. *Fraudulent use of defendant's own name*.—Where defendant not only uses his own name to designate his commodity, but sells it in boxes and with labels and wrappers made in imitation of the plaintiff's, and manufactures his goods for the express purpose of deceiving, he is guilty of infringement.—*Burke vs. Cassin*, 45 Cal. 467, 480, 13 Am. Rep. 204 ("Wolfe" infringed by "Wolf"). See *Conn. Boardman vs. Meriden Britannia Co.*, 35 Conn. 402, 95 Am. Dec. 270, 272, 274. *Fla. El Modelo C. Mfg. Co. vs. Gato*, 25 Fla. 886, 23 Am. St. Rep. 537, 7 So. Rep. 23, 6 L. R. A. 823. *Iowa. Shaver vs. Shaver*, 54 Iowa 208, 37 Am. Rep. 194, 6 N. W. Rep. 188. *La. Wolfe vs. Barnett*, 24 La. Ann. 97, 13 Am. Rep. 111. *Md. Robertson vs. Berry*, 50 Md. 591, 33 Am. Rep. 323, 330. *N. Y. Clark vs. Clark*, 25 Barb. 76, 79; *Amoskeag Mfg. Co. vs. Spear*, 2 Sandf. 599, 605 (said to be leading American case on question of trade-marks). *Wis. Fish Bros. W. Co. vs. La Belle W. W.*, 82 Wis. 546, 33 Am. St. Rep. 72, 52 N. W. Rep. 595. *Fed. Brown Chemical Co. vs. Meyer*, 139 U. S. 540, bk. 35 L. ed. 247, 11 Sup. Ct. Rep. 625; *Hill vs. Lockwood*, 32 Fed. Rep. 389, 393. *Eng. Holloway vs. Holloway*, 13 Beav. 209; *Rodgers vs. Nowill*, 5 Man. Gr. & S., 109, 57 Eng. C. L. 109.

155. *Initial as infringement of name*.—Where trade-mark consists of name, e. g. *Hostetter's Bitters*, it is infringement to sell spurious articles under name *H. Bitters*, where the evidence shows that no other deduction can be made than an attempt to palm off spurious article for the genuine.—*Hostetter Co. vs. Mar-*
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tinoni, 110 Fed. Rep. 524, 525-527 (case arising in California).

156. *Prefixes*.—Name *Wolfe* is infringed by use of name *Wolf* notwithstanding fact that defendant uses prefix *Van* or *Von*.—*Burke vs. Cassin*, 45 Cal. 467, 480, 13 Am. Rep. 204. See *Wolfe vs. Barnett*, 24 La. Ann. 97, 13 Am. Rep. 111 (infringing same trade-mark).

See par 152 this note.

157. *Transfer of name to corporation*.—Man may give his own name to corporation, if he has good reason therefor and does it in such way as not to mislead public, but where such name is already in use as trade-mark, or part of trade-mark, and it is given to corporation for purpose of fraudulently palming off spurious articles and deceiving public, equity will interfere.—*International Silver Co. vs. Wm. H. Rogers Corp.* (N. J. Ch. Feb. 9, 1904), 57 Atl. Rep. 1037 (protecting name "Rogers" as applied to silver-plated ware). See *Baker vs. Baker*, 115 Fed. Rep. 297, 53 C. C. A. 157.

158. *PACKAGE*.—Consideration of general appearance of.—In determining question of infringement court will have regard not only to trade-mark proper and simulation thereof, but will consider the resemblance of packages in form, size, color, printing, and other characteristics.—*Keuffel & E. Co. vs. H. S. Crocker Co.*, 118 Fed. Rep. 187 (case arising in California). See *McLean vs. Fleming*, 96 U. S. 245, 255, bk. 24 L. ed. 828; *Moxie Nerve Food Co. vs. Baumbach*, 32 Fed. Rep. 205, 213; *N. K. Fairbank Co. vs. Luckel, K. & C. S. Co.*, 102 Fed. Rep. 327, 42 C. C. A. 376.

159. *PARTIAL INFRINGEMENT GIVES RIGHT TO RELIEF*.—In order to constitute infringement or piracy of trade-mark it is not necessary that the whole trade-mark should be appropriated by defendant, and if he copies and uses a portion of it in such manner as is calculated to deceive the public action lies.—*Mo. Filley vs. Fassett*, 44 Mo. 169, 100 Am. Dec. 275. *R. I. Barrows vs. Knight*, 6 R. I. 434, 78 Am. Dec. 453. *Wis. Listman M. Co. vs. William Listman M. Co.*, 38 Wis. 334, 43 Am. St. Rep. 907, 60 N. W. Rep. 261. *Fed. Enoch Morgan's Sons Co. vs. Hunkeler*, 3 Fed. Cas. 724.

160. *SIMULATION IS ESSENTIAL INGREDIENT OF INFRINGEMENT*.—Court will not restrain defendant from use of trade-mark on ground that it infringes that of plaintiff unless form of the printed words, the words themselves, and figures, lines, and devices are so similar that any person, with such reasonable care and observation as the public generally are capable of using and may be expected to exercise, would mistake the one for the other. When there is such absence of resemblance that ordinary inspection would enable public to discriminate between trade-marks, court will not interfere.—*Falkinburg vs. Lucy*, 35 Cal. 52, 62, 66, 67, 92 Am. Dec. 76. *Colo. Solis Cigar Co. vs. Pozo*, 16 Colo. 333, 25 Am. St. Rep. 279, 281, 26 Pac. Rep. 555. *Conn. Boardman vs. Meriden Britannia Co.*, 35 Conn. 402, 95 Am. Dec. 270, 272, 274. *Ill. Candee S. & Co. vs. Deere & Co.*, 54 Ill. 439, 5 Am. Rep. 125; *Ball vs. Siegel*, 116 Ill. 127, 56 Am. Rep. 766, 4 N. E. Rep. 667. *Md. Robertson vs. Berry*, 50 Md. 591, 33 Am. Rep. 323. *Mass.*

Gilman vs. Hunnewell, 122 Mass. 139, 148.
Neb. Miskell vs. Prokop, 58 Neb. 628, 79 N. W. Rep. 552.
N. Y. Popham vs. Cole, 66 N. Y. 69, 23 Am. Rep. 22; **Hier vs. Abrahams**, 82 N. Y. 519, 37 Am. Rep. 589, 591; **Morgan's Sons Co. vs. Troxell**, 89 N. Y. 292, 42 Am. Rep. 294; **Partridge vs. Menok**, 2 Sandf. Ch. 622, 2 Barb. Ch. 101, 47 Am. Dec. 281; **Amoskeag Mfg. Co. vs. Spear**, 2 Sandf. 599 (said to be leading American case on question of trade-marks).
Oreg. Lichtenstein vs. Mellis, 8 Oreg. 464, 34 Am. Rep. 592; **Dunlway Pub. Co. vs. Northwestern Print. & Pub. Co.**, 11 Oreg. 322, 8 Pac. Rep. 283.
Fed. Amoskeag Mfg. Co. vs. Trainer, 101 U. S. 51, bk. 25 L. ed. 993; **Coats vs. Merrick Thread Co.**, 149 U. S. 562, 565, bk. 37 L. ed. 847, 13 Sup. Ct. Rep. 966; **Columbia M. Co. vs. Alcorn**, 150 U. S. 460, bk. 37 L. ed. 1144, 14 Sup. Ct. Rep. 151; **Hostetter vs. Fries**, 17 Fed. Rep. 620; **Philadelphia Novelty Mfg. Co. vs. Rouss**, 40 Fed. Rep. 585; **Clotworthy vs. Schepp**, 42 Fed. Rep. 62; **Kohler Mfg. Co. vs. Beeshore**, 59 Fed. Rep. 572, 3 C. C. A. 215; **Postum C. Co. vs. American H. F. Co.**, 109 Fed. Rep. 898, 900; **Osgood vs. Allen**, 1 Holmes C. C. 185, 18 Fed. Cas. 871.

Infringement—Simulation is necessary.—See note by Robert Desty, 9 L. R. A. 151.

161. PICTURES.—In action for infringement of label on washing compound, picture of washerwomen in red petticoats, with their arms in a wash-tub and their heads enveloped in clouds of steam, is not infringed by picture of young man in blouse and tights climbing a mountain with a banner in his hands.—**Falkinburg vs. Lucy**, 35 Cal. 52, 62, 66, 67, 95 Am. Dec. 76. See **Popham vs. Cole**, 66 N. Y. 69, 23 Am. Rep. 22.

162. PRESUMPTION OF INTENT TO DECEIVE.—When trade-mark is calculated to mislead, even if no one has been actually deceived, the intention to deceive will be presumed.—**El Modelo C. Mfg. Co. vs. Gato**, 25 Fla. 386, 23 Am. St. Rep. 537, 7 So. Rep. 23, 6 L. R. A. 823.

163. QUESTION OF FACT FOR JURY.—In action for infringement in which there is jury trial, question of infringement is one of fact for jury under appropriate instruction from the court.—**Alff vs. Radam**, 77 Tex. 530, 19 Am. St. Rep. 792, 14 S. W. Rep. 164, 9 L. R. A. 145.

164. REFILLING BOTTLES WILL BE ENJOINED.—Where bottles which originally contained "Hostetter's Bitters" are refilled with spurious substitute, equity will grant injunction.—**Hostetter Co. vs. Martinoni**, 110 Fed. Rep. 524, 525-527 (case arising in California).

Constitutes misdemeanor.—See Pen. Code § 364 and note.

165. REMOVAL OF LESSEE OF HOTEL AFTER ESTABLISHING NAME.—Ownership of name.—Where lessee of hotel establishes name for it, to wit, "What Cheer House," the ownership of the trade-mark belongs to the lessee and is not a fixture appurtenant to the premises; hence the lessee may establish another hotel and give it such name and enjoin a subsequent tenant of the original "What Cheer House" from using the name.—**Wood-**

ward vs. Lazar, 21 Cal. 443, 449, 451, 452, 82 Am. Dec. 751.

166. TRANSFER OF TRADE-MARK.—Subsequent imitation by transferor.—Principle seems to be well settled, that where a party sells out an established business, and with it his own name, to be used in connection with such business, he cannot afterwards resume it in carrying on the same business.—**Fraser vs. Fraser L. Co.**, 121 Ill. 147, 2 Am. St. Rep. 73, 78, 13 N. E. Rep. 639.

As to violation of covenants involving goodwill, see post § 992 and note.

167. TRANSPOSITION OF WORDS.—"German sweet chocolate" is infringed by "Sweet German chocolate" where in addition there is a colorable imitation of packages, etc.—**Pierce vs. Guitard**, 68 Cal. 68, 72, 58 Am. Rep. 1, 3 Pac. Rep. 645.

168. UNFAIR BUSINESS COMPETITION.—Relief regardless of infringement of trade-mark.—Competing business firm is bound to deal fairly in placing its rival article upon the market; and, if it clearly appears that the defendant has closely imitated the plaintiff's labels and style, and has done obvious damage to the latter's business through the unlawful business methods employed, the plaintiff is entitled to relief upon the ground of fraud, even though plaintiff has no trade-mark which is entitled to protection, e. g. where his alleged trade-mark is merely descriptive of his article of manufacture.—**Schmidt vs. Brieg**, 100 Cal. 672, 680, 35 Pac. Rep. 623, 22 L. R. A. 790. See **Weinstock L. & Co. vs. Marks**, 109 Cal. 529, 536, 50 Am. St. Rep. 57, 42 Pac. Rep. 142, 30 L. R. A. 132; **Gregory vs. Spieker**, 110 Cal. 150, 154, 52 Am. St. Rep. 70, 42 Pac. Rep. 576. **N. Y. Bininger vs. Wattles**, 28 How. Pr. 206, 207. **Wash. Woodcock vs. Guy**, 33 Wash. 234, 74 Pac. Rep. 353. **Fed. McLean vs. Fleming**, 96 U. S. 245, bk. 24 L. ed. 828 (wherein principle is stated as follows: "Nor is it necessary, in order to give a right to an injunction, that a specific trade-mark should be infringed; but it is sufficient that the court is satisfied that there was an intent on the part of the respondent to palm off his goods as the goods of the complainant, and that he persists in so doing after being requested to desist"); **Goodyear's India R. G. Mfg. Co. vs. Goodyear Rubber Co.**, 128 U. S. 598, 604, bk. 32 L. ed. 535, 9 Sup. Ct. Rep. 166; **Goodyear R. Co. vs. Day**, 22 Fed. Rep. 44; **Carbolic Soap Co. vs. Thompson**, 25 Fed. Rep. 625; **Investor Pub. Co. vs. Dobinson**, 72 Fed. Rep. 603 (case arising in California); **Hilson vs. Foster**, 80 Fed. Rep. 896, 897; **Centaur Co. vs. Marshall**, 92 Fed. Rep. 605; **American Washboard Co. vs. Saginaw Mfg. Co.**, 103 Fed. Rep. 231, 48 C. C. A. 233, 50 L. R. A. 609; **Fuller vs. Huff**, 104 Fed. Rep. 141, 43 C. C. A. 453, 51 L. R. A. 332; **Hostetter Co. vs. Martinoni**, 110 Fed. Rep. 524, 525-527 (case arising in California); **Davless Co. Distilling Co. vs. Martinoni**, 117 Fed. Rep. 186, 188 (case arising in California); **Keuffel & E. Co. vs. H. S. Crocker Co.**, 118 Fed. Rep. 187 (case arising in California); **Samuel Bros. & Co. vs. Hostetter Co.**, 118 Fed. Rep. 257, 55 C. C. A. 111 (case arising in California); **Allen B. W. Co. vs.**

Iowa S. Co., 122 Fed. Rep. 796, 797. Eng. Wol-lam vs. Ratcliffe, 1 Hemm. & M. 259.

169. Fraud must be proved.—In case of un-fair competition the action is based upon deception, unfairness, and fraud, and this fraud should be generally proved, and not left to inferential evidence alone. This rule is far more strictly followed in cases of unfair com-petition than in cases involving a technical trade-mark, where fraud will be presumed from the wrongful use of the trade-mark, without regard to the intent.—Davless Co. Distilling Co. vs. Martinoni, 117 Fed. Rep. 186, 188 (case arising in California).

VI. REMEDIES FOR INFRINGEMENT—PLEADING AND PRACTICE.

170. COMMON-LAW REMEDIES NOT AB-ROGATED by statute.—Although Political Code provides for registration of trade-marks, and Penal Code prescribes penalties for invasion thereof, such provisions add nothing to the rights previously possessed by owner of trade-mark, and are only in affirmance of the com-mon law.—Derringer vs. Plate, 29 Cal. 292, 293, 299, 87 Am. Dec. 170. See Woodcock vs. Guy, 33 Wash. 234, 74 Pac. Rep. 238; La Croix vs. May, 15 Fed. Rep. 226, 237.

171. COSTS ARE RECOVERABLE BY COM-PLAINANT WHEN INJUNCTION GRANTED.—Decree for injunction carries costs for com-plainant even though no demand was made before instituting suit that defendant should cease to infringe.—Sawyer vs. Kellogg, 9 Fed. Rep. 601.

172. Criminal prosecution for violation of trade-mark.—See KERR'S CYC. PENAL CODE §§ 350-354½ and notes.

173. DEMAND BEFORE ACTION FOR IN-FRINGEMENT UNNECESSARY.—Before institu-ting suit to enjoin infringement of trade-mark plaintiff need not demand that defendant should desist.—Sawyer vs. Kellogg, 9 Fed. Rep. 601.

174. INJUNCTION—Equity jurisdiction.—Usual and most appropriate remedy for in-fractionment of trade-mark is writ of injunction.—Woodward vs. Lazar, 21 Cal. 448, 449, 451, 82 Am. Dec. 751; Derringer vs. Plate, 29 Cal. 292, 298, 87 Am. Dec. 170; Burke vs. Cassin, 45 Cal. 467, 482, 13 Am. Rep. 204; Pierce vs. Guittard, 68 Cal. 68, 72, 58 Am. Rep. 1, 8 Pac. Rep. 645; Sperry vs. Percival Mill Co., 81 Cal. 252, 258, 259, 22 Pac. Rep. 651; Schmidt vs. Brieg, 100 Cal. 672, 680, 35 Pac. Rep. 623, 22 L. R. A. 790; Spieker vs. Lash, 102 Cal. 38, 44, 36 Pac. Rep. 862; Weinstock L. & Co. vs. Marks, 109 Cal. 529, 537, 50 Am. St. Rep. 57, 42 Pac. Rep. 142, 30 L. R. A. 182; Hainque vs. Cyclops Iron Works, 136 Cal. 351, 68 Pac. Rep. 1014. See Conn. Bradley vs. Norton, 38 Conn. 157, 87 Am. Dec. 200; Holmes B. & H. vs. Holmes B. & A. Mfg. Co., 37 Conn. 278, 9 Am. Rep. 324; Meriden Britannia Co. vs. Parker, 39 Conn. 450, 12 Am. Rep. 401. Fla. El Modelo C. Mfg. Co. vs. Gato, 25 Fla. 886, 28 Am. St. Rep. 537, 7 So. Rep. 23, 6 L. R. A. 823. Iowa. Shaver vs. Shaver, 54 Iowa 208, 37 Am. Rep. 194, 6 N. W. Rep. 188. Ky. Metcalfe vs. Brand, 36 Ky. 331, 9 Am. St. Rep. 232, 5 S. W. Rep. 773. Me. Symonds vs. Jones, 32 Me. 303, 17 Am. St. Rep. 485, 19 Atl. Rep. 820, 8 L. R. A. 570. Md.

Witthaus vs. Braun, 44 Md. 303, 22 Am. Rep. 44; Robertson vs. Berry, 50 Md. 591, 32 Am. Rep. 328. Mass. Lawrence Mfg. Co. vs. Lowell H. Mills, 129 Mass. 325, 37 Am. Rep. 362; Weener vs. Brayton, 152 Mass. 101, 25 N. E. Rep. 46, 8 L. R. A. 640; Regis vs. Jaynes & Co., 185 Mass. 458, 70 N. E. Rep. 480. Mo. Liggett & M. T. Co. vs. Sam Reid T. Co., 104 Mo. 53, 61, 24 Am. St. Rep. 313, 15 S. W. Rep. 543. N. Y. Congress & E. S. Co. vs. High Rock C. S. Co., 45 N. Y. 291, 6 Am. Rep. 82; Gillott vs. Esterbrook, 48 N. Y. 374, 8 Am. Rep. 553; Fetridge vs. Wells, 4 Ab. Pr. 144; Partridge vs. Menck, 2 Sandf. Ch. 622, 2 Barb. Ch. 101, 47 Am. Dec. 281; Stokes vs. Landgraft, 17 Barb. 603; Williams vs. Johnson, 2 Bosw. 1; Amoskeag Mfg. Co. vs. Spear, 2 Sandf. 599 (to which case, said to be leading American case on question of trade-marks, particular reference is made as elucidating questions per-taining to trade-marks); Howard vs. Hen-riques, 3 Sandf. 725, 727. R. I. American S. L. B. Co. vs. Anthony, 15 R. I. 338, 2 Am. St. Rep. 393, 5 Atl. Rep. 626. Fed. McLean vs. Fleming, 96 U. S. 245, bk. 24 L. ed. 828; Cof-teen vs. Brunton, 5 McL. C. C. 256, 5 Fed. Cas. 1186; Hostetter vs. Vowinkle, 1 Dill. C. C. 329, 12 Fed. Cas. 546; Kinney vs. Allen, 1 Hughes C. C. 106, 14 Fed. Cas. 603; Taylor vs. Carpenter, 3 Story C. C. 463, 23 Fed. Cas. 742; Burton vs. Stratton, 12 Fed. Rep. 696, 700; Liggett & M. T. Co. vs. Hynes, 30 Fed. Rep. 883, 884; Estes vs. Worthington, 22 Fed. Rep. 822; Moxie Nerve Food Co. vs. Baumbach, 32 Fed. Rep. 205, 210; Celluloid Mfg. Co. vs. Read, 47 Fed. Rep. 712, 716; California Fig Syrup Co. vs. Improved Fig S. Co., 51 Fed. Rep. 296 (case arising in California); Cleveland Stone Co. vs. Wallace, 52 Fed. Rep. 431; Improved Fig Syrup Co. vs. California Fig S. Co., 54 Fed. Rep. 175, 4 C. C. A. 264 (case arising in California); Van Hoboken vs. Mohns, 112 Fed. Rep. 523 (case arising in California); Kosterling vs. Seattle Brew. & M. Co., 116 Fed. Rep. 620 (case arising in California); Keuffel & Esser Co. vs. H. S. Crocker Co., 118 Fed. Rep. 187 (case arising in California). Eng. Sykes vs. Sykes, 3 Barn. & C. 541, 10 Eng. C. L. 176, 27 Rev. Rep. 420; Croft vs. Day, 7 Beav. 84, 29 Eng. Ch. 84; Holloway vs. Holloway, 13 Beav. 209; Knott vs. Cologan, 3 Keen 213, 15 Eng. Ch. 213; Crawshaw vs. Thompson, 4 Man. & Gr. 357, 43 Eng. C. L. 357; Millington vs. Fox, 3 Myl. & C. 338, 14 Eng. Ch. 338; Harper vs. Pearson, 3 L. T. (N. S.) 547.

175. Contra: Blanchard vs. Hill, 3 Atk. 284 (in which case, long since exploded, Lord Hardwick remarked that he "knew of no in-stance in granting an injunction to restrain one trader from using a trade-mark of an- other, and that, in his opinion, it would be of mischievous consequences to do so").

As to when injunction will lie against in- fringement of trade-mark, see note 96 U. S. 245, bk. 24 L. ed. 828-830.

176. Clear right to relief must be shown.— Although court unhesitatingly grants injunc- tion when infringement is shown, clear right to relief must appear and court proceeds with caution.—Md. Witthaus vs. Braun, 44 Md. 303, 22 Am. Rep. 44. N. Y. Amoskeag Mfg. Co. vs. Spear, 2 Sandf. 599, 606 (said to be leading

American case on question of trade-marks). Fed. Coffeen vs. Brunton, 5 McL. C. C. 256, 5 Fed. Cas. 1186.

177. Discretion of court.—In suits for infringement of trade-marks injunction is allowable, in sound discretion of the court, in accordance with ordinary rule governing law of injunctions.—Enoch Morgan's Sons Co. vs. Whittier-Coburn & Co., 118 Fed. Rep. 657, 661 (case arising in California).

As to discretion of court in granting injunction, see 10 Encyc. Pl. & Pr. 988-994.

178. Fraud—Not basis of jurisdiction.—Although to certain extent fraud enters into grounds upon which infringement of trade-mark will be enjoined, positive proof of fraudulent intent is not required, the rule being that claimant of trade-mark has unqualified right to have infringement enjoined.—International Silver Co. vs. Wm. H. Rogers Corp. (N. J. Ch. Feb. 9, 1904), 57 Atl. Rep. 1037 (instructive case upon this point). See Conn. Holmes B. & H. vs. Holmes B. & A. Mfg. Co., 37 Conn. 278, 9 Am. Rep. 324. Iowa. Shaver vs. Shaver, 54 Iowa 208, 37 Am. Rep. 194, 6 N. W. Rep. 188. Ky. Metcalfe vs. Brand, 86 Ky. 331, 9 Am. St. Rep. 282, 5 S. W. Rep. 773. N. Y. Glen & H. Mfg. Co. vs. Hall, 61 N. Y. 226, 19 Am. Rep. 278; Hier vs. Abrahams, 82 N. Y. 519, 37 Am. Rep. 589, 591. R. L. Davis vs. Kendall, 2 R. I. 566, 570; Carmichel vs. Latimer, 11 R. I. 395, 23 Am. Rep. 481. Wis. Manitowoc M. Co. vs. Milwaukee M. Co. 119 Wis. 543, 97 N. W. Rep. 389. Fed. McLean vs. Fleming, 96 U. S. 245, bk. 24 L. ed. 823, 331, 332; Coffeen vs. Brunton, 5 McL. C. C. 256, 5 Fed. Cas. 1186; N. K. Fairbank Co. vs. Luckel, K. & C. S. Co., 103 Fed. Rep. 327, 42 C. C. A. 376 (case arising in Washington). Eng. Wotherspoon vs. Curry, L. R., 5 Eng. & Ir. App. 512.

179. Compare: Shaver vs. Shaver, 54 Iowa 208, 37 Am. Rep. 194, 195, 6 N. W. Rep. 188; Osgood vs. Allen, 1 Holmes C. C. 135, 13 Fed. Cas. 871; Gaines vs. Sroufe, 117 Fed. Rep. 965, 966, 967 (case arising in California).

180. Plaintiff's fraud—Injunction denied unless plaintiff has clean hands.—Plaintiff who asks injunction against infringement of trade-mark must come with clean hands; he cannot be granted relief upon a claim to the exclusive use of a trade-mark which contains a false representation, calculated to deceive the public as to the manufacturer of the article and the place where it is manufactured.—Joseph vs. Macowsky, 96 Cal. 513, 521, 31 Pac. Rep. 914, 19 L. R. A. 53. See Colo. Solis Cigar Co. vs. Pozo, 16 Colo. 388, 25 Am. St. Rep. 279, 26 Pac. Rep. 556. Conn. Meriden Britannia Co. vs. Parker, 39 Conn. 450, 12 Am. Rep. 401. Md. Selgert vs. Abbott, 61 Md. 276, 284, 43 Am. Rep. 101. N. Y. Taylor vs. Gilles, 59 N. Y. 331, 17 Am. Rep. 333; Fetridge vs. Wells, 13 How. Pr. 385, 390, 393 ("Balm of Thousand Flowers," falsely representing ingredients of medicine); Hobbs vs. Francals, 19 How. Pr. 571. Pa. Palmer vs. Harris, 60 Pa. St. 156, 100 Am. Dec. 557; Phalon vs. Wright, 5 Phila. 464, 467 ("Extract of Night-Blooming Cereus" fraudulently used). R. L. Carmichel vs. Latimer, 11 R. I. 395, 23 Am. Rep. 481. Tenn. C. F. Simmons Medicine Co. vs. Mansfield Drug Co., 93 Tenn. 84, 23 S. W. Rep. 165. Fed. Man-

hattan Med. Co. vs. Wood, 108 U. S. 213, bk. 27 L. ed. 706, 2 Sup. Ct. Rep. 436; Lawrence Mfg. Co. vs. Tennessee Mfg. Co., 138 U. S. 537, bk. 34 L. ed. 997, 11 Sup. Ct. Rep. 396; Brown C. Co. vs. Meyer, 139 U. S. 540, bk. 35 L. ed. 247, 11 Sup. Ct. Rep. 625; Clinton E. Worden & Co. vs. California F. & C. Co., 137 U. S. 516, bk. 47 L. ed. 282 (case arising in California); Burton vs. Stratton, 13 Fed. Rep. 696, 700; Moxie Nerve Food Co. vs. Baumbach, 32 Fed. Rep. 205, 207, 208; Clotworthy vs. Schepp, 42 Fed. Rep. 62; Krauss vs. Jos. R. Peebles Sons Co., 58 Fed. Rep. 585, 594 (whisky falsely alleged to be Pepper whisky); Kohler Mfg. Co. vs. Beeshore, 59 Fed. Rep. 572, 3 C. C. A. 215 ("One Night Cough Cure," asserting physiological impossibility).

Deception as bar to relief for infringement of trade-mark.—See note bk. 47 L. ed. U. S. Rep. 282-286.

181. Same—Same—False representation as to make of goods.—Where dealer in razors has them stamped "Queen's Own Co." and thereby falsely represents that they were manufactured in Sheffield, he is not entitled to an injunction against infringement.—Joseph vs. Macowsky, 96 Cal. 513, 520, 31 Pac. Rep. 914, 19 L. R. A. 53.

182. Same—Same—Intoxicating ingredients in nerve food.—Where so-called nerve food is sold under name of Moxie and upon the representation that it contains no poison, stimulant, or alcohol, trade-mark is entitled to protection notwithstanding the fact that the beverage contains an imperceptible amount of alcohol, which is discoverable upon chemical analysis, but which is so small that practically speaking there is no alcohol in it.—Moxie Nerve Food Co. vs. Baumbach, 32 Fed. Rep. 205, 210.

183. Same—Same—Merits of proprietary medicine not inquired into.—In suit for injunction against infringement of trade-mark used in connection with proprietary medicine, to wit, a tonic which is sold as being efficacious in restoring strength to those weakened by various ailments and which is widely known and largely sold, court will not enter upon minute investigation of question whether it is a mere alcoholic stimulant and quack medicine injurious to the human system.—Samuel Bros. Co. vs. Hostetter Co., 118 Fed. Rep. 257, 260, 55 C. C. A. 111 (case arising in California).

184. Same—Same—Misrepresentation as to origin or article.—Where importer of tea calls it "He-No Tea" and uses such trade-mark in connection with false representation that it is "kind the Chinese drink," when in fact it is not peculiarly the kind that the Chinese drink and is nothing but ordinary tea, he is not entitled to protection.—Kenny vs. Gillet, 70 Md. 574, 17 Atl. Rep. 499.

185. Ignorance and innocence of infringer immaterial.—Equity will enjoin infringement of trade-mark regardless of the defendant's ignorance or innocence in committing the offense.—Metcalfe vs. Brand, 86 Ky. 331, 9 Am. St. Rep. 282, 5 S. W. Rep. 773; Coffeen vs. Brunton, 5 McL. C. C. 256, 5 Fed. Cas. 1186; Moxie Nerve Food Co. vs. Baumbach, 32 Fed. Rep. 205, 213; Millington vs. Fox, 3 Myl. & C. 338, 14 Eng. Ch. 338.

186. Compare: *Davless Co. Distilling Co. vs. Martinoni*, 117 Fed. Rep. 186, 188 (case arising in California; plaintiff's trade-mark recently adopted and not well known).

187. Injunction against injunction.—Party threatened with injunction against infringement of trade-mark is not entitled to injunction against such impending injunction.—*Wolfe vs. Burke*, 56 N. Y. 115.

188. Mandatory injunction requiring defendant to change sign.—Where plaintiff builds store of peculiar architecture and design and competitor builds imitation store so that it is difficult to distinguish one from the other and in addition imitates plaintiff's sign, using "Mechanical" as substitute for "Mechanics" store, court will grant mandatory injunction requiring defendant to put distinctive sign on his establishment.—*Weinstock L. & Co. vs. Marks*, 109 Cal. 529, 538-543, 50 Am. St. Rep. 57, 42 Pac. Rep. 142, 30 L. R. A. 182 (case of first impression). See *Howard vs. Henriques*, 3 Sandf. (N. Y.) 725.

189. Monetary loss not necessary.—Although it is found that the plaintiff has not suffered any monetary loss, yet if the plaintiff's title to the trade-mark and infringement thereof are found, equity will interfere and grant injunction.—*Regis vs. Jaynes*, 135 Mass. 458, 70 N. E. Rep. 480. See *Shaver vs. Shaver*, 54 Iowa 208, 210, 212, 37 Am. Rep. 194, 6 N. W. Rep. 188.

190. Preliminary injunction.—Removal of obnoxious sign should not be decreed before final hearing except in extreme cases and where right thereto is clearly established.—*Hagen vs. Beth*, 118 Cal. 320, 331, 50 Pac. Rep. 425. See *Fairbanks vs. Jacobus*, 14 Blatchf. C. C. 337, 8 Fed. Cas. 951.

191. Quality of defendant's article immaterial.—Imitator of trade-mark may not defend as against true owner, by showing that the article sold by him is as good as the representation implied by the use of the trade-mark; while such fact may, perhaps, be shown in defense, or at least in mitigation of damages, in an action on the case by the purchasers.—*Weinstock L. & Co. vs. Marks*, 109 Cal. 529, 536, 50 Am. St. Rep. 57, 42 Pac. Rep. 142, 30 L. R. A. 182. See *Comm. Boardman vs. Meriden Britannia Co.*, 35 Conn. 402, 95 Am. Dec. 270, 272. *Fla. El Modelo C. Mfg. Co. vs. Gato*, 25 Fla. 886, 23 Am. St. Rep. 537, 7 So. Rep. 23, 6 L. R. A. 823. *Iowa. Shaver vs. Shaver*, 54 Iowa 208, 37 Am. Rep. 194, 6 N. W. Rep. 188. *Fed. Coffeen vs. Brunton*, 5 McL. C. C. 256, 5 Fed. Cas. 1186.

192. Scope of injunction.—Business not enjoined.—It is not proper to enjoin defendant from manufacturing and selling articles to which trade-mark is attached, but decree should be so limited as merely to enjoin him from fraudulent use of trade-mark.—*Spieker vs. Lash*, 102 Cal. 38, 46, 36 Pac. Rep. 362. See *Moxie Nerve Food Co. vs. Baumbach*, 22 Fed. Rep. 205, 207.

193. Third person.—Infringement by immaterial.—Fact that third persons have imitated trade-mark is no defense. "This rather aggravates than excuses the misconduct unless done with the consent or acquiescence of the plain-

tiff."—*Taylor vs. Carpenter*, 3 Story C. C. 458, 23 Fed. Cas. 742. See *Filley vs. Fassett*, 44 Mo. 169, 100 Am. Dec. 275; *Taylor vs. Carpenter*, 2 Woodb. & M. C. C. 1, 2, 23 Fed. Cas. 744.

194. Threats to continue wrong need not be proved.—In suit for infringement fact that defendant has infringed trade-mark is sufficient evidence of his intention to continue to do so, and it is not necessary that plaintiff should aver or prove threats.—*Bradley vs. Norton*, 23 Conn. 157, 208, 37 Am. Dec. 200.

195. JURISDICTION.—Foreign courts have.—Owner of trade-mark may enforce his rights in foreign states.—*Derringer vs. Plate*, 29 Cal. 292, 295, 37 Am. Dec. 170.

196. LACHES.—Application of equitable principles.—Reasonable diligence is required of claimant of trade-mark in asserting his rights, and if he has slept on his rights for a long time court may in its discretion deny injunction.—*El Modelo C. Mfg. Co. vs. Gato*, 25 Fla. 886, 23 Am. St. Rep. 537, 7 So. Rep. 23, 6 L. R. A. 823; *La Republique Francaise vs. Saratoga V. S. Co.*, 191 U. S. 427, bk. 48 L. ed. 247; *N. K. Fairbank Co. vs. Luckel K. & C. S. Co.*, 116 Fed. Rep. 322, 323, 54 C. C. A. 204 (case arising in Oregon).

197. Accounting denied because of.—Laches on part of owner of a trade-mark in asserting his right against one who infringes it, while it may not bar his right to seek the intervention of a court of equity by injunction, bars his right to require an accounting of the gains and profits earned by the infringer.—*McLean vs. Fleming*, 96 U. S. 245, 255, bk. 24 L. ed. 822; *Low vs. Fels*, 35 Fed. Rep. 361 (four years' delay); *N. K. Fairbank Co. vs. Luckel, K. & C. Soap Co.*, 106 Fed. Rep. 498, 499; *Harrison vs. Taylor*, 11 Jur. (N. S.) 408 (said to be leading case); *Beard vs. Turner*, 13 Law T. (N. S.) 747 (two years' delay).

198. Defense not favored.—Court of equity will not, in general, refuse an injunction on account of delay in seeking relief, where the proof of infringement is clear, even though the delay may be such as to preclude the party from any right to an account for past profits.—*Schmidt vs. Brieg*, 100 Cal. 672, 682, 35 Pac. Rep. 623, 22 L. R. A. 790. *Fla. El Modelo Mfg. Co. vs. Gato*, 25 Fla. 886, 23 Am. St. Rep. 537, 7 So. Rep. 23, 6 L. R. A. 823. *La. Wolfe vs. Barnett*, 24 La. Ann. 97, 13 Am. Rep. 111. *N. Y. Gillott vs. Esterbrook*, 48 N. Y. 374, 8 Am. Rep. 553; *Amoskeag Mfg. Co. vs. Spear*, 2 Sandf. 599, 605 (said to be leading American case on question of trade-mark). *Fed. Delaware & H. C. Co. vs. Clark*, 80 U. S. (13 Wall.) 311, bk. 20 L. ed. 581; *McLean vs. Fleming*, 96 U. S. 245, bk. 24 L. ed. 822; *Estes vs. Worthington*, 23 Fed. Rep. 822; *N. K. Fairbank Co. vs. Luckel K. & C. Soap Co.*, 106 Fed. Rep. 498, 499 (case arising in Oregon). *Eng. Rogers vs. Rogers*, 31 Law T. (N. S.) 285.

199. Notice and knowledge of infringement.—Owner of trade-mark is not to be deemed to have acquiesced in infringement and to have been guilty of laches until after he has notice or knowledge of the infringement.—*El Modelo C. Mfg. Co. vs. Gato*, 25 Fla. 886, 23 Am. St. Rep. 537, 7 So. Rep. 23, 6 L. R. A. 823.

200. Preliminary injunction denied because

of.—When delay of the owner of trade-mark to prosecute infringer has been of a tendency to mislead the public or the defendant sought to be enjoined into a false security, and a sudden injunction would result injuriously, it ought not to be granted summarily, but the complainant should be left to his relief at final hearing.—*Estes vs. Worthington*, 22 Fed. Rep. 822 (from which case it would seem that laches affect merely right to preliminary injunction).

201. PLEADING—Allegations on information and belief are not permitted as respects matters which are essential to the rights of complainant and which are necessarily within his knowledge; and hence such matters as existence of trade-mark and the imitation thereof must be alleged positively.—*Gaines & Co. vs. Sroufe*, 117 Fed. Rep. 965, 966, 967 (case arising in California).

202. Demurrer to bills for injunction, like demurrer to other bills, amounts to a confession of allegations of frauds contained in bill.—*Enoch Morgan's Sons Co. vs. Hunkele*, 8 Fed. Cas. 724.

203. General requisites of bill for injunction.—In order to warrant injunction bill must allege, (1) existence of trade-mark; (2) fact of imitation either actual or colorable; and (3) fact that such imitation is made without license or acquiescence of complainant.—*Gaines & Co. vs. Sroufe*, 117 Fed. Rep. 965, 966, 967 (case arising in California).

204. Laches must be pleaded.—Where defendant proposes to make the defense that plaintiff has been guilty of laches he should set up such defense in his answer; and if plaintiff's evidence discloses laches defendant should avail himself thereof in the trial court and not raise the question for the first time on appeal.—*Schmidt vs. Brieg*, 100 Cal. 672, 681, 682, 35 Pac. Rep. 623, 22 L. R. A. 790.

205. STAY OF INJUNCTION PENDING APPEAL.—Mandatory injunction requiring removal of sign is stayed and suspended by appeal taken from order granting such injunction; but appeal has no such effect upon that part of injunction which is merely prohibitory.—*Schwarz vs. Superior Court*, 111 Cal. 106, 110, 111, 43 Pac. Rep. 580.

206. TRESPASS ON THE CASE LIES FOR INFRINGEMENT.—One remedy which may be resorted to for infringement of trade-mark is trespass on the case, but such action is not usually brought, and the more appropriate course is to go into equity for an injunction and accounting.—See *Derringer vs. Plate*, 29 Cal. 292, 298, 87 Am. Dec. 170. *Ga. M. A. Theford Medicine Co. vs. Curry*, 96 Ga. 89, 22 S. E. Rep. 661. *Ky. Metcalfe vs. Brand*, 86 Ky. 321, 9 Am. St. Rep. 282, 5 S. W. Rep. 773. *Mass. Regis vs. Jaynes*, 185 Mass. 458, 70 N. E. Rep. 480. *R. I. Barrows vs. Knight*, 6 R. I. 434, 78 Am. Dec. 452; *Carmichel vs. Latimer*, 11 R. I. 395, 23 Am. Rep. 481.

207. Purchaser of spurious article has remedy, it would seem, by action on the case.—See *Boardman vs. Meriden Britannia Co.*, 35 Conn. 402, 95 Am. Dec. 270, 272.

VII. DAMAGES FOR INFRINGEMENT.

208. ARE RECOVERABLE for infringement of trade-mark in action on the case or in suit

for injunction and accounting.—*Derringer vs. Plate*, 29 Cal. 292, 298, 87 Am. Dec. 170. See *Graham vs. Plate*, 40 Cal. 593, 6 Am. Rep. 639; *Eggers vs. Hink*, 63 Cal. 446, 49 Am. Rep. 96.

As to remedy by case, see para. 206, 207 this note.

As to remedy by injunction, see para. 174-205 this note.

209. EXEMPLARY DAMAGES—Distinction between actions at law and in equity.—Although exemplary or punitive damages may be recoverable in action on the case where wanton disregard of plaintiff's right is shown, such damages will not be awarded upon an accounting in a suit in equity.—*Hennessy vs. Wilmerding-Loewe Co.*, 103 Fed. Rep. 90, 95, 96 (case arising in California; distinguishing *Press Pub. Co. vs. Monroe*, 73 Fed. Rep. 196, 201, 19 C. C. A. 429, 51 L. R. A. 353).

210. NOMINAL DAMAGES ARE RECOVERABLE, even though plaintiff is not shown to have sustained actual damages.—*El Modelo C. Mfg. Co. vs. Gato*, 25 Fla. 886, 23 Am. St. Rep. 537, 7 So. Rep. 23, 6 L. R. A. 823.

211. PROFITS REALIZED BY INFRINGER.—Because of the inherent difficulty of ascertaining how much of the profits made by the infringer results from the intrinsic value of his commodity and how much from the credit given to it by the trade-mark, the reasonable and just rule is that in action for infringement owner of the trade-mark shall have the whole profit made by the infringer, although under certain circumstances the owner may be entitled to more.—*Graham vs. Plate*, 40 Cal. 593, 598, 399, 6 Am. Rep. 639. See Fla. *El Modelo C. Mfg. Co. vs. Gato*, 25 Fla. 886, 23 Am. St. Rep. 537, 7 So. Rep. 23, 6 L. R. A. 823. *Mass. Marsh vs. Billings*, 61 Mass. (7 Cush.) 322, 54 Am. Dec. 723. *Me. Pelts vs. Elchele*, 62 Mo. 171. *N. Y. Coats vs. Holbrook*, 2 Sandf. Ch. 586. *Ohio. Burckhardt vs. Burckhardt*, 42 Ohio St. 474, 51 Am. Rep. 842. *Fed. Hostetter vs. Vowinkle*, 1 Dill. C. C. 329, 12 Fed. Cas. 546; *Pitts vs. Hall*, 2 Blatchf. C. C. 329, 19 Fed. Cas. 754; *Benkert vs. Feder*, 34 Fed. Rep. 534, 535 (case arising in California); *Hennessy vs. Wilmerding-Loewe Co.*, 103 Fed. Rep. 90 (case arising in California).

212. Compare: *Gregory vs. Spieker*, 110 Cal. 150, 154, 155, 52 Am. St. Rep. 70, 42 Pac. Rep. 576 (injury to good-will).

Damages for infringement of patents, copyrights, or trade-marks, as affected by loss of profits.—See note by F. H. Bowby, 51 L. R. A. 301-325.

213. Difference in price with and without trade-mark not proper measure of damages.—Court will not adopt as measure of compensation for infringement of trade-mark difference between price for which the spurious goods would sell without trade-mark and for which they would sell with it, but infringer will be made to account for entire profits made upon goods wrongfully sold under trade-mark.—*Benkert vs. Feder*, 34 Fed. Rep. 534, 535 (case arising in California). See *Graham vs. Plate*, 40 Cal. 593, 598, 599, 6 Am. Rep. 639.

214. REPUTATION OF PLAINTIFF INJURED.—In addition to recovering for profits lost by plaintiff or made by defendant, the

court will consider the injury which has been inflicted upon the reputation of plaintiff's goods by the sale of defendant's spurious article.—

Hennessey vs. Wilmerding-Loewe Co., 103 Fed. Rep. 90 (case arising in California).

§ 992. GOOD-WILL OF BUSINESS. The good-will of a business is the expectation of continued public patronage, but it does not include a right to use the name of any person from whom it was acquired.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2-G. Various definitions of good-will.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc.**, in: *Snow vs. Holmes*, 71 Cal. 142, 143, 11 Pac. Rep. 856 (cited); *Prior vs. Diggs* (Cal. Oct. 1, 1892), 31 Pac. Rep. 155 (cited); *Rankin vs. Newman*, 114 Cal. 635, 664, 46 Pac. Rep. 742, 34 L. R. A. 265 (applied); *Merchants Ad-Sign Co. vs. Sterling*, 124 Cal. 429, 431, 71 Am. St. Rep. 94, 57 Pac. Rep. 463, 46 L. R. A. 142 (referred to).

2. **DEFINITION OF GOOD-WILL.**—Good-will of business is expectation of continued public patronage.—*Snow vs. Holmes*, 71 Cal. 142, 143, 11 Pac. Rep. 856. See *Bell vs. Ellis*, 33 Cal. 620, 624; *Cruess vs. Fessler*, 39 Cal. 336, 338. *Ind. Smock vs. Pierson*, 63 Ind. 405, 34 Am. Rep. 269. *Iowa. Millsbaugh Laundry vs. First Nat. Bank*, 24 Iowa 1, 94 N. W. Rep. 262. *La. Bergamini vs. Bastian*, 35 La. Ann. 60, 48 Am. Rep. 216; *Vonderbank vs. Schmidt*, 44 La. Ann. 264, 32 Am. St. Rep. 336, 10 So. Rep. 616, 15 L. R. A. 462. *Mich. Chittenden vs. Witbeck*, 50 Mich. 401, 15 N. W. Rep. 526; *Myers vs. Kalamazoo B. Co.*, 54 Mich. 215, 52 Am. Rep. 811, 19 N. W. Rep. 961, 20 Id. 645; *Williams vs. Farrand*, 38 Mich. 473, 50 N. W. Rep. 446, 14 L. R. A. 161. *N. H. Smith vs. Gibbs*, 44 N. H. 343. *N. Y. Boon vs. Moss*, 70 N. Y. 469, 474; *Howe vs. Searing*, 19 How. Pr. 14; *Johnson vs. Friedhoff*, 7 Misc. Rep. 484, 27 N. Y. Supp. 932. *N. J. Lane vs. Smythe*, 46 N. J. Eq. (1 Dick.) 443, 19 Atl. Rep. 199. *Ohio. Morgan vs. Perhamus*, 36 Ohio St. 517, 522, 38 Am. Rep. 607. *Tenn. Slack vs. Suddoth*, 102 Tenn. 375, 73 Am. St. Rep. 331, 52 S. W. Rep. 180, 45 L. R. A. 589. *Tex. Rice vs. Angell*, 73 Tex. 350, 11 S. W. Rep. 338, 3 L. R. A. 769. *Fed. Menendez vs. Holt*, 128 U. S. 514, bk. 32 L. ed. 525, 9 Sup. Ct. Rep. 143; *Metropolitan Nat. Bank vs. St. Louis Dispatch Co.*, 149 U. S. 436, bk. 37 L. ed. 799, 13 Sup. Ct. Rep. 944; *Washburn vs. National Wall Paper Co.*, 31 Fed. Rep. 17; *Sheldon vs. Houghton*, 5 Blatchf. C. C. 285, 21 Fed. Cas. 1239. *Eng. England vs. Downs*, 6 Beav. 269; *Wedderburn vs. Wedderburn*, 22 Beav. 84; *Chissum vs. Dewes*, 5 Russ.

29, 29 Rev. Rep. 10; *Giblet vs. Read*, 9 Mod. 460; *Kennedy vs. Lee*, 3 Mer. 441; 17 Rev. Rep. 110; *Crutwell vs. Lye*, 17 Ves. 335, 346, 11 Rev. Rep. 98 (per Lord Eldon).

See note 95 Am. St. Rep. 293.

3. **Comprehensive definition**, and one which, with unimportant variations, has been quite generally approved, is, "the advantage or benefit which is acquired by an establishment, beyond the mere value of the capital stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers on account of its local position or common celebrity."—*England vs. Downs*, 6 Beav. 269 (quoted with approval in *Millsbaugh Laundry vs. First Nat. Bank*, 120 Iowa 1, 94 N. W. Rep. 262).

4. **Lord Eldon's definition** is, that trademark is "no more than probability that the old customers will resort to the old place."—*Crutwell vs. Lye*, 17 Ves. 335, 11 Rev. Rep. 98.

5. **Compare: Menendez vs. Holt**, 128 U. S. 514, bk. 32 L. ed. 525, 9 Sup. Ct. Rep. 143 (declaring Lord Eldon's definition too narrow); *Churton vs. Douglass*, 1 John. Eng. Ch. 174 (where Lord Eldon's definition was pronounced too narrow, and good-will was held to include every positive advantage acquired arising out of the business, whether connected with the premises where it was carried on, the name of proprietor, or with another matter carrying with it the benefit of the business).

6. **Story's definition.**—Good-will is "the advantage or benefit which is acquired by an establishment beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices."—*Bell vs. Ellis*, 33 Cal. 620, 624, quoting Story Part. § 99.

§ 993. GOOD-WILL AND NAME, TRANSFER OF. The good-will of a business is property, transferable like any other, and the person transferring it may transfer with it the right of using the name under which the business is conducted.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 395, held unconstitutional, see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXLII, p. 602.

1. Applied, cited, construed, referred to, etc.
2. Analogy between good-will and trademark.
3. Any legitimate business—Good-will may be acquired with reference to.

4. Appurtenance—Good-will is.
5. Same—Incorporeal right.
6. Assignment of good-will by transferee.
7. Change of business location does not affect ownership of good-will.

8. Corporate stock—Good-will not included in value of shares.
9. Injunction against interference with good-will—Equity has jurisdiction.
10. Same—Breach of contract by plaintiff.
11. Same—Evidence must be clear and satisfactory.
12. Same—Lessee's violation of good-will after termination of lease.
13. Same—Nominal damages only—Injunction notwithstanding.
- 14, 15. Same—Scope of decree—Disposition of mail matter.
16. Same—Stipulation to pay liquidated damages.
17. Ownership of good-will.
18. Partnership—Good-will passes to surviving partner when.
- 19, 20. Pleading—Bill for injunction—Requisite allegations.
21. Property right.
22. Same—Asset in determining solvency.
23. Same—Capital stock of corporation issued for good-will.
24. Same—Decedent's estate—Good-will is part of.
25. Same—Same—Administrator accountable for good-will.
26. Same—Taxation of good-will.
27. Transfer of good-will—Assignability in general.
28. Same—Contract to retire from business.
29. Same—Same—Breach of covenant by acting as agent.
30. Same—Same—Construction of contract is strict.
31. Same—Same—Limitation of restraint to time that transferee is in business.
32. Same—Same—Partial restraint of trade.
33. Same—Same—Restraint necessary to protect purchaser.
- 34, 35. Same—Estoppel to deny assignability and title.
36. Same—Fraudulent representations as to value.
37. Same—Same—Rescission of contract.
38. Same—Judicial sale admissible.
- 39, 40. Same—Lease—Assignment of—Lease of business.
41. Same—Married woman may transfer good-will.
42. Same—Mortgage of assets does not include good-will.
43. Same—Ownership of transferor—Transfer is evidence of.
44. Same—Parol evidence of agreement by transferor to retire.
45. Same—Right of transferor to engage in business unless covenant to contrary.
46. Same—Rival establishment set up by third person.
47. Same—Set-off of damages for breach of covenant.
- 48, 49. Same—Severable contract.
50. Same—Solicitation of business by transferor.
51. Same—Same—Violation of express covenant.
52. Same—Stipulation for liquidated damages.

- 53, 54. Same—Stockholder's agreement to retire from corporation's business—Transfer of corporation's good-will.
- 55, 56. Same—Territorial limitations.
57. Variance between pleading and proof.
58. Warranty on sale of good-will.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Snow vs. Holmes*, 71 Cal. 142, 148, 11 Pac. Rep. 856 (referred to); *Prior vs. Diggs* (Cal. Oct. 1, 1892), 31 Pac. Rep. 155 (referred to); *Rankin vs. Newman*, 114 Cal. 635, 664, 46 Pac. Rep. 742, 34 L. R. A. 265 (cited); *Merchants Ad-Sign Co. vs. Sterling*, 124 Cal. 429, 431, 71 Am. St. Rep. 94, 57 Pac. Rep. 468, 46 L. R. A. 142 (referred to).

2. Analogy between good-will and trademark.—See ante § 991 and note.

3. ANY LEGITIMATE BUSINESS—GOOD-WILL MAY BE ACQUIRED WITH REFERENCE TO.—Abstracting title is business with reference to which good-will may be acquired.—*Ragsdale vs. Nagle*, 106 Cal. 332, 336, 39 Pac. Rep. 628.

4. APPURTENANCE—Good-will is.—Right to good-will cannot exist as mere abstract right independent of business, but is in the nature of appurtenance to business in connection with which it is used.—See *Spring Valley Water Works vs. Schottler*, 62 Cal. 69, 118; *Merchants Ad-Sign Co. vs. Sterling*, 124 Cal. 429, 432, 433, 71 Am. St. Rep. 94, 57 Pac. Rep. 468, 46 L. R. A. 142. *Mich. Williams vs. Farrand*, 88 Mich. 473, 50 N. W. Rep. 446, 14 L. R. A. 161. *Neb. Wittenberg vs. Mollyneaux*, 60 Neb. 583, 83 N. W. Rep. 842. *N. J. Lane vs. Smythe*, 46 N. J. Eq. (1 Dick.) 443, 19 Atl. Rep. 199. *N. Y. Williams vs. Wilson*, 4 Sandf. Ch. 379. *Fed. Metropolitan Nat. Bank vs. St. Louis Dispatch Co.*, 149 U. S. 436, bk. 37 L. ed. 799, 13 Sup. Ct. Rep. 944; *Sheldon vs. Houghton*, 5 Blatchf. C. C. 285, 21 Fed. Cas. 1239. *Eng. Chisum vs. Dewes*, 5 Russ. 29, 29 Rev. Rep. 10.

5. Incorporeal right.—Good-will is not tangible property, but is incorporeal and mere right attached to business or property to which it appertains.—*Bell vs. Ellis*, 33 Cal. 620, 625. *Ind. Hart vs. Smith*, 159 Ind. 182, 95 Am. St. Rep. 280, 64 N. E. Rep. 661, 58 L. R. A. 949. *N. Y. Boon vs. Moss*, 70 N. Y. 469, 474. *Tex. Rice vs. Angell*, 73 Tex. 350, 11 S. W. Rep. 338, 3 L. R. A. 769. *Fed. Sheldon vs. Houghton*, 5 Blatchf. C. C. 285, 21 Fed. Cas. 1239.

6. ASSIGNMENT OF GOOD-WILL BY TRANSFEREE—Where good-will is transferred and bond conditioned not to engage in business is given for protection of transferee, covenants contained in such bond are personal, and transferee cannot assign before breach so as to entitle his assignee to sue on the bond given his covenantor's breach by subsequently starting up business.—*Hillman vs. Shannahan*, 4 Oreg. 163, 18 Am. Rep. 281.

7. CHANGE OF BUSINESS LOCATION does not affect ownership of good-will, and owner thereof may transfer it from one place of business to another (dictum).—*Washburn vs. National Wall Paper Co.*, 81 Fed. Rep. 17, 20.

See *Hart vs. Smith*, 159 Ind. 132, 95 Am. St. Rep. 230, 64 N. E. Rep. 661, 53 L. R. A. 949.

8. CORPORATE STOCK—Good-will not included in value of shares.—Good-will does not enter into and form an element in the value of shares of stock in trading corporation.—*Spring Valley Water Works vs. Schottler*, 62 Cal. 69, 118.

9. INJUNCTION AGAINST INTERFERENCE WITH GOOD-WILL.—Where good-will is sold and transferee agrees or covenants to retire from business and not to compete with transferee, and such agreement or covenant is not so unreasonable as respects time and place as to make it obnoxious to public policy, if transferee sets up in business in opposition to transferee injunction will lie.—*Brown vs. Kling*, 101 Cal. 295, 299, 35 Pac. Rep. 995. See *City Carpet B. etc. Works vs. Jones*, 102 Cal. 506, 515, 36 Pac. Rep. 542; *Ragsdale vs. Nagle*, 106 Cal. 332, 336, 39 Pac. Rep. 628; *Meyers vs. Merillion*, 118 Cal. 352, 358, 50 Pac. Rep. 662. *Ala.* *McCurry vs. Gibson*, 108 Ala. 451, 54 Am. St. Rep. 177, 8 So. Rep. 806. *Ark.* *Webster vs. Williams*, 62 Ark. 101, 34 S. W. Rep. 537. *Ga.* *Jefferson vs. Markert*, 112 Ga. 498, 37 S. E. Rep. 758. *Ill.* *Ranft vs. Reimers*, 200 Ill. 386, 65 N. E. Rep. 720, 60 L. R. A. 291. *Ind.* *Eisel vs. Hayes*, 141 Ind. 41, 40 N. E. Rep. 119. *Kan.* *Hollis vs. Shaffer*, 38 Kan. 492, 17 Pac. Rep. 86. *Ky.* *J. G. Mattingly Co. vs. Mattingly*, 96 Ky. 430, 27 S. W. Rep. 985. *Mass.* *Angier vs. Webber*, 96 Mass. (14 Allen) 211, 92 Am. Dec. 748; *Dwight vs. Hamilton*, 113 Mass. 175, 178; *Anchor Elec. Co. vs. Hawkes*, 171 Mass. 101, 107, 68 Am. St. Rep. 403, 50 N. E. Rep. 109, 41 L. R. A. 189. *Mich.* *Grow vs. Seligman*, 47 Mich. 607, 41 Am. Rep. 737, 11 N. W. Rep. 404; *Myers vs. Kalamazoo B. Co.*, 54 Mich. 215, 52 Am. Rep. 811, 19 N. W. Rep. 961, 20 Id. 545; *Williams vs. Farrand*, 88 Mich. 473, 50 N. W. Rep. 446, 14 L. R. A. 161. *N. J.* *Lane vs. Smythe*, 46 N. J. Eq. (1 Dick.) 443, 19 Atl. Rep. 199; *Althen vs. Vreeland* (N. J. Ch. Jan. 13, 1897), 36 Atl. Rep. 479. *N. Y.* *Dr. David Kennedy Corp. vs. Kennedy*, 165 N. Y. 353, 59 N. E. Rep. 133; *U. S. Cordage Co. vs. William Wall's Sons Rope Co.*, 90 Hun 429, 35 N. Y. Supp. 978. *N. C.* *Kramer vs. Old*, 119 N. C. 1, 56 Am. St. Rep. 650, 25 So. Rep. 813, 34 L. R. A. 309. *Pa.* *Hall's Appeal*, 60 Pa. St. 458, 100 Am. Dec. 584. *Tex.* *Welsh vs. Morris*, 81 Tex. 159, 26 Am. St. Rep. 801, 16 S. W. Rep. 744. *Fed.* *Lawrence vs. Times Print. Co.*, 90 Fed. Rep. 24 (case arising in Washington). *Eng.* *Jones vs. Heavens*, L. R. 4 Ch. Div. 636, 20 Moak Eng. Rep. 800. See note 68 Am. St. Rep. 409.

10. Breach of contract by plaintiff will preclude him from complaining that defendant violated his covenant not to re-establish his business.—*Johnson vs. Moss*, 45 Cal. 515, 518.

11. Evidence must be clear and satisfactory that defendant, upon transferring good-will, agreed upon sufficient consideration to retire from business, otherwise injunction will not be granted.—*Hall's Appeal*, 60 Pa. St. 458, 100 Am. Dec. 584.

12. Lessee's violation of good-will after termination of lease.—Where newspaper business, including good-will, is leased, upon ter-

mination of lease injunction lies to prevent lessee from continuing to use good-will.—*Lane vs. Smythe*, 46 N. J. Eq. (1 Dick.) 443, 19 Atl. Rep. 199.

13. Nominal damages.—Even though only nominal damages can be proven, plaintiff in such case is entitled to injunction—partly, perhaps, upon the very ground of the difficulty in proving damages.—*Brown vs. Kling*, 101 Cal. 295, 302, 35 Pac. Rep. 995.

14. SCOPE OF INJUNCTION—Disposition of mail matter.—Where rival establishment is set up in violation of covenant contained in transfer of good-will and defendant receives mail intended for plaintiff, but there appears to be no likelihood that any great number of letters will miscarry, the court should not decree that all mail should pass through hands and under scrutiny of plaintiff, but decree should be so formed as to leave defendant to receive all mail that comes to him and he should be required forthwith to deliver to plaintiff all that appears to have been intended for the latter.—*Myers vs. Kalamazoo B. Co.*, 54 Mich. 215, 52 Am. Rep. 811, 19 N. W. Rep. 961, 20 Id. 545. See *Ranft vs. Reimers*, 200 Ill. 386, 65 N. E. Rep. 720, 60 L. R. A. 291.

15. Same—Referee appointed to open mail.—Where business is done through mail by advertising, and, owing to defendant's fraudulent acts after transferring business, mail matter intended for transferee miscarries, court may appoint referee to receive, open, and read letters and distribute them to their true destination.—*Dr. David Kennedy Corp. vs. Kennedy*, 165 N. Y. 353, 59 N. E. Rep. 133.

16. Stipulation to pay liquidated damages in case of breach of covenant not to engage in business after sale of good-will does not oust equity of jurisdiction to enjoin future breaches.—*McCurry vs. Gibson*, 108 Ala. 451, 54 Am. St. Rep. 177, 8 So. Rep. 806.

17. Ownership of good-will.—See ante § 655 and note.

18. PARTNERSHIP—Express provision that good-will shall go to survivorship.—Where articles of partnership provide that surviving partners and their successors shall have right and privilege of continuing business under name adopted, good-will of business passes to surviving partner and does not form an asset of the estate of a deceased partner.—*Rankin vs. Newman*, 114 Cal. 635, 650, 46 Pac. Rep. 742, 34 L. R. A. 265.

Dissolution of partnership—Agreement not to carry on similar business.—See Code Civ. Proc. § 1675 and note.

Partner has no authority to dispose of good-will.—See post § 2430 subd. 2 and note.

19. PLEADING—Bill for injunction must allege performance by plaintiff of the acts which he undertook to do where injunction is sought against breach by defendant of covenant not to carry on business.—*Hollis vs. Shaffer*, 38 Kan. 492, 17 Pac. Rep. 86.

20. PLEADING—Complaint need not allege non-payment.—Where good-will is sold and agreement made to retire from business and covenant for liquidated damages is inserted,

complaint alleging establishment of rival business shows breach of contract and cause of action without any allegation of non-payment, because the contract was not simply for the payment of money.—*Frans vs. Bieler*, 126 Cal. 176, 179, 58 Pac. Rep. 466.

21. PROPERTY RIGHT.—It is abundantly settled by authority that good-will is property.—*Bell vs. Ellis*, 83 Cal. 620, 624, 625; *Cruess vs. Fessler*, 39 Cal. 336, 338. *Ind. Smock vs. Pierson*, 68 Ind. 405, 34 Am. Rep. 269. *Mass. Angier vs. Webber*, 96 Mass. (14 Allen) 211, 92 Am. Dec. 748. *N. J. Lane vs. Smythe*, 46 N. J. Eq. (1 Dick.) 443, 19 Atl. Rep. 199. *N. Y. Glen & H. Mfg. Co. vs. Hall*, 61 N. Y. 226, 230, 19 Am. Rep. 373; *Williams vs. Wilson*, 4 Sandf. Ch. 479. *N. C. Kramer vs. Old*, 119 N. C. 1, 56 Am. St. Rep. 650, 25 So. Rep. 813, 34 L. R. A. 309. *Pa. Buck's Estate*, 185 Pa. St. 57, 64 Am. St. Rep. 616, 39 Atl. Rep. 821. *Wis. Washburn vs. Dosh*, 96 Wis. 436, 60 Am. Rep. 873, 32 N. W. Rep. 551. *Fed. Metropolitan Nat. Bank vs. St. Louis Dis. Co.*, 149 U. S. 436, bk. 37 L. ed. 799, 13 Sup. Ct. Rep. 944; *Metropolitan Nat. Bank vs. St. Louis Dispatch*, 36 Fed. Rep. 722; *Washburn vs. National Wall Paper Co.*, 81 Fed. Rep. 17, 20; *Sheldon vs. Houghton*, 5 Blatchf. C. C. 285, 21 Fed. Cas. 1239.

22. Asset in determining question of solvency.—Good-will of trade or business must be taken into account in determining whether, at a given date, party conducting business was insolvent.—*Bell vs. Ellis*, 83 Cal. 620, 625.

23. Capital stock of corporation issued for good-will.—Where capital stock is issued and good-will is taken in payment for it, the stock is issued for "property actually received" within meaning of statute if proper valuation is put upon such good-will.—*Washburn vs. National Wall Paper Co.*, 81 Fed. Rep. 17, 19-21.

24. Decedent's estate—Good-will is part of.—Good-will is property which may be disposed of by good-will.—*Hitchcock vs. Coker*, 6 Ad. & E. 432, 38 Eng. C. L. 98. See *Martin vs. Bowker*, 163 Mass. 461, 40 N. E. Rep. 766 (question not expressly decided).

25. Administrator accountable for good-will.—Where saloon-keeper dies leaving an unexpired lease and saloon business and his administrator takes possession of the premises and carries on the business the administrator must account for the value of the good-will although the license to sell liquor, not being assignable, is not an asset of the estate.—*Buck's Estate*, 185 Pa. St. 57, 64 Am. St. Rep. 616, 39 Atl. Rep. 821 (distinguishing *Grimm's Estate*, 181 Pa. St. 233, 37 Atl. Rep. 403, where executor sold stock and fixtures to widow of deceased and she secured new lease).

26. Taxation of good-will.—Although good-will is property in such sense that legislature may tax it, it is not property of such character as is within the constitutional command that all property must be taxed; and statute which declares that all property not expressly exempt shall be subject to taxation does not apply to good-will.—*Hart vs. Smith*, 159 Ind. 182, 188-190, 95 Am. St. Rep. 280, 64 N. E. Rep. 661, 58 L. R. A. 949.

27. TRANSFERS—Assignability of good-will.—It is well settled that good-will is property which is assignable in like manner as other property.—*Buckingham vs. Waters*, 14 Cal. 146, 147; *Cruess vs. Fessler*, 39 Cal. 336, 338. See *Cole. Herfort vs. Cramer*, 7 Colo. 483, 490, 4 Pac. Rep. 396. *Ind. Smock vs. Pierson*, 68 Ind. 405, 408, 34 Am. Rep. 269. *Iowa. Millsbaugh Laundry vs. First Nat. Bank*, 120 Iowa 1, 94 N. W. Rep. 262. *Mass. Morse vs. Hutchins*, 102 Mass. 439. *Mich. Beal vs. Chase*, 31 Mich. 490. *N. Y. Hathaway vs. Bennett*, 10 N. Y. 103, 61 Am. Dec. 739; *Glen & H. Mfg. Co. vs. Hall*, 61 N. Y. 226, 230, 19 Am. Rep. 273; *Boon vs. Moss*, 70 N. Y. 469, 473; *Howe vs. Searing*, 19 How. Pr. 14. *N. C. Kramer vs. Old*, 119 N. C. 1, 56 Am. St. Rep. 650, 25 S. E. Rep. 813, 34 L. R. A. 389. *Ohio. Morgan vs. Perhamus*, 36 Ohio St. 517, 33 Am. Rep. 607. *Pa. McClurg's Appeal*, 53 Pa. St. 51; *McFarland vs. Stewart*, 2 Watts 111, 26 Am. Dec. 109. *Wis. Washburn vs. Dosh*, 96 Wis. 436, 60 Am. Rep. 873, 32 N. W. Rep. 551. *Fed. Brown Chemical Co. vs. Meyer*, 132 U. S. 540, bk. 35 L. ed. 247, 11 Sup. Ct. Rep. 625; *Metropolitan Nat. Bank vs. St. Louis Dispatch*, 149 U. S. 436, bk. 37 L. ed. 799, 13 Sup. Ct. Rep. 944; *Barber vs. Connecticut Mut. L. Ins. Co.*, 15 Fed. Rep. 312; *Metropolitan Nat. Bank vs. St. Louis Dispatch Co.*, 36 Fed. Rep. 722; *Knoedler vs. Boussod*, 47 Fed. Rep. 465; *Washburn vs. National Wall Paper Co.*, 81 Fed. Rep. 17, 20. *Eng. Hitchcock vs. Coker*, 6 Ad. & E. 432, 446, 38 Eng. C. L. 98; *Wedderburn vs. Wedderburn*, 22 Beav. 84; *Bradbury vs. Dickens*, 27 Beav. 53; *Johnson vs. Helleley*, 34 Beav. 63; *Turner vs. Major*, 3 Giff. 442.

28. Contract to retire from business.—Where business and good-will are sold and agreement is made by seller to retire from business or not to compete with purchaser, contract is void as being in restraint of trade and against public policy unless it has limitations as to time and place, and although no precise rule has been laid down or can be declared, and each case must be determined upon its own particular circumstances, cardinal rule seems to be that stipulation to retire from business indefinitely, which applies to the entire area of the state, is void.—*Wright vs. Ryder*, 36 Cal. 342, 353, 359, 95 Am. Dec. 186. See *More vs. Bonnet*, 40 Cal. 251, 254, 6 Am. Rep. 621; *Callahan vs. Donnolly*, 45 Cal. 152, 154, 13 Am. Rep. 172 (holding contract by which defendant agreed not to manufacture "Donnolly's Yeast Powder," and not to engage in any branch of the yeast powder business void as respects latter clause); *Brown vs. Kling*, 101 Cal. 395, 299, 35 Pac. Rep. 995; *Merchants Ad-Sign Co. vs. Sterling*, 124 Cal. 429, 433, 71 Am. St. Rep. 94, 57 Pac. Rep. 463, 46 L. R. A. 142. *Ga. Rakestraw vs. Lanier*, 104 Ga. 183, 189, 69 Am. St. Rep. 154, 30 S. E. Rep. 735. *Mich. Western Wooden Ware Assoc. vs. Starkey*, 84 Mich. 76, 83, 22 Am. St. Rep. 636, 47 N. W. Rep. 604, 11 L. R. A. 503. *Neb. Wittenberg vs. Mollyneaux*, 60 Neb. 533, 33 N. W. Rep. 342. *N. J. Althen vs. Vreeland* (N. J. Ch. Jan. 13, 1897), 36 Atl. Rep. 479. *N. Y. Dunlop vs. Gregory*, 10 N. Y. 244, 61 Am. Dec. 746; *Chappel vs. Brockway*, 21 Wend. 157, 159. *Tex. Texas Standard Oil*

Co. vs. Adoue, 38 Tex. 650, 29 Am. St. Rep. 690, 19 S. W. Rep. 274, 15 L. R. A. 598. Wash. Oregon Steam Nav. Co. vs. Hale, 1 Wash. 383, 286, 34 Am. Rep. 802. Eng. Homer vs. Ashford, 3 Bing. 322, 11 Eng. C. L. 121, 28 Rev. Rep. 634; Horner vs. Graves, 7 Bing. 735, 20 Eng. C. L. 310, 32 Rev. Rep. 635.

See post §§ 1673, 1674 and notes.

29. Breach of covenant by acting as agent.—Where seller of good-will agrees that he will not establish, carry on, etc., business or act as agent for specified period he will be held to such stipulation and will not be permitted to manage or operate the business wholly or in part as the agent of another.—Meyers vs. Merillion, 118 Cal. 352, 353, 50 Pac. Rep. 662.

30. Same.—Construction of contract is strict, but in construing it its ultimate aim and end are not to be lost sight of and it must not be given such narrow construction as to render it inoperative.—Meyers vs. Merillion, 118 Cal. 352, 357, 358, 50 Pac. Rep. 662. See Snow vs. Holmes, 71 Cal. 142, 143, 11 Pac. Rep. 856.

31. Same.—Limitation of restraint to time that transferee is in business.—This rule limits restraint to time during which buyer of good-will or his assignee is in business, for beyond that time there is nothing to protect.—See Brown vs. Kling, 101 Cal. 295, 300, 35 Pac. Rep. 995.

32. Same.—Partial restraint of trade.—Where good-will is sold and contract or covenant is made by transferrer to retire from business, and such contract or covenant is limited as to time and place and is reasonably necessary for protection of transferee, it will be upheld.—Wright vs. Ryder, 36 Cal. 342, 357, 95 Am. Dec. 186; City Carpet B. etc. Works vs. Jones, 102 Cal. 506, 511, 512, 36 Pac. Rep. 841. See Ala. McCurry vs. Gibson, 108 Ala. 451, 54 Am. St. Rep. 177, 18 So. Rep. 806. Ark. Webster vs. Williams, 62 Ark. 101, 34 S. W. Rep. 537. Ga. Jefferson vs. Markert, 112 Ga. 495, 37 S. E. Rep. 758. Ind. Elsel vs. Hayes, 141 Ind. 41, 40 N. E. Rep. 119. Iowa. Mills-paugh Laundry vs. First Nat. Bank, 120 Iowa 1, 94 N. W. Rep. 262. Kan. Hollis vs. Shaffer, 32 Kan. 492, 17 Pac. Rep. 36. La. Bergamini vs. Bastian, 35 La. Ann. 60, 48 Am. Rep. 216. Mass. Boutelle vs. Smith, 116 Mass. 111, 114; Anchor Elec. Co. vs. Hawkes, 171 Mass. 101, 105, 107, 63 Am. St. Rep. 403, 50 N. E. Rep. 109, 41 L. R. A. 189. Neb. Wittenberg vs. Mollyneaux, 60 Neb. 583, 33 N. W. Rep. 842. N. C. Kramer vs. Old, 119 N. C. 1, 56 Am. St. Rep. 650, 25 S. E. Rep. 313, 34 L. R. A. 389. Ohio. Morgan vs. Perhamus, 36 Ohio St. 517, 38 Am. Rep. 607. Pa. Hall's Appeal, 60 Pa. St. 453, 100 Am. Dec. 584. Utah. Lashus vs. Chamberlain, 6 Utah 385, 24 Pac. Rep. 188. Wis. Washburn vs. Dosh, 62 Wis. 436, 60 Am. Rep. 373, 32 N. W. Rep. 551. Eng. Nordenfelt vs. Maxim Nordenfelt Co., App. Cas. 1 Ch. Div. 535.

33. Same.—Restraint necessary to protect purchaser.—Covenant on part of seller of good-will not to resume business must not impose greater restraint upon seller than is necessary to protect buyer.—Brown vs. Kling, 101 Cal. 295, 300, 35 Pac. Rep. 995. See Webster vs. Williams, 62 Ark. 101, 34 S. W. Rep. 537.

34. Estoppel of purchaser to assert non-assignability.—Purchaser of good-will who does not set up fraud or deceit cannot recover back purchase price for good-will on theory that it is not vendible commodity, even though he may have been worsted in bargain.—Buckingham vs. Waters, 14 Cal. 146, 147.

35. Estoppel of transferrer to deny title.—Where business and good-will are transferred, transferrer is estopped to deny his interest or title.—Potter vs. Ahrens, 110 Cal. 674, 679, 43 Pac. Rep. 338.

36. Fraudulent representations as to value.—Where business and good-will are transferred representations as to value of good-will are material, and if misrepresentations are knowingly made and transferee is ignorant of true value, transferrer is guilty of fraud, for which transferee may maintain action.—Cruess vs. Fessler, 39 Cal. 336, 338. See Loaliza vs. Superior Court, 85 Cal. 11, 30, 20 Am. St. Rep. 197, 9 L. R. A. 376, sub nom. Loaliza vs. Levy, 24 Pac. Rep. 707. Colo. Herfort vs. Cramer, 7 Colo. 483, 490, 4 Pac. Rep. 896. Ind. Manley vs. Felty, 146 Ind. 194, 199, 45 N. E. Rep. 74. Mass. Morse vs. Hutchins, 102 Mass. 439. Minn. Griffin vs. Farrier, 22 Minn. 474, 475, 21 N. W. Rep. 553. Neb. Hook vs. Bowman, 42 Neb. 80, 33, 47 Am. St. Rep. 691, 60 N. W. Rep. 389. Pa. Byrne vs. Stewart, 124 Pa. St. 450, 17 Atl. Rep. 19. R. L. Handy vs. Waldron, 18 R. L. 567, 49 Am. St. Rep. 794, 29 Atl. Rep. 142.

37. Same.—Rescission of contract.—Because of fraud, transferee of business is entitled to rescind the entire contract, and it is of no moment what is the relative value of the stock and fixtures and of the business and good-will.—Cruess vs. Fessler, 39 Cal. 336, 338.

38. Judicial sale of good-will.—Good-will is property which may be sold by order of court.—Glen & H. Mfg. Co. vs. Hall, 61 N. Y. 226, 230, 19 Am. Rep. 278. See Lawrence vs. Times Print. Co., 90 Fed. Rep. 24 (sale under decree foreclosing chattel mortgage).

As to judicial sale of trade-mark, ante § 991 and note par. 126.

39. Lease assigned.—When good-will consists in advantage of location it follows an assignment of lease of such location.—Williams vs. Farrand, 83 Mich. 473, 50 N. W. Rep. 446.

40. Lease of business may include good-will without it being expressly stated (dictum).—Santa Fe Elec. Co. vs. Hitchcock, 9 N. M. 156, 50 Pac. Rep. 332.

41. Married woman may transfer good-will, in like manner as man or as feme sole.—See Potter vs. Ahrens, 110 Cal. 674, 679, 43 Pac. Rep. 338.

As to capacity of married women to make contracts, see ante § 158 and note, particularly para. 71-106.

42. Mortgage of entire assets does not include good-will.—Santa Fe Elec. Co. vs. Hitchcock, 9 N. M. 156, 50 Pac. Rep. 332.

43. Ownership of transferrer.—Written contract transferring business and good-will is evidence of ownership as against transferrer.—Potter vs. Ahrens, 110 Cal. 674, 679, 43 Pac. Rep. 338.

44. **Parol evidence of agreement to retire is not admissible where good-will is sold by instrument in writing, unless it is clearly shown that the stipulation sought to be proved was omitted through fraud or mistake.**—Hall's Appeal, 60 Pa. St. 453, 100 Am. Dec. 534.

45. **Right of transferee to engage in business.**—Where business and good-will are sold without any agreement or covenant on part of seller to retire from business he may set up same business in same town or city.—Knoedler vs. Bousod, 47 Fed. Rep. 465. See *La. Bergamini vs. Bastian*, 35 La. Ann. 60, 43 Am. Rep. 216. *Mass. Bassett vs. Percival*, 37 Mass. (5 Allen) 345. *Pa. Hall's Appeal*, 60 Pa. St. 453, 100 Am. Dec. 534. *R. L. Zanturjian vs. Boornasian* (R. I. April 24, 1903), 55 Atl. Rep. 199. *Wis. Washburn vs. Dosch*, 63 Wis. 436, 60 Am. Rep. 373, 32 N. W. Rep. 551. *Eng. Crutwell vs. Lye*, 17 Ves. 335, 11 Rev. Rep. 92.

Transfer of good-will.—Right to set up rival establishment in the absence of express covenant.—See note 43 Am. Rep. 223-232, wherein annotator arrives at the following conclusions: (1) The vendor can set up a similar business. (2) He cannot use the name of the old firm. (3) But he may solicit the favors of the old customers, both by public advertisement and by private solicitation."

46. **Rival establishment set up by third person.**—Where business and good-will are sold with covenant against engaging in business on the part of the transferee, act of third person in setting up competing establishment does not constitute breach of such covenant.—*Webb vs. McCloskey*, 68 Md. 196, 11 Atl. Rep. 715.

47. **Set-off of damages for breach of covenant.**—In action by seller of good-will to recover purchase price defendant may set off damages sustained by reason of plaintiff's breach of covenant not to resume business.—*Snow vs. Holmes*, 71 Cal. 142, 149, 11 Pac. Rep. 856.

48. **Severable contract.**—Although Civil Code, § 1674, permits restriction to extent merely to "specify county, city, or part thereof," where covenant is made to retire from business in territory "within a radius of ten miles in either direction" from a point which will make the covenant include a part of Contra Costa County and a part of the City of San Francisco and also a portion of Alameda County, in which the central point is located, the description of territory is good as to all of it that lies within Alameda County.—*Frans vs. Bieler*, 126 Cal. 176, 181, 56 Pac. Rep. 249, 58 Id. 466. See *City Carpet B. etc. Works vs. Jones*, 102 Cal. 506, 36 Pac. Rep. 341.

See post § 1674 and note.

49. **Compare:** *More vs. Bonnet*, 40 Cal. 251, 254, 6 Am. Rep. 621; *Althen vs. Vreeland* (N. J. Ch. Jan. 13, 1897), 36 Atl. Rep. 479.

50. **Solicitation of business by transferee.**—After sale of good-will in absence of express agreement to contrary transferee may go into same business at same place and solicit customers in public manner.—*Ward vs. Ward*, 40 N. Y. St. Rep. 792, 15 N. Y. Supp. 913; *Snowden vs. Noah*, 1 Hopk. Ch. (N. Y.) 347; *Vernon vs. Hallam*, 84 Ch. Div. 748.

51. **Same.—Violation of express covenant.**—Solicitation of business on part of transferee of good-will will not be permitted in violation of express covenant.—*Angier vs. Webber*, 96 Mass. (14 Allen) 211, 93 Am. Dec. 748.

52. **Stipulation for liquidated damages.**—In view of the difficulty of estimating damages where covenant to retire from business is broken, and of § 1671, which provides that parties to contract may agree upon amount of damages "when from nature of case it would be impracticable or extremely difficult to fix actual damages," where good-will is sold with covenant to retire from business, parties may agree upon liquidated damages, and in action for breach of covenant plaintiff is entitled to stand strictly upon terms of covenant.—*Potter vs. Ahrens*, 110 Cal. 674, 680, 681, 43 Pac. Rep. 338. See *Frans vs. Bieler*, 126 Cal. 176, 56 Pac. Rep. 249, 58 Id. 466.

53. **Stockholder's agreement to retire from corporation's business.**—Where stockholder in plaintiff corporation transfers "all his interest, direct and indirect, in plaintiff, and his interest in the good-will of the business of plaintiff," and agrees not to conduct or to assist in conduct of business in which such corporation is engaged, such stipulation to retire from business is void.—*Merchants Ad-Sign Co. vs. Sterling*, 124 Cal. 429, 433, 71 Am. St. Rep. 94, 57 Pac. Rep. 468, 46 L. R. A. 142.

54. **Stockholder cannot transfer corporation's good-will.**—Stockholder in a corporation cannot transfer the good-will of the corporation.—*Merchants Ad-Sign Co. vs. Sterling*, 124 Cal. 429, 432, 71 Am. St. Rep. 94, 57 Pac. Rep. 463, 46 L. R. A. 142.

55. **Territorial limitations.—Reaffirmance of common law by code.**—Code introduces no new principle in giving right to refrain from engaging in business within county, city, or part thereof, but simply eliminates from controversy arising upon such restriction question as to what is a reasonable territorial limit, by specifically defining it, and thus preventing litigation.—*City Carpet B. etc. Works vs. Jones*, 102 Cal. 506, 511, 36 Pac. Rep. 341.

56. **Same.—Radius of five miles.—Three years.**—Where butcher business is sold and good-will, agreement on part of seller not to engage, directly or indirectly, in such business in city in which he established it or within radius of five miles from said city, within period of three years, is not unreasonable and will be sustained.—*Brown vs. Kling*, 101 Cal. 295, 298, 299, 35 Pac. Rep. 995.

57. **VARIANCE BETWEEN PLEADING AND PROOF.**—Where plaintiff in his complaint sets up contract which did not require the defendant to give plaintiff any written guaranty that he would not re-establish his business, proof of contract containing such provision is essentially different from the one declared on, the variance is vital, and nonsuit should be granted.—*Johnson vs. Moss*, 45 Cal. 515, 517, 518.

58. **Warranty on sale of good-will.**—See post § 1776 and note.

See *Sigourney vs. Zellerbach*, 55 Cal. 431, 440; *Reed vs. Norton*, 99 Cal. 617, 619, 34 Pac. Rep. 333; *Owen vs. Meade*, 104 Cal. 179, 183, 37 Pac. Rep. 923; *Elmore vs. Elmore*, 114 Cal. 516, 521, 46 Pac. Rep. 453.

§ 994. **TITLE DEEDS.** Instruments essential to the title of real property, and which are not kept in a public office as a record, pursuant to law, belong to the person in whom, for the time being, such title may be vested, and pass with the title.

History: Enacted March 21, 1872.

Applied, cited, construed, referred to, etc., in: Hoag vs. Howard, 55 Cal. 564, 566 (referred to).

PART IV. ACQUISITION OF PROPERTY.

TITLE I. MODES IN WHICH PROPERTY MAY BE ACQUIRED, §§ 1000, 1001.

- II. OCCUPANCY, §§ 1006, 1007.
- III. ACCESSION, §§ 1013-1033.
- IV. TRANSFER, §§ 1039-1231.
- V. HOMESTEADS, §§ 1237-1269a.
- VI. WILLS, §§ 1270-1377.
- VII. SUCCESSION, §§ 1383-1408.
- VIII. WATER RIGHTS, §§ 1410-1422.
- IX. HYDRAULIC MINING, §§ 1424, 1425.

TITLE I.

MODES IN WHICH PROPERTY MAY BE ACQUIRED.

§ 1000. Property, how acquired.

§ 1001. Acquisition of property by exercise of eminent domain.

§ 1000. PROPERTY, HOW ACQUIRED. Property is acquired by:

1. Occupancy;
2. Accession;
3. Transfer;
4. Will; or,
5. Succession.

History: Enacted March 21, 1872.

Applied, cited, construed, referred to, etc., in: *In re Estate Burdick*, 113 Cal. 237, 294, 44 Pac. Rep. 734 (referred to).

§ 1001. ACQUISITION OF PROPERTY BY EXERCISE OF EMINENT DOMAIN. Any person may, without further legislative action, acquire private property for any use specified in section twelve hundred and thirty-eight of the Code of Civil Procedure either by consent of the owner or by proceedings had under the provisions of title seven, part three, of the Code of Civil Procedure; and any person seeking to acquire property for any of the uses mentioned in such title is "an agent of the state," or a "person in charge of such use," within the meaning of those terms as used in such title. This section shall be in force from and after the fourth day of April, eighteen hundred and seventy-two.

History: Enacted March 21, 1872.

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| <ol style="list-style-type: none"> 1. Applied, cited, construed, referred, to, etc. 2. "Any person" includes corporation. 3. Complaint in condemnation proceedings. 4. Constitutionality of statute. 5. Estates and rights in land which may be taken. 6. Generality of statute—Plenary power conferred. 7. Municipal corporations within statute. 8. Necessity must exist to justify taking. 9. Previous effort to agree unnecessary. 10. Private individuals have right of eminent domain. | <ol style="list-style-type: none"> 11. Private property which may be taken—Classes enumerated. 12. Public uses—Statutory—enumeration of. 13. Railroad corporations—Exercise of power of eminent domain by. <p style="margin-top: 10px;">1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: <i>St. Helena Water Co. vs. Forbes</i>, 62 Cal. 132, 133, 45 Am. Rep. 659 (applied); <i>Lux vs. Haggin</i>, 69 Cal. 258, 301, 10 Pac. Rep. 674 (construed and applied); <i>Moran vs. Ross</i>, 79 Cal. 159, 162, 21 Pac. Rep. 547 (construed and applied); <i>Moran vs. Ross</i>, 79 Cal.</p> |
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549, 550, 21 Pac. Rep. 958 (applied); Pasadena vs. Stimson, 91 Cal. 238, 248, 27 Pac. Rep. 604 (construed and applied); Santa Cruz vs. Enright, 95 Cal. 105, 111, 112, 30 Pac. Rep. 197 (applied); Kellett vs. Clayton, 99 Cal. 210, 218, 33 Pac. Rep. 885 (referred to); Los Angeles vs. Leavis, 119 Cal. 164, 165, 51 Pac. Rep. 34 (referred to); Robinson vs. Southern Cal. R. Co., 129 Cal. 8, 11, 61 Pac. Rep. 947 (construed); Beveridge vs. Lewis, 137 Cal. 619, 632, 92 Am. St. Rep. 183, 67 Pac. Rep. 1040, 70 Id. 1083, 59 L. R. A. 581 (referred to in dis. op.).

2. "ANY PERSON" INCLUDES CORPORATION.—Either corporation or individual may be agent of state to prosecute proceedings for condemnation.—Lux vs. Haggin, 69 Cal. 255, 301, 10 Pac. Rep. 674; Pasadena vs. Stimson, 91 Cal. 238, 248, 27 Pac. Rep. 604; Los Angeles vs. Leavis, 119 Cal. 164, 165, 51 Pac. Rep. 34; Robinson vs. Southern Cal. R. Co., 129 Cal. 8, 11, 61 Pac. Rep. 947.

As to corporation being person, see ante § 14 and note.

3. COMPLAINT IN CONDEMNATION PROCEEDINGS.—See Code Civ. Proc. § 1244 and note.

4. Constitutionality of statute.—See Code Civ. Proc. § 1238 and note.

5. Estates and rights in land which may be taken.—See Code Civ. Proc. § 1239 and note.

6. GENERALITY OF STATUTE.—This section and Code Civil Procedure, § 1238, is "general in the widest and fullest sense of the term," and confers power upon "any public or private corporation or any natural person."—Pasadena vs. Stimson, 91 Cal. 238, 248, 27 Pac.

Rep. 604; Santa Cruz vs. Enright, 95 Cal. 105, 111, 30 Pac. Rep. 197.

7. MUNICIPAL CORPORATIONS WITHIN STATUTE.—Provision is applicable to municipal corporations which were formed before as well as to those which were formed after adoption of constitution.—Pasadena vs. Stimson, 91 Cal. 238, 248, 27 Pac. Rep. 604; Santa Cruz vs. Enright, 95 Cal. 105, 111, 30 Pac. Rep. 197; Los Angeles vs. Leavis, 119 Cal. 164, 165, 51 Pac. Rep. 34.

8. Necessity must exist to justify taking.—See Code Civ. Proc. § 1241 and note.

9. PREVIOUS EFFORT TO AGREE UNNECESSARY.—There is no provision in the statute requiring a previous effort to agree before instituting condemnation proceedings.—Pasadena vs. Stimson, 91 Cal. 238, 249, 27 Pac. Rep. 604.

10. PRIVATE INDIVIDUALS HAVE RIGHT OF EMINENT DOMAIN.—This section and Code Civil Procedure, § 1238, taken together, confer upon private individuals right of eminent domain in class of cases specified in plain and unequivocal terms.—Moran vs. Ross, 79 Cal. 159, 162, 21 Pac. Rep. 547, 79 Cal. 549, 550, 21 Pac. Rep. 958.

11. Private property which may be taken—Classes enumerated.—See Code Civ. Proc. § 1240 and note.

12. Public uses—Statutory enumeration of.—See Code Civ. Proc. § 1238 and note.

13. Railroad corporations—Exercise of power of eminent domain by.—See ante §§ 465, 467, 469, 472, and notes; and consult KERR'S SYNTHETICAL INDEX to this work.

TITLE II. OCCUPANCY.

§ 1006. Simple occupancy.

§ 1007. Prescription.

§ 1006. SIMPLE OCCUPANCY. Occupancy for any period confers a title sufficient against all except the state and those who have title by prescription, accession, transfer, will, or succession.

History: Enacted March 21, 1872.

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| 1. Applied, cited, construed, referred to, etc. | 21. Same—Same—Color of title. |
| 2-6. Actual possession as evidence of title. | 22. Same—Of mining claim. |
| 7, 8. Same—Fence around premises. | 23. Same—Is treated as property. |
| 9. Same—Naked possession. | 24. Same—Must be actual bona fide occupation. |
| 10, 11. Possession, inclosure. | 25, 26. Same—Proof of, sufficient to maintain ejectment. |
| 12. Same—By license. | 27. Same—Inclosing and pasturing cattle. |
| 13. Same—Compensation to possessor for land taken. | 28. Same—Trespasser claiming by may inclose how much. |
| 14. Same—Presumed rightful, when. | 29. Same—Sufficiency of entry, survey, etc. |
| 15. Same—Possessor may recover until when. | 30. Same—What constitutes. |
| 16. Same—Is prima facie evidence of title. | 31. Same—Mexican law. |
| 17. Same—Same—Adversary has burden of rebuttal. | 32. Same—Occupancy, actual, effect of. |
| 18. Same—Same—Sufficient to maintain ejectment. | 33. Same—Same—Of portion, effect of. |
| 19. Same—Same—Presumption as to. | 34-36. Same—Same—Is sufficient title when. |
| 20. Same—Prior possession as evidence of title. | 37-39. Same—Same—What constitutes. |
| | 40-43. Same—Occupation, meaning of term. |
| | 44. Same—Province of jury as to certain acts. |

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Learned vs. Tangeman*, 65 Cal. 334, 4 Pac. Rep. 191 (cited); *King vs. Gots*, 70 Cal. 236, 240, 11 Pac. Rep. 656 (construed with other sections); *Wilhoit vs. Tubbs*, 33 Cal. 279, 283, 23 Pac. Rep. 386 (cited with other sections in discussion); *McGovern vs. Mowry*, 91 Cal. 332, 335, 27 Pac. Rep. 746 (applied); *Ramus vs. Humphreys* (Cal. July 24, 1901), 65 Pac. Rep. 375, 376 (applied); *Burns vs. Clark*, 132 Cal. 634, 636, 85 Am. St. Rep. 233, 66 Pac. Rep. 12 (applied and construed); *Pendola vs. Ramm*, 138 Cal. 517, 520, 71 Pac. Rep. 624 (applied).

2. ACTUAL POSSESSION OF LAND is evidence prima facie of ownership; and one in possession may maintain an action upon nuisance which injuriously affects his enjoyment of possession.—*Learned vs. Castle* (Cal. June 17, 1884), 4 Pac. Rep. 191, 194. See *Stone vs. Bumpus*, 40 Cal. 423.

See par. 16 this note.

3. AND A PARTY IN ACTUAL POSSESSION OF REAL ESTATE is in the first instance to be deemed to hold the same by title or in subordination to the title, in whomsoever it may be.—*Hawxhurst vs. Lander*, 23 Cal. 331, 333.

4. ACTUAL POSSESSION AND OCCUPATION of premises at, and for long time before, commencement of action to quiet title to lands, is sufficient to enable plaintiff to maintain action to quiet title against any one who establishes no title in himself, or as against trespasser.—*McGovern vs. Mowry*, 91 Cal. 332, 335, 27 Pac. Rep. 746.

5 And it may exist without fences or inclosure.—*Sheldon vs. Mull*, 67 Cal. 299, 300, 7 Pac. Rep. 710.

6. PARTIES IN ACTUAL POSSESSION and claiming title are presumed to be owners of land.—*Sacramento V. R. Co. vs. Moffatt*, 7 Cal. 577, 578.

See note 60 Am. Dec. 579; 39 Am. Dec. 435.

7. Fence around premises.—Fence around the premises, if evidence of possession at all, must be a substantial inclosure, which not only indicates a purpose of appropriation, and of such character and quality as to exclude intrusion by persons or cattle upon the premises.—*Wolf vs. Baldwin*, 19 Cal. 306, 317.

8. Inclosure by an ordinary fence of premises without residence thereon, or improvements or cultivation, or other acts of ownership, is of itself insufficient to constitute possession.—*Wolf vs. Baldwin*, 19 Cal. 306, 313.

9. MERE NAKED POSSESSION antecedently held by plaintiff's intestate, and not sufficient in point of duration to entitle him to protection of statute of limitations, cannot operate to create presumption that claim of possessor was connected with any particular source of title.—*McManus vs. O'Sullivan*, 48 Cal. 7, 17.

10. PARTY'S POSSESSION is not always confined to his actual inclosure.—*Castro vs. Gill*, 5 Cal. 40, 42; *Gunn vs. Bates*, 6 Cal. 262, 273.

11. POSSESSION of mining claim need not be evidenced by actual inclosures, but if

ground was included within distinct, visible, and notorious boundaries, and if claimant works portion of ground within those boundaries, this is enough as against one entering without title.—*English vs. Johnson*, 17 Cal. 107, 115, 76 Am. Dec. 574.

12. Grantor of defendant who goes into possession by license of plaintiff's agent, his possession is that of plaintiff.—*Potter vs. Knowles*, 5 Cal. 37, 38.

13. PARTIES IN POSSESSION ENTITLED TO COMPENSATION before their lands can be taken for public use, although land is claimed by another.—*Sacramento Valley R. Co. vs. Moffatt*, 7 Cal. 577, 578.

See note 60 Am. Dec. 579, 39 Am. Dec. 435.

14. POSSESSION OF PREMISES IN DISPUTE must be presumed to have been rightful until overcome by evidence to contrary.—*Hawxhurst vs. Lander*, 23 Cal. 331, 333.

15. Possession of real property is sufficient to enable possessor, or those claiming through him, to recover, until adversary has shown an anterior possession or has traced title from a paramount source.—*Keane vs. Cannovan*, 21 Cal. 291, 305, 32 Am. Dec. 733; *Hicks vs. Coleman*, 25 Cal. 122, 141, 35 Am. Dec. 103. See *Cole. Sears vs. Taylor*, 4 Colo. 33. *Fla. L'Engle vs. Reed*, 27 Fla. 345, 9 So. Rep. 213. *Neb. Spitznagle vs. Vanhessch*, 13 Neb. 333, 14 N. W. Rep. 417. *Nev. Patchen vs. Keeley*, 19 Nev. 404, 14 Pac. Rep. 347.

16. POSSESSION IS ALWAYS PRIMA FACIE EVIDENCE of title.—*Hutchinson vs. Perley*, 4 Cal. 33, 34, 60 Am. Dec. 579; *Hicks vs. Davis*, 4 Cal. 67, 69; *Winans vs. Christy*, 4 Cal. 70, 73, 60 Am. Dec. 597; *Plume vs. Seward*, 4 Cal. 94, 96, 60 Am. Dec. 599; *Potter vs. Knowles*, 5 Cal. 37, 38; *Merced Mining Co. vs. Fremont*, 7 Cal. 317, 319, 68 Am. Dec. 262; *Nagle vs. Macy*, 9 Cal. 426, 427; *Morton vs. Folger*, 15 Cal. 275, 283; *Keane vs. Cannovan*, 21 Cal. 291, 305, 32 Am. Dec. 733; *Hicks vs. Coleman*, 25 Cal. 122, 141, 35 Am. Dec. 103; *Hawxhurst vs. Lander*, 23 Cal. 331, 333; *Leonard vs. Flynn*, 89 Cal. 543, 546, 23 Am. St. Rep. 500, 26 Pac. Rep. 1099; *McGovern vs. Mowry*, 91 Cal. 332, 335, 27 Pac. Rep. 746; *Zilmer vs. Gerichten*, 111 Cal. 73, 77, 43 Pac. Rep. 403. See *Cole. Milsap vs. Stone*, 2 Colo. 137; *Sears vs. Taylor*, 4 Colo. 33. *Ga. Bagley vs. Kennedy*, 85 Ga. 703, 11 S. E. Rep. 1091. *Neb. Spitznagle vs. Vanhessch*, 13 Neb. 333, 14 N. W. Rep. 417. *Nev. Staininger vs. Andrews*, 4 Nev. 59. *Oreg. Oregon R. & N. Co. vs. Hertsberg*, 28 Oreg. 216, 37 Pac. Rep. 1019. *Tex. House vs. Reavis*, 39 Tex. 626, 35 S. W. Rep. 1063. *Wis. Baier vs. Ziegelbauer*, 66 Wis. 524, 29 N. W. Rep. 277; *Hacker vs. Horlemus*, 74 Wis. 21, 41 N. W. Rep. 965. *Fed. Burt vs. Panjaud*, 99 U. S. 180, bk. 25 L. ed. 451; *Mickey vs. Stratton*, 5 Sawy. C. C. 475, 17 Fed. Cas. 263; *Turner vs. Aldridge*, 1 McAll. C. C. 229, 24 Fed. Cas. 343.

See monographic note 60 Am. Dec. 601, 602; also notes 62 Am. Dec. 334; 70 Am. Dec. 630; 55 Am. Dec. 124; 94 Am. Dec. 333.

17. And throws upon the adversary the burden of rebutting the presumption thus raised.—*Milsap vs. Stone*, 2 Colo. 137; *Spitznagle vs. Vanhessch*, 13 Neb. 333, 14 N. W. Rep. 417. See

Hacker vs. Horlemus, 74 Wis. 21, 41 N. W. Rep. 965.

18. And is sufficient to maintain ejectment.—Plume vs. Seward, 4 Cal. 94, 96, 60 Am. Dec. 599; Merced Mining Co. vs. Fremont, 7 Cal. 317, 319, 68 Am. Dec. 262; Nagle vs. Macy, 9 Cal. 426, 427; Bagley vs. Kennedy, 85 Ga. 703, 11 S. E. Rep. 1091. See Nev. Staininger vs. Andrews, 4 Nev. 59. Tex. House vs. Reavis, 89 Tex. 626, 35 S. W. Rep. 1063. Wis. Baier vs. Ziegelbauer, 66 Wis. 524, 29 N. W. Rep. 277.

19. And as between two parties who rely upon possession solely the presumption is in favor of the possessor.—Potter vs. Knowles, 5 Cal. 87, 88.

20. PRIOR POSSESSION is evidence of title.—Norris vs. Russell, 5 Cal. 249, 250; Hicks vs. Coleman, 25 Cal. 122, 141, 85 Am. Dec. 103.

21. And cannot be made to yield to mere color of title.—Norris vs. Russell, 5 Cal. 249, 250; Hicks vs. Coleman, 25 Cal. 122, 141, 85 Am. Dec. 103.

22. POSSESSION TAKEN OF A MINING CLAIM, without reference to mining rules, is sufficient as against one entering by no better title, to maintain an action for possession.—English vs. Johnson, 17 Cal. 107, 115, 76 Am. Dec. 574.

23. POSSESSION OF REAL ESTATE is constantly treated as property, which may be purchased and sold, and for the recovery of which an action may be maintained against one having no better title.—King vs. Gots, 70 Cal. 236, 240, 11 Pac. Rep. 656.

24. POSSESSION MUST BE AN ACTUAL bona fide occupation, possessio pedis, subjection to will and control, and not mere assertion of title, and exercise of casual acts of ownership.—Plume vs. Seward, 4 Cal. 94, 96, 60 Am. Dec. 599; Sankey vs. Noyes, 1 Nev. 68.

25. Proof of prior possession is enough to maintain ejectment against mere naked trespasser.—Hutchinson vs. Perley, 4 Cal. 33, 34, 60 Am. Dec. 578; Winans vs. Christy, 4 Cal. 70, 73, 60 Am. Dec. 597; Nagle vs. Macy, 9 Cal. 426, 427. Ga. Bagley vs. Kennedy, 85 Ga. 703, 11 S. E. Rep. 1091. Oreg. Oregon R. & N. Co. vs. Hertzberg, 26 Oreg. 216, 37 Pac. Rep. 1019. Fed. Burt vs. Panjaud, 99 U. S. 180, bk. 25 L. ed. 451; Turner vs. Aldridge, 1 McAll. C. C. 229, 24 Fed. Cas. 343.

26. PROOF OF POSSESSION, HOWEVER SHORT, by a claimant will entitle him to recover, unless the defendant can account for such possession, or show a prior possession or title in himself, or a third person.—Potter vs. Knowles, 5 Cal. 87, 88.

27. Prior possession by inclosing and pasturing cattle is sufficient to defeat recovery as against a subsequent intruder or trespasser.—Bradshaw vs. Treat, 6 Cal. 172, 173; followed in Dyson vs. Bradshaw, 23 Cal. 523, 537.

28. Trespasser on public lands claiming by possession may inclose more than one hundred and sixty acres.—Dyson vs. Bradshaw, 23 Cal. 523, 537.

29. A mere entry without color of title, accompanied by survey and marking of boundaries, is not sufficient.—Murphy vs. Walling—C. C.—52

ford, 6 Cal. 648, 649; Bird vs. Dennison, 7 Cal. 297, 298.

30. As to what does and does not constitute occupancy and possession, see discussion of subject in Brumagim vs. Bradshaw, 39 Cal. 24, 44 et seq. and in note 39 C. C. A. 524.

31. THE MEXICAN LAW ON THE SUBJECT OF POSSESSION does not differ materially from laws of France and Louisiana, or from common-law rules concerning possession.—Sunol vs. Hepburn, 1 Cal. 254, 267.

32. WHEN A PARTY CAN MAKE OUT HIS POSSESSION by showing actual occupancy, although he may have no title whatever, if he has been evicted by force or fraud, he is entitled to be restored to possession, even though other party may be able to prove valid title in himself.—Sunol vs. Hepburn, 1 Cal. 254, 270.

33. WHEN PLAINTIFF CLAIMS THE POSSESSION of large lot or tract of land included within boundaries of his deed, by virtue of his having entered on and actually occupied portion, he cannot recover for an intrusion on any portion not so actually occupied unless it appears that he claims under just title and in good faith.—Sunol vs. Hepburn, 1 Cal. 254, 270.

34. OCCUPANCY OF LAND IS SUFFICIENT TITLE as against all but owner.—Pendola vs. Ramm, 138 Cal. 517, 520, 71 Pac. Rep. 624.

35. Mere occupancy of a thing, as against all except state and the owner, is sufficient title, and where things are found which have no owner, they belong, as in state of nature, to first occupant or fortunate finder.—Burns vs. Clark, 133 Cal. 634, 636, 85 Am. St. Rep. 233, 66 Pac. Rep. 12.

36. OCCUPATION AND POSSESSION AT THE TIME OF THE COMMENCEMENT OF AN ACTION to quiet title to a mining claim, which occupation and possession had continued for many years, were sufficient to maintain an action as against a defendant who set up in defense that claim prior to plaintiff's had never been abandoned.—Ramus vs. Humphreys (Cal. July 24, 1901), 65 Pac. Rep. 875, 276.

37. What will constitute actual bona fide occupation of land, subjection to will and control, must depend much upon the local situation of the premises, local customs and local circumstances of country, business for which land is used, and policy of law, and end it intends to accomplish.—Bird vs. Dennison, 7 Cal. 297, 311.

38. Wherever there is subjection of land to will and control of another with title in him, it is occupied and in actual legal possession of that other.—United States vs. Rogers, 23 Fed. Rep. 658.

39. OCCUPANT NEED NOT CULTIVATE THE PROPERTY claimed, nor is any particular kind of inclosure required when party is in possession of land marked by distinct monuments of boundary; claiming title to whole tract, possession of part so occupied will draw after it possession of the whole.—Plume vs. Seward, 4 Cal. 94, 96, 60 Am. Dec. 599; Feirbaugh vs. Masterson, 1 Idaho 133, overruled in Polack vs. McGrath, 32 Cal. 15, 20, as not being in accordance with the general rule on

the subject, and as being approved by many subsequent cases in this court.

40. Occupation is ordinarily synonymous with actual possession.—*McIntyre vs. Sherwood*, 82 Cal. 139, 143, 22 Pac. Rep. 937.

41. "Occupation," "possessio pedis," and "subjection to the will and control" are ordinarily employed as synonymous terms and as signifying actual possession.—*Lawrence vs. Fulton*, 19 Cal. 683, 690; *McKenzie vs. Brandon*, 71 Cal. 209, 211, and see *Staininger vs. Andrews*, 4 Nev. 59, 67.

See note 10 Am. Dec. 611.

42. The word "occupation" may be so used in connection with other expressions or under peculiar facts of case as to signify residence.—*Lawrence vs. Fulton*, 19 Cal. 683, 690.

43. The words "occupation" or "occupy" "mean, as used, subject to will and control *possessio pedis*," and are synonymous with subjection to will and control.—*United States vs. Rogers*, 28 Fed. Rep. 653.

44. It is the province of jury and not of court to decide what effect should be given to repairing of wall and ditch as an act of dominion over property, and whether or not this act in connection with pasturing of cattle on land, considering its quality, locality and character was sufficient, under all circumstances, to notify public that land was appropriated.—*Brumagim vs. Bradshaw*, 39 Cal. 24, 51.

See West's "Words and Phrases," tits. "Occupancy" and "Occupation."

§ 1007. **PREScription.** Occupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar an action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all.

History: Enacted March 21, 1872.

I. Adverse Possession.

1. Applied, cited, construed, referred to, etc.
- 2, 3. Adverse possession gives title, when.
4. Same—Acquisition of right depends upon.
5. Same—Code Civ. Proc. section applying.
6. Same—Continuity of user.
7. Same—Dismissal of ejectment, effect of on.
- 8-12. Same—Elements required.
13. Same—Grantee in fee may hold adversely.
14. Same—Occupancy, effect of.
15. Same—Possession evidence of ownership.
16. Same—State no power to prescribe time for United States.
17. Same—Title draws possession.
18. Same—Vendee assumes title *prima facie* good.
19. Same—Where owner in possession, intruder cannot acquire constructive possession.

II. Prescription, Title by.

20. Action for partition, when in time.
21. Burden of proving uninterrupted user.
22. Corporation authorized to acquire by.
23. Constitute right by, essentials.
24. Execution of deed, not prevent after acquisition by.
25. Five years, period fixed for.
26. Interruption of adverse user prevents.
27. Occupancy for requisite period confers title.
28. Party possessing may recover.
29. Prescription, application of.
30. Same—Will not mature against United States.
- 31, 32. Prescriptive title or rights vests, when.
33. Proof of prescriptive right, effect of.
34. Right acquired by, essentials of.
35. Same—Cannot be to commit nuisance.
36. Statute only fixes time.
- 37, 38. Taxes, effect of non-payment of.
39. Title acquired by is perfect.
40. Title by, to inclosed land.

41. Same—Conduct of parties, effect of.

42. Use of land to deposit debris on, effect.

III. Prescriptive Rights in Waters.

43. Abandonment or forfeiture of, time acquired for.
44. Same—Irrigation ditch, continuity of use.
45. Same—Right may be lost by.
46. Same—Same—Adverse use of another.
47. Essentials and requisites of—Diverting stream.
48. Same—Incursions resisted.
49. Same—Maintenance of flume.
50. Same—Mere claim of right.
- 51-53. Same—Permission to use.
- 54, 55. Same—Sufficiency of water for all, use of.
56. Same—Usufructuary right to use.
57. Same—Use of enlarged ditch not adverse, when.
58. Same—Use of water under claim of title.
59. Time and requisites of—Adverse possession for five years.
60. Same—Claim of after acquisition from government.
61. Same—If held adversely for five years, effect of disputing such possession.
- 62-67. Same—Continuous, etc., use for five years or more.
68. Change of place of diversion or use.
- 69, 70. Change of course of stream.
71. Failure to apply water to useful purpose.
72. Prescriptive right cannot be acquired against United States.
73. Same—Nor in dam to convey between two points.
74. Southern Pac. lands, adverse possession begins, when.
75. Wrongful obstruction of water, injunction.

I. ADVERSE POSSESSION.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Langford vs. Poppe*, 56 Cal. 73, 75, 76 (applied and construed); *Thomas vs. England*, 71 Cal. 456, 458, 12 Pac.

Rep. 491 (construed and applied); Willhoit vs. Tubbs, 33 Cal. 279, 289, 23 Pac. Rep. 386 (applied); Labory vs. Los Angeles Orp. Asy., 97 Cal. 270, 273, 32 Pac. Rep. 231 (construed and applied); Sullivan vs. Zeiner, 98 Cal. 346, 349, 350, 33 Pac. Rep. 209, 20 L. R. A. 730 (construed); Robinson vs. Thornton, 102 Cal. 675, 684, 34 Pac. Rep. 120 (applied); Goodwin vs. Scheerer, 106 Cal. 690, 695, 40 Pac. Rep. 18 (construed and applied); Woodward vs. Faris, 109 Cal. 12, 18, 41 Pac. Rep. 781 (construed and applied); Baker vs. Clark, 128 Cal. 181, 187, 60 Pac. Rep. 677 (applied); Rice vs. Meiners, 136 Cal. 292, 293, 68 Pac. Rep. 817 (construed and applied); Crocker vs. Dougherty, 139 Cal. 521, 525, 73 Pac. Rep. 429 (applied); Centerville & K. Irr. D. Co. vs. Sanger L. Co., 140 Cal. 385, 388, 73 Pac. Rep. 1079 (applied); Harris vs. Duarte, 141 Cal. 497, 501, 70 Pac. Rep. 298, 75 Id. 58 (applied); Adams vs. Hopkins, 144 Cal. 19, 27, 77 Pac. Rep. 712 (applied); Montecito V. W. Co. vs. Santa Barbara, 144 Cal. 578, 594, 77 Pac. Rep. 1113 (applied).

2. ADVERSE POSSESSION OF LAND for the period prescribed by the statute gives sufficient title as against a former owner.—Langford vs. Poppe, 56 Cal. 73, 75.

3. ACTUAL AND ADVERSE POSSESSION of premises continuously for more than five years gives a perfect title thereto.—Sharp vs. Blankenship, 59 Cal. 288, 289; Johnson vs. Brown, 63 Cal. 391, 393.

See notes 83 Am. Dec. 497; 94 Am. Dec. 741; 95 Am. Dec. 209.

4. ACQUISITION OF RIGHT BY ADVERSE POSSESSION depends upon adverse holding of person claiming right, and not simply upon acts of one claiming paramount title, who has been in position to assert his title during statutory period.—Langford vs. Poppe, 56 Cal. 73, 76.

5. Where state patent to land is issued, neither § 315 nor § 316 of the Code of Civil Procedure, which limit right of state and grantees thereof to ten years limitation-period as against commonwealth, has any application; five-year limit prescribed by code respecting adverse possession between private individuals applies in such case as this one, and in favor of an occupant who holds adversely, begins to run from the date of the patent.—Willhoit vs. Tubbs, 33 Cal. 279, 286, 23 Pac. Rep. 386.

6. Continuity of user to give presumptive right to an easement, and what shall constitute such continuity can be stated only with reference to the nature and character of the right claimed.—Hesperia L. & W. Co. vs. Rogers, 83 Cal. 10, 11, 17 Am. St. Rep. 209, 33 Pac. Rep. 196.

7. Dismissal of an action of ejectment terminates the right of party against whom property is held adversely to claim anything by virtue of that action; and facts that adverse holder and his predecessors contested such action, and refused to surrender possession, tend only to prove that their possession was adverse.—Langford vs. Poppe, 56 Cal. 73, 76.

8. Elements required to make out adverse possession are: (1) possession must be by actual occupation, open, and notorious, not clandestine, must be hostile to owner's title;

(2) must be held under a claim of title exclusive to any other right as one's own; (3) must be continuous and uninterrupted for a period of five years; (4) must include payment of all taxes.—Thomas vs. England, 71 Cal. 456, 458, 12 Pac. Rep. 491.

9. Entry by mere intruder under claim of right to title in whole tract does not give constructive possession which would oust or supersede constructive possession of real owner.—Labory vs. Los Angeles Orphan Asylum, 97 Cal. 270, 273, 32 Pac. Rep. 231.

10. Possession to be adverse must be accompanied by all elements required to make out adverse possession; it must be by actual occupation, open, notorious, and not clandestine; it must be hostile to other title; it must be held under claim of title, exclusive of any other right as one's own; it must be continuous and uninterrupted for period of five years.—Cox vs. Clough, 70 Cal. 345, 347, 11 Pac. Rep. 732; Alta L. & W. Co. vs. Hancock, 85 Cal. 219, 226, 20 Am. St. Rep. 217, 24 Pac. Rep. 645.

11. Possession or use in order to create presumption of grant must, under code as well as under common law, have been made under such circumstances that he whose property or right was affected could have prevented possession of use, if no grant in fact had been made.—Sullivan vs. Zeiner, 98 Cal. 346, 350, 33 Pac. Rep. 209, 20 L. R. A. 730.

12. User must be adverse to true owner and must be accompanied by elements required to make out adverse possession.—Thomas vs. England, 71 Cal. 456, 458, 12 Pac. Rep. 491.

13. Grantee in fee may hold adversely to grantor, and there can be no good reason why he should not be at liberty to deny that grantor had any title; there is no estoppel when occupant is under no obligation, express or implied, that he will at some time or in some event surrender possession.—Robinson vs. Thornton, 102 Cal. 675, 683, 34 Pac. Rep. 120.

14. Occupancy which will confer title sufficient against all would not affect validity of mere lien, but it must be held to extinguish all adverse titles to land, whether legal or equitable.—Crocker vs. Dougherty, 139 Cal. 521, 525, 73 Pac. Rep. 429.

15. POSSESSION OF LAND IS ITSELF PRIMA FACIE EVIDENCE OF OWNERSHIP, and in action of ejectment, proof of such possession prior to intrusion of adverse holder, in absence of any evidence in support of adverse holder's right to possession, is sufficient to authorize judgment of recovery.—Goodwin vs. Scheerer, 106 Cal. 690, 695, 40 Pac. Rep. 18.

16. STATE IS WITHOUT POWER TO PRESCRIBE TIME within which United States shall assert its rights in order to preserve them, and there can be no adverse possession of land under such law or adverse user of water, to natural flow of which such land is entitled, while title remains in United States.—Jatunn vs. Smith, 95 Cal. 154, 156, 30 Pac. Rep. 200.

17. TITLE TO PROPERTY DRAWS TO IT THE POSSESSION, and it remains with owner of legal title until he is divested of it by an actual adverse possession; while he is in possession of part of premises, his possession is

title to constructive possession, and can only be ousted by and to extent of actual occupation of mere intruder.—*Labory vs. Los Angeles Orp. Asy.*, 97 Cal. 370, 373, 32 Pac. Rep. 331.

18. VENDEE ENTERING UPON POSSESSION of real property under title received from grantor thereby assumes it to be prima facie good, but he is not estopped thereby from showing otherwise, or from showing in any controversy another and independent title in himself.—*Robinson vs. Thornton*, 103 Cal. 676, 682, 34 Pac. Rep. 120.

19. WHERE OWNER OF TRUE WRITTEN TITLE is also in possession an intruder cannot acquire title by constructive possession, and can only claim such portions actually occupied.—*McCormick vs. Sutton*, 97 Cal. 373, 378, 32 Pac. Rep. 444.

Adverse possession—What constitutes.—See note 4 L. R. A. 321; 6 L. R. A. 833; 53 L. R. A. 941.

Occupation under written instrument or judgment when deemed adverse.—See Code Civ. Proc. § 323 and note.

Premises actually occupied under claim of title deemed to be held adversely.—See Code Civ. Proc. § 324 and note.

Possession, when presumed.—Occupation deemed under legal title unless adverse.—See Code Civ. Proc. § 321 and note.

Right of possession not affected by descent cast.—See Code Civ. Proc. § 327 and note.

Relation of landlord and tenant as affecting adverse possession.—See Code Civ. Proc. § 326 and note.

What constitutes adverse possession under a claim of title not written.—See Code Civ. Proc. § 325 and note.

What constitutes adverse possession under written instrument or judgment.—See Code Civ. Proc. § 323 and note.

II. PRESCRIPTION, TITLE BY.

20. ACTION FOR PARTITION OF LAND granted originally by Mexican nation, brought within five years from issuance of patent therefor, under § 318 Code Civ. Proc. and § 1007 Civ. Code, former requiring seisin or possession within five years before commencement of action as necessary condition of right to maintain action for recovery of real estate, and latter providing that occupancy for period prescribed by former section confers title by prescription, is brought in time.—*Adams vs. Hopkins*, 144 Cal. 19, 27, 77 Pac. Rep. 712.

21. BURDEN OF PROVING UNINTERRUPTED USER with knowledge of owner is on party claiming by prescription.—*Ball vs. Kehl*, 95 Cal. 606, 613, 30 Pac. Rep. 780.

22. CORPORATION IS AUTHORIZED TO ACQUIRE TITLE BY PRESCRIPTION by subd. 4, § 354, Civil Code, which provides that corporation shall have right to "hold" land, and § 1007, which declares that occupancy for prescribed period is sufficient to bar action for recovery of property, and confers thereto title denominated title by prescription, notwithstanding provisions of §§ 236 and 360 of Civil Code, under which corporation may obtain title by purchase and condemnation.—*Montecito V. W. Co. vs. Santa Barbara*, 144 Cal. 578, 594, 77 Pac. Rep. 1113.

23. CONSTITUTE RIGHT BY PRESCRIPTION there must have been such an invasion of rights of party against whom it is claimed that he would have had ground of action against intruder.—*Alta L. & W. Co. vs. Hancock*, 85 Cal. 219, 226, 20 Am. St. Rep. 217, 24 Pac. Rep. 645; *Faulkner vs. Rondoni*, 104 Cal. 140, 146, 37 Pac. Rep. 832.

24. EXECUTION OF DEED DOES NOT PREVENT GRANTOR FROM AFTERWARD ACQUIRING TITLE BY ADVERSE POSSESSION against his grantee, and title by prescription is available as basis on action to quiet title to property held adversely, as well as for defense in action brought by grantee.—*Baker vs. Clark*, 128 Cal. 181, 187, 60 Pac. Rep. 677.

25. FIVE YEARS IS THE PERIOD FIXED BY LAW in California for ripening of adverse possession under prescriptive title. It is also period prescribed by law for which prescriptive right depending upon enjoyment is lost for non-using.—*Smith vs. Hawkins*, 110 Cal. 122, 127, 42 Pac. Rep. 453.

26. INTERRUPTION OF ADVERSE USER, however slight, prevents acquisition of title by prescription.—*Ball vs. Kohl*, 95 Cal. 606, 613, 30 Pac. Rep. 780.

27. OCCUPANCY FOR PERIOD PRESCRIBED BY LAW is sufficient to bar action for recovery of property, and confers title thereto, denominated title by prescription, which is sufficient against all.—*Harris vs. Duarte*, 141 Cal. 497, 501, 70 Pac. Rep. 298, 75 Id. 58.

28. PARTY POSSESSING PRESCRIPTIVE TITLE, if ousted by previous owner, may recover possession.—*Langford vs. Poppe*, 56 Cal. 73, 75.

29. PRESCRIPTION AS KNOWN TO COMMON LAW, applied to manner of acquiring or losing right by effect of lapse of time, as contradistinguished from mode of acquiring title to thing itself, by effect given to long possession or enjoyment of it. Interpretation of term, in modern times, however, raises legal presumption, under grant, but is not conclusive, and may be rebutted by other evidence.—*Thomas vs. England*, 71 Cal. 456, 458, 12 Pac. Rep. 491.

30. Prescription or adverse user will not mature into title as against United States, and it will not avail as defense, unless user has been adverse for requisite period after title has passed from United States.—*Jatunn vs. Smith*, 95 Cal. 154, 156, 30 Pac. Rep. 200.

31. Prescriptive title to tract of land held adversely under claim of title derived from patent issued to him by United States, which had been open, notorious, continuous, and exclusive for period of twenty-two years, is vested in such adverse holder.—*Wilhoit vs. Tubbs*, 83 Cal. 279, 239, 23 Pac. Rep. 356.

32. Prescriptive right becomes fixed only after five years' adverse enjoyment, and to have been adverse it must have been asserted under claim of title with knowledge and acquiescence of person having prior right, and must have been uninterrupted.—*Alta L. & W. Co. vs. Hancock*, 85 Cal. 219, 226, 20 Am. St. Rep. 217, 24 Pac. Rep. 645.

32. PROOF THAT POSSESSION HAS BEEN CONTINUED for period long enough to bar action for recovery, thereby establishing title by prescription, throws upon party who would recover possession burden to show that his right to possession has not been overcome.—*Goodwin vs. Scheerer*, 106 Cal. 690, 695, 40 Pac. Rep. 12.

34. RIGHT ACQUIRED BY PRESCRIPTION is measured by extent of continuous enjoyment. Right claim must be adverse asserted under claim of title with knowledge and acquiescence of person having prior right, and must have been uninterrupted.—*Faulkner vs. Rondoni*, 104 Cal. 140, 146, 37 Pac. Rep. 883.

35. Right cannot be acquired by prescription to continue to commit public nuisance.—*Woodruff vs. North B. G. Min. Co.*, 9 Sawy. C. C. 441, 18 Fed. Rep. 753, 811.

36. STATUTE DOES NOTHING BUT FIX THE TIME at which title by prescription shall vest, which was not very definite under common law, and it leaves circumstances which shall constitute prescription to be determined by settled law of land as it stood before code.—*Thomas vs. England*, 71 Cal. 456, 458, 12 Pac. Rep. 491; *Sullivan vs. Zeiner*, 93 Cal. 346, 350, 33 Pac. Rep. 309, 20 L. R. A. 730.

37. Non-payment of taxes will not defeat claim by prescription to water right unless property claimed adversely was actually assessed by taxation.—*Coonradt vs. Hill*, 79 Cal. 587, 591, 21 Pac. Rep. 1099.

38. If no taxes are found to have been assessed it need not be found that party claiming by adverse possession has paid taxes.—*Oneto vs. Restano*, 78 Cal. 374, 20 Pac. Rep. 743.

39. TITLE CANNOT BE BETTER OR MORE ABSOLUTE than one conferred by prescription under provisions of this section.—*Woodward vs. Faris*, 109 Cal. 12, 18, 41 Pac. Rep. 781.

40. TITLE BY PRESCRIPTION to land within limits of inclosure may be acquired by adverse possession, although inclosure was made under mistaken belief that it was within boundary of land to which he was entitled to ownership in fee; but if inclosure was made without claim that fence was upon boundary line, and with expectation of moving it to line when such should be determined by surveyor, such possession would not be adverse to owner of fee, and no title by prescription could be acquired.—*Woodward vs. Faris*, 109 Cal. 12, 17, 41 Pac. Rep. 781.

41. Title by prescription is created only where conduct of party who submits to use by other cannot be accounted for on any other hypothesis than that which raises presumption of grant of easement, and conduct of party claiming benefit of prescription must in all cases have been such in itself as to give other party right to complain.—*Lakeside D. Co. vs. Crane*, 80 Cal. 181, 184, 22 Pac. Rep. 76.

42. USE OF LAND FOR PURPOSE OF DEPOSITING DEBRIS from running stream used to convey such debris from mines does not ripen into title by prescription.—*Woodruff vs. North B. G. Min. Co.*, 9 Sawy. C. C. 441, 18 Fed. Rep. 753, 811.

Seisin within five years when necessary in action for real property.—See Code Civ. Proc. § 313 and note.

Time of commencing actions for the recovery of real property.—See Code Civ. Proc. § 315 and note.

When action cannot be brought by grantee from the state.—See Code Civ. Proc. § 316 and note.

When actions by the people or their grantees are to be brought within five years.—See Code Civ. Proc. § 317 and note.

III. PRESCRIPTIVE RIGHTS IN WATERS.

43. FIVE YEARS IS A JUST AND PROPER MEASURE OF TIME for forfeiture of an appropriator's water right for failure to use water for beneficial purpose.—*Smith vs. Hawkins*, 110 Cal. 122, 127, 42 Pac. Rep. 453.

44. Right is not abandoned to use ditch to convey water and also for purpose of irrigation because water does not flow in it every day in year. Law does not require party, to constitute continuity of use, to use water when he does not need it; if he has used ditch at such times as he needed it, the use is continuous use.—*Hesperia L. & W. Co. vs. Rogers*, 83 Cal. 10, 11, 17 Am. St. Rep. 209, 23 Pac. Rep. 196.

45. Right which is acquired to use of water by appropriation may be lost by abandonment.—*Utt vs. Frey*, 106 Cal. 392, 397, 39 Pac. Rep. 807.

46. Right which is acquired in and to waters of stream by prior appropriation thereof may be lost, either wholly or in part, by adverse possession and user of another.—*Faulkner vs. Rondoni*, 104 Cal. 140, 146, 37 Pac. Rep. 883.

47. DIVERTING OR APPROPRIATING TO USEFUL PURPOSE waters of running stream is sufficient to acquire an ownership to use of such waters to amount appropriated by operation of statute of limitations even against riparian owner, although point of diversion is without limits of lands of such riparian owner, as against any lawful use to which riparian owner had or was making of waters during time of operation of creation of right in appropriator.—*Hargrave vs. Cook*, 103 Cal. 72, 77, 41 Pac. Rep. 18, 30 L. R. A. 390.

48. INCURSIONS OF PLAINTIFF UPON DEFENDANT'S LAND for purpose of obstructing flow of water in north channel and increasing flow in south channel were never assented to by defendant, but as often as discovered, work of plaintiff in that behalf was undone by defendant. However long such incursions must have continued, or however frequently they must have been repeated, they did not secure to plaintiff any prescriptive right in water secured thereby.—*Last Chance W. D. Co. vs. Hellbron*, 86 Cal. 1, 13, 26 Pac. Rep. 523.

49. MAINTENANCE OF FLUME FOR MANY YEARS, not under license, but as of right, confers prescriptive title thereto, and owner thereof cannot be required to do some other act as condition to its continuous future maintenance.—*Centerville & S. Irr. D. Co. vs. Sanger L. Co.*, 140 Cal. 335, 338, 73 Pac. Rep. 1079.

50. MERE CLAIM OF RIGHT TO USE AND ENJOYMENT OF WATER, however long con-

tinued, will not ripen into adverse title thereto.—*Cox vs. Clough*, 70 Cal. 345, 347, 11 Pac. Rep. 732.

51. Prescriptive right in use of water from ditch cannot be claimed by parties by reason of being permitted to use certain amount of waste water from such ditch, although such permission was continued for over period of five years.—*Green vs. Carotta*, 72 Cal. 267, 269, 13 Pac. Rep. 685.

52. Where circumstances show that use of water was permissive and not adverse no right to its use can be acquired by prescription.—*Shenandoah M. & M. Co. vs. Morgan*, 106 Cal. 409, 416, 39 Pac. Rep. 802.

53. Use of water by permission of owner is not adverse.—*Ball vs. Kehl*, 95 Cal. 606, 613, 30 Pac. Rep. 780.

54. Sufficient water flowing in river to supply demands of all parties, its use by one cannot be invasion of right of any other, and right by prescription cannot be acquired thereon.—*Anaheim W. Co. vs. Semi-Tropic W. Co.*, 64 Cal. 185, 192, 30 Pac. Rep. 623.

55. Use of water from slough during seasons of abundance without objection on part of defendants gave to plaintiff no prescriptive right to change course of flow in seasons of scarcity.—*Last Chance W. D. Co. vs. Heilbron*, 86 Cal. 1, 20, 26 Pac. Rep. 523.

56. Undisputed usufructuary right to use of water for ten years is not necessarily right acquired by adverse possession.—*Heintzen vs. Binniger*, 79 Cal. 5, 6, 21 Pac. Rep. 377.

57. Use of enlarged ditch is not adverse where rights claimed by subsequent appropriators of water above dam of first appropriator have not been interfered with by enlargement of ditch of first appropriator, and box used by subsequent appropriators in diverting water to which they were entitled would not close after such enlargement, and no rights are acquired thereby.—*Natoma W. & M. Co. vs. Hancock*, 101 Cal. 42, 46, 31 Pac. Rep. 112, 35 Id. 334.

58. Use of water to be adverse must have been asserted under claim of title with knowledge and acquiescence of person having prior right, and must have been uninterrupted.—*Alta L. & W. Co. vs. Hancock*, 85 Cal. 219, 226, 20 Am. St. Rep. 217, 24 Pac. Rep. 645.

59. ADVERSE POSSESSION TO USE WATER for five years continuously and uninterruptedly with knowledge of and to injury of true owner will bar his right thereto.—*Cox vs. Clough*, 70 Cal. 345, 347, 11 Pac. Rep. 732.

60. Claim to prescriptive right to divert water from stream to injury of riparian proprietor below who had acquired his title from United States cannot be successfully asserted within five years from time of such acquisition.—*Jatunn vs. Smith*, 95 Cal. 154, 156, 30 Pac. Rep. 200.

61. If defendants used and held water adversely for five years next before suit was brought, mere disputing their right to such possession by plaintiffs would not prevent bar of statute.—*Cox vs. Clough*, 70 Cal. 345, 347, 11 Pac. Rep. 732.

62. One who claims water right by prescription must use water continuously, uninterruptedly, and adversely for period of at least five years, after which time law will conclusively presume antecedent grant to him of his asserted right.—*Smith vs. Hawkins*, 110 Cal. 122, 126, 42 Pac. Rep. 453.

63. Prescriptive right to parties to use of water becomes fixed only by five years' adverse enjoyment.—*Alta L. & W. Co. vs. Hancock*, 85 Cal. 219, 226, 20 Am. St. Rep. 217, 24 Pac. Rep. 645.

64. Right as against riparian owners cannot be created by an appropriation of water, otherwise than by prescription which requires adverse user for five years.—*Rice vs. Meiners*, 136 Cal. 292, 293, 68 Pac. Rep. 817.

65. Where adverse claimant has had continued, notorious, uninterrupted, and adverse enjoyment of water or of portion thereof during period prescribed by statute of limitations for entry upon lands, which in this state is five years, law will presume grant of right so held and enjoyed by him.—*Faulkner vs. Rondoni*, 104 Cal. 140, 146, 37 Pac. Rep. 833.

66. Where water has been appropriated from stream for six years next succeeding said appropriation, use of such water by plaintiff and her grantor was of full knowledge of defendant's grantors, continuous, uninterrupted, peaceable, open, and notorious under claim of right adverse and in hostility to all and particularly to defendants and their grantors, a prescriptive right to use and divert such water is acquired.—*Spargur vs. Heard*, 90 Cal. 221, 229, 27 Pac. Rep. 198.

67. Where for period of more than five years party diverted to his own use for beneficial purposes water from stream and used and enjoyed for beneficial purposes waters thereof under claim of right and title continuously, openly, notoriously, peaceably, uninterruptedly, and adversely to plaintiff and to all other persons and with knowledge and acquiescence of plaintiff and predecessors in interest, it is sufficient to sustain the demand of prescriptive right to use such water.—*Gallagher vs. Montecito W. Co.*, 101 Cal. 242, 243, 35 Pac. Rep. 770.

68. One entitled to use of water may change place of diversion, or place where it is used, or use to which it was first applied, if others are not injured by such change.—*Gallagher vs. Montecito W. Co.*, 101 Cal. 242, 246, 35 Pac. Rep. 770.

69. Where an owner of land has changed course of stream so as to affect other riparian proprietors favorably, who acquiesce therein for sufficient length of time, he cannot claim right to change flow of water to detriment of such other riparian owners.—*Palge vs. Rocky Ford C. Co.*, 83 Cal. 84, 93, 21 Pac. Rep. 1102, 23 Id. 875.

70. When stream flowing through person's land is diverted into new channel, either artificially or by sudden flow, affecting rights of other riparian owners favorably, and owner acquiesces in new state of stream for so long a time that new rights accrue, or presume to have accrued, such acquiescence is binding, and the stream cannot be turned to its former

channel.—*Paige vs. Rocky Ford C. Co.*, 33 Cal. 84, 92, 21 Pac. Rep. 1102, 23 Id. 375.

71. Perpetuity would be most mischievous which would allow one who has made appropriation of stream to retain indefinitely as against other appropriators right to water therein while failing to apply same to some useful or beneficial purpose.—*Smith vs. Hawkins*, 110 Cal. 122, 127, 42 Pac. Rep. 453.

72. Prescriptive right to use water cannot be acquired against United States, and can only be acquired by one claimant against another private individual.—*Smith vs. Hawkins*, 110 Cal. 122, 126, 42 Pac. Rep. 453.

73. Prescriptive right to obstruct ordinary course of flow cannot be acquired in dam used to convey water from one point to another.—*Bliss vs. Johnson*, 76 Cal. 597, 604, 16 Pac. Rep. 542, 18 Id. 735.

74. Where lands were embraced in grant made by congress to Southern Pac. R. Co., adverse possession will begin to run from date of grant, if water was appropriated before grant was made, or from date of appropriation if it were made afterward, and not from date of patent issued many years later.—*Wood vs. Etiwanda W. Co.*, 122 Cal. 152, 157, 54 Pac. Rep. 726.

75. Where defendant's land is situated on creek below the head of plaintiff's ditch, and plaintiff had acquired right to appropriate from creek amount of water claimed by her, and defendant has wrongfully obstructed flow of water into her ditch and threatened to continue to do so, plaintiff was entitled to injunction without proof of any actual damages.—*Spargur vs. Heard*, 90 Cal. 221, 236, 27 Pac. Rep. 192.

TITLE III.

ACCESSION.

Chapter I. To REAL PROPERTY, §§ 1013-1019.

II. To PERSONAL PROPERTY, §§ 1025-1033.

CHAPTER I.

ACCESSION TO REAL PROPERTY.

§ 1013. Fixtures.

§ 1014. Alluvion.

§ 1015. Sudden removal of bank.

§ 1016. Islands, in navigable streams.

§ 1017. In unnavigable streams.

§ 1018. Islands formed by division of stream.

§ 1019. Fixtures; removal of by tenant.

§ 1013. **FIXTURES.** When a person affixes his property to the land of another, without an agreement permitting him to remove it, the thing affixed, except as provided in section ten hundred and nineteen, belongs to the owner of the land, unless he chooses to require the former to remove it.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 224.

1. Applied, cited, construed, referred to, etc.

2. Appurtenances.

3. Fixtures—What constitute.

4. Mines—Fixtures attached to.

5. Tenant's right to remove fixtures.

eroy vs. Bell, 118 Cal. 625, 636, 50 Pac. Rep. 683 (applied).

2. Appurtenances.—See ante § 662 and note.

3. Fixtures—What constitute.—See ante § 660 and note.

4. Mines—Fixtures attached to.—See ante § 661 and note.

5. Tenant's right to remove fixtures.—See post § 1019 and note.

1. Applied, cited, construed, referred to, etc., in: *West Coast L. Co. vs. Apfield*, 36 Cal. 235, 239, 24 Pac. Rep. 993 (referred to); *Pom-*

§ 1014. **ALLUVION.** Where, from natural causes, land forms by imperceptible degrees upon the bank of a river or stream, navigable or not navigable, either by accumulation of material or by the recession of the stream, such land belongs to the owner of the bank, subject to any existing right of way over the bank.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 295, held unconstitutional, see history, § 4 ante.

1. Applied, cited, construed, referred to, etc.

2. As to construction.

3. Accretion and alluvion—Not apply in case of preasure.

4. Same—Land formed by, in angle of dock, ownership.

5. Same—Same—On fractional quarter-section, deed of.

6. Same—Land gained from the sea by—Ownership of.
7. Same—No vested right to future.
8. Same—Owner of land on shore of Utah Lake entitled to, what.
9. Same—Owner of lot on bay at San Francisco, when not entitled to.
10. Same—Owner of government patent not entitled to island.
11. Same—Process of reducing size of stream—Ownership.
12. Same—Riparian owner right to future.
13. Same—Sea-weed adhering to soil, ownership of.
14. Same—Shore of ocean between high and low water, ownership.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Fillmore vs. Jennings*, 78 Cal. 634, 636, 21 Pac. Rep. 536 (construed and applied).

2. **AS TO CONSTRUCTION**.—This section construed to be enunciation of law as it has always existed.—*Fillmore vs. Jennings*, 78 Cal. 634, 636, 21 Pac. Rep. 536.

3. **ACCRETION AND ALLUVION** does not apply in case of purpresture caused by erection of wharf in public harbor.—*Dana vs. Jackson St. Wharf Co.*, 31 Cal. 113, 120, 39 Am. Dec. 164.

4. Land formed by accretion in angle made by line of dock and shore line of large parcel goes with land to which it has accrued.—*Roberts vs. Brooks*, 78 Fed. Rep. 411, 45 U. S. App. 395, 24 C. C. A. 153.

5. Land formed by accretion on fractional quarter-section passes by deed conveying fractional quarter-section by its number; statement of quantity of land conveyed by deed is not controlling.—*Tappendorff vs. Downing*, 78 Cal. 169, 170, 18 Pac. Rep. 247.

6. Land gained from sea by alluvion, i. e. by washing up of sand or earth so as in time to make land, if this gain be by little and little, by small and imperceptible degrees, it shall go to owner of land adjoining.—*Dana vs. Jackson St. Wharf Co.*, 31 Cal. 113, 120.

7. No vested riparian right to future accretions.—*Eisenbach vs. Hatfield*, 2 Wash. 236, 250, 26 Pac. Rep. 539, 12 L. R. A. 632.

8. Owner of land on shore of Utah Lake along old shore of the lake by patent from United States is entitled to recover all dry land made by recession of waters.—*Poynter vs. Chipman*, 8 Utah 442, 32 Pac. Rep. 690.

9. Owner of lot on shore of bay at San Francisco has no right of entry upon land formed by accretion and alluvion upon his lot caused by erection of wharf in water in front of his lot, and cannot maintain ejectment for such land so formed.—*Dana vs. Jackson St. Wharf Co.*, 31 Cal. 113, 120.

10. Owner of patent from federal government of land fronting on river does not acquire title to land formed by accretion beginning in middle of river and running towards his land; such island so formed belongs to government.—*Glassell vs. Hansen*, 135 Cal. 547, 550, 67 Pac. Rep. 964.

11. **PROCESS OF ACCRETION**, naturally reducing size of adjoining stream and rendering it unnavigable, notwithstanding land formed by such natural process of accretion upon bank of stream belongs to owner of bank on which it has formed.—*Fillmore vs. Jennings*, 78 Cal. 634, 636, 21 Pac. Rep. 536.

12. **RIPARIAN OWNER HAS RIGHT TO ACCRETIONS** to his land, but he cannot ask court to interfere with granting of patent by state, and prevent cloud being cast upon his title to that which may never have existence.—*Taylor vs. Underhill*, 40 Cal. 471, 473.

13. Sea-weed thrown up by sea and gradually adhering to soil belongs to owner of soil.—*Emans vs. Turnbull*, 2 John. (N. Y.) 313, 3 Am. Dec. 427 and note.

14. Shore of ocean, between high and low water mark, cannot be converted into private ownership, in absence of explicit legislative provision to that effect.—*Kimball vs. Macpherson*, 46 Cal. 103, 108.

Aerolite falling on land and embedded therein becomes part of soil.—See ante § 659 note para. 2, 3.

As to accretion and alluvion: definitions, see note 22 Am. St. Rep. 202.

As to subject of accretion and alluvion, see monographic note 35 Am. St. Rep. 303-313.

As to some features of the law of accretion applicable to islands and navigable rivers, see monographic note 72 Am. St. Rep. 230, 236.

As to accretions caused by obstructions in river, see note 16 Am. Rep. 526.

As to title to alluvion artificially formed, see note 33 Am. Dec. 270, 276.

As to the difference between accretion and reliction, see note 33 Am. Dec. 280.

See note 5 L. R. A. 634; 12 L. R. A. 637.

§ 1015. **SUDDEN REMOVAL OF BANK.** If a river or stream, navigable or not navigable, carries away, by sudden violence, a considerable and distinguishable part of a bank, and bears it to the opposite bank, or to another part of the same bank, the owner of the part carried away may reclaim it within a year after the owner of the land to which it has been united takes possession thereof.

History: Enacted March 21, 1872.

Commissioners' note appended to this section says: "Where the soil is suddenly taken from one man's estate and carried to another's by the immediate and manifest power of a river or stream, the property belongs to the first owner; but an acquiescence on his part will in time entitle the owner of the land to

which it is attached to claim it as his own.—Bract. 221; 2 Black. Com. 262; Code Napoleon. art. 559; Civil Code La., art. 503.

"Avalision differs from alluvion in this, that in the latter case the change of soil is gradual and imperceptible."

§ 1016. ISLANDS, IN NAVIGABLE STREAMS. Islands and accumulations of land, formed in the beds of streams which are navigable, belong to the state, if there is no title or prescription to the contrary.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Alluvion forming to island belongs to United States.
3. Exception in patent, covers island when.
4. Patent to swamp-land gives no title to island.
- 5, 6. Patentee of land on river not entitled to island opposite.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc.,** in: *Heckman vs. Swett*, 99 Cal. 308, 309, 33 Pac. Rep. 1099 (applied); *Glassell vs. Hansen*, 135 Cal. 547, 550, 67 Pac. Rep. 964 (applied).

2. **ALLUVION FORMING TO ISLAND** in navigable river belonging to the United States, and extending thence into stream so as to connect with another island belonging to private owner, such owner does not thereby become the owner of the alluvion so formed.—*Benson vs. Morrow*, 61 Mo. 345, 347.

3. **Exception in United States patent** of land covered by navigable waters of bay, will except therefrom an island in the bay as well.—*De Guyer vs. Banning*, 91 Cal. 400, 404, 27 Pac. Rep. 761.

4. **Patent to swamp-land**, after passage of the Act of April 21, 1858, which describes the land conveyed as bounded on one side by southern bank of navigable stream, where channel of such river which constitutes such boundary is materially changed by action of freshet, subsequently to survey, but prior to issuance of patent, thus creating an island out of portion of the land formerly constituting part of realty conveyed to patentee by the grant from state, gives no title to the island, but such island is property of state, and patentee can claim no right thereto.—*Heckman vs. Swett*, 99 Cal. 308, 309, 33 Pac. Rep. 1099. See *United States vs. Mission Rock Co.*, 152 U. S. 391, 406, bk. 47 L. ed. 865.

5. **PATENTEE OF GOVERNMENT**, holding title to land which the Sacramento River is

its eastern boundary, is not entitled to accretions of land to an island which springs up in middle of river opposite his land; such island, with accumulations thereto, albeit they extend towards the mainland, is property of state, and patentee of state is entitled to all of island's accretions.—*Glassell vs. Hansen*, 135 Cal. 547, 550, 67 Pac. Rep. 964.

6. **TITLE OF PATENTEE**, who holds under patent issued on confirmed Mexican grant, extends no further than edge of stream by which on one side his land is bounded, and does not include island in river opposite mainland, notwithstanding fact that the channel of river between island and mainland is not navigable, if the stream itself is considered navigable one; there is but one river, and that is a navigable one; and waters on each side of the island constitute parts of one navigable stream.—*Packer vs. Bird*, 71 Cal. 184, 185, 11 Pac. Rep. 878, affirmed in *Packer vs. Bird*, 137 U. S. 661, bk. 34 L. ed. 819, 11 Sup. Ct. Rep. 210.

As to islands in navigable waters and accretions thereto, see *Ark. St. Louis I. M. & S. R. Co. vs. Ramsey*, 53 Ark. 314, 23 Am. St. Rep. 195, 13 S. W. Rep. 931. *Iowa. Bigelow vs. Hoover*, 85 Iowa 161, 39 Am. St. Rep. 296, 52 N. W. Rep. 124, 8 L. R. A. 559. *Mich. People vs. Warner*, 116 Mich. 228, 74 N. W. Rep. 705. *Mo. Benson vs. Morrow*, 61 Mo. 345; *Cooley vs. Golden*, 117 Mo. 38, 23 S. W. Rep. 100, 21 L. R. A. 300; *Cox vs. Arnold*, 129 Mo. 337, 50 Am. St. Rep. 450, 31 S. W. Rep. 592; *Perkins vs. Adams*, 132 Mo. 181, 33 S. W. Rep. 778; *Hahn vs. Dawson*, 134 Mo. 581, 36 S. W. Rep. 233; *Sweringen vs. City of St. Louis*, 151 Mo. 348, 52 S. W. Rep. 346. *Neb. Wiggernhorn vs. Kountz*, 23 Neb. 690, 3 Am. St. Rep. 150, 37 N. W. Rep. 603.

As to islands and title thereto, see notes 33 Am. Dec. 281; 53 Am. Rep. 215-221; 35 Am. St. Rep. 213; 53 Am. Rep. 289; 72 Am. St. Rep. 280-286; 5 L. R. A. 684; 12 L. R. A. 632; 58 L. R. A. 673-678.

§ 1017. IN UNNAVIGABLE STREAMS. An island, or an accumulation of land, formed in a stream which is not navigable, belongs to the owner of the shore on that side where the island or accumulation is formed; or, if not formed on one side only, to the owners of the shore on the two sides, divided by an imaginary line drawn through the middle of the river.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 395, held unconstitutional, see history, § 4 ante.

§ 1018. ISLANDS FORMED BY DIVISION OF STREAM. If a stream, navigable or not navigable, in forming itself a new arm, divides itself and surrounds land belonging to the owner of the shore, and thereby forms an island, the island belongs to such owner.

History: Enacted March 21, 1872.

§ 1019. FIXTURES, REMOVAL OF BY TENANT. A tenant may remove from the demised premises, any time during the continuance of his term, anything affixed thereto for purposes of trade, manufacture, ornament, or domestic use, if the removal can be effected without injury to the premises, unless the thing has, by the manner in which it is affixed, become an integral part of the premises.

History: Original section, relating to abandonment of bed of stream, enacted March 21, 1872, was repealed and the above provision substituted therefor by Act March 30, 1874, Code Amdts. 1873-4, p. 225.

1. Applied, cited, construed, referred to, etc.
2. Assignment of lease—Effect of on right to remove fixtures.
3. As between landlord and tenant—Rule relaxed.
- 4, 5. Buildings and bridges—When removable.
6. Engine and boiler—When not removable.
7. Evidence of agreement to remove not admissible, when.
- 8, 9. Fixtures pass to vendee, and vendor cannot remove.
10. Improvements by tenant are property of landlord, when.
11. Lessee no right to remove on surrender or forfeiture of lease.
12. Lessor enjoined from removing building, when.
13. Machinery may be removed by tenant, when.
14. Mortgagee cannot authorize removal of fixtures.
15. Same—By so doing releases them from mortgage.
16. One-story wooden storehouse may be removed, when.
17. Property under agreement to purchase—Not subject to removal.
18. Right to remove under this section, when given.
19. Tenant may remove fixtures, when.
20. Tenant cannot remove buildings, when.
21. Tenant may remove buildings, when.
22. Upon eviction lessee cannot remove for improvements.
23. When lessee may have lease reformed and remove fixtures.

As to fixtures generally, see ante § 660 and note.

As to appurtenances, see ante § 1013 and note.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO,** etc., in: *West Coast Lumber Co. vs. Apfield*, 86 Cal. 335, 339, 24 Pac. Rep. 993 (construed and applied); *Security Loan & Trust Co. vs. Willamette Steam Mills L. & M. Co.*, 99 Cal. 636, 639, 34 Pac. Rep. 321 (applied); *MacDonough vs. Starbird*, 105 Cal. 15, 19, 38 Pac. Rep. 510 (applied); *Pomeroy vs. Bell*, 118 Cal. 635, 636, 639, 50 Pac. Rep. 683 (applied and cited).

2. **ASSIGNMENT BY LESSEE**, with consent of lessor, of all his right, title, and interest in lease which contains provision giving to lessee option of either removing buildings belonging to him located on demised premises at expiration of term, or to require lessor to purchase them at an ascertained valuation, transfers to assignee not only ownership of buildings, but as well right to compel lessor to purchase same.—*California Ann. Conf. M. E. Church vs. Seitz*, 74 Cal. 287, 290, 15 Pac. Rep. 839.

3. **As between landlord and tenant**, rule of law prescribing that whatever is once annexed to freehold becomes integral part of original premises, has been in modern times greatly relaxed, in relation to things affixed for purposes of trade and manufacture, and also in relation to articles put up for ornament or domestic use.—*Sands vs. Pfeiffer*, 10 Cal. 253, 264.

4. **BUILDING AND BRIDGES ERECTED BY LESSEE UPON DEMISED PREMISES** for purposes of trade, and used as such, or intended to be used by lessee in connection with, and as accessory to, carrying on business as a lumber dealer, are, within meaning of this section, trade fixtures, and as such are removable by tenant from leased premises at any time during continuance of term, unless they are so physically annexed to property that they could not be removed without committing injury to the premises, or that they had become an integral part thereof by manner in which they were annexed.—*Security L. & T. Co. vs. Willamette Steam Mills L. & M. Co.*, 99 Cal. 636, 639, 34 Pac. Rep. 321.

5. **Buildings erected on land under lease** which is silent as to right to remove such buildings, belong, at expiration of term of lease, to owner of land, notwithstanding provisions of advertisement for bids for lease providing that all improvements on land, unless purchased by landlord, should be removed at expiration of lease by owners thereof.—*Board Education vs. Grant*, 118 Cal. 39, 41, 50 Pac. Rep. 5.

6. **ENGINE AND BOILER** securely fastened upon brick foundation and to wooden foundation beneath by bolts and screws which could be removed without material injury to building, while some portions were bolted directly to walls, as between lessor of building and their creditors, are fixtures and, as to them, their removal was wrongful, notwithstanding an agreement between lessor and lessees that latter should be at liberty to remove machinery upon expiration of lease.—*McNally vs. Connolly*, 70 Cal. 3, 5, 11 Pac. Rep. 320.

7. **EVIDENCE OF CONTEMPORANEOUS ORAL AGREEMENT**, that lessee should have right, at expiration of term of lease, to remove buildings erected by him on premises, where it is specifically stipulated in written lease that premises shall be surrendered at expiration thereof, "reasonable use and wear thereof and damages by elements excepted," is inadmissible, because contradicting term of lease, there being no independent agreement or license to remove buildings.—*Jungerman vs. Bovee*, 19 Cal. 354, 364.

8. FIXTURES, AS AGAINST VENDOR, pass to his vendee, even though erected for purposes of trade and manufacture, or for ornament or domestic use, unless specially reserved in conveyance, and cannot be removed by vendor.—*Sands vs. Pfeiffer*, 10 Cal. 253, 264.

9. Gas-fixtures, consisting of chandeliers, globes, brackets, burners, pendants, etc., kitchen range with boiler attached, patent water filter, tanks and mosquito screens attached to hotel building, as between vendor and purchaser of such building, are fixtures, and cannot be removed by vendor, in absence of express agreement allowing such removal.—*Fratt vs. Whittier*, 58 Cal. 126, 131, 41 Am. Rep. 251.

See ante § 660 and note.

10. IMPROVEMENTS MADE BY TENANT which become part of freehold are property of landlord when it is provided in the lease that all improvements made on demised premises during continuity of lease shall be made at expense of lessee, and that premises shall be surrendered to lessor at expiration of term.—*Gett vs. McManus*, 47 Cal. 56, 57.

11. LESSEE CAN CLAIM NO RIGHTS UNDER CONTRACT made with lessor, by terms of which it was provided that lessee should be allowed reasonable time, after expiration of lease, to remove his buildings, when lease was surrendered or forfeited before expiration thereof; and intention of parties must be confined to legal expiration of lease.—*Whipley vs. Dewey*, 3 Cal. 36, 39.

12. LESSOR IS ENTITLED TO RECOVER DAMAGES for, and may enjoin lessee from, taking bricks from and destroying brick building erected by lessee on premises leased—tenant claiming right to remove building under terms of lease,—where answer makes no denial of damages, and no proof is offered thereof, and court, after hearing, grants injunction.—*Jungerman vs. Bovee*, 19 Cal. 354, 364.

13. MACHINERY PUT UP IN MILL BY TENANT and fastened therein by bolts, screws, etc., may be removed by tenant.—*McGreary vs. Osborne*, 9 Cal. 119, 122.

See ante § 660 and note.

14. MORTGAGEE OF PREMISES who authorizes and permits removal of fixtures from premises which are covered by his mortgage thereby releases such fixtures from lien of mortgage.—*Hill vs. Gwin*, 51 Cal. 47, 50.

15. MORTGAGEE OF PREMISES has no authority to authorize removal of fixtures from premises although such fixtures were covered by mortgage which was afterwards foreclosed.—*Hill vs. Gwin*, 51 Cal. 47, 50.

16. ONE-STORY WOODEN STRUCTURE, twenty feet square, having for its foundation ordinary mud-sills on surface of ground on which main sills rested, erected by tenant in lumber-yard and used by him as an office, is trade fixture, which lessee has a right under this section to remove at any time during continuance of term of lease.—*MacDonough vs. Starbird*, 105 Cal. 15, 19, 38 Pac. Rep. 510.

17. Property placed permanently upon land under executory agreement for its purchase, and affixed thereto without any agreement with vendor permitting vendee to remove any portion of same, becomes thereby integral part of realty, property of vendor, and therefore not subject to removal by vendee, during or after term of his option.—*Pomeroy vs. Bell*, 118 Cal. 635, 636, 50 Pac. Rep. 683.

18. RIGHT TO REMOVE BUILDINGS FROM DEMISED PREMISES is not given to tenants by code, unless right is expressly granted or reserved in instrument creating tenancy, or buildings are such, or so erected, as not to partake of the realty.—*West Coast Lumber Co. vs. Apfield*, 86 Cal. 335, 339, 24 Pac. Rep. 993.

19. Tenant may remove what fixtures he has added when he can do so without injury to estate, unless it has become by its manner of addition an integral part of original premises.—*Sands vs. Pfeiffer*, 10 Cal. 253, 264.

20. Tenant cannot remove erections, made by him on demised premises, after forfeiture or re-entry for covenant broken.—*Whipley vs. Dewey*, 3 Cal. 36, 38.

21. Tenant may remove buildings erected by him, at any time before expiration of the lease.—*Whipley vs. Dewey*, 3 Cal. 36, 38.

22. UPON EVICTION OF LESSEE he cannot maintain action for value of his improvements, lessor having re-entered for non-payment of rent, where the lease contains usual covenants for the payment of rent, and re-entry for non-payment, and provides for the appraisements of improvements erected by lessee to be paid for at expiration of term by lessor.—*Lawrence vs. Knight*, 11 Cal. 293, 303.

23. Where either by accident or mistake, or otherwise, condition allowing lessee to remove fixtures and buildings to be erected by him was omitted from lease, which lessee objected to and refused to sign because of omission mentioned, and on such refusal, lessor agreed with lessee that such omission should make no difference; and relying on this agreement entered into by lessor, and upon good faith and honesty of lessor lessee executed lease, he is entitled to have lease reformed and to remove fixtures.—*Isenhoot vs. Chamberlain*, 59 Cal. 630, 639.

CHAPTER II.

ACCESSION TO PERSONAL PROPERTY.

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| § 1025. Accession by uniting several things. | § 1030. Materials of several owners. |
| § 1026. Principal part, what. | § 1031. Wilful trespassers. |
| § 1027. Same. [The more valuable or bulky.] | § 1032. Owner may elect between the thing and its value. |
| § 1028. Uniting materials and workmanship. | § 1033. Wrong-doer liable in damages. |
| § 1029. Inseparable materials. | |

§ 1025. **ACCESSION BY UNITING SEVERAL THINGS.** When things belonging to different owners have been united so as to form a single thing, and cannot be separated without injury, the whole belongs to the owner of the thing which forms the principal part; who must, however, reimburse the value of the residue to the other owner, or surrender the whole to him.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Accession, none except for principal materials.
3. Same—Cestui que trust must show property to be identical property, or result thereof.
4. Same—Commingleing money, presumption.
5. Same—Money mingled with trust funds.
6. Same—Principal materials, title to.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc.,** in: *Byrne vs. McGrath*, 130 Cal. 316, 320, 80 Am. St. Rep. 127, 62 Pac. Rep. 559 (applied).

2. **ACCESSION DOES NOT EXIST** in favor of one who did not furnish principal materials.—*Dunn vs. Oneal*, 1 Sneed (Tenn.) 106, 60 Am. Dec. 140.

3. **Before cestui que trust can claim specific real or personal property** he must show that it is identical property originally conferred by trust, or that it is fruit or product thereof in new form.—*Lathrop vs. Bampton*, 31 Cal. 17, 22, 39 Am. Dec. 141.

4. **Commingleing of the money of deceased** with that of another person which had been deposited in bank in name of deceased for several weeks, or months, prior to her death,

raises no presumption that money on deposit, or any part of it, at time of her death, is money of other party.—*Bagnall vs. Roach*, 76 Cal. 106, 108, 18 Pac. Rep. 137.

5. **MONEY OF FATHER MINGLED WITH THAT OF TRUST** created by deceased wife for benefit of her children becomes thereby part of trust fund by accession.—*Byrne vs. McGrath*, 130 Cal. 316, 320, 80 Am. St. Rep. 127, 62 Pac. Rep. 559.

6. **PRINCIPAL MATERIALS FURNISHED BY ONE PARTY** and another furnishes other materials and performs labor, property is in first party by accession.—*Mack vs. Snell*, 140 N. Y. 193, 37 Am. St. Rep. 534, 35 N. E. Rep. 493.

As to whether title by accession to personal property taken by one not the owner can be acquired, see note 44 Am. St. Rep. 444-448.

As to title by accession, see note 54 Am. Dec. 533-597.

As to title by accession to crops, fruit and timber, wrongfully severed, see monographic note by Ernest Watts, 33 L. R. A. 422-434.

As to title by labor bestowed on personal property, see note 26 Am. Rep. 525.

§ 1026. **PRINCIPAL PART, WHAT.** That part is to be deemed the principal to which the other has been united only for the use, ornament, or completion of the former, unless the latter is the more valuable, and has been united without the knowledge of its owner, who may, in the latter case, require it to be separated and returned to him, although some injury should result to the thing to which it has been united.

History: Enacted March 21, 1872.

As to what is principal part, see *Kan. Arnott vs. Kansas Pac. R. Co.*, 19 Kan. 95. *Mass. Comins vs. Newton*, 23 Mass. (10 Allen) 518. *N. Y. Gregory vs. Stryker*, 2 Den. 623;

McConihe vs. New York & E. R. Co., 20 N. Y. 495, 75 Am. Dec. 430; *Mack vs. Snell*, 140 N. Y. 193, 37 Am. St. Rep. 534, 35 N. E. Rep. 493. See ante § 1035 and note.

§ 1027. **SAME. [THE MORE VALUABLE OR BULKY.]** If neither can be considered the principal, within the rule prescribed by the last section, the more valuable, or, if the values are nearly equal, the more considerable in bulk, is to be deemed the principal part.

History: Enacted March 21, 1872.

1. Brick when burned, title to.
2. Hay cut in good faith, title to.
3. Timber converted into hoops, title to.
4. Test of ownership, value.

1. Brick, when burned, is so enhanced in value as compared with unburned clay as to vest title in manufacturer as against owner of the clay.—*Lampton vs. Preston*, 1 J. J. Marsh. (Ky.) 454, 19 Am. Dec. 104. See *Baker vs. Meisch*, 29 Neb. 327, 45 N. W. Rep. 685.

2. Hay cut in good faith from land of another, being worth many times more than when uncut, belongs to mowder.—*Lewis vs. Courtright*, 77 Iowa 190, 41 N. W. Rep. 615.

2. Timber converted into hoops when timber was worth twenty-five dollars and hoops seven hundred dollars was held to give title to manufacturer.—*Wetherbee vs. Green*, 23 Mich. 311, 7 Am. Rep. 653.

4. Test which satisfies reason of law cannot be applied in adjustment of question of title to chattels by accession, unless it keeps in view circumstances of relative values.—*Wetherbee vs. Green*, 23 Mich. 311, 7 Am. Rep. 653.

As to test and proportion of values, see 1 Am. & Eng. Encyc. of L. (3d ed.) 251; 1 Cyc. 224.

See also § 1025 and note.

§ 1028. **UNITING MATERIALS AND WORKMANSHIP.** If one makes a thing from materials belonging to another, the latter may claim the thing on reimbursing the value of the workmanship, unless the value of the workmanship exceeds the value of the materials, in which case the thing belongs to the maker, on reimbursing the value of the materials.

History: Enacted March 21, 1872.

1. Cutting grass, no title by accession.
2. Change must be sufficient to destroy identity.
3. Owner of property may pursue it, when.
4. Performing labor on another property by mistake.
5. Right by specification, acquired when.

1. Cutting grass and making hay out of it is not sufficient to acquire property by accession.—*Lindsay vs. Winona & St. P. R. Co.*, 29 Minn. 411, 43 Am. Rep. 225, 18 N. W. Rep. 191.

2. Change of character in goods must be sufficient to destroy identity to give one property in another's goods.—*Betts vs. Lee*, 5 John. (N. Y.) 348, 4 Am. Dec. 368.

3. Owner of property wrongfully taken may pursue it so long as it is capable of identification, whatever alteration of form it might have undergone, unless it was annexed to, or made part of, some other thing which was principal, e. g. timber converted into house.—*Davis vs. Easley*, 13 Ill. 193.

4. One in an honest mistake regarding his rights in good faith performing labor on property of another, is not entitled to be compensated therefor, if its identity is not destroyed, or it is not converted into something substantially different, and its value is not enhanced, although owner may have availed himself of benefit.—*Isle Royal Min. Co. vs. Hertin*, 37 Mich. 322, 26 Am. Rep. 520.

5. Right by specification can only be acquired when, without accession of any other material, that of another person, which has been used by operator innocently, has been converted by him into something specifically different in the inherent and characteristic qualities which identify it.—*Lampton vs. Preston*, 1 J. J. Marsh. (Ky.) 454, 19 Am. Dec. 104.

See 1 Am. & Eng. Encyc. of L. (3d ed.) 249 et seq.; 1 Cyc. 223 et seq.

See also ante § 1025 and note.

§ 1029. **INSEPARABLE MATERIALS.** Where one has made use of materials which in part belong to him and in part to another, in order to form a thing of a new description, without having destroyed any of the materials, but in such a way that they cannot be separated without inconvenience, the thing formed is common to both proprietors; in proportion, as respects the one, of the materials belonging to him, and as respects the other, of the materials belonging to him and the price of his workmanship.

History: Enacted March 21, 1872.

1. Accession not apply when parts are severable.
2. Same—When article is not substantially changed.
3. Title by—Article made from materials belonging to two parties.

1. Accession does not apply when parts are severable, as wheels of a wagon.—*Clark vs. Wells*, 45 Vt. 4, 12 Am. Rep. 187.

2. Accession does not apply when article is not substantially changed.—*Gregory vs. Stryker*, 2 Den. (N. Y.) 628.

3. Title to articles by accession made by

one person from materials belonging in part to him and in part to another.—As to, see *Kan. Arnott vs. Kansas Pac. R. Co.*, 19 Kan. 95. *Me. Fulcifer vs. Page*, 32 Me. 404, 54 Am. Dec. 532. *Mass. Comins vs. Newton*, 92 Mass. (10 Allen) 513. *N. Y. Merritt vs. Johnson*, 7 John. 473, 5 Am. Dec. 239; *Mack vs. Snell*, 140 N. Y. 193, 37 Am. St. Rep. 534, 35 N. E. Rep. 493. *Tenn. Dunn vs. Oneal*, 1 Sneed (Tenn.) 106, 60 Am. Dec. 140.

See 1 Am. & Eng. Encyc. of L. (3d ed.) 245, 249; 1 Cyc. 225.

See also ante §§ 1026, 1027 and notes.

§ 1030. MATERIALS OF SEVERAL OWNERS. When a thing has been formed by the admixture of several materials of different owners, and neither can be considered the principal substance, an owner without whose consent the admixture was made may require a separation, if the materials can be separated without inconvenience. If they cannot be thus separated, the owners acquire the thing in common, in proportion to the quantity, quality, and value of their materials; but if the materials of one were far superior to those of the others, both in quantity and value, he may claim the thing on reimbursing to the others the value of their materials.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Commingling of dried fruit—Effect on title.

1. Applied, cited, construed, referred to, etc., in: *Arnold vs. Producers' Fruit Co.*, 128 Cal. 637, 641, 61 Pac. Rep. 233 (applied).

2. Commingling of dried fruit under contract between fruit company and number of fruit growers to receive and dry and market their crops at specified rates per pound, under which fruit was weighed and dried separately

and then mingled with other fruit, had no effect upon title of several owners other than simply to convert it into an ownership in common.—*Arnold vs. Producers' Fruit Co.*, 128 Cal. 637, 641, 61 Pac. Rep. 233.

As to confusion of goods, what is, and effect of, see monographic note 54 Am. Dec. 589 et seq.

As to confusion of goods and rights of owner, see 6 Am. & Eng. Encyc. of L. (2d ed.) 592, 593; 3 Cyc. 571, 572.

§ 1031. WILFUL TRESPASSERS. The foregoing sections of this article are not applicable to cases in which one wilfully uses the materials of another without his consent; but, in such cases, the product belongs to the owner of the material, if its identity can be traced.

History: Enacted March 21, 1872.

1. Wilful trespasser acquires no title.
2. Same—No compensation for improvements.

1. Wilful trespasser acquires no title to property taken and improved by him, but original owner retains possession of original materials in their improved form, without regard to comparative value, or change of species, if he can trace original materials.—*Iowa. Murphy vs. Sioux City & P. R. Co.*, 55 Iowa 473, 39 Am. Rep. 175, 3 N. W. Rep. 320. *Ky. Strubbee vs. Trustees Cincinnati R.*, 78 Ky. 481, 39 Am. Rep. 251. *Mass. Pierce vs. Goddard*, 39 Mass. (22 Pick.) 559, 33 Am. Dec. 764. *Mich. Isle Royal Min. Co. vs. Hertin*, 37 Mich. 332, 26 Am. Rep. 520. *N. Y. Betts vs. Lee*, 5 John. 348, 4 Am. Dec. 368; *Curtis vs. Groat*, 6 John. 168, 169, 5 Am. Dec. 204; *Baker vs. Wheeler*, 3 Wend. 505, 24

Am. Dec. 66; *Sillsbury vs. McCoon*, 3 N. Y. 379, 53 Am. Dec. 307; *Levy vs. Barnett*, 60 N. Y. Supp. 991. *Pa. Snyder vs. Vaux*, 3 Rawle 423, 21 Am. Dec. 466. *Tex. Missouri K. & T. R. Co. vs. Starr*, 22 Tex. Civ. App. 352, 55 S. W. Rep. 393.

2. In such case trespasser is not entitled to any compensation for improvements made by him.—*Conn. Benjamin vs. Benjamin*, 15 Conn. 347, 39 Am. Dec. 334. *Me. Moody vs. Whitney*, 38 Me. 174, 61 Am. Dec. 239. *Mich. Isle Royal Min. Co. vs. Hertin*, 37 Mich. 332, 26 Am. Rep. 520. *N. Y. Guckenhelmer vs. Angevine*, 81 N. Y. 394. *Fed. E. E. Bolles W. W. Co. vs. United States*, 106 U. S. 422, bk. 27 L. ed. 230, 1 Sup. Ct. Rep. 393.

See notes 4 Am. Dec. 368; 5 Am. Dec. 204; 24 Am. Dec. 70-83; 53 Am. Dec. 315.

§ 1032. OWNER MAY ELECT BETWEEN THE THING AND ITS VALUE. In all cases where one whose material has been used without his knowledge, in order to form a product of a different description, can claim an interest in such product, he has an option to demand either restitution of his material in kind, in the same quantity, weight, measure, and quality, or the value thereof; or where he is entitled to the product, the value thereof in place of the product.

History: Enacted March 21, 1872.

§ 1033. WRONG-DOER LIABLE IN DAMAGES. One who wrongfully employs materials belonging to another is liable to him in damages, as well as under the foregoing provisions of this chapter.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2, 3. Damages, measure of.

1. Applied, cited, construed, referred to, etc., in: *Bank of Suisun vs. Stark*, 106 Cal. 202, 205, 39 Pac. Rep. 531 (erroneously cited).

2. Damages are to be given to utmost value the article will bear.—*Brackenridge vs. Holland*, 2 Blachf. (Ind.) 377, 20 Am. Dec. 123; *Hart vs. Ten Eyck*, 2 John. Ch. (N. Y.) 62, 103.

3. Where the owner voluntarily waives right to reclaim property itself, and sues for damages, value of property at moment of conversion, with such increase as it may have received from fluctuations of market, or other causes independent of acts of defendant, should be measure of damages.—*Weymouth vs. Chicago & N. W. R. Co.*, 17 Wis. 550, 84 Am. Dec. 763. See *Single vs. Schneider*, 24 Wis. 399.

TITLE IV.

TRANSFER.

Chapter I. TRANSFER IN GENERAL, §§ 1039-1085.

II. TRANSFER OF REAL PROPERTY, §§ 1091-1115.

III. TRANSFER OF PERSONAL PROPERTY, §§ 1135-1153.

IV. RECORDING TRANSFERS OF REAL PROPERTY, §§ 1158-1213.

V. UNLAWFUL TRANSFERS, §§ 1227-1231.

The obligations of the parties to a transfer for consideration, or to a contract of hiring, are regulated by the titles on sales, on exchange, and on hiring. Transfers in trust for the benefit of creditors are regulated by the part on debtor and creditor.—Commissioners' note.

CHAPTER I.

TRANSFERS IN GENERAL.

Article I. Definition of Transfer, §§ 1039, 1040.

II. What May Be Transferred, §§ 1044-1047.

III. Mode of Transfer, §§ 1052-1060.

IV. Interpretation of Grants, §§ 1066-1072.

V. Effect of Transfer, §§ 1083-1085.

ARTICLE I.

DEFINITION OF TRANSFER.

§ 1039. Transfer, what.

§ 1040. Voluntary transfer.

§ 1039. **TRANSFER, WHAT.** Transfer is an act of the parties, or of the law, by which the title to property is conveyed from one living person to another.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Deed presumed to transfer in fee simple, unless.
3. Deed containing conditions subsequent, operate as.
4. Maxim "nemo plus juris" applicable to.
5. Transfer is a grant.
6. Transfers are conveyances.

1. Applied, cited, construed, referred to, etc., in: *Mabury vs. Ruiz*, 58 Cal. 11, 16 (cited); *Estate of Hinckley*, 58 Cal. 457, 484 (cited); *Bank of Suisun vs. Stark*, 106 Cal. 202, 205, 39 Pac. Rep. 531 (cited); *Curtin vs. Kowalsky*, 145 Cal. 431, 434, 73 Pac. Rep. 962 (applied).

2. Deed is presumed to transfer a title in fee simple, unless trust is expressed on its face.—*Logan vs. Rose*, 83 Cal. 263, 267, 26 Pac. Rep. 106.

3. Deed containing conditions subsequent will operate as transfer.—*Bank of Suisun vs. Stark*, 106 Cal. 202, 205, 39 Pac. Rep. 531.

4. Maxim, "nemo plus juris," etc., is generally applicable to transfers of chattels. By general rule of English common law sale of goods would pass to purchaser only such title as vendor had. Sales in market overt form exception to this rule, but in this state there is no market overt.—*Robinson vs. Haas*, 40 Cal. 474, 479.

5. Transfer of title to property is grant, and fee simple title is presumed to pass by it.—*Mabury vs. Ruiz*, 58 Cal. 11, 15.

6. "Transfers" are conveyances of title from one living person to another.—*Estate of Hinckley*, 58 Cal. 457, 484.

As to effect of transfer of bill of lading as passing title, see note 55 Am. Dec. 399.

§ 1040. **VOLUNTARY TRANSFER.** A voluntary transfer is an executed contract, subject to all rules of law concerning contracts in general; except that a consideration is not necessary to its validity.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
 2. Amount of consideration immaterial, when.
 3. Conclusion of fraud—Want of consideration.
 4. Confidential relationship.
 5. Deed from husband to wife creates trust, when.
 6. Same—May be avoided, when.
 7. Same—Gift, when sustained.
 8. Deed, obtained by parol promise, when fraudulent.
 - 9, 10. Deed, no consideration expressed.
 11. Same—Under Mexican law not void.
 12. Deed, procured by fraud and without consideration.
 13. Deed, from father to daughter.
 14. Deed, from mother to daughter.
 15. Doctrine resulting trusts as to voluntary conveyances.
 16. Evidence of gift from wife to husband—Presumption.
 17. Husband may make deed to wife.
 18. If deed obtained by promise to reconvey, constructive fraud, when.
 19. Judgment may be transferred without consideration.
 20. Parol evidence admissible to raise trust, when.
 21. Presumption, deed from husband to wife.
 22. Property conveyed under verbal agreement to reconvey.
 23. Question of fraudulent transfer one of fact.
 24. Recital of consideration may be contradicted, when.
 25. Right to complain of fraud not transferable.
 26. Transfer, husband to wife—Effect.
 27. Same—While insolvent, effect.
 28. Same—From father to daughter—Presumption.
 29. Same—From husband to children by former wife, pending divorce.
 30. Same—Of insurance policy to defeat creditors, effect.
 31. Same—Not fraudulent if without consideration.
 32. Same—Procured by son from mother on promise—Trust.
 33. Same—Procured from person of weak mind—Trust.
 34. Same—From niece to aunt—Trust.
 35. Same—Of cord-wood—How made.
 - 36-38. Voluntary conveyance—Not prima facie fraudulent.
 39. Want of consideration, does not avoid deed.
 40. Same—In deed of trust—Immaterial.
 41. Same—Does not raise resulting trust.
 42. Same—May be proved as part of constructive fraud.
 43. Where failure of consideration entire—Constructive trust.
 44. Where grantee and grantor have fiduciary relation—Trust.
 45. Wife taking secret fraudulent conveyance—Effect.
- 1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in:** *Brison vs. Brison*, 75 Cal. 525, 532, 7 Am. St. Rep. 139, 17 Pac. Rep. 689 (applied); *Feeney vs. Howard*, 79 Cal. 525, 530, 12 Am. St. Rep. 162, 21 Pac. Rep. 984, 4 L. R. A. 326 (construed); *Kopp vs. Gunther*, 95 Cal. 63, 74, 30 Pac. Rep. 301 (applied); *Smith vs. Mason*, 122 Cal. 426, 428, 55 Pac. Rep. 143 (applied); *Driscoll vs. Driscoll*, 143 Cal. 528, 533, 77 Pac. Rep. 471, 473 (applied); *Curtin vs. Kowalsky*, 145 Cal. 431, 434, 78 Pac. Rep. 962 (applied).
- 2. AMOUNT OF CONSIDERATION** for deed is immaterial in absence of any imputation of fraud.—*Driscoll vs. Driscoll*, 143 Cal. 528, 533, 77 Pac. Rep. 471, 473.
- 3. CONCLUSION OF FRAUD** does not spring from want of consideration in deed, which will enable stranger to attack it, although it is circumstance among others from which fraud may be inferred.—*Gillan vs. Metcalf*, 7 Cal. 137, 138.
- 4. CONFIDENTIAL RELATIONSHIP BETWEEN PARTIES**, parol promise given, and want of consideration, are circumstances of fraud.—*Brison vs. Brison*, 75 Cal. 525, 532, 7 Am. St. Rep. 139, 17 Pac. Rep. 689. See *Nordholt vs. Nordholt*, 27 Cal. 552, 555, 23 Am. St. Rep. 268, 26 Pac. Rep. 599; *Brison vs. Brison*, 90 Cal. 323, 27 Pac. Rep. 136; *Hayne vs. Hermann*, 97 Cal. 259, 262, 32 Pac. Rep. 171.
- 5. Conveyance from husband to his wife without consideration, under verbal understanding that wife should hold the property during the life of husband, and at his death divide it equally between herself and his daughter, creates trust which will be enforced in favor of daughter.**—*Hayne vs. Hermann*, 97 Cal. 259, 263, 32 Pac. Rep. 171.
- 6. Made under belief that their marriage was legal, and at instance and request of wife, in consideration of love and affection, may be avoided by husband upon discovering invalidity of marriage.**—*Jackson vs. Jackson*, 94 Cal. 446, 460, 29 Pac. Rep. 957.
- 7. Deed of gift from husband to wife, having been attacked as being in fraud of creditors, and trial court having found that it was not in fraud of creditors, will be sustained.**—*Knox vs. Moses*, 104 Cal. 502, 506, 32 Pac. Rep. 318.
- 8. Deed to realty obtained by means of parol promise, made without any intention of performing same, and which is entirely without consideration, is secured by actual fraud.**—*Brison vs. Brison*, 75 Cal. 525, 527, 7 Am. St. Rep. 139, 17 Pac. Rep. 689. See *Hays vs. Gloster*, 38 Cal. 560, 565, 26 Pac. Rep. 367; *Brison vs. Brison*, 90 Cal. 323, 27 Pac. Rep.

186; *Becker vs. Schwerdtle*, 141 Cal. 386, 339, 74 Pac. Rep. 1029.

9. Deed of conveyance may be good and operative, notwithstanding it expresses no consideration, and it may pass legal title of property, whether it was made to hinder and delay creditors or not.—*Goad vs. Moulton*, 67 Cal. 536, 539, 3 Pac. Rep. 63.

10. Deed by owner of land, signed and acknowledged by him, and delivered to grantee, conveying land to latter in fee simple, is not void on account of either want or failure of consideration; nor does want or failure of consideration raise resulting trust.—*Tillaux vs. Tillaux*, 115 Cal. 663, 667, 47 Pac. Rep. 691.

11. Deed of conveyance of California land, under Mexican law, is not void because it does not recite consideration.—*Havens vs. Dale*, 18 Cal. 359, 366. See *Merle vs. Mathews*, 26 Cal. 465, 470; *Schmitt vs. Giovanari*, 43 Cal. 617, 624.

12. DEED EXECUTED WITHOUT CONSIDERATION, having been procured by fraud and undue influence, may be set aside although it was executed and delivered for purpose of evading creditors.—*Donnelly vs. Rees*, 141 Cal. 56, 60, 74 Pac. Rep. 433.

13. Deed made by father conveying parcel of land to his daughter, which instrument is alleged to have been given without consideration, relationship of parties and alleged lack of consideration do not of themselves raise presumption of fraud, nor suffice to raise resulting trust in favor of other children of grantor.—*Smith vs. Mason*, 122 Cal. 426, 427, 55 Pac. Rep. 143.

14. Deed from mother to her daughter, in consideration that daughter should support mother during her life, is void, as such consideration cannot be specifically enforced by mother, and is therefore no consideration.—*Grimmer vs. Carlton*, 93 Cal. 189, 193, 27 Am. St. Rep. 171, 23 Pac. Rep. 1043.

15. DOCTRINE OF RESULTING TRUSTS has never been applied to mere voluntary conveyances. Mere want of consideration has never raised resulting trusts out of these.—*Jackson vs. Cleveland*, 15 Mich. 94, 90 Am. Dec. 266.

16. Evidence tending to show transaction between husband and his wife to be gift from wife to husband, immediately raises presumption that gift was obtained from wife by exercise of undue influence on part of husband.—*White vs. Warren*, 120 Cal. 322, 323, 49 Pac. Rep. 129, 52 Id. 723.

17. Husband may make deed of his own or community property to his wife, which will, in absence of evidence of contrary intent, vest in her land conveyed as her separate property.—*Hamilton vs. Hubbard*, 134 Cal. 603, 606, 65 Pac. Rep. 321, 66 Id. 860.

18. If, by means of parol promise to reconvey, party obtains an absolute deed, without consideration, from one to whom he stands in fiduciary relation, violation of promise is constructive fraud, although at time of promise there was no intention not to perform.—*Alaniz vs. Casenave*, 91 Cal. 41, 46, 27 Pac. Rep. 521.

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19. JUDGMENT MAY BE TRANSFERRED without consideration, and such transfer will be given preference to its subsequent transfer for valuable consideration.—*Curtin vs. Kowalsky*, 145 Cal. 431, 434, 78 Pac. Rep. 962.

20. PAROL EVIDENCE IS ADMISSIBLE in cases of fraud, actual or constructive, to prove fraud. Perhaps most comprehensive and philosophical expression of rule is that parol evidence is admissible to raise trust in cases of actual or constructive fraud.—*Brison vs. Brison*, 75 Cal. 525, 532, 7 Am. St. Rep. 189, 17 Pac. Rep. 689.

21. PRESUMPTION THAT DEED WAS PROCURED BY FRAUD or undue influence does not arise from mere negative fact that it was from husband to his wife.—*Sheehan vs. Sullivan*, 126 Cal. 189, 192, 53 Pac. Rep. 543.

22. Property conveyed by deed without consideration, under verbal agreement of grantee to convey it back, cannot be recovered by grantor.—*Hasshagen vs. Hasshagen*, 80 Cal. 614, 618, 22 Pac. Rep. 294.

23. Question of fraudulent transfer is one of fact and not of law.—*Daugherty vs. Daugherty*, 104 Cal. 321, 323, 37 Pac. Rep. 839.

24. RECITAL IN DEED OF CONSIDERATION may be contradicted for collateral purposes; this, however, cannot be done in absence of fraud or mistake, or for purpose of defeating operation of instrument or raising trust.—*Brison vs. Brison*, 75 Cal. 525, 532, 7 Am. St. Rep. 189, 17 Pac. Rep. 689; *Feeney vs. Howard*, 79 Cal. 525, 530, 12 Am. St. Rep. 162, 31 Pac. Rep. 984, 4 L. R. A. 826. See *Philbrook vs. Deland*, 16 Me. 412, 413; *Graves vs. Graves*, 29 N. H. 139.

25. Right to complain of fraud cannot be transferred.—*Archer vs. Freeman*, 124 Cal. 528, 532, 57 Pac. Rep. 474; *Smith vs. Pacific Bank*, 137 Cal. 363, 367, 70 Pac. Rep. 184.

26. TRANSFER FROM HUSBAND TO WIFE is not, of itself, evidence tending to show undue influence.—*McDougall vs. McDougall*, 135 Cal. 316, 317, 67 Pac. Rep. 778.

27. While insolvent, is circumstance to show fraudulent intent.—*Woolridge vs. Boardman*, 115 Cal. 74, 77, 46 Pac. Rep. 868.

28. Facts that it was made from father to daughter, and that it was without consideration, do not of themselves raise presumption of fraud, nor suffice to raise resulting trust in favor of other children of grantor.—*Smith vs. Mason*, 122 Cal. 426, 427, 55 Pac. Rep. 143.

29. Transfer by husband, pending suit for divorce, to his children by former wife, is not void as to wife suing for divorce, but is voidable as to her claims for alimony.—*Tully vs. Tully*, 137 Cal. 60, 66, 69 Pac. Rep. 700.

30. Transfer of insurance policy without consideration by beneficiary of insured, for purpose of defeating her creditors, will not operate to prevent creditors from participating in proceeds of such policy.—*Fidelity & Cas. Co. vs. Thompson*, 128 Cal. 506, 509, 61 Pac. Rep. 94.

31. Transfer cannot be adjudged fraudulent solely on ground that it was not made for valuable consideration.—*Foulson vs. Stan-*

ley, 122 Cal. 655, 658, 68 Am. St. Rep. 73, 55 Pac. Rep. 605.

32. **Transfer of property**, procured by son from his mother, upon express promise that he will convey it to his brother, when he arrives at age, raises constructive trust in favor of brother.—Nordholt vs. Nordholt, 87 Cal. 552, 555, 22 Am. St. Rep. 268, 26 Pac. Rep. 599.

33. **Transfer of property** from person of weak mind, induced by promise of grantee that he would take care of such person and give him home, made with intention to deceive, is subject to trust in favor of grantor.—Hays vs. Gloster, 88 Cal. 560, 565, 26 Pac. Rep. 367.

34. **Transfer of property** by niece, when minor, to her aunt, for express consideration of five hundred dollars, although no money in fact was paid, upon representations of aunt that conveyance was necessary to protect niece, and that she would reconvey to niece upon her arriving at age, establishes trust in property in favor of niece, and she is entitled to reconveyance upon arriving at age.—Butler vs. Hyland, 89 Cal. 575, 581, 26 Pac. Rep. 1108.

35. **Transfer** may be made of one hundred and twenty-six cords of wood by delivery of bill of sale thereof, and pointing wood out to transferee, and telling him that it was his.—Dubois vs. Spinks, 114 Cal. 289, 294, 46 Pac. Rep. 95.

36. **VOLUNTARY CONVEYANCE** is not prima facie fraudulent, and fraudulent intent is not to be arrived at as presumption of law.—Emmons vs. Barton, 109 Cal. 662, 671, 42 Pac. Rep. 303; Cook vs. Cockins, 117 Cal. 140, 147, 48 Pac. Rep. 1025.

37. **Voluntary deed**, which purports to be for beneficial use of grantee, and which is made deliberately and without mistake or contrivance, does not differ from any other deed in binding grantor, and can only be attacked by those having superior equities which grantor had no right to cut off—as creditors and like.—Jackson vs. Cleveland, 15 Mich. 94, 90 Am. Dec. 266.

38. **Voluntary transfer** by an aged mother of all her estate to one of her sons, without consideration, to exclusion of her other children, will not be set aside as constructively fraudulent.—Soberanes vs. Soberanes, 97 Cal. 140, 144, 31 Pac. Rep. 910.

39. **DEED WITHOUT CONSIDERATION**, or, as is sometimes said, voluntary, not of it-

self sufficient to avoid deed.—Brison vs. Brison, 75 Cal. 525, 532, 7 Am. St. Rep. 189, 17 Pac. Rep. 689. See *Me. Green vs. Thomas*, 11 Me. 321; *Laborce vs. Carlton*, 53 Me. 312. *Mass. Viney vs. Abbott*, 109 Mass. 300. *Mo. Poe vs. Domec*, 48 Mo. 441, 443. *N. Y. Jackson vs. Garnsey*, 16 John. 189; *Bunn vs. Winthrop*, 1 John. Ch. 329.

40. Is immaterial in voluntary deed of trust passing presumed interest in fee to trustee thereof.—Kopp vs. Gunther, 95 Cal. 63, 74, 30 Pac. Rep. 301.

41. In case of voluntary conveyance never raises resulting trust to donor; nor is it void on account of either want or failure of consideration.—Tillaux vs. Tillaux, 115 Cal. 663, 668, 47 Pac. Rep. 691.

42. Is fact proper to be proved in connection with and as part of constructive fraud.—Brison vs. Brison, 75 Cal. 525, 532, 7 Am. St. Rep. 189, 17 Pac. Rep. 689.

43. **WHERE THERE IS ENTIRE FAILURE OF CONSIDERATION** for transfer, and circumstances of transaction are such that person who takes title to property cannot be permitted to enjoy it without unnecessarily violating some principle of equity, constructive trust will be raised for party entitled in equity to its beneficial enjoyment.—Kimball vs. Tripp, 136 Cal. 631, 635, 69 Pac. Rep. 423.

44. **WHERE GRANTEE AND GRANTOR OF LAND STAND IN FIDUCIARY RELATIONS** to each other, and deed is executed without consideration other than promise, express or implied, of grantee to hold land for purpose of carrying out an express trust in favor of grantor, violation by trustee of terms of parol agreement as to express trust constitutes constructive fraud which makes grantee involuntary trustee of land, for use of grantor, and gives grantor right to have deed declared void.—Jones vs. Jones, 140 Cal. 587, 590, 74 Pac. Rep. 143.

45. **Wife** cannot by knowingly accepting a fraudulent conveyance without consideration and keeping it secret, be allowed to aid and assist her husband in procuring credit, by holding himself out to world as owner of property.—Bush & Mallett Co. vs. Helbing, 134 Cal. 676, 681, 66 Pac. Rep. 967.

As to gifts, see § 1146 et seq. post.

As to voluntary conveyances, see monographic note 14 Am. Dec. 703-709; 14 Am. St. Rep. 739-754; 65 Am. St. Rep. 793-801.

ARTICLE II.

WHAT MAY BE TRANSFERRED.

§ 1044. What may be transferred.

§ 1045. Possibility.

§ 1046. Right of re-entry can be transferred.

§ 1047. Owner ousted of possession may transfer.

§ 1044. WHAT MAY BE TRANSFERRED. Property of any kind may be transferred, except as otherwise provided by this article.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Adverse possession—Transferability of title claimed by.
3. Burden of obligation not transferable.
4. Chose in action is transferable.
5. Contracts are transferable.
6. Lease prior to expiration of former leases valid.
7. Non-negotiable instruments are transferable.
8. Possibility not transferable.
9. Right arising out of obligation is transferable.
10. Right of re-entry or repossession is transferable.
11. Servitude—Grant of.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc. In: Rice vs. Whitmore, 74 Cal. 619, 623, 5 Am. St. Rep. 479, 16 Pac. Rep. 501 (cited); La Rue vs. Groezinger, 84 Cal. 281, 283, 18 Am. St. Rep. 179, 24 Pac. Rep. 42 (construed); Fudickar vs. East Riverside Irr. Dist., 109 Cal. 29, 37, 41 Pac. Rep. 1024 (construed); Curtin vs. Kowalsky, 145 Cal. 481, 484, 78 Pac. Rep. 963 (referred to).

2. Adverse possession—Transferability of title claimed by.—See post § 1047 and note.

3. Burden of obligation not transferable.—
See post § 1457 and note.

4. Chose in action is assignable.—See ante § 954 and note.

5. Contracts are assignable.—This section and §1458, which latter section provides that right arising out of obligation may be transferred, does away with whatever restrictions there may formerly have been upon power to assign ordinary contracts.—*La Rue vs. Groesinger*, 34 Cal. 331, 333, 18 Am. St. Rep. 179, 24 Pac. Rep. 42.

See post § 1458 and note.

6. LEASE PRIOR TO EXPIRATION OF FORMER LEASES.—Landowner can make valid lease of land before former leases have expired and tenants have surrendered back to him possession.—*Rice vs. Whitmore*, 74 Cal. 619, 623, 5 Am. St. Rep. 479, 16 Pac. Rep. 501.

7. Non-negotiable instruments may be transferred.—See post § 1459 and note.

8. Possibility not transferable.—See post § 1045 and note.

9. Right arising out of obligation is transferable.—See post § 1458 and note pars. 3, 4.

10. Right of re-entry or of repossession is transferable.—See post § 1046 and note.

11. Servitudes—Grant of.—See ante § 802 and note.

§ 1045. **POSSIBILITY.** A mere possibility, not coupled with an interest, cannot be transferred.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Common-law rule declared.
3. Same—Contract between husband and wife.
4. Same—Release to ancestor by heir.
- 5, 6. Heir apparent's deed—Equitable doctrine concerning.
7. Possibility is not interest of any kind.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Rice vs. Whitmore, 74 Cal. 619, 623, 5 Am. St. Rep. 479, 16 Pac. Rep. 501 (referred to); In re Estate Garcelon, 104 Cal. 570, 584, 43 Am. St. Rep. 134, 38 Pac. Rep. 414, 32 L. R. A. 595 (construed); In re Estate Wickersham, 138 Cal. 355, 361, 70 Pac. Rep. 1076 (applied); In re Estate Ryder, 141 Cal. 366, 370, 74 Pac. Rep. 993 (construed and applied).

2. COMMON-LAW RULE DECLARED.—This section and §700 simply state well-settled and well-understood rule of common law upon subject. At common law mere possibility, such as expectancy of heir, was not re-

garded as such existing interest as to be subject of sale or capable of passing by assignment.—In re Estate Garcelon, 104 Cal. 570, 584, 43 Am. St. Rep. 184, 38 Pac. Rep. 414, 32 L. R. A. 595.

3. Contract between husband and wife.—Husband may, for adequate consideration, enter into valid contract with his wife, releasing all his interest as her heir in her lands and personal property.—*Crum vs. Sawyer*, 132 Ill. 443, 24 N. E. Rep. 956.

4. Release to ancestor by heir.—Heir may release to ancestor his expected share in ancestor's estate and thereby will estop himself claiming as heir.—*Havens vs. Thompson*, 26 N. J. Eq. (11 C. E. Gr.) 383. See *Bishop vs. Davenport*, 52 Ill. 105.

5. HEIR APPARENT'S DEED—Equitable doctrine concerning.—Conveyance by heir apparent may in some cases be enforced in equity as grant to convey, or by way of estoppel, but it is not conveyance of legal title.—In re

Estate Ryder, 141 Cal. 866, 370, 74 Pac. Rep. 993. See *In re Estate Garcelon*, 104 Cal. 570, 584, 42 Am. St. Rep. 134, 33 Pac. Rep. 414, 32 L. R. A. 595.

6. Compare: *In re Estate Wickersham*, 133 Cal. 355, 361, 70 Pac. Rep. 1076.

7. Possibility is not interest of any kind.—See ante § 700 and note.

§ 1046. RIGHT OF RE-ENTRY CAN BE TRANSFERRED. A right of re-entry, or of repossession for breach of condition subsequent, can be transferred.

History: Enacted March 21, 1872.

§ 1047. OWNER OUSTED OF POSSESSION MAY TRANSFER. Any person claiming title to real property in the adverse possession of another may transfer it with the same effect as if in actual possession.

History: Enacted March 21, 1872.

Commissioners' note calls attention to the fact that the common-law rule making void conveyance of land in the adverse possession of another was abrogated by statute in this state, and adds: "The reason of the ancient common-law doctrine does not exist here. When livery of seisin was necessary, as it could only be made by the person in

possession, it followed as matter of course that a conveyance by a person out of possession was void. In this state the execution and delivery of a deed without livery of seisin or entry consummates a conveyance, and therefore there is no good reason why the conveyance of land to which the grantor has a rightful claim should not be valid."

ARTICLE III.

MODE OF TRANSFER.

§ 1052. When oral.

§ 1053. Grant, what.

§ 1054. Delivery necessary.

§ 1055. Date.

§ 1056. Delivery to grantee is necessarily absolute.

§ 1057. Delivery in escrow.

§ 1058. Surrendering or cancelling grant does not reconvey.

§ 1059. Constructive delivery.

§ 1060. Gratuitous grants take effect immediately; exception (repealed).

§ 1052. WHEN ORAL. A transfer may be made without writing, in every case in which a writing is not expressly required by statute.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Claim against state under Bounty Act assignable by parol.
3. Frauds—Statute of—Contracts which must be in writing.
4. Judgment may be assigned by parol.
5. Negotiable promissory note is assignable by parol.
6. Transfer of real property must be in writing.
7. Trust in personal property.
8. Trusts in real property must be in writing.

dike vs. State, 144 Cal. 681, 691, 78 Pac. Rep. 370.

3. Frauds—Statute of—Contracts which must be in writing.—See post § 1624 and note.

4. JUDGMENT MAY BE ASSIGNED BY PAROL, because there is no statutory provision requiring writing.—*Smith vs. Peck*, 128 Cal. 527, 530, 61 Pac. Rep. 77.

5. NEGOTIABLE PROMISSORY NOTE IS ASSIGNABLE BY PAROL.—There being no requirement by statute that a negotiable promissory note can be transferred only by writing, its title can be passed by delivery.—*Edwards vs. Wagner*, 121 Cal. 376, 377, 378, 53 Pac. Rep. 321.

6. Transfer of real property must be in writing.—See Code Civ. Proc. § 1971 and note.

7. TRUST IN PERSONAL PROPERTY.—Where subject of trust is personal property, it is not necessary that transfer should be in writing.—*Hellman vs. McWilliams*, 70 Cal. 449, 452, 11 Pac. Rep. 659; *Doran vs. Doran*, 99 Cal. 311, 315, 23 Pac. Rep. 929.

8. Trusts in real property must be in writing.—See ante §§ 552, 553 and notes.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Hellman vs. McWilliams*, 70 Cal. 449, 452, 11 Pac. Rep. 659 (applied); *Edwards vs. Wagner*, 121 Cal. 376, 377, 53 Pac. Rep. 321 (construed and applied); *Smith vs. Peck*, 128 Cal. 527, 530, 61 Pac. Rep. 77 (construed and applied); *Hohenshell vs. South Riverside L. & W. Co.*, 128 Cal. 627, 632, 61 Pac. Rep. 371 (erroneously citing this section instead of § 1053); *Bickerdike vs. State*, 144 Cal. 681, 691, 78 Pac. Rep. 270 (applied).

2. CLAIM AGAINST STATE UNDER BOUNTY ACT ASSIGNABLE BY PAROL.—Claim against state under Bounty Act for killing coyotes is transferable by parol.—*Bicker-*

§ 1053. **GRANT, WHAT.** A transfer in writing is called a grant, or conveyance, or bill of sale. The term "grant," in this and the next two articles, includes all these instruments, unless it is specially applied to real property.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 225.

1. Applied, cited, construed, referred to, etc.
2. All ordinary modes of acquiring property.
3. Common-law definition.
4. Comprehensiveness of word "grant."
5. Conclusive on purchaser—To what extent grant is.
6. Condition precedent—Grant on.
7. Condition subsequent—Grant on.
8. Construction of grants.
9. Conveyances which are not gifts.
10. Corporeal hereditaments conveyed by grant.
11. Deed—Presumption as to time of delivery.
12. Deed of trust is not grant.
13. Definition of grant or conveyance.
14. Delivery necessary.
15. Donation by municipal corporation to eleemosynary institution.
16. Evidence of gift or grant—Deed is more.
17. Fee simple presumed to pass by grant.
18. Form of grant.
19. Grantee defined.
20. Homestead—Grant of.
21. Implied covenants—Effect of use of word "grant."
22. Incorporeal hereditaments—Grants of.
23. "Instrument" defined.
24. License and grant distinguished.
25. Livery of seizin abolished.
26. Mexican land grant.
27. Mortgage not grant.
28. Ownership and title denoted by word grant.
29. Personal property may be transferred without deed.
30. Public land grant.
31. Qualification of meaning by parties to deed.
32. Reclamation of land under water.
33. Release will operate as grant.
34. Rents, reversions, and remainders—Grant of.
35. Surrendering or canceling grant—Effect of redelivery.
36. Transfer—What constitutes.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc.**, in: Hoag vs. Howard, 55 Cal. 564, 565 (referred to); Mabury vs. Ruiz, 58 Cal. 11, 15 (referred to); Hibberd vs. Smith, 67 Cal. 547, 556, 56 Am. Rep. 726, 4 Pac. Rep. 473, 3 Id. 46 (referred to); Faivre vs. Daley, 93 Cal. 664, 668, 29 Pac. Rep. 256 (cited); Banning vs. Marleau, 101 Cal. 238, 240, 35 Pac. Rep. 772 (referred to); Hohenshell vs. South Riverside L. & W. Co., 128 Cal. 627, 633, 61 Pac. Rep. 371 (erroneously citing § 1052 instead of this section); Hamilton vs. Hubbard, 134 Cal. 603, 605, 65 Pac. Rep. 321, 66 Id. 860 (cited); Driscoll vs. Driscoll, 143 Cal. 528, 536, 77 Pac. Rep. 471 (cited).

2. **ALL ORDINARY MODES OF ACQUIRING PROPERTY BY DEED**, whether operating by force of statute of uses or not, are included within term grant.—Ross vs. Adams, 28 N. J. L. (4 Dutch.) 160, 165.

3. **COMMON-LAW DEFINITION.**—"This word [grant] is taken largely where anything is granted or passed from one to another. And

in this sense it doth comprehend feoffments, bargains and sales, gifts, leases, charges, and the like; for he that doth give or sell doth grant also."—McVey vs. Green Bay & M. R. Co., 42 Wis. 532, 536 (quoting Shep. Touch. 228). See Estes Park Toll R. Co. vs. Edwards, 3 Colo. App. 74, 77, 32 Pac. Rep. 549; Muckelstone vs. Thomas, Willes 147, 149.

4. **COMPREHENSIVENESS OF WORD "GRANT."**—"The word 'grant' is nomen generalissimum. It includes all sorts of conveyances."—Durant vs. Ritchie, 4 Mason C. C. 45, 69, 8 Fed. Cas. 118 (quoted in Faivre vs. Daley, 93 Cal. 664, 669, 29 Pac. Rep. 256). See Dudley vs. Sumner, 5 Mass. 438, 472.

5. **CONCLUSIVE ON PURCHASER—To what extent grant is.**—See post § 1107 and note.

6. **CONDITION PRECEDENT—Grant on.**—See post § 1110 and note.

7. **CONDITION SUBSEQUENT—Grant on.**—See post § 1109 and note.

8. **CONSTRUCTION OF GRANTS.**—See post §§ 1066-1072 and notes.

9. **CONVEYANCES WHICH ARE NOT GIFTS.**—Where statute makes provision with reference to "gift" or "grant" the word grant means all conveyances by deed which are not gifts.—Peck vs. Walton, 36 Vt. 82, 85.

10. **CORPOREAL HEREDITAMENTS CONVEYED BY GRANT.**—"Grant is used by the most accurate writers as comprehending more than a transfer of incorporeal hereditaments—a conveyance of corporeal hereditaments."—Dudley vs. Sumner, 5 Mass. 438, 472; McVey vs. Green Bay & M. R. Co., 42 Wis. 532.

11. **DEED—Presumption as to time of delivery.**—See post § 1055 and note.

12. **DEED OF TRUST IS NOT GRANT** or conveyance within meaning of U. S. Rev. Stats. § 2262, which provides that certain grants or conveyances made by pre-emptor shall be null and void.—Wilcox vs. John, 21 Colo. 367, 52 Am. St. Rep. 246, 40 Pac. Rep. 880. See Norris vs. Heald, 12 Mont. 282, 33 Am. St. Rep. 581, 29 Pac. Rep. 1121.

13. **DEFINITION OF GRANT OR CONVEYANCE** is contained in this section.—See Mabury vs. Ruiz, 58 Cal. 11, 15; Hibberd vs. Smith, 67 Cal. 547, 556, 56 Am. Rep. 726, 4 Pac. Rep. 473, 3 Id. 46; Faivre vs. Daley, 93 Cal. 664, 668, 29 Pac. Rep. 256; Hohenshell vs. South Riverside L. & W. Co., 128 Cal. 627, 633, 61 Pac. Rep. 371; Driscoll vs. Driscoll, 143 Cal. 528, 536, 77 Pac. Rep. 471.

14. **DELIVERY NECESSARY.**—See post § 1054 and note.

15. **DONATION BY MUNICIPAL CORPORATION TO ELEEMOSYNARY INSTITUTION** is grant and ultra vires within constitutional prohibition against "grant" of funds to such institutions.—State ex rel. Orr vs. New Orleans, 50 La. Ann. 880, 24 So. Rep. 666.

16. EVIDENCE OF GIFT OR GRANT—Deed is more than mere evidence of gift or other grant, but it is gift or grant itself, and ipso facto operates to transfer or convey title of property described to grantee.—*Hamilton vs. Hubbard*, 134 Cal. 603, 605, 65 Pac. Rep. 321, 66 Id. 860.

17. Fee simple presumed to pass by grant.—See post § 1105 and note.

18. Form of grant.—See post § 1092 and note.

19. Grantee defined to be "one who takes by any species of conveyance."—*Dudley vs. Sumner*, 5 Mass. 438, 472.

20. Homestead—Grant of.—See post § 1243 and note.

21. IMPLIED COVENANTS—Effect of use of word "grant."—See post § 1113 and note.

22. INCORPOREAL HEREDITAMENTS—Grant of.—Word "grant" is applicable to conveyance of incorporeal hereditaments.—*McVey vs. Green Bay & M. R. Co.*, 42 Wis. 532, 536.

23. "INSTRUMENT" DEFINED.—Under this and other sections instrument means some written paper or instrument signed and delivered by one person to another, transferring the title to or creating a lien on property or giving right to debt or duty.—*Hoag vs. Howard*, 55 Cal. 564, 565, 566.

See ante §§ 709, 994 and notes, and post §§ 1056, 1059, 1091, 1093-1095, 1106, 1107, 1110, 1135, 1158, 1161, 1162, 1165, 1170, 1172, 1180-1183, 1185, 1186, 1188, 1190, 1193, 1195-1205, 1207, 1215, 1216, 1227-1229, 1451, 1629, 3087, 3413, 3414 and notes, and consult *KERR'S SYNTHETICAL INDEX* to this work.

24. A LICENSE AND A GRANT DISTINGUISHED.—"There is a clear distinction between the effect of a license to enter lands, uncoupled with an interest, and a grant. A grant passes some estate of greater or less degree, must be in writing, and is irrevocable, unless it contains words of revocation; whereas a license is a personal privilege, can be conferred by parol or in writing, conveys no estate or interest, and is revocable at the pleasure of the party making it."—*De Haro vs. United States*, 72 U. S. (5 Wall.) 599, 627, bk. 18 L. ed. 681. See *Jensen vs. Hunter* (Cal. July 11, 1895), 41 Pac. Rep. 14, 17.

25. LIVERY OF SEIZIN ABOLISHED.—Since title to corporeal hereditaments is no longer passed by livery of seizin, but only by deed, it may well be said that they no longer lie in livery, but in grant.—*McVey vs. Green Bay & M. R. Co.*, 42 Wis. 532, 536.

26. MEXICAN LAND GRANT.—The term "grant" has not only been universally used by people to designate all concessions of Mexican government, whether inchoate and requiring action of United States government to perfect titles under them, or perfect, vesting complete title, which cannot be disturbed; but such use of term has also been so general in

legal proceedings as to have acquired this comprehensive signification in legal language of state; and word as used in stipulation that party "claimed by grant" and "was seized in fee" does not ex vi termini import that such party had "perfect title."—*Seale vs. Ford*, 39 Cal. 104, 107, 108.

27. MORTGAGE NOT GRANT.—Mortgagee is not grantee within meaning of statute, as mortgagee out of possession has only chattel and mortgagor has fee and may maintain trespass against mortgagee.—*Van Rensselaer vs. Sheriff Albany*, 1 Cow. (N. Y.), 501, 511. See *Wilcox vs. John*, 21 Colo. 367, 52 Am. St. Rep. 246, 40 Pac. Rep. 880. See *Norris vs. Heald*, 12 Mont. 282, 33 Am. St. Rep. 581, 39 Pac. Rep. 1121.

28. OWNERSHIP AND TITLE DENOTED BY WORD GRANT.—In construing treaty relative to "grant" by Spain, grant does not mean mere grant itself, but right, title, legal possession and estate, property and ownership, legally resulting upon grant of land to the owner.—*United States vs. Arredondo*, 31 U. S. (6 Pet.) 691, 744, bk. 3 L. ed. 547.

29. PERSONAL PROPERTY MAY BE TRANSFERRED WITHOUT DEED, but deed of bill of sale may be resorted to in order to suit the convenience of the parties.—*Hastings vs. Blue Hill Turnp. Corp.*, 26 Mass. (9 Pick.) 80, 82.

30. PUBLIC LAND GRANT.—In such connection "grant" means act evidenced by letters patent under the great seal granting something from state or sovereign to subject.—*Estes Park T. Road Co. vs. Edwards*, 3 Colo. App. 74, 77, 32 Pac. Rep. 549.

31. QUALIFICATION OF MEANING BY PARTIES TO DEED.—Word "grant," as used in deeds, has well-known signification; but parties may limit or qualify its meaning, and if they choose to do so, court should not hesitate to carry out their expressed intention.—*Faivre vs. Daley*, 93 Cal. 664, 670, 29 Pac. Rep. 256. See *Morrison vs. Wilson*, 30 Cal. 344, 347; *Castro vs. Tennent*, 44 Cal. 253, 260.

32. Reclamation of land under water.—Where it was agreed that grantors of land should have right to reclaim overflowed land, and that reclamation should inure to benefit of plaintiff, etc., such agreement constitutes grant.—*Hohenshell vs. South Riverside L. & W. Co.*, 128 Cal. 627, 632, 633, 61 Pac. Rep. 371.

33. RELEASE WILL OPERATE AS GRANT in order to effect intent of party.—*Hastings vs. Blue Hill Turnp. Corp.*, 26 Mass. (9 Pick.) 80, 82.

34. Rents, reversions, and remainders.—Grant of.—See post § 1111 and note.

35. Surrendering or canceling grant—Effect of redelivery.—See post § 1058 and note.

36. Transfer—What constitutes.—See ante § 1039 and note.

§ 1054. DELIVERY NECESSARY. A grant takes effect, so as to vest the interest intended to be transferred, only upon its delivery by the grantor.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
 2. In general—Nature and necessity for delivery.
 3. Acceptance necessary.
 4. Same—Civil law.
 5. Same—Presumption of acceptance.
 6. Same—Same—Infant grantee.
 7. Agency—Application of ordinary rules as to authority.
 8. Same—Death of principal before delivery by agent.
 - 9, 10. Same—Delivery by and to agent.
 11. Answer—Non-delivery alleged.
 12. Appeal—Objection not raised below.
 13. Conditions must be complied with.
 14. Constructive delivery.
 15. Contract takes effect upon delivery.
 16. C. O. D.—Duty of buyer to pay price.
 17. Criterion of delivery—Dominion and control must be parted with by grantor.
 18. Date—Grant presumed to have been delivered at its date.
 19. Deposit with grantee without delivery.
 20. Effect of delivery.
 21. Elements of delivery.
 22. Escrow—Rules governing.
 23. Evidence—Acknowledgment of deed.
 - 24, 25. Same—Burden of proof.
 26. Same—Declarations and acts of grantor not admissible.
 27. Same—Deed is evidence of delivery.
 28. Same—Grantee's possession—Creates presumption of delivery.
 29. Same—Same—Parol evidence to explain circumstances.
 30. Same—Grantor's possession—Circumstances indicating non-delivery.
 31. Same—Same—Parol evidence to explain.
 32. Same—Recital in one instrument as to another.
 33. Same—Signature creates no presumption.
 34. "Execution"—Includes making and delivery.
 35. Same—Word not used in strict legal sense.
 36. Formalities and ceremonies—None necessary.
 37. Frauds, statute of—Delivery of part of goods sold.
 38. Fraudulent delivery inoperative.
 39. Same—Subsequent purchaser from grantee.
 40. Gift—Necessity for delivery.
 41. Intention is crucial question.
 42. Same—Circumstances of each case must be considered.
 43. Joint tenants and tenants in common—Delivery to one sufficient.
 44. Limitation, condition or interest—Delivery determines time.
 - 45, 46. Manual delivery—Not criterion.
 47. Necessity for delivery.
 48. Pleading—Answer denying delivery.
 49. Pledge and collateral security—Delivery necessary.
 50. Public land grants—Delivery not necessary.
 - 51, 52. Question for jury—Evidence not reviewed on appeal.
 53. Recordation—Is evidence of delivery.
 54. Same—Not essential to constitute delivery.
 55. Same—Parol evidence is admissible to rebut presumption.
 56. Relation back to date of purchase.
 57. Trusts—Sufficiency of delivery to beneficiary.
1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Banning vs. Marleau*, 101 Cal. 238, 240, 35 Pac. Rep. 772 (applied); *Driscoll vs. Driscoll*, 143 Cal. 528, 536, 77 Pac. Rep. 471 (cited).
2. **IN GENERAL**—Nature and necessity for delivery.—"Delivery is either actual, i. e. by doing something and saying nothing, or else verbal, i. e. by saying something and doing nothing, or it may be by both. And either of these may make a good delivery and perfect deed; for otherwise, albeit it be never so well sealed and written, yet is the deed of no force. And though the party to whom it is made take it to himself or happen to get it into his hands, yet will it do him no good, nor him that made it any hurt until it be delivered. And a deed may be delivered by the party himself that doth make it, or by any other by his appointment or authority precedent, or assent or agreement subsequent, for omnis rati habitio mandato equiparatur."—*Bank of Healdsburg vs. Bailhache*, 65 Cal. 327, 328, 329, 4 Pac. Rep. 106 (quoting *Shep. Touch.* 57).
- As to necessity for delivery, see par. 47 this note.
3. **ACCEPTANCE NECESSARY**.—Deed or donation is not valid unless it is accepted. "There may be burdens growing out of the ownership which he [grantee] does not choose to assume. If he affirmatively declines to accept the donation the law does not force it upon him against his will."—*De Levillain vs. Evans*, 39 Cal. 120, 122, 123; *Harris vs. Harris*, 59 Cal. 620, 622; *Jennings vs. Jennings*, 104 Cal. 150, 154, 37 Pac. Rep. 794. See *Bank of Healdsburg vs. Bailhache*, 65 Cal. 327, 331, 4 Pac. Rep. 106.
4. **Civil law**.—In respect to the question of acceptance, civil law does not differ materially from common law. Under neither is donation valid and obligatory until it is accepted.—*De Levillain vs. Evans*, 39 Cal. 120, 122.
5. **Presumption of acceptance**.—Although law requires acceptance of grant in case of adult grantee, if grant is for his advantage he will be presumed to have accepted it, until the contrary appears.—*De Levillain vs. Evans*, 39 Cal. 120, 123.
6. **Same—Infant grantee**.—In case of minor, who is presumed in law to be incapable of exercising sound discretion over his affairs and therefore not bound by his contracts unless in exceptional cases, there is strong reason for presuming that he has accepted grant which is for his advantage.—*De Levillain vs. Evans*, 39 Cal. 120, 122, 123. See *Donner vs. Palmer*, 31 Cal. 500.
7. **AGENCY**—In accordance with general rules governing agents, agent has no authority to deliver deed except such as has been expressly or impliedly conferred upon him.—*Bank of Healdsburg vs. Bailhache*, 65 Cal. 327, 331, 4 Pac. Rep. 106.

8. **Death of principal before delivery by agent.**—Where deed is made and handed to third person to be recorded and then delivered to grantee and the next day grantee dies and subsequently deed is recorded and delivered in pursuance of grantor's instructions, in absence of evidence that deed was delivered to grantee in pursuance of prior mutual understanding or agreement between grantor and grantee, such delivery is valid.—*Corker vs. Corker*, 95 Cal. 308, 310, 30 Pac. Rep. 541.

9. **Delivery by agent of grantor.**—If grantor deliver writing as his deed to third person to be delivered over by him to grantee on some future event, it is grantee's deed presently, and third person is trustee of it for grantee.—*Wellborn vs. Weaver*, 17 Ga. 267, 63 Am. Dec. 235. See *Wheelwright vs. Wheelwright*, 2 Mass. 447, 3 Am. Dec. 66; *Bushel vs. Pasmore*, 6 Mod. 217, 218.

10. **Delivery to agent of grantee.**—It is not essential to the valid delivery of deed that grantee be present and that it be accepted by him personally.—*Wellborn vs. Weaver*, 17 Ga. 267, 63 Am. Dec. 235 (citing *Shep. Touch.* 58). See *Byars vs. Spencer*, 101 Ill. 429, 40 Am. Rep. 212.

11. **ANSWER.**—Non-delivery alleged.—An answer which avers that agreement was never delivered to said plaintiff, and that he never had right to same, but obtained possession thereof in forcible and surreptitious manner, sufficiently alleges non-delivery of instrument.—*Haskell vs. Doty*, 73 Cal. 424, 426, 21 Pac. Rep. 10.

12. **APPEAL.**—Objection not raised below.—In action for partition of land, where no objection is made on trial to introduction of certified copy of deed on ground that it was never delivered, such objection cannot be made for first time on appeal.—*Davis vs. Pacific Impr. Co.*, 118 Cal. 45, 49, 50 Pac. Rep. 7.

13. **CONDITIONS MUST BE COMPLIED WITH.**—Grantee acquires no title under deed except on strict compliance with conditions on which delivery was to be made.—*Dyson vs. Bradshaw*, 23 Cal. 523, 537. See *Harkreader vs. Clayton*, 56 Miss. 383, 391, 31 Am. Rep. 369; *Black vs. Shreve*, 13 N. J. Eq. (2 Beas.) 455.

See post § 1056 and note.

14. **Constructive delivery.**—See post § 1059 and note.

15. **Contract takes effect upon delivery.**—See post § 1626 and note.

16. **C. O. D.**—Duty of buyer to pay price.—See post § 1784 and note.

17. **CRITERION OF DELIVERY.**—Loss of grantor's control.—It is settled that "delivery is not complete until the person delivering [grantor] has so dealt with instrument delivered as to lose all control over it. And whether he has so dealt with instrument depends upon intent to be deduced from all surrounding circumstances, the *res gestæ*."—*Hibberd vs. Smith*, 67 Cal. 547, 552, 56 Am. Rep. 726, 4 Pac. Rep. 473, 3 Id. 46. See *Hastings vs. Vaughn*, 5 Cal. 315, 318; *Denis vs. Velati*, 96 Cal. 223, 31 Pac. Rep. 1; *Bury vs. Young*, 98 Cal. 446, 35 Am. St. Rep. 186, 33

Pac. Rep. 338; *Ford vs. James*, 2 Abb. Dec. (N. Y.) 159; *Prutsman vs. Baker*, 30 Wis. 644, 11 Am. Rep. 592.

Dominion or control over instrument must be parted with by grantor in order to constitute delivery.—See note 63 Am. Dec. 244, 245.

18. **Date.**—Grant presumed to have been delivered at its date.—See post § 1055 and note.

19. **DEPOSIT WITH GRANTEE WITHOUT DELIVERY.**—Deed may be deposited with grantee, or handed to him, for any purpose other than as deed of the grantor, or as effective instrument between parties, without becoming operative as deed.—*Denis vs. Velati*, 96 Cal. 223, 227, 31 Pac. Rep. 1. See *Ford vs. James*, 2 Abb. Dec. (N. Y.) 159; *Prutsman vs. Baker*, 30 Wis. 644, 11 Am. Rep. 592.

20. **EFFECT OF DELIVERY OF GRANT** is to vest in grantee interest intended to be granted.—*Driscoll vs. Driscoll*, 143 Cal. 523, 536, 77 Pac. Rep. 471.

21. **"ELEMENTS OF DELIVERY** are that writing must be meant, by the maker, to take immediate effect; and be presumably, or in fact, accepted by the other party."—*Harris vs. Harris*, 59 Cal. 620, 622 (quoting *Bishop Cont.* 168).

22. **Escrow.**—See post § 1067 and note.

23. **EVIDENCE.**—Acknowledgment of deed only proves that it was signed and does not prove that it was delivered.—*Boyd vs. Slayback*, 63 Cal. 493, 494.

24. **Burden of proof.**—In action to recover deed on ground that it was not delivered rests upon plaintiff.—*Corker vs. Corker*, 95 Cal. 308, 310, 30 Pac. Rep. 541.

25. **Party claiming under deed must prove delivery.**—*Boyd vs. Slayback*, 63 Cal. 493, 494.

26. **Declarations and acts of grantor made and done in his own interest after delivery of deed are not admissible as indicating his intention in delivering it.**—*Bury vs. Young*, 98 Cal. 446, 452, 35 Am. St. Rep. 186, 33 Pac. Rep. 338; *Emmons vs. Barton*, 109 Cal. 662, 670, 42 Pac. Rep. 303. See *Ord vs. Ord*, 99 Cal. 523, 525, 34 Pac. Rep. 83.

27. **Deed is evidence of delivery.**—Deed which purports to be deed of bargain and sale executed and acknowledged and recorded is some evidence that it was delivered.—*Bensley vs. Atwill*, 12 Cal. 231, 236; *Anthony vs. Chapman*, 65 Cal. 73, 76, 2 Pac. Rep. 889; *Ward vs. Dougherty*, 75 Cal. 240, 243, 7 Am. St. Rep. 151, 17 Pac. Rep. 193; *Jennings vs. Jennings*, 104 Cal. 150, 154, 37 Pac. Rep. 794; *Davis vs. Pacific Impr. Co.*, 118 Cal. 45, 49, 50 Pac. Rep. 7. See *Barr vs. Schroeder*, 32 Cal. 609; *Branson vs. Caruthers*, 49 Cal. 374, 380; *Wedel vs. Herman*, 59 Cal. 507, 513-515; *Kidder vs. Stevens*, 60 Cal. 414.

28. **Grantee's possession.**—Creates presumption of delivery.—Possession of duly executed deed by grantee raises presumption of its delivery to him.—*Kidder vs. Stevens*, 60 Cal. 414, 424; *McLennan vs. McDonnell*, 78 Cal. 273, 276, 20 Pac. Rep. 566; *Jennings vs. Jennings*, 104 Cal. 150, 154, 37 Pac. Rep. 794; *Black vs. Sharkey*, 104 Cal. 279, 280, 37 Pac. Rep. 339. See *Bensley vs. Atwill*, 12 Cal. 231, 236. Ark.

Ammon vs. Martin, 59 Ark. 191, 26 S. W. Rep. 826. *Fla. Billings vs. Stark*, 15 Fla. 297; *Campbell vs. Carruth*, 32 Fla. 264, 13 So. Rep. 432. Ill. *Tunison vs. Chamblin*, 38 Ill. 378. Iowa. *Savery vs. Browning*, 18 Iowa 246, 250. Mich. *Dunlap vs. Dunlap*, 94 Mich. 11, 53 N. W. Rep. 788. Neb. *Roberts vs. Swearingen*, 3 Neb. 363, 1 N. W. Rep. 305. N. H. *Boody vs. Davis*, 20 N. H. 140, 51 Am. Dec. 210. Oreg. *Flint vs. Phipps*, 16 Oreg. 437, 19 Pac. Rep. 543; *Tyler vs. Cate*, 29 Oreg. 515, 45 Pac. Rep. 800.

29. Same—Parol evidence to explain circumstances.—Possession of deed by grantee is not conclusive evidence of delivery, but only prima facie evidence, and circumstances may be explained by parol.—*Black vs. Sharkey*, 104 Cal. 279, 280, 37 Pac. Rep. 939. See *Trust Co. vs. Cole*, 4 Fla. 359; *Kingsbury vs. Burnside*, 58 Ill. 310, 324, 11 Am. Rep. 67; *Tyler vs. Cate*, 29 Oreg. 515, 45 Pac. Rep. 800.

30. Grantor's possession.—Circumstance indicating non-delivery.—Continued and subsequent possession of deed by grantor is pregnant circumstance to show that supposed delivery was not absolute.—*Lessee of Mitchell vs. Ryan*, 3 Ohio St. 377, 383.

31. Same—Grantor's possession explained by parol.—Even though deed remains in hands of grantor, it is competent to show by parol that it has been delivered.—See *Black vs. Sharkey*, 104 Cal. 279, 280, 37 Pac. Rep. 939; *Lessee of Mitchell vs. Ryan*, 3 Ohio St. 377.

32. Recital in one instrument as to another.—Bond reciting that maker of note "has executed unto" payee certain promissory notes imports both making and delivery.—*Bagley vs. McMickle*, 9 Cal. 430, 452. See *Joseph vs. Dougherty*, 60 Cal. 353, 360.

33. Signature creates no presumption.—No legal presumption of delivery arises from mere fact that deed is signed.—*Boyd vs. Slayback*, 63 Cal. 493, 494.

34. "EXECUTION," when applied to instrument in writing, includes both making and delivery.—*Bagley vs. McMickle*, 9 Cal. 430, 452; *Le Mesnager vs. Hamilton*, 101 Cal. 532, 533, 40 Am. St. Rep. 81, 35 Pac. Rep. 1054. See *Dean vs. Parker*, 38 Cal. 283, 287, 26 Pac. Rep. 91.

35. Word not used in strict legal sense.—Where court finds that deed was made and executed, but was never delivered, it is apparent that the word "executed" is not used in its strict legal sense, and proper construction of finding is that deed was signed but not in fact delivered.—*Dean vs. Parker*, 38 Cal. 283, 287, 26 Pac. Rep. 91.

36. NO FORMALITIES AND CEREMONIES NECESSARY.—No particular form or ceremony is necessary to constitute delivery. It may be by acts or words of both, or by one without other; but what is done or said must be clearly manifest intention of grantor and of grantee that grant shall at once become operative to pass title.—*Byars vs. Spencer*, 101 Ill. 429, 40 Am. Rep. 212. See *Cannon vs. Cannon*, 26 N. J. Eq. (11 C. E. Gr.) 316, 319, 320.

37. Frauds, statute of.—Delivery of part of goods sold.—See post § 1624 par. 4 and note.

38. FRAUDULENT DELIVERY INOPERATIVE.—Where possession of deed is obtained without authority and in fraud of maker there is no valid delivery.—*Klose vs. Hillenbrand*, 33 Cal. 473, 477, 26 Pac. Rep. 352; *Gould vs. Wise*, 97 Cal. 532, 536, 32 Pac. Rep. 576. See *Haskell vs. Doty*, 78 Cal. 424, 21 Pac. Rep. 10; *Loaiza vs. Superior Court*, 35 Cal. 11, 30, 20 Am. St. Rep. 197, sub nom. *Loaiza vs. Levy*, 24 Pac. Rep. 707, 9 L. R. A. 376. Ill. *Stanley vs. Valentine*, 79 Ill. 544. Ind. *Henry vs. Carson*, 96 Ind. 412. Miss. *Harkreader vs. Clayton*, 56 Miss. 333, 31 Am. Rep. 369. Ohio. *Shirley vs. Ayres*, 14 Ohio 307, 45 Am. Dec. 546. Wis. *Everts vs. Agnes*, 6 Wis. 453; *Tisher vs. Beckwith*, 30 Wis. 55, 11 Am. Rep. 546 (stolen deed does not pass title).

39. Subsequent purchaser from grantee, where deed has been fraudulently procured, will not be protected even though he takes without notice and for valuable consideration.—*Gould vs. Wise*, 97 Cal. 532, 536, 32 Pac. Rep. 576.

40. Gift—Necessity for delivery.—See post § 1147 and note.

41. INTENTION IS CRUCIAL QUESTION.—Deed may be operative although never parted with by person who executed it; rule being that intention is more important than mode of fulfilling intention.—*Hastings vs. Vaughn*, 5 Cal. 315, 318; *Dean vs. Parker*, 38 Cal. 283, 289, 26 Pac. Rep. 91; *Corker vs. Corker*, 95 Cal. 808, 809, 30 Pac. Rep. 541; *Dimmick vs. Dimmick*, 95 Cal. 323, 328, 30 Pac. Rep. 547; *Denis vs. Velati*, 96 Cal. 223, 227, 31 Pac. Rep. 1; *Gould vs. Wise*, 97 Cal. 532, 535, 32 Pac. Rep. 576; *Bury vs. Young*, 98 Cal. 446, 451, 35 Am. St. Rep. 136, 33 Pac. Rep. 338. See *Barr vs. Schroeder*, 32 Cal. 609; *Hibberd vs. Smith*, 67 Cal. 547, 551, 56 Am. Rep. 726, 4 Pac. Rep. 473, 3 Id. 46; *McLennan vs. McDonnell*, 78 Cal. 273, 276, 20 Pac. Rep. 566; *Haskell vs. Doty*, 78 Cal. 424, 426, 21 Pac. Rep. 10. Ill. *Byars vs. Spencer*, 101 Ill. 429, 40 Am. Rep. 212. N. J. *Cannon vs. Cannon*, 26 N. J. Eq. (11 C. E. Gr.) 316, 320. N. Y. *Ford vs. James*, 2 Abb. Dec. 159. Oreg. *Tyler vs. Cate*, 29 Oreg. 515, 45 Pac. Rep. 800. Wis. *Pruitsman vs. Baker*, 30 Wis. 644, 11 Am. Rep. 592. Fed. *Calhoun Co. vs. American Em. Co.*, 93 U. S. 124, bk. 23 L. ed. 826. Eng. *Garnons vs. Knight*, 5 Barn. & C. 671, 12 Eng. C. L. 351, 29 Rev. Rep. 355.

42. Circumstances of each case must be considered.—"It is impossible to state priori in exact terms what shall or shall not constitute delivery, that paper may have its full operation as deed. It is to great extent matter of fact depending upon intent, and under such circumstances intent as evidencing what maker of instrument meant to do must be found from circumstances of transaction, the res gestæ, and while some general rules may be and are laid down in regard to it to ascertain such intent, intent must be found as a fact, and cannot always be determined as matter of law."—*Hibberd vs. Smith*, 67 Cal. 547, 552, 56 Am. Rep. 726, 4 Pac. Rep. 473, 3 Id. 46.

43. JOINT TENANTS AND TENANTS IN COMMON.—Delivery to one is valid delivery.—

Eshleman vs. Henrietta V. Co., 102 Cal. 199, 201, 36 Pac. Rep. 579.

Tenants in common and joint tenants—Delivery of shares by depositary.—See post § 1827 and note.

44. Limitation, condition, or interest—Delivery determines time.—See ante § 749 and note.

45. MANUAL DELIVERY—Non-delivery notwithstanding transfer of grant.—Although the deed is actually placed in grantee's hands, if he does not accept it and declines to go further with the transaction there is no delivery in legal contemplation.—*Fenton vs. Alsip*, 79 Cal. 402, 404, 21 Pac. Rep. 839. See *Black vs. Sharkey*, 104 Cal. 279, 280, 281, 37 Pac. Rep. 939; *Cecil vs. Beaver*, 28 Iowa 241, 246, 4 Am. Rep. 174; *Cannon vs. Cannon*, 28 N. J. Eq. (11 C. E. Gr.) 316, 320.

46. It is not necessary that grant should be actually put into the hands of grantee by grantor; e. g. where grantor signed grant and left it lying on grantee's table with intention that grantee should take it, delivery is sufficient.—*McLennan vs. McDonnell*, 78 Cal. 273, 276, 20 Pac. Rep. 566.

47. NECESSITY FOR DELIVERY.—Act solemn and authentic, done in writing in form apt for conveyance of land, with signature and seal, does not take effect as deed until delivery with intent that it shall so operate. The elements going to make up such paper all constitute an act factum or deed, but not complete until paper has been delivered with intent above mentioned.—*Hibberd vs. Smith*, 67 Cal. 547, 551, 56 Am. Rep. 726, 4 Pac. Rep. 473, 3 Id. 46. See *Dyson vs. Bradshaw*, 23 Cal. 523, 536; *Fitch vs. Bunch*, 30 Cal. 208, 213; *Boyd vs. Slayback*, 63 Cal. 493, 494; *Bank of Healdsburg vs. Bailhache*, 65 Cal. 327, 329, 4 Pac. Rep. 106; *Fenton vs. Alsip*, 79 Cal. 402, 404, 21 Pac. Rep. 839; *Gould vs. Wise*, 97 Cal. 532, 535, 32 Pac. Rep. 576; *Ruiz vs. Dow*, 113 Cal. 490, 497, 498, 45 Pac. Rep. 867; *Tracy vs. Alvord*, 118 Cal. 654, 655, 50 Pac. Rep. 757. *Gas. Wellborn vs. Wellborn*, 17 Ga. 267, 63 Am. Dec. 235. *Ill. Fash vs. Blake*, 44 Ill. 302; *Skinner vs. Baker*, 79 Ill. 496; *Union Mut. Ins. Co. vs. Campbell*, 95 Ill. 267, 35 Am. Rep. 166; *Byars vs. Spencer*, 101 Ill. 429, 40 Am. Rep. 212; *Doe ex d. Herbert vs. Herbert*, *Breese* 278. *Me. Leigh vs. Horsum*, 4 Me. 28. *Mass. Maynard vs. Maynard*, 10 Mass. 456, 6 Am. Dec. 146. *N. J. Cannon vs. Cannon*, 26 N. J. Eq. (11 C. E. Gr.) 316, 320. *N. Y. Jackson ex d. Eames vs. Phipps*, 12 John. 418. *Ohio. Mitchell vs. Ryan*, 3 Ohio St. 377; *Flanders vs. Blandy*, 45 Ohio St. 108, 12 N. E. Rep. 321; *Leonard vs. Kebler*, 50 Ohio St. 444, 34 N. E. Rep. 659. *Tex. Holliday vs. White*, 33 Tex. 447, 459, 460. *Vt. Chamberlain vs. Hopps*, 3 Vt. 94. *Va. Humphreys vs. Richmond & M. R. Co.*, 88 Va. 431, 13 S. E. Rep. 985. *Wis. Schmidt vs. Deegan*, 69 Wis. 300, 307, 34 N. W. Rep. 83. *Fed. Younge vs. Guilbeau*, 70 U. S. (3 Wall.) 636, 641, bk. 13 L. ed. 262; *Parmelee vs. Simpson*, 72 U. S. (5 Wall.) 81, 86, bk. 13 L. ed. 542; *Calhoun Co. vs. American Em. Co.*, 93 U. S. 124, bk. 23 L. ed. 826; *Clark vs. National Bank*, 66 Fed. Rep. 404, 408, 13 C. C. A. 545; *Howard Ins. Co. vs.*

Silverberg, 89 Fed. Rep. 163, 171 (case arising in California).

48. PLEADING—Answer denying delivery.—Where complaint alleges execution and delivery of instrument and answer denies execution without further denial of delivery, fact of delivery is put in issue as word "execute" when applied to written instrument, unless context indicates that it is used in narrow sense and imports delivery.—*Le Mesnager vs. Hamilton*, 101 Cal. 532, 538, 539, 40 Am. St. Rep. 81, 35 Pac. Rep. 1054.

49. Pledge and collateral security—Delivery necessary.—See post § 2938 and note.

50. PUBLIC LAND GRANTS—Delivery not necessary.—Grant of land by gift vests "the moment it has received the stamp of the last act required to completely authenticate the instrument," and delivery is not necessary.—*Donner vs. Palmer*, 31 Cal. 500, 513. See *Marbury vs. Madison*, 5 U. S. (1 Cr.) 137, bk. 2 L. ed. 60.

51. QUESTION FOR JURY.—It is for jury, under proper instructions as to law from court, to say whether or not deed was delivered so as to become operative.—*Hastings vs. Vaughn*, 5 Cal. 315, 318; *Dean vs. Parker*, 38 Cal. 283, 289, 26 Pac. Rep. 91. See *Bensley vs. Atwill*, 12 Cal. 231, 240; *Kidder vs. Stevens*, 60 Cal. 414; *Hibberd vs. Smith*, 67 Cal. 547, 56 Am. Rep. 726, 4 Pac. Rep. 473, 3 Id. 46; *Bury vs. Young*, 98 Cal. 446, 451, 35 Am. St. Rep. 186, 33 Pac. Rep. 338. *N. C. Vanhook vs. Barnett*, 4 Dev. 268. *Pa. Hannah vs. Swarner*, 3 Watts 9, 34 Am. Dec. 442. *Vt. Lindsay vs. Lindsay*, 11 Vt. 621. *Eng. Garnons vs. Knight*, 5 Barn. & C. 671, 12 Eng. C. L. 351, 79 Rev. Rep. 355.

52. Review on appeal.—In accordance with well-established rule governing appellate courts, finding upon question of delivery will not be disturbed on appeal if there is any evidence to support finding of inferior tribunal.—*Hibberd vs. Smith*, 67 Cal. 547, 554, 56 Am. Rep. 726, 4 Pac. Rep. 473, 3 Id. 46.

53. RECORDATION—Is evidence of delivery.—Due recordation of deed is some evidence of its delivery, after lapse of many years is strong evidence; and in any event, when there is no evidence to the contrary, it is sufficient to establish the fact of delivery.—*Davis vs. Pacific Impr. Co.*, 118 Cal. 45, 49, 50 Pac. Rep. 7. See *Anthony vs. Chapman*, 65 Cal. 73, 76, 2 Pac. Rep. 839. *Ala. Gregory vs. Walker*, 38 Ala. 26. *Ill. Rivard vs. Walker*, 39 Ill. 412; *Union Mut. Ins. Co. vs. Campbell*, 95 Ill. 267, 35 Am. Rep. 166. *Iowa. Savary vs. Browning*, 18 Iowa 246, 250; *Robinson vs. Gould*, 26 Iowa 89, 93; *Cecil vs. Beaver*, 28 Iowa 241, 4 Am. Rep. 174. *N. Y. Spencer vs. Carr*, 45 N. Y. 406, 6 Am. Rep. 112. *Ohio. Mitchell vs. Ryan*, 3 Ohio St. 377.

54. Not essential to delivery—Request to refrain from recording instrument.—There may be valid delivery without recordation and notwithstanding fact that grantor requested grantee to refrain from recording instrument until after grantor's death.—*Dimmick vs. Dimmick*, 95 Cal. 323, 328, 30 Pac. Rep. 547.

55. Parol evidence to rebut presumption.—

Presumption of delivery arising from recordation may be rebutted by parol evidence.—*Union Mut. Ins. Co. vs. Campbell*, 95 Ill. 267, 35 Am. Rep. 166. See *N. J. Cannon vs. Cannon*, 28 N. J. Eq. (11 C. E. Gr.) 316, 320. *N. Y. Jackson ex d. Ten Eyck vs. Perkins*, 2 Wend. 308; *Gilbert vs. North Am. F. Ins. Co.*, 23 Wend. 43, 35 Am. Dec. 543. *Ohio. Mitchell vs. Ryan*, 3 Ohio St. 377.

56. RELATION BACK TO DATE OF PURCHASE.—Where land is sold and purchase

money is paid and deed is subsequently executed, as against execution creditor of grantor, deed related back to date of purchase.—*Grigsby vs. Shwarz*, 22 Cal. 378, 382, 22 Pac. Rep. 1041.

57. TRUSTS.—Sufficiency of delivery to beneficiary.—Delivery of deed to real beneficiary of grant, or person to whose benefit it will inure, is good, without any delivery to person named as grantee in deed.—*Holcombe vs. Richards*, 38 Minn. 38, 35 N. W. Rep. 714.

§ 1055. DATE. A grant duly executed is presumed to have been delivered at its date.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Commissioners' note.
3. Common law declared.
4. Date of acknowledgment different from date of deed.
5. Evidence of delivery unnecessary.
6. Extraneous evidence to overcome presumption.
7. Non-payment of consideration.
8. Presumption defined.
9. Recordation after death of grantor.
10. Time only included in presumption.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in. *McFadden vs. Mitchell*, 61 Cal. 148 (applied); *Ward vs. Dougherty*, 75 Cal. 240, 243, 7 Am. St. Rep. 151, 17 Pac. Rep. 193 (construed and applied); *Banning vs. Marleau*, 101 Cal. 238, 240, 35 Pac. Rep. 772 (referred to); *Gordon vs. San Diego*, 108 Cal. 264, 268, 41 Pac. Rep. 301 (applied); *Gerke vs. Cameron* (Cal. Sept. 15, 1897), 50 Pac. Rep. 434, 436 (cited); *Murray vs. Tulare Irr. Co.*, 120 Cal. 311, 315, 49 Pac. Rep. 563, 52 Id. 586 (cited); *Lewis vs. Burns*, 122 Cal. 358, 362, 50 Pac. Rep. 132 (construed and applied); *McGorray vs. Robinson*, 135 Cal. 312, 314, 67 Pac. Rep. 279 (applied).

2. COMMISSIONERS' NOTE cites, in support of this section, following cases: *Bagley vs. McMickle*, 9 Cal. 430; *Bensley vs. Atwill*, 12 Cal. 231; *Fitch vs. Bunch*, 30 Cal. 208; *Barr vs. Schroeder*, 32 Cal. 609; *Harris vs. Norton*, 16 Barb. (N. Y.) 264 (the relevancy of which cases to this section is not apparent).

3. COMMON LAW DECLARED.—Ordinary rule is that deeds are presumed to have been made at their date.—*Ill. Lake Erie & W. R. Co. vs. Whitham*, 155 Ill. 514, 46 Am. St. Rep. 355, 40 N. E. Rep. 1014, 28 L. R. A. 612. *N. Y. Purdy vs. Coar*, 109 N. Y. 443, 4 Am. St. Rep. 491, 17 N. E. Rep. 352. See *S. D. Erickson vs. Brookings Co.*, 3 S. D. 434, 53 N. W. Rep. 357, 18 L. R. A. 347.

4. DATE OF ACKNOWLEDGMENT DIFFERENT FROM DATE OF DEED.—In face of statute court will not presume that when date of acknowledgment is different from date of deed it was not delivered until after it was acknowledged.—*Gordon vs. San Diego*, 108 Cal. 264, 268, 41 Pac. Rep. 301.

5. EVIDENCE OF DELIVERY UNNECESSARY.—Under this section it is not good objection to introduction of bill of sale in evidence that there was no proof of its delivery.—*McFadden vs. Mitchell*, 61 Cal. 148 (which decision is incomprehensible, because only presumption created by section is as to date of delivery, and not fact of delivery). See *Lewis vs. Burns*, 122 Cal. 358, 362, 55 Pac. Rep. 132 (holding evidence of delivery unnecessary under this section).

See par. 10 this note.

6. EXTRANEOUS EVIDENCE TO OVERCOME PRESUMPTION.—Presumption that date found in body of grant is date at which it was delivered is not conclusive, and true date of delivery may be proved aliunde.—*Treadwell vs. Reynolds*, 47 Cal. 171, 174. See *Ward vs. Dougherty*, 75 Cal. 240, 7 Am. St. Rep. 151, 17 Pac. Rep. 193; *Gordon vs. San Diego*, 108 Cal. 264, 268, 41 Pac. Rep. 301; *McDougall vs. McDougall*, 135 Cal. 316, 67 Pac. Rep. 778.

7. NON-PAYMENT OF CONSIDERATION is not sufficient evidence to rebut statutory presumption at time of date.—*Gerke vs. Cameron* (Cal. Sept. 15, 1897), 50 Pac. Rep. 434, 436.

8. PRESUMPTION DEFINED.—Presumption within meaning of this section is, as is declared in Code Civil Procedure, § 1959, "a deduction which the law expressly directs to be made from particular facts."—*McDougall vs. McDougall*, 135 Cal. 316, 319, 67 Pac. Rep. 778.

See Code Civ. Proc. § 1959 and note.

9. RECORDATION AFTER DEATH OF GRANTOR does not overcome such statutory presumption that grant was delivered at this date.—See *Lewis vs. Burns*, 122 Cal. 358, 362, 55 Pac. Rep. 132.

10. TIME ONLY INCLUDED IN PRESUMPTION.—Statutory inference applies only to time and not to fact of delivery. In other words, fact of delivery must be proven by other and competent evidence, but when proven presumption of code as to time of such delivery applies.—*Ward vs. Dougherty*, 75 Cal. 240, 243, 7 Am. St. Rep. 151, 17 Pac. Rep. 193. See *Boyd vs. Slayback*, 63 Cal. 493, 494.

See par. 5 this note.

§ 1056. DELIVERY TO GRANTEE IS NECESSARILY ABSOLUTE. A grant cannot be delivered to the grantee conditionally. Delivery to him, or to his agent

as such, is necessarily absolute, and the instrument takes effect thereupon, discharged of any condition on which the delivery was made.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Party or agent as depositary of escrow.
3. Uses—Freehold to commence in futuro.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: Hoag vs. Howard, 55 Cal. 564, 565 (referred to); Banning vs. Marleau, 101 Cal. 238, 240, 35 Pac. Rep. 772 (referred to); Kenney vs. Parks, 137 Cal. 527, 531, 70 Pac. Rep. 556 (referred to).

2. **Party or agent as depositary of escrow.**—See post § 1057 and note.

2. **USES—Freehold to commence in futuro.**—Although it be assumed that statute of uses was in force prior to codes, deed is inoperative as common-law conveyance of legal title when it is an attempt to create or convey freehold to commence in futuro, and deed cannot operate as covenant to stand seized when only consideration for such covenant is blood or marriage.—See Chandler vs. Chandler, 55 Cal. 267, 270, 271.

Freehold estate to commence in futuro, invalid.—Hawes vs. Stebbins, 49 Cal. 369.

§ 1057. **DELIVERY IN ESCROW.** A grant may be deposited by the grantor with a third person, to be delivered on performance of a condition, and, on delivery by the depositary, it will take effect. While in possession of the third person, and subject to condition, it is called an escrow.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Agency of depositary—Depositary is agent for both parties.
3. Same—Revocation of depositary's authority.
4. Same—Same—Mere agent's authority is revocable.
5. Same—Same—No valid executory contract.
6. Common-law rule—Validity of escrow.
7. Conditions—Essential ingredient of escrow.
8. Same—Estoppel of grantor to question delivery.
9. Same—Executory contract may be altered.
10. Same—Non est factum pleadable by grantor.
11. Same—Performance of conditions necessary.
12. Same—Recordation immaterial.
13. Same—Rights of purchaser from grantee after wrongful delivery.
14. Same—Waiver of conditions by grantee.
15. Same—Same—Law merchant not applicable.
16. Construction—Application of ordinary rules.
- 17, 18. Death of grantor—Deed deposited to take effect upon.
19. Death of parties—Does not revoke depositary's authority to make delivery.
20. Same—Revocation of authority of mere agent.
21. Definition and distinctions.
22. Same—Conditions to be performed are crucial.
23. Same—Escrow and deed distinguished.
24. Same—Partial and qualified delivery.
25. Delivery is necessary.
26. Dominion and control must be parted with by grantor.
27. Duty of depositary to make delivery.
28. Equitable remedy against depositary for wrongful delivery.
29. Formalities necessary to constitute escrow—No particular terms necessary.

30. Frauds, statute of—Condition may rest in parol.
31. Same—Several writings construed together.
32. Fraudulent procurement of deed.
33. Interpleader.
34. Mutuality and meeting of minds necessary.
35. Parol evidence—As general proposition admissible to show conditions.
36. Same—Contradiction of writing not permitted.
37. Same—Subsequent declarations and acts of grantor.
- 38, 39. Party cannot act as depositary.
- 40, 41. Same—Agent or attorney of party.
42. Same—Effect of deposit with grantee on condition.
43. Same—Qualification of rule—Deeds which are not contracts.
44. Privity between grantor and grantee.
45. Question of fact for jury as to escrow.
46. Quietting title.
47. Rescission decreed where grantee obtains wrongful possession.
48. Right of grantee to delivery of deed.
49. Specific performance—Complaint.
50. Subsequent declarations do not affect delivery and constitute escrow.
51. Tender—Necessity to keep tender good.
52. Testamentary deed—Deposit to take effect on death of grantor.
53. Time when deed takes effect—Relation back to time of deposit.
54. Same—Marriage of woman pending delivery.
55. Trustee—Depositary is.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: Banning vs. Marleau, 101 Cal. 238, 240, 35 Pac. Rep. 772 (referred to); Kenney vs. Parks, 135 Cal. 146, 149, 57 Pac. Rep. 772 (held not applicable).

2. **AGENCY OF DEPOSITARY—Depositary is agent for both parties.**—Person to whom deed is delivered is by mutual consent consti-

tuted agent of both parties. He does not hold deed subject to control of grantor.—*McDonald vs. Huff*, 77 Cal. 279, 282, 19 Pac. Rep. 499. See *Ga. Wellborn vs. Weaver*, 17 Ga. 267, 63 Am. Dec. 235. *Kan. Davis vs. Clark*, 58 Kan. 100, 48 Pac. Rep. 563. *Utah. Gammon vs. Bunnell*, 22 Utah 421, 64 Pac. Rep. 958.

3. **Revocation of depositary's authority.**—When deed is deposited in escrow to be delivered upon the happening of certain event or the performance of specified condition, depositor is not at liberty to withdraw deed or forbid its delivery without consent of other party.—*Cannon vs. Handley*, 72 Cal. 133, 140, 13 Pac. Rep. 315. See *McDonald vs. Huff*, 77 Cal. 279, 19 Pac. Rep. 499; *Ruiz vs. Dow*, 113 Cal. 490, 497, 45 Pac. Rep. 867; *Bradbury vs. Davenport*, 120 Cal. 152, 154, 52 Pac. Rep. 801. *Ga. Wellborn vs. Weaver*, 17 Ga. 267, 63 Am. Dec. 235. *Kan. Davis vs. Clark*, 58 Kan. 100, 48 Pac. Rep. 563. *Ky. Millett vs. Parker*, 2 Met. 608, 616. *Minn. Knopf vs. Hansen*, 37 Minn. 215, 33 N. W. Rep. 781; *Thoraldsen vs. Hatch*, 87 Minn. 168, 91 N. W. Rep. 467. *N. Y. Mechanics' Nat. Bank vs. Jones*, 76 N. Y. App. Div. 534, sub nom. *Mechanics' Nat. Bank vs. Roughhead*, 78 N. Y. Supp. 800. *Pa. Blight vs. Schenck*, 10 Pa. St. 385, 51 Am. Dec. 478. *Utah. Gammon vs. Bunnell*, 22 Utah 421, 64 Pac. Rep. 958. *Wis. Albright vs. Albright*, 70 Wis. 523, 36 N. W. Rep. 254.

4. **Same—Mere agent's authority is revocable.**—Where deed is not placed in escrow, but is placed in hands of one with authority to deliver when grantor assents to proposed contract, depositary is mere agent, and his authority is revocable.—*Fitch vs. Bunch*, 30 Cal. 203, 213, 214; *Bank of Healdsburg vs. Ballhache*, 65 Cal. 327, 331, 4 Pac. Rep. 106. See *Hubback vs. Ross*, 96 Cal. 426, 31 Pac. Rep. 358; *Ruiz vs. Dow*, 113 Cal. 490, 497, 45 Pac. Rep. 867.

5. **Same—No valid executory contract.**—Where one deposits deed with directions to depositary to deliver it to grantee on happening of given event, but grantor has made no valid executory contract to convey, he may revoke directions to depositary and recall deed at any time before conditions of deposit have been complied with, provided those conditions are such that title does not pass at once to grantee upon delivery to depositary.—*Campbell vs. Thomas*, 42 Wis. 437, 24 Am. Rep. 427.

6. **COMMON-LAW RULE—Validity of escrow.**—It is well settled that conveyance which instead of being delivered to grantee is delivered to third person to be delivered to grantee upon condition is valid and upon delivery is effectual to convey title.—*Fulton vs. Priddy*, 123 Mich. 298, 81 Am. St. Rep. 201, 32 N. W. Rep. 65. See *Mass. Hatch vs. Hatch*, 9 Mass. 307, 6 Am. Dec. 67; *Foster vs. Mansfield*, 44 Mass. (3 Met.) 412, 37 Am. Dec. 154. *Mich. Wallace vs. Harris*, 32 Mich. 380; *Taft vs. Taft*, 59 Mich. 185, 60 Am. Rep. 291, 26 N. W. Rep. 426. *Pa. Blight vs. Schenck*, 10 Pa. St. 385, 51 Am. Dec. 478.

7. **CONDITIONS—Essential ingredient of escrow** is that instrument shall be left with third person to be delivered upon condition and if no condition is imposed there is no escrow.—*Martin vs. Flaharty*, 18 Mont. 96, 40 Am. St. Rep. 415, 32 Pac. Rep. 287, 19 L. R. A.

242; *Farrar vs. Bridges*, 5 Humph. (Tenn.) 411, 42 Am. Dec. 439.

8. **Estoppel of grantor to question delivery.**—Although ordinarily delivery in violation of conditions is not binding upon grantor there may be circumstances which will estop him from asserting title against bona fide purchaser.—*Quick vs. Milligan*, 108 Ind. 419, 58 Am. Rep. 49, 9 N. E. Rep. 392.

9. **Executory contract may be altered.**—Conditions on which deed is deposited necessarily rest in parol, and while they remain executory they may be changed by mutual consent; they may be dissolved or varied by parol.—*Raymond vs. Smith*, 5 Conn. 555, 559.

10. **Non est factum pleadable by grantor.**—If grantee obtains possession of deed before event happens upon which it was intended to be delivered, it is not grantor's deed, and he may fight it by pleading non est factum.—*Wheelwright vs. Wheelwright*, 2 Mass. 447, 3 Am. Dec. 66.

11. **Performance of condition necessary.**—Where deed is placed in hands of third person as escrow, grantee is only entitled to delivery thereof upon strict compliance with conditions or terms of agreement.—*Beem vs. McKusick*, 10 Cal. 532, 540; *Dyson vs. Bradshaw*, 23 Cal. 523, 536; *Fitch vs. Bunch*, 30 Cal. 203, 212; *Heney vs. Pesoli*, 109 Cal. 53, 63, 41 Pac. Rep. 319. See *McLaughlin vs. Clausen*, 35 Cal. 322, 326, 24 Pac. Rep. 636; *Ruiz vs. Dow*, 113 Cal. 490, 496, 497, 45 Pac. Rep. 867. *Colo. Hamill vs. Thompson*, 3 Colo. 518, 523; *Wolcott vs. Johns*, 7 Colo. App. 360, 44 Pac. Rep. 675. *Conn. Coe vs. Turner*, 5 Conn. 36, 92; *Raymond vs. Smith*, 5 Conn. 555, 559; *White vs. Bailey*, 14 Conn. 271. *Ind. Berry vs. Anderson*, 22 Ind. 36; *Robbins vs. Magee*, 76 Ind. 381; *Vaughan vs. Godman*, 103 Ind. 499, 3 N. E. Rep. 257; *Quick vs. Milligan*, 108 Ind. 419, 58 Am. Rep. 49, 9 N. E. Rep. 392; *Riggs vs. Trees*, 120 Ind. 402, 22 N. E. Rep. 254, 5 L. R. A. 696. *Iowa. Haven vs. Kramer*, 41 Iowa 382; *Hoyt vs. McLagan*, 37 Iowa 746, 55 N. W. Rep. 18; *Jackson vs. Lynn*, 94 Iowa 151, 58 Am. St. Rep. 286, 62 N. W. Rep. 704. *Kan. Carter vs. Moulton*, 51 Kan. 9, 37 Am. St. Rep. 259, 32 Pac. Rep. 633, 20 L. R. A. 309. *Miss. Harkreader vs. Clayton*, 56 Miss. 383, 391, 31 Am. Rep. 369. *Mont. Helm vs. Kleinschmidt*, 12 Mont. 586, 31 Pac. Rep. 542. *Neb. Patrick vs. McCormick*, 10 Neb. 1, 4 N. W. Rep. 312; *Whipple vs. Fowler*, 41 Neb. 675, 60 N. W. Rep. 15. *N. J. Black vs. Shreve*, 13 N. J. Eq. (3 Beas.) 455; *State Bank vs. Evans*, 15 N. J. L. (3 Gr.) 155, 23 Am. Dec. 400; *Tensick vs. Flagg*, 29 N. J. L. (5 Dutch.) 25. *N. Y. Hathaway vs. Payne*, 34 N. Y. 92, 106; *Cagger vs. Lansing*, 43 N. Y. 550; *Jackson ex d. Gratz vs. Catlin*, 3 John. 248, 3 Am. Dec. 415; *Artcher vs. Whalen*, 1 Wend. 179; *Jackson ex d. Russell vs. Rowland*, 6 Wend. 666, 22 Am. Dec. 557. *Ohio. Ogden vs. Ogden*, 4 Ohio St. 182. *Oreg. Gaston vs. Portland*, 16 Oreg. 255, 19 Pac. Rep. 127. *Pa. Stephens vs. Rinehart*, 72 Pa. St. 434; *Robins vs. Bellas*, 3 Watts 359. *Vt. Smith vs. South Royalton Bank*, 32 Vt. 341, 76 Am. Dec. 179. *Va. Hicks vs. Goode*, 12 Leigh 479, 37 Am. Dec. 677. *W. Va. White vs. Core*, 20 W. Va. 272. *Wis. Everts vs. Agnes*, 4 Wis. 343, 65 Am. Dec. 314; *Tisher vs. Beckwith*, 30 Wis.

55, 11 Am. Rep. 546; Prutsman vs. Baker, 30 Wis. 644, 11 Am. Rep. 592; Chipman vs. Tucker, 33 Wis. 43, 20 Am. Rep. 1; Schmidt vs. Deegan, 69 Wis. 300, 24 N. W. Rep. 83. Fed. Duncan vs. United States, 32 U. S. (7 Pet.) 435, bk. 8 L. ed. 739 (Marshall, J., saying: "It is a principle of the common law, too well settled to be controverted, that where an instrument is delivered as an escrow . . . no obligation is incurred until the condition shall happen"); Calhoun Co. vs. American Em. Co., 93 U. S. 124, bk. 28 L. ed. 826; Glover vs. Chase, 11 Fed. Rep. 375; Balfour vs. Parkinson, 84 Fed. Rep. 855; Balfour vs. Hopkins, 93 Fed. Rep. 564, 35 C. C. A. 445; Clarke vs. Eureka Co. Bank, 123 Fed. Rep. 922. Eng. Bushnell vs. Pasmore, 6 Mod. 217, 218, Shep. Touch. 59.

12. **Recordation immaterial.**—Where deed is wrongfully procured and recorded without performance of conditions upon which it was placed in escrow, such recordation is immaterial and does not give it validity.—Calhoun Co. vs. American Em. Co., 93 U. S. 124, bk. 28 L. ed. 826.

13. **Rights of purchaser from grantee after wrongful delivery.**—Purchaser with notice of conditions from grantee named in deed placed in escrow takes no title if delivery by depositary was ineffectual because of non-performance of conditions.—Conneau vs. Geis, 73 Cal. 176, 181, 2 Am. St. Rep. 785, 14 Pac. Rep. 580. See *Miss. Harkreader vs. Clayton*, 56 Miss. 383, 391, 31 Am. Rep. 369. N. Y. *Souverby vs. Arden*, 1 John. Ch. 240. Vt. *Smith vs. South Royalton Bank*, 22 Vt. 241, 249, 76 Am. Dec. 179.

14. **Waiver of conditions by grantee.**—Conditions in deposit of deed in escrow for sole benefit of one of parties thereto may be waived by him, and delivery enforced, notwithstanding such conditions.—Thoraldsen vs. Hatch, 87 Minn. 168, 91 N. W. Rep. 467. See *Witmer Bros. Co. vs. Weid*, 108 Cal. 569, 579, 580, 41 Pac. Rep. 491.

15. **Same—Law merchant not applicable,** case being within general rule of common law that assignee takes chose in action subject to all equities that existed between original parties.—*Smith vs. South Royalton Bank*, 22 Vt. 241, 251, 76 Am. Dec. 179.

16. **CONSTRUCTION.**—Application of ordinary rules.—Where instrument is placed in escrow, court applies universal rule. Where language used is not clear, positive, and certain, it is proper to consult condition, situation, and motives of respective parties for purpose of ascertaining their intention.—*Clarke vs. Eureka Co. Bank*, 123 Fed. Rep. 922, 927.

17. **DEATH OF GRANTOR.**—Deed deposited to take effect upon.—If owner of land desires to convey same, but not to have his deed take effect until his decease, he can make reservation of life estate in deed, or it may be done by absolute delivery of deed to third person to be passed to grantee upon decease of grantor, holder in such case being trustee for grantee.—*Bury vs. Young*, 98 Cal. 446, 449, 35 Am. St. Rep. 186, 33 Pac. Rep. 338; *Schuur vs. Rodenback*, 133 Cal. 85, 83, 65 Pac. Rep. 292. See *Ruiz vs. Dow*, 113 Cal. 490, 496, 45 Pac. Rep. 367. Conn. *Belden vs. Carter*, 4 Day 66,

4 Am. Dec. 135. Ill. *Stone vs. Duvall*, 77 Ill. 475. Mass. *Wheelwright vs. Wheelwright*, 2 Mass. 447, 3 Am. Dec. 66; *O'Kelly vs. O'Kelly*, 49 Mass. (8 Met.) 436, 439; *Mather vs. Corliss*, 103 Mass. 568. Mich. *Hosley vs. Holmes*, 27 Mich. 415; *Wallace vs. Harris*, 32 Mich. 380; *Latham vs. Udell*, 33 Mich. 238; *Taft vs. Taft*, 59 Mich. 185, 60 Am. Rep. 291, 26 N. W. Rep. 426; *Jenkinson vs. Brooks*, 119 Mich. 108, 77 N. W. Rep. 640. N. Y. *Hathaway vs. Payne*, 34 N. Y. 92. N. D. *Arnegard vs. Arnegard*, 7 N. D. 475, 75 N. W. Rep. 797, 41 L. R. A. 253. Pa. *Stephens vs. Rinenart*, 72 Pa. St. 434. Wis. *Prutsman vs. Baker*, 30 Wis. 644, 650, 11 Am. Rep. 592; *Albright vs. Albright*, 70 Wis. 523, 36 N. W. Rep. 254.

18. **Compare:** *Howlin vs. Castro*, 136 Cal. 605, 610, 611, 69 Pac. Rep. 432.

19. **DEATH OF PARTIES.**—Does not revoke depositary's authority to make delivery.—If instrument is deposited as escrow to be delivered on conditions performed, before which maker or grantee dies, and conditions are afterwards performed, it is the deed of maker from first delivery, although it was only inchoate, and it is to be deemed consummated by performance of condition.—*Bostwick vs. McEvoy*, 62 Cal. 496, 499. See Conn. *Peck vs. Goodwin*, Kirby 164. Kan. *Davis vs. Clark*, 58 Kan. 100, 48 Pac. Rep. 563. Mass. *Wheelwright vs. Wheelwright*, 2 Mass. 447, 3 Am. Dec. 66; *Hatch vs. Hatch*, 9 Mass. 310, 6 Am. Dec. 67; *Bodwell vs. Webster*, 30 Mass. (13 Pick.) 411, 418; *Foster vs. Mansfield*, 44 Mass. (3 Met.) 412, 37 Am. Dec. 154; *Daggett vs. Simonds*, 173 Mass. 340, 53 N. E. Rep. 907, 46 L. R. A. 332. Mich. *Thatcher vs. St. Andrews Church*, 37 Mich. 264. Minn. *Lindley vs. Groff*, 37 Minn. 338, 34 N. W. Rep. 26; *Thoraldsen vs. Hatch*, 87 Minn. 168, 91 N. W. Rep. 467. Mont. *Martin vs. Flaharty*, 13 Mont. 96, 40 Am. St. Rep. 415, 32 Pac. Rep. 287, 19 L. R. A. 242. N. Y. *Webster vs. Kings Co. T. Co.*, 145 N. Y. 275, 39 N. E. Rep. 964; *Hunter vs. Hunter*, 17 Barb. 25; *Ruggles vs. Lawson*, 13 John. 285. Eng. *Perryman's Case*, 5 Coke 84b (wherein Lord Coke says: "If the grantee dies between the first delivery and the deed becoming absolute, the deed is good, for there was traditio inchoata in the life of the parties, sed postea consummata existens by the performance of the condition takes its effect by force of the first delivery, without any new delivery").

20. **Revocation of authority of mere agent.**—Where instrument is not placed in escrow, but is delivered to mere agent for delivery and agency is not coupled with interest, authority of agent is revoked by death of principal.—*Farmer vs. Marvin*, 63 Kan. 250, 65 Pac. Rep. 221; *Daggett vs. Simonds*, 173 Mass. 340, 53 N. E. Rep. 907, 46 L. R. A. 332. See Conn. *Jones vs. Jones*, 6 Conn. 111, 16 Am. Dec. 35. Utah. *Peck vs. Rees*, 7 Utah 467, 27 Pac. Rep. 581, 13 L. R. A. 714. Wis. *Prutsman vs. Baker*, 30 Wis. 644, 11 Am. Rep. 592.

21. **DEFINITION AND DISTINCTIONS.**—Delivery of deed may be absolute, that is, to grantee himself, or to third person for him; or it may be conditional, that is, to third person, with directions to keep it till some condition is performed by grantee. In first case,

title presently passes, but in second, instrument is an escrow, and no title passes until condition is performed, and generally, until second delivery of deed.—*Fitch vs. Bunch*, 30 Cal. 208, 211; *McDonald vs. Huff*, 77 Cal. 279, 282, 19 Pac. Rep. 499; *Kenney vs. Parks*, 125 Cal. 146, 149, 57 Pac. Rep. 772. See *Beem vs. McKusick*, 10 Cal. 538, 540; *Miller vs. Sears*, 91 Cal. 282, 284, 25 Am. St. Rep. 176, 27 Pac. Rep. 589; *Kenney vs. Parks*, 127 Cal. 527, 532, 70 Pac. Rep. 556 (wherein it is declared that doctrines relative to escrow "have often been misunderstood and misapplied"). *Conn. Raymon* vs. *Smith*, 5 Conn. 555, 559; *Coe vs. Turner*, 5 Conn. 86, 92 (citing *Shep. Touch.* 58); *White vs. Bailey*, 14 Conn. 271, 275; *Hillhouse vs. Pratt*, 74 Conn. 113, 49 Atl. Rep. 905. Ill. *Stone vs. Duvall*, 77 Ill. 475, 480. Iowa. *Hoijt vs. McLagan*, 87 Iowa 746, 55 N. W. Rep. 18. Kan. *Davis vs. Clark*, 58 Kan. 100, 48 Pac. Rep. 563. Me. *Hubbard vs. Greeley*, 84 Me. 340, 24 Atl. Rep. 799, 17 L. R. A. 511; *Day vs. Lacasse*, 85 Me. 242, 27 Atl. Rep. 124. Mass. *Bodwell vs. Webster*, 30 Mass. (13 Pick.) 411, 416; *Foster vs. Mansfield*, 44 Mass. (3 Met.) 412, 37 Am. Dec. 154. Minn. *Thoraldsen vs. Hatch*, 87 Minn. 168, 91 N. W. Rep. 467. Mont. *Martin vs. Flaharty*, 18 Mont. 96, 40 Am. St. Rep. 415, 32 Pac. Rep. 287, 19 L. R. A. 242. Neb. *Patrick vs. McCormick*, 10 Neb. 1, 4 N. W. Rep. 312; *Wier vs. Batdorf*, 24 Neb. 83, 38 N. W. Rep. 22. N. J. *State Bank vs. Evans*, 15 N. J. L. (3 Gr.) 155, 28 Am. Dec. 400; *Ordinary of New Jersey vs. Thatcher*, 41 N. J. L. (12 Vr.) 408, 32 Am. Rep. 235. N. Y. *Green vs. Putnam*, 1 Barb. 500; *Jackson ex d. Gratz vs. Catlin*, 2 John. 248, 3 Am. Dec. 415; *Ruggles vs. Lawson*, 18 John. 285, 7 Am. Dec. 375; *Clark vs. Gifford*, 10 Wend. 310. Ore. *Gaston vs. Portland*, 16 Ore. 255, 19 Pac. Rep. 127. Tex. *Beaumont Car Works vs. Beaumont Impr. Co.*, 4 Tex. Civ. App. 257, 23 S. W. Rep. 274. Wash. *Nichols vs. Oppermann*, 6 Wash. 618, 34 Pac. Rep. 162; *Glenn vs. Hill*, 11 Wash. 541, 40 Pac. Rep. 141. Vt. *Smith vs. South Royalton Bank*, 32 Vt. 341, 76 Am. Dec. 179. Wis. *Prutsman vs. Baker*, 30 Wis. 644, 11 Am. Rep. 592; *Schmidt vs. Deegan*, 69 Wis. 300, 34 N. W. Rep. 83. Fed. *United States vs. Hammond*, 4 Biss. C. C. 333, 26 Fed. Cas. 94. Eng. *Bushnell vs. Pasmore*, 6 Mod. 217.

22. Conditions to be performed are crucial.—Deed is not regarded as escrow unless there is something agreed to be done by or on the part of grantee, as condition upon performance of which deed was to become absolute, and to be delivered to him by third person. It is general rule, that deed delivered to third person is viewed as escrow only in case it is agreed that deed is to be delivered to grantee upon performance by him of stipulated condition.—*Fitch vs. Bunch*, 30 Cal. 208, 213.

23. Escrow and deed distinguished.—"An escrow differs from deed in one particular only, and that is delivery. In all other requisites they are same."—*Fitch vs. Bunch*, 30 Cal. 208, 212.

24. Partial and qualified delivery.—Deposit of deed in escrow constitutes partial and qualified delivery thereof.—*Thoraldsen vs. Hatch*, 87 Minn. 168, 91 N. W. Rep. 467.

25. DELIVERY IS NECESSARY.—Delivery

is as essential to escrow as to deed; the only difference being that in one case grantor makes delivery to grantee, and in other to stranger or third person. In either case, until grantor makes delivery, instrument is dead letter.—*Wellborn vs. Weaver*, 17 Ga. 267, 63 Am. Dec. 235. See *Wheelwright vs. Wheelwright*, 2 Mass. 447, 3 Am. Dec. 66; *Jackson ex d. Gratz vs. Catlin*, 2 John. (N. Y.) 248, 3 Am. Dec. 415.

26. DOMINION AND CONTROL MUST BE PARTED WITH BY GRANTOR, otherwise there is no escrow, "for deed which is deposited with third person, to be held subject to order of depositor, cannot be said to be delivered, because it is deemed in law to be under control of depositor."—*Fitch vs. Bunch*, 30 Cal. 208, 213; *Bury vs. Young*, 98 Cal. 446, 451, 35 Am. St. Rep. 186, 33 Pac. Rep. 338; *Kenney vs. Parks*, 125 Cal. 146, 149, 57 Pac. Rep. 772. See *James vs. Vanderheyden*, 1 Paige Ch. (N. Y.) 385; *Prutsman vs. Baker*, 30 Wis. 644, 11 Am. Rep. 592.

27. DUTY OF DEPOSITARY TO MAKE DELIVERY.—When instrument is placed in escrow and conditions are performed it becomes incumbent upon depositary to make delivery.—See *Cannon vs. Handley*, 72 Cal. 133, 141, 13 Pac. Rep. 315; *McDonald vs. Huff*, 77 Cal. 279, 282, 19 Pac. Rep. 499; *Bradbury vs. Davenport*, 120 Cal. 152, 52 Pac. Rep. 301; *Hughes vs. Thistlewood*, 40 Kan. 232, 19 Pac. Rep. 629; *Grove vs. Jennings*, 46 Kan. 366, 26 Pac. Rep. 738; *Schmidt vs. Deegan*, 69 Wis. 300, 34 N. W. Rep. 83.

28. EQUITABLE REMEDY AGAINST DEPOSITARY FOR WRONGFUL DELIVERY.—If depositary makes wrongful delivery, grantor cannot maintain bill in equity to recover value of land, because grantor has adequate remedy at law, and because title did not pass to grantee.—*Coe vs. Turner*, 5 Conn. 86, 90-93.

29. FORMALITIES NECESSARY TO CONSTITUTE ESCROW.—No particular terms necessary.—Where deed is delivered to stranger for delivery, question whether it is placed with him in escrow depends rather on words used and purposes expressed than upon the name which parties give to instrument.—See *Ken-niff vs. Caulfield*, 140 Cal. 34, 40, 73 Pac. Rep. 803. Conn. *White vs. Bailey*, 14 Conn. 271, 275. Mass. *Foster vs. Mansfield*, 44 Mass. (3 Met.) 412, 37 Am. Dec. 154. Minn. *Thoraldsen vs. Hatch*, 87 Minn. 168, 91 N. W. Rep. 467. N. J. *State Bank vs. Evans*, 15 N. J. L. (3 Gr.) 155, 28 Am. Dec. 400. N. Y. *Clark vs. Gifford*, 10 Wend. 310, 313. Ore. *Gaston vs. Portland*, 16 Ore. 255, 19 Pac. Rep. 127. Vt. *Smith vs. South Royalton Bank*, 32 Vt. 341, 347, 76 Am. Dec. 179. Eng. *Murray vs. Stair*, 2 Barn. & C. 82, 87, 9 Eng. C. L. 83, 26 Rev. Rep. 232.

30. FRAUDS, STATUTE OF.—Condition may rest in parol.—If person who has made parol agreement to sell land, sign instrument and deposit it in escrow, if such instrument, in form of conveyance of such land to vendee, contains terms of parol agreement, including consideration, it is sufficient compliance with requirements of statute of frauds.—*Cannon vs. Handley*, 72 Cal. 133, 144, 13 Pac. Rep. 315. See *McDonald vs. Huff*, 77 Cal. 279, 282, 19 Pac.

Rep. 499; Thayer vs. Luce, 22 Ohio St. 62; Campbell vs. Thomas, 42 Wis. 487, 24 Am. Rep. 427.

31. Several writings construed together.—In cases of escrow, as in other cases, it is well settled that several writings, though executed at different times, may be construed together for purpose of ascertaining terms of contract and for purpose of taking action founded thereon out of operation of statute of frauds; but mutual relation of several writings to same transaction must appear in writings themselves, parol evidence being inadmissible for purpose of showing their connection.—Thayer vs. Luce, 22 Ohio St. 62, 74.

As to parol evidence to show conditions of escrow, see par. 23 this note.

32. FRAUDULENT PROCUREMENT OF DEED from depositary by grantee without compliance with conditions upon which deed was deposited does not operate as valid delivery.—See Fitch vs. Bunch, 30 Cal. 208, 214; Lewis vs. Prather, 14 Ky. L. Rep. 749, 21 S. W. Rep. 538; Smith vs. South Royalton Bank, 32 Vt. 341, 76 Am. Dec. 179.

33. INTERPLEADER.—Where persons hold corporate stock in escrow, to be delivered in accordance with terms of option, and no collusion appears, they may require parties interested to interplead and litigate conflicting claims between themselves.—Walker vs. Bamberger, 17 Utah 239, 54 Pac. Rep. 108.

34. MUTUALITY AND MEETING OF MINDS NECESSARY.—In cases of escrow ordinary law of contracts as to mutuality and necessity for meeting of minds governs. A proposal to sell, or proposal to buy, though stated in writing, will not be sufficient. The minds of parties must have met, terms have been agreed upon, and both must have assented to instrument as conveyance of land, which grantor would then have delivered, and grantee received, except for agreement then made that it be delivered to third person, to be kept until some specified condition is performed by grantee, and thereupon to be delivered to him by such third person.—Fitch vs. Bunch, 30 Cal. 208, 212. See Cannon vs. Handley, 72 Cal. 133, 140, 18 Pac. Rep. 315; Clark vs. Campbell, 22 Utah 569, 90 Am. St. Rep. 716, 65 Pac. Rep. 496, 54 L. R. A. 508.

35. PAROL AGREEMENT.—As general proposition admissible to show conditions.—Condition upon which deed is delivered in escrow may be expressed in writing or rest in parol, or be partly in writing and partly oral; and rule that instrument or contract made in writing must be deemed to contain entire agreement or understanding has no application to escrow.—Wittenbrock vs. Cass, 110 Cal. 1, 6, 42 Pac. Rep. 300. See Cannon vs. Handley, 72 Cal. 133, 144, 18 Pac. Rep. 315; McDonald vs. Huff, 77 Cal. 279, 282, 19 Pac. Rep. 499; Bury vs. Young, 98 Cal. 446, 35 Am. St. Rep. 186, 33 Pac. Rep. 338; Ruiz vs. Dow, 118 Cal. 490, 497, 45 Pac. Rep. 867. **III.** Great W. Tel. Co. vs. Loewenthal, 154 Ill. 261, 40 N. E. Rep. 318. Mich. Fulton vs. Priddy, 123 Mich. 298, 800, 81 Am. St. Rep. 201, 82 N. W. Rep. 65. Minn. Knopf vs. Hansen, 37 Minn. 215, 33 N. W. Rep. 781; Thoraldsen vs. Hatch, 87 Minn. 168, 91

N. W. Rep. 467. N. Y. Stanton vs. Miller, 53 N. Y. 192; Blewitt vs. Boorum, 142 N. Y. 357, 40 Am. St. Rep. 600, 37 N. E. Rep. 119; Cheger vs. Lansing, 57 Barb. 421. Oreg. Gaston vs. Portland, 16 Oreg. 255, 19 Pac. Rep. 127. Va. Wendlinger vs. Smith, 75 Va. 309, 40 Am. Rep. 727; Humphreys vs. Richmond & M. R. Co., 88 Va. 481, 13 S. E. Rep. 985; Ward vs. Churn, 18 Gratt. 801, 98 Am. Dec. 749; Nash vs. Fugate, 23 Gratt. 595, 34 Am. Rep. 780; Hicks vs. Goode, 12 Leigh 479, 37 Am. Dec. 677. Wash. Nichols vs. Oppermann, 6 Wash. 618, 34 Pac. Rep. 162. Fed. Pawling vs. United States, 3 U. S. (4 Cr.) 219, bk. 2 L. ed. 601; Minah Consol. Min. Co. vs. Briscoe, 47 Fed. Rep. 276.

36. Contradiction of writing not permitted.—Where deed is absolute on its face and is delivered to grantee it takes effect at once, and parol evidence is not admissible to show that it was intended to take effect only upon some condition not expressed therein.—Mowry vs. Heney, 36 Cal. 471, 476, 25 Pac. Rep. 17. See Ill. Foy vs. Blackstone, 31 Ill. 538, 83 Am. Dec. 246. N. Y. Braman vs. Bingham, 26 N. Y. 483, 492. Wash. Pacific Nat. Bank vs. San Francisco Bridge Co., 23 Wash. 425, 63 Pac. Rep. 207. Eng. Whyddon's Case, Cro. Eliz. 520, Shep. Touch. 59.

37. Subsequent declarations and acts of grantor made and done in his own interest after deed had been deposited are not admissible for purpose of showing his intentions.—Bury vs. Young, 98 Cal. 446, 452, 35 Am. St. Rep. 186, 33 Pac. Rep. 338 (distinguishing Dean vs. Parker, 88 Cal. 282, 26 Pac. Rep. 91).

38. PARTY CANNOT ACT AS DEPOSITARY.—Written instrument can only become escrow where it is placed in hands of person not party to it, and delivery of instrument into hands of one of several joint makers thereof does not impart to it legal qualities of an escrow.—Carter vs. Moulton, 51 Kan. 9, 37 Am. St. Rep. 259, 32 Pac. Rep. 638, 20 L. R. A. 309. See Me. Hubbard vs. Greeley, 84 Me. 340, 24 Atl. Rep. 799, 17 L. R. A. 511; Day vs. Lacasse, 85 Me. 242, 27 Atl. Rep. 124. Minn. Thoraldsen vs. Hatch, 87 Minn. 168, 91 N. W. Rep. 467. Mo. State vs. Potter, 63 Mo. 212, 21 Am. Rep. 440. Neb. Wier vs. Batdorf, 24 Neb. 83, 38 N. W. Rep. 22. N. Y. Worrall vs. Munn, 5 N. Y. 229, 238, 55 Am. Dec. 330; Braman vs. Bingham, 26 N. Y. 483, 492; Hinman vs. Booth, 21 Wend. 267. Oreg. Gaston vs. Portland, 16 Oreg. 255, 19 Pac. Rep. 127. Va. Wendlinger vs. Smith, 75 Va. 309, 40 Am. Rep. 727. Fed. Flagg vs. Mann, 2 Sumn. C. C. 486, 9 Fed. Cas. 202.

39. Compare: Worth vs. Case, 42 N. Y. 362.

40. Agent or attorney of party is within rule, and cannot be depositary where instrument is placed in escrow.—Ga. Duncan vs. Pope, 47 Ga. 445. Me. Hubbard vs. Greeley, 84 Me. 340, 24 Atl. Rep. 799, 17 L. R. A. 511; Day vs. Lacasse, 85 Me. 242, 27 Atl. Rep. 124. Neb. Wier vs. Batdorf, 24 Neb. 83, 38 N. W. Rep. 22. N. Y. Worrall vs. Munn, 5 N. Y. 229, 55 Am. Dec. 330.

41. Compare: McLaughlin vs. Wheeler, 1 S. D. 497, 47 N. W. Rep. 816 (holding that agent is not necessarily incapacitated, by force of his agency, from acting as custodian

of escrow between his principal and purchaser, and principal cannot complain in such case of such provision).

42. Effect of deposit with grantee on condition.—If deed be sealed and delivered to party himself to whom it is made, as escrow, but to become deed of him who sealed it on certain conditions, in such case, let form of words be what it may, delivery is absolute, and deed shall take effect presently as his deed, and party is not bound to perform the conditions.—*Mowry vs. Heney*, 36 Cal. 471, 476, 25 Pac. Rep. 17. See *Hicks vs. Goode*, 13 Leigh (Va.) 479, 37 Am. Dec. 677 (citing *Coke Litt.* 36a, and *Shep. Touch.* 53, 59).

43. Qualification of rule—Deeds which are not contracts.—Rule of law, that deed cannot be delivered to party to whom it is made as escrow, to be deed of obligor only on condition, and that in such case the delivery is absolute and condition nugatory, is applicable only to case of deeds which are upon their face complete contracts, requiring nothing but delivery to make them perfect according to intention of parties; not to deeds which upon their face import that something more is to be done besides delivery to make them complete and perfect contracts according to intention of parties.—*Wendlinger vs. Smith*, 75 Va. 309, 40 Am. Rep. 727.

44. PRIVITY BETWEEN GRANTOR AND GRANTEE.—In every case of escrow there is contract and privity between grantor and grantee.—*Wellborn vs. Weaver*, 17 Ga. 367, 43 Am. Dec. 235.

45. QUESTION OF FACT FOR JURY AS TO ESCROW.—Where instrument is deposited by maker with stranger for delivery, it is question of fact for jury as to intention of maker and as to whether it was deposited in escrow.—*Howlin vs. Castro*, 136 Cal. 605, 610, 69 Pac. Rep. 432. See *Kenniff vs. Caulfield*, 140 Cal. 34, 40, 73 Pac. Rep. 303; *White vs. Bailey*, 14 Conn. 271, 276; *Clark vs. Gifford*, 10 Wend. (N. Y.) 310, 312.

46. QUIETING TITLE.—Where deed is placed in escrow and depositary wrongfully redelivers same to grantor, if grantee complies with conditions or is ready to perform, he may maintain action to quiet title.—*Grove vs. Jennings*, 46 Kan. 366, 26 Pac. Rep. 738. See *Lewis vs. Frather*, 14 Ky. L. Rep. 749, 21 S. W. Rep. 538.

47. RESCISSION DECREED WHERE GRANTEE OBTAINS WRONGFUL POSSESSION.—Where instrument is placed in escrow and grantee fails to perform conditions equity has jurisdiction to rescind if deed has been wrongfully delivered in violation of conditions. *Hamill vs. Thompson*, 3 Colo. 518, 523. See *Denis vs. Velati*, 96 Cal. 223, 31 Pac. Rep. 1. *Ky. Lewis vs. Prather*, 14 Ky. L. Rep. 749, 21 S. W. Rep. 538. *Oreg. Tyler vs. Cate*, 29 Oreg. 315, 45 Pac. Rep. 800. *Tex. Beaumont Car Works vs. Beaumont Improv. Co.*, 4 Tex. Civ. App. 257, 23 S. W. Rep. 274.

48. RIGHT OF GRANTEE TO DELIVERY OF DEED.—Where deed is placed in escrow performance of conditions entitles grantee to delivery of deed from depositary.—*Atkinson* C. C.—55

vs. Tabor, 11 Colo. 377, 17 Pac. Rep. 905; *Mechanics' Nat. Bank vs. Jones*, 76 N. Y. App. Div. 534, sub nom. *Mechanics' Nat. Bank vs. Routhead*, 73 N. Y. Supp. 800.

49. SPECIFIC PERFORMANCE.—Complaint, in action for specific performance, which alleges legal contract, part payment of the consideration, placing of title papers in escrow, tender of balance of consideration and its refusal, hostile attitude of one refusing money tendered, and possession of lands by plaintiff since date of original contract, states cause of action.—*Gammon vs. Bunnell*, 22 Utah 421, 64 Pac. Rep. 958.

50. SUBSEQUENT DECLARATIONS DO NOT AFFECT DELIVERY AND CONSTITUTE ESCROW.—Deed cannot be made escrow by any other declarations than those which are made at time of signing and executing instrument.—*Souverbye vs. Arden*, 1 John. Ch. (N. Y.) 240; *Blight vs. Schenck*, 10 Pa. St. 285, 51 Am. Dec. 478.

51. TENDER.—Necessity to keep tender good.—Where deed is placed in escrow to be delivered upon payment of money and tender is made with due promptitude, grantee becomes entitled to deed, and it is not necessary that he should keep tender good.—*Cannon vs. Handley*, 73 Cal. 123, 142, 13 Pac. Rep. 215. See *McDanel vs. Kimbrell*, 3 Iowa 335; *Washburn vs. Dewey*, 17 Vt. 92; *White vs. Dobson*, 17 Gratt. (Va.) 262.

52. Testamentary deed.—Deposit to take effect on death of grantor.—See para. 17, 13 this note.

53. TIME WHEN DEED TAKES EFFECT.—Relation back to time of deposit.—When all conditions of agreement between parties have been complied with and deed delivered, it relates back to day of its execution, and rights of parties are to be determined as if deed had been fully delivered in the first instance.—*Marr vs. Rhodes*, 131 Cal. 267, 270, 63 Pac. Rep. 364. See *Comm. Belden vs. Carter*, 4 Day 66, 4 Am. Dec. 185. *Ga. Wellborn vs. Weaver*, 17 Ga. 267, 63 Am. Dec. 235. *Kan. Davis vs. Clark*, 58 Kan. 100, 48 Pac. Rep. 563. *Mass. Wheelwright vs. Wheelwright*, 3 Mass. 447, 3 Am. Dec. 66; *Hatch vs. Hatch*, 9 Mass. 307, 6 Am. Dec. 67; *Foster vs. Mansfield*, 44 Mass. (3 Met.) 412, 415, 37 Am. Dec. 154; *Mather vs. Corliss*, 103 Mass. 568; *Daggett vs. Simonds*, 173 Mass. 340, 53 N. E. Rep. 907, 46 L. R. A. 332. *Minn. Thoraldsen vs. Hatch*, 87 Minn. 168, 91 N. W. Rep. 467. *Mont. Helm vs. Kleinschmidt*, 12 Mont. 586, 31 Pac. Rep. 542. *Pa. Stephens vs. Rinehart*, 72 Pa. St. 434. *Wis. Prutsman vs. Baker*, 30 Wis. 644, 11 Am. Rep. 592. *Fed. Darling vs. Butler*, 45 Fed. Rep. 332, 335, 10 L. R. A. 469 (citing *Co. Litt.* 363 and *Shep. Touch.* 59).

54. Marriage of woman pending delivery.—If feme sole seals writing and delivers it as escrow to be delivered over on condition, and she afterwards marries, and writing be then delivered over on performance of condition, it is her deed from first delivery, otherwise her marriage would defeat it.—*Wheelwright vs. Wheelwright*, 2 Mass. 447, 3 Am. Dec. 66.

55. TRUSTEE.—Depositary is.—Grantor upon irrevocable delivery of deed to depositary

constitutes him trustee of grantee.—Bury vs. Young, 98 Cal. 446, 452, 35 Am. St. Rep. 186, 33 Pac. Rep. 338. See Wheelwright vs. Wheel-

wright, 3 Mass. 447, 3 Am. Dec. 66; Martin vs. Flaharty, 13 Mont. 96, 40 Am. St. Rep. 416, 32 Pac. Rep. 387, 19 L. R. A. 242.

§ 1058. SURRENDERING OR CANCELING GRANT DOES NOT RECONVEY. Redelivering a grant of real property to the grantor, or canceling it, does not operate to retransfer the title.

History: Enacted March 21, 1872.

1. Agent's delivery—Destruction of deed after.
2. Common-law rule declared.
3. Consent of all parties immaterial.
4. Withdrawal of deed from recorder's office.

1. Agent's delivery—Destruction of deed after.—Rule is applicable to delivery by agent of grantor, and after delivery by him destruction or detention of deed does not divest grantee.—Regan vs. Howe, 121 Mass. 424, 426.

2. Common-law rule declared.—This section is merely declaratory of common law.—Kearnsing vs. Killian, 18 Cal. 491, 493; Bowman vs. Cudworth, 31 Cal. 148, 152; Killey vs. Wilson, 33 Cal. 690, 693; Lawton vs. Gordon, 34 Cal. 36, 38, 91 Am. Dec. 670; Lawton vs. Gordon, 37 Cal. 202, 207; Cranmer vs. Porter, 41 Cal. 462,

466. See Ala. Fawcetts vs. Kinney, 33 Ala. 264. Ga. Jordan vs. Jordan, 14 Ga. 145. Mass. Regan vs. Howe, 121 Mass. 424. Me. Lawrence vs. Lawrence, 24 Mo. 269. N. J. Wilson vs. Hill, 13 N. J. Eq. (3 Beas.) 143.

3. Consent of all parties immaterial.—Even though return, destruction, or cancelation of deed after delivery be with consent of all parties to it and for express purpose of restoring title to grantor, such result cannot be so effected.—Cranmer vs. Porter, 41 Cal. 462, 466.

4. Withdrawal of deed from recorder's office to enable it to be canceled and thereby re-vest title in grantor is ineffectual for that purpose.—Lawton vs. Gordon, 37 Cal. 202, 207.

§ 1059. CONSTRUCTIVE DELIVERY. Though a grant be not actually delivered into the possession of the grantee, it is yet to be deemed constructively delivered in the following cases:

1. Where the instrument is, by the agreement of the parties at the time of execution, understood to be delivered, and under such circumstances that the grantee is entitled to immediate delivery; or,
2. Where it is delivered to a stranger for the benefit of the grantee, and his assent is shown, or may be presumed.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Assent of grantee.
3. Gift—Necessity for actual or symbolical delivery.
4. Instrument defined.
5. Knowledge of facts on part of grantee.
6. Question for jury as to delivery.

1. Applied, cited, construed, referred to, etc., in: Hoag vs. Howard, 55 Cal. 564, 565 (referred to in defining "instrument"); Hibberd vs. Smith, 67 Cal. 547, 556, 557, 56 Am. Rep. 726, 4 Pac. Rep. 473, 3 Id. 46 (construed).

2. Assent of grantee.—Statute does not recognize delivery as perfected until assent is proved either by act or by presumption.—Hibberd vs. Smith, 67 Cal. 547, 557, 56 Am. Rep. 726, 4 Pac. Rep. 473, 3 Id. 46.

3. Gift—Necessity for actual or symbolical delivery.—See post § 1147 and note.

4. Instrument defined as indicating "some written paper or instrument signed and delivered by one person to another, transferring title to or creating lien on property or giving right to debt or duty."—Hoag vs. Howard, 55 Cal. 564, 565.

See ante §§ 709, 1052, 1056 and notes; and post §§ 1091, 1093-1095, 1106, 1107, 1110, 1135, 1158, 1161, 1162, 1165, 1170, 1172, 1180-1183, 1185, 1186, 1188, 1190, 1193, 1195-1205, 1207, 1215, 1216, 1227-1229, 1629, 3087, 3413, 3414 and notes.

5. Knowledge of facts on part of grantee.—Presumption of assent cannot be made unless it appears that all the facts were known to grantee, as law does not force man to take estate against his will.—Hibberd vs. Smith, 67 Cal. 547, 557, 56 Am. Rep. 726, 4 Pac. Rep. 473, 3 Id. 46.

6. Question for jury as to delivery.—See ante § 1054 and note.

§ 1060. GRATUITOUS GRANTS TAKE EFFECT IMMEDIATELY; EXCEPTION (repealed).

History: Enacted March 21, 1872; repealed March 30, 1874, Code Amdts. 1873-4, p. 225.

ARTICLE IV.

INTERPRETATION OF GRANTS.

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| § 1066. Grants, how interpreted. | § 1070. Irreconcilable provisions. |
| § 1067. Limitations, how controlled. | § 1071. Meaning of "heirs" and "issue," in certain remainders. |
| § 1068. Recitals, when resorted to. | § 1072. Words of inheritance unnecessary. |
| § 1069. Interpretation against grantor. | |

§ 1066. GRANTS, HOW INTERPRETED. Grants are to be interpreted in like manner with contracts in general, except so far as is otherwise provided in this article.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. "Bargain, sell, and convey"—Operation of.
3. Construction of deed—All words given effect.
4. Same—Acts of parties.
5. Same—Ambiguous phrase in deed.
- 6, 7. Same—Absolute deed and contemporaneous agreement.
8. Same—Absolute deed and covenant to re-convey.
9. Same—Conflicting descriptions.
10. Same—Condition precedent.
- 11-15. Same—Conditions subsequent.
16. Same—Given by parties to deed.
- 17, 18. Same—Forfeiture clause.
- 19-23. Same—General rules.
- 24-31. Same—Intention of parties, how ascertained.
32. Consideration—Cannot be impeached, when.
33. Same—Mexican deed need not express.
- 34, 35. Covenant of non-claim—Operation and effect of.
36. Courses and distances give way to monuments, when.
- 37-42. Deed in fee or bargain and sale carries after-acquired title.
43. Same—Contra as to grant of school lands before code.
- 44, 45. Deed of undivided half interest conveys, what.
46. Deed—When conveys undivided interest.
47. Deed not conclusive evidence of, what.
48. Deed may be gift, when.
49. Deed reciting mortgage—Effect of.
50. Deed of community property from husband to wife.
51. Deed where grantor has no title but contract of sale.
52. Deed of buildings, fixtures, etc., carries right to operate them.
53. Deed subject to lease carries rents under lease.
54. Deed for alley purposes carries easement only.
55. Deed by widow of all right, etc., in estate—Effect of.
56. Description, mistake in, when immaterial.
57. Estoppel cannot be worked by void deed.
58. Extrinsic evidence received to explain technical terms, etc.
59. "Grant" is term applicable to all transfers of real estate.
60. Same—Construed together, when.
- 61-63. Same—Carries whatever is incident to it.
64. Same—Without warranty—Passes, what.
65. Same—Upon condition rendered impossible by grantee's act.
- 66, 67. Grantor—May change meaning of terms, etc.
68. Same—Estate to deny title, when.
- 69, 70. Latent ambiguity—How explained.
- 71-73. Monuments, when control courses and distances.
74. "North" in deed means, what.
75. "Parallel lines," meaning of.
- 76, 77. Provisions of court to construe deed.
- 78, 79. Proviso, in deed implies condition, when.
80. Same—Not binding if unreasonable.
81. "Purchase," includes what.
- 82-93. Quitclaim deed—Passes what title.
- 94, 95. Same—Operative words in.
96. Spanish deed—Not to carry after-acquired title.
97. "Waive and renounce"—Not words of conveyance.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO,** etc., in: *Pellissier vs. Corker*, 103 Cal. 516, 518, 37 Pac. Rep. 465 (cited); *Barnett vs. Barnett*, 104 Cal. 298, 300, 37 Pac. Rep. 1049 (construed and applied).

2. **"BARGAIN, SELL, AND CONVEY"** in a deed operate not merely to release but to transfer any interest which grantor has in the land at date of deed.—*Muller vs. Boggs*, 25 Cal. 175, 185. See *Touchard vs. Crow*, 20 Cal. 150, 31 Am. Dec. 108.

3. All the words employed in deed should be given some effect if possible and if consistent with evident purpose and operation of deed.—*Faivre vs. Daley*, 93 Cal. 664, 670, 29 Pac. Rep. 256.

4. Acts of parties.—When meaning of language of contract is considered doubtful, acts of parties done under it afford one of most reliable clues to intention of parties.—*Hill vs. McKay*, 94 Cal. 5, 20, 29 Pac. Rep. 406.

5. Phrase in deed of such ambiguous import that its meaning cannot be determined from deed itself, reference will be had to circumstances surrounding parties at date of transaction.—*Grennam vs. McGregor*, 73 Cal. 253, 262, 30 Pac. Rep. 559.

6. Absolute deed and contemporaneous agreement acknowledging that deed is given for loan must be construed together.—*Patterson vs. Donner*, 43 Cal. 369, 378.

7. Deed is given of mining property, in satisfaction of certain debts of grantor, under agreement that grantees shall hold and work

said property until such debts are paid from proceeds, including expenses of working mine, and then reconvey one half of premises to grantor, which agreement is afterwards put in writing, deed and agreement should be construed together, and to raise trust in favor of grantor, which will be enforced.—*Adams vs. Lambard*, 80 Cal. 426, 435, 22 Pac. Rep. 180.

8. Absolute deed accompanied by a covenant to reconvey upon payment of purchase money or even larger sum may be construed to be mortgage if such was intention of parties.—*Sears vs. Dixon*, 33 Cal. 326, 333.

9. Deed conveying 22.29 acres from south-easterly part of quarter-section and subsequent deed conveying east 100 acres in quarter-section commencing on west bank of Feather River and running back to westward far enough so as to contain 100 acres and so as to comprise east 100 acres of quarter-section, excepting therefrom the 22.29 acres before conveyed; second conveyance conveyed 77.71 acres only.—*Cox vs. Hayes*, 64 Cal. 32, 33, 27 Pac. Rep. 735.

10. Condition precedent in deed is one which is to be performed before some right dependent thereon accrues or some act dependent thereon is performed.—*Stockton vs. Weber*, 98 Cal. 433, 440, 33 Pac. Rep. 332.

11. Conditions subsequent in deed does not prevent estate from vesting, and thereafter, upon breach, grantor cannot again have title except by reverter based upon breach and re-entry therefor.—*Stockton vs. Weber*, 98 Cal. 433, 441, 33 Pac. Rep. 332.

12. Condition subsequent which is impossible of performance is void, but not so with condition precedent, in which case estate will not vest.—*Stockton vs. Weber*, 98 Cal. 433, 441, 33 Pac. Rep. 332.

13. Condition subsequent runs with land, and will inure to deed given by grantee of deed containing such condition.—*Quatman vs. McCray*, 128 Cal. 235, 232, 60 Pac. Rep. 355.

14. Deed on condition subsequent passes title to grantees therein named.—*Spect vs. Gregg*, 51 Cal. 198, 201.

15. Deed containing an illegal condition subsequent vests property in grantee notwithstanding his failure to perform illegal stipulations.—*Patterson vs. Donner*, 48 Cal. 369, 379.

16. Deed if open to construction as to extent of grant, most reliable circumstances in aid of such construction is practical construction given it by acts of parties immediately following its execution.—*Yocco vs. Conroy*, 104 Cal. 468, 471, 33 Pac. Rep. 107.

17. Deed will be construed so as to avoid forfeiture if it can reasonably be so interpreted.—*Quatman vs. McCray*, 128 Cal. 235, 239, 60 Pac. Rep. 355.

18. Deed of four lots containing forfeiture clause, if building of certain character is erected on premises, will be so construed as to forfeit only lot on which building is erected, if it can be gathered that such is reasonable intent of parties.—*Quatman vs. McCray*, 128 Cal. 235, 239, 60 Pac. Rep. 355.

19. Construing deed it is proper to place ourselves as near as possible in seats occupied by parties at time instrument was executed and take it by its four corners and read it.—*Walsh vs. Hill*, 38 Cal. 431, 437.

20. Construing a doubtful description in grant, court must assume as nearly as possible position of contracting parties and consider circumstances of transaction between them, and then read and interpret words used in light of these circumstances.—*Thompson vs. Southern Cal. M. R. Co.*, 82 Cal. 497, 501, 23 Pac. Rep. 130; *Truett vs. Adams*, 66 Cal. 218, 5 Pac. Rep. 96.

21. It is impossible to lay down an invariable and universal rule of construction; tendency is to uphold conveyances and give effect to intention of parties, regardless of technical rules of construction.—*Falvre vs. Daley*, 93 Cal. 664, 671, 29 Pac. Rep. 256.

22. Deed or other instrument consisting of diverse parts or clauses, diverse parts or clauses will be judged by looking at whole; and each part will be given its proper office so as to ascertain and carry out intention of parties.—*Brannan vs. Mesick*, 10 Cal. 95, 106; *Stockton vs. Weber*, 98 Cal. 433, 439, 33 Pac. Rep. 332; *Barnett vs. Barnett*, 104 Cal. 293, 300, 27 Pac. Rep. 1049.

23. "CONVEYANCE" OR "CONVEY" are words used in several senses; in strict legal sense former term imports transfer of legal title to land, but it is also habitually used by lawyers to denote any transfer of title, legal or equitable, and last is also popular sense of term.—*Adams vs. Hopkins*, 144 Cal. 19, 37, 77 Pac. Rep. 712, 69 Id. 228.

24. First step in construction of deed is to ascertain understanding and intention of parties at time of contracting, and to this end situation of parties and subject matter at time of contracting should be considered.—*Brannan vs. Mesick*, 10 Cal. 95, 106; *Stockton vs. Weber*, 98 Cal. 433, 439, 33 Pac. Rep. 332.

25. As to general rules of construction, see ante § 4, 13 and notes.

26. Intention of the parties to deed may be arrived at when language used is not absolute by construing it with reference to situation of parties and character and conditions of subject-matter of contract.—*Martin vs. Lloy*, 94 Cal. 202, 29 Pac. Rep. 491.

27. Intention of the parties being clearly expressed in deed, little weight should be attached to technical definitions of terms used.—*Painter vs. Pasadena L. & W. Co.*, 31 Cal. 74, 31, 27 Pac. Rep. 539.

28. Intent of parties distinctly appearing upon face of instrument, without presence of covenant of warranty, either by recital or otherwise, to convey and receive reciprocally certain estate, grantor will be estopped from denying operation of deed according to such intent.—*Clark vs. Baker*, 14 Cal. 612, 629, 16 Am. Dec. 449.

29. Must be such that the intention of the grantor will be certain from entire instrument including habendum as well as granting clause; if it appear from such consideration that grantor intended by habendum clause to

restrict or limit estate named in granting clause, habendum will prevail over granting clause.—*Barnett vs. Barnett*, 104 Cal. 298, 300, 38 Pac. Rep. 1049.

30. Object is to ascertain intention of the parties, and if instrument contains glossary of its own terms or if term used in one part of instrument can be interpreted by its use in another part, courts will avail themselves of this means of ascertaining meaning of term.—*Hochstein vs. Berghauser*, 128 Cal. 681, 687, 56 Pac. Rep. 547.

31. Court should not presume an intention not indicated by language used.—*Sears vs. Ackerman*, 138 Cal. 583, 586, 73 Pac. Rep. 171. See *Me. Goodwin vs. Hubbard*, 47 Me. 595. *Mich. Wait vs. Baldwin*, 60 Mich. 622, 1 Am. St. Rep. 551, 27 N. W. Rep. 697. *Pa. Whitaker vs. Brown*, 46 Pa. St. 197.

32. CONSIDERATION IN DEED cannot be impeached for purpose of effecting the operation of deed to pass legal title, but it may for collateral purposes.—*Rhine vs. Ellen*, 36 Cal. 362, 370.

33. Deed under Mexican law need not recite price or consideration.—*Havens vs. Dale*, 18 Cal. 359, 366; *Schmitt vs. Giovanari*, 43 Cal. 617, 624.

34. COVENANT OF NON-CLAIM amounts to ordinary covenant of warranty, and operates equally by way of estoppel.—*Gee vs. Moore*, 14 Cal. 472, 474.

35. Covenant of non-claim operates only on interest conveyed; it does not prevent after-acquisition of property.—*Morrison vs. Willson*, 30 Cal. 344, 348.

36. COURSES AND DISTANCES AND QUANTITIES must give way to monuments if monuments can be satisfactorily located, but not otherwise.—*Payne vs. English*, 79 Cal. 540, 546, 21 Pac. Rep. 952.

37. DEED IN FEE CARRIES AN AFTER-ACQUIRED TITLE, even if taken in name of stranger.—*Quivey vs. Baker*, 37 Cal. 465, 470.

38. After-acquired property is carried by deed in which grantor bargains, sells, and conveys such property.—*Dalton vs. Hamilton*, 50 Cal. 422, 424.

39. Deed of bargain and sale, as pre-emptor of land, to his wife, after final proof and payment for land, but before issuance of certificate of purchase, conveys all after-acquired title and the perfect title acquired by issuance of patent, as against subsequent transfer from husband to another person, made after issuance of patent.—*Merrill vs. Clark*, 103 Cal. 367, 371, 37 Pac. Rep. 228.

40. Deed in fee simple absolute and expressly purporting to convey all after-acquired interest of grantor operates upon all interest after-acquired by him, causing it to inure to benefit of grantee.—*Green vs. Green*, 103 Cal. 108, 110, 37 Pac. Rep. 188. See *Hitchens vs. Nougues*, 11 Cal. 23; *Clark vs. Baker*, 14 Cal. 612, 76 Am. Dec. 449; *Quivey vs. Baker*, 37 Cal. 465, *Dalton vs. Hamilton*, 50 Cal. 422.

41. Deed containing the words "grant" and "quitclaim," "grant" being printed in form,

and word "quitclaim" being added in writing, will convey after-acquired property of grantor.—*Pekin M. & M. Co. vs. Kennedy*, 81 Cal. 356, 358, 22 Pac. Rep. 679.

42. Deed to all lands remaining unsold includes lot which had been formerly quitclaimed, but which at time grantor had and claimed no title to, and acquired title to afterwards.—*Central Pac. R. Co. vs. Beal*, 47 Cal. 151, 154.

43. Deed of grant of school lands made under statute as it existed before codes had been adopted and before grantor had acquired any property of any title to such lands will not pass title afterwards acquired by him to lands.—*People vs. Blake*, 84 Cal. 611, 615, 22 Pac. Rep. 1142, 24 Id. 312.

44. Deed of an undivided one-half interest by one who only owns an undivided quarter interest conveys his whole interest.—*Jordan vs. Fay*, 98 Cal. 364, 368, 33 Pac. Rep. 95.

45. Deed granting one-half interest in right, title, and interest of party of first part in and to undivided one-tenth part of that certain tract or parcel of ground, etc., and deed from grantee thereof of one-half interest in his right, title, and interest in and to undivided one-tenth part of that certain tract or parcel of ground, etc., conveys title to undivided one fortieth of tract.—*Hayes vs. Wetherbee*, 60 Cal. 396, 398.

46. Deed of definite number of acres, or of any other definite quantity of land within, and as parcel of larger tract of land, well described, but without locating the land thus conveyed, is to be construed as conveying undivided interest in larger tract if deed does not purport specifically to describe smaller tract so conveyed.—*Cullen vs. Sprigg*, 33 Cal. 56, 61, 23 Pac. Rep. 222.

47. Deed is not conclusive evidence of its date, acknowledgment of payment, or consideration.—*Rhine vs. Ellen*, 36 Cal. 362, 370.

48. Deed although expressing consideration may declare gift, if it can be so ascertained from fact, interpreted in light of surrounding facts, that it was intended so to be, without proof aliunde of that fact.—*Salmon vs. Willson*, 41 Cal. 595, 604.

49. Deed reciting the fact that premises conveyed are covered by prior mortgage imposes no obligation on grantee to pay mortgage debt.—*Salmon vs. Willson*, 41 Cal. 595, 608.

50. Deed of community property from husband to his wife is effectual as against subsequent purchaser from husband.—*Taylor vs. Opperman*, 79 Cal. 468, 470, 21 Pac. Rep. 869.

51. Deed of undivided interest in land from grantor who has no title thereto, but has contract of sale thereof, transfers proportionate part of his interest in such contract of sale.—*Brock vs. Pearson*, 37 Cal. 581, 584, 25 Pac. Rep. 963.

52. Deed of grant, bargain, and sale of grantor's right, title, and interest in and to "all buildings, tanks, derricks, pipes, pipe lines, fixtures and all other personal property whatsoever," situated upon rancho, necessarily carried with it right to operate same in man-

ner that they theretofore had been operated.—*Diets vs. Mission Transfer Co.*, 95 Cal. 92, 100, 30 Pac. Rep. 330.

53. Deed of grant, bargain, and sale of land, together with rents, issues, and profits thereof, with usual covenant of warranty, made subject, however, to certain lease, transfers rents and profits under such lease.—*Garber vs. Giannella*, 98 Cal. 527, 530, 23 Pac. Rep. 458.

54. Deed for sole purpose of alleyway grants easement, and nothing more.—*Pellissier vs. Corker*, 103 Cal. 516, 517, 37 Pac. Rep. 465.

55. Deed by widow of testator granting all of her right, title, claim, and interest in estate of testator, both as legatee under will and as widow and heir at law of testator, does not convey her right to have admeasured to her probate homestead.—*In re Estate Vance*, 100 Cal. 425, 429, 34 Pac. Rep. 1037.

56. DESCRIPTION IN DEED "thence down said slough north seventy-two degrees west" when it should have been "north twelve degrees west," mistake is immaterial, for wrong course is controlled by direction to go "down said slough."—*Castro vs. Barry*, 79 Cal. 443, 448, 31 Pac. Rep. 946.

57. ESTOPPEL BY DEED CANNOT be made unless deed itself be valid instrument; if void, though under seal, it does not work estoppel in law or in equity.—*Gordon vs. San Diego*, 101 Cal. 522, 526, 40 Am. St. Rep. 73, 36 Pac. Rep. 18.

58. EXTRINSIC EVIDENCE MAY BE RECEIVED to explain meaning of technical mercantile terms, abbreviations, words of foreign language, technical and scientific terms which are not generally understood used in deed.—*Reamer vs. Nesmith*, 34 Cal. 624, 626.

59. "GRANT," WHEN USED IN ITS GENERIC and not in its technical meaning, is term applicable to all transfers of real estate.—*Faivre vs. Daley*, 93 Cal. 664, 668, 29 Pac. Rep. 256.

60. Grants, from same grantor to different grantees, of two parcels of land to each grantee, should be construed together, in order to ascertain location of respective tracts; if lands conveyed are capable of identification by construction of deeds themselves, other evidence should not be received.—*Pulliam vs. Bennett*, 55 Cal. 363, 371.

61. Grant of thing carries with it whatever is incident to it and necessary to its beneficial enjoyment.—*Cave vs. Crafts*, 53 Cal. 135, 140.

62. When owner of lands divides his property into two parts, granting away one of them, he is taken by implication to include in his grant all such easements in remaining part as are necessary for reasonable enjoyment of part which he grants in form which it assumes at time he transfers it.—*Cave vs. Crafts*, 53 Cal. 135, 140.

63. When one purchases land, afterwards by artificial means introduces water upon such land for the purpose of irrigation by means of water right purchased by him, deed from him of such land will carry with it as appurtenant such water-right privileges.—*Harmer vs. Ukiah W. Co.*, 56 Cal. 11, 14.

64. Grant or a conveyance unaccompanied with covenants of warranty passes only estates which are vested in interest at time, and does not bind or transfer by way of estoppel future or contingent estates.—*Clark vs. Baker*, 14 Cal. 612, 628, 76 Am. Dec. 449.

65. Grant of land upon condition that grantee recover possession thereof at his own expense, at suit at law, conveys such property, notwithstanding such condition is not carried out by grantee, if grantor by his own act renders it impossible to be carried out.—*Houghton vs. Steele*, 58 Cal. 421, 424.

66. GRANTOR IN A DEED MAY CHANGE ORDINARY MEANING OF TERMS OR WORDS and assign to them meaning of his own.—*Morrison vs. Wilson*, 30 Cal. 344, 347.

67. Whenever it is apparent that "grantor" was used to convey idea different from its technical signification court will construe it accordingly.—*Central Pacific R. Co. vs. Beal*, 47 Cal. 151, 153.

68. Grantor in deed of grant, bargain, and sale is estopped by deed purporting to grant absolute title from denying that before and after date of that deed he had such absolute title and by that deed conveyed it to grantees.—*De Frieze vs. Quint*, 94 Cal. 653, 659, 23 Am. St. Rep. 151, 30 Pac. Rep. 1. See *Clark vs. Baker*, 14 Cal. 613, 76 Am. Dec. 449; *Dodge vs. Walley*, 22 Cal. 224, 83 Am. Dec. 61; *Belcher Con. G. M. Co. vs. DeFerrari*, 63 Cal. 160.

69. LATENT AMBIGUITY IN A DEED may be explained by evidence of all facts and circumstances by which parties and subject-matter were surrounded.—*Piper vs. True*, 36 Cal. 606, 614.

70. Latent ambiguity in deed's description of premises, by reason of fact that head of an arroyo and blazed tree named as point of beginning are considerable distance apart, such tree was controlling monument if clearly identified.—*Spreckels vs. Ord*, 72 Cal. 36, 38, 13 Pac. Rep. 153.

71. MONUMENTS WHEN IDENTIFIED control both the courses and distances given in deed, whether seen by parties to deed or not.—*Anderson vs. Richardson*, 92 Cal. 623, 625, 28 Pac. Rep. 679; *Stinchfield vs. Gills*, 107 Cal. 34, 91, 40 Pac. Rep. 98.

72. MONUMENTS CONTAINED IN DESCRIPTION in deed if cannot be found, courses and distances named in deed must prevail.—*O'Hara vs. O'Brien*, 107 Cal. 309, 313, 40 Pac. Rep. 423.

73. Grant of tract with well-known boundaries, designated and known by general name, passes all land within tract so named and designated, and upon same principle where in grant of tract of land by metes and bounds there is excepted therefrom portion of tract with well-known boundaries designated by general name by which it is known, tract so designated does not pass by grant.—*Truett vs. Adams*, 66 Cal. 218, 219, 5 Pac. Rep. 96.

74. "NORTH" IN DEED does not necessarily mean due north, but may be construed to mean northeasterly, or northwesterly, in order to make good description.—*Martin vs. Lloyd*, 94 Cal. 195, 202, 29 Pac. Rep. 491.

75. "PARALLEL LINES" used in deed are often used to represent lines which are not straight but are "photographs" [?] of each other.—Fratt vs. Woodward, 33 Cal. 219, 230, 91 Am. Dec. 573.

76. PROVINCE OF COURT to construe deed in evidence.—Moody vs. Palmer, 50 Cal. 31, 37.

77. Province of court to construe the language of deed and from it determine intention of grantor whether it was to convey land or only to create use.—Malford vs. Le Franc, 26 Cal. 33, 112.

78. "PROVIDED" when used in deed is one of apt words commonly used to create condition.—Stockton vs. Weber, 93 Cal. 433, 440, 33 Pac. Rep. 332; Gilbert vs. Peteler, 33 N. Y. 165, 97 Am. Dec. 785; Raley vs. Umatilla Co., 15 Oreg. 172, 3 Am. St. Rep. 142; 13 Pac. Rep. 890.

79. PROVISIO IN DEEDS always implies condition unless subsequent words changes it to covenant.—Stockton vs. Weber, 93 Cal. 433, 440, 33 Pac. Rep. 332.

80. Proviso in grant that if grantee should ever sell any of property it shall be sold to grantor at certain price, if construed as covenant, was merely personal and not binding upon heirs or assigns of grantee; if, as condition, it is unreasonable and contrary to policy of law, because in restraint of alienation.—Maynard vs. Polhemus, 74 Cal. 141, 143, 15 Pac. Rep. 451.

81. "PURCHASE" INCLUDES EVERY MODE OF VESTING AN ESTATE, except inheritance.—Greer vs. Blanchard, 40 Cal. 194.

82. QUITCLAIM DEED SUFFICIENT to pass any estate grantor has at time of execution of deed.—Carpentier vs. Williamson, 25 Cal. 154, 163. Graff vs. Middleton, 43 Cal. 341, 344; Regor vs. Van Pelt, 65 Cal. 354, 356, 3 Pac. Rep. 367; Taylor vs. Opperman, 79 Cal. 463, 470, 21 Pac. Rep. 369; Wholey vs. Cavanaugh, 83 Cal. 132, 135, 25 Pac. Rep. 1112. See Sullivan vs. Davis, 4 Cal. 291; Downer vs. Smith, 24 Cal. 114, 123; Lawrence vs. Ballou, 37 Cal. 513, 521; Frey vs. Clifford, 44 Cal. 335, 343.

83. Quitclaim deed will not pass an after-acquired title.—Cadiz vs. Majors, 33 Cal. 233, 239; Quivey vs. Baker, 37 Cal. 465, 470.

84. Quitclaim deed does not generally pass after-acquired property, but in case of unperfected title transferred by patent from government when such title is perfected and patent issued it relates back to initiation of proceedings and quitclaim passes title.—Wholey vs. Cavanaugh, 83 Cal. 132, 136, 25 Pac. Rep. 1112. See Stanway vs. Rubio, 51 Cal. 41.

85. Quitclaim deed by grantee of Mexican grant will carry with it rights under patent issued by United States to grantor of quitclaim deed.—Crane vs. Salmon, 41 Cal. 63, 66.

86. QUITCLAIM—Conveyance of the right, title, and interest of grantor is not enlarged by warranty of title so that grantee will take after-acquired title of grantor.—Barrett vs. Birge, 50 Cal. 655, 659. See Gee vs. Moore, 14 Cal. 474.

87. Quitclaim deed habendum clause of which reads "to have and to hold . . . and also any estate, right, title, and interest which the said party of first part may hereafter acquire in and to above-described premises" will not operate to convey after-acquired title in premises.—Anderson vs. Yoakum, 94 Cal. 227, 229, 23 Am. St. Rep. 121, 29 Pac. Rep. 500.

88. Quitclaim deed will not pass title to property upon which grantor has prepared his application to purchase from state but has not yet filed, but which was afterwards filed and purchase was filed and approved and certificate issued.—Anderson vs. Yoakum, 94 Cal. 227, 228, 23 Am. St. Rep. 121, 29 Pac. Rep. 500. See Morrison vs. Wilson, 30 Cal. 344; Cadlerque vs. Duran, 49 Cal. 356; People vs. Blake, 34 Cal. 614, 22 Pac. Rep. 1142, 24 Id. 313.

89. Quitclaim deed only purports to release and quitclaim whatever interest grantor possesses at time, and does not estop him from subsequently acquiring valid title and enforcing it.—San Francisco vs. Lawton, 18 Cal. 465, 477, 79 Am. Dec. 187.

90. Quitclaim deed does not preclude grantor from afterwards acquiring and holding for his own use true title to the land.—McDonald vs. Edmonds, 44 Cal. 328, 330. See Gee vs. Moore, 14 Cal. 472; San Francisco vs. Lawton, 18 Cal. 465, 79 Am. Dec. 187; Morrison vs. Wilson, 30 Cal. 344; Cadiz vs. Majors, 33 Cal. 233.

91. Warranty in deed attaches to interest conveyed, and not to land itself, and when annexed to conveyance merely of grantor's present interest will not estop grantor from setting up after-acquired title.—Kimball vs. Sample, 25 Cal. 440, 452.

92. Covenant of non-claim is confined to estate granted, and where there is "the right and interest" of the grantor instead of land itself he is not estopped from setting up after-acquired interest.—Gee vs. Moore, 14 Cal. 472, 474.

93. QUITCLAIM DEED OF "ALL MY RIGHT, title, and interest in Sacramento city, upper California, consisting of town lots and buildings thereupon," will pass title to all real property owned by grantor at time of deed in place designated.—Frey vs. Clifford, 44 Cal. 335, 343.

94. Operative words of quitclaim deed are ordinarily "remit, release, and quitclaim," but omission of first word is not material; the words "release" and "forever quitclaim" are sufficient.—Wholey vs. Cavanaugh, 83 Cal. 132, 134, 25 Pac. Rep. 1112.

95. Operative words of release in simple quitclaim deed are "remit, release, and quitclaim"; words "bargain, sell, and quitclaim" operate not merely to release but to transfer any interest which grantor possessed at execution of deed.—Touchard vs. Crow, 20 Cal. 150, 161, 31 Am. Dec. 103.

96. SPANISH LAW does not make an after-acquired title inure to benefit of former grantee.—Bixby vs. Bent, 59 Cal. 522, 530.

97. "WAIVE" AND "RENOUNCE" are not words of conveyance, and when inserted in

document which does not purport to be conveyance are not sufficient to convey title.—*Davis vs. McGrew*, 32 Cal. 135, 138, 23 Pac. Rep. 41.

As to interpretation of contracts, see § 1635 et seq.

As to construction of deeds in general, see note by Robert Desty, 18 L. R. A. 318.

As to words sufficient to constitute conveyance, see monographic note 31 Am. St. Rep. 26.

As to when words of present grant do not

convey title, see monographic note 48 Am. Dec. 45.

As to effect of quitclaim deeds, see monographic note 53 Am. Rep. 749.

As to construction of conditions subsequent in deeds, see monographic note 57 Am. Rep. 62, 31 Am. St. Rep. 46, 79 Am. St. Rep. 747.

As to construction of conditions precedent and subsequent in deeds, see 70 Am. St. Rep. 829, 832.

As to after-acquired title, when passes to grantee, see 53 Am. Dec. 533.

§ 1067. LIMITATIONS, HOW CONTROLLED. A clear and distinct limitation in a grant is not controlled by other words less clear and distinct.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 395, held unconstitutional, see history, § 4 ante.

1. Applied, cited, construed, referred to, etc.
2. Deed—May be effectual on future event.
3. Same—Limitation of grant not controlled, when.
4. Same—Clause limiting to quitclaim.
5. Same—Clause of reconveyance—When does not limit time.
6. Same—"One-half interest" no limit on previous terms.
- 7, 8. Same—General language limited by what follows.
9. "Grant"—Meaning of may be limited.
- 10-12. Habendum—Limits and defines estate granted.
13. Same—When not affected.
14. "North"—Meaning of may be limited.
15. Possession may be deferred.
16. Proviso is limitation of grant.
17. Sheriff's deed—Clause in no limitation, when.
18. Words expressing grantor's purpose fail, when.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Watson vs. Sutro*, 86 Cal. 500, 521, 24 Pac. Rep. 172, 25 Id. 64 (construed and applied).

2. DEED OF CONVEYANCE.—Release and partition may be effectual on future event, at least to estop party on happening of such event to contravert it.—*Tewksbury vs. Provisso*, 12 Cal. 20, 21, 25.

3. Deed to trustee of certain lands, described as lands legal and equitable title to which was then in trustee, does not convey to trustee lands to which he did not then have either legal or equitable title, but which he had conveyed previously to one of grantors; clear limitation of grant cannot be controlled by legal description of quantity qualified by words "more or less."—*Watson vs. Sutro*, 86 Cal. 500, 521, 24 Pac. Rep. 172, 25 Id. 64.

4. Deed of bargain and sale containing clause "it is fully understood that as to title this is only quitclaim deed" is limited by such clause to quitclaim only.—*Morrison vs. Wilson*, 30 Cal. 344, 347.

5. Deed containing proviso that portion of land conveyed to be selected by grantor should be reconveyed to grantor within one year from date of deed does not limit such

grantor to one year in making such selection, time not being of essence of contract.—*Hearst vs. Pujol*, 44 Cal. 230, 232.

6. Deed conveying all right, title, and interest of grantor, words "being one-half undivided interest" are not words limiting terms of previous extent of conveyance or excepting out any interest conveyed by previous terms.—*McLennan vs. McDonnell*, 78 Cal. 273, 277, 20 Pac. Rep. 566.

7. Same—Established canon of construction of a deed is that general words therein may be restrained by particularity of recital.—*Watson vs. Sutro*, 86 Cal. 500, 521, 24 Pac. Rep. 172, 25 Id. 64. See *N. H. Barnard vs. Martin*, 5 N. H. 536; *Woods vs. Nashua Mfg. Co.*, 5 N. H. 467. *N. Y. Jackson vs. Stevens*, 16 John. 110. *Pa. Shurts vs. Thomas*, 3 Pa. St. 359. *Eng. Simons vs. Johnson*, 3 Barn. & Ad. 175, 23 Eng. C. L. 48, 37 Rev. Rep. 377; *Payler vs. Homersham*, 4 Maule & S. 423, 16 Rev. Rep. 516.

8. General language in first part of deed is limited and qualified by what follows, designed solely to define what interest is possessed and granted.—In re *Estate Vance*, 100 Cal. 425, 428, 34 Pac. Rep. 1087.

9. "Grant" as used in deeds has well-known signification, but parties may limit or qualify its meaning, and if they choose to do so court will carry out their expressed intention.—*Faivre vs. Daley*, 93 Cal. 664, 670, 23 Pac. Rep. 256.

10. HABENDUM—Limits and defines estate which grantee is to have in property granted.—*Montgomery vs. Sturdivant*, 41 Cal. 290, 296.

11. Habendum is to define or limit quantity of interest or estate which grantee is to have in property granted; it need not necessarily be separate portion of instrument, and it may be wholly omitted, and interest or estate granted may be defined or limited in the premises, or granting part of conveyance.—*Barnett vs. Barnett*, 104 Cal. 298, 300, 37 Pac. Rep. 1049. See *Montgomery vs. Sturdivant*, 41 Cal. 290.

12. HABENDUM WILL PREVAIL OVER GRANTING CLAUSE if it appear from entire instrument that grantor intended by habendum clause to restrict or limit or enlarge

estate named in granting clause.—*Barnett vs. Barnett*, 104 Cal. 293, 300, 37 Pac. Rep. 1049. See *Faivre vs. Daley*, 93 Cal. 664, 29 Pac. Rep. 256; *Pellissier vs. Corker*, 103 Cal. 516, 37 Pac. Rep. 465.

13. Deed of bargain and sale in usual form except that in habendum of deed these words appear, "for use of Chinese church or for religious worship or moral instruction under his direction and in conformity to rules of the See Yup Co.," vests title in grantees absolutely, and the See Yup Co. has no equitable title under deed.—*Eldridge vs. See Yup Co.*, 17 Cal. 44, 51.

14. "NORTH"—In description in deed may be controlled or qualified in its meaning by other words used in connection with it, but unless so controlled it means due north.—*Currier vs. Nelson*, 96 Cal. 505, 508, 31 Am. St. Rep. 239, 31 Pac. Rep. 531, 746.

15. POSSESSION OR ENJOYMENT of estate may be deferred, but deed to be operative must pass present interest.—*McGarrigle vs. Roman Cath. O. Asy.*, 145 Cal. 694, 695, 79 Pac. Rep. 447.

§ 1068. RECITALS, WHEN RESORTED TO. If the operative words of a grant are doubtful, recourse may be had to its recitals to assist the construction.

History: Enacted March 21, 1872.

1. Description, when vague, helped by statement of acreage.
2. Particular recital qualifies general words.
- 3-6. Recitals bind parties.
7. Same—By attorney binds grantor.
8. Same—May be rejected, when.
9. Same—In sheriff's deed—Effect.

1. DESCRIPTION OF TRACTS OF LAND BY MONUMENTS, distances, or otherwise being vague and indefinite, statement of acreage sheds valuable light upon the issue.—*Hostetter vs. Los Angeles T. R. Co.*, 103 Cal. 28, 42, 41 Pac. Rep. 330.

2. Particular recital in deed qualifies general words which follow.—*Hayes vs. Wetherbee*, 60 Cal. 396, 398.

3. Particular recitals in deed are binding upon parties and privies, and this doctrine applies to authorized acts of corporation.—*Gordon vs. San Diego*, 101 Cal. 522, 526, 40 Am. St. Rep. 73, 36 Pac. Rep. 18.

4. Recital in deed of material fact is binding and conclusive upon party receiving it against all claiming under him and as privies in blood, in estate, or in law.—*Simson vs. Eckstein*, 22 Cal. 580, 593.

5. Recitals in deed of municipal corporation properly executed to effect that qualified electors of city at election held for that purpose directed, authorized, and empowered trustees to sell land, and that board of trustees,

16. PROVISIO IN DEED is limitation or exception of grant made or authority conferred, effect of which is to declare that one shall not operate or other be exercised unless in case provided.—*Stockton vs. Weber*, 93 Cal. 432, 440, 33 Pac. Rep. 332. See *Voorhees vs. Bank of United States*, 35 U. S. (10 Pet.) 449, 471, bk. 9 L. ed. 490.

17. SHERIFF'S DEED conveying all right, title, and interest of judgment debtor and followed by words "being leasehold unexpired," latter clause is not words limiting extent of previous terms of conveyance or excepting out any interest conveyed by previous terms, but merely statement of officer and grantor.—*Dodge vs. Walley*, 22 Cal. 224, 225, 229, 33 Am. Dec. 61.

18. WORDS FOLLOWING THE DESCRIPTION of property in deed expressing purpose of grantor that after death of grantee lands granted should go to orphan asylum contain no operative words of grant and fail to convey present interest in property.—*McGarrigle vs. Roman Cath. O. Asy.*, 145 Cal. 694, 695, 79 Pac. Rep. 447.

duly assembled and acting as such, prescribed terms and conditions upon which sales would be made, bind parties to deed.—*Gordon vs. City San Diego*, 101 Cal. 522, 525, 40 Am. St. Rep. 73, 36 Pac. Rep. 18.

6. Recitals of consideration in deed cannot, in absence of fraud or mistake, be contradicted between parties, for purpose of defeating operation of instrument, or raising trust.—*Feeney vs. Howard*, 79 Cal. 525, 530, 12 Am. St. Rep. 162, 31 Pac. Rep. 984, 4 L. R. A. 826.

7. Recital in deed made by grantor's agent and attorney is equally binding upon him as though he had himself executed the deed.—*Simson vs. Eckstein*, 22 Cal. 580, 593.

8. Recital in deed by town trustees that it was made in pursuance of judgment which was afterwards declared void will not avoid deed if it contains operative words of conveyance sufficient to transfer title; such recitals may be rejected as surplusage.—*Ryan vs. Tomlinson*, 39 Cal. 639, 645.

9. Where it is duty of sheriff to make recital in sheriff's deed, such recital so made is entitled to same effect as an instrument of evidence, as it is official return on execution, if one be made.—*Hihn vs. Peck*, 30 Cal. 280, 283.

As to notice by recitals in deed, see note 16 Am. Dec. 754.

§ 1069. INTERPRETATION AGAINST GRANTOR. A grant is to be interpreted in favor of the grantee, except that a reservation in any grant, and every grant by a public officer or body, as such, to a private party, is to be interpreted in favor of the grantor.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
- 2, 3. Deeds construed most strongly against grantor.
4. Same—Conflicting descriptions.
5. Same—Bounded by tidal waters.
6. Same—Presumption of valid grant.
7. Public grants construed in favor of grantor.
8. Same—Rule presupposes effective grant.
- 9, 10. Reservations and exceptions construed in favor of grantor.
- 11, 12. Same—Distinction between.
13. Same—Exception of oil in land deeded, construction.
- 14-17. Same—Construction of various reservation clauses.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Cullen vs. Sprigg*, 83 Cal. 56, 63, 23 Pac. Rep. 222 (construed and applied); *Martin vs. Lloyd*, 94 Cal. 195, 203, 29 Pac. Rep. 491 (applied); *Hostetter vs. Los Angeles T. R. Co.*, 108 Cal. 38, 44, 41 Pac. Rep. 330 (applied); *Oakland vs. Oakland W. Front Co.*, 113 Cal. 160, 175, 50 Pac. Rep. 277 (applied); *Sears vs. Ackerman*, 138 Cal. 583, 586, 72 Pac. Rep. 171 (applied); *Adams vs. Hopkins*, 144 Cal. 19, 37, 77 Pac. Rep. 712, 69 Id. 228 (construed and applied).

2. **DEEDS AND GRANTS ARE ALWAYS TO BE CONSTRUED MOST STRONGLY AGAINST GRANTOR**, and in favor of grantee, when there is any ambiguity or uncertainty.—*Dodge vs. Walley*, 23 Cal. 224, 225, 229, 38 Am. Dec. 61; *Piper vs. True*, 36 Cal. 606, 617; *Salmon vs. Wilson*, 41 Cal. 595, 603; *Hager vs. Speet*, 52 Cal. 579, 582.

3. **Deed, as between parties, is to be construed most strongly in favor of grantee and if possible so as to give all of its operative words effect**; if any doubt still exists as to intention of grantor, in arriving at that intention there should be considered situation of parties, subject-matter at time of contracting, and attendant and surrounding circumstances leading to execution of instrument.—*Walsh vs. Abbott*, 145 Cal. 385, 389, 78 Pac. Rep. 715.

4. **Of conflicting descriptions in deed, one most strongly against grantor will be adopted**.—*Hager vs. Speet*, 52 Cal. 579, 582.

5. **Grants from a private person are to be construed most strongly in favor of grantee, and, when bounded by tidal waters, will be held to extend to middle line or thread of stream, or so far thereto as grantor owns**.—*Freeman vs. Bellegarde*, 108 Cal. 179, 185, 49 Am. St. Rep. 76, 41 Pac. Rep. 339.

6. **Presumption must be that a grantor intended to make val'd grant of some property, unless contrary appears**.—*Cullen vs. Sprigg*, 83 Cal. 56, 63, 23 Pac. Rep. 222.

7. **Grants of land by public bodies, or officers as such, to private parties, are to be interpreted in favor of grantor**.—*Cullen vs. Sprigg*, 83 Cal. 56, 63, 23 Pac. Rep. 222; *Hostetter vs. Los Angeles T. R. Co.*, 108 Cal. 38, 42, 41 Pac. Rep. 330; *Oakland vs. Oakland W. Front Co.*, 113 Cal. 160, 174, 50 Pac. Rep. 277.

8. **Rule of construction that public grants**

to private persons are to be construed most strongly in favor of grantor presupposes existence of an effective grant and relates only to extent of its operation.—*Cullen vs. Sprigg*, 83 Cal. 56, 63, 23 Pac. Rep. 222.

9. **Reservations and exceptions in a grant are to be interpreted in favor of grantor**.—*Martin vs. Lloyd*, 94 Cal. 195, 203, 29 Pac. Rep. 491; *Sears vs. Ackerman*, 138 Cal. 583, 586, 72 Pac. Rep. 171.

10. **Same—Deed conveying to grantees all lands embraced in grant "excepting and reserving from this conveyance all lands which have been heretofore conveyed by said parties of first part from above described premises," comes under rule of interpretation of this section**.—*Adams vs. Hopkins*, 144 Cal. 19, 37, 77 Pac. Rep. 712, 69 Id. 228.

11. **DISTINCTION BETWEEN RESERVATION AND EXCEPTION** is that exception is always some part of estate not granted at all, where reservation is always something taken out of that which is clearly granted.—*Sears vs. Ackerman*, 138 Cal. 583, 586, 72 Pac. Rep. 171.

12. **Exception to title to timber growing upon land conveyed, which appears as such exception in deed, is effective to same extent, and with same effect, as if exception had been of fractional portion of land included within exterior boundaries set out in instrument; and such exception is not to be construed as mere reservation**.—*Sears vs. Ackerman*, 138 Cal. 583, 586, 72 Pac. Rep. 171.

13. **Exception in deed of any oil that may be in land granted, and right to sink wells, bore, tunnel, or dig for such oil, means right to develop; and that there are no oil croppings on surface will not prevent grantor from digging, tunneling, etc., to ascertain whether any exist below surface, providing such right be exercised in reasonable manner**.—*Diets vs. Mission Trans. Co.*, 95 Cal. 92, 98, 30 Pac. Rep. 380.

14. **Reservation in deed.—A deed of real estate by husband and wife "reserving and saving from the effect of operation of this conveyance four square miles in two separate parts to be selected and located by parties of first part," is to be construed as having effect of exception of land reserved in instrument, and four square miles remain property of grantors as fully as if no conveyance had by them been made; such exception, however, does not evidence title upon which can be maintained suit in ejectment, without proof that land excepted had been by grantors located and selected**.—*Butler vs. Gosling*, 130 Cal. 422, 425, 62 Pac. Rep. 596.

15. **Reservation in a deed of "the wharf and wharf franchises" does not include house out on piers immediately adjoining and abutting on the wharf**.—*Upham vs. Hosking*, 62 Cal. 250, 255.

16. **Reservation of water power for certain machinery is not to be held as fixing manner of use, but as fixing measure of quantity of water reserved, unless contrary intention is plainly manifested (not reported in official opinion in 137 Cal. 401)**.—*Walker vs. Lillingston*, 70 Pac. Rep. 352.

17. Land partly subject to overflow was partly deeded subject to reservation giving grantor right of reclamation by means of ditch. Such reservation is to be construed not only in favor of grantor's right to maintain

ditch, but also in favor of grantee's right to maintain such ditch.—*Hohenshell vs. South Riverside L. & W. Co.*, 128 Cal. 627, 632, 61 Pac. Rep. 871.

§ 1070. IRRECONCILABLE PROVISIONS. If several parts of a grant are absolutely irreconcilable, the former part prevails.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Conflicting premises and habendum—Premises control.
3. Same—Proper rule in such case.
4. Same—Same—Habendum controls, when.
5. Covenant of future assurance in quitclaim.
- 6, 7. Deed—Repugnant clause rejected.
8. Description of metes and bounds governs quantity.
- 9, 10. Different description—True one adopted.
11. Discrepancy between monuments and courses and distances.
12. Easterly—Construed with qualifying words.
13. General description, certain, and particular, uncertain.
14. Grant, not irreconcilable, when.
15. Succeeding calls conflicting with first call govern.
16. Two parts of grant irreconcilable, first governs.
17. Where first and second description irreconcilable.
18. "Without embracing my said rancho," when rejected.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Martin vs. Lloyd*, 94 Cal. 195, 203, 29 Pac. Rep. 491 (applied); *Pellissier vs. Corker*, 103 Cal. 516, 518, 37 Pac. Rep. 465 (construed); *Barnett vs. Barnett*, 104 Cal. 298, 300, 37 Pac. Rep. 1049 (applied).

2. **PREMISES AND HABENDUM CLAUSE** of deed conflicting, premises control.—*Eldridge vs. See Yup Co.*, 17 Cal. 44, 53; *Havens vs. Dale*, 18 Cal. 359, 366; *Faivre vs. Daley*, 93 Cal. 664, 670, 29 Pac. Rep. 256.

As to where habendum controls, see par. 4 this note.

3. But proper rule is to give them if possible some effect not inconsistent with evident purpose and operation of deed, and expressed words of grant going before.—*Havens vs. Dale*, 18 Cal. 359, 366; *Faivre vs. Daley*, 93 Cal. 664, 670, 29 Pac. Rep. 256.

4. Intention of the parties to grant is to be gathered from instrument itself, and determined by proper construction of language used therein, but for purpose of ascertaining this intention, entire instrument, habendum as well as premises, is to be considered; and if it appears from such consideration that grantor intended by the habendum clause to restrict or limit, or enlarge the estate named, the habendum will prevail.—*Barnett vs. Barnett*, 104 Cal. 298, 300, 37 Pac. Rep. 1049.

See post § 1105 par. 3.

5. **COVENANT OF FUTURE ASSURANCE** in quitclaim deed does not impair the words of conveyance nor prevent it from operating as present transfer of whatever interest

grantor then had.—*Wholey vs. Cavanaugh*, 88 Cal. 132, 136, 25 Pac. Rep. 1112.

6. Deed conveying all right, title, interest, estate, claim, and demand of grantor containing clause limiting interest conveyed to that only which he acquired by conveyance from certain party, whereas he never acquired any interest from such party, will pass all of his right and title notwithstanding such clause.—*Wilcoxson vs. Sprague*, 51 Cal. 640, 642.

7. **DEED TO BE SO CONSTRUED**, if possible, as to give effect to it as conveyance of some interest of grantor in lands therein described, and if clause is therein found which is repugnant to general intention of deed it is rejected as void.—*Wilcoxson vs. Sprague*, 51 Cal. 640, 642.

8. **DESCRIPTION OF PROPERTY** in deed by metes and bounds, or by name or part, governs assertion of quantity in deed.—*Stanley vs. Green*, 12 Cal. 143, 164.

9. Different descriptions, one of which applies to land owned by grantor and others do not apply to land owned by him, description which applies to land owned must be adopted as true one and others discarded as false.—*Piper vs. True*, 36 Cal. 606, 619.

10. **CONSTRUCTION OF DEED** which described land by name as "all the undivided two thirds of all the lands known by name of Rancho de San Vicente, situated in County of Los Angeles and State of California," and thereafter particularly described by courses and distances, which, if adopted, would have left out large portion of rancho, must be that it indicates that dominant idea in mind of grantor when deed was made was that two thirds of Rancho San Vicente as whole was to be conveyed.—*Haley vs. Amestoy*, 44 Cal. 132, 138.

11. **Discrepancy between the monuments and the courses and distances set forth in deed, monuments govern.**—*Franklin vs. Dorland*, 28 Cal. 175, 178, 37 Am. Dec. 111.

12. **"Easterly"** in deed when used alone means due east, but must be construed in connection with other qualifying words when such words are used.—*Fratt vs. Woodward*, 32 Cal. 219, 228, 91 Am. Dec. 573.

13. **GENERAL DESCRIPTION OF REAL PROPERTY** in deed of conveyance, which is certain, must prevail if particular description therein is uncertain.—*Martin vs. Lloyd*, 94 Cal. 195, 203, 29 Pac. Rep. 491.

14. Grant to grantee, his heirs and assigns, for sole purpose of an alleyway, to be used in common with owners of other property adjoining said alleyway, all that tract of land, etc., contains no irreconcilable parts within

meaning of above section.—*Pellissier vs. Corker*, 103 Cal. 516, 518, 37 Pac. Rep. 465.

15. Succeeding calls in description of deed all conflicting with first call and agreeing with each other, their united testimony must control.—*Walsh vs. Hill*, 38 Cal. 481, 486.

16. Two parts of grant being irreconcilable, first prevails.—*Martin vs. Lloyd*, 94 Cal. 195, 203, 29 Pac. Rep. 491.

17. Where owner of Mexican grant conveyed undivided one third thereof and remained in possession until title so conveyed was extinguished, and thereafter made second

conveyance to another party, describing it as interest in said lands heretofore conveyed to first party, and also as undivided third part of whole tract, second description will govern.—*Hartman vs. Reed*, 50 Cal. 485, 490.

18. "Without embracing my said rancho," at end of description in deed, if they contradict premises, are to be rejected, but should if possible be given some effect not inconsistent with evident purpose and operation of deed and express words of grant going before.—*Havens vs. Dale*, 13 Cal. 359, 366.

See post § 1105 note par. 9.

§ 1071. MEANING OF "HEIRS" AND "ISSUE" IN CERTAIN REMAINDERS. Where a future interest is limited by a grant to take effect on the death of any person without heirs, or heirs of his body, or without issue, or in equivalent words, such words must be taken to mean successors, or issue living at the death of the person named as ancestor.

History: Enacted March 21, 1872, founded upon § 2, Act 1855, Stats. 1855, p. 171.

1. Deed to grantee and heirs for life conveys, what.
2. Deed to such other heirs as wife might have, etc.
3. "Heirs" not word of purchase.
4. "Heirs" in deed means statutory heirs, when.

1. Deed purporting to give, grant, alien, and confirm to grantee and to his heirs to have and to hold, etc., for and during his natural life and to the issue and heirs of the body of the grantee, conveys to grantee life estate with remainder to issue and heirs of his body.—*Barnett vs. Barnett*, 104 Cal. 298, 301, 37 Pac. Rep. 1049.

2. Deed from grantor to his wife and son and to such other heirs as his wife might have during marriage, and after her decease to children of marriage, their heirs and as-

signs forever, vests estate in wife and son in equal moieties as tenants in common in fee simple.—*Brenham vs. Davidson*, 51 Cal. 352, 356.

3. "Heir" is not a word of purchase carrying title to heirs, but only qualifying title of grantee.—*Hunter vs. Watson*, 13 Cal. 363, 377, 73 Am. Dec. 543.

4. Limitation in deed of remainder to heir or heirs of children, if there are no words in deed to indicate that grantor uses words "heir" or "heirs" other than in their strict legal sense, means heirs designated by statute.—*Hockstein vs. Berghauser*, 123 Cal. 681, 687, 56 Pac. Rep. 547.

As to phrase "dying without issue," meaning and definition of, see note 55 Am. Rep. 774.

§ 1072. WORDS OF INHERITANCE UNNECESSARY. Words of inheritance or succession are not requisite to transfer a fee in real property.

History: Enacted March 21, 1872, founded upon § 3, Act 1855, Stats. 1855, p. 171.

1. Applied, cited, construed, referred to, etc.
2. "Grant" effectual to convey estate.
3. Section 1072 intended to change common law.
- 4-8. Words of inheritance not necessary in deed.

1. Applied, cited, construed, referred to, etc., in: *Painter vs. Pasadena L. & W. Co.*, 91 Cal. 74, 81, 27 Pac. Rep. 539 (construed and applied); *Barnett vs. Barnett*, 104 Cal. 298, 301, 37 Pac. Rep. 1049 (construed and applied); *Sears vs. Ackerman*, 133 Cal. 583, 586, 73 Pac. Rep. 171 (applied).

2. "Grant" is effectual to convey estate in corporeal hereditament.—*San Francisco & O. Co. vs. Oakland*, 43 Cal. 502, 505.

3. §§ 1072, 1092, 1105, Civil Code, were intended to change common-law rule not only respect to transfer of fee, but of all estates in real property.—*Painter vs.*

Pasadena L. & W. Co., 91 Cal. 74, 81, 27 Pac. Rep. 539.

4. Words of inheritance are not requisite to transfer fee in real property.—*Painter vs. Pasadena L. & W. Co.*, 91 Cal. 74, 81, 27 Pac. Rep. 539.

5. Words of inheritance in deed in connection with exception therein are entirely unnecessary, and title of inheritance as to timber excepted in deed remains in grantor without words of inheritance.—*Sears vs. Ackerman*, 133 Cal. 583, 586, 73 Pac. Rep. 171.

6. Right of profit prendre being assignable at common law with words of inheritance under provisions of §§ 1072, 1092, 1105, Civil Code, may now be assigned without such words.—*Painter vs. Pasadena L. & W. Co.*, 91 Cal. 74, 81, 27 Pac. Rep. 539.

7. Title in fee simple may be conveyed by

intended with other

deed without words of inheritance, but such title may be limited in habendum clause to estate for life without being repugnant to granting clause.—*Montgomery vs. Sturdivant*, 41 Cal. 290, 298.

8. Use of the word "heirs" in granting

clause of deed creates no repugnance between that clause and habendum, since same estate would pass to plaintiff whether this word were inserted or omitted.—*Barnett vs. Barnett*, 104 Cal. 298, 301, 37 Pac. Rep. 1049.

See § 762 ante and §§ 1105 and 1829 post.

ARTICLE V.

EFFECT OF TRANSFER.

§ 1083. What title passes.

§ 1084. Incidents.

§ 1085. Grant may inure to benefit of stranger.

§ 1083. WHAT TITLE PASSES. A transfer vests in the transferee all the actual title to the thing transferred which the transferor then has, unless a different intention is expressed or is necessarily implied.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to.
2. Conveyance conveys all title of grantor.

1. Applied, cited, construed, referred to, etc., in: *Alexander vs. Jackson*, 92 Cal. 514, 524, 27 Am. St. Rep. 158, 28 Pac. Rep. 593 (referred to).

2. Conveyance passes all title of grantor, including rents accruing, unless contrary in-

tention is reasonably inferable from the terms of the grant.—*Eiseley vs. Spooner*, 23 Neb. 470, 8 Am. St. Rep. 178, 36 N. W. Rep. 659. See *Ambercrombie vs. Redpath*, 1 Iowa 111; *Moffett vs. Armstrong*, 40 Iowa 484; *Townsend vs. Isenberger*, 45 Iowa 670; *Cobel vs. Cobel*, 2 Pa. St. 342; *Wilkins vs. Vashbinder*, 7 Watts (Pa.) 378.

§ 1084. INCIDENTS. The transfer of a thing transfers also all its incidents, unless expressly excepted; but the transfer of an incident to a thing does not transfer the thing itself.

History: Enacted March 21, 1872.

I. Transfer of a Thing Carries Incidents There- to.

1. Applied, cited, construed, referred to, etc.
- 2-7. Essentials to thing transferred pass with it.
- 8-10. Air and light.
11. Same—English doctrine.
12. "Appurtenance"—Includes what.
- 13, 14. Artificial arrangements.
15. Connection at time of sale.
16. Dam appurtenant to mill.
- 17, 18. Ditch appurtenant, when.
- 19, 20. Easement appurtenant to land, when.
- 21, 22. Same—Apparent sign of servitude.
23. Same—House and conduits.
- 24, 25. Lien incident to thing, when.
- 26, 27. Mill—What passes with.
- 28-32. Percolating water—Rights to.
33. Subterraneous watercourse.
34. Water ditch—Does not pass, when.
- 35, 36. Water pipe—Appurtenant, when.

II. Transfer of Incident Does Not Carry Thing to Which Attached.

37. Incident of property does not carry the property.
38. Same—Franchise.

I. TRANSFER OF A THING CARRIES INCIDENTS THERETO.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Cross vs. Kitts*, 69 Cal. 217, 221, 58 Am. Rep. 558, 10 Pac. Rep. 409

(construed and applied); *McShane vs. Carter*, 80 Cal. 310, 312, 22 Pac. Rep. 178 (applied); *Alexander vs. Jackson*, 92 Cal. 514, 524, 27 Am. St. Rep. 158, 28 Pac. Rep. 593 (cited); *Duncan vs. Hawn*, 104 Cal. 10, 12, 37 Pac. Rep. 626 (construed and applied); *Kennedy vs. Burnap*, 120 Cal. 488, 490, 52 Pac. Rep. 843, 40 L. R. A. 476 (cited and applied); *Jones vs. Sanders*, 138 Cal. 405, 411, 71 Pac. Rep. 506 (cited).

2. EVERY ESSENTIAL TO BENEFICIAL USE AND ENJOYMENT of property granted is, in absence of language indicating different intention on part of grantor, to be considered as passing to grantee.—*Sparks vs. Hess*, 15 Cal. 186, 195-196. See *Cross vs. Kitts*, 69 Cal. 217, 221, 58 Am. Rep. 558, 10 Pac. Rep. 409; *Mitchell vs. Amador Canal Co.*, 75 Cal. 464 493, 17 Pac. Rep. 246; *McShane vs. Carter*, 80 Cal. 310, 312, 22 Pac. Rep. 178. *Ind.* *Scott vs. Michael*, 129 Ind. 250, 254, 28 N. E. Rep. 546; *Branson vs. Studabaker*, 133 Ind. 147, 33 N. E. Rep. 98; *Indianapolis D. & W. R. Co. vs. First Nat. Bank*, 134 Ind. 127, 131, 33 N. E. Rep. 679. *N. Y.* *Huttemeier vs. Albro*, 18 N. Y. 48, 50; *Lampman vs. Milks*, 21 N. Y. 505; *Jackson ex d. Barclay vs. Blodget*, 5 Cow. 202, 205; *Le Roy vs. Platt*, 4 Paige Ch. 77, 81; *Langdon vs. Buell*, 9 Wend. 80, 83. *Oreg.* *Jackson vs. Trullinger*, 9 Oreg. 393, 399. *Fed.* *Sheets vs. Selden*, 69 U. S. (3 Wall.) 177, 188, bk. 17 L. ed. 822; *Scheel vs. Alhambra Min. Co.*, 79 Fed. Rep. 321, 325

See pars. 21, 22 this note.

2. Conveyance of land will carry with it whatever is incident and appurtenant to land conveyed; e. g. right of way or other easement.—*Huttemeier vs. Albro*, 18 N. Y. 48, 51.

See para. 19, 20 this note.

4. Conveyance of "certain tenement, to wit, one half of corn-mill situated in Washington in lot 1, with all the privileges thereto belonging," passes the land on which mill stands, and such water privileges as may be necessary for use of mill.—*Gibson vs. Brockway*, 8 N. H. 465, 31 Am. Dec. 200. See *Blake vs. Clark*, 6 Me. (6 Greenl.) 436; *Doe vs. Collins*, 2 Durnf. & E. (3 T. R.) 498, 1 Rev. Rep. 529.

5. Conveyance of certain spring of water issuing from head of open cut run by grantor in his mining claim, with right and privilege to run another and deeper cut, or tunnel, or cut and tunnel, to said spring over and through mining claim of grantor, and right of way and easement to construct said cut or tunnel, and divert, manage, and control said water, and make repairs, lay pipes and boxes, and convey and direct said water, renders such easement an incident to realty for whose benefit spring of water was conveyed, which passes as an incident with title of such property.—*Cross vs. Kitts*, 69 Cal. 317, 221, 58 Am. Rep. 558, 10 Pac. Rep. 409.

6. Store with appurtenances in building occupied by several tenants with yard adjoining building containing privies for use of tenants and to furnish light necessary for back part of store; with door leading from store to yard and door from hallway used by all tenants leading from yard; plaintiff held to have an easement in yard for light and air unaffected by closing of door leading from store into yard.—*New Ipswich W. L. Pac. vs. Batchelder*, 3 N. H. 190, 14 Am. Dec. 346. See *Doyle vs. Lord*, 64 N. Y. 432, 21 Am. Rep. 629; *Pyer vs. Carter*, 1 Hurl. & N. 916, 26 L. J. Exch. 258, 40 Eng. L. & Eq. 410, 412.

7. Right of way or other easement being embraced in deed, whether it passes with grant of land, is always question of construction of deed, having reference to its terms and practical incidents belonging to grant of land at time of conveyance; intention of parties is to be ascertained from these facts.—*Huttemeier vs. Albro*, 18 N. Y. 48, 52; *United States vs. Appelpont*, 1 Sumn. C. C. 492, 24 Fed. Cas. 841.

8. AIR AND LIGHT—Easement of, passes with transfer of real property as an incident thereof, unless expressly excepted.—*Kennedy vs. Burnap*, 120 Cal. 488, 493, 52 Pac. Rep. 843, 40 L. R. A. 476.

9. Not implied in grant of house having windows overlooking land retained by grantor.—*Keats vs. Hugo*, 115 Mass. 204, 15 Am. Rep. 60. See *Ga. Turner vs. Thompson*, 53 Ga. 268, 24 Am. Rep. 497. *Iowa. Morrison vs. Marquardt*, 24 Iowa 35, 92 Am. Dec. 444. *Mass. Collier vs. Pierce*, 73 Mass. (7 Gray) 13, 66 Am. Dec. 453; *Keats vs. Hugo*, 115 Mass. 204, 15 Am. Rep. 60. *Ohio. Mullen vs. Stricker*, 19 Ohio St. 135, 2 Am. Rep. 379. *Pa. Maynard vs. Echer*, 17 Pa. St. 222. *Eng. Dodd vs. Burchell*, 1 Hurl. & C. 316.

10. As to easement of light and air passing with conveyance of tenement, authorities are not agreed; weight of judicial decision and better opinion is thought to be to effect that English common-law doctrine does not apply in this country, as elsewhere pointed out in this note, other than in cases where easement in servitude of light may be implied from grant.—*Janes vs. Jenkins*, 34 Md. 1, 6 Am. Rep. 300.

11. SAME—ENGLISH DOCTRINE respecting acquiring of right to light by prescription held to be without foundation in principle, not adapted to existing state of things in this country, and cannot be applied without mischievous consequences.—*Keats vs. Hugo*, 115 Mass. 204, 15 Am. Rep. 60. See *Ala. Ward vs. Neal*, 37 Ala. 500. *Me. Pierre vs. Fernald*, 26 Me. 436. *Md. Cherry vs. Stein*, 11 Md. 1. *Mass. Rogers vs. Sawin*, 76 Mass. (10 Gray) 376; *Carrig vs. Dee*, 30 Mass. (14 Gray) 533. *Ohio. Mullen vs. Stricker*, 19 Ohio St. 135, 142, 2 Am. Rep. 379. *Pa. Haverstick vs. Sipe*, 23 Pa. St. 368. *S. C. Napier vs. Bulwinkle*, 5 Rich. L. 311. *Vt. Hubbard vs. Town*, 23 Vt. 295. *W. Va. Powell vs. Sims*, 5 W. Va. 1, 13 Am. Rep. 629.

Apparent sign of servitude.—See para. 21, 22 this note.

12. "APPURTENANCES," IN DEED, includes and will carry easement or privileges to another's land, when annexed to granted premises.—*Swartz vs. Swartz*, 4 Pa. St. 353, 45 Am. Dec. 697; *Murphy vs. Campbell*, 4 Pa. St. 480, 485; *Philadelphia & R. R. Co. vs. Philadelphia*, 47 Pa. St. 325, 329.

13. ARTIFICIAL ARRANGEMENTS—Adding to the advantage and enhancing value of land, openly and visibly attached, cannot be destroyed or materially diminished in value on sale of land; and if they impose burden on remaining portion of land not conveyed, easements or servitudes are created thereon.—*Lampman vs. Milks*, 21 N. Y. 505, 507.

14. Thus where owner erects two adjoining dwelling-houses on his land, with an arched passageway wholly underneath one, which has for some time been used by tenants of both houses as passageway, and drain pipes are placed under passageway by which both houses and lots are drained, subsequent conveyance of house other than one under which passageway is constructed, by metes and bounds, original owner will be entitled to close up passageway for purposes of ingress and egress, but will not be entitled or permitted to disturb the pipes.—*McPherson vs. Acker, MacA. & Mack*, (D. C.) 150, 48 Am. Rep. 749; *Goodal vs. Godfrey*, 53 Vt. 219, 38 Am. Rep. 671.

15. CONDITION OF PROPERTY AT TIME OF SALE, with all its appurtenance, presumed to be taken into consideration by parties at time of contract.—*Lampman vs. Milks*, 21 N. Y. 505, 508; *Simmons vs. Cloonan*, 47 N. Y. 9; *Curtiss vs. Ayrault*, 47 N. Y. 73, 79; *Kurkel vs. Haley*, 47 How. Fr. (N. Y.) 75, 76; *Outerbridge vs. Phelps*, 13 Abb. N. C. (N. Y.) 125, 53 How. Fr. (N. Y.) 77, 84, 45 N. Y. Sup. Ct. 555.

Conduits.—See par. 23 this note.

16. DAM APPURTENANT TO MILL, and right to maintain it at its usual height, passes

with grant of mill.—*Scott vs. Michael*, 139 Ind. 250, 254, 28 N. E. Rep. 546. See *Branson vs. Studabaker*, 183 Ind. 147, 83 N. E. Rep. 98; *Jackson vs. Trullinger*, 9 Oreg. 392, 399.

17. **DITCH AND WATER RIGHT**, by means of which mining ground is operated, is an incident or appurtenance thereof.—*McShane vs. Carter*, 80 Cal. 310, 313, 22 Pac. Rep. 178.

18. Ditch by means of which mine is operated is an appurtenance to mine and passes with grant thereof.—*McShane vs. Carter*, 80 Cal. 310, 315, 22 Pac. Rep. 178. See *Hungarian Hill G. M. Co. vs. Moses*, 58 Cal. 168.

19. **EASEMENT EXISTS AS AN APPURTENANT TO LAND GRANTED**, by reason of implication or by reason of necessity, to full enjoyment of property granted.—*Lampman vs. Milks*, 21 N. Y. 505, 507; *Ogden vs. Jennings*, 62 N. Y. 526, 556; *Grimths vs. Morrison*, 36 Hun (N. Y.) 340.

See ante § 662, note par. 12.

20. Easements thereto attached, and in favor of such real property, creates easement to use other real property belonging to grantor to same extent and in like manner as was permanently and obviously used by grantee for purpose of enjoyment of an easement at time transfer was completed or was agreed upon.—*Cross vs. Kitts*, 69 Cal. 217, 221, 58 Am. Rep. 558, 10 Pac. Rep. 409.

21. Apparent sign of servitude must exist before severance and sale of one tenement will create easement subservient.—*Butterworth vs. Crawford*, 46 N. Y. 349, 7 Am. Rep. 352; *Pyer vs. Carter*, 1 Hurl. & N. 916, 26 L. J. Exch. 258, 40 Eng. L. & Eq. 410.

22. Mere convenience is not sufficient; it must be actual and direct necessity in order to attach to and pass with land.—*Ogden vs. Jennings*, 62 N. Y. 526, 532. See *Green vs. Collins*, 86 N. Y. 246, 252, 40 Am. Rep. 531; *Evans vs. Dana*, 7 R. I. 306; *Powell vs. Sims*, 5 W. Va. 1, 13 Am. Rep. 629; *Turner vs. Thompson*, 58 Ga. 368, 34 Am. Rep. 497.

23. House and conduits thereto on part of land conveying water by pipes to house, grant of house with appurtenances, reserving land, will carry therewith conduits and pipes passing through land reserved.—*Nicholas vs. Chamberlain*, Cro. Jac. 121.

See par. 13 this note.

24. Lien becomes an incident of primary obligation it is given to secure, right to which must be held to pass by assignment of latter, unless there is something in act creating it which takes it out of this general rule prescribed by code.—*Duncan vs. Hawn*, 104 Cal. 10, 12, 37 Pac. Rep. 626.

25. Assignment of bond or debt carries with it mortgage or collateral securing the same.—*Ord vs. McKee*, 5 Cal. 515, 516; *Phelan vs. Olney*, 6 Cal. 479, 483; *McMillan vs. Richards*, 9 Cal. 365, 410, 70 Am. Dec. 655; *Willis vs. Farley*, 24 Cal. 490, 497; *Storch vs. McCain*, 85 Cal. 307, 24 Pac. Rep. 639; *Adler vs. Sargent*, 109 Cal. 42, 49, 41 Pac. Rep. 799. III. *Vansant vs. Allmon*, 23 Ill. 26, 30; *Harris vs. Mills*, 23 Ill. 44, 46. Iowa. *Crow vs. Vance*, 4 Iowa 434. La. *Perot vs. Levasseur*, 21 La. Ann. 529. Mich. *Lendue vs. Detroit & M. R. Co.*, 13 Mich.

320, 396, 87 Am. Dec. 759. N. H. *Southerlin vs. Mendum*, 5 N. H. 420; *Smith vs. Moore*, 11 N. H. 55; *Ellison vs. Daniels*, 11 N. H. 274; *Northy vs. Northy*, 45 N. H. 144. N. Y. *Kortright vs. Cady*, 21 N. Y. 343, 78 Am. Dec. 145; *Bolen vs. Crosby*, 49 N. Y. 183; *Parmelee vs. Dann*, 23 Barb. 461; *Jackson ex d. Barclay vs. Blodget*, 5 Cow. 202, 205; *Green vs. Hart*, 1 John. 580, 590; *Jackson vs. Willard*, 4 John. 41, 43; *Runyan vs. Mersereau*, 11 John. 534, 538; *Langdon vs. Buell*, 9 Wend. 80, 84. Pa. *Donley vs. Hays*, 17 Serg. & R. 400. Tex. *Perkins vs. Sterne*, 23 Tex. 561, 563, 76 Am. Dec. 73. Fed. *Shelden vs. Sill*, 49 U. S. (8 How.) 441, 450, bk. 12 L. ed. 1147. Eng. *Richards vs. Syms*, Barn. Ch. 90, 93; *Martin vs. Mowlin*, 3 Burr. 978.

26. **MILL**—Conveyance of, passes right to land covered by water-power.—*Swartz vs. Swartz*, 4 Pa. St. 353, 45 Am. Dec. 697.

27. Mill granted by devise will carry with it not merely building, but all of land under the mill necessary for its use, and commonly used with it.—*Whitney vs. Olney*, 3 Mas. C. C. 230, 29 Fed. Cas. 1108. See *Gibson vs. Brockway*, 8 N. H. 465.

28. **PERCOLATING WATER IS PART OF THE LAND** and grows therewith as long as it remains in the land; and when collected and running in defined channel, is property, use of which may be acquired by appropriation or grant.—*Cross vs. Kitts*, 69 Cal. 217, 221, 58 Am. Rep. 558, 10 Pac. Rep. 409. See *Saddler vs. Lee*, 66 Ga. 45, 42 Am. Rep. 62; *Strait vs. Brown*, 16 Nev. 317, 40 Am. Rep. 497.

29. Percolating water in unknown channel is not subject of property, but every landowner has, as incident to ownership of land, an unlimited right to appropriate such water in its natural state by lawful, even if artificial means.—*Ballard vs. Tomlinson* (Eng.), 24 Am. L. Reg. 634.

30. Water combined with earth, or passing through it by percolation, or filtration or chemical attraction, has no distinctive character of its own from earth itself any more than metallic oxides of which earth is composed.—*Cross vs. Kitts*, 69 Cal. 217, 222, 58 Am. Rep. 558, 10 Pac. Rep. 409.

California doctrine on percolating waters peculiar.—See full citation of authorities as to percolating waters, ante § 662 note pars. 45-47.

31. **WATERS MOVING OR MOTIONLESS IN EARTH** are not, in eye of law, distinct from earth.—*Cross vs. Kitts*, 69 Cal. 217, 222, 58 Am. Rep. 558, 10 Pac. Rep. 409. See *Hanson vs. McCue*, 42 Cal. 303, 10 Am. Rep. 299; *Roath vs. Driscoll*, 20 Conn. 533, 540, 52 Am. Dec. 352.

32. They are not of earth in sense that they are part and parcel of it, and no secret influence moves them or can separate them from it; they are of distinct character from earth, subject to law of gravitation which may separate them from particular tract and precipitate them upon another tract, and ownership thereof attaches only while they remain in the particular tract of land.—*Chatfield vs. Wilson*, 23 Vt. 49, 54.

33. **Subterraneous watercourse** flowing in well-defined channel which can be traced,

owner of any particular tract of land through which it flows will not have the absolute right of ownership, and lower proprietor will be protected against diversion thereof by upper owner.—*Saddler vs. Lee*, 66 Ga. 45, 42 Am. Rep. 62. See *Wheatley vs. Baugh*, 25 Pa. St. 528, 64 Am. Dec. 721; *Dickinson vs. Grand Junction C. Co.*, 16 Jur. 200, 9 Eng. L. & Eq. 513, 521.

34. **WATER DITCH** particularly described as lying between given termini, in sheriff's deed on sale under mortgage foreclosure, will not pass title to new parallel ditch constructed by company in furtherance of its general purposes, which was not projected at time mortgage was executed.—*Mitchell vs. Amador C. & Min. Co.*, 75 Cal. 464, 493, 17 Pac. Rep. 246.

See ante § 662 note para. 49, 50.

35. **WATER PIPE TO GRANTOR'S PREMISES**, for domestic purposes and for irrigation, is appurtenant and passes by deed of grant.—*Farmer vs. Ukiah Water Co.*, 56 Cal. 11, 13. See *Hungarian Hill G. Min. Co. vs. Moses*, 58 Cal. 168.

36. Compare: *McDonald vs. Bear River & A. W. & Min. Co.*, 18 Cal. 220, 235; *Quirk vs.*

Falk, 47 Cal. 453, 455; *White vs. Barlow*, 72 Ga. 337.

For further illustrations of the doctrine, see ante § 662 and note.

II. TRANSFER OF INCIDENT DOES NOT CARRY THING TO WHICH ATTACHED.

37. **INCIDENT OF THE PROPERTY** transferred without conveyance of property itself does not transfer property; e. g. transfer of mortgage does not carry with it debt secured thereby.—*Kellogg vs. Smith*, 26 N. Y. 18; *Jackson ex d. Curtis vs. Bronson*, 19 John. (N. Y.) 225; *Jackson ex d. Barclay vs. Blodget*, 5 Cow. (N. Y.) 202; *Langdon vs. Buell*, 9 Wend. (N. Y.) 80, 84.

See para. 24, 25 this note.

38. **Franchise of turnpike**, under deed of sheriff at forced sale, does not pass to purchaser, in absence of statute.—*Wood vs. Truckee Turnp. Co.*, 24 Cal. 474, 487. See Appeal of *N. B. & M. R. Co.*, 22 Cal. 499, 529; *Gregory vs. Blanchard*, 98 Cal. 311, 313, 33 Pac. Rep. 199.

Franchise passes under § 383 ante.

See ante § 662 note para. 13-15.

§ 1085. **GRANT MAY INURE TO BENEFIT OF STRANGER.** A present interest, and the benefit of a condition or covenant respecting property, may be taken by any natural person under a grant, although not named a party thereto.

History: Enacted March 21, 1872.

Commissioners' note says this was not so at common law, citing *Hornbeck vs. Westbrook*, 9 John. (N. Y.) 78, and *Craig vs. Wells*, 11 N.

Y. 315; but that the English law has been as stated in this section ever since Stats. 8 and 9 Vict. c. 106 § 5.

CHAPTER II.

TRANSFER OF REAL PROPERTY.

Article I. Mode of Transfer, §§ 1091-1096.

II. Effect of Transfer, §§ 1104-1115.

ARTICLE I.

MODE OF TRANSFER.

§ 1091. Requisites for transfer of certain estates.
§ 1092. Form of grant.
§ 1093. Grant by married woman, how acknowledged.

§ 1094. Power of attorney of married woman, how acknowledged.
§ 1095. Attorney in fact, how must execute for principal.
§ 1096. Conveyance of real estate when name of person has been changed.

§ 1091. **REQUISITES FOR TRANSFER OF CERTAIN ESTATES.** An estate in real property, other than an estate at will or for a term not exceeding one year, can be transferred only by operation of law, or by an instrument in writing, subscribed by the party disposing of the same, or by his agent thereunto authorized by writing.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Assumed name taken by grantor.
3. Attempt to convey by parol.
4. Auction sale of land.

5, 6. Executed parol gift.
7. Forged instrument.
8, 9. Life estate—Oral contract to build house—Part performance.

- 10, 11. Mines and mining claims—Parol transfer.
12. Release of equitable estate.
13. Several grantors—Execution by part only.
14. Same—Attorney in fact must sign twice.
15. Signature—Grantor's hand guided by third person.
- 16-18. Same—Affixed by third person—Generally.
- 19-23. Same—Same—Authority to execute—Subsequent acknowledgment.
- 24, 25. Variance between name signed and name in instrument.
26. Written instrument as indispensable evidence of transfer.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Melton vs. Lambard*, 51 Cal. 258, 260 (applied); *Hoag vs. Howard*, 55 Cal. 564, 565 (cited with other sections); *Garthe vs. Hart*, 73 Cal. 541, 544, 15 Pac. Rep. 93 (applied); *Manning vs. Franklin*, 81 Cal. 205, 207, 208, 22 Pac. Rep. 550 (applied); *Blaisdell vs. Leach*, 101 Cal. 405, 408, 40 Am. St. Rep. 65, 35 Pac. Rep. 1019 (construed and applied); *Tuffree vs. Polhemus*, 108 Cal. 670, 674, 41 Pac. Rep. 806 (construed and applied); *Southern Pac. R. Co. vs. Prosser*, 122 Cal. 413, 420, 55 Pac. Rep. 145 (cited); *Farmers' Ex. Bank vs. Purdy*, 130 Cal. 455, 457, 62 Pac. Rep. 738 (referred to); *Siddall vs. Haight*, 132 Cal. 320, 322, 64 Pac. Rep. 410 (construed); *Nathan vs. Dierssen*, 134 Cal. 232, 234, 66 Pac. Rep. 485 (construed and applied).

2. ASSUMED NAME—Taken by grantor, to whom the property has been transferred under some name assumed for the occasion, does not render deed incapable of transferring title to land.—*Wilson vs. White*, 84 Cal. 239, 24 Pac. Rep. 114. See *Fallon vs. Kehoe*, 38 Cal. 44, 99 Am. Dec. 347n; *Garwood vs. Hastings*, 38 Cal. 216, 222.

3. ATTEMPT TO CONVEY BY PAROL, and without consideration, strip of land belonging to one of tracts abutting upon well-recognized boundary line, is squarely in teeth of statute of frauds.—*Nathan vs. Dierssen*, 134 Cal. 232, 234, 66 Pac. Rep. 485, distinguishing: *Tuffree vs. Polhemus*, 108 Cal. 670, 674, 41 Pac. Rep. 806 (an executed parol partition). See 146 Cal. —, 79 Pac. Rep. 739.

4. AUCTION SALE OF LAND where no note or memorandum of sale is made by auctioneer, and no writing exists between parties, is void by statute of frauds.—*People vs. White*, 6 Cal. 75.

5. EXECUTED PAROL GIFT of land is valid.—*Siddall vs. Haight*, 132 Cal. 320, 322, 64 Pac. Rep. 410.

6. Executed parol gift from a father to his daughter vests in her all title to said property held by father.—*Tuffree vs. Polhemus*, 108 Cal. 670, 674, 41 Pac. Rep. 806.

7. FORGED INSTRUMENT—Cannot divest owner of property of his title thereto, although his connection with reference to instrument may estop him from denying its validity. "As between himself and person who committed the forgery such estoppel may not arise, but if, with knowledge of forgery, he should declare to innocent person that signature was his own, and that he had executed C. C.—56

instrument, and thereby induced him to purchase property, he could not afterwards claim property upon ground that instrument was forgery."—*Blaisdell vs. Leach*, 101 Cal. 405, 408, 40 Am. St. Rep. 65, 35 Pac. Rep. 1019.

8. LIFE ESTATE—Verbal contract to build dwelling-house upon property of aged and infirm person by one who, in consideration of erection of such building and payment of half taxes that might thereafter and during continuance of said agreement be levied upon said property, and of one half of charge for water on said premises during said agreement, and of personal care for such infirm person during sickness, might occupy same during natural life of owner of property, is in no sense a lease of the property, but a sale of life estate therein, and contract being parol, is void.—*Manning vs. Franklin*, 81 Cal. 205, 207, 208, 22 Pac. Rep. 550.

9. Part performance takes out of statute.—*Manning vs. Franklin*, supra; *McCarger vs. Rood*, 47 Cal. 133; *Burlingame vs. Rowland*, 77 Cal. 315, 19 Pac. Rep. 526, 1 L. R. A. 329; *Seaman vs. Ascherman*, 51 Wis. 678, 37 Am. Rep. 349.

See post §1624 and note.

10. MINE IS REAL ESTATE, and estate therein, other than estate at will, or for term not exceeding one year, cannot be transferred by verbal sale; transfer can be made only by instrument in writing.—*Melton vs. Lambard*, 51 Cal. 258, 260; followed *Moore vs. Hamerstag*, 109 Cal. 122, 41 Pac. Rep. 805. See *Williams vs. Gibson*, 84 Ala. 223, 5 Am. St. Rep. 368, 4 So. Rep. 350; *Hirbour vs. Reading*, 8 Mont. 13, 19.

As to miner's claim, see ante §654 note pars. 5-11.

11. PAROL TRANSFERS OF MINING PROPERTY being done away with by an act of legislature of 1863 (*Laws 1863*, p. 98), verbal transfer of mine, although accompanied by change of possession, could not operate as valid transfer.—*Garthe vs. Hart*, 73 Cal. 541, 544, 15 Pac. Rep. 93. See *Moore vs. Hamerstag*, 109 Cal. 122, 124, 41 Pac. Rep. 805.

12. RELEASE OF EQUITABLE ESTATE in land is not "by act or operation of law," but by act of party releasing, and act can be proved only "by deed or conveyance in writing, subscribed by party creating, granting, assigning, surrendering, or declaring same, or by his lawful agent thereunto authorized by writing."—*Millard vs. Hathaway*, 27 Cal. 119, 144. See *Chenoweth vs. Johnson*, 9 Oreg. 150, 152; *Hughes vs. Moore*, 11 U. S. (7 Cr.) 176, bk. 3 L. ed. 307.

13. SEVERAL GRANTORS—Deed executed by part only is good as to those who did execute and deliver it, and conveys their interest in land.—*Colton vs. Seavey*, 22 Cal. 495, 496, 501, 33 Am. Dec. 130. See *Tustin vs. Faught*, 23 Cal. 237, 239; *Moore vs. Hinnant*, 39 N. C. 453.

14. Attorney in fact, who is also one of grantors, must sign twice,—both as such agent, and also in his own behalf.—*Meagher vs. Thompson*, 49 Cal. 189, 192.

15. SIGNATURE BY GRANTOR HOLDING PEN IN HIS HAND, but in fact made with

assistance and under guidance of third person, at signer's request, is sufficient.—*Harris vs. Harris*, 65 Cal. 620.

As to signature by one who cannot write, see ante § 14 and notes para. 19-25, 55-64, 67-77.

16. Affixed by third person in his presence and at his request is as much his signature as though it had been written by himself.—*Jansen vs. McCahill*, 22 Cal. 563, 566, 83 Am. Dec. 84. See *Gardner vs. Gardner*, 59 Mass. (5 Cush.) 483, 52 Am. Dec. 740; *Wood vs. Goodridge*, 60 Mass. (6 Cush.) 117, 52 Am. Dec. 771; *Martin vs. Maguire*, 73 Mass. (7 Gray) 177; *Burns vs. Lynde*, 83 Mass. (6 Allen) 355; *Mutual Ben. L. Ins. Co. vs. Brown*, 30 N. J. Eq. (3 Stew.) 193, 303 and note; *Goodell vs. Bates*, 14 R. I. 68, 51 Am. Rep. 341.

See notes 21 Am. Dec. 332; 30 Am. Dec. 300.

17. Signature of grantor need not be affixed by himself. It may be so affixed by another, if done in his presence, and by his own direction, and he may also adopt and ratify his signature made by another without any previous authority, and title to real property will be transferred by grant under such circumstances.—*Blaisdell vs. Leach*, 101 Cal. 405, 408, 40 Am. St. Rep. 65, 35 Pac. Rep. 1019. See also *Lewis vs. Watson*, 93 Ala. 479, 39 Am. St. Rep. 82, 4 So. Rep. 370; *Bartlett vs. Drake*, 100 Mass. 174, 97 Am. Dec. 92, and cases in last paragraph.

18. "There is no peculiar form for the signing of deed. It takes effect from delivery. The old form required no signature even, but a sealing was sufficient; and now the signature is often good, if made by another and adopted by the grantor. Any writing which clearly shows that a party has adopted a sealed instrument as his own, intending to be bound by the contents of it, is, if not a formal, at least a sufficient execution to satisfy the statute."—*Ingoldsby vs. Juan*, 12 Cal. 564, 578.

19. Same—Authority of agent to execute deed must be in writing; parol authority is not sufficient.—*Videau vs. Griffin*, 21 Cal. 389, 391. See *Territory vs. Klee*, 1 Wash. St. 183, 187, 23 Pac. Rep. 417.

As to power of attorney, and deed executed under, see note 31 Am. Dec. 776.

20. SAME—EXCEPTION TO RULE, recognized "where execution by attorney is in presence of principal. Exception arises from doctrine that what one does in presence of and

by the direction of another, it is act of latter—as much so as if it were done by himself in person. The attorney in such case, so far as signature to instrument is concerned, is mere amanuensis of grantor, and in affixing of seal is only the instrument, the hand, as it were, of grantor. It is not sufficient that attorney was directed to sign name of principal and affix his seal; execution must be in immediate presence of principal, and this fact must be affirmatively established by party who relies upon it as an excuse for absence of power in writing. It is not fact to be inferred from any coincidence between date of deed and acknowledgment of principal that it was executed by his attorney."—*Videau vs. Griffin*, 21 Cal. 389, 392.

21. SUBSEQUENT PAROL ACKNOWLEDGMENT of authority of agent to transfer real estate conferred by parol does not remove the insufficiency of original authority.—*Videau vs. Griffin*, 21 Cal. 389, 391; *Karns vs. Olney*, 80 Cal. 90, 97, 13 Am. St. Rep. 101, 32 Pac. Rep. 57. Distinguished: *Mowry vs. Mowry*, 103 Cal. 314, 317, 37 Pac. Rep. 393.

22. Admission by grantor to notary public who took acknowledgment that signature is his is proof of that fact, and may be testified to by such notary.—*Jansen vs. McCahill*, 22 Cal. 563, 566, 83 Am. Dec. 84.

23. Subsequent acknowledgment by grantor of deed not signed personally by him is sufficient recognition and adoption of signature as his own.—*Lewis vs. Watson*, 93 Ala. 479, 39 Am. St. Rep. 82, 18 So. Rep. 570, 22 L. R. A. 297n. See also *Bartlett vs. Drake*, 100 Mass. 174, 97 Am. Dec. 92, 1 Am. Rep. 101.

24. VARIANCE BETWEEN NAME SIGNED AND NAME STATED IN BODY of instrument is ground for excluding instrument from evidence in absence of proof that person signing was identical with person named.—*Tustin vs. Faught*, 23 Cal. 237, 239.

25. Edmund fer Edward Jones, signed to deed, when true name appears in the body of instrument, and it is acknowledged by true name, will be sufficient identification of person executing instrument.—*Middleton vs. Findia*, 25 Cal. 76, 81. See *Zann vs. Haller*, 71 Ind. 136, 36 Am. Rep. 193.

26. Written instrument as indispensable evidence of transfer.—See Code Civ. Proc. § 1971 and note.

§ 1092. FORM OF GRANT. A grant of an estate in real property may be made in substance as follows:

"I, A B, grant to C D all that real property situated in (insert name of county) County, state of California, bounded (or described) as follows: (Here insert description, or if the land sought to be conveyed has a descriptive name, it may be described by the name, as for instance, 'The Norris Ranch').

"Witness my hand this (insert day) day of (insert month), 18... "A B."

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Acreage—Statement of—Not controlling.
3. Same—Same—Essential part of description, when,

4. Code Commissioners' note.
5. Consideration not stated.
6. Construction—Of descriptive part of conveyance.

7, 8. Describing property by name—Mining claim.

9. "Grant"—Sufficient to convey land.

10. Parol evidence to aid description.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Haley vs. Amestoy*, 44 Cal. 132, 133 (applied); *Goad vs. Moulton*, 67 Cal. 536, 539, 8 Pac. Rep. 63 (applied); *Tredinnick vs. Red Cloud Consol. Min. Co.*, 72 Cal. 78, 82, 13 Pac. Rep. 152 (applied); *Carter vs. Bacigalupi*, 83 Cal. 187, 193, 23 Pac. Rep. 361 (construed and applied); *Painter vs. Pasadena L. & W. Co.*, 91 Cal. 74, 81, 27 Pac. Rep. 539 (cited); *Bates vs. Howard*, 105 Cal. 173, 183, 38 Pac. Rep. 715 (applied); *Murray vs. Tulare Irr. Co.*, 120 Cal. 311, 315, 49 Pac. Rep. 563, 52 Id. 586 (applied); *Southern Pac. Co. vs. Prosser*, 123 Cal. 413, 420, 55 Pac. Rep. 145 (cited).

2. **ACREAGE**—Statement of—Not controlling where there is description of land by boundaries, and two do not agree as to amount of land conveyed.—*Tappendorff vs. Downing*, 76 Cal. 169, 170, 13 Pac. Rep. 247. See *Stanley vs. Green*, 12 Cal. 148, 164, 165; *De Argueneo vs. Greer*, 26 Cal. 615, 632; *Baldwin vs. Temple*, 101 Cal. 396, 403, 35 Pac. Rep. 1003.

3. **Forms** an essential part of description whenever there is not sufficient certainty and demonstration of land granted as expressed in other terms of description.—*Hostetter vs. Los Angeles T. R. Co.*, 108 Cal. 38, 42, 41 Pac. Rep. 830; *Hall vs. Shotwell*, 66 Cal. 379, 381, 5 Pac. Rep. 683.

4. **CODE COMMISSIONERS' NOTE**—Recital of consideration said to be unnecessary.—See also par. 5 this note.

5. **CONSIDERATION IN DEED**—Lack of will not affect validity thereof.—*Goad vs. Moulton*, 67 Cal. 536, 539, 8 Pac. Rep. 63.

See post § 1614 and note.

§ 1093. GRANT BY MARRIED WOMAN, HOW ACKNOWLEDGED. A grant or conveyance of real property made by a married woman may be made, executed, and acknowledged in the same manner and has the same effect as if she were unmarried.

History: Enacted March 21, 1872; amended March 14, 1895, Stats. and Amdts. 1895, p. 53.

1. Applied, cited, construed, referred to, etc.
2. Assent of husband to conveyance.
3. Conclusiveness of certificate of acknowledgment.
4. Form and sufficiency of acknowledgment.
- 5, 6. Necessity of acknowledgment—Generally.
7. Same—Presumption of fraud.
- 8-10. Same—Effect of amendments of 1891 and 1895.
11. Same—Application of statute generally.
12. Same—Same—Declaration of homestead.
- 13-15. Same—Same—Executory contracts.
16. Same—Same—Lease.
- 17-20. Same—Same—Mortgage.
- 22, 23. Necessity of certificate of acknowledgment—Rule prior to code.
- 24, 25. Same—Rule under code.
- 26, 27. Practice—Findings.
28. Presumption of knowledge of contents of deed.

6. **CONSTRUCTION OF DESCRIPTIVE PART** of conveyance of real estate.—As to, see Code Civ. Proc. § 2077 and note.

7. **DESCRIBING PROPERTY BY NAME**, where it has and is generally known by such name, is sufficient, and defects in other parts of description may be disregarded.—*Haley vs. Amestoy*, 44 Cal. 132, 133; *Tredinnick vs. Red Cloud Consol. Min. Co.*, 72 Cal. 78, 82, 13 Pac. Rep. 152; *Burnett vs. Kullak*, 76 Cal. 535, 13 Pac. Rep. 401; *Vejar vs. Mound City L. & W. Assoc.*, 97 Cal. 659, 665, 32 Pac. Rep. 713; *Bates vs. Howard*, 105 Cal. 173, 183, 38 Pac. Rep. 715; *Murray vs. Tulare Irr. Co.*, 120 Cal. 311, 315, 49 Pac. Rep. 563, 52 Id. 586. See *Paroni vs. Ellison*, 14 Nev. 60, 63.

8. **Mining claim** having descriptive name, which was known and was described in mining records, may be conveyed by deed in which only description of property conveyed is name by which it is known.—*Carter vs. Bacigalupi*, 83 Cal. 187, 193, 23 Pac. Rep. 361.

9. **"GRANT."**—"That at the present day the word 'grant' is effectual to convey an estate in a corporeal hereditament is clear, and had become so in practice long before 1845, when the statute of Victoria provided that corporeal tenements and hereditaments should be deemed to lie in grant as well as in livery. In fact, the distinction of the ancient common law in this respect had probably never obtained in this country. At all events, the word 'grant' has now become a generic term, applicable to the transfer of all classes of real property."—*San Francisco & O. R. Co. vs. Oakland*, 43 Cal. 502, 505.

See post § 1243 and note.

10. **PAROL EVIDENCE ADMISSIBLE** in aid of description of realty in deed which is in litigation.—*Carter vs. Bacigalupi*, 83 Cal. 187, 193, 23 Pac. Rep. 361.

See fully Code Civ. Proc. § 2077 and note.

29. **Reformation of conveyance of married woman.**

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Marlow vs. Barlew*, 53 Cal. 456, 460 (applied); *Leonis vs. Lazarovich*, 55 Cal. 52, 57 (applied); *Hoag vs. Howard*, 55 Cal. 564, 565 (cited); *Wedel vs. Herman*, 59 Cal. 507, 513, 514 (applied); *Hand vs. Hand*, 68 Cal. 135, 140, 53 Am. Rep. 5, 8 Pac. Rep. 705 (applied in dis. op.); *Tolman vs. Smith*, 74 Cal. 345, 350, 16 Pac. Rep. 189 (applied); *Danglarde vs. Elias*, 80 Cal. 65, 67, 22 Pac. Rep. 69 (applied); *Jackson vs. Torrence*, 83 Cal. 521, 537, 23 Pac. Rep. 696 (applied); *Banbury vs. Arnold*, 91 Cal. 606, 608, 27 Pac. Rep. 934 (applied); *Mathews vs. Davis*, 102 Cal. 202, 207, 36 Pac. Rep. 353 (applied); *Simons vs. Bedell*, 122 Cal. 341, 348, 63 Am. St. Rep. 35, 65 Pac. Rep. 3 (applied); *Loupe vs. Smith*, 123 Cal. 491, 56 Pac. Rep. 354 (applied).

2. Assent of husband to convey.—See ante § 162 and note.

3. Conclusiveness of certificate of acknowledgment.—See post § 1185 and note.

4. Form and sufficiency of acknowledgment.—See post §§ 1185-1187 and notes.

5. NECESSITY OF ACKNOWLEDGMENT.

Generally.—Acknowledgment is part of execution of married woman's deed; until acknowledged it is not executed. The statement that instrument is executed imports every act requisite to make it operative and effective.—Joseph vs. Dougherty, 60 Cal. 358, 360. See Leonis vs. Lazzarovich, 55 Cal. 52, 55; Wedel vs. Herman, 59 Cal. 507; Hand vs. Hand, 68 Cal. 135, 140, 58 Am. Rep. 5, 8 Pac. Rep. 705 (dis op.); Moore vs. Hopkins, 83 Cal. 270, 272, 17 Am. St. Rep. 348, 23 Pac. Rep. 318; Mathews vs. Davis, 102 Cal. 202, 207, 36 Pac. Rep. 358; American Sav. & L. Soc. vs. Burghardt, 19 Mont. 328, 61 Am. St. Rep. 507, 48 Pac. Rep. 391.

See par. 25 this note, post § 1187 note par. 8; also notes 41 Am. Dec. 179; 52 Am. Dec. 493; 73 Am. Dec. 599; 85 Am. Dec. 144.

6. Acknowledgment is only mode provided by law for authenticating act of parties, so as to entitle instrument to record and make it notice to subsequent purchasers, and entitle it to be read in evidence without other proofs. If purchasers neglect to have their deeds properly authenticated and recorded, they will be liable to have their title divested by subsequent conveyances to innocent parties, and to further inconvenience of being compelled to prove their execution when called upon to put them in evidence.—Landers vs. Bolton, 26 Cal. 392, 405.

7. SAME—LAW PRESUMES FRAUD OR COERCION in case of married woman's deed which is not acknowledged.—Leonis vs. Lazzarovich, 55 Cal. 52, 57.

8. Amendments of 1891 to §§ 1186, 1187, and 1191 do not repeal by implication provision of § 1093 requiring an acknowledgment by married woman to conveyance of her property. Eliminating portion of § 1093 referring to amended section, it is apparent that § 1093, read in conjunction with § 1187, as amended, still has plain meaning; i. e. that conveyance by married woman must be acknowledged by her.—Loupe vs. Smith, 123 Cal. 491, 494, 56 Pac. Rep. 254.

9. Since amendment to § 1093 of 1895, no cases have come before courts construing section as it now stands.

10. Neither § 1187 nor § 1093 of Civil Code effaces the other so long as definite and intelligible scheme is left, deduced from reading the two sections together.—Loupe vs. Smith, 123 Cal. 491, 495, 56 Pac. Rep. 254.

11. SAME—STATUTE APPLIES TO ALL MARRIED WOMEN without exception, whether living with or apart from their husbands, and to all property that is owned by a married woman as her separate property or otherwise.—Danglarde vs. Elias, 80 Cal. 65, 67, 22 Pac. Rep. 69.

12. Declaration of homestead by married woman must be acknowledged, and certified in manner prescribed by § 1186.—Kennedy vs.

Gloster, 98 Cal. 143, 148, 32 Pac. Rep. 941. See post §§ 1262, 1266.

13. Unacknowledged executory contract by feme covert for sale of real estate cannot be enforced against vendee. The vendee could not have enforced contract against her, and there is no principle of equity that gives, or should give, her rights under contract which to defendant vendee cannot be granted.—Banbury vs. Arnold, 91 Cal. 606, 608, 27 Pac. Rep. 934. See Mathews vs. Davis, 102 Cal. 202, 207, 36 Pac. Rep. 358.

14. Specific performance of unacknowledged executory contract of married woman to convey her real property cannot be compelled.—Jackson vs. Torrence, 83 Cal. 521, 537, 28 Pac. Rep. 695; Banbury vs. Arnold, 91 Cal. 606, 607, 27 Pac. Rep. 934; Mathews vs. Davis, 102 Cal. 202, 207, 36 Pac. Rep. 358; Loupe vs. Smith, 123 Cal. 491, 496, 56 Pac. Rep. 254.

15. Contra: where she has accepted and retained of the consideration with full knowledge of all facts.—Simons vs. Bedell, 122 Cal. 341, 348, 68 Am. St. Rep. 35, 65 Pac. Rep. 3 (Temple, J., dissenting).

16. SAME—SAME—LEASE given by married woman must be acknowledged.—Carlton vs. Williams, 77 Cal. 89, 11 Am. St. Rep. 243, 19 Pac. Rep. 185. See Mathews vs. Davis, 102 Cal. 202, 207, 36 Pac. Rep. 358.

See ante § 162.

17. SAME—SAME—MORTGAGE GIVEN BY MARRIED WOMAN upon her separate property is not valid unless acknowledged by her in the same manner as grant of her separate real property.—Tolman vs. Smith, 74 Cal. 345, 350, 16 Pac. Rep. 189.

18. In terms "instrument" and "conveyance," as used in sections of Civil Code, legislature intended to include mortgages, and mortgage signed by married woman is not executed so as to be valid unless acknowledged as deed is required to be.—Tolman vs. Smith, supra.

19. Acknowledgment by married woman is as necessary part of execution of mortgage by her as her signature.—Le Mesnager vs. Hamilton, 101 Cal. 532, 535, 40 Am. St. Rep. 31, 35 Pac. Rep. 1054.

20. Statement in certificate of officer purporting to take acknowledgment does not estop her to deny that she ever acknowledged execution of instrument.—Le Mesnager vs. Hamilton, supra; Wheelock vs. Cavitt, 91 Tex. 679, 683, 66 Am. St. Rep. 920, 45 S. W. Rep. 796.

21. No different rule should exist as between acknowledgment of mortgage or deed by married woman.—Tolman vs. Smith, 74 Cal. 345, 348, 16 Pac. Rep. 189.

22. NECESSITY OF CERTIFICATE OF ACKNOWLEDGMENT.—Prior to adoption of codes execution, acknowledgment, and certification essential to validity of conveyance by married woman, and each was required to be made and done in mode and according to form which law prescribed.—See Wedel vs. Herman, 59 Cal. 507, 511.

23. "The sole purpose of a certificate of acknowledgment is to furnish proof of due execution of instrument, which statute permits

or requires to be proven in that manner. When it is said that deed of married woman is not complete without certificate of acknowledgment, and that certificate forms essential part of the conveyance, the meaning is not that it forms part of the deed, as her signature or words expressive of conveyance do, but merely that deed cannot be offered in evidence or used in any manner to show that title has passed from her, unless it bears on its face evidence of its due execution. The certificate of acknowledgment still remains solely as evidence of execution of instrument."—*Smith vs. Greer*, 31 Cal. 476, 479.

24. SAME—RULE UNDER CODE.—Certificate of acknowledgment is not essential to conveyance of feme covert, but is regarded under codes simply as record proof of fact of acknowledgment; and when acknowledgment has been made, according to law, before an officer qualified by law to take it, party making it has done all that law requires to make instrument her act and deed, although defectively certified.—*Wedel vs. Herman*, 59 Cal. 507, 514; *Banbury vs. Arnold*, 91 Cal. 606, 610, 27 Pac. Rep. 934.

25. Certificate of officer not necessary to validity of deed, but may be supplied at later day; but where certificate is attached, it is prima facie evidence of fact that deed was acknowledged as therein indicated, and if it fails to show examination and acknowledgment separate and apart from husband, or any other essential to due and sufficient acknowledgment, it will be presumed that such necessary acts were not done.—*Dangiarde vs. Elias*,

30 Cal. 65, 67, 22 Pac. Rep. 69 (before amendment of 1891).

26. PRACTICE.—Findings of court trust deed was duly made, signed, executed, and delivered by married woman, will not be disturbed upon appeal, where evidence is conflicting as to whether code was complied with by notary public before he affixed his certificate of acknowledgment.—*People vs. Cogswell*, 113 Cal. 129, 142, 45 Pac. Rep. 270, 35 L. R. A. 269.

27. Finding that conveyance was "executed" imports that it was "acknowledged."—*Joseph vs. Dougherty*, 60 Cal. 358, 360.

See ante par. 5 this note.

28. PRESUMPTION OF KNOWLEDGE OF CONTENTS of deed by married woman does not arise from fact of executing it, especially when it appears from instrument itself that she was unable to write.—*Pease vs. Barbiers*, 10 Cal. 436, 440.

29. REFORMATION OF CONVEYANCE OF MARRIED WOMAN.—When conveyance, mortgage, or other contract of married woman has been duly executed by her, as provided by statute, it is subject to reformation in like manner as contract of any other person.—*Stevens vs. Holman*, 112 Cal. 345, 53 Am. St. Rep. 216, 219, 44 Pac. Rep. 670.

See post § 3399 and note.

Compare: *Selover vs. American R. Com. Co.*, 7 Cal. 266, 275, holding equity has no jurisdiction to reform defective deeds or acknowledgments of married women.

See note 19 Am. Dec. 230.

§ 1094. POWER OF ATTORNEY OF MARRIED WOMAN, HOW ACKNOWLEDGED. A married woman may make, execute, and revoke powers of attorney for the sale, conveyance, or encumbrance of her real or personal estate, which shall have the same effect as if she were unmarried, and may be acknowledged in the same manner as a grant of real property.

History: Enacted March 21, 1872, founded upon § 1, Act April 3, 1863, Stats. 1863, p. 165; amended March 9, 1895, Stats. and Amdts. 1895, p. 39.

1. Acknowledgment—Certificate not reciting separate examination.
2. Act of April 13, 1863—Prior thereto—Wife's disability to execute power.
3. Same—Husband as joint constituent with wife.
4. Same—Husband must join in execution.
5. Husband may be attorney in fact.
6. Joint power from husband and wife.
7. Power authorizing sale.
8. Power to convey wife's inchoate interest in husband's estate.
9. Statute validating previously invalid powers.
10. Same—Not to apply to instrument not signed by husband.

1. ACKNOWLEDGMENT.—Certificate not reciting separate examination of wife, as rendering power invalid.—See *Brown vs. Rouse*, 104 Cal. 672, 38 Pac. Rep. 507.

2. ACT OF APRIL 3, 1863.—Prior thereto married woman could not invest another with power to sell any interest which she might possess in real estate. It was essential that

she join with her husband in execution of conveyance.—*Mott vs. Smith*, 16 Cal. 532, 556; *Dentzel vs. Waldie*, 30 Cal. 138, 142; *Dow vs. Gould & C. S. Min. Co.*, 31 Cal. 629, 645, 654. See *Elliott vs. Teal*, 5 Sawy. C. C. 249, 8 Fed. Cas. 545.

3. Husband as joint constituent with wife, in body of instrument—not necessary; it is sufficient if he merely sign, seal, and acknowledge the instrument in proper form.—*Dentzel vs. Waldie*, 30 Cal. 138, 146.

4. Husband must join in execution of it, in order to give validity to the instrument.—*Heinlen vs. Martin*, 53 Cal. 321, 338.

5. HUSBAND MAY BE ATTORNEY IN FACT, under power of attorney from his wife.—*Racouillat vs. Sansevain*, 32 Cal. 376, 385.

As to necessity of attorney signing instrument both in his individual and representative capacity, see ante § 1091 note par. 14; also post § 1095 and note.

6. JOINT POWER FROM HUSBAND AND WIFE confers upon attorney power to deal

with separate property of wife.—*Douglas vs. Fulda*, 50 Cal. 77, 79.

7. **POWER AUTHORIZING SALE**, that is, transfer for valuable consideration, does not authorize conveyance from motives of love and affection.—*Mott vs. Smith*, 16 Cal. 533, 557.

8. **POWER TO CONVEY WIFE'S IN-CHOATE INTEREST** in husband's real estate may be given by wife to her husband; and instrument duly executed by himself, and by him for her under such authority, is effectual to transfer such interest.—*Munger vs. Bald-*

ridge, 41 Kan. 236, 13 Am. St. Rep. 273, 21 Pac. Rep. 159; followed *Wilkinson vs. Elliott*, 43 Kan. 590, 19 Am. St. Rep. 158, 23 Pac. Rep. 614.

9. **STATUTE VALIDATING PREVIOUSLY INVALID POWERS** of attorney by married woman, and all conveyances executed under such powers, is not unconstitutional.—*Dentzel vs. Waldie*, 30 Cal. 138, 145.

10. **Does not apply to instrument** to which husband had not manifested his assent by his written signature thereto.—*Dow vs. Gould & C. S. Min. Co.*, 31 Cal. 629, 655.

§ 1095. ATTORNEY IN FACT, HOW MUST EXECUTE FOR PRINCIPAL.

When an attorney in fact executes an instrument transferring an estate in real property, he must subscribe the name of his principal to it, and his own name as attorney in fact.

History: Enacted March 21, 1872.

1. Authority must be in writing.
2. Conclusiveness of conveyance.
3. Conveyance by attorney in fact.
4. Same—Words are descriptive persons merely.
5. Same—Binding in equity.

1. **Authority must be in writing.**—See ante § 1091 note par. 19.

2. **CONCLUSIVENESS OF CONVEYANCE.**—Conveyance made by attorney in fact under power authorizing him "to make and execute conveyances," and approved by principal, cannot be assailed for want of authority to execute it.—*Hunter vs. Watson*, 12 Cal. 363, 376, 73 Am. Dec. 543.

3. **CONVEYANCE BY ATTORNEY IN FACT**, by virtue of power conferred on him, must be in name of his principal; otherwise latter is not bound thereby.—*Fisher vs. Salmon*, 1 Cal. 413, 54 Am. Dec. 297; *Echols vs. Cheney*, 28 Cal. 157, 161; *Morrison vs. Bowman*, 29 Cal. 337, 351, 352. See *Southern Pac. Co. vs. Schmidt D. Co.*, 118 Cal. 368, 371, 50 Pac. Rep. 650; *Avery vs. Dougherty*, 102 Ind. 443, 52 Am. Rep. 680, 2 N. E. Rep. 123; *Stinchfield vs. Little*, 1 Me. 331, 10 Am. Dec. 65; *Brinley vs. Mann*,

56 Mass. (3 Cush.) 337, 48 Am. Dec. 669; *Wood vs. Goodridge*, 60 Mass. (6 Cush.) 117, 52 Am. Dec. 771; *Byington vs. Simpson*, 134 Mass. 169, 45 Am. Rep. 314; *Pentz vs. Stanton*, 10 Wend (N. Y.) 271, 25 Am. Dec. 553; *Hunt vs. Rousmaniers*, 21 U. S. (8 Wheat.) 174, bk. 5 L. ed. 589.

4. **Words are descriptive persons merely**, and the fact that in truth the person signing is such attorney in fact cannot impart to instrument executed by him "as attorney for" principal named character of such conveyance by latter.—*Echols vs. Cheney*, 28 Cal. 157, 161; *Morrison vs. Bowman*, 29 Cal. 337, 352.

5. **Binding in equity.**—An agreement made by an attorney for his principal, though inoperative at law for want of formal execution in the name of principal, is binding in equity if attorney had authority; and if instrument so defectively executed be conveyance of real estate, it will be sustained in equity as agreement to convey, and will be good against principal, subsequent lien creditors, and subsequent purchasers with notice.—*Love vs. Sierra Nevada L. W. & Min. Co.*, 32 Cal. 639, 652, 91 Am. Dec. 602.

§ 1096. CONVEYANCE OF REAL ESTATE WHEN NAME OF PERSON HAS BEEN CHANGED.

Any person in whom the title of real estate is vested, who shall afterwards, from any cause, have his or her name changed, must, in any conveyance of said real estate so held, set forth the name in which he or she derived title to said real estate.

History: Enacted, on recommendation of Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 396, held unconstitutional, see history, § 4 ante; re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXLIII, p. 602; a codification of § 1, Act March 11, 1874, Stats. 1873-4, p. 345.

MISNOMER OF GRANTOR—"Redman" instead of "Redmond."—Where the legal title to land is in K. F. Redmond, a deed executed by K. F. Redman will not convey title. The court say: "In holding that the last deed executed to defendant by Redman did not, of itself, cure the apparent defect in defendant's

title growing out of the fact that the land was formerly conveyed to Redmond, and not to Redman, we have not overlooked the act concerning conveyances."—Stats. 1873-4, p. 345 (codified in above section).—*Peckham vs. Stewart*, 37 Cal. 147, 154, 21 Pac. Rep. 147.

ARTICLE II.

EFFECT OF TRANSFER.

- § 1104. What easements pass with property.
 § 1105. When fee simple title is presumed to pass.
 § 1106. Subsequently acquired title passes by operation of law.
 § 1107. Grant, how far conclusive on purchasers.
 § 1108. Conveyances by owner for life or for years.
 § 1109. Grant made on condition subsequent.
 § 1110. Grants on condition, when absolute.
 § 1111. Grant of rents, reversions, and remainders.
 § 1112. Boundary by highway, what passes.
 § 1113. Implied covenants.
 § 1114. What the term "encumbrances" embraces.
 § 1115. Lineal and collateral warranties abolished.

§ 1104. WHAT EASEMENTS PASS WITH PROPERTY. A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Commissioners' note.
3. Construction of statute.
- 4, 5. Light and air—Generally.
6. Same—Construction of building by owner of two lots.
- 7, 8. Mode of transfer—No distinction as to.
9. Same—Mortgage and subsequent foreclosure deed.
- 10, 11. "Obviously and permanently used."
- 12-17. Severance of tenements.
- 18, 19. Way.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Cave vs. Crafts*, 53 Cal. 135 (construed and applied); *Cross vs. Kitts*, 69 Cal. 217, 221, 58 Am. Rep. 558, 10 Pac. Rep. 409 (applied); *Riverside L. & Irr. Co. vs. Jensen*, 73 Cal. 550, 554, 15 Pac. Rep. 131 (cited); *Blum vs. Weston*, 102 Cal. 362, 367, 41 Am. St. Rep. 188, 36 Pac. Rep. 778 (construed and applied); *Koshland vs. Spring*, 116 Cal. 689, 698, 48 Pac. Rep. 58 (cited); *Kennedy vs. Burnap*, 120 Cal. 488, 490, 492, 493, 52 Pac. Rep. 843, 40 L. R. A. 476 (cited); *Jones vs. Sanders*, 138 Cal. 405, 411, 414, 71 Pac. Rep. 506 (construed and applied); *Pendola vs. Ramm*, 138 Cal. 517, 521, 71 Pac. Rep. 624 (construed and applied).

2. COMMISSIONERS' NOTE says that "although question does not seem to have been decided, there can be little doubt that grantee is entitled to benefit of these quasi easements, whether existing at time grant is bargained for, or at time when it is actually delivered."

3. CONSTRUCTION OF STATUTE.—Section 1104 has not converted what at common law were implied easements of light and air, by severance of estates, into statutory easements by such severance.—*Kennedy vs. Burnap*, 120 Cal. 488, 492, 52 Pac. Rep. 843, 40 L. R. A. 476.

4. LIGHT AND AIR.—Doctrine that proprietor may by user acquire easement over adjoining land for the passage of, does not prevail in this country.—*Western Granite & M.*

Co. vs. Knickerbocker, 103 Cal. 111, 113, 37 Pac. Rep. 193; *Ingwersen vs. Barry*, 118 Cal. 342, 50 Pac. Rep. 536; *Kennedy vs. Burnap*, 120 Cal. 488, 490, 52 Pac. Rep. 843, 40 L. R. A. 476.

5. Use of light and air through windows overlooking adjoining lot is by right, in sense that it does not harm owner of adjoining property or such property, but it would not follow necessarily that this air and light are to be deemed appurtenant to user's land, or that enjoyment thereof was by strict right.—*Kennedy vs. Burnap*, 120 Cal. 488, 493, 52 Pac. Rep. 843, 40 L. R. A. 476.

6. SAME—CONSTRUCTION OF BUILDING BY OWNER OF TWO LOTS on one of them so as to obtain,—through windows overlooking vacant lot,—cannot be said to make such "obvious" and "permanent" use of these openings and lot as to be held by implication to transfer easement over vacant lot, when he sells the lot built upon.—*Kennedy vs. Burnap*, 120 Cal. 488, 492, 52 Pac. Rep. 843, 40 L. R. A. 476. See *Keats vs. Hugo*, 115 Mass. 204, 15 Am. Rep. 80; *Mullen vs. Stricker*, 19 Ohio St. 135, 2 Am. Rep. 379.

7. No distinction is made by code as to mode of transfer, but it is provided generally that transfer of real property passes all easements thereto attached.—*Blum vs. Weston*, 102 Cal. 362, 367, 41 Am. St. Rep. 188, 36 Pac. Rep. 778 (partition proceedings). See *Ritchey vs. Welsh*, 149 Ind. 214, 48 N. E. Rep. 1031, 40 L. R. A. 105.

8. EASEMENT—Resulting by operation of law from fact that parcel of land was cut off from county road by other subdivisions of original tract, attached to that parcel as appurtenance, and passes with any subsequent transfer of title, whether such transfer is by deed executed by party, or by sale under execution.—*Blum vs. Weston*, 102 Cal. 362, 367, 41 Am. St. Rep. 188, 36 Pac. Rep. 778. See *Ritchey vs. Welsh*, 149 Ind. 214, 220, 48 N. E. Rep. 1031, 40 L. R. A. 105; *Palmer vs. Palmer*, 150

N. Y. 139, 55 Am. St. Rep. 653, 44 N. E. Rep. 966 (created by partition of land).

9. Mortgage and subsequent foreclosure deed operate to create easement in mortgagee to use of mortgagor's canal and water right on lands adjoining mortgaged premises, when such water had been habitually used for many years upon mortgaged premises by mortgagor.—*Pendola vs. Ramm*, 188 Cal. 517, 521, 71 Pac. Rep. 624.

See par. 14 this note.

10. "Obviously and permanently used."—Easement not apparent of which grantor has not made use, and of which he has no information, does not pass by implication.—*Hyde Park T.-H. L. Co. vs. Brown*, 172 Ill. 329, 50 N. E. Rep. 127.

11. Distinguished: *Jones vs. Sanders*, 138 Cal. 405, 412, 71 Pac. Rep. 506 (holding that execution by mortgagor of grant of easement, whether essential to its creation or not, furnishes satisfactory evidence that grantor had knowledge of existence of quasi easement at time of his grant; and that as he was owner, with unconditional authority to sell, it was immaterial whether mortgagees, who had joined in execution of deed, had knowledge of its existence or not).

12. Severance of tenements.—Division of property into two parts by owner and grant of one of them, is taken by implication to include all such easements in remaining part as are necessary for reasonable enjoyment of part which he grants, and in form which it assumes at time he transfers it.—*Cave vs. Crafts*, 53 Cal. 135, 140. See *Sparks vs. Hess*, 15 Cal. 186, 195; *Farmer vs. Ukiah W. Co.*, 56 Cal. 11, 15; *Quinlan vs. Noble*, 75 Cal. 250, 252, 17 Pac. Rep. 69; *Smith vs. Corbit*, 116 Cal. 587, 591, 48 Pac. Rep. 725; *Lampman vs. Milks*, 21 N. Y. 505; *Frank vs. Hicks*, 4 Wyo. 502, 35 Pac. Rep. 475, 1025.

13. "Where owner of two tenements sells one of them, or owner of entire estate sells portion of it, purchaser takes tenement or portion sold with all benefits and burdens that appear at time of sale to belong to it, as between it and property which vendor retains. . . . No easement exists so long as unity of possession remains, because owner of whole may at any time rearrange quality of several servitudes; but upon severance by sale of part, right of owner to redistribute

ceases, and easements or servitudes are created corresponding to benefits or burdens existing at time of sale."—*Lampman vs. Milks*, 21 N. Y. 505, 507; quoted with approval *Quinlan vs. Noble*, 75 Cal. 250, 252, 17 Pac. Rep. 69.

14. Followed: *McPherson vs. Acker, MacA. & M. (D. C.)* 150, 43 Am. Rep. 749; *Leddell vs. Denton*, 24 N. J. Eq. 567; *Simmons vs. Cloonan*, 31 N. Y. 557, 565.

15. Distinguished: *Ludlow vs. Hudson River R. Co.*, 6 Lans. (N. Y.) 128; *Vidvard vs. Cushman*, 23 Hun (N. Y.) 437.

16. DEVISEE OF PROPERTY BURDENED WITH QUASI EASEMENT, imposed by deviser for benefit of other property owned by him, takes with such burden, and easement is thereby created; and upon subsequent sale of portion of burdened property to purchaser of property having easement, grantor at time granting easement in remaining portion, both properties have easement in such remaining portion.—*Jones vs. Sanders*, 138 Cal. 405, 412, 71 Pac. Rep. 506.

17. EXECUTION OF MORTGAGE on one of two tenements by owner of both, to which ditch is appurtenant, creates potentially severance of tenements, and easement of way for ditch over mortgaged tenement, over which ditch passes to other tenement, is reserved from mortgage by implication of law in favor of such other tenement.—*Dixon vs. Schermeier*, 110 Cal. 532, 536, 42 Pac. Rep. 1091.

See par. 9 this note.

18. WAY.—"Where the owner of land, to which right of way is appurtenant, sells or devises it in parcels to different persons, it is held that each of such persons acquires right of way as appurtenant to his particular part of land."—*Currier vs. Howes*, 103 Cal. 431, 436, 37 Pac. Rep. 521. See *Lansing vs. Wiswall*, 5 Den. (N. Y.) 213; *Hills vs. Miller*, 3 Paige Ch. (N. Y.) 254, 24 Am. Dec. 213; *Watson vs. Bloren*, 1 Serg. & R. (Pa.) 227, 7 Am. Dec. 617; *Codling vs. Johnson*, 9 Barn. & C. 333, 4 Man. & Ry. 671, 3 L. J. K. B. 68, 17 Eng. C. L. 524, 33 Rev. Rep. 375.

19. Way to reserved portion of leased building.—Where there is, without going through the leased portion, an implied right of way to reserved portion, way through any portion of leased portion cannot be claimed by lessor.—*Ramirez vs. McCormick*, 4 Cal. 245.

§ 1105. WHEN FEE SIMPLE TITLE IS PRESUMED TO PASS. A fee simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
- 2, 3. Contract to convey to one having but equitable title.
4. Contract to procure and deliver good and sufficient conveyance.
- 5, 6. "Grant."
- 7-9. Habendum.
10. Quitclaim deed.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Mabury vs. Ruiz*, 58

Cal. 11, 15 (cited); *Klumpke vs. Baker*, 68 Cal. 559, 561, 10 Pac. Rep. 197 (construed and applied); *People vs. Blake and McDonald*, 84 Cal. 611, 615, 22 Pac. Rep. 1042, 24 Id. 213 (construed and applied); *Palmer vs. Pasadena L. & W. Co.*, 91 Cal. 74, 81, 27 Pac. Rep. 539 (cited); *Pellissier vs. Corker*, 103 Cal. 516, 518, 37 Pac. Rep. 465 (construed as not applicable); *Barnett vs. Barnett*, 104 Cal. 293, 300, 37 Pac. Rep. 1049 (applied); *Bates vs. Howard*, 105

Cal. 173, 182, 38 Pac. Rep. 715 (construed and applied).

2. **CONTRACT TO CONVEY BY ONE HAVING BUT EQUITABLE TITLE**, when he can make deed, is promise to convey fee simple title as soon as such title vested in him.—*Burlingame vs. Rowland*, 77 Cal. 315, 317, 19 Pac. Rep. 526, 1 L. R. A. 329.

3. **After-acquired title**—When will pass,—as to, see post § 1106 and note.

4. **CONTRACT TO PROCURE AND DELIVER GOOD AND SUFFICIENT CONVEYANCE** by grant, bargain, and sale deed from all owners, binds party so contracting not simply to obtain conveyance in form, a semblance or muniment of title, but conveyance of land itself, and fee simple title thereto.—*Bates vs. Howard*, 105 Cal. 173, 182, 38 Pac. Rep. 715.

5. **"GRANT"** in the proper clause of a conveyance, without other words in any part of deed indicating a less estate, raises presumption that fee simple title was intended to pass.—*Klumpke vs. Baker*, 68 Cal. 559, 561, 10 Pac. Rep. 197 (in conveyance by husband to wife). See *Montgomery vs. Sturdivant*, 41 Cal. 290, 292.

See note 86 Am. Dec. 642.

6. **Grant of land to be used as an alleyway** by grantee, in common with owners of other property, is grant of easement—a right to use thereof, and nothing more, it clearly appearing from grant that lesser estate was intended.—*Pellissier vs. Corker*, 103 Cal. 516, 518, 37 Pac. Rep. 465.

7. **HABENDUM LIMITING ESTATE** conveyed to life estate, with remainder to issue and heirs of body of grantor, controls grant-

ing clause, and shows that grantor did not intend by its use to create estate in fee.—*Barnett vs. Barnett*, 104 Cal. 298, 300, 37 Pac. Rep. 1049. See *Henderson vs. Mack*, 32 Ky. 379.

8. **Attempt to limit use**, where conveyance in fee simple, is invalid, being inconsistent with fee title.—*Eldridge vs. See Yup Co.*, 17 Cal. 44; *Pellissier vs. Corker*, 103 Cal. 516, 518, 37 Pac. Rep. 465.

9. **CONSTRUCTION OF GRANT**.—**HABENDUM** is to be resorted to as well as any other part of instrument; and, if it appear from such consideration that grantee intended by habendum clause to restrict or limit or enlarge estate named in granting clause, habendum will prevail over granting clause.—*Faivre vs. Daley*, 93 Cal. 664, 670, 29 Pac. Rep. 256; *Pellissier vs. Corker*, 103 Cal. 516, 518, 37 Pac. Rep. 465; *Barnett vs. Barnett*, 104 Cal. 298, 300, 37 Pac. Rep. 1049.

See, however, ante § 1070 and note.

10. **QUITCLAIM DEED MADE IN GOOD FAITH FOR VALUABLE** consideration, conveys absolute fee simple title if party executing it had such title.—*Sullivan vs. Davis*, 4 Cal. 291; *Downer vs. Smith*, 24 Cal. 114, 123; *Carpentier vs. Williamson*, 25 Cal. 154; *Lawrence vs. Ballou*, 37 Cal. 518, 521; *Graff vs. Middleton*, 48 Cal. 341, 343-344 (transfers only such interest as grantor then had; prevails over warrantee deed subsequently registered); *Frey vs. Clifford*, 44 Cal. 335 (same holding as first case); *Rego vs. Van Pelt*, 65 Cal. 254, 256, 3 Pac. Rep. 867; *Spaulding vs. Bradley*, 79 Cal. 449, 456, 22 Pac. Rep. 47; *Taylor vs. Opperman*, 79 Cal. 463, 470, 21 Pac. Rep. 869.

As to effect of quitclaim deed to convey title, see note 53 Am. Rep. 749.

§ 1106. **SUBSEQUENTLY ACQUIRED TITLE PASSES BY OPERATION OF LAW**. Where a person purports by proper instrument to grant real property in fee simple, and subsequently acquires any title, or claim of title thereto, the same passes by operation of law to the grantee, or his successors.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 396, held unconstitutional, see history, § 4 ante.

1. Applied, cited, construed, referred to, etc.
2. Assignment and transfer by pre-emptor prior to patent.
3. Commissioners' note.
- 4, 5. Conveyance by pre-emptor subsequent to final proof.
6. Cotenant.
7. Decree distributing estate of decedent.
8. Deed of exchange.
9. Mortgage—Mortgager not having legal title.
10. Same—By one in possession of public land.
11. Patent to state school land to assignee of applicant to purchase.
12. Power of attorney to mortgage land.
- 13, 14. Quitclaim deed.
- 15, 16. Same—By mortgager to mortgagee.
- 17-19. Same—By applicant to purchase public land.
- 20, 21. Same—Covenant against encumbrances.

22. Reconveyance to husband of naked legal title.
- 23, 24. Spanish law.
25. Stranger—Taking after title in.
26. Tax title acquired by grantor.
27. Title in fee simple absolute.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Hoag vs. Howard*, 55 Cal. 564, 565 (cited); *Klumpke vs. Baker*, 68 Cal. 559, 561, 10 Pac. Rep. 197 (construed and applied); *People vs. Blake*, 84 Cal. 611, 614, 22 Pac. Rep. 1042, 24 Id. 313 (cited); *Dorn vs. Baker*, 96 Cal. 206, 209, 31 Pac. Rep. 37 (applied and construed); *Green vs. Green*, 103 Cal. 108, 110, 37 Pac. Rep. 188 (applied); *In Matter Estate Ryder*, 141 Cal. 366, 371, 74 Pac. Rep. 993 (construed and applied).

2. **ASSIGNMENT AND TRANSFER BY PRE-EMPTOR PRIOR TO PATENT**, within contemplation of U. S. Rev. Stats., § 2263, prohibiting such assignments, is assignment and

transfer made before final proof and before taking of affidavit prescribed by U. S. Rev. Stats., § 2262.—*Merrill vs. Clark*, 103 Cal. 367, 371, 37 Pac. Rep. 238.

2. **COMMISSIONERS' NOTE**, which is reprint of portion of opinion of Field, C. J., in *Clark vs. Baker*, 14 Cal. 612, 627-630, 76 Am. Dec. 449, says: "The thirty-third section of act concerning conveyances changes rule of common law as to effect of deeds under Statute of Uses, upon subsequently acquired interests of grantor, and gives to them an operation equivalent to most expressive covenant of warranty. That act reads as follows: 'If any person shall convey any real estate, by conveyance, purporting to convey same in fee simple absolute, and shall not, at time of such conveyance, have legal estate in such real estate, but shall afterwards acquire same, legal estate subsequently acquired shall immediately pass to grantee, and such conveyance shall be valid, as if such legal estate had been in grantor at time of conveyance.' A deed with covenant of warranty operates upon future-acquired interest, not as in fact passing such interest, but by way of estoppel upon grantor against its assertion. . . . The effect, then, of its provisions upon conveyance of premises in fee—such, for example, as that of *Clark to Baker*—is same as if it were written upon its face that grantor conveyed all estate which he then possessed, or which he might at any time thereafter acquire. Had *Clark*, after his conveyance to *Baker*, purchased outstanding title, it would, under statute, immediately have inured to the benefit of his grantee."

The case held section applied to mortgages equally as to conveyances, absolute in form; and that mortgage on land in fee, legal title to which mortgager did not have when he executed mortgage, operated on outstanding title, afterwards acquired by him, as effectually as if it had been originally possessed by him.—For other cases supporting this ruling, see *Lent vs. Morrill*, 25 Cal. 492, 500; *Green vs. Clark*, 31 Cal. 591, 593; *Sherman vs. McCarthy*, 57 Cal. 507, 515; *Camp vs. Grider*, 62 Cal. 20, 25; *Orr vs. Stewart*, 67 Cal. 275, 278, 7 Pac. Rep. 698; *Barnard vs. Wilson*, 74 Cal. 512, 517, 16 Pac. Rep. 307; *Stewart vs. Powers*, 98 Cal. 514, 518, 33 Pac. Rep. 486; *Madaris vs. Edwards*, 33 Kan. 284, 291, 4 Pac. Rep. 313.

See post § 2930 and note.

4. **CONVEYANCE BY PRE-EMPTOR SUBSEQUENT TO FINAL PROOF**, but before patent, passes to grantee title afterwards acquired by grantor through patent, regardless of any deed by him after patent to third person, with notice of prior conveyance.—*Merrill vs. Clark*, 103 Cal. 367, 370, 37 Pac. Rep. 238.

5. **Contra**: Where conveyance is by quitclaim deed.—*McDonald vs. Edmonds*, 44 Cal. 328, 330.

See pars. 13-20 this note.

6. **Cotenant who undertakes by a bargain and sale deed to grant specific tract in severalty**, although his deed will not convey interests of his cotenants, is estopped, under well-settled rules, from denying, as against his grantee, that he owned less interest than his deed purports to convey; and if he afterwards acquires title of his cotenants in specific tract,

such title will inure to benefit of his grantee; and if, upon partition, such specific tract be allotted to him, then it happens that he does acquire his cotenants' title, and it passes to his grantee.—*Emeric vs. Alvarado*, 90 Cal. 444, 456, 27 Pac. Rep. 356.

7. **DECREE DISTRIBUTING ESTATE OF DECEDENT** to one who, as heir apparent, had attempted to convey his expectancy, does not bar his grantee from asserting, in proper proceeding, any claim he may have under § 1106 to title so determined to have been acquired by such heir apparent, but such claim cannot be judicially determined by probate court or proceedings for such distribution.—*Estate of Ryder*, 141 Cal. 366, 371, 74 Pac. Rep. 993.

See Code Civ. Proc. 1678 and note.

8. **DEED OF EXCHANGE**, purporting to "exchange right and interest corresponding to each one" in designated ranches, but conveying no certain estate, contains no covenant of warranty, and has never been consummated by delivery of possession in lifetime of parties,—after-acquired title does not inure to benefit of grantee under.—*Bixby vs. Bent*, 59 Cal. 522, 530.

9. **MORTGAGE**—Mortgager not having legal title—Operation of mortgage on after-acquired title,—as to, see post § 2930 and note.

10. **By one in possession of public land** operates on title afterwards acquired by him to the land under the federal homestead act of 1862.—*Kirkaldie vs. Larrabee*, 31 Cal. 455, 457, 29 Am. Dec. 205.

See post § 2930 and note.

11. **PATENT TO STATE SCHOOL LAND TO ASSIGNEE OF APPLICANT TO PURCHASE**, vests in patentee legal title to land, and does not inure to benefit of holder of certificate of purchase of land under tax sale. The latter interest is equitable title only, to be perfected by payment in full to state of all charges; and most that can be claimed for holder of tax deed is that he has right, enforceable in equity, to have legal title transferred to him, upon his doing equity and paying back to patentee of state all money he has paid, and interest thereon.—*Dorn vs. Baker*, 96 Cal. 206, 209, 31 Pac. Rep. 37.

12. **POWER OF ATTORNEY TO MORTGAGE LAND**, title to which is not in principal, of which, however, he is in constructive possession, and which he had applied to government to purchase pursuant to act of congress, authorizes attorney to mortgage title subsequently acquired by patent, and mortgage passes to mortgagee such title.—*Ayres vs. Palmer*, 57 Cal. 309, 315.

13. **QUITCLAIM DEED** does not operate to pass after-acquired title of grantor.—*Morrison vs. Wilson*, 30 Cal. 344, 347; *Cadiz vs. Majors*, 33 Cal. 288. See *Quivey vs. Baker*, 37 Cal. 465, 471; *McDonald vs. Edmonds*, 44 Cal. 328, 330; *Barrett vs. Birge*, 50 Cal. 655-658; *Wholey vs. Cavanaugh*, 88 Cal. 132, 136, 25 Pac. Rep. 1112. See *Tillotson vs. Kennedy*, 5 Ala. 407, 39 Am. Dec. 330; *Simpson vs. Greeley*, 8 Kan. 586; *Harrison vs. Boring*, 44 Tex. 255, 261.

14. **"Quitclaim,"** written in after word "grant" in deed by homestead claimant before final proof, passes to grantee title afterward

acquired by grantor under patent from government, as against grantees from patentee by quitclaim deed subsequent to patent.—*Pekin Min. & M. Co. vs. Kennedy*, 81 Cal. 556, 563, 22 Pac. Rep. 679.

15. By mortgager to mortgagee after foreclosure, when he is purchaser at sale, but made before sheriff's deed is executed, passes all right, title, and interest acquired by such mortgager by purchase at sheriff's sale or by means of sheriff's deed.—*Green vs. Clark*, 31 Cal. 591, 593; *Ward vs. Dougherty*, 75 Cal. 240, 244, 7 Am. St. Rep. 151, 17 Pac. Rep. 193 (deed after period for redemption had expired, and before sheriff's deed executed); *Leonard vs. Flynn*, 89 Cal. 535, 539, 23 Am. St. Rep. 500, 26 Pac. Rep. 1097 (same where purchaser at execution sale transferred before period for redemption had expired).

16. **SHERIFF'S DEED RELATES BACK TO DAY OF SALE**, that is, takes effect from day of sale, and title inures for benefit of grantee from that date.—*Holman vs. Holman*, 66 Barb. (N. Y.) 215, 220; *Jackson vs. ex d. De Forest vs. Ramsay*, 3 Cow. (N. Y.) 75, 15 Am. Dec. 242; *Jackson ex d. Noah vs. Dickerson*, 15 John. (N. Y.) 309, 316, 3 Am. Dec. 236; *Wright vs. Douglass*, 3 N. Y. 373, 376-377. See *Del. Miles vs. Wilson*, 3 Harr. (Del.) 382; *Robinson vs. Robinson*, 3 Harr. (Del.) 391. Mo. *Alexander vs. Merry*, 9 Mo. 514; *Crowley vs. Wallace*, 12 Mo. 143; *Winston vs. Affalter*, 49 Mo. 263; *Shumate vs. Reavis*, 49 Mo. 333; *Strain vs. Murphy*, 49 Mo. 337 (otherwise as to strangers without notice); *Leach vs. Koenig*, 55 Mo. 451. N. C. *Davidson vs. Frew*, 3 Dev. L. 3, 22 Am. Dec. 708; *Hoke vs. Henderson*, 3 Dev. L. 12; *Dobson vs. Murphy*, 1 Dev. & B. L. 586; *Testerman vs. Poe*, 2 Dev. & B. L. 103; *Richardson vs. Thornton*, 7 Jones L. 453. Ohio. *Boyd vs. Longworth*, 11 Ohio 235. S. C. *Kingman vs. Glover*, 3 Rich. L. 27, 45 Am. Dec. 756. Tenn. *Wood vs. Turner*, 7 Humph. 517.

17. By applicant to purchase public land before approval, does not vest title in grantee afterwards acquired by grantor by patent, as against an assignee of applicant.—*Anderson vs. Yoakum*, 94 Cal. 227, 28 Am. St. Rep. 121, 29 Pac. Rep. 500. See *Myers vs. Reed*, 17 Fed. Rep. 401, 405, 9 Sawy. 132.

18. By applicant to purchase public land, who has received certificate of location or purchase, conveys all his right, title, and interest in lands described in such certificate, and vests in grantee all rights which grantor may thereafter acquire by means of proceedings for purchase of lands from state, including patent; and legal title passing by virtue of patent, vests in grantee and his heirs and assigns.—*Stanway vs. Rubio*, 51 Cal. 41, 46; *Wholey vs. Cavanaugh*, 88 Cal. 132, 136, 25 Pac. Rep. 1113. See *Crane vs. Salmon*, 41 Cal. 63, 65; *Thompson vs. Spencer*, 50 Cal. 532.

19. **DEED OF GRANT OF STATE SCHOOL LANDS** which was made prior to adoption of code, by grantor who had not yet received certificate of purchase and had no transferable interest in property at time he made grant, does not bind title to such land which afterwards was acquired by grantor from

state, when it appears that grantor did not purport to convey land in fee simple absolute.—*People vs. Blake*, 34 Cal. 611, 616, 22 Pac. Rep. 1143, 24 Id. 813. See *Anderson vs. Yoakum*, 94 Cal. 227, 238, 28 Am. St. Rep. 121, 29 Pac. Rep. 500.

20. **Covenant by grantor in deed of quitclaim and release that any after-acquired title shall vest in grantee does not have effect of itself to vest such title in grantee upon its acquisition by grantor.**—*Anderson vs. Yoakum*, 94 Cal. 227, 238, 28 Am. St. Rep. 121, 29 Pac. Rep. 500.

21. In deed purporting to pass all the right, title, and estate which the grantor possessed in land, that neither grantor nor his heirs, nor any parties under or through him, shall have any claim or demand, any right or title to premises, does not operate upon interest subsequently acquired.—*Gee vs. Moore*, 14 Cal. 472; *Kimball vs. Semple*, 35 Cal. 440, 452. See *Young vs. Clippinger*, 14 Kan. 148, 151; *Hull vs. Hull*, 35 W. Va. 155, 29 Am. St. Rep. 800, 803, 13 S. E. Rep. 49.

22. **RECONVEYANCE TO HUSBAND OF NAKED LEGAL TITLE** from trustees to whom he had executed deed of trust to secure payment of debt does not inure to community, but passes by operation of law to his wife, to whom he had previously conveyed land by grant.—*Klumpke vs. Baker*, 68 Cal. 559, 561, 10 Pac. Rep. 197.

See note 36 Am. Dec. 642.

23. **SPANISH LAW**—An after-acquired title does not inure to benefit of former grantee, under.—*Bixby vs. Bent*, 59 Cal. 522, 530. See *Norcum vs. Gaty*, 19 Mo. 65, 68.

24. Compare: *Schmitt vs. Giovanari*, 43 Cal. 617, 621, holding that title vests in confirmees and their assignees; followed in *Hartley vs. Brown*, 46 Cal. 201, 204, 51 Id. 465, 467; *Bihler vs. Platt*, 52 Cal. 550, 552.

25. **STRANGER**—Taking after-title in.—Salutary principle that if vendor conveys in fee land to which he has no title, and to which he afterward acquired true title, that title thus acquired shall inure to benefit of his vendee, and cannot be defeated in equity by shallow device of taking after-acquired title in name of stranger who had no real interest in transaction (dictum).—*Quivey vs. Baker*, 37 Cal. 465, 476.

26. **TAX TITLE ACQUIRED BY GRANTOR** subsequent to conveyance by grant, bargain, and sale deed inures to benefit of his grantee alone.—*De Frieze vs. Quint*, 94 Cal. 653, 659, 28 Am. St. Rep. 151, 30 Pac. Rep. 1.

27. **TITLE IN FEE SIMPLE ABSOLUTE**—Conveyance being of, and expressly purporting to convey all after-acquired interest of grantor, operates upon all interest thereafter acquired by grantor, causing it to inure to benefit of the grantee and of his heirs.—*Green vs. Green*, 103 Cal. 108, 110, 37 Pac. Rep. 188. See *Dalton vs. Hamilton*, 50 Cal. 422, 424; *Hitchens vs. Nougues*, 11 Cal. 23, 36. See *Morrison vs. Caldwell*, 5 T. B. Mon. (Ky.) 426, 17 Am. Dec. 84; *Williams vs. Gray*, 3 Greenl. (Me.) 207, 14 Am. Dec. 234; *Trull vs. Eastman*, 44 Mass. (3 Met.) 121, 37 Am. Dec. 126; *Kim-*

35, 36. Re-entry—Grantor or his heirs or assigns alone has right of.

37. Stipulation to procure witnesses.

38. Substantial performance sufficient.

39. Support and maintenance of grantees.

40, 41. Time of performance.

42. Unlawful conditions subsequent.

43. Waiver—Delivery of deed to subsequent grantee on express promise to perform.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Liebrand vs. Otto*, 56 Cal. 242, 248 (applied); *Weisenberg vs. Truman* (dis. op.), 58 Cal. 63, 73 (applied); *Wolverton vs. Baker*, 86 Cal. 591, 592, 25 Pac. Rep. 54 (cited); *Parsons vs. Smilie*, 97 Cal. 647, 657, 32 Pac. Rep. 702 (applied); *Quatman vs. McCray*, 128 Cal. 285, 291, 60 Pac. Rep. 855 (applied).

2. ACTION AFTER RE-ENTRY TO COMPEL RECONVEYANCE for non-performance of condition subsequent, and to remove the cloud on plaintiff's title, is taken out of ordinary proceedings in equity, and action is one based upon statutory right, since duty to recovery under such circumstances is one required and enjoined by statute and essential to show plaintiff's title upon record.—*Parsons vs. Smilie*, 97 Cal. 647, 657, 32 Pac. Rep. 708.

3. "ACTUAL IMPROVEMENT FOR MERCANTILE AND OTHER PURPOSES"—Conveyance for purposes of,—is on condition subsequent, and passes title to grantee named.—*Spect vs. Gregg*, 51 Cal. 198, 200 (dictum); where it was held that power of attorney to sell and dispose of lands for such purposes authorized attorney to sell and dispose of any of lands named, unlimited by words "for the purposes of," etc., deed however did not contain condition).

4. AGREEMENT FOR STATIONS in conveyance to railroad company at locations selected by grantor and at one of which all trains must stop is not condition upon which estate is granted so as to be available as ground for forfeiture on breach thereof, but is merely personal covenant on part of grantee.—*Behlow vs. Southern Pac. R. Co.*, 180 Cal. 16, 19, 62 Pac. Rep. 295.

5. APPORTIONMENT OF FORFEITURE—Condition subsequent in deed conveying several lots of land described restricting building to be erected "upon premises" applies to each lot same as if separate deeds had been taken each containing condition, and does not contemplate that all lots are to be forfeited if condition should be broken as to one of them.—*Quatman vs. McCray*, 128 Cal. 285, 290, 60 Pac. Rep. 855.

6. BREACH OF CONDITION SUBSEQUENT alone would not, at common law, revert title so as to authorize subsequent grant without office found.—*Norris vs. Moody* (dictum), 84 Cal. 143, 145, 24 Pac. Rep. 37. See *Cullen vs. Sprigg*, 83 Cal. 56, 65, 23 Pac. Rep. 222. *Conn. Chalker vs. Chalker*, 1 Conn. 79, 6 Am. Dec. 206. *Ind. Thompson vs. Thompson*, 9 Ind. 323, 63 Am. Dec. 638. *Mass. Hubbard vs. Hubbard*, 97 Mass. 183, 93 Am. Dec. 75. *Me. Frost vs. Butler*, 7 Me. (7 Greenl.) 225, 22 Am. Dec. 199. *N. H. Millard vs. Henry*, 2 N. H. 120. *Fed. Ruch vs. Rock Island*, 97 U. S. 693, bk. 24 L. ed. 1101.

7. BUILDING RESTRICTION IN DEED for several lots providing that "any building . . . erected . . . shall not cost less than twelve hundred dollars" is broken by second grantee removing to one of lots small unsightly building of no greater value than four hundred dollars, when removal, although before execution and delivery of deed to him, was made with knowledge that deed to his grantor contained such restriction, and under his repeated promises, upon original grantor's objection that building did not conform to condition when deed was delivered to him and subsequent thereto, to so improve it as to make it conform, which promises he has repeatedly broken.—*Quatman vs. McCray*, 128 Cal. 285, 292, 60 Pac. Rep. 855.

8. BURDEN OF PROVING BREACH is upon the grantor, his heirs or successors in interest, in order to defeat vested title.—*Cullen vs. Sprigg*, 83 Cal. 56, 65, 23 Pac. Rep. 222.

See generally, post § 1443 and note.

9. CONDITION CONTAINED IN PRIOR AGREEMENT.—Recital in deed that it is made for and in consideration of prior agreement between parties, accompanied by provision following granting clause that it is upon certain further express terms, conditions, and reservations contained in such agreement, does not create estate upon condition subsequent, there being no provision for re-entry for breach of such terms appended to grant, nor that absolute title granted should cease upon such breach.—*Portland vs. Terwilliger*, 16 Oreg. 465, 19 Pac. Rep. 90.

10. CONDITIONS SUBSEQUENT—Generally,—as to, see post § 1438 and note.

11. Distinguished from conditions precedent.—A condition precedent prevents estate from vesting, if not performed, and in such case there can be no reverter; but condition subsequent does not prevent estate from vesting, and therefore upon breach the grantor cannot again have title except by reverter, based upon breach and re-entry therefor.—*Stockton vs. Weber*, 98 Cal. 433, 441, 33 Pac. Rep. 332.

12. Distinguished from covenants.—Breach of former works forfeiture of estate; while breach of latter is merely ground for action for damages.—*Woodruff vs. Trenton Water P. Co.*, 10 N. J. Eq. (2 Stockt.) 508. See *Behlow vs. Southern Pac. R. Co.*, 180 Cal. 16, 19, 62 Pac. Rep. 295; *Sharon Iron Co. vs. Erie*, 41 Pa. St. 341; *Chicago T. & M. R. Co. vs. Titterington*, 84 Tex. 213, 31 Am. St. Rep. 39, 19 S. W. Rep. 472 (where the court also said: "In case of doubtful language or intention, promise or obligation of grantee will be construed to be covenant limiting grantor to an action thereon, and not condition subsequent with the right to defeat the conveyance.")

See note 5 L. R. A. 422.

13. Distinguished from limitations.—"A condition followed by limitation over to third person, in case condition be not fulfilled, or there be breach of it, is termed conditional limitation. A condition determines estate after breach, upon entry or claim by grantor or his heirs, or heirs of devisor. A limitation marks period which determines estate without any

act on part of him who has next expectant interest. Upon happening of prescribed contingency, estate first limited comes at once to an end, and subsequent estate arises. If it were otherwise, it would be in power of heir to defeat limitation over by neglecting or refusing to enter for breach of condition. This distinction was originally introduced in case of wills to get rid of embarrassment arising from rule of ancient common law, that estate could not be limited to stranger upon event which went to abridge or destroy estate previously limited. A conditional limitation is therefore of mixed nature; partaking both of condition and of limitation; of condition, because it defeats estate previously limited; and of limitation, because, upon happening of contingency, estate passes to person having next expectant interest, without entry or claim."—*Brattle Square Church vs. Grant*, 69 Mass. (3 Gray) 142, 63 Am. Dec. 725. See *Smith vs. Smith*, 23 Wis. 176, 99 Am. Dec. 153.

14. CONVEYANCE ON CONDITION SUBSEQUENT—After previous conveyance by deed without condition, is inoperative, as no estate remains in grantor to convey upon which conditions can operate.—*Alemanys vs. Daly*, 36 Cal. 90, 93.

15. CREATION OF CONDITION SUBSEQUENT must be express terms or clear implication, especially when relied on to work forfeiture.—*Behlow vs. Southern Pac. R. Co.*, 130 Cal. 16, 19, 62 Pac. Rep. 295. See *Cullen vs. Sprigg*, 83 Cal. 56, 63, 23 Pac. Rep. 222; *Greene vs. O'Connor*, 18 R. I. 56, 25 Atl. Rep. 692, 19 L. R. A. 262.

16. Reconveyance, as provided in § 1109, is not necessary where grantee has failed to perform condition subsequent upon which grant is made; duty devolves upon him, under provision of code, to reconvey property to grantor without demand or request.—*Liebrand vs. Otto*, 56 Cal. 242, 247. See *Gray vs. Dougherty*, 25 Cal. 266; *Jones vs. City of Petaluma*, 36 Cal. 230.

17. EJECTMENT BY CESTUI QUE TRUST may be maintained against trustee to whom estate was transferred subject to trust, upon satisfaction of trust, and he has right of entry therein (dis. op.).—*Weisenburg vs. Truman*, 58 Cal. 63, 72.

See ante § 871 and note.

As to ejectment, see Code Civ. Proc. § 738 et seq.

18. Excuse for non-performance,—as to, see post §§ 1440, 1441 and note.

19. FORMAL DENOUNCEMENT was not necessary, under the civil law as it existed in California prior to 1850, when common law was adopted, in case of forfeiture for breach of condition subsequent in grant; the court was to view facts of each particular case, and from those facts determine right "by those principles which every system would admit to be immutable laws of right and wrong."—*Norris vs. Moody*, 84 Cal. 143, 151, 24 Pac. Rep. 37.

20. Reaffirming, on this point, *Holliday vs. West*, 6 Cal. 519, 525; *Touchard vs. Touchard*, 5 Cal. 306, 307; *Vanderslice vs. Hanks*, 3 Cal. 27.

21. Declaring statement in Hart vs. Burnett, 15 Cal. 530, 599, that *Touchard vs. Touchard*

had been overruled in *Holliday vs. West* was obiter dictum.

22. GRANTS BY MUNICIPAL CORPORATIONS—"They must be construed in same manner as those of natural persons, and as private natural person can grant lands upon conditions subsequent, and upon their non-performance resume ownership, municipal corporation can do same."—*Touchard vs. Touchard*, 5 Cal. 306. See *Norris vs. Moody*, 84 Cal. 143, 146, 24 Pac. Rep. 37; *Cullen vs. Sprigg*, 83 Cal. 56, 62; 23 Pac. Rep. 222.

See ante § 238 note para. 15, 16.

23. ILLEGAL CONDITION—Non-performance of, by grantee, does not divest him of legal estate conveyed to him.—*Patterson vs. Donner*, 48 Cal. 369, 379.

See post § 1441 and note.

24. IMPOSSIBLE OF PERFORMANCE—Condition subsequent, which is, is void.—*Stockton vs. Weber*, 98 Cal. 433, 441, 33 Pac. Rep. 332. See *Ricketts vs. Louisville St. L. R. Co.*, 91 Ky. 221, 34 Am. St. Rep. 176, 15 S. W. Rep. 182, 11 L. R. A. 422; *Barksdale vs. Elam*, 30 Miss. 694; *Raley vs. Umatilla Co.*, 15 Oreg. 172, 3 Am. St. Rep. 142, 13 Pac. Rep. 890.

See post § 1441 and note.

25. Impossible conditions, generally,—as to, see post § 1441 and note.

26. Interpretation of condition involving forfeiture,—as to, see post § 1442 and note.

27. MANNER OF PAYING CONSIDERATION—Redelivery of property to grantor—Stipulation for, upon breach of condition as to and for its disposition and use for purpose of such payment, is condition subsequent.—*Cayton vs. Walker*, 10 Cal. 450, 454.

28. NOTICE—Recital of condition in subsequent deed contained in prior duly recorded deed, is not necessary to charge grantee thereunder with notice of such condition; condition attaches to title by virtue of such former deed.—*Quatman vs. McCray*, 128 Cal. 285, 293, 60 Pac. Rep. 855.

29. As to notice generally, see ante § 19 and par. 93 et seq.

30. Performance—When essential,—as to, see post § 1439 and note.

31. PUBLIC HIGHWAY—Clause in deed declaring that land conveyed was to be used as, which contains no language which imports that grant shall be void in case purpose for which land is conveyed is not carried out, and does not reserve to grantors and their heirs right, in that event, to re-enter on land, and resume possession of it as of their former estate, does not create estate on condition, but merely imposes confidence of trust on land, or raises implied agreement on part of grantee to use land for purpose specified.—*Greene vs. O'Connor*, 18 R. I. 56, 25 Atl. Rep. 692, 19 L. R. A. 262.

32. "Railroad purposes only", "and, if not so used, then to revert" to grantor, creates in grantee estate in fee in lands determinable upon breach of condition specified.—*Behlow vs. Southern Pac. R. Co.*, 130 Cal. 16, 19, 62 Pac. Rep. 295.

33. Compare: Chicago T. & M. R. Co. vs.

Titterington, 24 Tex. 218, 31 Am. St. Rep. 39, 19 S. W. Rep. 472; Morrill vs. Wabash, St. L. & P. R. Co., 96 Mo. 174, 9 S. W. Rep. 657.

34. Breach of condition is not shown by proof that grantee from time to time, ranging from daily use to every few months, but at no stated times, operated gravel trains for its own use and for hire over and across premises conveyed.—Behlow vs. Southern Pac. R. Co., 180 Cal. 16, 19, 62 Pac. Rep. 295.

35. RE-ENTRY.—No one but grantor or his heirs can re-enter after breach of condition subsequent; and conveyance by grantor before or after breach carries no right of re-entry.—Buckalew vs. Estell, 5 Cal. 108; Smith vs. Brannan, 13 Cal. 107, 115; Jackson vs. Topping, 1 Wend. (N. Y.) 388, 19 Am. Dec. 515. See *ind.* Cross vs. Carson, 3 Blackf. (Ind.) 138, 140, 44 Am. Dec. 742. *Me.* Hooper vs. Cummings, 45 Me. 359. *Mass.* Parker vs. Nichols, 24 Mass. (7 Pick.) 111. *N. H.* Dewey vs. Williams, 40 N. H. 222, 77 Am. Dec. 708. *N. J.* Southard vs. Central R. Co., 26 N. J. L. (3 Dutch.) 12. *Fed.* Ruch vs. Rock Island, 97 U. S. 693, 696, bk. 24 L. ed. 1101.

36. Compare: Hamilton vs. Kneeland, 1 Nev. 40, 55 (holding this rule of common law never adopted in this country, and grantees of original grantor creating conditional estate, could re-enter on breach).

Restriction,—as to, see para. 7, 82-84 this note.

37. STIPULATION TO PROCURE INTERESTS as condition subsequent to grant, to testify to particular fact, on performance of which the deed operates as mortgage, otherwise to be of no effect, is immoral and against public policy, and renders condition void.—Patterson vs. Donner, 48 Cal. 369, 379. See Goodrich vs. Tenney, 144 Ill. 429.

38. SUBSTANTIAL PERFORMANCE.—“Conditions subsequent operate upon estate already created and vested, rendering them liable to be defeated and broken. Those conditions

which work forfeiture must be construed literally. Nevertheless, grantee is bound to their substantial performance. When estate is once vested, it is sufficient if condition be performed to uphold grant: 1. Roll. 426. If condition be performed as near intent as possible, it is sufficient.”—State vs. Real Estate Bank, 5 Ark. 595, 41 Am. Dec. 109.

39. SUPPORT AND MAINTENANCE OF GRANTEE from rents and profits of property conveyed, non-performance of, as condition subsequent, is ground for compelling reconveyance of property.—Wolverton vs. Baker, 86 Cal. 591, 592, 25 Pac. Rep. 54. See Humphrey vs. West, 40 Mich. 597; Blake vs. Blake, 56 Wis. 392, 14 N. W. Rep. 173.

40. TIME OF PERFORMANCE—No time fixed.—Performance must be within reasonable time.—Allen vs. Howe, 105 Mass. 241; Rowell vs. Jewett, 69 Me. 293; Stuyvesant vs. New York, 11 Paige (N. Y.) 414.

41. No time being limited for performance of condition subsequent in grant, and condition becoming impossible, grant becomes single and absolute in the grantee.—Vanderslice vs. Hanks, 3 Cal. 27, 32; reversed on other grounds on rehearing, 3 Cal. 46.

42. Unlawful conditions subsequent,—as to, see post § 1441 and note.

43. WAIVER.—Execution and delivery of deed, though not containing condition, and acceptance of notes and mortgage for unpaid purchase money, with knowledge by original grantor creating condition of breach thereof, is not waiver where it appears that at time such original grantor objected and told grantee that what he had done did not conform to condition, and that delivery of deed was upon his express promise to conform to condition, right to do which was still remaining to him.—Quatman vs. McCray, 128 Cal. 285, 292, 60 Pac. Rep. 355.

As to waiver generally, see post § 1440 and note.

§ 1110. GRANTS ON CONDITION, WHEN ABSOLUTE. An instrument purporting to be a grant of real property, to take effect upon condition precedent, passes the estate upon the performance of the condition.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 225.

1. Applied, cited, construed, referred to, etc.
- 2, 3. Condition precedent—Generally.
4. Same—Covenant appointing grantee attorney in fact.
- 5, 6. Same—Deed on condition precedent is not a title.
7. Same—Excuse for non-performance.
8. Same—Grantor remaining in possession.
9. Same—Impossible of performance—Condition not void.
10. Same—Partition—Conveyance not to take effect until.
11. Same—Payment of purchase price.
12. Same—Performance—When essential.
13. Same—Strict performance necessary.
14. Same—Title vests on performance of condition.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Hoag vs. Howard, 55 Cal. 564, 565 (cited).

2. CONDITIONS PRECEDENT—Generally,—as to, see post § 1436 and note.

3. Grantee to bring action for possession of property conveyed at his own expense.—conveyance upon such condition, “conceded but not decided” to be on condition precedent in Houghton vs. Steele, 58 Cal. 421, 424.

4. COVENANT APPOINTING GRANTEE ATTORNEY IN FACT, inserted in deed otherwise in form bargain and sale deed with general warranty, to take possession of lands conveyed; to grant, bargain, sell, and convey any or all of said lands, and execute proper

deeds therefor; and to lease same until sold; and that grantor will not in any way sell or dispose, or authorize any other person to sell or dispose, of said lands, or in any way impair or revoke said power, unless grantee fails or refuses to pay consideration, is condition precedent, until performance of which grantee acquires no title.—*Brannan vs. Mesick*, 10 Cal. 95, 107. See *Tewksbury vs. Provizzo*, 12 Cal. 20, 25; *Emeric vs. Alvarado*, 64 Cal. 529, 574, 3 Pac. Rep. 418.

5. "DEED ON CONDITION PRECEDENT IS NOT TITLE, or proof of title; because fee is dependent, not on terms of deed, but on proof of performance of those terms. It is event which casts title and not deed."—*Mesick vs. Sunderland*, 6 Cal. 297, 315. See *Brannan vs. Mesick*, 10 Cal. 95, 107.

6. Affirmed: *Talbert vs. Hopper*, 42 Cal. 397, 401.

7. Excuse for non-performance,—as to, see post § 1440 and note.

8. GRANTOR REMAINING IN POSSESSION and taking rents and profits until determination of lawsuit, costs of which grantee had covenanted to pay as part consideration for conveyance, which purported to convey in present on money consideration paid, does not argue that title was to abide in grantor during interval, and make conveyance one on condition precedent.—*Hihn vs. Peck*, 30 Cal. 280, 289.

9. IMPOSSIBLE OF PERFORMANCE.—Condition precedent, which is, for any reason, incapable of performance, is net void, but estate will not vest.—*Stockton vs. Weber*, 93 Cal. 433, 441, 33 Pac. Rep. 332.

See post § 1441 and note.

16. PARTITION AND RECORDING OF IT.—Covenant in deed that instrument not to take

effect until, is a conveyance on condition precedent.—*Emeric vs. Alvarado*, 64 Cal. 529, 574, 3 Pac. Rep. 418.

11. PAYMENT OF PURCHASE PRICE.—Covenant that conveyance is to take effect as full and complete conveyance on, is conveyance upon condition precedent.—*Mesick vs. Sunderland*, 6 Cal. 297, 315.

12. Performance.—When essential.—See post § 1439 and note.

13. STRICT PERFORMANCE NECESSARY.—Conditions precedent are such as must happen or be performed before estate can vest or be enlarged; they admit of no latitude; they must be strictly, literally, and punctually performed. It is known maxim, that where estate is to arise upon condition precedent, it cannot vest until condition is performed, and this has been so strongly adhered to, that even where condition has become impossible, no estate or interest grew thereupon. Where condition copulative precedes estate, whole must be performed before estate can arise; or where an act is previous to any estate, and that act consists of several particulars, every particular must be performed before estate can vest or take effect.—*Brannan vs. Mesick*, 10 Cal. 95, 108. See *Oakley vs. Morton*, 11 N. Y. 35, 62 Am. Dec. 49; *Vanhorne vs. Dorrance*, 2 Dall. (U. S.) 304, 317, bk. 1 L. ed. 391.

14. TITLE VESTS ON PERFORMANCE OF CONDITION.—"Deed on condition precedent vests title in grantee, on performance of condition, without any further act on part of grantor, and being 'an instrument in writing affecting real estate,' not within exception mentioned in thirty-sixth section of Registration Act, its record imparts notice of its contents to all persons."—*Brannan vs. Mesick*, 10 Cal. 95, 108.

§ 1111. GRANT OF RENTS, REVERSIONS, AND REMAINDERS. Grants of rents or of reversions or of remainders are good and effectual without attornments of the tenants; but no tenant who, before notice of the grant, shall have paid rent to the grantor, must suffer any damage thereby.

History: Enacted March 21, 1872; founded upon § 6, Act 1855, Stats. 1855, p. 171.

1. Applied, cited, construed, referred to, etc.
- 2, 3. Apportionment.
4. Lease cannot be forfeited by secret assignment.
- 5-8. Mortgager cannot make lease binding on mortgagee, when.
9. Owner of reversion has right to sell the whole of it.
10. Payment of rent after judicial sale.
- 11, 12. Payment of rent to original landlord before notice of grant.
13. Payment of rent in advance.
- 14, 15. Purchaser under judicial sale.
16. Purchaser under foreclosure sale.
17. Rent granted away, reserving the reversion.
18. Tenant is not chargeable with constructive notice, when.
19. Unlawful detainer.

C. C.—57

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *McDonald vs. Hanlon*, 79 Cal. 442, 443, 21 Pac. Rep. 861 (construed and applied); *Dreyfus vs. Hirt*, 32 Cal. 621, 626, 627, 628, 23 Pac. Rep. 193 (construed and applied); *Harris vs. Foster*, 97 Cal. 292, 294, 33 Am. St. Rep. 187, 32 Pac. Rep. 246 (construed and applied).

2. APPORTIONMENT.—Where grantee and his grantor have failed to make any apportionment of rent, his grantor would, it seems, be entitled to collect whole of it; even after notice of grant of portion of reversion, and could sue for whole of it, and leave it to jury to determine apportionment between himself as lessor and his grantee of portion of reversion.—*Dreyfus vs. Hirt*, 32 Cal. 621, 627, 23 Pac. Rep. 193. See *Worthington vs. Cooke*, 56 Md. 51; *Walter vs. Munde*, 1 Jacob N. 181.

3. Distinguished: *Harris vs. Foster*, 97 Cal. 292, 294, 33 Am. St. Rep. 187, 33 Pac. Rep. 246.

4. LEASE CANNOT BE FORFEITED BY SECRET ASSIGNMENT of lease, and demand by assignee without making known fact of assignment.—*O'Connor vs. Kelly*, 41 Cal. 432, 434.

5. "MORTGAGEE CANNOT MAKE LEASE which will bind his mortgagee, where lessee at time had notice of mortgage, either actual or constructive. The interest of lessee in such case is dependent for its duration, except as limited by terms of lease, upon enforcement of mortgage. So long as mortgage remains unenforced, lease is valid against mortgagee, and in this state against mortgagee; but with its enforcement leasehold interest is determined."—*McDermott vs. Burke*, 16 Cal. 580, 589. *Mass. Haven vs. Adams*, 36 Mass. (4 Allen) 80. *Fed. Teal vs. Walker*, 111 U. S. 242, 248, bk. 28 L. ed. 415, 4 Sup. Ct. Rep. 420; *Tyler vs. Hamilton*, 63 Fed. Rep. 187, 190. *Eng. Rogers vs. Humphreys*, 4 Ad. & E. 299, 31 Eng. C. L. 72.

See par. 10 this note.

6. Tenant for years having right to redeem, the rule will be otherwise.—*Lockhart vs. Ward*, 45 Tex. 227, 238 (see dissenting opinion declaring for rule laid down in *McDermott vs. Burke*, supra).

7. MORTGAGEE CANNOT DEMAND RENT UNTIL POSSESSION TAKEN of mortgaged premises, where lease is subsequent to mortgage.—*Teal vs. Walker*, 111 U. S. 242, 248, bk. 28 L. ed. 415, 4 Sup. Ct. Rep. 420. See *Mayo vs. Shattuck*, 31 Mass. (14 Pick.) 525, 533; *Sanderson vs. Price*, 21 N. J. L. (1 Zab.) 678; *Price vs. Smith*, 3 N. J. Eq. (1 Gr.) 516; *Watts vs. Coffin*, 11 John. (N. Y.) 495; *McKircher vs. Hawley*, 16 John. 359.

8. Lease made before mortgage is executed, the mortgagee has been held to be entitled to receive rents upon notice to lessee.—See *Moss vs. Gallimore*, 1 Doug. 279; *Burrowes vs. Gradin*, 1 Dowl. & L. 213; *Rawson vs. Eicke*, 7 Ad. & E. 451, 34 Eng. C. L. 142.

See par. 11 this note.

9. OWNER OF REVERSION—Right to sell the whole or any part of it. Such right is incident to right of property, and necessary to full enjoyment of it.—*Linton vs. Hart*, 25 Pa. St. 193, 64 Am. Dec. 691.

10. PAYMENT OF RENT AFTER JUDICIAL SALE of premises, although in advance, does not relieve tenant of liability cast on him by statute (Prac. Act, § 236; Code Civ. Proc. § 707) to pay rent to purchaser under such sale.—*Webster vs. Cook*, 33 Cal. 423, 425.

See Code Civ. Proc. § 707 and note.

11. PAYMENT OF RENT TO ORIGINAL LANDLORD—Tenant is protected in, until such time as he shall receive actual notice of the grant of the reversion.—*Dreyfus vs. Hirt*, 32 Cal. 621, 623, 28 Pac. Rep. 193.

12. In advance of the time it becomes due, and prior to, but before notice of, the grant of the reversion, tenant is protected.—*Dreyfus vs. Hirt*, 32 Cal. 621, 626, 28 Pac. Rep. 193.

13. PAYMENT OF RENT IN ADVANCE is matter of defense, and in action by purchaser

under sheriff's sale against tenant for rent, latter should set up such payment in avoidance of his prima facie liability to plaintiff for rent.—*Webster vs. Cook*, 33 Cal. 423, 425.

14. PURCHASER UNDER JUDICIAL SALE.—"There is no privity of contract or of estate between purchaser upon decree of sale and tenant. The purchaser may, therefore, treat tenant as occupant without right, and maintain ejectment for premises. He cannot, for want of such privity, count upon lease, and sue for rent or value of use and occupation. Relation between purchaser and tenant is that of owner and trespasser until some agreement, express or implied, is made between them with reference to occupation. Until then, both are equally free from any contract obligations to each other. Tenant is not bound to attorn to purchaser, nor is latter bound to accept attornment, if offered. Purchaser may prefer to have possession, and tenant may also prefer to surrender it."—*McDermott vs. Burke*, 16 Cal. 580, 590.

15. Exception to rule.—"There are cases, undoubtedly, where purchaser would be estopped from treating tenant of mortgagee as trespasser; as, for instance, where lease was taken upon encouragement of mortgagee, and purchaser was cognizant of fact at time of his purchase."—*McDermott vs. Burke*, 16 Cal. 580, 590.

16. PURCHASER UNDER FORECLOSURE SALE entitled to rent for value of use and occupation of premises from date of purchase, where mortgage had been recorded, and judgment of foreclosure entered, prior to lease of land by lessee; and fact that rent had been paid in advance by lessee for entire term of lease is no defense to action brought by purchaser to recover for value of use and occupation.—*Harris vs. Foster*, 97 Cal. 292, 294, 33 Am. St. Rep. 187, 33 Pac. Rep. 246. See *McDevitt vs. Sullivan*, 3 Cal. 592, 593; *Wheat vs. Brown*, 3 Kan. App. 431, 43 Pac. Rep. 307.

See Code Civ. Proc. § 707 and note.

17. RENT MAY BE GRANTED AWAY, RESERVING THE REVERSION; and the reversion may be granted away, reserving rent by special words. By general grant of reversion, rent will pass with it as incident to it; but by general grant of rent, reversion will not pass.—*Demarest vs. Willard*, 8 Cow. (N. Y.) 206, 209. See *Beal vs. Boston Spring Car Co.*, 125 Mass. 157, 28 Am. Rep. 216.

18. TENANT IS NOT CHARGEABLE WITH CONSTRUCTIVE NOTICE that rents have been assigned in mortgage given on real estate which has been indexed and recorded as real estate mortgage only.—*Trulock vs. Donahue*, 76 Iowa 753, 40 N. W. Rep. 696.

As to constructive notice by record of instrument, see post § 1213 and note.

19. UNLAWFUL DETAINER—WHEN He against tenant from month to month who refuses to pay an increased rent or remove from premises upon proper notice served by tenant for years to whom owner of fee has made lease in present.—*McDonald vs. Hanlon*, 79 Cal. 443, 448, 31 Pac. Rep. 361.

See Code Civ. Proc. §§ 1161 et seq. and notes.

§ 1112. **BOUNDARY BY HIGHWAY, WHAT PASSES.** A transfer of land, bounded by a highway, passes the title of the person whose estate is transferred to the soil of the highway in front to the center thereof, unless a different intent appears from the grant.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 225.

1. Applied, cited, construed, referred to, etc.
- 2, 3. Description of land as bounded by street or highway.
- 4-8. Same—As to and along the side of street or highway.
- 9, 10. Same—As beginning on, and running by and to, side of street.
11. Same—As commencing at intersection of exterior lines.
12. Exclusive use and dominion—Abutting owner has no right to.
13. "Highway" regarded as line.
- 14-16. Intention to exclude soil of highway.
17. Interpretation of description, generally.
18. Presumption as to ownership to center of way.
19. Question of law and fact.
- 20, 21. Remedies of owner.
22. Right of possession.
23. Sale of lots by number on plat.
24. Vacation of highway—Right of abutting owner to possession.
25. Waters as boundaries.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Weyl vs. Sonoma V. R. Co.*, 69 Cal. 202, 206, 10 Pac. Rep. 510 (applied); *Alameda Macad. Co. vs. Williams*, 70 Cal. 524, 540, 12 Pac. Rep. 530 (applied); *Fraser vs. Ott*, 95 Cal. 661, 665, 30 Pac. Rep. 793 (applied); *Montgomery vs. Santa Ana W. R. Co.*, 104 Cal. 186, 188, 48 Am. St. Rep. 89, 37 Pac. Rep. 786, 25 L. R. A. 654 (applied); *Larrabee vs. Cloverdale*, 131 Cal. 96, 99, 63 Pac. Rep. 143 (applied).

2. **DESCRIPTION OF LAND AS BOUNDED BY STREET OR HIGHWAY** carries line to center of highway or street, unless it clearly appears that it is intended to make side line instead of center line the boundary. "Highway is monument, and in legal contemplation the thread of highway is monument, unless contrary intention clearly appears."—*Moody vs. Palmer*, 50 Cal. 31, 36; *Coburn vs. Ames*, 53 Cal. 385, 394, 28 Am. Rep. 634; *Weyl vs. Sonoma V. R. Co.*, 69 Cal. 202, 206, 10 Pac. Rep. 510; *Watkins vs. Lynch*, 71 Cal. 21, 27, 11 Pac. Rep. 308; *Fraser vs. Ott*, 95 Cal. 661, 665, 30 Pac. Rep. 793; *Montgomery vs. Santa Ana W. R. Co.*, 104 Cal. 186, 188, 48 Am. St. Rep. 89, 37 Pac. Rep. 786, 25 L. R. A. 654. See *Conn. Peck vs. Smith*, 1 Conn. 103, 6 Am. Dec. 216. *Ind. Warbritton vs. Demorett*, 129 Ind. 346, 27 N. E. Rep. 730, 28 Id. 613. *Iowa. Dubuque vs. Maloney*, 9 Iowa 451, 74 Am. Dec. 358. *Mass. Hamlin vs. Pairpoint Mfg. Co.*, 141 Mass. 51, 6 N. E. Rep. 531. *N. J. Hinchman vs. Paterson H. R. Co.*, 17 N. J. Eq. (2 C. E. Gr.) 75, 86 Am. Dec. 252. *N. Y. In re City Brooklyn*, 73 N. Y. 179; *Sherman vs. McKeon*, 38 N. Y. 266; *Lozier vs. New York C. R. Co.*, 42 Barb. 465. *Oreg. McQuaid vs. Portland & V. R. Co.*, 18 Oreg. 237, 22 Pac. Rep. 899. *S. D. Edmison vs. Lowry*, 3 S. D. 77, 44 Am. St. Rep. 774, 52 N. W. Rep. 583, 17 L. R. A. 275.

3. **LAND TO CENTER OF STREET** is conveyed by description of land in deed as bounded by, upon, or along a street.—*Webber vs. California & Oregon R. Co.*, 51 Cal. 425.

4. **As to, and along, side of street or highway**.—In absence of some express reservation by grantor of his property in road, such as would be implied where easement over it was alone granted, and description ran to and along side of it, as it was in *Jackson vs. Hathaway*, 15 John. (N. Y.) 447, 3 Am. Dec. 263, or later, in case of *Mott vs. Mott*, 68 N. Y. 246, conveyance of lands, generally bounded as along or upon a road, will convey fee to its center.—*Haberman vs. Baker*, 128 N. Y. 253, 28 N. E. Rep. 370, 13 L. R. A. 611.

5. **DESCRIPTION OF LAND AS TO CERTAIN STREETS** carries line to center of street, if there is nothing further therein to control or limit lines.—*Kittle vs. Pfeiffer*, 22 Cal. 484, 491; *Weyl vs. Sonoma V. R. Co.*, 69 Cal. 202, 206, 10 Pac. Rep. 510. See *Mass. Van O'Linda vs. Lothrop*, 38 Mass. (21 Pick.) 292, 295, 32 Am. Dec. 261; *Phillips vs. Bowers*, 73 Mass. (7 Gray) 21. *N. H. Goodeno vs. Hutchinson*, 54 N. H. 159. *Pa. Paul vs. Carver*, 26 Pa. St. 223, 67 Am. Dec. 413.

6. "Public policy demands that deeds containing descriptions of this character shall be construed, if practicable, as including the land to the center of the street."—*Moody vs. Palmer*, 50 Cal. 31, 37.

7. "Along the easterly line" of street, in deed, no other language being used in instrument to modify this boundary, intends that land shall run up to eastern line, and not to middle of street.—*Severy vs. Central Pac. R. Co.*, 51 Cal. 194, 197. See *Alameda Macad. Co. vs. Williams*, 70 Cal. 524, 541, 12 Pac. Rep. 530.

8. "To said [named] road; thence, by said road," etc., carries line to center of road.—*Oxton vs. Groves*, 68 Me. 371, 28 Am. Rep. 75. See *Kneeland vs. Van Valkenburgh*, 46 Wis. 484, 32 Am. Rep. 719.

9. **As "beginning on the . . . side of the new road . . . and running [course given] by said road . . . to a stake,"** and "thence [course given] to the place of beginning," carries line to center of road.—*Low vs. Tibbetts*, 72 Me. 92, 39 Am. Rep. 303; *Salter vs. Jonas*, 39 N. J. L. (10 Vr.) 469, 23 Am. Rep. 229.

10. **Compare:** *Sibley vs. Holden*, 27 Mass. (10 Pick.) 249, 30 Am. Dec. 521; *Kings Co. Fire Ins. Co. vs. Stevens*, 37 N. Y. 287, 41 Am. Rep. 361.

11. **As commencing at intersection of exterior lines of two streets,** necessarily excludes soil of street.—*White's Bank of Buffalo vs. Nichols*, 64 N. Y. 65, 71.

12. **EXCLUSIVE USE AND DOMINION**.—Abutting owner has no authority to appropri-

ate highway to his exclusive use and dominion to exclusion of public and to use same for storage of merchandise.—*Coburn vs. Ames*, 52 Cal. 385, 394, 28 Am. Rep. 634.

12. "HIGHWAY."—In one sense monument is regarded as line, "and center of highway in such case is regarded as true boundary indicated, as is case when tree, stone, or other similar object is designated as monument; center, in absence of any other indication, is regarded as giving true boundary or limit of grant."—*White's Bank vs. Nichols*, 64 N. Y. 65, 71. See *Wallace vs. Fee*, 50 N. Y. 695; *Perrin vs. New York C. R. Co.*, 86 N. Y. 120; *Bissell vs. New York C. R. Co.*, 23 N. Y. 61; *Banks vs. Ogden*, 69 U. S. (3 Wall.) 57 bk. 17 L. ed. 813; *Berridge vs. Ward*, 10 C. B. N. S. 400, 100 Eng. C. L. 400.

14. Intention to exclude soil of highway.—"When words clearly indicate intention to exclude from operation of grant soil of highway, it is equally well settled that it does not pass, and grantor retains title, subject only to any easement which may exist in public or in grantee of adjacent lands."—*White's Bank vs. Nichols*, 64 N. Y. 65, 71. See *Mass. Smith vs. Slocomb*, 75 Mass. (9 Gray) 36, 69 Am. Dec. 274. *N. J. Hoboken L. Co. vs. Kerrigan*, 31 N. J. L. (2 Vr.) 13, 16. *N. Y. Jackson vs. Hathaway*, 15 John. 447, 3 Am. Dec. 263. *Eng. Marquis of Salisbury vs. Great N. R. Co.*, 5 C. B. N. S. 174, 94 Eng. C. L. 173.

15. Presumption of intention to convey soil of highway is so strong, when premises granted actually border upon it, that any plain indications of contrary purpose are requisite to exclude it.—*Salter vs. Jonas*, 39 N. J. L. (10 Vr.) 469, 23 Am. Rep. 229.

16. Compare: *White's Bank vs. Nichols*, 64 N. Y. 65, 70, where court say: "No particular words or form of expression is necessary to restrict the grant to the exterior line of a street or margin of a stream, and exclude the soil of each; but that while the presumption is in every case that the grantor does not intend to retain the fee of the soil within the lines of the street or under the water, such presumption may be overcome by the use of any terms in describing the premises granted which clearly indicate an intent not to convey the soil of the street or stream."

17. INTERPRETATION OF DESCRIPTION—Generally,—as to, see Code Civ. Proc. § 2077 and note.

18. PRESUMPTION AS TO OWNERSHIP TO CENTER OF WAY.—This section and § 831 ante, as to presumption of ownership to center of way, are essentially same, and accordingly the annotation appended to this section is intended to cover both sections.

See ante § 831.

§ 1113. IMPLIED COVENANTS. From the use of the word "grant" in any conveyance by which an estate of inheritance or fee simple is to be passed, the following covenants, and none other, on the part of the grantor for himself and his heirs to the grantee, his heirs, and assigns, are implied, unless restrained by express terms contained in such conveyance:

1. That previous to the time of the execution of such conveyance, the grantor has

19. Questions of law and fact.—"What are boundaries is a matter of law; but where they are is a matter of fact."—*White vs. Spreckels*, 75 Cal. 610, 616, 17 Pac. Rep. 715. See *Stoll vs. Beecher*, 94 Cal. 1, 2, 29 Pac. Rep. 327.

20. REMEDIES OF OWNER.—Holder of title to public street, possession of which is held for public, may maintain action for damages to his property therein; but as against one who has taken no possession thereof, and is only in exercise of easement therein which is conferred by municipal authorities in pursuance of their power, and which is valid as to public, and which will expire with easement of public, of which it is part, should not be permitted to maintain ejectment for violation of his property rights, if any, but should be remitted to injunction to restrain, or if injury is consummated, to action for damages or to proceedings to abate as nuisance, as case may be.—*Montgomery vs. Santa Ana W. R. Co.*, 104 Cal. 186, 198, 43 Am. St. Rep. 39, 37 Pac. Rep. 786, 25 L. R. A. 654. See *Hopkins vs. Western Pac. R. Co.*, 50 Cal. 190, 194.

21. Owner of fee of land over which public highway has been established may not only maintain ejectment against intruder who takes possession of highway, but if he suffers special damage from obstruction beyond that suffered by public, he may maintain action for damages and to abate nuisance.—*Coburn vs. Ames*, 52 Cal. 385, 394, 28 Am. Rep. 634.

22. RIGHT OF POSSESSION.—Abutting owner is entitled to possession, subject to public easement.—*Coburn vs. Ames*, 52 Cal. 385, 394, 28 Am. Rep. 634.

23. SALE OF LOTS BY THEIR NUMBER ON PLAT, when lots are bounded by street or highway, is circumstance raising strong presumption of intent to pass soil to center of street or highway, and it will so pass accordingly, unless highway be clearly excluded.—*Dubuque vs. Maloney*, 9 Iowa 451, 74 Am. Dec. 358.

24. VACATION OF HIGHWAY.—Right of abutting owner to possession.—Vacation of highway, when duly and legally effected, involves something more than mere constructive closing, which would leave street still street, but no longer subject to municipal control, and it entitles owners of soil once occupied by highway to take full and complete possession of their land.—*Bigelow vs. Ballerino*, 111 Cal. 559, 565, 44 Pac. Rep. 307; *Id.* (Cal. July 31, 1895), 41 Pac. Rep. 14.

25. WATERS AS BOUNDARIES.—See ante § 830 and note.

Meander line as boundary.—See note 63 L. R. A. 157.

not conveyed the same estate, or any right, title, or interest therein, to any person other than the grantee;

2. That such estate is at the time of the execution of such conveyance free from encumbrances done, made, or suffered by the grantor, or any person claiming under him.

Such covenants may be sued upon in the same manner as if they had been expressly inserted in the conveyance.

History: Enacted March 21, 1872, founded upon § 9, Act 1855, Stats. 1855, p. 171.

1. Applied, cited, construed, referred to, etc.
2. Action—Parties plaintiff—Several grantees.
3. Apportionment of covenants.
4. Commissioners' note.
5. Construction—Section limited to conveyance of fee simple.
- 6-8. Covenants running with land generally.
9. "Demise" imports covenant.
10. Discharge in insolvency—Claim arising from breach of covenant.
11. "Give" imports covenant.
12. Grant as effectual to convey estate in corporeal hereditament.
- 13, 14. "Lease" imports covenant.
15. Love and affection, insufficient consideration, when.
16. Obligation imposed is joint and several.
- 17, 18. Quitclaim deeds.
19. "Suffer" implies responsible control.
- 20, 21. Title standing in third person.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc.**, in: *Bryan vs. Swain*, 56 Cal. 616, 619 (applied); *Waggle vs. Worthy*, 74 Cal. 266, 268, 5 Am. St. Rep. 440, 15 Pac. Rep. 831 (applied); *Maddock vs. Russell*, 109 Cal. 417, 424, 42 Pac. Rep. 139 (cited); *Jeffers vs. Easton*, 113 Cal. 345, 352, 45 Pac. Rep. 680 (construed and applied); *Woodward vs. Brown*, 119 Cal. 283, 294, 63 Am. St. Rep. 108, 51 Pac. Rep. 2, 51 Id. 542 (construed and applied); *McPike vs. Heaton*, 131 Cal. 109, 111, 82 Am. St. Rep. 335, 63 Pac. Rep. 179 (applied); *Holzheiser vs. Hayes*, 133 Cal. 456, 458, 65 Pac. Rep. 968 (construed and applied); *Lyles vs. Perrin*, 134 Cal. 417, 418, 66 Pac. Rep. 472 (construed and applied); *In re Porter* (Cal. March 13, 1903), 72 Pac. Rep. 173 (cited and applied).

2. **ACTION—PARTIES PLAINTIFF.**—Several grantees, when there are in deed, they should all join as parties plaintiff in action in implied covenant that grantor had not conveyed land and that it is free from encumbrances.—*Lawrence vs. Montgomery*, 37 Cal. 183, 188.

As to joinder of parties, see Code Civ. Proc. § 782 and note.

3. **APPORTIONMENT OF COVENANTS**,—as to, see post § 1467 and note.

4. **COMMISSIONERS' NOTE**, citing Stats. 1855, p. 171, § 9, says: "The operative words of a lease in a simple quitclaim deed are 'remitse, release, and quitclaim.' When the word 'grant' is hereafter employed, or when the words 'grant, bargain, and sell' have heretofore been employed, the operation of the conveyance will be not merely to release but to transfer any interest which the grantor possessed at the

execution of the deed."—*Touchard vs. Crow*, 30 Cal. 150, 31 Am. Dec. 108; *Muller vs. Boggs*, 35 Cal. 175.

5. **CONSTRUCTION.**—Provision of this section that only certain enumerated covenants shall be implied in transfers of property, is limited expressly to conveyance by which estate of inheritance, or fee simple, is to be passed.—*Jeffers vs. Easton*, 113 Cal. 345, 352, 45 Pac. Rep. 680.

"Demise"—As used in a lease.—See par. 9 this note.

"Give"—As to covenant of warranty raised by.—See par. 11 this note.

"Grant"—As effectual to convey estate.—See par. 12 this note.

"Lease" imports warranty.—See par. 13 this note.

"Suffer" implies responsible control.—See par. 19 this note.

6. **Covenants running with land**,—as to, see post §§ 1460-1464 and note.

7. **COVENANTS OF SEIZIN AND OF RIGHT TO CONVEY**, and that the land is free from encumbrances, are personal covenants, not running with land, or passing to assignee; for if not true there is breach of them as soon as deed is executed, and they become choses in action which are not technically assignable.—*Lawrence vs. Montgomery*, 37 Cal. 183, 188; *Woodward vs. Brown*, 119 Cal. 283, 284, 63 Am. St. Rep. 108, 51 Pac. Rep. 2, 542; *McPike vs. Heaton*, 131 Cal. 109, 111, 82 Am. St. Rep. 335, 63 Pac. Rep. 179. See *Ky. Birney vs. Hann*, 2 A. K. Marsh. (Ky.) 322, 13 Am. Dec. 167. *Mass. Prescott vs. Trueman*, 4 Mass. 627, 3 Am. Dec. 246. *N. Y. Hamilton vs. Wilson*, 4 John. (N. Y.) 72, 4 Am. Dec. 253.

8. **COVENANT AGAINST PREVIOUS CONVEYANCE OF WATER RIGHT** is implied from grant thereof as appurtenance to land conveyed, where such water right was appurtenance to land, and when it was conveyed to third person prior to execution of deed of grant in question, such grantee is entitled to recover from grantor, as damages for the breach of such implied covenant, value of water right.—*Lyles vs. Perrin*, 134 Cal. 417, 418, 66 Pac. Rep. 472.

9. **"DEMISE,"** used in a lease, imports covenant on the part of lessor of good right and title to make lease, and for quiet enjoyment.—*Sumner vs. Williams*, 8 Mass. 162, 201, 5 Am. Dec. 83; *Crouch vs. Fowle*, 9 N. H. 219, 32 Am. Dec. 350; *Bruce vs. Fulton Nat. Bank*, 79 N. Y. 154, 162, 35 Am. Rep. 505; *Grannis vs. Clark*, 8 Cow. (N. Y.) 36, 40; *Lanigan vs. Kille*, 97

Pa. St. 120, 39 Am. Rep. 797; Baber vs. Harris, 9 Ad. & El. 522, 36 Eng. C. L. 193.

10. **DISCHARGE IN INSOLVENCY**—Claim arising from breach of covenant made subsequently to filing of petition in insolvency, is not affected by.—Waggle vs. Worthy, 74 Cal. 266, 267, 5 Am. St. Rep. 440, 15 Pac. Rep. 331.

11. **"GIVE"**—Covenant of warranty implied from use of, in conveyances in fee simple, containing words "give, grant," etc.—Allen vs. Eayward, 5 Me. (5 Greenl.) 227, 17 Am. Dec. 221; Kent vs. Welch, 7 John. (N. Y.) 258, 5 Am. Dec. 266; Frost vs. Raymond, 2 Cal. (N. Y.) 133, 2 Am. Dec. 238; Rickets vs. Dickens, 1 Murph. (N. C.) 343, 4 Am. Dec. 555.

12. **"GRANT"**—As effectual to convey estate in corporeal hereditament.—See ante § 1053 and note.

13. **"LEASE" IMPORTS COVENANT** that lessor had right to make lease, and for quiet enjoyment.—Ross vs. Dysart, 33 Pa. St. 452.

14. Compare: Lovering vs. Lovering, 13 N. H. 513.

15. **LOVE AND AFFECTION**—Not constitute sufficient consideration to hold property which is also specifically devised, liable to implied covenant against encumbrances, although such consideration is sufficient to support executed deed of title subject to mortgage lien.—In re Porter (Cal. March 19, 1903), 73 Pac. Rep. 173.

16. **OBLIGATION IMPOSED IS JOINT AND SEVERAL**, and in case of two or more grantors, is binding on each grantor; and fact that he had no interest in land at time is immaterial.—Holsheler vs. Hayes, 133 Cal. 456, 458, 65 Pac. Rep. 968.

17. **QUITCLAIM DEEDS**, as passing title in fee simple, absolute in premises conveyed.—See Wholey vs. Cavanaugh, 33 Cal. 132, 135,

25 Pac. Rep. 1112; Spaulding vs. Bradley, 79 Cal. 449, 456, 22 Pac. Rep. 47.

18. **"GRANT, BARGAIN, SALE, REMISE, CONVEY, AND QUITCLAIM"**—Deed of.—Whether of character from which covenants would be implied, assumed for purpose of argument, but not decided, in Lawrence vs. Montgomery, 37 Cal. 183, 189.

19. **"SUFFER" IMPLIES RESPONSIBLE CONTROL**—"An encumbrance upon property, suffered by grantor, means one within his power and duty to have avoided. 'Suffer,' in that connection, implies responsible control, and it cannot be held to apply to thing not caused by act of party nor within his power to prevent. An instance of lien within scope of covenant would be judgment against covenantors. While it might not have been within their power to have prevented judgment in one sense, within sense of law, it could have been avoided by payment of debt. Such lien could not exist except by default of parties in failing to discharge their personal obligation, consequently could not be by their sufferance. But where grantor is under no personal obligation to discharge lien, and it was not created by his act, he cannot be held upon covenant like that under consideration. An encumbrance upon property at time grantor acquired title to it is not within his covenant against 'encumbrances done or suffered' by him."—Smith vs. Elgerman, 5 Ind. App. 269, 51 Am. St. Rep. 281, 31 N. E. Rep. 862.

20. **TITLE STANDING IN THIRD PERSON** does not constitute breach of covenant implied by section in grant, bargain, and sale deed.—Bryan vs. Swain, 56 Cal. 616, 619.

21. Does not constitute breach of express covenant for quiet and peaceable enjoyment when it appears that the grantee entered into, and remained in, possession of land.—Bryan vs. Swain, 56 Cal. 616, 619.

§ 1114. **WHAT THE TERM "ENCUMBRANCES" EMBRACES.** The term "encumbrances" includes taxes, assessments, and all liens upon real property.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 226.

1. Applied, cited, construed, referred to, etc.
2. Condition requiring erection of house.
3. Judgment lien.
4. Public road.
5. Prior mortgage.
6. Taxes.
7. Vendor's lien created prior to covenant.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: Hewes vs. Germain Fruit Co., 106 Cal. 441, 446, 39 Pac. Rep. 353 (cited erroneously for § 1141).

2. **CONDITION REQUIRING ERECTION OF HOUSE** within specified period is not encumbrance within legal meaning of covenant against encumbrances.—Estabrook vs. Smith, 72 Mass. (6 Gray) 572, 66 Am. Dec. 445.

3. **JUDGMENT AGAINST** grantor outstanding at time of conveyance, is breach of covenant of quiet enjoyment and against encumbrances.—Waggle vs. Worthy, 74 Cal. 266, 268, 5 Am. St. Rep. 440, 15 Pac. Rep. 331; Hall vs. Dean, 13

John. (N. Y.) 105. See Barlow vs. St. Nicholas Nat. Bank, 63 N. Y. 399, 402, 20 Am. Rep. 547.

4. **PUBLIC ROAD** over land conveyed constitutes encumbrance.—Kellogg vs. Ingersoll, 2 Mass. 97. See also Farrington vs. Tourtelott, 39 Fed. Rep. 733, where this doctrine was extended to case of a railroad track over the land conveyed.

5. **PRIOR MORTGAGE**—Eviction under, constitutes breach of covenant of warranty or for quiet enjoyment.—Cheney vs. Straube, 35 Neb. 521, 53 N. W. Rep. 479. See Cornish vs. Capron, 136 N. Y. 232, 33 N. E. Rep. 773; Corbett vs. Wrenn, 25 Oreg. 305, 35 Pac. Rep. 658; Jackson vs. McAuley, 13 Wash. 298, 43 Pac. Rep. 41.

6. **TAXES LEVIED AFTER, BUT ATTACHING AS LIEN AS OF DATE BEFORE** grant, are embraced in implied covenant against encumbrances.—McPike vs. Heaton, 131 Cal. 109,

111, 82 Am. St. Rep. 335, 63 Pac. Rep. 179. See *Cochran vs. Guild*, 106 Mass. 29, 8 Am. Rep. 296; *Rundell vs. Lakey*, 40 N. Y. 513, 516.

7. **VENDOR'S LIEN CREATED PRIOR TO COVENANT.**—Judgment against covenantor in possession, upon foreclosure of, rendered

after notice to warrantor to appear and defend, is conclusive of existence of outstanding paramount encumbrance.—*Collier vs. Cowger*, 52 Ark. 322, 12 S. W. Rep. 702, 6 L. R. A. 107.

As to eviction under covenant, see note 6 L. R. A. 107.

§ 1115. **LINEAL AND COLLATERAL WARRANTIES ABOLISHED.** Lineal and collateral warranties, with all their incidents, are abolished; but the heirs and devisees of every person who has made any covenant or agreement in reference to the title of, in, or to any real property, are answerable upon such covenant or agreement to the extent of the land descended or devised to them, in the cases and in the manner prescribed by law.

History: Enacted March 21, 1872, founded upon § 8, Act 1855, Stats. 1855, p. 171.

CHAPTER III.

TRANSFER OF PERSONAL PROPERTY.

Article I. Mode of Transfer, §§ 1135, 1136.

II. What Operates as a Transfer, §§ 1140-1142.

III. Gifts, §§ 1146-1153.

ARTICLE I.

MODE OF TRANSFER.

§ 1135. When must be in writing.

§ 1136. Transfer by sale, etc.

§ 1135. **WHEN MUST BE IN WRITING.** An interest in a ship, or in an existing trust, can be transferred only by operation of law, or by a written instrument, subscribed by the person making the transfer, or by his agent.

History: Enacted March 21, 1872.

1. Commissioners' note.
2. Conveyance of equitable interest to trustee.
3. Execution not of interest in trust.
4. Filling blanks in bill of sale.
5. Fraudulent transfers—Conclusive presumption.
- 6-8. "Instrument" defined.
9. Mortgage of ship at sea.
10. Possession as prima facie evidence of ownership.
11. Province of court and jury.
12. Sale of ship—At sea.
13. Same—Conditioned on payment on delivery of title.
14. "Ship" or "vessel" defined.
15. Voluntary transfer of minority interest in ship.

1. **COMMISSIONERS' NOTE** says that this section was intended to settle doubtful question; that "the uniform language of authorities is, that bill of sale is customary and proper mode of transfer."

2. **CONVEYANCE OF EQUITABLE INTEREST TO TRUSTEE**, not required by statute of frauds, in case of resulting trust, where trustee has conveyed to beneficiary other property in extinguishment of trust.—*Carter vs. Hopkins*, 79 Cal. 82, 84, 21 Pac. Rep. 549. See *Grisby vs. Shwarz*, 82 Cal. 278, 282, 22 Pac. Rep. 1041.

3. **EXECUTION SALE OF INTEREST IN TRUST** in land not possible where cestui que trust's interest has not ordinary incidents of life estate, either at law or in equity, and he has no power of seizure or possession of land, no power to dispose of any estate in it or to enjoy occupancy or to collect rents or to call upon trustee to execute any conveyance to himself.—*McIlvaine vs. Smith*, 43 Mo. 45, 97 Am. Dec. 295.

4. **FILLING BLANKS IN BILL OF SALE** transferring interest in ship, with consent of both parties, does not affect validity of instrument.—*Woolley vs. Constant*, 4 John. (N. Y.) 54, 58, 4 Am. Dec. 246.

See Code Civ. Proc. § 1982 and note.

5. **FRAUDULENT TRANSFERS**—Conclusive presumption as to, not applicable in case of transfer of ship at sea or in foreign port.—See post § 2440 and note.

6. **"INSTRUMENT,"** as used in Civil Code, indicates some written paper or instrument, signed and delivered by one person to another, transferring title or creating lien on property or giving right to debt or duty.—*Hoag vs. Howard*, 55 Cal. 564, 565. See *Warnock vs. Harlow*, 96 Cal. 298, 307, 31 Am. St. Rep. 209, 31 Pac. Rep. 166.

7. **Instrument in writing** containing some

agreement, and is said to be so called because it has been prepared as memorial of what has taken place or been agreed upon. It includes conveyances, leases, mortgages, bills, bonds, promissory notes, wills, etc.—*Footman vs. Wallace*, 75 Cal. 552, 555, 17 Pac. Rep. 680.

8. Plat of subdivided tract of land is not an "instrument" which affects title or possession of real property within meaning of recording act; nor is it instrument to be "executed" by party who prepared it or of which an execution can be acknowledged.—*Colton L. & W. Co. vs. Swartz*, 99 Cal. 278, 285, 33 Pac. Rep. 878.

See ante § 1091 and note; post § 1161 and note.

9. MORTGAGE OF SHIP AT SEA.—Mortgagee must take possession as soon as may be on her return before the mortgage is complete.—*Portland Bank vs. Stubbs*, 6 Mass. 422, 4 Am. Dec. 161. See *Badlam vs. Tucker*, 18 Mass. (1 Pick.) 289, 11 Am. Dec. 202.

10. POSSESSION OF PROPERTY AS PRIMA FACIE EVIDENCE OF OWNERSHIP is uniform in its application. Question of ownership of ship forms no exception.—*Bailey vs. Steamer New World*, 2 Cal. 370, 373.

See Code Civ. Proc. § 1963 and note.

11. PROVINCE OF COURT AND JURY.—Whether or not property sought to be transferred is a ship or vessel, within meaning of statute requiring written transfers of such property, is question of fact for jury; the only duty of court being to instruct jury as to meaning of term "vessel," within contemplation of statute.—*Yarnberg vs. Watson*, 13 Oreg. 11, 4 Pac. Rep. 296.

12. SALE AT SEA of vessel of United States forfeits national character unless new owner shall pursue all requisites of law for purpose of obtaining registration within five days after

her first arrival at port of United States.—*Davidson vs. Gorham*, 6 Cal. 243, 248.

13. Conditioned on payment of price on delivery of title, vendor must show an offer on his part to comply with agreement before he can recover purchase price.—*Fowler vs. Fisk*, 12 Cal. 112.

14. Ship or vessel has been defined to be any "structure made to float upon water for purpose of commerce or war, whether impelled by wind, steam or oars."—*Yarnberg vs. Watson*, 13 Oreg. 11, 4 Pac. Rep. 296 (the Oregon statute providing that "a sale or transfer of a vessel is not valid unless it be in writing and signed by the party making the transfer; and the structure in question was the hull of a vessel which had not at the time been enrolled as a vessel").

As to mortgage of vessel at sea, see par. 9 this note.

As to sale of vessel at sea, see par. 12 this note.

15. VOLUNTARY TRANSFER OF MINORITY INTEREST in ship does not confer upon the purchaser any more extensive control than vendor himself enjoyed; and it is difficult to see why forced sale under execution should have any greater effect than voluntary transfer. If distinction be made, then in case of sale under execution of minority interest, however trifling it may be, power is given to minority to usurp legal right of majority in appointing or discharging master, and in controlling management of affairs of vessel."—*Loring vs. Illsley*, 1 Cal. 24, 31.

Transfer of personal property by sale—Generally,—as to, see post § 1721 et seq.

Same—Delivery,—as to, see post § 1753 et seq.

Same—Auction,—as to, see post § 1792 et seq.

Transfer of obligations,—as to, see post § 1457 et seq.

§ 1136. TRANSFER BY SALE, ETC. The mode of transferring other personal property by sale is regulated by the title on that subject, in division third of this code.

History: Enacted March 21, 1872.

As to sale of property—Generally,—see post § 1721 et seq. and notes.

As to transfer of obligations, see post § 1457 et seq. and notes.

ARTICLE II.

WHAT OPERATES AS A TRANSFER.

§ 1140. Transfer of title under sale.

§ 1141. Transfer of title under executory agreement for sale.

§ 1142. When buyer acquires better title than seller has.

§ 1140. TRANSFER OF TITLE UNDER SALE. The title to personal property, sold or exchanged, passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified, whether it is separated from other things or not.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.

2. Conditional sales.

3. Consignee in bill of lading.

4, 5. Credit—Sale on—When effected.

6-9. Delivery—Sale of chattels without.

10. Same—Putting in condition for.

11. Fish to be caught.

12, 13. Future crops—Generally.

14, 15. Same—"Sold" as indicating consummated sale.

- 16-18. Identification—Generally.
19. Same—Not dispensed with by section.
20. Same—Weighing, measuring, counting, etc.
- 21, 22. Same—Same—Goods mingled with others.
23. Same—Same—Future weighing or measuring.
24. Same—Distinction between specification and ascertainment of total value at designated rates.
- 25-32. Intention of parties—Generally.
33. Same—Question of law.
34. Payment of price as condition precedent.
- 35, 36. Property in bulk or entirety—Sale of entire lot.
37. Same—Same—Number of articles.
- 38, 39. Same—Sale of portion.
40. Same—Same—Property uniform in kind and quality.
41. Same—Identification of each constituent particle.
42. Property in packages—Sale of entire lot by weight.
- 43-46. Property in storage.
47. Replevin.
48. Specific performance of sale of personal property.
49. Stipulation of seller to deliver at particular place.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Blackwood vs. Cutting Pack. Co.*, 76 Cal. 212, 218, 9 Am. St. Rep. 199, 18 Pac. Rep. 248 (construed and applied); *Greenbaum vs. Martinez*, 86 Cal. 459, 463, 28 Pac. Rep. 12 (applied); *Lassing vs. James*, 107 Cal. 348, 357, 40 Pac. Rep. 580 (applied).

2. Conditional sales.—See post § 1721 and note.

3. CONSIGNEE IN BILL OF LADING—Naming a person as, does not have effect to pass title, where evidence clearly shows contrary intention.—*Hilmer vs. Hills*, 138 Cal. 134, 140, 70 Pac. Rep. 1080. See *Emery vs. Irving Nat. Bank*, 25 Ohio St. 360, 18 Am. Rep. 299.

4. CREDIT—SALE ON.—Effectuated where the property is to be delivered at once under contract whereby vendee agrees to do certain things at future day.—*Lambert vs. McCloud*, 63 Cal. 162, 164, distinguished in *Kellogg vs. Burr*, 126 Cal. 33, 41, 58 Pac. Rep. 306.

5. Sale on credit not effected under contract whereby it is agreed that vendee should acquire property on performance of certain conditions promised by him to be performed.—*Cardinell vs. Bennett*, 52 Cal. 476. See *Fredricks vs. Tracy*, 98 Cal. 658, 33 Pac. Rep. 750; *Gracia vs. Gunn*, 119 Cal. 315, 317, 51 Pac. Rep. 684; *Keech vs. Beatty*, 127 Cal. 177, 183, 59 Pac. Rep. 837; *Yukon River S. S. Co. vs. Gratto*, 186 Cal. 538, 540, 69 Pac. Rep. 252.

6. DELIVERY—Sale of chattels without—Good as between the parties, and only void as to creditors and subsequent purchasers.—*Visher vs. Webster*, 13 Cal. 58, 61.

7. As to delivery generally, including when necessary and what is sufficient, see post § 1758 et seq. and notes.

8. Transfer by cropper of his share of crop, which has been segregated, which in fact operates to give secret lien, will not pass title

where there is no act purporting to be delivery nor any change of possession from him to transferee.—*Crocker vs. Cunningham*, 122 Cal. 547, 550, 55 Pac. Rep. 404. See *Palmer vs. Howard*, 73 Cal. 293, 1 Am. St. Rep. 60, 13 Pac. Rep. 858; *Stockton Sav. & L. Soc. vs. Purvis*, 112 Cal. 236, 53 Am. St. Rep. 210, 44 Pac. Rep. 561.

9. Sale complete before actual delivery, throwing risk of loss on vendee,—as to, see *Tyson vs. Wells*, 2 Cal. 122, 125.

10. Putting in condition for.—See post § 1141 and note.

11. FISH TO BE CAUGHT—Sale of title does not pass.—*Low vs. Pew*, 108 Mass. 347, 11 Am. Rep. 357.

"It is an elementary principle of law of sales, that man cannot grant personal property in which he has no interest or title. To be able to sell property, he must have vested right in it at time of sale. Thus it has been held that mortgage of goods which mortgager does not own at the time mortgage is made, though he afterward acquires them, is void. Same principle is applicable to all sales of personal property."—*Low vs. Pew*, supra. See *Head vs. Goodwin*, 37 Me. 181; *Jones vs. Richardson*, 51 Mass. (10 Met.) 481; *Rice vs. Stone*, 83 Mass. (1 Allen) 566.

12. FUTURE CROP OF FRUIT—Agreement for sale of.—One clause reading "bought defendant's crop" at certain place for certain seasons, specifying weight and price, and another signed by vendor reciting "sold my crop," etc., is mere agreement to sell.—*Blackwood vs. Cutting Pack. Co.*, 76 Cal. 212, 218, 9 Am. St. Rep. 199, 18 Pac. Rep. 248.

13. Contracts for purchase and sale of future crops running through series of years, held valid.—*Shoemaker vs. Acker*, 116 Cal. 239, 245, 48 Pac. Rep. 62.

See par. 15 this note, and post § 1768 and note.

14. "Sold," used in contract of sale of future crops, is not conclusive as indicating consummated sale.—*McLaughlin vs. Piatti*, 27 Cal. 451, 458; *Blackwood vs. Cutting Pack. Co.*, 76 Cal. 212, 218, 9 Am. St. Rep. 199, 18 Pac. Rep. 248; *Eaton vs. Richerl*, 83 Cal. 185, 186, 28 Pac. Rep. 286 ("sold" does not always imply sale made or title passed); *Anderson vs. Read*, 106 N. Y. 333, 13 N. E. Rep. 292.

15. Sale or mortgage of crop to be grown, and specified tract of land, is valid.—*Arques vs. Wasson*, 51 Cal. 620, 624, 21 Am. Rep. 718; *Apperson vs. Moore*, 30 Ark. 56, 21 Am. Rep. 170; *Fejavary vs. Broesch*, 52 Iowa 38, 35 Am. Rep. 261, 2 N. W. Rep. 963; *Everman vs. Robb*, 52 Miss. 653, 24 Am. Rep. 682; *McCaffrey vs. Woodin*, 65 N. Y. 459, 464, 22 Am. Rep. 644; *Van Hoozer vs. Cory*, 34 Barb. (N. Y.) 9; *Conderman vs. Smith*, 41 Barb. (N. Y.) 404; *Kennedy vs. Union Nat. Bank*, 23 Hun (N. Y.) 494; *Williams vs. Briggs*, 11 R. I. 476, 23 Am. Rep. 518; *Cook vs. Corthell*, 11 R. I. 482, 23 Am. Rep. 518; *Moore vs. Byrum*, 10 S. C. 452, 30 Am. Rep. 58; *Parker vs. Jacobs*, 14 R. C. 112, 37 Am. Rep. 724; *McCarthy vs. Blevins* 5 Yerg. (Tenn.) 195, 26 Am. Dec. 262; *Petch vs. Tutin*, 15 Mees. & W. 110.

See par. 13 this note.

Contra—Title does not pass with "sale" of crop yet to be planted that might be raised on farm during term.—*Hutchinson vs. Ford*, 9 Bush (Ky.) 313, 15 Am. Rep. 711.

16. IDENTIFICATION—Generally.—Where something is to be done by seller to ascertain identity, quantity, or quality of article sold, or to put it in condition which terms of contract require, title does not pass.—*Caruthers vs. McGarvey*, 41 Cal. 15, 17. See *Joyce vs. Adams*, 8 N. Y. 291; *Terry vs. Wheeler*, 25 N. Y. 520, 525; *Stephens vs. Santee*, 49 N. Y. 35, 41 (contract for manufacture and sale of railroad ties, where vendee was not bound to take all ties manufactured, but only such as were merchantable and suitable for purpose intended); *United States vs. Woodruff* (The Elgee Cotton Cases) 89 U. S. (22 Wall.) 180, 189, bk. 22 L. ed. 863; *Hanson vs. Meyer*, 6 East 614, 3 Rev. Rep. 553; *Simmons vs. Swift*, 5 Barn. & C. 857, 8 Dowl. & Ry. 698, 12 Eng. C. L. 388, 389, 29 Rev. Rep. 433.

17. Segregation dispensed with when property is otherwise identified.—*Blackwood vs. Cutting Pack. Co.*, 76 Cal. 212, 213, 9 Am. St. Rep. 199, 18 Pac. Rep. 248; *Lassing vs. James*, 107 Cal. 348, 357, 40 Pac. Rep. 534. See *Cutting Pack. Co. vs. Packers' Exch.*, 86 Cal. 574, 575-577, 21 Am. St. Rep. 63, 25 Pac. Rep. 52, 10 L. R. A. 369.

See par. 44 this note.

18. Necessity of identification "self-evident truth," when applied to those subjects of property which are distinguishable by their physical attributes from all other things, and, therefore, are capable of exact identification. No person can be said to own horse or picture, unless he is able to identify the chattel, or specify what horse or what picture it is that belongs to him. It is not only legally, but logically, impossible to hold property in such things, unless they are ascertained and distinguished from all other things; and this, I apprehend, is foundation of rule that, on sale of chattels, in order to pass title, articles must, if not delivered, be designated, so that possession can be taken by purchaser without any further act on part of seller.—*Kimberly vs. Patchin*, 19 N. Y. 330, 333, 75 Am. Dec. 334.

Constructive delivery of bulky articles—as to, see para. 43-46 this note, and note 75 Am. Dec. 443.

19. Same—Not dispensed with by section; it is in fact required.—*Blackwood vs. Cutting Pack. Co.*, 76 Cal. 212, 213, 9 Am. St. Rep. 199, 18 Pac. Rep. 248.

20. SAME—WEIGHING, measuring, counting, etc., being necessary to identification of goods, title does not pass until they have been weighed or measured.—*Horr vs. Barker*, 8 Cal. 603, 608; *McLaughlin vs. Piatti*, 27 Cal. 451, 463; *Caruthers vs. McGarvey*, 41 Cal. 15, 16; *Blackwood vs. Cutting Pack. Co.*, 76 Cal. 212, 219, 9 Am. St. Rep. 199, 18 Pac. Rep. 248; *Preston vs. Knapp*, 85 Cal. 559, 565, 24 Pac. Rep. 811; *Hubler vs. Gaston*, 9 Oreg. 66, 42 Am. Rep. 794; *United States vs. Woodruff* (Elgee Cotton Cases), 89 U. S. (22 Wall.) 180, bk. 22 L. ed. 863. See *Ala. Fry vs. Mobile Bank*, 75 Ala. 473, 474. *Ind. Commercial Nat. Bank vs. Gillette*, 90 Ind. 268, 46 Am. Rep. 222. *N. H. Hutchinson vs. Railroad Co.*, 59 N. H. 489. *Tex. Allen vs. Mel-*

ton, 64 Tex. 213. *Wia. Galloway vs. Week*, 54 Wia. 604, 608, 12 N. W. Rep. 10.

See para. 43-46 this note.

21. Goods mingled with others, sale by weight, measure, or number, is incomplete until bargained property is separated and identified. Reason is that sale cannot apply to any article until it is clearly designated and its identity ascertained.—*McLaughlin vs. Piatti*, 27 Cal. 451, 463 (where sale in question was of 500 head of cattle then running in herd of much larger number).—*Blackwood vs. Cutting Pack. Co.*, 76 Cal. 212, 217-218, 9 Am. St. Rep. 199, 18 Pac. Rep. 248 (75 to 100 tons of crop to be raised); *Commercial Nat. Bank vs. Gillette*, 90 Ind. 268, 46 Am. Rep. 222 (sale of 510 car wheels out of 1,100 in one common mass, without separation or designation in any way); *New England D. M. & W. Co. vs. Standard W. Co.*, 165 Mass. 328, 52 Am. St. Rep. 516, 43 N. E. Rep. 112 (sale of 2,000 to 2,500 pounds of wool, and all they may make for 30 days up to 10,000 to 15,000 pounds); *Hubler vs. Gaston*, 9 Oreg. 66, 42 Am. Rep. 794 (oats to be delivered on board car on demand). See *Ala. Browning vs. Hamilton*, 42 Ala. 484. *Ark. Upham vs. Dodd*, 24 Ark. 545. *Iowa. Courtwright vs. Leonard*, 11 Iowa 32. *Ky. Ferguson vs. Northern Bank*, 14 Bush 555, 29 Am. Rep. 413. *Me. Morrison vs. Dingley*, 63 Me. 553. *Mass. Scudder vs. Worster*, 65 Mass. (11 Cush.) 573; *Middlesex Co. vs. Osgood*, 70 Mass. (4 Gray) 447; *Weld vs. Cutler*, 63 Mass. (2 Gray) 195; *Ropes vs. Lane*, 91 Mass. (9 Allen) 502; *Nichols vs. Morse*, 100 Mass. 523; *Morse vs. Sherman*, 106 Mass. 430, 432; *Keeler vs. Goodwin*, 111 Mass. 490; *Turner vs. Langdon*, 112 Mass. 265. *Mich. Hahn vs. Fredericks*, 30 Mich. 223, 18 Am. Rep. 119. *Miss. Baldwin vs. McKay*, 41 Miss. 353. *N. H. Bailey vs. Smith*, 43 N. H. 141. *Ohio. Woods vs. McGee*, 7 Ohio 467. *Pa. Haldeman vs. Duncan*, 51 Pa. St. 66. *Fed. United States vs. Woodruff* (Elgee Cotton Cases), 89 U. S. (22 Wall.) 180, 187, bk. 22 L. ed. 863; *Hatch vs. Standard Oil Co.*, 100 U. S. 124, 134, bk. 25 L. ed. 554.

See par. 23 this note.

22. Compare: *Waldron vs. Chase*, 37 Me. 414, 59 Am. Dec. 56.

"Cases on this subject are quite conflicting. In Virginia, New York, Connecticut, Maine, and New Jersey, courts hold that where subject-matter of sale is part of ascertained mass of uniform quality and value, property will pass though there be no separation of quantity sold, if such be intention of parties, and that no rule of law will overrule that intention if it be not otherwise clearly expressed.—*Chapman vs. Shepard*, 39 Conn. 420; *Kimberly vs. Patchin*, 19 N. Y. 330, 75 Am. Dec. 334; *Russell vs. Carrington*, 42 N. Y. 118, 1 Am. Rep. 493; *Waldron vs. Chase*, 37 Me. 414, 59 Am. Dec. 56, 44 N. J. 486; 6 Randall 473."—*Lord, C. J.*, in *Hubler vs. Gaston*, 9 Oreg. 66, 42 Am. Rep. 794.

23. SAME—SAME—FUTURE WEIGHING OR MEASURING.—Agreement, accompanying sale of nine stacks of hay at so much per ton, to ascertain number of tons of hay at some future time by weight and measurement, does not effect present passing of title.—*Lassing vs. James*, 107 Cal. 348, 357, 40 Pac. Rep. 534.

See par. 21 this note.

24. SAME—DISTINCTION BETWEEN THE SPECIFICATION AND ASCERTAINMENT OF TOTAL VALUE AT DESIGNATED RATES.—

Burrows vs. Whitaker, 71 N. Y. 291, 296, 27 Am. Rep. 42 (where court said that if what remains to be done by seller is specification, title did not pass; but that if it is merely to ascertain total value of property at designated rates, change of title is effected).—See, also, *Nash vs. Brewster*, 39 Minn. 530, 41 N. W. Rep. 105, 2 L. R. A. 409; *Sanger vs. Waterbury*, 116 N. Y. 371, 22 N. E. Rep. 404; *Hatch vs. Oil Co.*, 100 U. S. 124, bk. 25 L. ed. 554; *Isett vs. Stetson & Post Mill Co.*, 22 Wash. 300, 60 Pac. Rep. 1123.

Compare: *Cornell vs. Clark*, 104 N. Y. 451.

25. Intention to transfer title is material; but intention must be collected from whole transaction, and not from any particular feature of it.—*Kohler vs. Hayes*, 41 Cal. 455, 458; *Palmer vs. Howard*, 72 Cal. 293, 295, 1 Am. St. Rep. 60, 13 Pac. Rep. 858. See *Terry vs. Wheeler*, 25 N. Y. 520, 525; *United States vs. Woodruff* (The *Elgee Cotton Cases*), 39 U. S. (22 Wall.) 180, 187 bk. 22 L. ed. 863.

26. "Where it is clear from whole transaction that for all practical purposes ownership of property was intended to be transferred, and that seller only intended to reserve security for price, any characterization of transaction by parties, or any mere denial of its legal effect, will not be regarded."—*Palmer vs. Howard*, 72 Cal. 293, 295, 1 Am. St. Rep. 60, 13 Pac. Rep. 858.

27. Where parties meet and orally agree for terms of sale, vendor being asked by vendee if he wished a payment to bind bargain and he said he did not at that time, and soon thereafter vendor asked for partial payment to "bind bargain so that there will be no chance to back out," which payment is made, present sale of property by which title passes to purchaser is effected.—*Bissell vs. Balcom*, 39 N. Y. 275.

28. Delivery of raw materials under contract for their sale and delivery as wanted for manufacturing into finished product and storage of finished products, subject to vendor's order, vendee having privilege of drawing from storage manufactured products on making payments to be agreed upon, passes title.—*Hewlet vs. Flint*, 7 Cal. 264.

29. PROVISION TO SELL PROPERTY ON BEING RETAKEN FROM VENDOR, "to best advantage rendering to said borrower [vendee] surplus, if any, after paying price agreed upon and expenses of removal and sale," shows intention to vest ownership of property in vendee and that sole object of seller was to secure payment of purchase price.—*Palmer vs. Howard*, 72 Cal. 293, 296, 1 Am. St. Rep. 60, 13 Pac. Rep. 858.

30. Transfer by debtor by bill of sale of property in his store to one representing board of trade, in consideration of release and discharge by his creditors of their claims against him, is not mere assignment for benefit of creditors, but is an absolute sale; and fact that transferee was as to creditors trustee and accountable for disposition of proceeds delivered from sale of property will not change character of transaction.—*Levy vs. Scott*, 115 Cal. 39, 48, 46 Pac. Rep. 392.

31. As to assignment for creditors generally, see § 3449 et seq.

32. Recital of sale and delivery of property then in the possession of third person under contract for its care transfers title, although no money was actually paid and no formal credit given for agreed price upon debt due from vendor to vendee.—*Crill vs. Doyle*, 53 Cal. 718.

33. Question of law.—Where facts are undisputed or are ascertained either by written agreement of parties or by findings of court.—*Terry vs. Wheeler*, 25 N. Y. 520, 525; *Smith vs. Edwards*, 29 Hun (N. Y.) 493.

34. PAYMENT OF PRICE AS CONDITION PRECEDENT.—Title does not pass, although possession is given to purchaser.—*Hilmer vs. Hills*, 133 Cal. 134, 140, 70 Pac. Rep. 1080. See *Empire State Type Found. Co. vs. Grant*, 114 N. Y. 40, 21 N. E. Rep. 49.

35. PROPERTY IN BULK OR ENTIRETY.—Sale of entire lot of articles, number of which is unknown, and at certain price for articles, counting must necessarily be made before seller has done all that was material for him to do.—*Horr vs. Barker*, 3 Cal. 603, 608 (dictum); *Kingman vs. Holmquist*, 36 Kan. 735, 739, 59 Am. Rep. 604.

"Where subject-matter is part of ascertained mass of uniform quality and value, no selection is required; and in this class of cases it is affirmed by authorities of highest character that severance is not, as matter of law, necessary in order to vest legal title in vendee to part sold. Title may and will pass if such is clear intention of contracting parties, and if there is no other reason than want of separation to prevent transfer of title."—*Chapman vs. Shepard*, 39 Conn. 413. See *Horr vs. Barker*, 3 Cal. 603, 11 Cal. 393, 70 Am. Dec. 791; *Phillips vs. Ocmulgee Mills*, 55 Ga. 633; *Waldron vs. Chase*, 37 Me. 414, 59 Am. Dec. 56; *Gardner vs. Dutch*, 9 Mass. 427; *Carpenter vs. Graham*, 42 Mich. 191, 3 N. W. Rep. 974; *Hurff vs. Hires*, 40 N. J. L. (11 Vr.) 531, 29 Am. Rep. 232; *Kimberly vs. Patchin*, 19 N. Y. 330, 75 Am. Dec. 334; *Clark vs. Gifford*, 24 N. Y. 595; *Lobdell vs. Stowell*, 51 N. Y. 70; *Groat vs. Gile*, 51 N. Y. 431; *Pleasants vs. Pendleton*, 6 Rand. (Va.) 473, 18 Am. Dec. 726; *Young vs. Miles*, 20 Wis. 615.

36. Sale of entire lot at so much per pound, or so many pounds out of larger quantity—necessary to weigh so as to ascertain in first case or to separate portion sold from larger mass in second case (dictum).—*Horr vs. Barker*, 3 Cal. 603, 608.

37. Same—Number of articles.—Ascertainment of not necessary to pass title where sale is not of certain undesignated number to be selected and delivered at future time, but is in fact of particular lot of such articles.—*Groat vs. Gile*, 51 N. Y. 431, 437.

38. Sale of portion.—Goods not mixed, but easily distinguishable by marks, packages, or otherwise, although portion of larger lot of such goods, obviates necessity of weighing, measuring, or counting.—*Horr vs. Barker*, 3 Cal. 603, 608.

39. Sale and removal of remaining portion of goods to other customers, a portion of which has been previously sold to customer,

amounts to segregation of such latter customer's goods and vests in him at time of sale clear title.—*Horr vs. Barker*, 6 Cal. 489, 496.

40. **Same**—Property uniform in kind and quality from which quantity purchased is to be separated, rule requiring identification is not necessary to pass title where property has been approved by purchaser and purchase price paid.—*Hurff vs. Hires*, 40 N. J. L. (11 Vr.) 581, 29 Am. Rep. 232.

41. **SAME—IDENTIFICATION OF EACH CONSTITUENT PARTICLE**.—"Where quantity and general mass from which it is to be taken are specified, subject of contract is thus ascertained, and it becomes possible result for title to pass, if sale is complete in all its other circumstances. Actual delivery indeed cannot be made unless whole is transferred to possession of purchaser, or unless particular quantity sold is separated from residue. But actual delivery is not indispensable in any case in order to pass title, if thing to be delivered is ascertained, if price is paid or credit given, and if nothing further remains to be done in regard to it."—*Kimberly vs. Patchin*, 19 N. Y. 330, 332, 75 Am. Dec. 334.

See par. 35 this note.

42. **PROPERTY IN PACKAGES**—Sale of entire lot by weight.—Ascertainment of gross sum to be paid by mere arithmetical calculation is not sufficient to prevent title from passing.—*Bradley vs. Wheeler*, 44 N. Y. 496.

43. **PROPERTY IN STORAGE**—Sale of—Accompanied by receipted bill of sale and order on warehousemen for property and payment of purchase price, passes title.—*Russell vs. Carlington*, 42 N. Y. 118, 125, 1 Am. Rep. 498.

44. **Distinguished**: *Higgins vs. Delaware L. & W. Co.*, 60 N. Y. 553, 556; *Hubler vs. Gaston*, 9 Oreg. 66, 42 Am. Rep. 794.

45. **SALE OF GOODS IN WAREHOUSE**.—Partion to each of various customers to whom are given orders on warehousemen which are

surrendered to him passes title to property to each customer, although neither separates his purchase from mass of goods, but merely takes credit on books of warehousemen for quantity of his purchase.—*Horr vs. Barker*, 11 Cal. 393, 402, 70 Am. Dec. 791. See *Cushing vs. Breed*, 96 Mass. (14 Allen) 376, 92 Am. Dec. 777; *King vs. Jarman*, 35 Ark. 190, 37 Am. Rep. 11.

46. **PRESENT TRANSFER AGREED UPON AND INTENDED**, and identification sufficient, at time of sale of certain quantity of wheat by weight where part of purchase money is then paid and certificates of weight for portion of wheat in warehouse are delivered to vendee, balance to be paid upon notification of exact weight of wheat, and remainder of wheat to be delivered at same warehouse for vendee.—*Greenbaum vs. Martinez*, 86 Cal. 459, 464, 25 Pac. Rep. 12.

47. **REPLEVIN** will not lie to recover property to which plaintiff has no title other than under contract with defendant by which he should acquire property on performance of certain conditions.—*Cardinell vs. Bennett*, 52 Cal. 476. See *Garcia vs. Gunn*, 119 Cal. 315, 317, 51 Pac. Rep. 684.

As to when replevin will lie, see Code Civ. Proc. § 509 et seq. and notes.

48. **SPECIFIC PERFORMANCE OF SALE OF PERSONAL PROPERTY**.—Bill in equity does not lie to enforce as general rule; but there are exceptions to rule, or where there can be no adequate compensation in damages.—*McLaughlin vs. Platti*, 27 Cal. 451, 463; *Senter vs. Davis*, 38 Cal. 450, 454.

As to specific performance, see monographic note 26 Am. Dec. 661-671.

49. **STIPULATION OF SELLER TO DELIVER AT PARTICULAR PLACE** does not prevent title from passing where article sold was perfectly identified and paid for.—*Terry vs. Wheeler*, 25 N. Y. 520, 525.

Distinguished: *Allen vs. Chapman*, 17 N. Y. Wkly. Dig. 515.

§ 1141. **TRANSFER OF TITLE UNDER EXECUTORY AGREEMENT FOR SALE**. Title is transferred by an executory agreement for the sale or exchange of personal property only when the buyer has accepted the thing, or when the seller has completed it, prepared it for delivery, and offered it to the buyer, with intent to transfer the title thereto, in the manner prescribed by the chapter upon offer of performance.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
- 2-4. Construction of thing not yet in esse.
- 5, 6. Deliverable condition.
7. Distinction between sale and agreement to sell.
8. Inspection and acceptance by vendee.
- 9, 10. Offer to sell.
11. Offer to perform.
- 12, 13. Order to manufacture or buy.
14. Parol evidence as to goods offered.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Hallidie vs. Sutter St. R. Co.*, 63 Cal. 575, 576 (applied); *Habenicht vs. Lissak*, 77 Cal. 139, 144, 12 Am. St. Rep. 63, 19 Pac. Rep. 260 (applied); *Crocker vs. Field's*

B. & C. Co., 93 Cal. 532, 534, 29 Pac. Rep. 225 (referred to).

2. **CONSTRUCTION OF THING NOT YET IN ESSE**—Agreement for, does not vest any property in party for whom it is agreed to be constructed during progress of work, nor until it is finished and delivered, or at least ready for delivery and approved by such party.—*Andrews vs. Durant*, 11 N. Y. 35, 40, 62 Am. Dec. 55. See *Yukon R. S. B. Co. vs. Gratto*, 136 Cal. 533, 540, 69 Pac. Rep. 252; *McComie vs. New York & E. R. Co.*, 20 N. Y. 495, 497, 75 Am. Dec. 420.

3. **Agreement with workman to construct article**, whether at agreed price or not, is not

sale until actual or constructive delivery and acceptance.—*Hallidie vs. Sutter St. R. Co.*, 63 Cal. 575, 576; *Goddard vs. Binney*, 115 Mass. 450, 15 Am. Rep. 112; *Fickett vs. Swift*, 41 Me. 65, 66 Am. Dec. 214. See *Spencer vs. Come*, 1 Met. 42 (Mass.) 288; *Hight vs. Ritely*, 19 Me. 137.

4. Agreement for manufacture of article to be suitable for uses of purchaser which is to be accepted by purchaser if after fair trial found to be suitable, otherwise article to be returned, held to be executing contract under order, and action for goods sold not lie.—*Hallidie vs. Sutter St. R. Co.*, 63 Cal. 575, 576.

5. **DELIVERABLE CONDITION.**—Where vendor is to do anything to property to put it in, performance of such act is condition precedent to passing title.—*United States vs. Woodruff* (The *Elgee Cotton Cases*), 39 U. S. (22 Wall.) 180, 182, bk. 22 L. ed. 363.

6. Fruits to be cured and delivered at packing house in good order, does not refer to their condition when brought to packing house, but the "delivery" mentioned refers to delivery to buyer, which is to be at packing house after they were properly packed. It makes no difference whether they were cured where they were grown or at packing house, if they were in fact properly cured, packed, and afterwards delivered in good order.—*Hewes vs. Germain Fruit Co.*, 106 Cal. 441, 444, 39 Pac. Rep. 853.

7. **DISTINCTION BETWEEN SALE AND AGREEMENT TO SELL.**—"When the contract is contract of sale, either of article then existing, or of articles which vendor usually has for sale in course of his business, statute [of frauds] applies to contract as well where it is to be executed at future time as when it is to be executed immediately. But where it is agreement with workman to put materials together and construct article for employer, whether at agreed price or not, though in common parlance it may be called purchase and sale of article to be completed in future, it is not sale until actual or constructive delivery and acceptance."—*Mixer vs. Howarth*, 33 Mass. (21 Pick.) 205, 32 Am. Dec. 256; quoted with approval, *Hallidie vs. Sutter St. R. Co.*, 63 Cal. 575, 576.

8. Inspection and acceptance by vendee up-

on arrival—Title passes to vendee under executory contract upon.—*Habenicht vs. Lissak*, 77 Cal. 139, 144, 12 Am. St. Rep. 63, 19 Pac. Rep. 260.

9. **OFFER TO SELL**, when no time is given, must be accepted at once, or within reasonable time thereafter.—*Roberts vs. Evans*, 43 Cal. 380, 383 (holding year, or even six months, as matter of law, to be unreasonable time).

10. Contract to sell, pick, and deliver as much as buyer should wish of fruit crop, is mere offer which may be accepted or rejected by buyer, or retracted by seller, at any time before acceptance; but when buyer names quantity of fruit which he would take, contract is complete.—*Keller vs. Ybarra*, 3 Cal. 147. See *Smith vs. Morse*, 20 La. Ann. 220; *Cooper vs. Lansing W. Co.*, 94 Mich. 272, 275, 34 Am. St. Rep. 341, 54 N. W. Rep. 39 (proposition to sell all wheels wanted during year named as wanted, order of lot of wheels at price named is acceptance of offer, and contract binding); *Bailey vs. Austrian*, 19 Minn. 535; *Tarbox vs. Gotsain*, 20 Minn. 139 (concurrent offer and agreement to sell on one hand and to purchase on other, all pig iron wanted in contractor's business for balance of year, is not binding because vendee did not engage to want any quantity whatever); *Moulton vs. Kershaw*, 59 Wis. 316, 321, 48 Am. Rep. 516, 18 N. W. Rep. 172 (acceptance must be in terms as to price and quantities).

11. Offer to perform,—as to, see post § 1485 and note.

12. **ORDER TO MANUFACTURE OR BUY IS MERE OFFER OR PROPOSAL**, revocable by party giving at any time before acceptance.—*Harvey vs. Duffey*, 99 Cal. 401, 406, 33 Pac. Rep. 397.

See authorities cited in par. 10 this note.

13. Order for delivery of articles contracted for to purchaser by seller, purchaser is liable therefor where he fails to call for articles as agreed.—*Crocker vs. Field's B. & C. Co.*, 93 Cal. 532, 534, 29 Pac. Rep. 225.

14. **PAROL EVIDENCE** is admissible to show where specified number of articles of certain kind and description are sold that goods offered for delivery are identical articles which were sold.—*Habenicht vs. Lissak*, 77 Cal. 139, 146, 12 Am. St. Rep. 63, 19 Pac. Rep. 260.

§ 1142. WHEN BUYER ACQUIRES BETTER TITLE THAN SELLER HAS.

Where the possession of personal property, together with a power to dispose thereof, is transferred by its owner to another person, an executed sale by the latter, while in possession, to a buyer in good faith and in the ordinary course of business, for value, transfers to such buyer the title of the former owner, though he may be entitled to rescind, and does rescind, the transfer made by him.

History: Enacted March 21, 1872.

1. Agent with power to ship, sell, and receive payment.
2. Appointment of chattel mortgagor as agent to sell property.
3. Construction—"Possession."
4. Delivery of goods on consignment.

5. Delivery of goods to merchant.
- 6-8. Honest purchaser.
9. Property in hands of bailee.
- 10, 11. Second vendee.
12. Seller may be estopped from claiming title.

13. Stolen goods.

14. Wrongful possession—Sale of property by one in.

15. Wrongful sale by pledgee.

1. AGENT WITH POWER TO SHIP, SELL, AND RECEIVE PAYMENT from purchaser, has no power to affect property consigned to him for those purposes by tortiously selling it, or mortgaging or pledging it as satisfaction or security for his own debt. The utmost that he could do, in that respect, would be to mortgage or pledge it to extent of any lien which he might have upon it.—Wright vs. Solomon, 19 Cal. 64, 76, 79 Am. Dec. 196; Hayes vs. Campbell, 55 Cal. 421, 424, 36 Am. Rep. 48; Green vs. Campbell, 55 Cal. 477. See Dewes Brewery Co. vs. Merritt, 32 Mich. 198, 201, 46 N. W. Rep. 379, 9 L. R. A. 270; Warner vs. Martin, 52 U. S. (11 How.) 209, bk. 13 L. ed. 667; Allen vs. St. Louis Nat. Bank, 120 U. S. 20, 32, 34, bk. 80 L. ed. 572, 7 Sup. Ct. Rep. 460; Terry vs. Bamberger, 14 Blatchf. C. C. 284, 237, 23 Fed. Cas. 853; Steiger vs. Third Nat. Bank, 6 Fed. Rep. 569, 575, 2 McC. C. C. 494.

As to factor's power to pledge, see 22 Am. & Eng. Encyc. of L. (2d ed.) 848, note 5; also notes 36 Am. Dec. 716; 58 Am. Dec. 164; 59 Am. Dec. 297; 70 Am. Dec. 797; 92 Am. Dec. 537; 95 Am. Dec. 406; 97 Am. Dec. 374; 42 Am. St. Rep. 48.

2. APPOINTMENT OF CHATTEL MORTGAGER AS AGENT TO SELL PROPERTY, and deposit net proceeds of sale in bank to credit of mortgagees, intends, upon sale by him, that title to sheep shall pass to purchaser free of lien of mortgage, and that proceeds of sale shall be paid to such mortgager.—Maier vs. Freeman, 112 Cal. 8, 11, 53 Am. St. Rep. 151, 44 Pac. Rep. 357.

3. CONSTRUCTION.—Possession mentioned in section does not necessarily mean actual exclusive manual possession.—Goldstone vs. Merchants' I. & C. Stor. Co., 123 Cal. 625, 632, 56 Pac. Rep. 776.

4. DELIVERY OF GOODS ON CONSIGNMENT, to be held as property of consignor until sold and subject to his order, with right in consignee to sell at his own price, and not to be paid for until so sold, is not sale on credit, but is sale upon valid condition,—condition being that consignee shall sell to some third person—and until then he is under no obligation to pay, and he may be compelled to surrender goods on demand.—Vermont Marble Co. vs. Brown, 109 Cal. 236, 239, 50 Am. St. Rep. 37, 41 Pac. Rep. 1031.

5. Delivery of goods to merchant engaged in sale of articles of similar kind, is such evidence of bestowal of right to dispose of same as to protect purchaser from possessor. Possession under such circumstances is evidence, not that possessor is owner, but that he has received authority from owner to sell.—Wright vs. Solomon, 19 Cal. 64, 76, 79 Am. Dec. 196.

6. "Honest purchaser who buys for valuable consideration, in course of trade, without notice of any adverse claim, or any circumstances which might lead prudent man to sus-

pect such adverse claim, will be protected in his title against original owner in those cases, and in those only, where such owner has by his own direct voluntary act conferred upon person from whom bona fide vendee derives title, apparent right of property as owner, or of disposal as agent."—Saltus vs. Everett, 20 Wend. (N. Y.) 267, 279, 32 Am. Dec. 541.

7. Distinguished: Hoffman vs. Carow, 22 Wend. (N. Y.) 285, 316; Cobb vs. Dows, 10 N. Y. 336, 339.

8. Explained: Roach vs. Turk, 9 Heisk. (Tenn.) 708, 24 Am. Rep. 260, 263.

9. Property in hands of bailee, right of possession may be transferred subject to bailee's lien.—Goldstone vs. Merchants' I. & C. Stor. Co., 123 Cal. 625, 632, 56 Pac. Rep. 776.

10. Second vendee, either in case of conditional or absolute sale, is not entitled to stand in any better situation than his vendor in regard to title of personal property, other than negotiable instruments, and whatever comes under general denomination of currency.—Putnam vs. Lamphier, 36 Cal. 151, 158. See Johnson vs. Kirby, 65 Cal. 482, 486, 4 Pac. Rep. 458; Baehr vs. Clark, 38 Iowa 313, 49 N. W. Rep. 340, 13 L. R. A. 717; Truman vs. Hardin, 5 Sawy. C. C. 115, 118, 24 Fed. Cas. 249.

As to possession as evidence of ownership, see pars. 11, 14 this note; note 79 Am. Dec. 208; 13 L. R. A. 717; 3 Am. & Eng. Encyc. of L. (2d ed.) 762 par. 4; 28 Id. tit. "Trove and Conversion"; 21 Encyc. Pl. & Pr. 1050.

11. EXCEPTION IN FAVOR OF BONA FIDE PURCHASERS from person purchasing on conditional sale, is made in some cases.—See Putnam vs. Lamphier, 36 Cal. 151, 158; Hussey vs. Thornton, 4 Mass. 405, 3 Am. Dec. 224; Smith vs. Lynes, 5 N. Y. 41; Comer vs. Cunningham, 77 N. Y. 391, 33 Am. Rep. 626; Haggerty vs. Palmer, 6 John. Ch. (N. Y.) 437; Keeler vs. Field, 1 Paige Ch. (N. Y.) 312; O'Connor vs. Clark, 170 Pa. St. 318, 32 Atl. Rep. 1029, 29 L. R. A. 607.

12. SELLER MAY BE ESTOPPED FROM CLAIMING TITLE as against bona fide purchaser from buyer in possession, by investing buyer with evidence of title or authority to resell.—Chase vs. Whitmore, 68 Cal. 545, 547, 9 Pac. Rep. 943; Columbus B. Co. vs. Turley, 73 Miss. 529, 55 Am. St. Rep. 550, 19 So. Rep. 232, 32 L. R. A. 260. See Lewenberg vs. Hayes, 91 Me. 104, 64 Am. St. Rep. 215, 39 Atl. Rep. 469.

13. STOLEN GOODS—Sale of, passes no title.—Hoffman vs. Carow, 20 Wend. 21, affd. 22 Wend. 285. See Jones vs. Nellis, 41 Ill. 482, 39 Am. Dec. 389; Spooner vs. Holmes, 102 Mass. 503, 3 Am. Rep. 491; Ventress vs. Smith, 35 U. S. (10 Pet.) 161, bk. 9 L. ed. 382.

See par. 10 this note.

14. WRONGFUL POSSESSION—The sale of property by one in,—as to, see Wooster vs. Sherwood, 25 N. Y. 278; McGoldrick vs. Willits, 52 N. Y. 612; Pease vs. Smith, 61 N. Y. 477.

15. WRONGFUL SALE BY PLEDGEE of negotiable instrument,—as to, see Gay vs. Moss, 34 Cal. 125; Donohoe vs. Gamble, 38 Cal. 340, 99 Am. Dec. 399.

ARTICLE III.

GIFTS.

- § 1146. Gifts defined.
 § 1147. Gifts, how made.
 § 1148. Gift not revocable.
 § 1149. Gift in view of death, what.

- § 1150. When gift presumed to be in view of death.
 § 1151. Revocation of gift in view of death.
 § 1152. Effect of will upon gift.
 § 1153. When treated as legacy.

§ 1146. **GIFTS DEFINED.** A gift is a transfer of personal property, made voluntarily, and without consideration.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Construction—Gift—Generally.
- 3-8. Same—Same—By legislature within constitutional prohibition.
9. Same—Voluntary transfer.
- 10-12. Fraud—Undue influence, etc.—Generally.
13. Same—Donee has not burden of negating.
14. Mental competency—Gift by person subject to insane delusions.
15. Same—Mere mental weakness.
- 16, 17. Same—Burden of proving not on donee.
- 18-20. Parties—Must be living.
21. Gifts of land between husband and wife.
22. Subjects of gift—Generally.
23. Same—Chose in action.
24. Same—Deposits in savings bank.
25. Same—Negotiable paper.
26. Same—Partnership interests—Rights of transferee.
27. Same—Property held on conditional sale.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO,** etc., in: *Yosemite S. & Turnp. Co. vs. Dunn*, 83 Cal. 264, 265, 23 Pac. Rep. 369 (construed and applied); *Conlin vs. Board Supervrs. San Francisco*, 99 Cal. 17, 21, 37 Am. St. Rep. 17, 33 Pac. Rep. 753, 21 L. R. A. 474 (applied in construction of gifts prohibited by constitution); *Knight vs. Tripp*, 121 Cal. 674, 675, 54 Pac. Rep. 267 (construed and applied in connection with other sections); *Calkins vs. Equitable B. & L. Assoc.*, 126 Cal. 531, 534, 59 Pac. Rep. 30 (construed and applied); *Williams vs. Tam*, 131 Cal. 64, 67, 63 Pac. Rep. 133 (applied); *Hamilton vs. Hubbard*, 134 Cal. 603, 605, 65 Pac. Rep. 321, 66 Id. 860 (applied in connection with other sections); *Pullen vs. Placer Co. Bank*, 138 Cal. 169, 170, 94 Am. St. Rep. 19, 71 Pac. Rep. 83 (construed and applied in connection with other sections); *Driscoll vs. Driscoll*, 143 Cal. 528, 536, 77 Pac. Rep. 471 (construed and applied in connection with other sections).

2. **CONSTRUCTION.**—Gift is transfer of personal property.—*Driscoll vs. Driscoll*, 143 Cal. 528, 536, 77 Pac. Rep. 471.

3. **SAME—By legislature, within constitutional prohibition,** is not limited to mere voluntary transfer of personal property without consideration as defined in this section. It includes all appropriation of public moneys for which there is no authority or enforceable claim, or which rests upon some equitable or mere obligation which in mind of generous or even just individual dealing with his own money might prompt him to recognize as worthy of some reward.—*Conlin vs. Board*

Supervrs. San Francisco, 99 Cal. 17, 22, 37 Am. St. Rep. 17, 33 Pac. Rep. 753, 21 L. R. A. 474.

4. **LEGISLATURE IS REGARDED AS HOLDING PUBLIC MONEY IN TRUST** for public purposes; and limitation in constitution as to gifts of public moneys is directed against disposal of funds except for public purposes.—*Conlin vs. Board Superv. San Francisco*, 99 Cal. 17, 22, 37 Am. St. Rep. 17, 33 Pac. Rep. 753, 21 L. R. A. 474.

5. **Appropriation of money by legislature for relief of one who has no legal claim thereto is gift in meaning of term as used in this section;** and it is none less a gift that sufficient motive appears for appropriation if that motive does not rest on valid consideration.—*Conlin vs. Board of Supervrs. San Francisco*, 99 Cal. 17, 22, 37 Am. St. Rep. 17, 33 Pac. Rep. 753, 21 L. R. A. 474.

6. **"Appropriations to individuals in general consideration of charity, or gratitude, or because of some supposed moral obligation resting upon people of state, and such as just and generous man, although under no legal moral obligation so to do, might be willing to recognize in his dealings with others,"** constitutes gift within prohibition of constitution.—*Stevenson vs. Colgan*, 91 Cal. 649, 652, 35 Am. St. Rep. 280, 27 Pac. Rep. 1089, 14 L. R. A. 459; *Conlin vs. Board of Supervrs. San Francisco*, 99 Cal. 17, 22, 37 Am. St. Rep. 17, 33 Pac. Rep. 753, 21 L. R. A. 474. See *Molineaux vs. State*, 109 Cal. 378, 381, 50 Am. St. Rep. 49, 43 Pac. Rep. 34.

7. **Appropriation made in payment of claim for damages on account of personal injuries sustained while in its service, and for which state is not responsible, either upon general principle of law, or by reason of some previous statute creating such liability, is gift within meaning of constitution.**—*Bourne vs. Hart*, 93 Cal. 321, 327, 27 Am. St. Rep. 203, 23 Pac. Rep. 951, 15 L. R. A. 431; *Conlin vs. Board Supervrs. San Francisco*, 99 Cal. 17, 22, 37 Am. St. Rep. 17, 33 Pac. Rep. 753, 21 L. R. A. 474.

8. **Appropriation under an act providing for purchase of unexpired lease of Yosemite and Wawana road, does not constitute gift where commissioners appointed to manage Yosemite Valley and Mariposa Big Tree Grove have power to make lease.**—*Yosemite S. & Turnp. Co. vs. Dunn*, 83 Cal. 264, 269, 23 Pac. Rep. 369.

9. **SAME—"VOLUNTARY TRANSFER,"** in order to be transfer, must be gratuitous—handing over to donee something for nothing.—*Yosemite S. & Turnp. Co., vs. Dunn*, 83 Cal. 264, 265, 23 Pac. Rep. 369.

10. **FRAUD—UNDUE INFLUENCE**—Generally,—as to, see post §§ 1709, 1710 and notes.

11. **GIFTS VOLUNTARILY MADE**, and with full knowledge of all facts, and of nature and effect of transfer, should not be set aside merely because the donor had divested himself of his property; to do so would be to establish a rule that no man can make voluntary disposition of his estate except by will.—*Soberanes vs. Soberanes*, 97 Cal. 140, 145, 31 Pac. Rep. 910.

12. **DONOR**, in disposing of his property in contemplation of death, is not called upon to consider wishes or views of jurors or courts.—*Field vs. Shorb*, 99 Cal. 661, 670, 34 Pac. Rep. 504.

13. **Donee has not burden of negating**.—Alleged donee does not have burden of proving that no fraud was practised upon donor.—*Vandor vs. Roach*, 73 Cal. 614, 615, 15 Pac. Rep. 354.

14. **MENTAL COMPETENCY**.—Gift by person subject to insane delusions in regard to his wife and children, entertaining belief that they had combined to injure him personally, in reputation and in property, and even to poison him to death, that they were his enemies and very bad people, and because of this, that they were not proper recipients of any of his estate, was held invalid in *Riggs vs. American T. Soc.*, 95 N. Y. 503, 509. See *Potter vs. McAlpine*, 3 Dem. (N. Y.) 108, 118, 123; *Jackson vs. Jackson*, 37 Hun (N. Y.) 308; *In Matter Keeler*, 12 N. Y. St. Rep. 156.

See post § 1270 and note; see also 37 Moak Eng. Rep. 748; 9 Am. & Eng. Encyc. of L. (2d ed.) 195; 16 Id. 563; 23 Id. "Testamentary Capacity."

Distinguished: *Valentine vs. Lunt*, 115 N. Y. 496, 497, 22 N. E. Rep. 209.

15. **Mere mental weakness of donor is not of itself sufficient to invalidate an otherwise valid gift**.—*Field vs. Shorb*, 99 Cal. 661, 666, 34 Pac. Rep. 504.

16. **Donee does not have the burden of proving that donor was of sound and disposing mind at time of gift**.—*Vandor vs. Roach*, 73 Cal. 614, 615, 15 Pac. Rep. 354.

17. **A prima facie case is made when it is shown by alleged donee that disposition has been attended by all requisites which common law prescribes to give it validity**. Certainly he is not required to prove affirmatively that donor was of sound, disposing mind and memory when he made gift, and that delivery of subject was his free and voluntary act. These are matters of defense equally applicable to gifts *inter vivos* and *causa mortis*.—*Bedell vs. Carll*, 33 N. Y. 581, 586.

18. **PARTIES**—Living donor and living donee are indispensable to valid gift.—*Knight vs. Tripp*, 121 Cal. 674, 678, 54 Pac. Rep. 267.

19. **Where no institution is selected by**

donor to which charitable gift is to go in his instructions to party to whom is intrusted power of distribution, but is left to said party, it cannot be held that there was gift to any charitable institution.—*Hart vs. Ketchum*, 121 Cal. 426, 429, 53 Pac. Rep. 931.

20. **Death of donee in lifetime of donor avoids gift causa mortis**.—*Zeller vs. Jordan*, 105 Cal. 143, 148, 33 Pac. Rep. 640; *Ridden vs. Thrall*, 125 N. Y. 572, 579, 21 Am. St. Rep. 758, 26 N. E. Rep. 627, 11 L. R. A. 684.

See monographic note 11 L. R. A. 684-687.

21. **Gifts of land between husband and wife**,—as to, see **KERR'S SYNTHETICAL INDEX** and note.

22. **SUBJECTS OF GIFT**—Generally.—Every species of personal property in its largest sense capable of delivery, actual or constructive, may be the subject of valid gift.—*Thomas vs. Lewis*, 89 Va. 1, 67, 37 Am. St. Rep. 848, 15 S. E. Rep. 339, 18 L. R. A. 170.

See also note 18 L. R. A. 170-172.

23. **Chose in action**, although not susceptible of manual delivery, is not for that reason incapable of being made subject of a gift.—*Driscoll vs. Driscoll*, 143 Cal. 523, 534, 77 Pac. Rep. 471.

24. **Deposit in savings bank may be subject of gift causa mortis**, if it appears from transaction that donor intended thereby to confer upon donee a present right to money, and at same time clothed him with the means of obtaining it.—*Hart vs. Ketchum*, 121 Cal. 426, 428, 53 Pac. Rep. 931.

See post § 1147, note para. 69-72.

25. **Negotiable paper payable to order may be subject of donatio causa mortis**.—*Druke vs. Heiken*, 61 Cal. 346, 44 Am. Rep. 553; *Edwards vs. Wagner*, 121 Cal. 376, 53 Pac. Rep. 321. See *Bradley vs. Hunt*, 5 Gill. & J. (Md.) 54, 23 Am. Dec. 597, 606.

See post § 1147, para. 42-45 of note.

26. **Partnership interest**—Rights of transferee.—Transferee of partnership interest is not given right to possession of any portion of partnership property; he acquires mere right to accounting from other members of partnership, and upon settlement of its affairs to receive share to which partner would have been entitled.—*Miller vs. Brigham*, 50 Cal. 615, 616; *Driscoll vs. Driscoll*, 143 Cal. 523, 534, 77 Pac. Rep. 471.

27. **Property held under conditional sale may be subject of gift, at least to extent of donor's interest therein, and subject of course to rights of vender**.—*Fredericks vs. Sault*, 19 Ind. App. 604, 49 N. E. Rep. 909.

GIFT BY IMPLICATION,—as to, see 1 L. R. A. 551.

Failure to devise remainder after a life estate to daughter, and specific grant of one dollar only to sons, implied gift of remainder to daughter's issue.—*Barnard vs. Barlow*, 50 N. J. Eq. 135, 24 Atl. Rep. 912.

§ 1147. **GIFT, HOW MADE**. A verbal gift is not valid, unless the means of obtaining possession and control of the thing are given, nor, if it is capable of delivery, unless there is an actual or symbolical delivery of the thing to the donee.

History: Enacted March 21, 1872.

I. In General.

1. Applied, cited, construed, referred to, etc.
2. Construction—Delivery.
3. Same—Gift—Generally.
4. Same—Gift causa mortis.

II. Acceptance.

5-7. In general.

8. Presumption of—Gift beneficial to donee.
9. Time of—Need not be immediately.

III. Delivery.

- 10-13. Necessity—Generally.
- 14-16. Same—Donatio causa mortis.
- 17-19. Same—Donee in possession at time of gift.
- 20-23. Same—Donor retaining possession of property.
- 24-26. Sufficiency—Generally.
- 27-29. Same—Construction of "delivery."
30. Same—Executed grant.
- 31-35. Same—Nature of property to be considered.
36. Same—Same—Bank notes.
- 37, 38. Same—Same—Bank checks.
39. Same—Same—Certificates of corporate stock.
- 40, 41. Same—Same—Chose in action.
- 42-45. Same—Same—Negotiable paper.
46. Same—Proof of.
- 47, 48. Same—Property in hands of third person.
49. Same—To third person.
- 50, 51. Time of delivery.

IV. Intention.

- 52, 53. In general.
- 54-57. Mode of expressing.
- 58-60. Proof—Presumptions and burden of proof—Generally.
61. Same—Same—Donor under moral obligation to give.
- 62-64. Same—Declarations of donor.
65. Same—Testimony of alleged donor.
66. Same—Donor without family.
67. Question of fact.

V. Time of Taking Effect.

68. In general.
- 69-72. Check on bank deposit.
- 73, 74. Delivery must not be for future disposal.
- 75, 76. Gift to take effect at death of donor.
- 77-81. Promise.

I. IN GENERAL.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Giselman vs. Starr*, 106 Cal. 651, 657, 40 Pac. Rep. 8 (applied); *Ruiz vs. Dow*, 113 Cal. 490, 497, 45 Pac. Rep. 867 (construed and applied); *Hart vs. Ketchum*, 121 Cal. 426, 429, 53 Pac. Rep. 931 (construed and applied); *Knight vs. Tripp*, 121 Cal. 674, 681, 54 Pac. Rep. 267 (construed and applied in connection with other sections); *Williams vs. Tam*, 131 Cal. 64, 66, 63 Pac. Rep. 133 (referred to); *Pullen vs. Placer Co. Bank*, 138 Cal. 169, 170, 14 Am. St. Rep. 19, 71 Pac. Rep. 83 (construed and applied); *Driscoll vs. Driscoll*, 143 Cal. 523, 532, 77 Pac. Rep. 471 (construed and applied).

2. Construction—Delivery.—See para. 27-29 this note.

C. C.—53

2. Same—Gift—Generally.—See ante § 1146 and note.

4. Same—Gift causa mortis.—See post § 1149 and note.

II. ACCEPTANCE.

5. IN GENERAL.—Gift, in order to be valid and complete, must be accepted by donee.—*Dow vs. Gould & Curry S. M. Co.*, 31 Cal. 629, 652; *De Levillain vs. Evans*, 39 Cal. 120. See *Sullivan vs. Corbett*, 3 Kan. App. 390, 42 Pac. Rep. 1105.

6. "In respect to question of acceptance by donee, as we understand civil law, it does not differ materially from common law. Under neither is donation valid and obligatory until it is accepted. It may be that donee does not desire to have property. There may be burdens growing out of ownership which he does not choose to assume. If he affirmatively declines to accept donation, law does not force it upon him against his will. This must be so upon every principle of reason and justice. Nevertheless, in case of an adult donee, if donation is for his advantage he will be presumed to have accepted it unless contrary appears. In case of minor who is presumed in law to be incapable of exercising sound discretion over his affairs, and is, therefore, not bound by his contracts, unless in exceptional cases, there is greater reason for presuming that he has accepted what is for his advantage. In other words, if it is for his advantage, law accepts it for him and will hold donor bound; but if not for his advantage, law will repudiate it at instance of minor, even though he may in terms have accepted it. In this respect we understand rule at common law and under civil law to be the same."—*De Levillain vs. Evans*, 39 Cal. 120, 122.

See par. 8 this note.

7. CHECK DELIVERED TO PAYEE BY DRAWER AS GIFT of fund of which check was drawn, until paid or accepted is incomplete as gift.—*Simmons vs. Cincinnati Sav. Soc.*, 31 Ohio St. 457, 27 Am. Rep. 521.

8. PRESUMPTION OF—Where gift, otherwise complete, is beneficial to donee.—*Beaver vs. Beaver*, 117 N. Y. 421, 15 Am. St. Rep. 531, 22 N. E. Rep. 940, 6 L. R. A. 403. See *Robbins vs. Rascoe*, 130 N. C. 79, 58 Am. St. Rep. 774, 26 S. E. Rep. 807, 33 L. R. A. 233.

See par. 6 this note.

9. TIME.—Acceptance of gift need not be made immediately. It is sufficient that it be accepted before revoked by death or otherwise.—*Love vs. Francis*, 63 Mich. 181, 6 Am. St. Rep. 290, 29 N. W. Rep. 843.

III. DELIVERY.

10. NECESSITY—Generally.—Gift is not complete, nor does any interest pass to proposed donee, until there has been delivery by donor.—*Dow vs. Gould & C. S. M. Co.*, 31 Cal. 629, 652; *Hart vs. Ketchum*, 121 Cal. 426, 429, 53 Pac. Rep. 931; *Pullen vs. Placer Co. Bank*, 138 Cal. 169, 170, 94 Am. St. Rep. 19, 71 Pac. Rep. 83. See *Ind. Smith vs. Dorsey*, 38 Ind. 451, 10 Am. Rep. 118. *Kan. Johnson vs. Eaton*, 51 Kan. 703, 33 Pac. Rep. 597. *Me. Hatch vs.*

Atkinson, 56 Me. 324, 96 Am. Dec. 464; Robinson vs. Ring, 72 Me. 140, 39 Am. Rep. 308; Drew vs. Hagerty, 81 Me. 231, 10 Am. St. Rep. 255, 17 Atl. Rep. 63, 3 L. R. A. 230. Mass. Fearing vs. Jones, 149 Mass. 13, 14 Am. St. Rep. 392, 20 N. E. Rep. 199. Nev. Simpson vs. Harris, 21 Nev. 353, 31 Pac. Rep. 1009. N. Y. Curry vs. Powers, 70 N. Y. 212, 26 Am. Rep. 577; Noble vs. Smith, 2 John. 52, 3 Am. Dec. 399; Young vs. Young, 80 N. Y. 422, 36 Am. Rep. 634. N. C. Bullock vs. Tinnen, 2 Car. L. Repos. 271, 6 Am. Dec. 562. Ohio. Gano vs. Fisk, 43 Ohio St. 462, 54 Am. Rep. 819. Pa. Walsh's Appeal, 122 Pa. St. 177, 9 Am. St. Rep. 83, 15 Atl. Rep. 470, 1 L. R. A. 535. Vt. Williamson vs. Johnson, 62 Vt. 378, 23 Am. St. Rep. 117, 20 Atl. Rep. 279, 9 L. R. A. 277. Wis. Crook vs. First Nat. Bank, 83 Wis. 31, 35 Am. St. Rep. 17, 52 N. W. Rep. 1131. Fed. Mahan vs. United States, 83 U. S. (16 Wall.) 143, 21 L. ed. 307.

See monographic notes by Robert Desty, 1 L. R. A. 535; 2 L. R. A. 230; 6 L. R. A. 403.

11. "Delivery by donor, either actual or constructive, operating to divest donor of possession of and dominion over thing, is constant and essential factor in every transaction which takes effect as completed gift. Anything short of this strips it of equality of completeness which distinguishes an intention to give, which alone amounts to nothing, from consummated act, which changes title. Intention to give is often established by most satisfactory evidence, although gift fails. Instruments may be ever so formally executed by donor, purporting to transfer title to donee, or there may be most explicit declaration of intention to give, or of an actual present gift, yet unless there is delivery intention is defeated."—Beaver vs. Beaver, 117 N. Y. 421, 15 Am. St. Rep. 531, 534, 23 N. E. Rep. 940, 6 L. R. A. 403.

12. Purpose to give must be executed by actual delivery to donee of thing given, or means of getting possession or enjoyment thereof.—Pullen vs. Placer Co. Bank, 138 Cal. 169, 170, 94 Am. St. Rep. 19, 71 Pac. Rep. 83.

13. DELIVERY IN BOTH KINDS OF GIFTS is equally requisite on grounds of public policy and convenience, and to prevent mistake and imposition.—Noble vs. Smith, 2 John. (N. Y.) 52, 3 Am. Dec. 399.

14. Donatio causa mortis is governed by the same rules with regard to delivery as gift inter vivos.—Knight vs. Tripp, 121 Cal. 674, 678, 54 Pac. Rep. 267.

15. DONOR, IN MAKING GIFT CAUSA MORTIS, DOES NOT PART WITH WHOLE INTEREST, except only in particular event of death; and it is of essence of such gift, that it shall not otherwise take effect; and it remains subject to his revocation at any time before event of death. But nevertheless it is essential, in order to give effect to donation, that deceased should not only part with the possession, but also with present dominion over subject of gift, subject only to subsequent revocation.—Taylor vs. Henry, 43 Md. 550, 30 Am. Rep. 486 (where there was neither possession nor dominion surrendered by deceased, at any time before his death).

16. Delivery converts the unexecuted and revocable purpose to give into an executed and complete gift.—Knight vs. Tripp, 121 Cal. 674, 678, 54 Pac. Rep. 267; Pullen vs. Placer Co. Bank, 138 Cal. 169, 170, 94 Am. St. Rep. 19, 71 Pac. Rep. 83. N. H. Cutting vs. Gilman, 41 N. H. 147; Emery vs. Clough, 63 N. H. 552, 56 Am. Rep. 543, 4 Atl. Rep. 796. N. C. Newman vs. Bost, 122 N. C. 524, 29 S. E. Rep. 848. Pa. Walsh's Appeal, 122 Pa. St. 177, 9 Am. St. Rep. 83, 15 Atl. Rep. 470, 1 L. R. A. 535. Va. Yancy vs. Field, 85 Va. 756, 3 S. E. Rep. 721; Miller vs. Jeffries, 4 Gratt. 472.

17. Donee in possession at time of gift.—Delivery has been held to be essential even where subject of gift is in possession of donee when gift was made.—Daniel vs. Smith, 64 Cal. 346, 351, 30 Pac. Rep. 575. See Cutting vs. Gilman, 41 N. H. 147; Huntington vs. Gilmore, 14 Barb. (N. Y.) 243; Shower vs. Pilck, 4 Exch. 473.

18. Compare: Drew vs. Hagerty, 81 Me. 231, 10 Am. St. Rep. 255, 17 Atl. Rep. 63, 3 L. R. A. 230, where court say: "We are aware that some text-writers have assumed that when property is already in possession of donee a delivery is not necessary. But cases cited in support of doctrine nearly all relate to gifts inter vivos, and not to gifts causa mortis. A gift inter vivos may be sustained without distinct act of delivery at time of gift, if property is then in possession of donee, and gift is supported by long acquiescence of donor, or other entirely satisfactory evidence."

19. Gift when donee is already in possession, accompanied by memorandum the amount and identity of the fund given, and clear and explicit declaration of donor of intention to give, is valid.—Champney vs. Blanchard, 39 N. Y. 111, 115. See Gray vs. Barton, 55 N. Y. 68, 14 Am. Rep. 181; Carpenter vs. Soule, 38 N. Y. 251, 42 Am. Rep. 248; Champlin vs. Seeber, 56 How. Pr. (N. Y.) 46; Stevens vs. Stevens, 2 Hun (N. Y.) 272; In Matter Smether, 30 Hun (N. Y.) 632; Curtis vs. Barrus, 38 Hun (N. Y.) 167; Whiting vs. Barrett, 7 Lans. (N. Y.) 106; In Matter O'Gara, 15 N. Y. St. Rep. 737.

20. Donor retaining possession of property.—Gift inter vivos subject to revocation, when.—Pullen vs. Placer Co. Bank, 138 Cal. 169, 170, 94 Am. St. Rep. 19, 71 Pac. Rep. 83.

21. Retaining possession by donor after he has executed instrument of gift is no violation of law or infringement of public policy.—Driscoll vs. Driscoll, 143 Cal. 523, 535, 77 Pac. Rep. 471.

22. DISTINCTION TO BE NOTED between reserving a right to use of property given and reserving property itself until future time.—Driscoll vs. Driscoll, 143 Cal. 523, 535, 77 Pac. Rep. 471.

23. Where note and mortgage for money loaned are taken in name of daughter of lender with intention as gift to her, mere retention of manual custody of note and mortgage by father is immaterial.—Spitler vs. Kaeding, 133 Cal. 500, 503, 65 Pac. Rep. 1040.

24. SUFFICIENCY—Generally.—Delivery

must be effected in true and effectual way of obtaining command and dominion of subject of gift.—*Giselman vs. Starr*, 106 Cal. 651, 657, 40 Pac. Rep. 8; *Knight vs. Tripp*, 121 Cal. 674, 678, 54 Pac. Rep. 267. See *N. H. Sanborn vs. Goodhue*, 28 N. H. 48, 59 Am. Dec. 398. *S. C. Reid vs. Colcock*, 1 N. & McC. 592, 9 Am. Dec. 729. *Vt. Ross vs. Draper*, 55 Vt. 404, 45 Am. Rep. 624. *Va. Thomas vs. Lewis*, 39 Va. 1, 37 Am. St. Rep. 848, 15 S. E. Rep. 389, 18 L. R. A. 170.

25. It is essential to gift causa mortis that donor shall confer upon donee, at time of gift, present title and property in thing given; and, if thing given is capable of corporeal delivery, there must be actual or symbolical delivery of it, or, if it is not so capable, means of obtaining control and possession of thing must be then given.—*Hart vs. Ketchum*, 121 Cal. 426, 429, 53 Pac. Rep. 931.

26. Fact that donor had intended giving note and that note had been inventoried by guardian of donee as part of his estate will not establish gift in itself in absence of delivery or indorsement of the note.—*Giselman vs. Starr*, 106 Cal. 651, 657, 40 Pac. Rep. 8.

27. Construction of "delivery."—Delivery required by code to validity of gift is limited to "verbal" gifts, and requires an actual delivery only when thing given "is capable of delivery." Delivery in this, as in every other case, must be according to nature of thing. It must be actual delivery, so far as subject is capable of delivery. It must be secundum subjectam materiam, and be true and effectual way of obtaining command and dominion of subject. If thing be not capable of actual delivery, there must be some act equivalent to it. The donor must part not only with possession, but with dominion of property.—*Driscoll vs. Driscoll*, 143 Cal. 528, 534, 77 Pac. Rep. 471.

28. Delivery necessary for validity of verbal gifts contemplated by statute is actual or symbolic delivery to donee.—*Ruiz vs. Dow*, 113 Cal. 490, 497, 45 Pac. Rep. 367.

29. Actual delivery of thing given is made substitution for form in writing required for testamentary disposition.—*Knight vs. Tripp*, 121 Cal. 674, 678, 54 Pac. Rep. 267.

30. Executed grant.—There is no statutory requirement in California that gift which is effected by executed grant shall be accompanied by delivery of property given.—*Driscoll vs. Driscoll*, 143 Cal. 528, 535, 77 Pac. Rep. 471. See *Bullock vs. Tinnen*, 2 Car. L. Repos. (N. C.) 271, 6 Am. Dec. 562.

Execution of deed by mark,—as to, see ante § 14 note pars. 19, 20, 56-64.

31. Nature of property to be considered in determining whether or not there has been sufficient delivery.—*Driscoll vs. Driscoll*, 143 Cal. 528, 534, 77 Pac. Rep. 471; *Ross vs. Draper*, 55 Vt. 404, 45 Am. Rep. 624.

32. DELIVERY OF KEY TO RECEPTACLE, which is itself capable of delivery, will not of itself constitute delivery of contents of receptacle.—*Knight vs. Tripp*, 121 Cal. 674, 681, 54 Pac. Rep. 267; *Keepers vs. Fidelity T. & D. Co.*, 56 N. J. L. (27 Vr.) 302, 44 Am. St. Rep. 397, 23 Atl. Rep. 585, 23 L. R. A. 184; *Gano vs. Fisk*, 43 Ohio St. 462, 54 Am. Rep. 319, 3 N. E.

Rep. 532. See *Hatch vs. Atkinson*, 56 Me. 314; *Newman vs. Bost*, 122 N. C. 524, 29 S. E. Rep. 348.

33. Compare: *Thomas vs. Lewis*, 39 Va. 1, 37 Am. St. Rep. 848, 15 S. E. Rep. 389, sub nom. *Page vs. Lewis*, 18 L. R. A. 170.

34. DELIVERY OF KEY TO LOCKED SECRETARY in decedent's rooms until her death, unaccompanied by any word or gift, is not transfer of indorsed notes and certificates contained in locked tin box placed in secretary.—*Knight vs. Tripp*, 121 Cal. 674, 680, 54 Pac. Rep. 267. See *Hatch vs. Atkinson*, 56 Me. 324, 96 Am. Dec. 464.

35. Compare: *Thomas vs. Lewis*, 39 Va. 1, 37 Am. St. Rep. 848, 15 S. E. Rep. 389, sub nom. *Page vs. Lewis*, 18 L. R. A. 170.

36. Same—Bank notes and notes payable to bearer pass by delivery.—*Bradley vs. Hunt*, 5 Gil. & J. (Md.) 54, 28 Am. Dec. 597.

37. Same—Bank checks—Merely signing and delivering does not complete gift; delivery must have been made with intention to transfer money as gift.—*Frantz vs. Porter*, 132 Cal. 49, 55, 64 Pac. Rep. 92 (where this rule was recognized by court in ruling upon whether instructions to jury were misleading).

38. Whether bank check uncollected and unrepresented in lifetime of drawer and unaccompanied by delivery of pass-book, which, under depositor's contract, must be presented with order for withdrawal of the deposit, is effectual is donatio causa mortis, discussed but not decided in *Zeller vs. Jordan*, 105 Cal. 143, 147, 33 Pac. Rep. 640.

39. Same—Certificates of corporate stock.—Indorsement and delivery, without consideration, but with intent to make present transfer, constitutes valid gift, although donor reserved to himself dividends declared during his lifetime.—*Calkins vs. Equitable B. & L. Assoc.*, 126 Cal. 531, 535, 59 Pac. Rep. 30.

Law applies to shares of national bank.—See notes 46 Am. Dec. 332; 75 Am. Dec. 445.

40. Same—Chose in action, in order to pass as gift, must be by assignment, or some equivalent instrument, and such transfer must be actually executed and delivered.—*Giselman vs. Starr*, 106 Cal. 651, 657, 40 Pac. Rep. 8; *Driscoll vs. Driscoll*, 143 Cal. 528, 535, 77 Pac. Rep. 471. See *Matson vs. Abbey*, 70 Hun (N. Y.) 475, 24 N. Y. Supp. 284.

41. DELIVERY TO MORTGAGER OF RECEIPT FOR PART OF MORTGAGE DEBT containing provision that sum was to be indorsed on mortgage as gift of so much of debt constitutes gift of so much, though indorsement is never made.—*Carpenter vs. Soule*, 83 N. Y. 251, 42 Am. Rep. 248; *McKenzie vs. Harrison*, 130 N. Y. 260, 17 Am. St. Rep. 638, 24 N. E. Rep. 458, 3 L. R. A. 257.

42. Negotiable paper.—Indorsement by the donor of note of third person as gift causa mortis constitutes valid gift of note.—*Weston vs. Hight*, 17 Me. 287, 35 Am. Dec. 250; *Bedell vs. Carll*, 33 N. Y. 581 (possession of the note indorsed is prima facie evidence of gift); *Dean vs. Corbett*, 51 N. Y. Super. Ct. 103; *Conklin vs. Conklin*, 20 Hun (N. Y.) 278; *Shepherd vs. Earle*, 25 Hun (N. Y.) 317.

43. **INDORSEMENT BY PAYEE** of negotiable paper payable to order is not essential to valid donatio causa mortis.—*Druke vs. Heiken*, 61 Cal. 346, 347, 44 Am. Rep. 553; *Edwards vs. Wagner*, 121 Cal. 376, 53 Pac. Rep. 821. See *Conner vs. Root*, 11 Colo. 183, 17 Pac. Rep. 773; *Leyson vs. Davis*, 17 Mont. 220, 283, 42 Pac. Rep. 775, 31 L. R. A. 429; *Hackney vs. Vrooman*, 62 Barb. (N. Y.) 650; *Kiff vs. Weaver*, 94 N. C. 274, 55 Am. Rep. 601.

44. Compare: *Bradley vs. Hunt*, 5 Gill & J. (Md.) 54, 23 Am. Dec. 600.

45. **TAKING NOTE AND MORTGAGE FOR MONEY LOANED** in the name of his daughter is prima facie evidence that lender intended to make gift of it, as no implication of trust arises upon purchase of property by parent in name of child. Prima facie, such purchase is to be regarded as gift or advancement.—*Spitler vs. Kaeding*, 133 Cal. 500, 503, 65 Pac. Rep. 1040.

46. **PROOF OF DELIVERY**.—It requires less positive and unequivocal testimony to establish delivery of gift from father to his children than it does between persons who are not related, and in cases where there is no suggestion of fraud or undue influence very slight evidence will suffice.—*Love vs. Francis*, 63 Mich. 181, 6 Am. St. Rep. 290, 297, 29 N. W. Rep. 843.

47. **Property in hands of third person**.—If property is not in possession of donor, his execution and delivery of deed or assignment thereof is efficient mode of parting with his dominion over property, since he thereby gives means of obtaining possession and control of thing given.—*Driscoll vs. Driscoll*, 148 Cal. 528, 534, 77 Pac. Rep. 471.

48. **An order by the alleged donor to the custodian of property for possession thereof does not of itself show gift**. In such case it must be presumed that person to whom delivered under order holds as bailee for original owner.—*Estate of Rathgeb*, 125 Cal. 302, 306, 57 Pac. Rep. 1010.

49. **TO THIRD PERSON**.—To constitute valid gift inter vivos, there must be delivery of thing given, either actual or constructive. It is not necessary that it be delivered to person intended directly. It may be delivered to some person for him or to trustee for that purpose, and in all cases such disposition of it must be made in favor of donee as effectuates the object and places the jus disponendi beyond power of donor to recall. Under some circumstances donor himself may constitute himself trustee of thing for benefit of donee.—*Love vs. Francis*, 63 Mich. 181, 6 Am. St. Rep. 290, 296, 29 N. W. Rep. 843. See *Williamson vs. Johnson*, 62 Vt. 378, 22 Am. St. Rep. 117, 20 Atl. Rep. 279, 9 L. R. A. 277.

50. **TIME OF DELIVERY**.—Delivery must accompany gift and must be made at same time. It is delivery by donor, and not possession by donee, that makes gift effective.—*Hart vs. Ketchum*, 121 Cal. 426, 429, 53 Pac. Rep. 931.

51. Compare: *Carradine vs. Carradine*, 58 Miss. 286, 38 Am. Rep. 324, where it was held

that it was not essential that delivery should be simultaneous with the words of donation. "It may either precede or succeed the words. If it precede the words so that the property is already in possession of donee, no new delivery is necessary; if it succeed the words, it makes perfect that which was before incomplete."

IV. INTENTION.

52. **IN GENERAL**.—Intention to give is necessary to valid gift.—*Knight vs. Tripp*, 121 Cal. 674, 678, 54 Pac. Rep. 267; *Pullen vs. Placer Co. Bank*, 138 Cal. 169, 170, 94 Am. St. Rep. 19, 71 Pac. Rep. 83. See *Hatch vs. Atkinson*, 56 Me. 224, 96 Am. Dec. 464.

53. **Intent of donor to make gift is that which is the most to be regarded, within rule, ejus est dare, ejus est disponere**. Giver of gift has right to regulate its disposal (*Broom's Leg. Max.* 444); a fortiori has he right to designate donee.—*In re Stevens*, 83 Cal. 322, 325, 17 Am. St. Rep. 252, 23 Pac. Rep. 379.

54. **MODE OF EXPRESSING**.—Purpose to give must be expressed either orally or in writing.—*Pullen vs. Placer Co. Bank*, 138 Cal. 169, 170, 94 Am. St. Rep. 19, 71 Pac. Rep. 83.

55. **NO FORMULA OR SET PHRASE** is necessary to show an intention to give; nor is it necessary to use word "give" or "have given"; it is sufficient, if there was delivery, and any words importing intention to give.—*Vandor vs. Roach*, 73 Cal. 614, 615, 15 Pac. Rep. 354 (where only evidence on subject was that of physician, who testified that the dying man took package from under his pillow and handed it to plaintiff saying: "These bonds are for you." Witness did not pretend to give precise words uttered, but stated that this was substance of what was stated; and it was held sufficient).

56. **Deposit in joint name of depositor and another "and survivor of them, but subject to order of either" does not import gift**.—*Taylor vs. Henry*, 48 Md. 550, 30 Am. Rep. 486.

57. **Directions to donee to make payments of money to designated persons is inconsistent with intention to make gift to donee**.—*Hart vs. Ketchum*, 121 Cal. 426, 429, 53 Pac. Rep. 931. See *Beals vs. Crowley*, 59 Cal. 665, 663.

58. **PROOF**—Presumptions and burden of proof—Generally.—There is no presumption in favor of gift as general rule.—*Denigan vs. Hibernia Sav. & L. Soc.*, 127 Cal. 137, 141, 59 Pac. Rep. 339; *Denigan vs. San Francisco Sav. Union*, 127 Cal. 142, 147, 78 Am. St. Rep. 35, 59 Pac. Rep. 390. See *White vs. Warren*, 120 Cal. 322, 49 Pac. Rep. 139, 52 Id. 723; *Grey vs. Grey*, 47 N. Y. 552.

59. **BURDEN OF PROOF** that gift was intended is on donee.—*Frantz vs. Porter*, 132 Cal. 49, 55, 64 Pac. Rep. 92.

60. **Degree of proof**.—When claim of gift is not asserted until after death of alleged donor, it should be sustained by clear and satisfactory evidence of every element which is requisite to constitute gift.—*Denigan vs. Hibernia Sav. & L. Soc.*, 127 Cal. 137, 141, 59 Pac. Rep. 339. See *Frantz vs. Porter*, 132 Cal. 49, 55, 64 Pac. Rep. 92; *Whalen vs. Mil-*

holland, 89 Md. 199, 43 Atl. Rep. 45, 44 L. R. A. 208; De Puy vs. Stevens, 37 N. Y. App. Div. (N. Y.) 239, 232, 55 N. Y. Supp. 810.

61. Donor under moral obligation to give.—“The doctrine of equity, as regards presumptions of gifts, is this, that where one person stands in such relation to another that there is an obligation on that person to make provision for other, and we find either purchase or investment in name of other, . . . of amount which would constitute provision for other, presumption arises of intention on part of person to discharge obligation to other, and therefore, in absence of evidence to contrary, that purchase or investment is held to be in itself evidence of gift. In other words, presumption of gift arises from moral obligation to give.”—Bennett vs. Bennett, L. R. 10 Ch. Div. 474, 476; quoted with approval in Spittler vs. Kaeding, 133 Cal. 500, 502, 65 Pac. Rep. 1040.

62. Declarations of donor.—Intention of alleged donor may be proved by his own declaration made either before or after transaction.—Ruis vs. Dow, 113 Cal. 490, 496, 45 Pac. Rep. 867.

63. In this case court, in answer to contention that reception of such declarations was in effect permitting parol evidence to contradict his expressed intention in deed itself, say: “Without conceding that his intention bearing upon delivery of deed as expressed in writing was at all different from his intention as subsequently expressed in parol, still he had right at all times, up to date of actual delivery of instrument, to modify, enlarge, or even annul his intentions in this regard, and, as to these things, he was in no way bound by any writing made by himself, for document was in his possession and subject in all respects to his control. He not only had right to change character of delivery originally contemplated, but he had right to destroy and nullify instrument itself.”—Supra.

64. DECLARATIONS OF DONOR AFTER HE HAS PARTED with property are not admissible, as against donee, either to prove fraud or otherwise.—Walden vs. Purvis, 73 Cal. 513, 519, 15 Pac. Rep. 91.

65. TESTIMONY OF ALLEGED DONOR is competent on issue as to his intentions when he executed deeds and transfers.—Kye vs. Craig, 125 Cal. 107, 114, 57 Pac. Rep. 791.

66. Donor without family.—Evidence that donor had no children or parents to provide for is relevant as having some bearing on probability of gift to one not related to him having been made.—Russell vs. Langford, 135 Cal. 356, 359, 67 Pac. Rep. 331.

67. QUESTION OF FACT.—Intention of alleged donor, while all-important in arriving at conclusion as to whether actual gift is accomplished, is still pure question of fact.—Ruis vs. Dow, 113 Cal. 490, 496, 45 Pac. Rep. 867; Calkins vs. Equitable B. & L. Assoc., 126 Cal. 531, 535, 59 Pac. Rep. 30.

V. TIME OF TAKING EFFECT.

68. IN GENERAL.—Gift, whether inter vivos or causa mortis, must, in order to be

valid, be fully executed and go into effect at once, that is to say, the present title or property in thing given must be conferred upon donee at time of gift.—Zeller vs. Jordan, 105 Cal. 143, 33 Pac. Rep. 640; Hart vs. Ketchum, 121 Cal. 426, 428, 53 Pac. Rep. 931; Knight vs. Tripp, 121 Cal. 674, 682, 54 Pac. Rep. 367; Williams vs. Tam, 131 Cal. 64, 66, 63 Pac. Rep. 133. Ind. Smith vs. Dorsey, 38 Ind. 451, 10 Am. Rep. 118. Md. Taylor vs. Henry, 48 Md. 550, 30 Am. Rep. 486. Mo. McCord vs. McCord, 77 Mo. 166, 46 Am. Rep. 9. Pa. Walsh's Appeal, 123 Pa. St. 177, 9 Am. St. Rep. 33, 15 Atl. Rep. 470, 1 L. R. A. 535. Fed. Basket vs. Hassell, 107 U. S. 602, bk. 27 L. ed. 500, 3 Sup. Ct. Rep. 415.

Revocation of gift causa mortis,—as to, see post § 1151 and note.

69. CHECK ON BANK DEPOSIT.—Check on bank deposit, in order to be effective as gift, must be presented in lifetime of donor.—Pullen vs. Placer Co. Bank, 133 Cal. 169, 171, 94 Am. St. Rep. 19, 71 Pac. Rep. 83. See Phelps vs. Phelps, 28 Barb. (N. Y.) 121; Fulton vs. Fulton, 48 Barb. (N. Y.) 531; Lant vs. Bank of N. A., 49 Barb. (N. Y.) 122; Harris vs. Clark, 3 N. Y. 93, 51 Am. Dec. 352; In re Beak's Estate, L. R. 13 Eq. 489, sub nom. Beak vs. Beak, 3 Moak Eng. Rep. 390.

Compare: Wilbar vs. Smith, 37 Mass. (5 Allen) 194; Paine vs. Hunt, 40 Barb. (N. Y.) 75; Worth vs. Case, 3 Lans. (N. Y.) 264, affd. 42 N. Y. 362; Lloyd vs. Clevne, 2 Giff. 441.

70. Idea of gift of bank deposit is inconsistent with retention by donee of right in herself to withdraw the whole of money from bank. Valid gift goes into immediate effect, and has no reference to future. It divests donor of his title, and requires renunciation on his part of all claim and interest in subject of gift.—Denigan vs. Hibernia Sav. & L. Soc., 127 Cal. 137, 141, 59 Pac. Rep. 339.

71. Check given to payee requesting him not to present same until after death of drawer is not complete gift nor assignment of funds drawn against.—Pullen vs. Placer Co. Bank, 133 Cal. 169, 171, 94 Am. St. Rep. 19, 71 Pac. Rep. 83.

72. Check payable six months after maker's death delivered to payee in trust is not gift inter vivos nor trust which equity will enforce.—Appeal of Waynesburg College, 111 Pa. St. 130, 56 Am. Rep. 252, 3 Atl. Rep. 19.

73. DELIVERY MUST NOT BE FOR PURPOSE OF FUTURE DISPOSAL under direction of donor. If donee is merely empowered to draw money and is thereafter to dispose of it in accordance with instructions of donor, he is merely agent of donor, and his agency terminates with death of donor.—Hart vs. Ketchum, 121 Cal. 426, 428, 53 Pac. Rep. 931.

74. Declaration made by decedent at time of transfer of bank-books, made in contemplation of death, that “she wanted to assign money to defendant, with all rest of her property, under certain conditions that she had given in regard to its disposal,” is insufficient to sustain claim of gift to defendant, but merely make him her agent to carry out instructions.—Knight vs. Tripp, 121 Cal. 674, 680, 54 Pac. Rep. 367.

75. GIFT TO TAKE EFFECT AT DEATH OF DONOR is an attempted testamentary disposal, and not gift.—*Zeller vs. Jordan*, 105 Cal. 143, 148, 38 Pac. Rep. 640.

Gift causa mortis,—as to, see post § 1149 and note.

76. LIMITATION THAT GIFT IS NOT TO TAKE EFFECT TILL DONOR'S DEATH is condition precedent by which gift is prevented from becoming absolute in lifetime of donor, and thing given is therefore portion of his estate at time of his death.—*Daniel vs. Smith*, 64 Cal. 346, 349, 30 Pac. Rep. 575, 75 Cal. 548, 550; *Hart vs. Ketchum*, 121 Cal. 426, 429, 53 Pac. Rep. 931; *Walter vs. Ford*, 74 Mo. 195, 41 Am. Rep. 312; *Basket vs. Hassell*, 107 U. S. 602, bk. 27 L. ed. 500, 2 Sup. Ct. Rep. 415.

77. PROMISE—Gift to take effect in future is merely promise to give, and promise to give is no gift.—*Williams vs. Tam*, 131 Cal. 64, 66, 68 Pac. Rep. 133.

78. To make gift inter vivos perfect and complete, there must be actual transfer of all right and dominion over thing given by donor, and acceptance by donee, or some competent person for him; and it is essential, to the validity of such gift, that it should go into effect, that is, transfer property at once and completely; for if it has reference to future time when it is to operate as transfer, it is but promise without consideration, and cannot

be enforced, either at law or in equity. Until gift is thus made perfect, locus penitentis remains, and owner may make any other disposition of the property that he may think proper.—*Taylor vs. Henry*, 48 Md. 550, 30 Am. Rep. 436.

79. Donor's promissory note to donee creates no enforceable obligation; being mere promise without consideration to give sum of money in future, it is of no legal consequence. Besides tending to subvert statute of wills, it is still but promise to make gift, and invalid because thing promised is not delivered.—*Tracy vs. Alvord*, 118 Cal. 654, 655, 50 Pac. Rep. 757. See *Ill. Shaw vs. Camp*, 160 Ill. 425, 48 N. E. Rep. 608. *Md. Bradley vs. Hunt*, 5 Gill. & J. 54, 23 Am. Dec. 597. *Mass. Bartlett's Petition*, 163 Mass. 509, 40 N. E. Rep. 899. *N. Y. Harris vs. Clark*, 3 N. Y. 93, 51 Am. Dec. 352; *Matter of James*, 146 N. Y. 78, 48 Am. St. Rep. 774, 40 N. E. Rep. 876; *Fink vs. Cox*, 18 John. 145, 9 Am. Dec. 191. *Ohio. Johnson vs. Otterbein University*, 41 Ohio St. 527. *S. C. Priester vs. Priester*, Rich. Eq. Cas. 626, 23 Am. Dec. 191.

80. Compare: *Kern's Estate*, 171 Pa. St. 55, 33 Atl. Rep. 129.

81. Note promising to pay a sum out of donor's estate after his death is not gift causa mortis, but mere promise.—*Holley vs. Adams*, 16 Vt. 206, 42 Am. Dec. 508, 509.

§ 1148. GIFT NOT REVOCABLE. A gift, other than a gift in view of death, cannot be revoked by the giver.

History: Enacted March 21, 1872.

1. Fraudulent conveyances—Gifts as.
2. Revocation of gift inter vivos.
3. Revocation of gift causa mortis.
4. Resumption of possession by donor.

1. Fraudulent conveyances—Gift as.—See post § 3439 et seq. and notes.

2. Revocation of gift inter vivos.—It is general rule of law that gift by competent party, made perfect by delivery and acceptance, is irrevocable by donor.—*Fredericks vs. Sault*,

19 Ind. App. 604, 49 N. E. Rep. 909; *Williamson vs. Johnson*, 62 Vt. 373, 23 Am. St. Rep. 117, 20 Atl. Rep. 279, 9 L. R. A. 277.

3. Revocation of gift causa mortis,—as to, see post § 1151 and note.

4. Resumption of possession by donor of subject of valid and complete gift inter vivos, does not revoke or annul gift.—*Grover vs. Grover*, 41 Mass. (24 Pick.) 261, 35 Am. Dec. 319.

§ 1149. GIFT IN VIEW OF DEATH, WHAT. A gift in view of death is one which is made in contemplation, fear, or peril of death, and with intent that it shall take effect only in case of the death of the giver.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 396, held unconstitutional, see history, § 4 ante.

1. Applied, cited, construed, referred to, etc.
2. Construction—Gift causa mortis.
3. Same—View of death.
4. Gifts causa mortis—Not regarded with favor.
5. Same—Testamentary character.
- 6-8. Same—Made while donor in full health.
9. Requisites of gift causa mortis—What are.
10. Same—Must be clearly proved.
11. View of death—"Speedy."
12. Same—"Near approach."
13. Same—"Present disease," "impending peril."
14. Same—Existence of fatal illness.

15. Same—Death from other cause than apprehended disease.

16. Same—In extremis—Not necessary.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Zeller vs. Jordan*, 105 Cal. 143, 147, 38 Pac. Rep. 640 (construed and applied).

2. Construction—Gift causa mortis.—See para. 4-8 this note.

3. Same—View of death.—See para. 11-16 this note.

4. GIFTS CAUSA MORTIS ARE NOT RE-

GADED WITH FAVOR, since they are in contravention of rules of testamentary disposition of property.—*Knight vs. Tripp*, 121 Cal. 674, 678, 54 Pac. Rep. 267.

5. Testamentary to extent that it is made in contemplation of death, and becomes absolute only on death of owner.—*Knight vs. Tripp*, 121 Cal. 674, 678, 54 Pac. Rep. 267.

See post § 1153 note par. 1.

6. Made while donor is in full health, or while suffering from disease that in reasonable expectations will not produce death in near future, is invalid.—*Zeller vs. Jordan*, 105 Cal. 143, 148, 38 Pac. Rep. 640.

7. Check on deposit in bank while donor is in good health, payable to donee in case of death of donor, is held to be invalid gift.—*Zeller vs. Jordan*, 105 Cal. 143, 148, 38 Pac. Rep. 640.

8. Deed delivered long prior to grantor's last illness, not being made in contemplation of death, cannot be regarded as gift causa mortis, nor testamentary provision by party.—*Driscoll vs. Driscoll*, 143 Cal. 528, 532, 77 Pac. Rep. 471.

9. **REQUISITES OF GIFT CAUSA MORTIS**—What are.—In order to render perfect donatio causa mortis, three things must occur: (1) that gift be made with view to donor's death; (2) that it be with condition, either express or implied, that it shall take effect only on death of donor by disorder from which he is then suffering; and (3) that there be delivery of subject of donation.—*Taylor vs. Henry*, 48 Md. 550, 30 Am. Rep. 486.

10. Should in all cases be established by proof which is clear and convincing.—*Knight vs. Tripp*, 121 Cal. 674, 678, 54 Pac. Rep. 267.

11. **VIEW OF DEATH**—"Speedy."—Circumstances which would naturally impress donor with an expectation of speedy death is suffi-

cient to constitute gift made thereunder causa mortis.—*Knight vs. Tripp*, 121 Cal. 674, 677, 54 Pac. Rep. 267.

12. "Near approach."—*Donatio causa mortis*, to constitute gift, must be made in contemplation of near approach of death of donor and must be delivered.—*Daniel vs. Smith*, 64 Cal. 346, 349, 30 Pac. Rep. 575; *Zeller vs. Jordan*, 105 Cal. 143, 148, 38 Pac. Rep. 640. See *Hart vs. Ketchum*, 121 Cal. 426, 429, 53 Pac. Rep. 931; *Hatcher vs. Buford*, 60 Ark. 169, 176, 29 S. W. Rep. 641, 27 L. R. A. 507; *Simpson vs. Harris*, 21 Nev. 353, 363, 31 Pac. Rep. 1009.

13. "Present disease"—"Impending peril."—Apprehension of death from some present disease or some other impending peril is necessary to donatio causa mortis.—*Zeller vs. Jordan*, 105 Cal. 143, 148, 38 Pac. Rep. 640; *Ridden vs. Thrall*, 125 N. Y. 572, 21 Am. St. Rep. 758, 26 N. E. Rep. 627, 11 L. R. A. 684.

14. Existence of fatal illness.—Rule by law in case of gift made in prospect of death demands for its validity that proof show existence of bodily disorder or illness which impends existence of donor's life or which eventually terminates it.—*Zeller vs. Jordan*, 105 Cal. 143, 148, 38 Pac. Rep. 640; *Williams vs. Gulle*, 117 N. Y. 343, 22 N. E. Rep. 1071, 6 L. R. A. 366.

15. Death from other cause than apprehended disease is not essential.—*Ridden vs. Thrall*, 125 N. Y. 572, 21 Am. St. Rep. 758, 26 N. E. Rep. 627, 11 L. R. A. 684 (when the gift was originally made in view of death from surgical operation, but immediate cause of death was heart disease).

See note 11 L. R. A. 684-687.

16. In extremis.—It is not necessary that gift be made in extremis, when there is no time to make will.—See *Ridden vs. Thrall*, 125 N. Y. 572, 21 Am. St. Rep. 758, 26 N. E. Rep. 627, 11 L. R. A. 684.

§ 1150. WHEN GIFT PRESUMED TO BE IN VIEW OF DEATH. A gift made during the last illness of the giver, or under circumstances which would naturally impress him with an expectation of speedy death, is presumed to be a gift in view of death.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Pleading—Averments of execution and delivery.
- 3, 4. Statement of donor as to presence of death.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Knight vs. Tripp*, 121 Cal. 674, 677, 54 Pac. Rep. 267 (construed and applied).

2. **PLEADING**—Averment of execution and delivery of deed under belief that injury from which grantor was then suffering would terminate fatally, and for the purpose of fully conveying to grantee all of interest in said property, which was his as matter of right, and for purpose of further vesting in him all her interest in said property, is not sufficient to raise implication that transfer was in na-

ture of gift causa mortis.—*Carty vs. Connolly*, 91 Cal. 15, 20, 27 Pac. Rep. 599.

3. **STATEMENT OF DONOR** when issue is whether or not transfer was made with belief on part of donor that he was in presence of death, evidence of what was said by him on occasion should be received.—*Kyle vs. Craig*, 125 Cal. 107, 113, 57 Pac. Rep. 791.

4. With reference to gift made during surgical operation that same was in contemplation of death is not necessary, if circumstances authorize conclusion that death was apprehended; "if circumstances under which it was made were such as to authorize such conclusion, it will be treated same as if it had been so stated by her."—*Knight vs. Tripp*, 121 Cal. 674, 677, 54 Pac. Rep. 267.

§ 1151. REVOCATION OF GIFT IN VIEW OF DEATH. A gift in view of death may be revoked by the giver at any time, and is revoked by his recovery

from the illness, or escape from the peril, under the presence of which it was made, or by the occurrence of any event which would operate as a revocation of a will made at the same time, but when the gift has been delivered to the donee, the rights of a bona fide purchaser from the donee before the revocation, shall not be affected by the revocation.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 226.

1. Applied, cited, construed, referred to, etc.
- 2, 3. Action brought to revoke gift causa mortis.
4. Death of donor of check before acceptance.
- 5, 6. Particular procedure to revoke—Not prescribed by statute.
- 7, 8. Recovery from disease.
9. Subsequent actual possession by donor not necessary.

1. Applied, cited, construed, referred to, etc., in: *Doran vs. Doran*, 99 Cal. 311, 315, 33 Pac. Rep. 929 (applied); *Adams vs. Atherton*, 132 Cal. 164, 166, 64 Pac. Rep. 283 (construed and applied).

2. Action brought to revoke a gift causa mortis which consisted of assignment of note of mortgage and bill of sale of other property belonging to donor which seeks to cancel assignment under bill of sale operates as revocation of gift as whole.—*Adams vs. Atherton*, 132 Cal. 164, 166, 64 Pac. Rep. 283.

3. Service of summons in action to revoke gift causa mortis sufficiently gives knowledge to donee of such intention.—*Adams vs. Atherton*, 132 Cal. 164, 166, 64 Pac. Rep. 283.

4. Death of donor of check causa mortis before its presentation or acceptance operates as revocation of the check.—*Simmons vs. Cincinnati Sav. Soc.*, 31 Ohio St. 457, 27 Am. Rep. 521.

5. Particular procedure to revocation of

gift causa mortis is not prescribed by code. It declares simply that such gift may be revoked by giver at any time.—*Adams vs. Atherton*, 132 Cal. 164, 166, 64 Pac. Rep. 283. See *Doran vs. Doran*, 99 Cal. 311, 315, 33 Pac. Rep. 929.

6. Where several days after the assignment of a pass-book donor told alleged donee to hurry to bank and get out money and bring to him, revocation of gift is shown.—*Doran vs. Doran*, 99 Cal. 311, 315, 33 Pac. Rep. 929.

7. Recovery from disease or escape from peril operates to revoke gift causa mortis.—*Zeller vs. Jordan*, 105 Cal. 143, 148, 38 Pac. Rep. 640; *Ridden vs. Thrall*, 135 N. Y. 572, 21 Am. St. Rep. 753, 26 N. E. Rep. 627, 11 L. R. A. 634. See *O'Kane vs. Whelan*, 124 Cal. 200, 201, 71 Am. St. Rep. 42, 56 Pac. Rep. 330; *Weston vs. Hight*, 17 Me. 287, 35 Am. Dec. 250; *Priester vs. Priester*, Rich. Eq. Cas. (S. C.) 36, 23 Am. Dec. 191.

8. The law requires gift causa mortis to be absolute at time it is given, but adds to it condition that it may be revoked at will of donor, and that it is revoked by his recovery.—*Hart vs. Ketchum*, 121 Cal. 426, 429, 53 Pac. Rep. 931.

9. Subsequent actual possession of property given is not requisite to revocation.—*Adams vs. Atherton*, 132 Cal. 164, 166, 64 Pac. Rep. 283.

§ 1152. EFFECT OF WILL UPON GIFT. A gift in view of death is not affected by a previous will; nor by a subsequent will, unless it expresses an intention to revoke the gift.

History: Enacted March 21, 1872.

Applied, cited, construed, referred to, etc., in: *Adams vs. Atherton*, 132 Cal. 164, 166, 64 Pac. Rep. 283 (cited).

§ 1153. WHEN TREATED AS LEGACY. A gift in view of death must be treated as a legacy, so far as relates only to the creditors of the giver.

History: Enacted March 21, 1872.

1. Gifts causa mortis.
2. Partake of character of testamentary disposition.

1. Gifts causa mortis resemble legacies in being subject to debts of the deceased, and in being ambulatory or revocable, and contingent on death.—*Knight vs. Tripp*, 121 Cal. 674, 678, 54 Pac. Rep. 267; *Gano vs. Fisk*, 43 Ohio St. 462, 54 Am. Rep. 319. See *Emery vs. Clough*, 63 N. H. 552, 56 Am. Rep. 543.

2. "And in that respect partakes somewhat of character of testamentary disposition of

property, so far as it is liable for intestate's debts, but it differs materially from will, in that donee's title is derived directly from donor, and assent of representative of donor is not necessary to support his title, yet at same time executor or administrator of alleged donor has corresponding rights, and accordingly, upon deficiency of assets to pay lawful claims of creditors, any gift causa mortis must give way, so far as may be necessary to discharge lawful demands."—*Kiff vs. Weaver*, 36 N. C. 274, 55 Am. Rep. 601.

CHAPTER IV.

RECORDING TRANSFERS.

Article I. What May Be Recorded, §§ 1158-1165.

II. Mode of Recording, §§ 1169-1173.

III. Proof and Acknowledgments of Instruments, §§ 1180-1207.

IV. Effect of Recording, or of the Want Thereof, §§ 1213-1218.

ARTICLE I.

WHAT MAY BE RECORDED.

§ 1158. What may be recorded.

§ 1159. Judgments may be recorded without acknowledgment. [Location of mining claim.]

§ 1160. Letters patent may be recorded without acknowledgment.

§ 1161. Instruments must be acknowledged, except, etc.

§ 1162. Same. [Certified instruments recorded, when.]

§ 1163. Certificate of residence filed with recorder, showing where service of summons may be made.

§ 1164. Transfers in trust, etc.

§ 1165. Recorder's fees to be indorsed.

§ 1158. **WHAT MAY BE RECORDED.** Any instrument or judgment affecting the title to or possession of real property may be recorded under this chapter.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Common law does not require recordation.
3. Same—Record not prima facie evidence.
4. Constitutionality of statute upheld.
5. Deposit in recorder's office.
- 6, 7. Enumeration of "instruments" and "conveyances."
8. Ordinary use of word "instrument."
9. Real property sole subject of Recording Act.
10. Sealed instruments—Distinction as to, abolished.
11. Sections of code read together.
12. Subject-matter of statute considered.
13. Void deed—Immaterial record of.
14. Same—Tax deed.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Hoag vs. Howard*, 55 Cal. 564, 565, 566 (cited); *Meherin vs. Oaks*, 67 Cal. 57, 58, 7 Pac. Rep. 47 (construed and applied); *Oglesby vs. Hollister*, 76 Cal. 136, 140, 9 Am. St. Rep. 177, 18 Pac. Rep. 146 (applied); *Cardenas vs. Miller*, 108 Cal. 250, 256, 49 Am. St. Rep. 84, 39 Pac. Rep. 733, 41 Id. 472 (cited and applied); *Weaver vs. McKay*, 108 Cal. 546, 549, 41 Pac. Rep. 450 (applied).

2. **COMMON LAW DOES NOT REQUIRE RECORDATION**, and it has been expressly provided by § 1217 that unrecorded instrument is valid as between parties thereto and those who have notice thereof.—*Warnock vs. Harlow*, 96 Cal. 298, 305, 31 Am. St. Rep. 209, 31 Pac. Rep. 166. See *Clarke vs. White*, 37 U. S. (12 Pet.) 178, 198, bk. 9 L. ed. 1046.

See post § 1217 and note.

3. **No prima facie evidence of title is produced at common law by registration of deed**, and it imports no notice whatever, and notwithstanding such recordation purchaser is put upon inquiry in like manner as if there had been no recordation.—*Mesick vs. Sunderland*, 6 Cal. 297, 315.

4. **CONSTITUTIONALITY OF STATUTE** has been upheld, it being declared that it is competent for legislature to make recordation of deed notice to encumbrancers both prior and subsequent.—*Dennis vs. Burritt*, 6 Cal. 670, 673.

5. **DEPOSIT IN RECORDER'S OFFICE**.—An instrument is deemed to be recorded, under § 1170, when, being duly acknowledged or proved, and certified to, it is deposited in recorder's office with proper officer for record.—*Meherin vs. Oaks*, 67 Cal. 57, 58, 7 Pac. Rep. 47. See post § 1170 and note.

6. **Enumeration of "instruments" and "conveyances."**—See post § 1215 and note.

7. **CLASSIFICATION OF INSTRUMENTS**, although it might be properly made here or under § 1213 or § 1214, seems to fall more properly under § 1215, which defines term "conveyance," and accordingly full treatment of subject has been reserved for last-named section, except as respects few cases which have specifically cited §§ 1158, 1213, 1214.

8. **ORDINARY USE OF WORD "INSTRUMENT"** seems to have been intended, and according to lexicographers it means "an abbreviated form of written instrument," word "written" being elided.—*Hoag vs. Howard*, 55 Cal. 564, 566.

9. **REAL PROPERTY** must be involved by instrument in order to entitle it to recordation.—*Meherin vs. Oaks*, 67 Cal. 57, 58, 7 Pac. Rep. 47; *Cardenas vs. Miller*, 108 Cal. 250, 256, 49 Am. St. Rep. 84, 39 Pac. Rep. 733, 41 Id. 472.

10. **SEALED INSTRUMENTS**.—Distinction between sealed and unsealed instruments has been abolished by § 1629.—*Hoag vs. Howard*, 55 Cal. 564, 566.

See post § 1629 and note.

11. **SECTIONS OF CODE READ TOGETHER** in determining what is instrument which may be recorded, and it is invariable rule that word "instrument" indicates some written pa-

per or instrument signed and delivered by one person to another, transferring title to or creating lien on property or giving right to debt or duty.—*Hoag vs. Howard*, 55 Cal. 564, 565, 566 (in which case court cited more than 40 sections of the code as indicating that this is proper construction of word "instrument").

See ante §§ 709, 994, 1053, 1056, 1059, 1091, 1093-1095, 1106, 1107, 1110, 1135 and notes; and post §§ 1161, 1162, 1165, 1170, 1172, 1180-1186, 1188, 1190, 1193, 1195-1205, 1207, 1216, 1227-1229, 1451, 1629, 2087, 2413, 2414, and notes; each of which sections bears upon the proper construction of the word "instrument;" and in particular see post § 1215 and note.

12. THE SUBJECT-MATTER OF STATUTE MUST BE CONSIDERED, in accordance with familiar rule, in determining its meaning.—

Cardenas vs. Miller, 103 Cal. 250, 256, 49 Am. St. Rep. 34, 39 Pac. Rep. 733, 41 Id. 472.

13. VOID DEED does not affect title, and its registration gives no notice to any person.—*Oglesby vs. Hollister*, 76 Cal. 136, 140, 9 Am. St. Rep. 177, 18 Pac. Rep. 146. See *Mesick vs. Sunderland*, 6 Cal. 297, 315. *Kam. Stone vs. French*, 37 Kan. 145, 1 Am. St. Rep. 227, 14 Pac. Rep. 530. *Miss. Harkreader vs. Clayton*, 56 Miss. 333, 31 Am. Rep. 369. *Vt. Sawyer vs. Adams*, 8 Vt. 172, 30 Am. Dec. 459; *Smith vs. South Royalton Bank*, 32 Vt. 341, 76 Am. Dec. 179. *Wis. Chipman vs. Tucker*, 38 Wis. 43, 20 Am. Rep. 1.

14. Tax deed which is void on its face, even though registered, does not affect title.—*Oglesby vs. Hollister*, 76 Cal. 136, 140, 9 Am. St. Rep. 177, 18 Pac. Rep. 146.

§ 1159. JUDGMENTS MAY BE RECORDED WITHOUT ACKNOWLEDGMENT. [LOCATION OF MINING CLAIM.] Judgments affecting the title to or possession of real property, authenticated by the certificate of the clerk of the court in which such judgments were rendered (and notices of location of mining claims), may be recorded without acknowledgment, certificate of acknowledgment, or further proof.

[Work upon mining claims.] The record of all notices of location of mining claims heretofore made in the proper office without acknowledgment, or certificate of acknowledgment, or other proof, shall have the same force and effect for all purposes as if the same had been duly acknowledged, or proved and certified as required by law. Affidavits showing work or posting of notices upon mining claims may also be recorded in the recorder's office of the county where such mining claims are situated.

History: Enacted March 21, 1872; amended March 9, 1897, Stats. and Amdts. 1897, pp. 97, 98. In effect March 9, 1897.

1. Applied, cited, construed, referred to, etc.
2. Failure to record notice of location of mining claim.
3. Record of notice of location of mining claim—Sufficiency.

1. Applied, cited, construed, referred to, etc., in: *Kern Co. vs. Lee*, 129 Cal. 361, 362, 363, 61 Pac. Rep. 1124 (applied).

2. Failure to record notices of location of

mining claims does not affect validity of location, in absence of state or district requirement so to do.—*Carter vs. Bacigalupi*, 33 Cal. 187, 188, 23 Pac. Rep. 361.

3. Record of notice of location of mining claim is sufficient under the rules of Tuolumne Mining District, if it is same as that posted, provided latter is sufficient.—*Carter vs. Bacigalupi*, 33 Cal. 187, 191, 23 Pac. Rep. 361.

§ 1160. LETTERS PATENT MAY BE RECORDED WITHOUT ACKNOWLEDGMENT. Letters patent from the United States, or from the state of California, executed and authenticated pursuant to existing law, may be recorded without acknowledgment or further proof, and where letters patent have been lost, or are beyond the control of any party deraining title therefrom, or for any reason they remain unrecorded, any person claiming title thereunder may cause a transcript of the copy of such letters patent kept by the government issuing the same, duly certified by the officer or individual having lawful custody of such copy, to be recorded in lieu of the original; and such recorded copy shall have, prima facie, the same force and effect as the original, for title or for evidence, until said original letters patent be recorded.

History: Enacted March 21, 1872; amended April 1, 1878, Code Amdts. 1877-8, p. 86.

1. Applied, cited, construed, referred to, etc.
2. Letters patent.

1. Applied, cited, construed, referred to, etc., in: *People vs. Harrold*, 84 Cal. 567, 569, 24 Pac. Rep. 106 (construed as not applicable).

2. "Letters patent" within meaning of this section are such as affect real property only, and do not include letters patent for an invention.—*People vs. Harrold*, 84 Cal. 567, 569, 24 Pac. Rep. 106.

§ 1161. INSTRUMENTS MUST BE ACKNOWLEDGED, EXCEPT, ETC.

Before an instrument can be recorded, unless it belongs to the class provided for in either section eleven hundred and fifty-nine, eleven hundred and sixty, twelve hundred and two, or twelve hundred and three, its execution must be acknowledged by the person executing it, or if executed by a corporation, by its president or secretary, or other person executing the same on behalf of the corporation, or proved by a subscribing witness, or as provided in sections eleven hundred and ninety-eight and eleven hundred and ninety-nine, and the acknowledgment or proof certified in the manner prescribed by article three of this chapter.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdt. 1873-4, p. 226; by Code Commission, Act March 16, 1901, Stats. and Amdt. 1900-1, p. 396, held unconstitutional, see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdt. 1905, c. CDXLIV, p. 602.

1. Applied, cited, construed, referred to, etc.
2. Acknowledgment is necessary.
3. Certificate of sheriff's sale.
4. Deed of corporation.
5. Map need not be acknowledged.
6. Purpose of acknowledgment.

1. Applied, cited, construed, referred to, etc., in: *Hoag vs. Howard*, 55 Cal. 564, 565 (cited); *Martin vs. Splivalo*, 56 Cal. 128, 129 (cited); *Bennett vs. Green*, 74 Cal. 425, 429, 16 Pac. Rep. 231 (referred to); *Emerie vs. Alvarado*, 90 Cal. 444, 479, 27 Pac. Rep. 356 (cited).

2. Acknowledgment only mode of authenticating the acts of parties, so as to entitle instrument to record and to make it notice to subsequent purchasers, and to entitle it to be read in evidence without other proofs. If purchasers neglect to have their deeds properly authenticated and recorded, they will be liable to have their title divested by subsequent conveyances to innocent parties, and to have further inconvenience of being compelled to prove their execution when called upon to put them in evidence.—*Landers vs. Bolton*, 26 Cal. 393, 405. See *Reid vs. Kleyensteuber* (Aris. March 28, 1900), 60 Pac. Rep. 379. *Ga. Rushin vs. Shields*, 11 Ga. 636, 56 Am. Dec. 436. *Kan. Fisher vs. Cowles*, 41 Kan. 418, 21 Pac. Rep. 228. *N. C. Bernhardt vs. Brown*, 122 N. C. 587, 65 Am. St. Rep. 725, 29 S. E. Rep. 884. *Tex. Taylor vs. Harrison*, 47 Tex. 454, 26 Am. Rep. 304.

3. Certificate of sheriff's sale requires no

acknowledgment and duplicate of such certificate may be filed, and recorded under Political Code § 4237, without acknowledgment.—*Foorman vs. Wallace*, 75 Cal. 552, 557, 558, 17 Pac. Rep. 620. See *Riley vs. Martinelli*, 97 Cal. 575, 583, 28 Am. St. Rep. 209, 32 Pac. Rep. 579, 21 L. R. A. 33; *Duff vs. Randall*, 116 Cal. 226, 231, 58 Am. St. Rep. 158, 48 Pac. Rep. 66.

4. Deed of corporation executed by president, secretary, and two stockholders, which is neither acknowledged by them nor proved by examination of subscribing witness, is not entitled to registration, and its registration will not be effectual to pass the title as against creditors or purchasers.—*Duke vs. Markham*, 105 N. C. 181, 18 Am. St. Rep. 889, 10 S. E. Rep. 1017.

5. Map need not be acknowledged, as it is not instrument, when recorded pursuant to County Government Act, § 123 (Stats. 1883, p. 325).—*Colton L. & W. Co. vs. Swartz*, 99 Cal. 278, 285, 28 Pac. Rep. 378. See *McCullough vs. Olds*, 108 Cal. 529, 534, 41 Pac. Rep. 420, 30 L. R. A. 182.

See HENNING'S GEN. LAWS, tit. County Government.

6. Purpose of acknowledgment is to enable deed to be recorded as a notice to others. The acknowledgment adds nothing to its validity or effect as between the parties, and it is the record, not original certificate, that operates as notice to all others.—*Middlecoff vs. Hemstreet*, 135 Cal. 173, 175, 67 Pac. Rep. 768. See *Gordon vs. San Diego*, 108 Cal. 264, 267, 41 Pac. Rep. 301.

§ 1162. SAME. [CERTIFIED INSTRUMENTS RECORDED, WHEN.] An instrument proved and certified pursuant to sections eleven hundred and ninety-eight and eleven hundred and ninety-nine may be recorded in the proper office if the original is at the same time deposited therein to remain for public inspection, but not otherwise.

History: Enacted March 21, 1872.

Applied, cited, construed, referred to, etc., in: *Hoag vs. Howard*, 55 Cal. 564, 565 (cited).

§ 1163. CERTIFICATE OF RESIDENCE FILED WITH RECORDER SHOWING WHERE SERVICE OF SUMMONS MAY BE MADE. Any person, firm, or corporation, may record in the office of the county recorder of any county in the state of California a certificate setting forth the name of said person, firm, or corporation, and the place of residence of said person, firm, or corporation, and the place where service of summons may be made upon said person, firm, or corporation. The said certificate must be verified by the oath of the person, or of a member of the firm, or officer of the corporation making the same, and may be recorded without acknowledgment. Such person, firm or corporation may upon a change of place of residence file affidavit as herein provided and such last affidavit filed shall be the place designated as the place where service of summons may be made as herein provided.

The fee of the recorder for recording said certificate shall be fifty cents; and the recorder shall keep in his office an index entitled "Index to Certificates of Residence," in which must be entered the name of the person, firm, or corporation in whose behalf said certificate was filed.

History: Original section, providing that instruments enacted under power of attorney should not be recorded until the power of attorney was filed, was repealed March 30, 1873-4, p. 226. The above section is a new provision added, under old section number, March 18, 1905, Stats. and Amdts. 1905, c. CXXXVIII, pp. 139, 140.

§ 1164. TRANSFER IN TRUST, ETC. Transfers of property in trust for the benefit of creditors, and transfers or liens on property by way of mortgage, are required to be recorded in the cases specified in the titles on the special relation of debtor and creditor, and the chapter on mortgages, respectively.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Construction.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc.,** in: Cardenas vs. Miller, 108 Cal. 250, 256, 49 Am. St. Rep. 84, 39 Pac. Rep. 783, 41 Id. 472 (construed).

2. **CONSTRUCTION.**—Intention of legislature to confine entire chapter, of which this section is a part, to instruments relating to real property and their recording, is made more manifest by language of this chapter, which tends to show intention of legislature

to relegate manner of recording in specified cases to several statutes pointed out, and which provide therefor.—Cardenas vs. Miller, 108 Cal. 250, 256, 49 Am. St. Rep. 84, 39 Pac. Rep. 783, 41 Id. 472.

Assignments for benefit of creditors,—as to, see § 3449 et seq. and note.

Debtor and creditor—Special relation of,— See § 3429 et seq. and notes.

Fraudulent instruments and transfers.—See § 3439 et seq. and notes.

Mortgages,—as to, see § 2920 et seq. and notes.

§ 1165. RECORDER'S FEES TO BE INDORSED. The recorder must, in all cases, indorse the amount of his fee for recordation on the instrument recorded.

History: Enacted March 11, 1874, Code Amdts. 1873-4, p. 275.

Applied, cited, construed, referred to, etc., in: Hoag vs. Howard, 55 Cal. 564, 565 (referred to).

ARTICLE II.

MODE OF RECORDING.

§ 1169. In what office.

§ 1170. Instrument, when deemed recorded.

§ 1171. Books of record.

§ 1172. Duties of recorder.

§ 1173. Transfer of vessels.

§ 1169. **IN WHAT OFFICE.** Instruments entitled to be recorded must be recorded by the county recorder of the county in which the real property affected thereby is situated.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Township severed and annexed to another.

1. Applied, cited, construed, referred to, etc., in: *Green vs. Green*, 103 Cal. 108, 110, 37 Pac. Rep. 188 (applied).

2. Township severed and annexed to another county.—Where: township in which land

conveyed was located, and in which justice of peace before whom deed was acknowledged had jurisdiction, was, at time of execution and acknowledgment, located in one county, but was, before record of deed, severed from that county and annexed to another, deed is properly recorded in latter county.—*Green vs. Green*, 103 Cal. 108, 110, 37 Pac. Rep. 188.

§ 1170. **INSTRUMENT, WHEN DEEMED RECORDED.** An instrument is deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited in the recorder's office, with the proper officer, for record.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 227.

1. Applied, cited, construed, referred to, etc.
2. Construction of statute.
3. Definition of "recorded."
4. Deposit of instrument insufficient.
5. Filing consists of depositing, etc.
6. Attestation by seal of officer unnecessary.
7. Authority of recording officer is essential.
8. Certificate of sheriff's sale—How recorded.
9. Chattel mortgage is recorded, when.
10. Conflict between indorsement and record.
11. Fees—Non-payment of, immaterial.
12. Hours of office—Filing may be after.
- 13, 14. Index not part of record.
15. Indorsement of time of deposit not essential.
16. Office of recorder is proper place for delivery.
17. Seal need not be transcribed.
18. Statute is mandatory.
19. Time of recordation—Moment of deposit.
20. Transcription of instrument essential.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Hoag vs. Howard*, 55 Cal. 564, 565 (cited); *Donald vs. Beals*, 57 Cal. 399, 401, 402 (applied); *Meherin vs. Oaks*, 67 Cal. 57, 58, 7 Pac. Rep. 47 (construed and applied); *Emerie vs. Alvarado*, 90 Cal. 444, 447, 27 Pac. Rep. 356 (cited); *Rollins vs. Wright*, 93 Cal. 395, 399, 29 Pac. Rep. 58 (applied); *Watkins vs. Wilhoit* (Cal. Jan. 26, 1894), 35 Pac. Rep. 646, 647 (construed and applied); *Quackenbush vs. Reed*, 102 Cal. 493, 498, 37 Pac. Rep. 755 (cited); *Watkins vs. Wilhoit*, 104 Cal. 395, 400, 38 Pac. Rep. 53 (construed and applied); *Edwards vs. Grand*, 121 Cal. 254, 256, 53 Pac. Rep. 796 (construed and applied); *Cady vs. Purser*, 131 Cal. 552, 556, 557, 553, 32 Am. St. Rep. 391, 63 Pac. Rep. 844 (construed and applied with other sections).

2. **CONSTRUCTION OF SECTION** must be in connection with § 1213, and each one must be construed with reference to purposes for which it was enacted.—*Cady vs. Purser*, 131 Cal. 552, 557, 32 Am. St. Rep. 391, 63 Pac. Rep. 844.

See post § 1213 and note.

3. **DEFINITION OF "RECORDED"** is in ordinary usage when instrument has been copied or transcribed into some permanent book.—*Cady vs. Purser*, 131 Cal. 552, 557, 32 Am. St. Rep. 391, 63 Pac. Rep. 844.

4. **DEPOSIT OF INSTRUMENT INSUFFICIENT** to constitute recordation, but in addition it must be transcribed in book of records, and transcribing of instrument in different book from that in which law requires it to be recorded is not sufficient.—*Watkins vs. Wilhoit* (Cal. Jan. 26, 1894), 35 Pac. Rep. 646, 649, 650 (reversed on other grounds, 104 Cal. 395, 38 Pac. Rep. 53). See *Sawyer vs. Adams*, 3 Vt. 172, 175, 30 Am. Dec. 459.

5. **FILING INSTRUMENT CONSISTS OF DEPOSITING** it in proper office with directions to officer to record it.—*Edwards vs. Grand*, 121 Cal. 254, 256, 53 Pac. Rep. 796. See *Booth vs. Barnum*, 9 Conn. 286, 23 Am. Dec. 329.

6. Attestation by seal of recorder upon his certificate of receipt of instrument for record, and that it had been recorded, indorsed upon original instrument, is not required. It is only certified copies that must be so attested.—*Glas vs. Glas*, 114 Cal. 566, 569, 55 Am. St. Rep. 90, 46 Pac. Rep. 667.

See par. 14 this note.

7. Authority of recording officer is essential, and alleged acts of officer having no authority to record deed will not be regarded as constituting recordation.—*Smith vs. Brannan*, 13 Cal. 107, 115.

See Pol. Code § 4235 and note.

8. Certificate of sheriff's sale is deemed to be recorded when it is lodged with recorder and filed and by him marked "Filed," and then copied in book of records of deeds; and fact that it is then indexed by him and placed among recorded deeds, and not with certificates of sale, is immaterial.—Page vs. Rogers, 81 Cal. 293, 307.

9. Chattel mortgage properly executed and accompanied by requisite affidavit is recorded when it is deposited in recorder's office with proper officer for record.—Meherlin vs. Oaks, 67 Cal. 57, 58, 7 Pac. Rep. 47.

10. Conflict between indorsement and actual record must be resolved so as to give effect to actual record as it appears in record book, unless those dealing with actual record had notice and knowledge of constructive record.—Donald vs. Beals, 57 Cal. 399, 402.

11. FEES.—Non-payment of immaterial, and certificate of tax sale must be deemed to have been properly filed where tax collector presented it to recorder for filing, although latter did not mark it filed because no fees were paid him; this is public duty, for which no fees are provided.—Rollins vs. Wright, 93 Cal. 395, 399, 29 Pac. Rep. 58.

Indorsement of fees by recorder.—See post § 1165.

12. HOURS FIXED BY STATUTE FOR KEEPING OFFICE OPEN are established for purpose of defining duty of officer, and for convenience of public, and are not to be construed as limiting time within which individuals may avail themselves of rights elsewhere conferred by statute, and hence an instrument may be delivered to and received by recorder after office hours.—Edwards vs. Grand, 121 Cal. 254, 257, 53 Pac. Rep. 796 (where question was as to priority between instrument so filed and instrument filed first thing next morning, and it was held that record of former instrument was in fact prior in point of time to that of latter).

13. INDEX IS NOT PART OF RECORD, and instrument which has been transcribed at length in proper office, and by proper officer,

and duly certified as recorded, will be deemed to have been recorded, although not indexed.—Curtis vs. Lyman, 24 Vt. 338, 53 Am. Dec. 174. See Bishop vs. Schneider, 46 Mo. 472, 2 Am. Rep. 533; Mutual L. Ins. Co. vs. Dake, 87 N. Y. 257.

14. Failure of county recorder to note the recordation of declaration of homestead in his index of recorded instruments cannot affect validity of homestead.—Southwick vs. Davis, 78 Cal. 504, 505, 21 Pac. Rep. 121.

15. INDORSEMENT OF FACT AND TIME OF DEPOSIT for record is not essential part of filing of instrument (dictum)—Edwards vs. Grand, 121 Cal. 254, 255, 53 Pac. Rep. 796 (citing Smith vs. Biscailuz, 83 Cal. 344, 21 Pac. Rep. 15, 23 Id. 314; Bishop vs. Cook, 13 Barb. (N. Y.) 326).

See par. 2 this note.

16. Office where instrument is required by statute to be filed is place where delivery must be made, and delivery elsewhere is not sufficient, even though officer indorses it as properly filed.—Edwards vs. Grand, 121 Cal. 254, 255, 53 Pac. Rep. 796 (citing Estate of Sbarboro, 63 Cal. 5; Schulte vs. First Nat. Bank, 34 Minn. 43, 24 N. W. Rep. 320).

17. SEAL NEED NOT BE COPIED UPON BOOK; it is enough if it appear from record that instrument copied is under seal.—Smith vs. Dall, 13 Cal. 510, 512.

18. STATUTE IS MANDATORY as respects formalities which are required in order to record deed.—Todd vs. Union Dime Sav. Inst., 118 N. Y. 387, 23 N. E. Rep. 299.

19. TIME OF RECORDATION is moment of time when deed was deposited in recorder's office with proper officer for record.—Donald vs. Beals, 57 Cal. 399, 401.

20. TRANSCRIPTION OF INSTRUMENT correctly in appropriate book is one of requirements prescribed for giving of constructive notice.—Cady vs. Purser, 131 Cal. 552, 556, 82 Am. St. Rep. 391, 63 Pac. Rep. 344. See Chamberlain vs. Bell, 7 Cal. 292, 294, 68 Am. Dec. 260; Gilchrist vs. Gough, 63 Ind. 576, 30 Am. Rep. 250; Jones vs. McNarrin, 68 Me. 324, 28 Am. Rep. 66.

§ 1171. BOOKS OF RECORD. Grants, absolute in terms, are to be recorded in one set of books, and mortgages in another.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
- 2, 3. Instrument not notice unless recorded in proper book.
4. Mortgage—Transcribed in book of "Bills of sales and agreements."
5. Same—Containing power of sale not to be recorded as power of attorney.
6. Same—Deed absolute on face—Record as mortgage.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Cady vs. Purser, 131 Cal. 552, 553, 82 Am. St. Rep. 391, 63 Pac. Rep. 344 (cited).

2. INSTRUMENT CANNOT BE CONSTRUCTIVE NOTICE of its contents unless it has

been transcribed into proper book.—Cady vs. Purser, 131 Cal. 552, 557, 82 Am. St. Rep. 391, 63 Pac. Rep. 344.

3. Policy of law is to afford facilities for intending purchasers or mortgagees of land in examining records for purpose of ascertaining whether there are any claims against it, and for this purpose it has prescribed mode in which recorder shall keep records of several instruments; and instrument must be recorded as herein directed in order that it may be recorded as prescribed by law. If recorded in different book from one directed, it is to be regarded same as if not recorded at all.—Cady vs. Purser, 131 Cal. 552, 553, 82 Am. St. Rep. 391, 63 Pac. Rep. 344. See New York L. Ins.

Co. vs. White, 17 N. Y. 469; Gillig vs. Maass, 38 N. Y. 191; Sawyer vs. Adams, 3 Vt. 172, 30 Am. Dec. 459.

4. MORTGAGE TRANSCRIBED IN BOOK ENTITLED "BILLS OF SALES AND AGREEMENTS" is not properly recorded.—Cady vs. Purser, 131 Cal. 552, 558, 82 Am. St. Rep. 391, 68 Pac. Rep. 344.

5. Containing power of sale which has been recorded in book of record for mortgages need not also be recorded as power of attorney. So far as question of notice is concerned rec-

ord is notice of what instrument contained.—Fogarty vs. Sawyer, 23 Cal. 570, 574.

6. Deed absolute on its face but in fact equitable mortgage must not be recorded as absolute deed, but as mortgage.—Manufacturers' & M. Bank vs. Bank of Pennsylvania, 7 Watts & S. (Pa.) 335, 42 Am. Dec. 240; James vs. Morey, 2 Cow. (N. Y.) 246, 14 Am. Dec. 475. See Shaw vs. Wiltshire, 65 Me. 485; Dey vs. Dunham, 3 John. Ch. (N. Y.) 182; Brown vs. Dean, 3 Wend. (N. Y.) 208, 213.

§ 1172. DUTIES OF RECORDER. The duties of county recorders, in respect to recording instruments, are prescribed by the Political Code.

History: Enacted March 21, 1872.

Duties of recorder—Generally.—See Pol. Code § 4235 et seq. and notes.

§ 1173. TRANSFER OF VESSELS. The mode of recording transfers of ships registered under the laws of the United States is regulated by acts of Congress.

History: Enacted March 21, 1872.

Recording transfers of vessels.—See U. S. Rev. Stats. § 4131 et seq.

ARTICLE III.

PROOF AND ACKNOWLEDGMENT OF INSTRUMENTS.

§ 1180. By whom acknowledgments may be taken in this state.

§ 1181. Same.

§ 1182. By whom taken without the state.

§ 1183. By whom taken without the United States.

§ 1184. Deputy can take acknowledgment.

§ 1185. Requisites for acknowledgments.

§ 1186. Acknowledgment by married women (repealed).

§ 1187. Conveyance by married woman. Acknowledgment.

§ 1188. [Same.] Certificate.

§ 1189. General form of certificate. [Outside of state.]

§ 1190. Form of acknowledgment by corporation.

§ 1191. Form of certificate of acknowledgment by married women (repealed).

§ 1192. Form of certificate of acknowledgment by attorney in fact.

§ 1193. Officers must affix their signatures.

§ 1194. Certificate of authority of justices in certain cases.

§ 1195. Proof of execution, how made.

§ 1196. Witness must be personally known to officer.

§ 1197. Witness must prove, what.

§ 1198. Handwriting may be proved, when.

§ 1199. Evidence of handwriting must prove, what.

§ 1200. Certificate of proof.

§ 1201. Officers authorized to do certain things.

§ 1202. Instrument improperly certified, how corrected.

§ 1203. Judgment proving instrument.

§ 1204. Effect of judgment in such action.

§ 1205. Conveyances heretofore made to be governed by then existing laws.

§ 1206. Recording, and as evidence, to be governed by then existing laws.

§ 1207. Validating defectively executed instruments. Record imparts notice. Certified copies.

§ 1180. BY WHOM ACKNOWLEDGMENTS MAY BE TAKEN IN THIS STATE. The proof or acknowledgment of an instrument may be made at any place within this state before a justice or clerk of the supreme court, or judge of a superior court.

History: Enacted March 21, 1872; amended April 3, 1880, Code Amdts. 1880 (C. C. pt.), p. 2.

Applied, cited, construed, referred to, etc., in: Hoag vs. Howard, 55 Cal. 564, 565 (referred to as aiding in definition of word "instrument").

As to instruments included in term "conveyance," see post § 1215 and note.

See also "Words and Phrases," tit. Conveyance.

§ 1181. SAME. The proof or acknowledgment of an instrument may be made in this state, within the city, county, city and county, or township for which the officer was elected or appointed, before either:

1. A clerk of a court of record;
2. A county recorder;
3. A court commissioner;
4. A notary public;
5. A justice of the peace.

History: Enacted March 21, 1872; amended April 3, 1880, Code Amdts. 1880 (C. C. pt.), p. 2; March 31, 1891, Stats. and Amdts. 1891, p. 214; by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 396, held unconstitutional, see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXLV, p. 603.

1. Applied, cited, construed, referred to, etc.
2. Authority of officer must be proved.
3. City recorder of San Francisco.
4. County clerk.
5. Court commissioners.
6. Grantee or mortgagee disqualified.
7. Identity of officer and mortgagee.
8. Justice of the peace—Certificate made out of jurisdiction.
9. Same—Deed to land lying out of jurisdiction.
- 10, 11. Same—Married woman's deed.
12. Notary public—Authority unquestioned.
13. Same—Certificate must show name of office.
14. Office of corporation—Disqualification of.
15. Specification of officers not exclusive.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc.**, in: Hoag vs. Howard, 55 Cal. 564, 565 (cited); Ex parte Carpenter, 64 Cal. 267, 268, 30 Pac. Rep. 316 (construed and applied); Emeric vs. Alvarado, 90 Cal. 444, 448, 27 Pac. Rep. 356 (applied); Malone vs. Bosch, 104 Cal. 680, 683, 33 Pac. Rep. 516 (construed); People ex rel. Board Harbor Comrs. vs. Pacific Impr. Co., 130 Cal. 443, 447, 62 Pac. Rep. 739 (cited).

2. **AUTHORITY OF OFFICER TO TAKE—Proof of.**—"Acknowledgment or proof is nothing unless it be taken by authorized officer, and whether person be authorized or not is fact which ought to appear in certificate of officer himself. This, prima facie, would be sufficient to authorize record, and throw proof on person impeaching deed."—Johnson vs. Haines, 2 Ohio St. 55, 15 Am. Dec. 533. See III. Harding vs. Curtiss, 45 Ill. 252. Minn. Thompson vs. Morgan, 6 Minn. 292. N. Y. Thurman vs. Cameron, 24 Wend. 87, 92. Fed. Carpenter vs. Dexter, 75 U. S. (8 Wall.) 513, 19 L. ed. 426.

3. **CITY RECORDER OF SAN FRANCISCO** has authority to take acknowledgments of conveyances.—Hopkins vs. Delaney, 3 Cal. 35, 37.

4. **COUNTY CLERK** is not without power to take acknowledgment because he had no seal of office. Phrase "having a seal" was only intended to denote court of record, which is defined to be court having seal. The power of clerk was never intended to be made to depend upon fact of his having procured this article, or care with which he preserved it.—Ingoldsby vs. Juan, 13 Cal. 564, 580.

5. **COURT COMMISSIONERS.**—Amendment of 1880, in which court commissioners were not named as officers authorized to take and certify acknowledgments, is not inconsistent with § 259 of Code of Civil Procedure, as amended just previously, and authorizing court commissioners to take acknowledgments, and does not repeal it by implication.—Malone vs. Bosch, 104 Cal. 680, 683, 33 Pac. Rep. 516.

6. **GRANTEE OR MORTGAGEE TAKING ACKNOWLEDGMENT**—In case of, acknowledgment is void, and does not authorize instrument to be recorded, and, as consequence, record of it does not impart any notice to third persons of its contents, although as between parties to it mortgage is in full force and binding effect.—Lee vs. Murphy, 119 Cal. 364, 370, 51 Pac. Rep. 549, 955; Merced Bank vs. Rosenthal, 99 Cal. 39, 47, 31 Pac. Rep. 849, 33 Id. 732. See Iowa. Wilson vs. Traer, 20 Iowa 231. Me. Beamon vs. Whitney, 20 Me. 413. Mich. Groesbeck vs. Seeley, 18 Mich. 329. Miss. Wasson vs. Connor, 54 Miss. 351. Mo. Stevens vs. Hampton, 46 Mo. 404. Pa. Withers vs. Baird, 7 Watts 227, 32 Am. Dec. 754. Tex. Brown vs. Moore, 38 Tex. 645. Va. Davis vs. Beasley, 75 Va. 491; Bowden vs. Parrish, 36 Va. 67, 19 Am. St. Rep. 373, 9 S. E. Rep. 616.

7. **IDENTITY OF OFFICER AND MORTGAGEE—Presumption.**—The fact that mortgage is between two residents of same county, was executed and acknowledged in that county, and that name of mortgagee and officer taking acknowledgment appearing on face of instrument is identical, is prima facie evidence that such officer and mortgagee were one and same person.—Lee vs. Murphy, 119 Cal. 364, 369, 51 Pac. Rep. 549, 955.

Presumption of identity of person from identity of name.—See, generally, Code Civ. Proc. § 1963 subd. 25 and note.

8. **JUSTICE OF THE PEACE.**—Certificate, by showing that acknowledgment by him was taken outside of his territorial jurisdiction, does not entitle instrument to be recorded.—Middlecoff vs. Hemstreet, 185 Cal. 173, 175, 67 Pac. Rep. 763. See Share vs. Anderson, 7 Serg. & R. (Pa.) 43, 10 Am. Dec. 421.

9. **Land conveyed may be outside county.**—Jurisdiction of justice of peace to take acknowledgments is not confined to conveyances of real property situated in county where he holds office. He may take acknowl-

edgment and make his certificate thereof anywhere within county where he holds office, without regard to locality of land conveyed.—*Colton vs. Seavey*, 22 Cal. 496, 501.

10. Deed of married woman.—Justice of peace was held to have no authority to acknowledge deed by married woman in *Kendall vs. Miller*, 9 Cal. 591, 592.

11. Compare: §§ 1093, 1187 and notes.

12. NOTARY PUBLIC—Authority to take and certify acknowledgments to written instruments, and to administer oaths and take testimony for that purpose, is unquestioned.—*Ex parte Carpenter*, 64 Cal. 267, 268, 30 Pac. Rep. 816. See *Emerio vs. Alvarado*, 90 Cal. 444 473, 27 Pac. Rep. 356.

13. Certificate must show name of his office; i. e. his official name, "notary public in and for" county in which he has jurisdiction.—*Emerio vs. Alvarado*, 90 Cal. 444, 473, 27 Pac.

Rep. 356. See also *Willard vs. Cramer*, 36 Iowa 22.

14. OFFICER AND STOCKHOLDER OF CORPORATION taking acknowledgment of mortgage to corporation, whether the acknowledgment is void and mortgage not entitled to be recorded, raised but not decided in *Farmers' Exchange Bank vs. Purdy*, 130 Cal. 455, 458, 62 Pac. Rep. 738; and *Merced Bank vs. Rosenthal*, 99 Cal. 39, 47, 31 Pac. Rep. 849, 33 Id. 732 (where court said they saw no reason why objection would not be as good against an acknowledgment taken before agent of grantee as before grantee himself).

15. SPECIFICATION OF OFFICERS NOT EXCLUSIVE.—Statute does not say or imply that no other than these officers specifically named therein can take and certify acknowledgments.—*Malone vs. Bosch*, 104 Cal. 630, 633, 33 Pac. Rep. 516.

§ 1182. BY WHOM TAKEN WITHOUT THE STATE The proof or acknowledgment of an instrument may be made without this state, but within the United States, and within the jurisdiction of the officer, before either:

1. A justice, judge, or clerk of any court of record of the United States; or,
2. A justice, judge, or clerk of any court of record of any state; or,
3. A commissioner appointed by the governor of this state for that purpose; or,
4. A notary public; or,
5. Any other officer of the state where the acknowledgment is made authorized by its laws to take such proof or acknowledgment.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Authority of officer to take—Proof of.
3. Master in chancery.
4. Notary public—Act 1850.

1. Applied, cited, construed, referred to, etc. in: *Hoag vs. Howard*, 55 Cal. 564, 565 (referred to).

2. Authority of officer to take.—Acknowledgment taken in another state must show officer's authority.—*Cassell vs. Cooke*, 8 Serg.

& R. (Pa.) 268, 11 Am. Dec. 610 and note on p. 628.

See note 41 Am. Dec. 170.

3. Master in chancery not one of officers authorized by law to take acknowledgment of deeds out of this state and within any other state.—*Kimball vs. Semple*, 25 Cal. 440, 446.

4. Notary public did not have power under Registry Act of 1850 to take acknowledgments of conveyances.—*Lord vs. Sherman*, 1 Cal. 493, 502.

§ 1183. BY WHOM TAKEN WITHOUT THE UNITED STATES. The proof or acknowledgment of an instrument may be made without the United States, before either:

1. A minister, commissioner, or charge d'affaires of the United States, resident and accredited in the country where the proof or acknowledgment is made; or,
2. A consul, vice-consul, or consular agent of the United States, resident in the country where the proof or acknowledgment is made; or,
3. A judge of a court of record of the country where the proof or acknowledgment is made; or,
4. Commissioners appointed for such purposes by the governor of the state, pursuant to special statutes; or,
5. A notary public.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdd. 1873-4, p. 227.

1. Applied, cited, construed, referred to, etc.
2. Construction of Registry Act of 1850.
3. Consular agent.

1. Applied, cited, construed, referred to, etc. in: Hoag vs. Howard, 55 Cal. 564, 565 (referred to); Gibson vs. Wheeler, 110 Cal. 242, 245, 42 Pac. Rep. 810 (referred to).

2. Construction—Registry Act of 1850.—The general designation of "any notary public" or "any consul of the United States" was held to be sufficiently comprehensive to embrace no-

taries and consuls of every grade, and that it mattered not whether person exercising notarial or consular functions was principal or inferior notary or consul-general or vice-consul.—Mott vs. Smith, 16 Cal. 533, 552.

3. Consular agent of United States in foreign country was not, previous to adoption of this section, an officer empowered to take and certify acknowledgment or execution of deed conveying real estate in California.—McMinn vs. O'Connor, 27 Cal. 238, 242.

§ 1184. DEPUTY CAN TAKE ACKNOWLEDGMENT. When any of the officers mentioned in the four preceding sections are authorized by law to appoint a deputy, the acknowledgment or proof may be taken by such deputy, in the name of his principal.

History: Enacted March 21, 1872.

1. Deputy county recorder under Act March 26, 1851, concerning county recorders, was authorized to take and certify acknowledgments; and whether certificate stated that maker appeared before principal or deputy, or whether it was signed by deputy in his own name only,

was held to be immaterial.—Muller vs. Boggs, 25 Cal. 175, 186. See Touchard vs. Crow, 20 Cal. 150, 81 Am. Dec. 108; Abrams vs. Ervin, 9 Iowa 87.

2. Compare: Emmal vs. Webb, 26 Cal. 197, 208.

§ 1185. REQUISITES FOR ACKNOWLEDGMENTS. The acknowledgment of an instrument must not be taken, unless the officer taking it knows or has satisfactory evidence, on the oath or affirmation of a credible witness, that the person making such acknowledgment is the individual who is described in and who executed the instrument; or, if executed by a corporation, that the person making such acknowledgment is the president or secretary of such corporation, or other person who executed it on its behalf.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 396, held unconstitutional, see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXLV, p. 603.

1. Applied, cited, construed, referred to, etc.
- 2, 3. Construction—Necessity for acknowledgment.
- 4, 5. Same—Purpose of acknowledgment.
6. Credible witness—Is required.
7. Same—Introduction of grantor to officer insufficient.
8. Same—Party offering instrument is competent.
- 9, 10. Impeachment only for fraud, duress, etc.
11. Negligence of officer—Contributory negligence.
12. Same—Estoppel of party who introduces grantor.
13. Parol evidence to disprove acknowledgment.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Hoag vs. Howard, 55 Cal. 564, 565 (referred to); Malloy vs. Coubrough, 96 Cal. 649, 651, 31 Pac. Rep. 622 (cited); Hatton vs. Holmes, 97 Cal. 208, 212, 31 Pac. Rep. 1131 (construed and applied); Le Mesnager vs. Hamilton, 101 Cal. 532, 539, 40 Am. St. Rep. 81, 35 Pac. Rep. 1054 (cited); Joost vs. Craig, 131 Cal. 504, 507, 32 Am. St. Rep. 374, 63 Pac. Rep. 840 (construed and applied).

2. CONSTRUCTION.—As between parties

acknowledgment is unnecessary in order to make deed valid, purpose of acknowledgment being to entitle instrument to be recorded and to be admitted in evidence without further proof.—Hastings vs. Vaughn, 5 Cal. 215, 219. See Grant vs. Oliver, 91 Cal. 153, 163, 27 Pac. Rep. 861; Delano vs. Jacoby, 96 Cal. 275, 282, 31 Am. St. Rep. 201, 31 Pac. Rep. 290; Gordon vs. City of San Diego, 108 Cal. 264, 267, 41 Pac. Rep. 301.

3. To entitle deed to be recorded and admitted in evidence it must have been acknowledged and certificate must be in compliance with statute.—Fogarty vs. Finlay, 10 Cal. 239, 245, 70 Am. Dec. 714.

As to general form of certificate, see post § 1189 and note.

4. Purpose of certificate of acknowledgment is to entitle deed to be recorded, and to be admitted in evidence without further proof.—Fogarty vs. Finlay, 10 Cal. 239, 245, 70 Am. Dec. 714; Gordon vs. San Diego, 108 Cal. 264, 267, 41 Pac. Rep. 301.

5. Same—Prevention of fraud is aimed at, it being evident intention of statute to prevent one individual from impersonating another.—Livingston vs. Kettelle, 6 Ill. (1 Gilm.) 116, 41 Am. Dec. 166.

6. "CREDIBLE WITNESS" IS REQUIRED, where officer takes acknowledgment of grantor not previously known to him, and requirement that officer shall certify that such witness was a "credible witness" implies that he must be person known to officer.—*Joost vs. Craig*, 131 Cal. 504, 509, 32 Am. St. Rep. 374, 63 Pac. Rep. 840.

7. Introduction by responsible person to notary of person who makes acknowledgment is not sufficient. "If that were enough there would be no purpose in requiring oath, for such persons could always furnish introduction. This point has been often decided, although sufficiently obvious from the statute. To take acknowledgment upon such introduction without oath is negligence sufficient to render notary liable in case certificate turns out to be untrue."—*Hatton vs. Holmes*, 97 Cal. 208, 212, 31 Pac. Rep. 1181; *Joost vs. Craig*, 131 Cal. 504, 508, 32 Am. St. Rep. 374, 63 Pac. Rep. 840. See *State vs. Meyer*, 2 Mo. App. 413; *State ex rel. Covenant Mut. & L. Ins. Co. vs. Balmer*, 77 Mo. App. 463; *Jones vs. Bach*, 48 Barb. (N. Y.) 563.

8. Party offering to acknowledge instrument is, in case he is unknown to officer taking acknowledgment, competent witness in his own behalf to prove to officer that he is person described in and who has executed it.—*Ex parte Carpenter*, 64 Cal. 267, 271, 30 Pac. Rep. 816.

9. IMPEACHMENT ONLY FOR FRAUD, DURESS, ETC.—Certificate of acknowledgment in proper form is conclusive as to facts stated therein, in absence of affirmative proof of fraud, duress, or imposition practised and connected with acknowledgment, and that grantee or mortgagee had notice of such fraud, duress, or imposition.—*De Arnaz vs. Escandon*, 59 Cal. 486, 489. See *Baldwin vs. Bornheimer*, 48 Cal. 423, 435; *Grant vs. White*, 57 Cal. 141; *Moore vs. Hopkins*, 83 Cal. 270, 272, 17 Am. St. Rep. 248, 23 Pac. Rep. 313. III. *Eyster vs. Hatheway*, 50 Ill. 521, 99 Am. Dec. 537. *Miss. Johnston vs. Wallace*, 58 Miss. 331, 24 Am. Rep. 699. *Ohio. Baldwin vs. Snowden*, 11 Ohio St. 203, 78 Am. Dec. 303. *Pa. Schrader vs. Decker*, 9 Pa. St. 14, 49 Am. Dec. 538. *R. I. Kavanaugh*

vs. Day, 10 R. I. 393, 14 Am. Rep. 691. *Tex. Kocourek vs. Marak*, 54 Tex. 201, 23 Am. Rep. 623. *Fed. Hitz vs. Jenks*, 123 U. S. 297, 31 L. ed. 156, 3 Sup. Ct. Rep. 143.

10. *Contra: Dodge vs. Hollinshead*, 6 Minn. 25, 30 Am. Dec. 433; *Jackson vs. Schoonmaker*, 4 John. (N. Y.) 161, 163; *Gardner vs. Port Blakeley Mill Co.*, 8 Wash. 1, 35 Pac. Rep. 402.

11. NEGLIGENCE OF OFFICER.—Proximate cause of loss being negligence of loser, officer who took acknowledgment is not responsible, although negligence of officer constituted condition, in order of causation, by which loss or injury was brought about.—*Oakland Bank of Sav. vs. Murfey*, 68 Cal. 455, 461, 9 Pac. Rep. 843.

See Pol. Code § 801 and note.

12. Estoppel of party who introduces grantor.—Mortgagee who introduces mortgagor to notary public for purposes of acknowledgment of mortgage by person so introduced, is estopped from asserting any claim against sureties of notary, in case person so introduced should prove to be other than person he purported to be.—*Overacre vs. Blake*, 32 Cal. 77, 32, 22 Pac. Rep. 979.

13. PAROL EVIDENCE DISPROVING FACT OF ACKNOWLEDGMENT.—Certificate of acknowledgment is not conclusive evidence of fact of acknowledgment, and such certificate may be impeached by parol evidence that person named therein never in fact appeared before officer certifying to acknowledgment. In such case the act of officer is wholly void, and certificate is nothing but fabrication.—*Le Mesnager vs. Hamilton*, 101 Cal. 532, 535, 40 Am. St. Rep. 81, 35 Pac. Rep. 1054. See *Ala. Grider vs. American F. L. Mtg. Co.*, 99 Ala. 281, 42 Am. St. Rep. 58, 12 So. Rep. 775. *Ark. Meyer vs. Gosset*, 23 Ark. 377; *Donahue vs. Mills*, 41 Ark. 421. *Conn. Smith vs. Ward*, 2 Root 378, 1 Am. Dec. 80. *Id. Borland vs. Walrath*, 33 Iowa 130. *Miss. Johnston vs. Wallace*, 53 Miss. 331, 24 Am. Rep. 699. *Neb. Phillips vs. Bishop*, 31 Neb. 853, 48 N. W. Rep. 1106. *Ohio. Williamson vs. Carskadden*, 36 Ohio St. 664. *Pa. Michener vs. Cavender*, 23 Pa. St. 324, 30 Am. Dec. 486. *W. Va. Pickens vs. Knisely*, 29 W. Va. 1, 6 Am. St. Rep. 622, 11 S. E. Rep. 922.

§ 1186. ACKNOWLEDGMENT BY MARRIED WOMEN (repealed).

History: Enacted March 21, 1872; repealed March 19, 1891, Stats. and Amdts. 1891, p. 137.

1. Applied, cited, construed, referred to, etc.
2. Acknowledgment—Must be in compliance with statute.
3. Deeds by married women.
4. Mortgage not acknowledged is void.
5. Time of acknowledgment is material.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Hoag vs. Howard*, 55 Cal. 564, 565 (cited); *Leonis vs. Lassarovich*, 55 Cal. 52, 56 (construed and applied); *Wedel vs. Herman*, 59 Cal. 507, 513 (cited); *Joseph vs. Dougherty*, 60 Cal. 358, 360 (construed and applied); *Hutchinson vs. Ainsworth*, 63 Cal. 236, 238 (applied); *Bank of Healdsburg vs. Bailhache*, 65 Cal. 327, 330, 4 Pac. Rep. 106 (construed and applied); *Tolman vs. Smith*, 74

Cal. 345, 348, 349, 350, 16 Pac. Rep. 189 (construed and applied); *Beck vs. Soward*, 76 Cal. 527, 530, 18 Pac. Rep. 650 (construed and applied); *Danglarde vs. Elias*, 80 Cal. 65, 67, 22 Pac. Rep. 69 (construed and applied); *Jackson vs. Torrence*, 83 Cal. 521, 537, 23 Pac. Rep. 696 (applied); *Banbury vs. Arnold*, 91 Cal. 606, 607, 27 Pac. Rep. 934 (referred to); *Kennedy vs. Gloster*, 98 Cal. 143, 148, 32 Pac. Rep. 941 (construed and applied); *Le Mesnager vs. Hamilton*, 101 Cal. 532, 535, 40 Am. St. Rep. 81, 35 Pac. Rep. 1054 (construed and applied); *Mathews vs. Davis*, 102 Cal. 202, 207, 36 Pac. Rep. 358 (construed and applied); *People vs. Cogswell*, 113 Cal. 129, 142, 45 Pac. Rep. 270, 35 L. R. A. 269 (construed and applied); *Simons vs. Bedell*, 122 Cal. 341, 349, 63 Am. St. Rep. 35,

55 Pac. Rep. 3 (construed as not applicable); Loupe vs. Smith, 123 Cal. 491, 494, 495, 56 Pac. Rep. 254 (cited).

2. ACKNOWLEDGMENT MUST BE IN COMPLIANCE WITH STATUTE, otherwise instrument will be absolutely void and ineffectual to pass title.—Landers vs. Bolton, 28 Cal. 393, 408; Marlow vs. Barlew, 53 Cal. 456, 460; Leonis vs. Lazzarovich, 55 Cal. 52, 56; Joseph vs. Dougherty, 60 Cal. 358, 360; Bank of Healdsburg vs. Bailhache, 65 Cal. 327, 330, 4 Pac. Rep. 106; Durfee vs. Garvey, 65 Cal. 406, 4 Pac. Rep. 377; Hand vs. Hand, 68 Cal. 135, 140, 58 Am. Rep. 5, 8 Pac. Rep. 705; Beck vs. Soward, 76 Cal. 527, 529, 18 Pac. Rep. 650; Bollinger vs. Manning, 79 Cal. 7, 10; Danglarde vs. Elias, 80 Cal. 65, 67, 22 Pac. Rep. 69; Banbury vs. Arnold, 91 Cal. 606, 610, 27 Pac. Rep. 934; Mathews vs. Davis, 103 Cal. 202, 207, 36

Pac. Rep. 352. See Selover vs. American-Russian Com. Co., 7 Cal. 266, 275.

3. Deeds by married women.—See ante § 162 and note.

4. MORTGAGE IS VOID which is not acknowledged by married woman after examination separate and apart from her husband as provided in § 1186.—Tolman vs. Smith, 74 Cal. 345, 350, 16 Pac. Rep. 139.

5. TIME OF ACKNOWLEDGMENT is material, and where deed by married woman is acknowledged in ordinary form, and she conveys property by subsequent deed which is properly acknowledged, her first deed cannot be validated by her later appearing before notary public and having acknowledgment taken in proper form.—Durfee vs. Garvey, 65 Cal. 406, 4 Pac. Rep. 377.

§ 1187. CONVEYANCE BY MARRIED WOMAN. ACKNOWLEDGMENT. A conveyance by a married woman has the same effect as if she were unmarried, and may be acknowledged in the same manner.

History: Enacted March 21, 1872; amended March 19, 1891, Stats. and Amdts. 1891, p. 137.

1. Applied, cited, construed, referred to, etc.
2. Acknowledgment is necessary.
3. Same—Although wife is living apart from husband.
4. Adoption of another's signature.
5. Compulsion or undue influence of husband.
6. Same—Coercion presumed unless deed acknowledged.
7. Conclusiveness of acknowledgment.
8. Deeds by married women.
9. Estoppel results from acknowledgment.
10. Examination of deed before officer.
11. Fraud in procuring acknowledgment.
12. Handwriting admitted by acknowledgment.
13. Judicial act of officer in taking acknowledgment.
14. Part of deed—Acknowledgment is.
15. Pleading—Denial of acknowledgment—Dress.
16. Powers of attorney by married women.
17. Reformation of certificate.
18. Separate examination—Repealed statute.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in Leonis vs. Lazzarovich, 55 Cal. 52, 59 (cited); Hoag vs. Howard, 55 Cal. 564, 565 (cited); Wedel vs. Herman, 59 Cal. 507, 513 (construed and applied); Joseph vs. Dougherty, 60 Cal. 358, 360 (cited); Hand vs. Hand, 68 Cal. 135, 140, 58 Am. Rep. 5, 8 Pac. Rep. 705 (cited); Tolman vs. Smith, 74 Cal. 345, 349, 16 Pac. Rep. 139 (cited); Schwartz vs. Knight, 74 Cal. 432, 434, 16 Pac. Rep. 235 (cited); Moore vs. Hopkins, 83 Cal. 270, 272, 17 Am. St. Rep. 248, 23 Pac. Rep. 318 (cited); Banbury vs. Arnold, 91 Cal. 606, 610, 27 Pac. Rep. 934 (cited and applied); Le Mesnager vs. Hamilton, 101 Cal. 532, 535, 40 Am. St. Rep. 81, 35 Pac. Rep. 1054 (cited); Loupe vs. Smith, 123 Cal. 491, 497, 56 Pac. Rep. 254 (construed and cited).

2. ACKNOWLEDGMENT IS NECESSARY and is essential to validity of the deed, it being well settled that if conveyance of feme covert is not executed by forms prescribed

by statute, it is not valid.—Morrison vs. Willson, 13 Cal. 494, 498, 73 Am. Dec. 593; Maclay vs. Love, 25 Cal. 367, 374, 85 Am. Dec. 123; Leonis vs. Lazzarovich, 55 Cal. 52, 57. See Ala. Boykin vs. Rain, 28 Ala. 332, 65 Am. Dec. 349. Minn. Dodge vs. Hollinshead, 6 Minn. 25, 51, 80 Am. Dec. 433. Miss. James vs. Fisk, 9 Smed. & M. 144, 152, 47 Am. Dec. 111. Fed. Elliott vs. Peirsol, 26 U. S. (1 Pet.) 228, 238, bk. 7 L. ed. 164; Hepburn vs. Dubois, 37 U. S. (12 Pet.) 345, 375, bk. 9 L. ed. 1111; Daviess vs. Fairbairn, 44 U. S. (3 How.) 626, bk. 11 L. ed. 760.

3. Living separate or apart from husband immaterial, as statute is applicable to all married women.—Danglarde vs. Elias, 80 Cal. 65, 67, 22 Pac. Rep. 69.

4. ADOPTION OF ANOTHER'S SIGNATURE.—When deed is presented to married woman for her acknowledgment it is competent for her to adopt signature of her name that has been placed there without her knowledge or authority and by such adoption to give deed the same validity as if she had personally signed it.—Blaisdell vs. Leach, 101 Cal. 405, 409, 40 Am. St. Rep. 65, 35 Pac. Rep. 1019.

5. COMPULSION OR UNDUE INFLUENCE OF HUSBAND in obtaining wife's acknowledgment does not render wife's deed void, but voidable.—Connecticut L. Ins. Co. vs. McCormick, 45 Cal. 530, 533.

As to rescission of wife's contracts and deeds, see ante §§ 153, 162 and notes.

6. Presumption that married woman was coerced by her husband arises unless her deed is acknowledged, and it is well settled that deed of feme covert, conveying her interest in land, is not operative merely because of its execution and delivery as in common case of deed by person under no legal capacity.—Hepburn vs. Dubois, 37 U. S. (12 Pet.) 345, 375, bk. 9 L. ed. 1111.

7. Conclusiveness of acknowledgment.—See ante § 1185 and note.

8. Deeds by married women.—See ante § 162 and note.

9. ESTOPPEL RESULTS FROM ACKNOWLEDGMENT, and when person named in instrument appears in person before officer and makes acknowledgment, she is estopped from afterwards denying her declaration, as well as fact of her signature, as against any one who, without any other notice or knowledge than is imparted by deed, parts with his property upon strength of such deed.—*Blaisdell vs. Leach*, 101 Cal. 405, 410, 40 Am. St. Rep. 65, 35 Pac. Rep. 1019.

10. EXAMINATION OF DEED BEFORE OFFICER, or sufficient opportunity to examine it, will preclude maker from asserting that she had acknowledged deed which in fact she had not executed, and which was not same which she had signed, as, if she neglected to make sufficient examination of instrument acknowledged, such neglect should fall upon her rather than upon one who has acted in good faith and has been induced to part with his property.—*Blaisdell vs. Leach*, 101 Cal. 405, 410, 40 Am. St. Rep. 65, 35 Pac. Rep. 1019.

11. FALSE REPRESENTATION by which acknowledgment of married woman was procured will not enable her to avoid her deed on ground of compulsion or undue influence unless at time of acknowledgment she acted under fear, compulsion, or undue influence.—*Connecticut L. Ins. Co. vs. McCormick*, 45 Cal. 530, 532.

12. HANDWRITING IS ADMITTED BY ACKNOWLEDGMENT, rule being that married woman must be presumed to know her own handwriting, and her statement to notary that she had executed instrument will prevent her from questioning correctness of such statement as against one who, in reliance thereupon, has parted with property.—*Blaisdell vs.*

Leach, 101 Cal. 405, 409, 40 Am. St. Rep. 65, 35 Pac. Rep. 1019.

13. JUDICIAL ACT OF OFFICER.—In taking acknowledgment of married woman officer acts judicially, and if he blunders in certifying to acknowledgment duly made, or makes false or defective certificate, he cannot alter or amend it, because after taking acknowledgment and delivering return his function ceases and he is discharged from all further authority.—*Wedel vs. Herman*, 59 Cal. 507, 514. See *Bours vs. Zachariah*, 11 Cal. 281, 294, 70 Am. Dec. 779; *Danglarde vs. Elias*, 80 Cal. 65, 67, 22 Pac. Rep. 69.

14. PART OF DEED.—In case of a married woman, acknowledgment in manner required by statute is part of deed itself, and is necessary and essential to its validity.—*Danglarde vs. Elias*, 80 Cal. 65, 67, 22 Pac. Rep. 69.

15. PLEADING.—In action to foreclose mortgage where she alleges that she did not acknowledge that she executed mortgage freely and voluntarily, such answer is not sufficient to enable her to attack acknowledgment as having been procured by compulsion or undue influence of her husband.—*Connecticut L. Ins. Co. vs. McCormick*, 45 Cal. 530, 533.

16. Powers of attorney by married women.—See ante § 162 and note.

17. REFORMATION OF CERTIFICATE.—The certificate may, in action brought for that purpose, be corrected to conform to facts where no new rights have intervened.—*Wedel vs. Herman*, 59 Cal. 507, 514; *Danglarde vs. Elias*, 80 Cal. 65, 67, 22 Pac. Rep. 69.

See post § 1202 and note.

18. SEPARATE EXAMINATION OF MARRIED WOMEN under § 1186, which was repealed by Act March 19, 1891 (*Stats.* 1891, p. 137).

See ante § 1186 and note.

§ 1188. [SAME.] CERTIFICATE. An officer taking the acknowledgment of an instrument must indorse thereon or attach thereto a certificate substantially in the forms hereinafter prescribed.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 227.

1. Applied, cited, construed, referred to, etc.
2. Ministerial duty imposed upon officer.

1. Applied, cited, construed, referred to, etc., in: *Hoag vs. Howard*, 55 Cal. 564, 565 (referred to); *Emerio vs. Alvarado*, 90 Cal. 444, 445, 478, 27 Pac. Rep. 356 (applied); *Banbury vs. Arnold*, 91 Cal. 606, 610, 27 Pac. Rep. 934 (construed and applied).

2. Ministerial duty imposed upon officer in indorsing upon the instrument or attaching thereto certificate of acknowledgment in form required by law, and such act cannot be construed to form part of execution of instrument by married woman conveying realty.—*Banbury vs. Arnold*, 91 Cal. 606, 610, 27 Pac. Rep. 934.

§ 1189. GENERAL FORM OF CERTIFICATE. [OUTSIDE OF STATE.] The certificate of acknowledgment, unless it is otherwise in this article provided, must be substantially in the following form: "State of, County of, ss. On this day of, in the year, before me (here insert name and quality of the officer), personally appeared, known to me (or proved to me on the oath of) to be the person whose name is subscribed to the within instrument, and acknowledged that he (she or they) executed the same."

[Outside of state—Certificate of clerk of court.] Provided, however, that any acknowledgment taken without this state in accordance with the laws of the place where the acknowledgment is made, shall be sufficient in this state; and provided further, that the certificate of the clerk of a court of record of the county or district where such acknowledgment is taken, that the officer certifying to the same is authorized by law so to do, and that the signature of the said officer to such certificate is his true and genuine signature, and that such acknowledgment is taken in accordance with the laws of the place where the same is made, shall be prima facie evidence of the facts stated in the certificate of said clerk.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 37; February 26, 1897, Stats. and Amdts. 1897, p. 43; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 397, held unconstitutional, see history, § 4 ante.

1. Applied, cited, construed, referred to, etc.
2. Acknowledgment—Fact of, must be stated.
3. Coming before officer to be acknowledged, etc.
4. Date of certificate not material.
5. Form—Substantial compliance with statute necessary.
6. Same—Omission of immaterial matters.
7. Identity of maker of instrument must be stated.
8. Same—Argumentative statement is insufficient.
9. Same—Officer is liable for omission.
10. Same—Officer's satisfaction as to identity must be stated.
11. Same—Omission renders record inoperative.
12. Same—Word "personally" need not be inserted.
13. Ownership of property need not be recited.
14. Partnership—Existence and membership of, must be stated.
15. "Signed, sealed, and delivered."
16. Surplusage immaterial.
17. Variance between names in instrument and certificate.
18. Venue—Must be stated.
19. Voluntary execution of instrument need not be stated.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Emeric vs. Alvarado*, 90 Cal. 444, 478, 27 Pac. Rep. 356 (applied); *Rico vs. Brandenstein*, 98 Cal. 465, 468, 38 Am. St. Rep. 192, 33 Pac. Rep. 480, 20 L. R. A. 702 (referred to); *Le Mesnager vs. Hamilton*, 101 Cal. 532, 539, 40 Am. St. Rep. 81, 35 Pac. Rep. 1054 (cited); *County of Sutter vs. McGriff*, 180 Cal. 124, 125, 62 Pac. Rep. 412 (cited and applied); *Joost vs. Craig*, 131 Cal. 504, 508, 82 Am. St. Rep. 374, 63 Pac. Rep. 340 (erroneously cited; should be § 1185).

2. **ACKNOWLEDGMENT**—Fact of must be stated in language of form set out in statute or by use of words of equivalent import.—*Bryan vs. Ramirez*, 8 Cal. 461, 464, 68 Am. Dec. 340; *Henderson vs. Grewell*, 3 Cal. 581, 584.

3. **COMING BEFORE OFFICER TO BE ACKNOWLEDGED, ETC.**—Recital that grantor "came before me to acknowledge," etc., raises presumption that grantor did so come. "The officer could hardly have been guilty of so absurd and nugatory act as to give formal certificate that parties came before him to acknowledge deed if they did not actually

acknowledge it."—*Jackson ex dem. Woodruff vs. Gilchrist*, 15 John. (N. Y.) 89, 111.

4. **DATE OF CERTIFICATE IS NOT MATERIAL**, and it need not necessarily be made at time of acknowledgment.—*Grant vs. Oliver*, 91 Cal. 158, 160, 163, 27 Pac. Rep. 861 (where the certificate was made over two years after acknowledgment taken); *Stevens vs. Martin*, 13 Pa. St. 101. See *Irving vs. Brownell*, 11 Ill. 402; *Rackliff vs. Norton*, 19 Me. 274.

5. **FORM OF CERTIFICATE OF ACKNOWLEDGMENT** provided for by this section must be substantially followed, and indorsed or attached to instrument.—*Emeric vs. Alvarado*, 90 Cal. 444, 478, 27 Pac. Rep. 356. See *Whitney vs. Arnold*, 10 Cal. 531, 533.

6. **Omissions of immaterial matters**, the certificate being substantially unobjectionable, do not affect validity of it.—*Henderson vs. Grewell*, 3 Cal. 581, 583; *Musgrove vs. Bonser*, 5 Oreg. 313, 20 Am. Rep. 737; *Gable's Appeal* (Pa. Oct. 4, 1836), 7 Atl. Rep. 52.

7. **IDENTITY OF MAKER OF INSTRUMENT MUST BE STATED**.—Acknowledgment must state that maker of instrument was either personally known to officer or was proven to him to be person described in and who executed instrument.—*Kelsey vs. Dunlap*, 7 Cal. 160, 161; *Fogarty vs. Finlay*, 10 Cal. 239, 244, 70 Am. Dec. 714. See *Henderson vs. Grewell*, 3 Cal. 581, 584; *McMinn vs. O'Connor*, 27 Cal. 238, 242. *Cole. Nippel vs. Hammond*, 4 Colo. 211, 217. *Ill. Tully vs. Davis*, 30 Ill. 103, 83 Am. Dec. 179. *Nev. Johnson vs. Badger M. & Min. Co.*, 13 Nev. 351, 353. *N. Y. Hunt vs. Johnson*, 19 N. Y. 279, 295; *West Point I. Co. vs. Reymert*, 45 N. Y. 703, 706; *Fryer vs. Rockefeller*, 63 N. Y. 263, 273. *Oreg. Baker vs. Woodward*, 12 Oreg. 3, 6 Pac. Rep. 173. *S. D. Cannon vs. Deming*, 3 S. D. 421, 53 N. W. Rep. 863. *Fed. Kelly vs. Calhoun*, 95 U. S. 710, bk. 24 L. ed. 544; *Schley vs. Pullman Pal. Car Co.*, 120 U. S. 575, bk. 30 L. ed. 789, 7 Sup. Ct. Rep. 730.

8. **Argumentative statement is insufficient**.—Certificate of acknowledgment reciting that person was known to officer "to be the person who executed the instrument freely and voluntarily," etc., is mere statement of officer's knowledge of manner in which instrument was executed, and is not statement of

fact of acknowledgment.—*Bryan vs. Ramirez*, 8 Cal. 461, 466, 68 Am. Dec. 340.

9. Officer is liable for omission where loss results to subsequent purchaser or mortgagee because of his negligence.—See *Fogarty vs. Finlay*, 10 Cal. 239, 244, 70 Am. Dec. 714.

10. Officer's satisfaction as to identity must be stated.—If officer certifies that he is "satisfied" that person who made acknowledgment is same as person who executed it, he must state why he is satisfied, whether by personal knowledge or by sworn testimony of credible witness whose name is inserted in certificate.—*Kimball vs. Semple*, 25 Cal. 440, 446. See *Joost vs. Craig*, 131 Cal. 504, 508, 82 Am. St. Rep. 374, 63 Pac. Rep. 840.

11. Omission renders record inoperative.—Failure of officer taking acknowledgment to state that party making acknowledgment was known to him, etc., renders record of instrument inoperative to impart notice to subsequent purchasers or mortgagees.—*Fogarty vs. Finlay*, 10 Cal. 239, 244, 70 Am. Dec. 714.

12. Word "personally" need not be inserted in statement that maker was known to officer.—*Henderson vs. Grewell*, 3 Cal. 581, 584. See *Hopkins vs. Delaney*, 3 Cal. 85, 87; *Jackson vs. Gumaer*, 2 Cow. (N. Y.) 552, 567.

13. OWNERSHIP OF PROPERTY NEED NOT BE RECITED, and certificate need not declare that person executing instrument is same person who owns property described in instrument.—*Overacre vs. Blake*, 32 Cal. 77, 80, 22 Pac. Rep. 979.

14. PARTNERSHIP—Existence and membership of, must be stated.—Where deed is executed by partnership, acknowledgment should recite existence of such partnership and state who composed firm; and when an instrument so acknowledged is offered in evidence, prima facie case is made from identity of names that person executing it was

member of partnership.—*Malloye vs. Coubrough*, 96 Cal. 649, 651, 31 Pac. Rep. 622.

15. "SIGNED, SEALED, AND DELIVERED," employed in certificate of acknowledgment, are equivalent to word "executed."—*Jacoway vs. Gault*, 20 Ark. 190, 78 Am. Dec. 494.

Compare: *McDaniel vs. Needham*, 61 Tex. 269.

16. SURPLUSAGE IN CERTIFICATE IM-MATERIAL, and does not affect validity of certificate if it is otherwise unobjectionable.—*Whitney vs. Arnold*, 10 Cal. 531, 533.

17. VARIANCE BETWEEN NAMES IN INSTRUMENT AND CERTIFICATE of acknowledgment is fatal defect.—*Ala. Jones vs. Parks*, 22 Ala. 446. *Kan. Hell vs. Redden*, 38 Kan. 255, 16 Pac. Rep. 743. *Mich. Boothroyd vs. Engles*, 23 Mich. 19. *Tex. McKinzie vs. Stafford* (Tex. Sept. 20, 1894), 27 S. W. Rep. 790.

Compare: *Paxton vs. Ross*, 89 Iowa 661, 57 N. W. Rep. 428; *Rogers vs. Manley*, 46 Minn. 403, 49 N. W. Rep. 194.

18. VENUE—Necessity.—Certificate by justice of peace which shows neither venue nor jurisdiction, nor of what county he was justice, nor whether he was justice of any county, nor in what county or state acknowledgment was taken, is substantially defective, and fact that name of certain state and county were written at commencement of instrument has no more significance than appearance of those names in body of instrument, where they usually appear, would have had.—*Emeric vs. Alvarado*, 90 Cal. 444, 462, 27 Pac. Rep. 356. See *County of Sutter vs. McGriff*, 130 Cal. 124, 125, 62 Pac. Rep. 412.

19. VOLUNTARY EXECUTION OF INSTRUMENT NEED NOT BE STATED, as this is to be presumed from fact that he acknowledged that he "executed the same."—*Henderson vs. Grewell*, 3 Cal. 581, 584.

§ 1190. FORM OF ACKNOWLEDGMENT BY CORPORATION. The certificate of acknowledgment of an instrument executed by a corporation must be substantially in the following form:

"State of
"County of } ss.

"On this day of, in the year, before me (here insert the name and quality of the officer), personally appeared, known to me (or proved to me on the oath of) to be the president (or the secretary) of the corporation that executed the within instrument (where, however, the instrument is executed in behalf of the corporation by some one other than the president or secretary) insert: known to me (or proved to me on the oath of) to be the person who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1900, Stats. and Amdts. 1900-1, p. 397, held unconstitutional, see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXLV, p. 603.

Applied, cited, construed, referred to, etc., in: *Hoag vs. Howard*, 55 Cal. 564, 565 (referred to); *Le Mesnager vs. Hamilton*, 101

Cal. 532, 533, 40 Am. St. Rep. 31, 35 Pac. Rep. 1054 (cited).

§ 1191. FORM OF CERTIFICATE OF ACKNOWLEDGMENT BY MARRIED WOMAN (repealed).

History: Enacted March 21, 1872; repealed March 19, 1891, Stats. and Amdts. 1891, p. 137.

1. Applied, cited, construed, referred to, etc.
2. Construction—Reference in deed to another instrument.
3. Effect of repeal of statute.
4. Specific performance not enforced without acknowledgment.
5. Statute is mandatory.

1. Applied, cited, construed, referred to, etc., in: *Marlow vs. Barlow*, 53 Cal. 456, 460 (construed); *Leonis vs. Lazzarovich*, 55 Cal. 52, 56 (construed and applied); *Wedel vs. Herman*, 59 Cal. 507, 513 (referred to); *Hutchinson vs. Ainsworth*, 63 Cal. 386, 388 (cited); *Bank of Healdsburg vs. Bailhache*, 65 Cal. 327, 330, 4 Pac. Rep. 106 (construed and applied); *Hand vs. Hand*, 68 Cal. 135, 140, 58 Am. Rep. 5, 3 Pac. Rep. 705 (applied); *Tolman vs. Smith*, 74 Cal. 345, 346, 347, 350, 16 Pac. Rep. 189 (applied); *Bull vs. Coe*, 77 Cal. 54, 57, 11 Am. St. Rep. 235, 18 Pac. Rep. 808 (construed and applied); *Dangiarde vs. Elias*, 30 Cal. 65, 67, 22 Pac. Rep. 69 (applied); *Jackson vs. Torrence*, 33 Cal. 521, 536, 23 Pac. Rep. 695 (cited); *Le Mesnager vs. Hamilton*, 101 Cal. 532, 535, 40 Am. St. Rep. 81, 35 Pac. Rep. 1054 (applied); *Mathews vs. Davis*, 103 Cal. 202, 207, 36 Pac. Rep. 358 (cited); *Simons vs. Bedell*, 122 Cal. 341, 349, 68 Am. St. Rep. 35, 65 Pac. Rep. 3 (held not applicable); *Loupe vs. Smith*, 123 Cal. 491, 493, 494, 496, 56 Pac. Rep. 254 (applied, cited, construed, and referred to).

2. Construction.—Requirement of section that notary shall certify that he made married woman who is executing and acknowledging instrument acquainted with contents

"of instrument," has reference to instrument which officer has before him, and does not have reference to another document referred to in instrument which is being acknowledged; and officer does his whole duty when he explains to married woman instrument which he has before him and which she is about to acknowledge.—*Bull vs. Coe*, 77 Cal. 54, 57, 11 Am. St. Rep. 235, 18 Pac. Rep. 808, and see *Bull vs. Strong*, 98 Cal. 27, 28, 32 Pac. Rep. 973.

Same doctrine held in case *re Soher*, 78 Cal. 477, 481, 21 Pac. Rep. 8 (document referred to in will).

Otherwise as to defeasance while deed to homestead intended as mortgage.—*Merced Bank vs. Rosenthal*, 99 Cal. 39, 49, 31 Pac. Rep. 349, 33 Id. 732.

3. Effect of repeal of statute was to make meaningless references in § 1092 made to §§ 1186, 1191.—*Loupe vs. Smith*, 123 Cal. 491, 494, 56 Pac. Rep. 254.

4. Specific performance will not be enforced where acknowledgment is not in prescribed form.—See *Simons vs. Bedell*, 122 Cal. 341, 349, 68 Am. St. Rep. 35, 65 Pac. Rep. 3.

5. Statute is mandatory, and married woman's estate in land does not pass by any grant purporting to have been executed by her unless instrument is acknowledged in compliance with §§ 1186, 1191.—*Leonis vs. Lazzarovich*, 55 Cal. 52, 56; *Bank of Healdsburg vs. Bailhache*, 65 Cal. 327, 330, 4 Pac. Rep. 106; *Hand vs. Hand*, 68 Cal. 135, 140, 58 Am. Rep. 5, 3 Pac. Rep. 705.

See ante § 1186 and note.

§ 1192. FORM OF CERTIFICATE OF ACKNOWLEDGMENT BY ATTORNEY IN FACT. The certificate of acknowledgment by an attorney in fact must be substantially in the following form:

State of,
County of } ss.

On this day of, in the year, before me [here insert the name and quality of the officer] personally appeared, known to me [or proved to me on the oath of] to be the person whose name is subscribed to the within instrument as the attorney in fact of, and acknowledged to me that he subscribed the name of thereto as principal, and his own name as attorney in fact.

History: Enacted March 21, 1872.

Approved form.—Acknowledgment reciting that "personally appeared before me, a notary public in and for said county, John A. Sutter, by his attorney in fact, John S. Fowler, known to me to be the person who executed

the within instrument in writing, who acknowledged to me that he signed, sealed, and delivered the same as his voluntary act," etc., is sufficient.—*Talbert vs. Stewart*, 39 Cal. 602, 603.

§ 1193. OFFICERS MUST AFFIX THEIR SIGNATURES. Officers taking and certifying acknowledgments or proof of instruments for record, must authenticate their certificates by affixing thereto their signatures, followed by the names of their offices; also, their seals of office, if by the laws of the state or country

where the acknowledgment or proof is taken, or by authority of which they are acting, they are required to have official seals.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 397, held unconstitutional, see history, § 4 ante.

1. Applied, cited, construed, referred to, etc.
2. Seal—Is indispensable.
3. Same—Private seal is sufficient.
- 4, 5. Signature—Is indispensable.

1. Applied, cited, construed, referred to, etc., in: Hoag vs. Howard, 55 Cal. 564, 565 (cited); Emeric vs. Alvarado, 90 Cal. 444, 478, 27 Pac. Rep. 356 (construed and applied).

2. Seal of officer taking acknowledgment required by statute as preliminary to features of conveyance for registration.—Hastings vs. Vaughn, 5 Cal. 315, 318. See III. Mason vs. Brock, 12 Ill. 273, 52 Am. Dec. 490. Iowa. Jones vs. Berkshire, 15 Iowa 248, 83 Am. Dec. 412. Kan. Kelley vs. McBlain, 42 Kan. 764, 22 Pac. Rep. 994. Minn. Thompson vs. Scheld, 39 Minn. 102, 13 Am. St. Rep. 619, 38 N. W. Rep. 801. See note 74 Am. Dec. 369.

3. Private seal sufficient.—Certificate of acknowledgment by notary under his private seal is sufficient under Act 1850 to admit instrument to record, where notary stated therein that he had not obtained official seal.—Fogarty vs. Sawyer, 23 Cal. 570, 573. See Stark vs. Barrett, 15 Cal. 361, 372.

4. SIGNATURE OF OFFICER.—Duty devolves upon officers taking and certifying acknowledgments to authenticate same by affixing their signatures thereto.—Emeric vs. Alvarado, 90 Cal. 444, 478, 27 Pac. Rep. 356. See Clark vs. Wilson, 127 Ill. 449, 11 Am. St. Rep. 143, 19 N. E. Rep. 860; Marston vs. Brashaw, 18 Mich. 81, 100 Am. Dec. 152.

5. Variance in given name of officer between name stated in certificate of authentication and signature is not material.—Denny vs. Ashley, 12 Colo. 165, 20 Pac. Rep. 331.

§ 1194. CERTIFICATE OF AUTHORITY OF JUSTICES IN CERTAIN CASES. The certificate of proof or acknowledgment, if made before a justice of the peace, when used in any county other than that in which he resides, must be accompanied by a certificate under the hand and seal of the clerk of the county in which the justice resides, setting forth that such justice, at the time of taking such proof or acknowledgment, was authorized to take the same, and that the clerk is acquainted with his handwriting, and believes that the signature to the original certificate is genuine.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Mortgage without certificate not to be recorded.

1. Applied, cited, construed, referred to, etc., in: Middlecoff vs. Hemstreet, 135 Cal. 173, 176, 67 Pac. Rep. 768 (applied).

2. Mortgage without certificate not entitled to record.—Statute is mandatory, and mortgage is not entitled to record without required certificate of county clerk, and recordation without such certificate does not give constructive notice.—Middlecoff vs. Hemstreet, 135 Cal. 173, 176, 177, 67 Pac. Rep. 768.

§ 1195. PROOF OF EXECUTION, HOW MADE. Proof of the execution of an instrument, when not acknowledged, may be made either:

1. By the party executing it, or either of them; or,
2. By a subscribing witness; or,
3. By other witnesses, in cases mentioned in section eleven hundred and ninety-eight.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Notary has jurisdiction to administer oath.

1. Applied, cited, construed, referred to, etc., in: Hoag vs. Howard, 55 Cal. 564, 565 (referred to); Ex parte Carpenter, 64 Cal. 267, 271, 30 Pac. Rep. 816 (applied).

2. Notary has jurisdiction to administer oath to any credible witness for purpose of ascertaining and determining fact of identity, and when witness testifies falsely he may be prosecuted for perjury.—Ex parte Carpenter, 64 Cal. 267, 269, 271, 30 Pac. Rep. 816.

§ 1196. WITNESS MUST BE PERSONALLY KNOWN TO OFFICER. If by a subscribing witness, such witness must be personally known to the officer taking the proof to be the person whose name is subscribed to the instrument as a witness, or must be proved to be such by the oath of a credible witness.

History: Enacted March 21, 1872.

Applied, cited, construed, referred to, etc., in: *Hoag vs. Howard*, 55 Cal. 564, 565 (referred to); *Louis vs. Elfelt*, 89 Cal. 547, 550, 26 Pac. Rep. 1095 (erroneously cited in sup-

port of proposition that death of partner terminates contract of employment between partnership and servant).

§ 1197. WITNESS MUST PROVE, WHAT. The subscribing witness must prove that the person whose name is subscribed to the instrument as a party is the person described in it, and that such person executed it, and that the witness subscribed his name thereto as a witness.

History: Enacted March 21, 1872.

Applied, cited, construed, referred to, etc., in: *Hoag vs. Howard*, 55 Cal. 564, 565 (referred to); *Louis vs. Elfelt*, 89 Cal. 547, 550, 26 Pac. Rep. 1095 (erroneously cited in sup-

port of proposition that death of partner terminates contract of employment between partnership and servant).

§ 1198. HANDWRITING MAY BE PROVED, WHEN. The execution of an instrument may be established by proof of the handwriting of the party and of a subscribing witness, if there is one, in the following cases:

1. When the parties and all the subscribing witnesses are dead; or,
2. When the parties and all the subscribing witnesses are non-residents of the state; or,
3. When the place of their residence is unknown to the party desiring the proof, and cannot be ascertained by the exercise of due diligence; or,
4. When the subscribing witness conceals himself, or cannot be found by the officer by the exercise of due diligence in attempting to serve the subpoena or attachment; or,
5. In case of the continued failure or refusal of the witness to testify, for the space of one hour, after his appearance.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Married woman must make acknowledgment in person.
3. Time of proof.—Death of parties and witnesses immaterial.

1. Applied, cited, construed, referred to, etc., in: *Hoag vs. Howard*, 55 Cal. 564, 565 (referred to).

2. Married woman.—Certificate of acknowledgment of execution of conveyance by married woman could not be made as in case of other persons upon proof by subscribing witness or other witnesses under law as it stood previous to amendment of §§ 1092 and

1187. Acknowledgment in person before proper officer and his certificate in form prescribed by statute was only evidence admissible that she executed instrument.—*Landers vs. Bolton*, 26 Cal. 393, 408.

3. Time of proof.—Proof of execution of conveyance by proving handwriting of party and of subscribing witnesses by other witnesses so as to entitle instrument to record under sections of Registry Act of 1860 was held to be proper, even years after actual making of deed and after parties and witnesses to it are all dead.—*Landers vs. Bolton*, 26 Cal. 393, 408.

§ 1199. EVIDENCE OF HANDWRITING MUST PROVE, WHAT. The evidence taken under the preceding section must satisfactorily prove to the officer the following facts:

1. The existence of one or more of the conditions mentioned therein; and,
2. That the witness testifying knew the person whose name purports to be subscribed to the instrument as a party, and is well acquainted with his signature, and that it is genuine; and,
3. That the witness testifying personally knew the person who subscribed the

instrument as a witness, and is well acquainted with his signature, and that it is genuine; and,

4. The place of residence of the witness.

History: Enacted March 21, 1872; amended March 30, 1874; Code Amdts. 1873-4, pp. 227, 228.

Applied, cited, construed, referred to, etc., in: Hoag vs. Howard, 55 Cal. 564, 565 (referred to).

§ 1200. CERTIFICATE OF PROOF. An officer taking proof of the execution of any instrument must, in his certificate indorsed thereon or attached thereto, set forth all the matters required by law to be done or known by him, or proved before him on the proceeding, together with the names of all the witnesses examined before him, their places of residence respectively, and the substance of their testimony.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.

2. Particular form unnecessary.

1. Applied, cited, construed, referred to, etc., in: Hoag vs. Howard, 55 Cal. 564, 565 (referred to).

2. Particular form unnecessary—Commissioners' note.—The Commissioners say: "No particular form is necessary. If to a cer-

tificate of proof by a subscribing witness of the execution of a deed the witness adds his signature, and the officer adds the usual jurat to an affidavit, such additions do not vitiate the certificate, if, without them, it shows a substantial compliance with the statute."

See ante § 1189 and note, and 41 Am. Dec. 175, note.

§ 1201. OFFICERS AUTHORIZED TO DO CERTAIN THINGS. Officers authorized to take the proof of instruments are authorized in such proceedings:

1. To administer oaths or affirmations, as prescribed in section two thousand and ninety-three, Code of Civil Procedure;

2. To employ and swear interpreters;

3. To issue subpoena, as prescribed in section nineteen hundred and eighty-six, Code of Civil Procedure;

4. To punish for contempt, as prescribed in sections nineteen hundred and ninety-one, nineteen hundred and ninety-three, nineteen hundred and ninety-four, Code of Civil Procedure.

The civil damages and forfeiture to the party aggrieved are prescribed in section nineteen hundred and ninety-two, Code of Civil Procedure.

History: Enacted March 21, 1872.

Applied, cited, construed, referred to, etc., in: Hoag vs. Howard, 55 Cal. 564, 565 (referred to).

§ 1202. INSTRUMENT IMPROPERLY CERTIFIED, HOW CORRECTED. When the acknowledgment or proof of the execution of an instrument is properly made, but defectively certified, any party interested may have an action in the superior court to obtain a judgment correcting the certificate.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 397, held unconstitutional, see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXLV, p. 604.

1. Applied, cited, construed, referred to, etc.

2. Equity has jurisdiction.

3. Joinder of actions—Reformation and foreclosure.

4. Judgment—Sufficiency of complaint—To support.

5, 6. Married woman's acknowledgment not re-formable before code.

7. Notary not necessary party defendant.

8, 9. Officer cannot correct mistakes.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Judson vs. Porter, 53

Cal. 482, 485, 486, 487 (held not applicable); Hoag vs. Howard, 55 Cal. 564, 565 (referred to); Wedel vs. Herman, 59 Cal. 507, 514 (applied); Hutchinson vs. Ainsworth, 63 Cal. 286, 288 (construed and applied); Hutchinson vs. Ainsworth, 73 Cal. 452, 454, 2 Am. St. Rep. 323, 15 Pac. Rep. 82 (construed and applied); Poledori vs. Newman, 116 Cal. 375, 376, 48 Pac. Rep. 325 (construed and applied).

2. **EQUITY HAS JURISDICTION** under this section to reform defective certificates of acknowledgment.—Wedel vs. Herman, 59 Cal. 507, 514.

3. **JOINDER OF ACTIONS—Reformation and foreclosure.**—Action to correct defective certificate of acknowledgment of mortgage may be joined with action for foreclosure of mortgage as reformed.—Hutchinson vs. Ainsworth, 73 Cal. 452, 454, 2 Am. St. Rep. 323, 15 Pac. Rep. 82.

4. **JUDGMENT—Sufficiency of complaint to support.**—Judgment correcting certificate will not be disturbed on appeal upon ground that it went beyond issues in case, and corrected matters not alleged within complaint, in that in addition to omission of officer as alleged in complaint to certify that "upon examination without hearing of her husband, he had made her acquainted with contents of said deed, but used for his acknowledgment a blank form appropriate to cases certifying acknowledgment of deed made by an unmarried woman," his further omission not alleged, to certify that "she did not wish to retract said execution," where evidence of such additional omission not alleged was not objected to

when offered and received at trial.—Poledori vs. Newman, 116 Cal. 375, 377, 48 Pac. Rep. 325.

5. **MARRIED WOMAN'S ACKNOWLEDGMENT NOT REFORMABLE.**—Action cannot be maintained under §§ 1202, 1203 to correct notary's defective certificate of married woman's acknowledgment to deed of her separate property, when defective certificate was made prior to enactment of code.—Judson vs. Porter, 53 Cal. 482, 487. See Selover vs. American-Russian Com. Co., 7 Cal. 266, 274; Barrett vs. Tewksbury, 9 Cal. 13, 15; Leonis vs. Lazarevich, 55 Cal. 52, 55.

6. Compare: Wedel vs. Herman, 59 Cal. 507, 514.

As to deeds by married woman, see ante § 162 and note.

7. **NOTARY PUBLIC IS NOT NECESSARY PARTY DEFENDANT** to action brought to reform defective certificate of acknowledgment by him made.—Hutchinson vs. Ainsworth, 73 Cal. 452, 454, 2 Am. St. Rep. 323, 15 Pac. Rep. 82.

8. **OFFICER TAKING ACKNOWLEDGMENT** has not power to afterwards correct errors or mistakes in his certificate.—Wedel vs. Herman, 59 Cal. 507, 514. See Ill. Merritt vs. Yates, 71 Ill. 536, 22 Am. Rep. 128. Va. First National Bank vs. Paul, 75 Va. 594, 40 Am. Rep. 740. Fed. Elliott vs. Peirsol, 26 U. S. (1 Pet.) 328, bk. 7 L. ed. 164.

9. Compare: Jordan vs. Corey, 2 Ind. 335, 52 Am. Dec. 516.

§ 1203. **JUDGMENT PROVING INSTRUMENT.** Any person interested under an instrument entitled to be proved for record, may institute an action in the superior court against the proper parties to obtain a judgment proving such instrument.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 398, held unconstitutional, see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXLV, p. 604.

Applied, cited, construed, referred to, etc., in: Judson vs. Porter, 53 Cal. 482, 485, 486, 487 (construed as not applicable); Hoag vs. Howard, 55 Cal. 564, 565 (referred to).

§ 1204. **EFFECT OF JUDGMENT IN SUCH ACTION.** A certified copy of the judgment in a proceeding instituted under either of the two preceding sections, showing the proof of the instrument, and attached thereto, entitles such instrument to record, with like effect as if acknowledged.

History: Enacted March 21, 1872.

Applied, cited, construed, referred to, etc., in: Hoag vs. Howard, 55 Cal. 564, 565 (referred to).

§ 1205. **CONVEYANCE HERETOFORE MADE TO BE GOVERNED BY THEN EXISTING LAWS.** The legality of the execution, acknowledgment, proof, form, or record of any conveyance or other instrument made before this code goes into effect, executed, acknowledged, proved, or recorded is not affected by anything contained in this chapter, but depends for its validity and legality upon the laws in force when the act was performed.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Construction—Validatory effect.

1. Applied, cited, construed, referred to, etc. in: *Judson vs. Porter*, 53 Cal. 482, 486, 487 (construed); *Hoag vs. Howard*, 55 Cal. 564, 565 (referred to).

2. Construction.—This section is to be construed as declaring that no part of chapter wherein it appears should be held proprio

vigore to validate execution invalid when it was attempted. Section has no application to §§ 1202, 1203, unless its effect is to prohibit any proceeding under those sections to make good defective execution of instrument attempted prior to code; expressions, "the legality is not affected" and "the legality depends upon the laws then in force," are very broad when applied to execution of instrument.—*Judson vs. Porter*, 53 Cal. 482, 486.

§ 1206. RECORDING, AND AS EVIDENCE, TO BE GOVERNED BY THEN EXISTING LAWS. All conveyances of real property made before this code goes into effect, and acknowledged or proved according to the laws in force at the time of such making and acknowledgment or proof, have the same force as evidence, and may be recorded in the same manner and with the like effect, as conveyances executed and acknowledged in pursuance of this chapter.

History: Enacted March 21, 1872.

§ 1207. VALIDATING DEFECTIVELY EXECUTED INSTRUMENTS. RECORD IMPARTS NOTICE. CERTIFIED COPIES. Any instrument affecting real property, which was, previous to the first day of January, one thousand nine hundred and three, copied into the proper book of record, kept in the office of any county recorder, imparts, after that date, notice of its contents to subsequent purchasers and encumbrancers, notwithstanding any defect, omission, or informality in the execution of the instrument, or in the certificate of acknowledgment thereof, or the absence of any such certificate; but nothing herein affects the rights of purchasers or encumbrancers previous to that date.

[Certified copies as evidence.] Duly certified copies of the record of any such instrument may be read in evidence with like effect as copies of an instrument duly acknowledged and recorded; provided, when such copying in the proper book of record occurred within fifteen years prior to the trial of the action, it is first shown that the original instrument was genuine.

History: Enacted March 30, 1874, Code Amdts. 1873-4, p. 228; amended March 4, 1897, Stats. and Amdts. 1897, p. 641; by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 328, held unconstitutional, see history, § 4 ante; amendment re-enacted March 9, 1903, Stats. and Amdts. 1903, p. 108. In force July 1, 1903.

1. Applied, cited, construed, referred to, etc.
2. Construction liberal.
3. Irregularity respecting authority of corporate officers.
- 4, 5. Seal of notary need not be transcribed.

1. Applied, cited, construed, referred to, etc. in: *Hoag vs. Howard*, 55 Cal. 564, 565 (referred to); *McCroskey vs. Ladd* (Cal. Dec. 1, 1891), 28 Pac. Rep. 216 (construed and applied).

2. Construction liberal.—Act 1860, which is substantially embraced in § 1207, was held to be of remedial character and therefore entitled to liberal construction, such as would bring within its scope every case which came clearly within its spirit and policy.—*Wallace vs. Moody*, 26 Cal. 387, 392.

3. Irregularity relating directly to authority of corporate officers to act in the exe-

cution and acknowledgment of deed by corporation is not "mere defect, omission, or informality in execution of instrument, or in certificate of acknowledgment thereof" within contemplation of § 1207.—*McCroskey vs. Ladd* (Cal. Dec. 1, 1891), 28 Pac. Rep. 216.

4. Seal of notary not transcribed by recorder in making copy of deed, it will nevertheless be presumed that certificate of acknowledgment was in proper form and that seal of notary was affixed.—*Jones vs. Martin*, 16 Cal. 165, 166, 167. See *Emmal vs. Webb*, 36 Cal. 197, 203. *Fla. Sommer vs. Mitchell*, 29 Fla. 179, 30 Am. St. Rep. 106, 10 So. Rep. 562, 14 L. R. A. 815. *Mo. Mitchner vs. Holmes*, 117 Mo. 185, 22 S. W. Rep. 1070. *N. Y. Todd vs. Union Dime Sav. Inst.*, 118 N. Y. 337, 23 N. E. Rep. 299.

5. Compare: *Putney vs. Cutler*, 54 Wis. 66, 11 N. W. Rep. 437.

ARTICLE IV.

EFFECT OF RECORDING, OR THE WANT THEREOF.

- § 1213. Conveyance filed with recorder is constructive notice, etc.
- § 1214. Conveyances to be recorded, or are void, etc.
- § 1215. Conveyance defined.

- § 1216. Powers of attorney, how revoked.
- § 1217. Unrecorded instrument valid between the parties.
- § 1218. Recording certified copy of recorded instrument.

[Commissioners' Note.—"The provisions of the various statutes concerning conveyances, which relate to the effect as evidence of instruments acknowledged or recorded, have been placed and may be found in the fourth part of the Code of Civil Procedure."]

§ 1213. CONVEYANCE FILED WITH RECORDER IS CONSTRUCTIVE NOTICE, ETC. Every conveyance of real property, acknowledged or proved, and certified and recorded, as prescribed by law, from the time it is filed with the recorder for record, is constructive notice of the contents thereof to subsequent purchasers and mortgagees; and a certified copy of any such recorded conveyance may be recorded in any other county, and when so recorded the record thereof shall have the same force and effect as though it was of the original conveyance.

History: Enacted March 21, 1872; amended March 3, 1897, Stats. and Amdts. 1897, p. 59. In force March 3, 1897.

I. In General.

- 1. Applied, cited, construed, referred to, etc.
- 2. Definition of recording.
- 3. Construction of statute is strict.
- 4, 5. Acknowledgment of deed is necessary.
- 6. Same—Deed may be acknowledged by only one of makers.
- 7. English language must be used.

- 33. Validity not given to deed by recording it.
- 34. Water right appurtenant—Notice of is given.
- 35. Withdrawal of deed after filing—No notice imparted.
- 36. Practice—Finding as to notice necessary, when.

II. Effect of Recordation.

- 8. Constructive notice.
- 9. Duplicate of certificate of sheriff's sale.
- 10. Duration of notice.
- 11. Fraud is not charged.
- 12. Intention of statute.
- 13. Same—Depository for liens and conveyances established.
- 14. Same—Facilities for research afforded.
- 15. Same—One system of notice provided.
- 16. Investigation of record by purchaser presumed.
- 17, 18. Mistakes in record—Contents of record may be relied upon.
- 19. Same—Acknowledgment being omitted.
- 20. Same—Amount of mortgage misstated.
- 21. Same—Description of land erroneous.
- 22. Same—Seal not appearing of record.
- 23. Same—Signature omitted.
- 24. Mortgage recorded is notice.
- 25. Name of grantor—Conflict in record immaterial.
- 26. Office of index.
- 27. Same—Variance between index and record.
- 28. Original instrument need not be looked to.
- 29. Personal property—No constructive notice as to.
- 30. Persons to whom notice is given.
- 31. Priority of execution not shown by priority of filing.
- 32. Purchaser at administrator's sale—May rely on record.

I. IN GENERAL.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Odd Fellows' Sav. Bank vs. Banton*, 46 Cal. 603, 607, 608, 609 (construed and applied); *Hassey vs. Wilke*, 55 Cal. 525, 528 (construed); *Walker vs. Buffandeau*, 63 Cal. 312, 316 (construed); *Irving vs. Carpenter*, 70 Cal. 23, 25, 11 Pac. Rep. 391 (held not applicable); *In re McConnell*, 74 Cal. 217, 218, 15 Pac. Rep. 746 (cited); *Emeric vs. Alvarado*, 90 Cal. 444, 477, 27 Pac. Rep. 356 (construed and applied); *Warnock vs. Harlow*, 96 Cal. 298, 306, 307, 31 Am. St. Rep. 209, 31 Pac. Rep. 166 (construed and applied); *Gordan vs. City of San Diego* (Cal. April 17, 1893), 32 Pac. Rep. 885 (cited); *Watkins vs. Wilhoit*, 104 Cal. 395, 399, 400, 33 Pac. Rep. 53 (referred to); *Davis vs. Ward*, 109 Cal. 186, 189, 50 Am. St. Rep. 29, 41 Pac. Rep. 1010 (applied); *Hohenshell vs. South Riverside L. & W. Co.*, 128 Cal. 627, 632, 61 Pac. Rep. 371 (applied); *Cady vs. Purser*, 131 Cal. 552, 556, 557, 83 Am. St. Rep. 391, 63 Pac. Rep. 844 (construed and applied with other sections); *Filipini vs. Trobock*, 134 Cal. 441, 447, 66 Pac. Rep. 587 (cited dis. op.).

2. DEFINITION OF RECORDING is copying of instrument to be recorded into public records . . . in book kept for that purpose. The delivery of deed to recording officer, or his minute that he has received same, is not recording; but record, if completed, is considered as taking effect from that time.—*Sawyer vs. Adams*, 8 Vt. 172, 30 Am. Dec. 459.

3. CONSTRUCTION OF STATUTE IS STRICT because doctrine of constructive no-

vice has always been regarded as harsh rule of necessity.—*Call vs. Hastings*, 3 Cal. 179, 183; *Davis vs. Ward*, 109 Cal. 186, 189, 50 Am. St. Rep. 29, 41 Pac. Rep. 1010.

4. **ACKNOWLEDGMENT IS NECESSARY**, and recordation of deed which was not properly acknowledged or proved does not give constructive notice to subsequent bona fide purchasers.—*McMinn vs. O'Connor*, 27 Cal. 238, 243; *Hurlbutt vs. Butenop*, 27 Cal. 50, 56. See *Lee vs. Murphy*, 119 Cal. 364, 371, 51 Pac. Rep. 549, 955.

5. **Compare:** *Landers vs. Bolton*, 26 Cal. 393, 407, applying § 1 of Act of 1860, providing that all instruments in writing properly recorded should, after passage of that act, import notice to subsequent purchasers and encumbrancers, notwithstanding any defect, omission, or informality existing in execution, acknowledgment, certificate of acknowledgment, recording, or certificate of recording the same.—*Wallace vs. Moody*, 26 Cal. 387, 391.

6. **Deed acknowledged by one of makers**, record of, must be considered as constructive notice to subsequent purchaser.—*Shaw vs. Poor*, 23 Mass. (6 Pick.) 26, 17 Am. Dec. 347.

7. **ENGLISH LANGUAGE MUST BE USED**, and there is no law which requires recorder to record copy of deed in Spanish language so as to make it evidence without further proof.—*Wilson vs. Corbier*, 13 Cal. 166, 167.

II. EFFECT OF RECORDATION.

8. **CONSTRUCTIVE NOTICE** results from recordation of deed, and such notice is conclusive.—*Fair vs. Stevenot*, 29 Cal. 486, 489; *Odd Fellows' Sav. Bank vs. Banton*, 46 Cal. 603, 607; *Wilcoxon vs. Miller*, 49 Cal. 193, 195; *Farmer vs. Ukiah W. Co.*, 56 Cal. 11, 15; *Christie vs. Sherwood*, 113 Cal. 526, 532, 45 Pac. Rep. 820. See *Pell vs. McElroy*, 36 Cal. 268, 273; *Woods vs. Farmers*, 7 Watts (Pa.) 322, 326, 32 Am. Dec. 772.

See ante § 19, note par. 41.

9. **DUPLICATE OF CERTIFICATE OF SHERIFF'S SALE** recorded in mode prescribed by law imparts notice to subsequent purchasers and mortgagees that purchaser thereunder has acquired conditional equitable estate which will become absolute at expiration of period of redemption unless redemption was meanwhile effected, and that thereunder purchaser is vested with entire equitable estate, together with present indefeasible right to conveyance of legal title; and it does not of itself afford any notice of presumption that redemption has been or will be effected.—*Page vs. Rogers*, 31 Cal. 293, 315. See *Wright vs. Douglas*, 2 N. Y. 373, 377.

10. **DURATION OF NOTICE**—When record once becomes notice in absence of any provision to contrary, it continues to be notice at least while record exists.—*Page vs. Rogers*, 31 Cal. 293, 313. See *Purdy vs. Huntington*, 42 N. Y. 335, 338, 1 Am. Rep. 532.

11. **FRAUD IS NOT CHARGED**.—Constructive notice only is given by recorded deed, and mere fact of recordation is insufficient to charge party with fraud.—*Dennis vs. Burritt*, 6 Cal. 670, 673.

12. **INTENTION OF STATUTE** is to give notice of alienations, and of state of title to land, and thereby to prevent fraud.—*Woodworth vs. Guzman*, 1 Cal. 203, 205; *Call vs. Hastings*, 3 Cal. 179, 183; *Mesick vs. Sunderland*, 6 Cal. 297, 315; *Chamberlain vs. Bell*, 7 Cal. 292, 294, 68 Am. Dec. 260; *Bird vs. Denison*, 7 Cal. 297, 303; *Hager vs. Spect*, 52 Cal. 579, 584; *Warnock vs. Harlow*, 96 Cal. 298, 306, 31 Am. St. Rep. 209, 31 Pac. Rep. 166. See *Bishop vs. Schneider*, 46 Mo. 472, 2 Am. Rep. 533; *Vail vs. Reynolds*, 113 N. Y. 297, 23 N. E. Rep. 301.

13. **Depository for liens and conveyances** of lands, to which depository all may have access, is established by statute.—*Mesick vs. Sunderland*, 6 Cal. 297, 315.

14. **Facilities for research and information**, and diminution of frequency of application of doctrines of implied notice, are intended to be secured by statute.—*Call vs. Hastings*, 3 Cal. 179, 184.

15. **One system of notice** is established by statute, by which every one is enabled to ascertain what encumbrances exist upon real estate.—*Mesick vs. Sunderland*, 6 Cal. 297, 315.

16. **INVESTIGATION OF RECORD BY PURCHASERS PRESUMED**, and hence they will be taken to have known what record disclosed as to title.—*McPherson vs. Rollins*, 107 N. Y. 316, 1 Am. St. Rep. 326, 14 N. E. Rep. 411. See *Miller vs. Hicken*, 92 Cal. 229, 232, 28 Pac. Rep. 339.

17. **MISTAKE IN RECORD**—Contents of record may be relied upon, rule being that subsequent purchasers and encumbrancers are entitled to rely upon record as they find it, and that they are not charged with notice any further than record discloses terms of instrument.—*Chamberlain vs. Bell*, 7 Cal. 292, 294, 68 Am. Dec. 260; *Davis vs. Ward*, 109 Cal. 186, 189, 50 Am. St. Rep. 29, 14 Pac. Rep. 1010. See *Ga. Shepherd vs. Burkhalter*, 13 Ga. 443, 53 Am. Dec. 523. *Me. Bishop vs. Schneider*, 46 Mo. 472, 2 Am. Rep. 533. *N. Y. Frost vs. Beekman*, 1 John. Ch. 288, 299; *Todd vs. Union Dime Sav. Inst.*, 118 N. Y. 337, 23 N. E. Rep. 299. *Vt. Sawyer vs. Adams*, 8 Vt. 172, 36 Am. Dec. 459. *Wis. Pringle vs. Dunn*, 37 Wis. 449, 19 Am. Rep. 772.

18. **Contra:** *Mangold vs. Barlow*, 61 Miss. 593, 48 Am. Rep. 84 (in which case court said: "Grantee is not required to record instrument or to see that officer does his duty. All that is imposed on grantee is that instrument shall be acknowledged or proved and lodged with clerk of chancery court of proper county. There his duty ends. . . . The state has undertaken to have recording done, and if one suffers from negligence of officer he must seek redress from officer").

19. **Acknowledgment not being of record**, effect will be same, so far as third persons are concerned, as if deed had not in fact been acknowledged.—*Pringle vs. Dunn*, 37 Wis. 449, 19 Am. Rep. 772.

20. **Amount of mortgage being stated erroneously in record**, mortgage being for \$3,000 and it being recorded as mortgage of \$300, subsequent purchaser is only chargeable with

constructive notice to extent of \$300.—*Frost vs. Beekman*, 1 John. Ch. (N. Y.) 288-304. See *Chamberlain vs. Bell*, 7 Cal. 292, 294, 68 Am. Dec. 260; *Gilchrist vs. Gough*, 68 Ind. 576, 30 Am. Rep. 250.

21. Description of land, being erroneously recorded, so that mortgage is made to describe land as situated in range 24, when in fact it is situated in range 25, mortgage is not within doctrine of constructive notice, as record merely gives constructive notice of contents of deeds, and does not give notice of mistakes therein.—*Davis vs. Ward*, 109 Cal. 186, 189, 50 Am. St. Rep. 29, 41 Pac. Rep. 1010, distinguishing *Erickson vs. Rafferty*, 79 Ill. 209 (in which case subsequent purchaser was so circumstanced as to be put on inquiry and had been informed that there was mortgage on land). See *Chamberlain vs. Bell*, 7 Cal. 292, 294, 68 Am. Dec. 260; *Racouillat vs. Sansevain*, 32 Cal. 376, 389; *Racouillat vs. Rene*, 32 Cal. 450, 452; *Baker vs. Bartlett*, 18 Mont. 446, 448, 56 Am. St. Rep. 594, 45 Pac. Rep. 1084.

22. Seal not appearing of record, where instrument is one which requires seal, the record has same effect as if instrument had no seal.—*Todd vs. Union Dime Sav. Inst. of N. Y.*, 118 N. Y. 337, 23 N. E. Rep. 299.

23. Lack of signature, though signature was attached to original and omitted from record by mistake, results in instrument not being duly registered, and such defective record constitutes no notice.—*Shepherd vs. Burkhalter*, 13 Ga. 443, 58 Am. Dec. 523.

24. A MORTGAGE RECORDED IS CONSTRUCTIVE NOTICE TO WORLD; and as against prior mortgage which had, before that time, been discharged of record, it is, in absence of proof of actual notice, to be deemed prior in lien.—*Wittenbrock vs. Parker*, 102 Cal. 93, 107, 41 Am. St. Rep. 172, 36 Pac. Rep. 374, 24 L. R. A. 197.

25. NAME OF GRANTOR.—A conveyance from true owner by his true name, although different in given name from that under which he had acquired title to land, will, when recorded, impart notice of its contents to all subsequent purchasers and mortgagees; and it is not necessary that grantee under such deed put upon record in some form proper notice of fact that his grantor and grantee under original conveyance were same persons.—*Fallon vs. Kehoe*, 33 Cal. 44, 49, 99 Am. Dec. 847.

26. OFFICE OF INDEX is what its name imports—to point to record—but it forms and constitutes no part of record.—*Gilchrist vs. Gough*, 68 Ind. 576, 30 Am. Rep. 250; *Bishop vs. Schneider*, 46 Mo. 472, 2 Am. Rep. 533.

27. Variance between index and record as to matter which record is obliged to contain makes it devolve upon searcher to conclude that record is right and index is wrong.—*Gilchrist vs. Gough*, 68 Ind. 576, 30 Am. Rep. 250.

28. ORIGINAL INSTRUMENT NEED NOT BE LOOKED AT by intending purchaser, as record is not mere guide to enable the public to find instrument recorded, and it is sufficient for purchaser to take notice of contents

of record.—*Frost vs. Beekman*, 1 John. Ch. (N. Y.) 288, 299.

29. PERSONAL PROPERTY—No constructive notice as to by reason of recordation of deed of trust embracing both personal and real property.—*Scott vs. Sierra Lumber Co.*, 67 Cal. 71, 74, 7 Pac. Rep. 131.

30. Persons to whom notice is given are none others than subsequent purchasers and mortgagees.—*Rose vs. Munie*, 4 Cal. 173, 174; *McCabe vs. Grey*, 20 Cal. 509, 516; *Hager vs. Spect*, 52 Cal. 579, 585; *Filipini vs. Trobock*, 134 Cal. 441, 447, 66 Pac. Rep. 587. See *Hunter vs. Watson*, 12 Cal. 363, 377, 73 Am. Dec. 543.

31. Prior execution and delivery of one of two instruments is not shown by fact that one was recorded before other.—*Walker vs. Buffandeau*, 62 Cal. 312, 315, 317.

32. Purchaser at administrator's sale, while not warranted in his title, and is chargeable with knowledge and notice of that of which by exercise of due diligence he could have acquired knowledge, is still protected by recording acts, and secret defects in title apparently good are, as to him, no defects at all.—*Blankenship vs. Whaley*, 124 Cal. 300, 304, 57 Pac. Rep. 79.

33. VALIDITY IS NOT GIVEN TO DEED by recording it, rule being that neither record of forged deed nor record of absolutely void deed can be invoked to support or bolster up disputed title, and that record is worth no more than original deed itself.—*Oglesby vs. Hollister*, 76 Cal. 136, 140, 9 Am. St. Rep. 177, 18 Pac. Rep. 146 (involving void tax deed). See *Mesick vs. Sunderland*, 6 Cal. 297, 315. *Ind. Berry vs. Anderson*, 22 Ind. 36, 40. *Kan. Stone vs. French*, 37 Kan. 145, 1 Am. St. Rep. 237, 14 Pac. Rep. 530. *Miss. Harkreader vs. Clayton*, 56 Miss. 833, 31 Am. Rep. 369. *Pa. Van Amringe vs. Morton*, 4 Whart. 382, 34 Am. Dec. 517. *Vt. Sawyer vs. Adams*, 8 Vt. 172, 20 Am. Dec. 459; *Smith vs. South Royalton Bank*, 32 Vt. 341, 76 Am. Dec. 179. *Wis. Chipman vs. Tucker*, 38 Wis. 43, 20 Am. Rep. 1.

34. WATER RIGHT, even though water-course be artificial, conveyed as appurtenant, passes with land, and if deed is recorded subsequent purchaser will be deemed to have had constructive notice thereof.—*Farmer vs. Ukiah W. Co.*, 56 Cal. 11, 13, 15.

35. WITHDRAWAL OF DEED AFTER FILING BEFORE IT HAS BEEN RECORDED suspends operation of provision of Registry Act that conveyance from time it is filed for record shall impart notice of its contents to subsequent purchasers and mortgagees.—*Lawton vs. Gordon*, 37 Cal. 202, 205.

36. PRACTICE.—Omission of court to find as to constructive notice is ground for reversal where there was adduced at trial evidence upon question rendering it necessary for trial court to pass upon it.—*Prouty vs. Devin*, 118 Cal. 258, 261, 50 Pac. Rep. 280.

See ante § 19 and par. 4 this note.

Withdrawal will not reinvest title in grantor, even though it be for purpose of cancellation or distinction.—*Ibid.* See *Lawton vs. Gordon*, 34 Cal. 36, 91 Am. Dec. 670.

See note 65 Am. Dec. 283.

§ 1214. CONVEYANCES TO BE RECORDED, OR ARE VOID, ETC. Every conveyance of real property, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded, and as against any judgment affecting the title, unless such conveyance shall have been duly recorded prior to the record of notice of action.

History: Enacted March 21, 1872; amended March 12, 1895, Stats. and Amdts. 1895, p. 50.

1. Applied, cited, construed, referred to, etc.
2. Administrator's deed—Must be recorded.
3. Same—Purchaser without consideration must deny knowledge.
- 4-12. Assignees—Status of various assignees as bona fide purchasers.
13. Assignment for benefit of creditors—Must be recorded as against subsequent purchasers.
14. Same—Non-consenting creditors not subsequent purchasers.
15. Attaching creditors—Recordation unnecessary as against.
16. Burden of proof on subsequent purchaser—To show consideration, etc.
17. Same—To show priority of record.
18. "Consideration"—Definition of.
19. Same—General requisites of.
20. Same—Cancellation of pre-existing debt.
21. Same—"Good" consideration insufficient.
22. Same—Inadequacy of consideration.
23. Same—Mere security given insufficient.
24. Same—Surrender of right is sufficient.
25. Same—Valuable consideration as in mercantile law.
26. Same—Voluntary deed not preferred.
27. Construction—Sections of code construed together.
28. Contract to convey must be recorded.
29. "Conveyance" and "instrument" defined.
30. Deed and contemporaneous contract—Record of deed sufficient.
- 31, 32. Deed is valid without recordation.
33. Destruction of deed not excuse for not filing.
34. Effect of statute—Deeds not recorded void, etc.
35. Equitable interest—Purchasers not protected.
36. Same—Assignee of executory contract.
37. Same—Equities existing are prior.
38. Fraud not presumed.
39. "Good faith"—Consists of honest intention.
40. Same—Inadequacy of price may be considered.
41. Knowledge of prior deed—Subsequent purchaser not protected.
42. Same—Agent's knowledge charges principal.
43. Same—Facts discovered must furnish clue.
44. Same—Facts putting prudent man on inquiry.
45. Same—Grantee chargeable with grantor's knowledge.
46. Same—Language of instrument and surrounding circumstances considered.
47. Same—Means of acquiring knowledge sufficient.
- 48, 49. Same—Possession—Is constructive notice.
50. Same—Same—Consistency with record title.
- 51, 52. Same—Same—Knowledge of possession need not be shown.
53. Same—Same—Open, notorious, and unequivocal possession required.
54. Same—Same—Possession of tenant is notice.
55. Same—Same—Question for jury as to nature of possession.
56. Same—Same—Rebuttable presumption only arises.
57. Same—Same—Squatter's possession of public land.
58. Same—Same—Theory upon which doctrine rests.
59. Same—Same—Time of possession.
60. Same—Want of caution.
61. Lease is void if not recorded.
62. Legal title must be acquired by subsequent purchaser.
63. Mechanic's lien is inferior to mortgage.
64. Mortgagee is protected as purchaser.
65. Notice or actual knowledge of prior deed.
66. Partner of purchaser with notice not protected.
- 67, 68. Payment before notice.
69. Persons protected—Purchasers and mortgagees.
70. Pleading—Alleging purchase in good faith necessary.
71. Same—Denial of notice is necessary.
72. Same—Plea of purchase for valuable consideration, etc.
73. Pro tanto protection—Part payment.
74. "Purchaser"—Definition of.
- 75-77. Same—At execution sale.
78. Same—From heirs or representatives of vendor.
- 79, 80. Quitclaim deed—Prevalence of.
81. Recital in deed—Not evidence in favor of purchaser.
82. Same—Purchaser put on inquiry by.
83. Same—Receipt of valuable consideration.
84. Retroactive statute—Act 1850.
85. Time of notice—Before payment by purchaser.
86. Trust resulting in favor of prior purchaser.
87. Water—Appropriator of, not purchaser.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Odd Fellows' Sav. Bank vs. Banton*, 46 Cal. 602, 606, 609 (construed and applied); *Walker vs. Buffandeau*, 62 Cal.

313, 316 (construed); Schluter vs. Harvey, 65 Cal. 153, 159, 3 Pac. Rep. 659 (construed and applied); Gassen vs. Hendrick, 74 Cal. 444, 446, 16 Pac. Rep. 242 (construed); Foorman vs. Wallace, 75 Cal. 552, 554, 17 Pac. Rep. 639 (cited); Taylor vs. Weston, 77 Cal. 534, 538, 20 Pac. Rep. 62 (cited); Dreyfus vs. Hirt, 32 Cal. 621, 625, 23 Pac. Rep. 193 (construed and applied); Scheerer vs. Cuddy, 85 Cal. 270, 272, 24 Pac. Rep. 713 (cited); Warnock vs. Harlow, 96 Cal. 298, 306, 307, 31 Am. St. Rep. 309, 31 Pac. Rep. 166 (cited); Riley vs. Martinelli, 97 Cal. 575, 582, 31 Am. St. Rep. 209, 32 Pac. Rep. 579, 31 L. R. A. 33 (cited); Bank of Ukiah vs. Petaluma Sav. Bank, 100 Cal. 590, 591, 35 Pac. Rep. 170 (construed as not applicable); Watkins vs. Wilhoit, 104 Cal. 395, 398, 399, 38 Pac. Rep. 53 (applied); Davis vs. Ward, 109 Cal. 186, 189, 50 Am. St. Rep. 29, 41 Pac. Rep. 1010 (applied); Christie vs. Sherwood, 113 Cal. 526, 531, 45 Pac. Rep. 320 (held not applicable); County Bank vs. Fox, 119 Cal. 61, 64, 51 Pac. Rep. 11 (held not applicable); Beattie vs. Crewdson, 124 Cal. 577, 579, 57 Pac. Rep. 463 (held not applicable); Commercial Bank vs. Pritchard, 126 Cal. 600, 604, 59 Pac. Rep. 130 (applied); Farmers' Ex. Bank vs. Purdy, 130 Cal. 455, 458, 62 Pac. Rep. 738 (cited); Cady vs. Purser, 131 Cal. 552, 558, 559, 32 Am. St. Rep. 391, 63 Pac. Rep. 344 (applied); Filipini vs. Trobock, 134 Cal. 441, 443, 66 Pac. Rep. 587 (applied); Adams vs. Hopkins (Cal. June 5, 1902), 69 Pac. Rep. 228, 231 (cited).

2. **ADMINISTRATOR'S DEED**, unless recorded, is not such constructive notice as will invalidate title of subsequent bona fide purchaser.—Anthony vs. Wheeler, 130 Ill. 123, 17 Am. St. Rep. 281, 22 N. E. Rep. 494.

3. **Purchaser without consideration must deny knowledge**.—One who buys real property at administrator's sale, for which no money is paid, with understanding that title is to be held for administrator, is not without notice and for valuable consideration; and in suit brought by heirs, purchasers thereof must deny specifically that they had knowledge of any facts which would have put them upon inquiry, not only at time of purchase, but at any time before they paid purchase money or received their deeds.—Scott vs. Umbarger, 41 Cal. 410, 419.

4. **ASSIGNEE IN INSOLVENCY** is not subsequent purchaser or mortgagee for value or in good faith or otherwise, and hence in no position to question validity of mortgage given by his assignor previous to assignment on ground that it was not properly acknowledged.—Farmers' Ex. Bank vs. Purdy, 130 Cal. 455, 458, 62 Pac. Rep. 738. See Wallace vs. McKenzie, 104 Cal. 130, 132, 37 Pac. Rep. 359.

5. **Assignee of certificate of purchase of state lands** is not within rule protecting bona fide purchaser.—Taylor vs. Weston, 77 Cal. 534, 537, 20 Pac. Rep. 62, declaring obiter statement to contrary effect in Smith vs. Ewing, 23 Fed. Rep. 741, 11 Sawy. C. C. 56.

6. **Compare: Packard vs. Johnson**, 51 Cal. 45, 548; **People vs. Swift**, 96 Cal. 165, 170, 31 Pac. Rep. 16.

7. **Assignee of executory contract of purchase** is not within rule protecting bona fide purchaser.—Boone vs. Chiles, 35 U. S. (10 Pet.) 177, 209, bk. 9 L. ed. 388. See also Dupont vs. Wertheman, 10 Cal. 869. **N. C. Polk vs. Gallant**, 3 Dev. & B. Eq. 395, 397, 24 Am. Dec. 410. **Pa. Chew vs. Barnet**, 11 Serg. & R. 839. **Fed. Villa vs. Rodriguez**, 79 U. S. (12 Wall.) 323, 338, sub nom. **Alexander vs. Rodriguez**, bk. 20 L. ed. 406.

8. **Assignee of mortgage for value and without notice** is entitled to protection as bona fide purchaser.—Simpson vs. Del Hoyo, 94 N. Y. 189, 194; **Landigan vs. Mayer**, 32 Oreg. 245, 67 Am. St. Rep. 521, 51 Pac. Rep. 649.

9. **Assignee of second mortgage executed with knowledge on part of mortgagee of execution and existence of prior unrecorded mortgage** is not entitled to precedence as against such first unrecorded mortgage unless he shows that he took assignment for valuable consideration and without notice, actual or constructive, of such first unrecorded mortgage.—County Bank vs. Fox, 119 Cal. 61, 64, 51 Pac. Rep. 11.

10. **Assignee of pre-emption claim** is not within rule protecting bona fide purchaser.—Root vs. Shields, 1 Woolw. C. C. 340, 20 Fed. Cas. 1160. See **Stout vs. Hyatt**, 18 Kan. 232, 243, 244.

11. **Assignee of sheriff's certificate of sale** is not within rule protecting bona fide purchasers.—Reynolds vs. Harris, 14 Cal. 667, 680, 76 Am. Dec. 459.

12. **ASSIGNEE OF SWAMP-LAND CERTIFICATE OF PURCHASE** is not within rule protecting bona fide purchaser.—Maghee vs. Robinson, 93 Ill. 458, 466.

13. **ASSIGNMENT FOR BENEFIT OF CREDITORS MUST BE RECORDED**, else it is void as to subsequent purchasers in good faith and for value.—Watkins vs. Wilhoit, 104 Cal. 395, 399, 38 Pac. Rep. 53, reversing Commissioners' decision (Jan. 26, 1894), 35 Pac. Rep. 646.

14. **Non-consenting creditors**.—Assignment for benefit of creditors which was filed with recorder for record, but was not transcribed in proper book of record, was not void as to non-consenting creditors, as they are not subsequent purchasers or encumbrancers within meaning of this section.—Watkins vs. Wilhoit, 104 Cal. 395, 398, 38 Pac. Rep. 53, reversing Commissioners' decision (Jan. 26, 1894), 35 Pac. Rep. 646.

15. **ATTACHING CREDITOR IS NOT PROTECTED** by statute, and deed which is not recorded after attachment is not subject to attachment because it was not recorded.—Plant vs. Smythe, 45 Cal. 161, 163; **Hoag vs. Howard**, 55 Cal. 564, 565; **Morrow vs. Graves**, 77 Cal. 218, 219, 19 Pac. Rep. 439; **Bank of Ukiah vs. Petaluma Sav. Bank**, 100 Cal. 590, 591, 35 Pac. Rep. 170. See **Le Clert vs. Oullahan**, 52 Cal. 252, 253; **Shirk vs. Thomas**, 121 Ind. 147, 16 Am. St. Rep. 381, 22 N. E. Rep. 976; **Ex parte Foster**, 2 Story C. C. 181, 9 Fed. Cas. 503.

16. **BURDEN OF PROOF ON SUBSEQUENT PURCHASER**.—Subsequent purchaser asserting

that he is purchaser in good faith and without notice must show affirmatively that he paid good and valuable consideration.—*Colton vs. Seavey*, 22 Cal. 496, 503. See *Gassen vs. Hendrick*, 74 Cal. 444, 446, 16 Pac. Rep. 242; *Beattie vs. Crowdsen*, 134 Cal. 577, 579, 57 Pac. Rep. 463.

17. To show priority of record.—Burden of proof is on subsequent purchaser to show that his conveyance was first duly recorded.—*Commercial Bank vs. Pritchard*, 126 Cal. 600, 604, 59 Pac. Rep. 130. See *Thomas vs. Vanlieu*, 28 Cal. 616, 617; *Warnock vs. Harlow*, 96 Cal. 298, 306, 31 Am. St. Rep. 209, 31 Pac. Rep. 166.

18. "CONSIDERATION"—Definition of.—"Good consideration" is such as that of blood or natural affection; "valuable consideration" is such as money or like. Deeds made upon "good consideration" only are considered as merely "voluntary," and are frequently set aside in favor of creditors and bona fide purchasers.—*Clark vs. Troy*, 20 Cal. 220, 224.

19. General requisites are that it must be money or like, in contradistinction to good consideration, though it may be greatly disproportionate to value of land.—*Frey vs. Clifford*, 44 Cal. 335, 341. See *Morse vs. Wright*, 60 Cal. 260, 263.

20. Cancellation of pre-existing debt is valuable consideration for purchase of land within meaning of this section.—*Schluter vs. Harvey*, 65 Cal. 158, 159, 3 Pac. Rep. 659; *Conneau vs. Geis*, 78 Cal. 176, 180, 3 Am. St. Rep. 785, 14 Pac. Rep. 580; *Gassen vs. Hendrick*, 74 Cal. 444, 446, 16 Pac. Rep. 242; *Foorman vs. Wallace*, 76 Cal. 552, 554, 17 Pac. Rep. 680; *Riley vs. Martinelli*, 97 Cal. 575, 582, 33 Am. St. Rep. 209, 32 Pac. Rep. 579, 31 L. R. A. 23.

21. "Good consideration is such as that of blood, or of natural affection. A valuable consideration is such as money or like. Deeds made upon good consideration only are considered as merely voluntary, and are frequently set aside in favor of creditors and bona fide purchasers. When statute speaks of purchaser 'in good faith and for valuable consideration,' there is no reason to suppose it was intended to employ these terms in this connection as tautologous expression. The intent is that purchase must not only be in good faith, but it must be founded on valuable consideration. In other words, that voluntary deed, although taken in good faith and first recorded, will not have preference over prior deed. Mode in which terms are connected indicates intent with which latter was used: in good faith and for valuable consideration."—*Clark vs. Troy*, 20 Cal. 219, 224.

22. Inadequacy of consideration will not warrant inference of notice to purchaser of fraud on part of his grantor where it appears that, although such purchase price would be utterly inadequate to value of land if title were perfect, in fact because of litigation arising out of adverse claims land had no market value, but that real estate might reasonably be allowed to represent, so far as transactions involved in this suit are con-

cerned, purchasing power equivalent to perhaps double such purchase price.—*Fish vs. Benson*, 71 Cal. 428, 439, 12 Pac. Rep. 454.

23. Secured to be paid is not sufficient to constitute grantee bona fide purchaser. Purchaser is not protected, if he has notice previously to execution of deeds and payment of purchase money; for till then transaction is not complete; and therefore, if purchaser had notice previously to that time, he will be bound by it.—*Union Canal Co. vs. Young*, 1 Whart. (Pa.) 410, 30 Am. Dec. 212. See also *Jewett vs. Palmer*, 7 John. Ch. (N. Y.) 65, 11 Am. Dec. 401.

24. Surrender, suspension, or forbearance of legal right of process for enforcement of collection of debt may be sufficient, e. g. the right to process of attachment.—*Frey vs. Clifford*, 44 Cal. 335, 342. See also *Payne vs. Bensley*, 3 Cal. 260, 68 Am. Dec. 318; *Naglee vs. Lyman*, 14 Cal. 450.

25. Valuable consideration, such as will support transfer of negotiable paper, is sufficient to satisfy terms of statute.—*Frey vs. Clifford*, 44 Cal. 335, 342.

26. Voluntary deed will not have preference over prior deed although taken in good faith and first recorded.—*Clark vs. Troy*, 20 Cal. 220, 224.

27. Construction—Sections of code construed together.—See ante §§ 4, 1158 and notes.

28. CONTRACT TO CONVEY NEVER RECORDED is not entitled to precedence as against subsequent purchaser of part of premises where it is shown that such subsequent sale was made not only with knowledge, but at express request, of vendees under agreement, and proceeds thereof credited, at their request, upon the amount due to their vendor.—*Gray vs. African M. E. Z. Church*, 76 Cal. 576, 578, 18 Pac. Rep. 756.

29. "CONVEYANCE" AND "INSTRUMENT" MEAN SOME WRITTEN PAPER or instrument signed and delivered by one person to another, transferring the title to or creating a lien on property, or giving a right to a debt or duty.—*Warnock vs. Harlow*, 96 Cal. 298, 307, 31 Am. St. Rep. 209, 31 Pac. Rep. 166. See post § 1215 and note.

30. A DEED AND CONTEMPORANEOUS CONTRACT in the nature of a defeasance, such deed being recorded, put subsequent purchasers upon inquiry.—*Baker vs. Fireman's F. Ins. Co.*, 79 Cal. 34, 41, 21 Pac. Rep. 357.

31. DEED IS VALID ALTHOUGH UNRECORDED, because the recordation of a deed adds nothing to its effectiveness as a conveyance, and does no more than to impart notice.—*Warnock vs. Harlow*, 96 Cal. 298, 306, 31 Am. St. Rep. 209, 31 Pac. Rep. 166. See *Shirk vs. Thomas*, 121 Ind. 147, 16 Am. St. Rep. 381, 22 N. E. Rep. 976.

32. Mortgage need not be recorded in order to give the mortgagee a lien as against the mortgager, but it is only as against subsequent purchasers or mortgagees that recordation is necessary.—*Commercial Bank vs. Pritchard*, 126 Cal. 600, 604, 605, 59 Pac. Rep. 130.

33. DESTRUCTION OF DEED NOT EX-

CAUSE FOR NOT FILING.—Failure to record conveyance as required by the Registry Act of 1850, although executed prior to the passage of that act, is not excused by the destruction by fire of the deed where such destruction did not occur until more than a month after passage and taking effect of act.—*Graff vs. Middleton*, 43 Cal. 341, 343, where court also said that even if deed had been destroyed before act was passed, they did not see how it could help the case.

34. EFFECT OF STATUTE is to render conveyances void unless they are recorded as against subsequent purchasers or mortgagees for value and in good faith, and recordation of instrument is not necessary to give it validity except as against such subsequent purchasers or mortgagees.—*Stafford vs. Lick*, 7 Cal. 479, 489; *Odd Fellows Sav. Bank vs. Banton*, 46 Cal. 603, 607; *Forman vs. Wallace*, 75 Cal. 552, 554, 17 Pac. Rep. 680; *Dreyfus vs. Hirt*, 82 Cal. 621, 625, 23 Pac. Rep. 193; *Bank of Ukiah vs. Petaluma Sav. Bank*, 100 Cal. 590, 591, 35 Pac. Rep. 170; *Cady vs. Purser*, 131 Cal. 552, 559, 32 Am. St. Rep. 391, 63 Pac. Rep. 844; *Filipini vs. Trobeck*, 134 Cal. 441, 443, 66 Pac. Rep. 537. See *Root vs. Bryant*, 57 Cal. 48, 49; *Walker vs. Buffandeau*, 63 Cal. 312, 316; *Commercial Bank vs. Pritchard*, 126 Cal. 600, 604, 59 Pac. Rep. 130.

35. EQUITABLE INTEREST, PURCHASE OF.—General rule, subject to some exceptions and qualifications, is that such purchaser is not within protection of rule as to bona fide purchasers.—*Taylor vs. Weston*, 77 Cal. 534, 537, 20 Pac. Rep. 62; *Hyde vs. Mangan*, 33 Cal. 319, 327, 26 Pac. Rep. 180. See *Vattier vs. Hinde*, 32 U. S. (7 Pet.) 252, 271, bk. 3 L. ed. 675.

36. Assignee of executory contract of purchase is purchaser of mere equity within meaning of rule that purchaser of an equitable interest is not protected as bona fide purchaser, and so far as property is concerned his right is merely to have specific performance of contract, for which he must resort to court of equity, and court may refuse to lend its aid if not satisfied of fairness of transaction.—*Taylor vs. Weston*, 77 Cal. 534, 538, 20 Pac. Rep. 62. See *Polk vs. Gallant*, 2 Dev. & B. (N. C.) Eq. 395, 34 Am. Dec. 410; *Boone vs. Chiles*, 35 U. S. (10 Pet.) 177, 209, bk. 9 L. ed. 388; *Villa vs. Rodriguez*, 79 U. S. (12 Wall.) 323, 338, sub nom. *Alexander vs. Rodriguez*, bk. 20 L. ed. 406.

37. Priority of equities.—Purchaser of equitable title takes property subject to all existing equities. He is not within rule which protects bona fide purchasers for value without notice of real or apparent title. He must take imperfect title with all its imperfections.—*Dupont vs. Wertheman*, 10 Cal. 354, 363. See *Vattier vs. Hinde*, 32 U. S. (7 Pet.) 252, 273, bk. 3 L. ed. 675.

38. FRAUD—Not presumed.—Ground upon which holder of unrecorded conveyance may prevail over subsequent purchaser, who has recorded his conveyance according to statute, is, that it was fraudulent in him to take and register conveyance to prejudice of known title of another; and as fraud will not be pre-

sumed, but must be proven, notice, whether actual or constructive, of unrecorded conveyance must be clearly shown before exception established by court to Registration Act will be permitted to prevail.—*Smith vs. Yule*, 31 Cal. 180, 183, 39 Am. Dec. 167.

39. "GOOD FAITH" CONSISTS OF HONEST INTENTION to abstain from taking any unconscientious advantage of another, even through forms or technicalities of law, together with absence of all information or belief of facts which would render transaction unconscientious.—*Gress vs. Evans*, 1 Dak. 387, 46 N. W. Rep. 1132.

40. "Inadequacy of price is circumstance to be considered in determining question of good faith, but it will not less fall within legal definition of valuable consideration, however disproportioned it may be to value of land."—*Clark vs. Troy*, 20 Cal. 219, 224.

41. KNOWLEDGE THAT GRANTOR HAS PREVIOUSLY EXECUTED CONVEYANCE of some kind which has not been recorded will preclude subsequent purchaser from claiming to come within protection of statute protecting bona fide purchasers, and it matters not kind of conveyance that had been executed, whether it was estate for years or in fee simple.—*Hunter vs. Watson*, 12 Cal. 363, 374, 73 Am. Dec. 543; *Galland vs. Jackman*, 26 Cal. 79, 87, 35 Am. Dec. 172; *Christie vs. Sherwood*, 113 Cal. 526, 532, 45 Pac. Rep. 320. See *Lawton vs. Gordon*, 34 Cal. 36, 38, 91 Am. Dec. 670.

42. Agent's knowledge is knowledge of principal, and, accordingly, knowledge of bank cashier of a prior mortgage is knowledge of bank.—*Christie vs. Sherwood*, 113 Cal. 526, 532, 45 Pac. Rep. 320. See *Yerger vs. Barz*, 56 Iowa 77, 3 N. W. Rep. 769; *Distilled Spirits*, 78 U. S. (11 Wall.) 356, sub nom. *Harrington vs. United States*, bk. 20 L. ed. 167.

43. Facts discovered must furnish clue.—"There must appear to be in nature of case such connection between facts discovered and further facts to be discovered, that former may be said to furnish clue—a reasonable and natural clue—to latter."—*Page vs. Waring*, 76 N. Y. 463, 472.

44. FACTS PUTTING ON INQUIRY.—Actual notice is not essential to give effect to prior conveyance which is unrecorded; any fact or circumstance coming to knowledge of subsequent purchaser which would put prudent man upon inquiry, and which pursued would lead to actual notice of unrecorded deed lying in apparent chain of his title, is sufficient to invalidate subsequent purchase.—*Anthony vs. Wheeler*, 130 Ill. 123, 17 Am. St. Rep. 231, 23 N. E. Rep. 494.

45. Grantee chargeable with grantor's notice.—Purchaser from one who acquired title with notice of prior unrecorded deed, which, however, was recorded intermediate two conveyances in question, has constructive notice of such deed, and hence is not purchaser in good faith, and his title will fall before that of such prior deed.—*Mahoney vs. Middleton*, 41 Cal. 41, 50.

46. Language of instrument and surrounding circumstances may be such as to put any reasonable man upon inquiry; as where patent

issued pursuant to findings of Mexican grant commission recites that patentee appeared as representative of heirs of deceased claimant, of whom he was also one, although grant was to him individually, and subsequent mortgage by him recites "meaning to convey all of right, title, interest, claim, and demands, and inheritance as heirs" of such deceased claimant, mortgagee will be deemed to have notice of true facts as to title.—*Sherman vs. McCarthy*, 57 Cal. 507, 514.

47. Means of acquiring knowledge.—Having readily accessible means of acquiring knowledge of fact, which subsequent purchaser might have ascertained by inquiry, is equivalent to notice and knowledge of it.—*Montgomery vs. Keppel*, 75 Cal. 128, 131, 7 Am. St. Rep. 125, 19 Pac. Rep. 178.

48. Possession is constructive notice, it not being intention of statute to abolish other constructive notice, and such possession puts purchasers on inquiry as to possessor's title or existence of any deed he may have which is unrecorded.—*Bird vs. Dennison*, 7 Cal. 297, 306; *Stafford vs. Lick*, 7 Cal. 479, 489; *Partridge vs. McKinney*, 10 Cal. 181, 184; *Hunter vs. Watson*, 12 Cal. 363, 376, 73 Am. Dec. 543; *Lestrade vs. Barth*, 19 Cal. 660, 676; *Dutton vs. Warschauer*, 21 Cal. 609, 628, 82 Am. Dec. 765; *Landers vs. Bolton*, 26 Cal. 393, 419; *Fair vs. Stevenot*, 29 Cal. 486, 490; *Smith vs. Yule*, 31 Cal. 180, 183, 89 Am. Dec. 167; *Thompson vs. Ploche*, 44 Cal. 508, 516; *Taylor vs. Central Pac. R. Co.*, 67 Cal. 615, 619, 8 Pac. Rep. 436; *Peasley vs. McFadden*, 68 Cal. 611, 615, 10 Pac. Rep. 179; *Bank of Mendocino vs. Baker*, 82 Cal. 114, 116, 22 Pac. Rep. 1037, 6 L. R. A. 833; *Scheerer vs. Cuddy*, 85 Cal. 270, 272, 24 Pac. Rep. 713; *Hyde vs. Mangan*, 88 Cal. 319, 327, 26 Pac. Rep. 180; *Emeric vs. Alvarado*, 90 Cal. 444, 473, 27 Pac. Rep. 356; *Security L. & T. Co. vs. Willamette Steam Mills L. & M. Co.*, 99 Cal. 636, 641, 34 Pac. Rep. 321; *Beattie vs. Crewdson*, 124 Cal. 577, 579, 57 Pac. Rep. 463. See *Morrison vs. Wilson*, 13 Cal. 494, 500, 73 Am. Dec. 593; *Pell vs. McElroy*, 36 Cal. 368, 271. *Iowa. Thomas vs. Kennedy*, 24 Iowa 397, 95 Am. Dec. 740; *Iowa L. & T. Co. vs. King*, 58 Iowa 598, 12 N. W. Rep. 595; *Lindley vs. Martindale*, 78 Iowa 379, 380, 43 N. W. Rep. 233; *Elliot vs. Lane*, 82 Iowa 484, 31 Am. St. Rep. 504, 48 N. W. Rep. 720. *Kan. Sanford vs. Weeks*, 38 Kan. 319, 5 Am. St. Rep. 748, 16 Pac. Rep. 465. *Mass. Kendall vs. Lawrence*, 39 Mass. (22 Pick.) 544. *Minn. Wilkins vs. Bevier*, 43 Minn. 213, 19 Am. St. Rep. 238, 45 N. W. Rep. 157. *Mo. Vaughn vs. Tracy*, 25 Mo. 318, 69 Am. Dec. 471. *N. H. Bell vs. Twilight*, 22 N. H. 518. *Pa. Jaques vs. Weeks*, 7 Watts 269. *Wis. Ely vs. Wilcox*, 20 Wis. 523, 91 Am. Dec. 436. *Fed. Townsend vs. Little*, 109 U. S. 504, bk. 27 L. ed. 1012, 3 Sup. Ct. Rep. 357.

49. Compare: *Bird vs. Dennison*, 7 Cal. 297, 306 (where *Burnett, J.*, in his concurring opinion, said: "Is, then, possession of party holding under unregistered deed, implied notice under our statute? To say that it is, in all cases, would seem to be laying down unsound rule. This possession may be very recent—may be scrambling and irregular, and purchaser may not have means of ascertaining it. On other

hand, to say that in no case can it be even matter of evidence of bad faith in subsequent purchaser, would seem equally unsound. From nature of the subject, there can be no uniform rule laid down by courts. Facts and circumstances of each particular case must determine it. As it is question of bad faith, it should be left to jury to decide, in each case, whether subsequent purchaser had actual notice, or such means of notice as to make his negligence species of fraud. And to prove such actual notice, or gross and wilful carelessness, notorious possession of first purchaser, and knowledge of that fact by subsequent purchaser, as well as other circumstances tending to prove these conclusions, should go to jury as matter of evidence").

50. Consistency with record title.—Possession consistent with record title is not sufficient to put subsequent purchaser or mortgagee upon inquiry as to existence of unrecorded deeds.—*Smith vs. Yule*, 31 Cal. 180, 184, 89 Am. Dec. 167.

51. Knowledge of possession need not be shown, because such knowledge is presumed, and failure of purchaser to make inquiry is not excused by fact that he looked at premises and house upon it, and found doors of house locked.—*Scheerer vs. Cuddy*, 85 Cal. 270, 272, 24 Pac. Rep. 713.

52. Compare: *Taylor vs. Central Pac. R. Co.*, 67 Cal. 615, 619, 8 Pac. Rep. 436 (holding that testimony of subsequent purchaser that at time of his purchase he had no knowledge that land was in possession of another claiming rights therein, and adverse to him, is competent on issue of notice).

53. Open, notorious, and unequivocal possession required, under apparent claim of ownership, in order to constitute such notice as will put purchaser or encumbrancer upon inquiry.—*Lestrade vs. Barth*, 19 Cal. 660, 676; *Fair vs. Stevenot*, 29 Cal. 486, 490; *Taylor vs. Central Pac. R. Co.*, 67 Cal. 615, 620, 8 Pac. Rep. 436; *Bank of Mendocino vs. Baker*, 82 Cal. 114, 116, 22 Pac. Rep. 1037, 6 L. R. A. 833. See *Iowa. Elliot vs. Lane*, 82 Iowa 484, 31 Am. St. Rep. 504, 48 N. W. Rep. 720. *Kan. Sanford vs. Weeks*, 38 Kan. 319, 5 Am. St. Rep. 748. *Fed. Townsend vs. Little*, 109 U. S. 504, bk. 27 L. ed. 1012, 3 Sup. Ct. Rep. 357.

54. Possession of tenant is notice to subsequent purchaser of title of landlord.—*Thompson vs. Ploche*, 44 Cal. 508, 516. See *Dutton vs. Warschauer*, 21 Cal. 609, 628, 82 Am. Dec. 765; *Landers vs. Bolton*, 26 Cal. 393, 419.

55. Question for jury, under instructions from court, whether possession in particular case was such as to put purchaser on notice, question being mixed question of law and fact.—*Bird vs. Dennison*, 7 Cal. 297, 306.

56. Rebuttable presumption only arises from possession, rule being that possession is evidence of notice and that it may or not be sufficient, according to circumstances of that particular case.—*Fair vs. Stevenot*, 29 Cal. 486, 490. See *Taylor vs. Central Pac. R. Co.*, 67 Cal. 615, 619, 8 Pac. Rep. 436; *Emeric vs. Alvarado*, 90 Cal. 444, 473, 27 Pac. Rep. 356; *Calanchini vs. Branstetter*, 96 Cal. 612, 614.

57. Squatter's possession of public land, although he is entitled to pre-empt, and probate proceedings after death of such occupant, setting apart land to his widow and sons as homestead, import no notice of claims of his sons to land, as to such homestead, to subsequent mortgagee from one having legal title to land.—*Stockton B. & L. Assoc. vs. Chalmers*, 65 Cal. 93, 95, 3 Pac. Rep. 101.

58. Theory upon which doctrine proceeds is apparent relation that person in possession bears to title, and presumption arising from such possession.—*Smith vs. Yule*, 31 Cal. 180, 183, 89 Am. Dec. 187.

59. Time of possession must have been "at time of acquisition of title or deed of subsequent vendee."—*Hunter vs. Watson*, 12 Cal. 363, 376, 73 Am. Dec. 543.

60. Want of caution, as distinguished from fraudulent and wilful blindness, is not sufficient to charge subsequent purchaser with constructive notice of unrecorded deed.—*Anthony vs. Wheeler*, 130 Ill. 128, 17 Am. St. Rep. 281, 22 N. E. Rep. 494. See also *Grundies vs. Reid*, 107 Ill. 304.

61. LEASE IS VOID IF NOT RECORDED as against subsequent purchaser.—*Scheerer vs. Cuddy*, 85 Cal. 370, 372, 24 Pac. Rep. 713. See *Hyde vs. Mangan*, 33 Cal. 319, 327, 36 Pac. Rep. 180.

62. LEGAL TITLE MUST BE ACQUIRED as essential element in order to constitute one bona fide purchaser for value and without notice.—See *Dupont vs. Wertheman*, 10 Cal. 354, 363; *Gallion vs. McCaslin*, 1 Blackf. (Ind.) 91, 12 Am. Dec. 303; *Grimstone vs. Carter*, 3 Paige Ch. (N. Y.) 421, 436, 24 Am. Dec. 230.

63. MECHANIC'S LIEN IS INFERIOR TO MORTGAGE even though such mortgage be unrecorded where statute provides that unrecorded deed shall be void only as against subsequent "purchasers or mortgagees without notice."—*Rose vs. Munie*, 4 Cal. 173, 174.

64. MORTGAGEE IS PROTECTED AS PURCHASER where he takes for value and without notice.—*Frey vs. Clifford*, 44 Cal. 335, 342; *Connecticut L. Ins. Co. vs. McCormick*, 45 Cal. 580, 583; *Taylor vs. Weston*, 77 Cal. 534, 538, 20 Pac. Rep. 63; *San Francisco W. Co. vs. Pattee*, 86 Cal. 623, 628, 25 Pac. Rep. 135. See *Wallace vs. McKenzie*, 104 Cal. 130, 132, 37 Pac. Rep. 859; *County Bank vs. Fox*, 119 Cal. 61, 63, 51 Pac. Rep. 11; *Work vs. Brayton*, 5 Ind. 396; *Michener vs. Bengel*, 135 Ind. 188, 34 N. E. Rep. 664, 816; *Landigan vs. Mayer*, 32 Oreg. 245, 67 Am. St. Rep. 521, 51 Pac. Rep. 649.

65. Notice or actual knowledge of prior deed.—See pars. 41-60 this section.

66. PARTNER OF PURCHASER OF LAND WITH NOTICE of prior conveyance thereof by grantor is not within law protecting bona fide purchaser, although at time he knew nothing of such prior conveyance.—*Stanley vs. Green*, 12 Cal. 148, 168.

67. PAYMENT BEFORE NOTICE is necessary to entitle one to protection as bona fide purchaser.—See *Mich. Blanchard vs. Tyler*, 12 Mich. 339, 86 Am. Dec. 57. N. Y. *Dickerson vs. Tillinghast*, 4 Paige Ch. 215, 25 Am. Dec. 528;

Jewett vs. Palmer, 7 John. Ch. 65, 11 Am. Dec. 401. Pa. *Union Canal Co. vs. Young*, 1 Whart. 410, 30 Am. Dec. 212.

68. Payment before notice of vendor's lien is necessary in order to constitute purchaser a bona fide purchaser for value without notice; it is not enough for him to show merely that he purchased in good faith, without any previous knowledge of fact that original vendor had not been fully paid by his vendor.—*Combination Land Co. vs. Morgan*, 95 Cal. 548, 552, 30 Pac. Rep. 1102.

69. PERSONS PROTECTED are subsequent purchasers and mortgagees in good faith.—*Pixley vs. Huggins*, 15 Cal. 127, 132. See *Rose vs. Munie*, 4 Cal. 173, 174.

70. PLEADING—Allegations as to purchase in good faith.—To entitle party to protection as purchaser for value and in good faith he must aver possession of his grantor, purchase of premises, payment of purchase money in good faith and without notice, actual or constructive, prior to and down to time of its payment; for if he had notice, actual or constructive, at any moment of time before payment of money, he is not bona fide purchaser.—*Isenhoot vs. Chamberlain*, 59 Cal. 630, 639; *Eversdon vs. Mayhew*, 65 Cal. 163, 167, 3 Pac. Rep. 641; *Willhoit vs. Lyons*, 98 Cal. 409, 413, 33 Pac. Rep. 325. See *Ala. Wells vs. Morro*, 38 Ala. 128. Ark. *Pearce vs. Foreman*, 29 Ark. 568. N. Y. *Taylor vs. Ranney*, 4 Hill 619, 624. Eng. *Wallwyn vs. Lee*, 9 Ves. Jr. 24, 32.

71. Denial of notice is necessary in all cases in which party sets up his title to relief in equity as bona fide purchaser.—*Frost vs. Beekman*, 1 John. Ch. (N. Y.) 238, 303. See *Bodman vs. Van Den Bendy*, 1 Vern. 179; *Jerrard vs. Saunders*, 3 Ves. Jr. 454 (where Lord Loughborough held that defendant who pleads purchase for valuable consideration without notice is bound to deny, fully and in most precise terms, every circumstance from which notice could be inferred).

72. Plea of purchase for valuable consideration without notice must be that money was actually paid; averment must be not only that purchaser had not notice at or before execution of deed, but that purchase money was paid before notice.—*Jewett vs. Palmer*, 7 John. Ch. 65, 68, 11 Am. Dec. 401.

73. PRO TANTO PROTECTION.—Purchaser from mortgager who was paid only portion of purchase price before notice is "entitled to protection only to extent that he was hurt."—*Davis vs. Ward*, 109 Cal. 186, 189, 191, 50 Am. St. Rep. 29, 41 Pac. Rep. 1010.

74. "PURCHASER" DEFINED to mean, as used in statute, simply "buyer" in the popular sense of that term, word not being used in broad sense as indicating all acquisitions of title except by descent.—*Middle Creek D. Co. vs. Henry*, 15 Mont. 558, 39 Pac. Rep. 1054.

75. At execution sale under his own judgment is bona fide purchaser for value.—*Hunter vs. Watson*, 12 Cal. 363, 377, 73 Am. Dec. 543; *Riley vs. Martinelli*, 97 Cal. 575, 581, 582, 33 Am. St. Rep. 209, 32 Pac. Rep. 579, 21 L. R. A. 33; *Cady vs. Purser*, 131 Cal. 552, 559, 32 Am. St. Rep. 391, 63 Pac. Rep. 844. See *Gower vs.*

Doheney, 33 Iowa 36; Wood vs. Chapin, 18 N. Y. 509, 520, 67 Am. Dec. 62.

76. Compare: Vitito vs. Hamilton, 86 Ind. 137; Carnahan vs. Yerkes, 87 Ind. 62.

77. Same—Prior unrecorded mortgage.—Purchaser at execution sale under his own judgment must as against holder of prior unrecorded mortgage, in order to bring himself within provisions of § 26 of Registry Act of 1850, show not only that he is purchaser in good faith and for valuable consideration, but he must show that his conveyance was first duly recorded.—Thomas vs. Vanlieu, 23 Cal. 616, 617.

78. From heirs or representatives of vendor, if he purchases and pays for land, without actual or constructive notice of previous sale, is as fully within spirit and equity of statute as second purchaser from vendor himself.—Taylor vs. Harrison, 47 Tex. 454, 26 Am. Rep. 304.

79. QUITCLAIM DEED received in good faith and for valuable consideration will prevail over prior unrecorded deed.—Graft vs. Middleton, 43 Cal. 341, 344. See Frey vs. Clifford, 44 Cal. 335, 343.

80. Compare: Allison vs. Thomas, 72 Cal. 562, 564, 1 Am. St. Rep. 89 (declaring that unless foregoing cases are justified by peculiar wording of statute, they seem to be against decisions elsewhere upon subject; that it has been uniformly held that conveyance of right, title, and interest of grantor vests in purchaser only what grantor himself could claim); American Mortgage Co. vs. Hutchinson, 19 Oreg. 334, 24 Pac. Rep. 515; Rodgers vs. Burchard, 34 Tex. 441, 7 Am. Rep. 283; Taylor vs. Harrison, 47 Tex. 454, 26 Am. Rep. 304.

81. RECITAL IN DEED NOT PRIMA FACIE EVIDENCE IN FAVOR OF PURCHASER.—Subsequent purchaser claiming to be bona fide purchaser for value must, as against prior purchaser whose conveyance was subsequently recorded, show himself to be such subsequent purchaser in good faith and for valuable consideration aside from recitals contained in his deed which are not prima facie proof of

valuable consideration but are mere declarations of grantor.—Long vs. Dollarhide, 24 Cal. 218, 227.

82. Puts purchaser on inquiry.—Recital in deed that consideration was "secured to be paid" is of fact well calculated to put subsequent purchaser upon inquiry.—Willis vs. Gay, 43 Tex. 463, 26 Am. Rep. 323.

83. Receipt of valuable consideration.—Recital of is not proof of that fact as against strangers nor against one claiming under party executing reciting deed by title prior thereto or adversely to him; but is only such evidence against those claiming under him by title subsequent.—Galland vs. Jackman, 26 Cal. 79, 86, 85 Am. Dec. 172. See Lloyd vs. Lynch, 23 Pa. St. 419, 425, 70 Am. Dec. 137; Pennsylvania Salt Mfg. Co. vs. Neel, 54 Pa. St. 9, 19.

84. RETROACTIVE STATUTE.—Registry Act of 1850 required conveyances made before its passage to be recorded, and pronounced same penalty for failure to record them as in cases of conveyances made after its passage.—Graft vs. Middleton, 43 Cal. 341, 343. See Stafford vs. Lick, 7 Cal. 479; Clark vs. Troy, 20 Cal. 219; Anderson vs. Fisk, 36 Cal. 625.

85. TIME OF ACTUAL OR CONSTRUCTIVE NOTICE may be at any moment before payment of money and such prior notice will render useless plea that one is purchaser without notice and for valuable consideration.—Beattie vs. Crewdson, 124 Cal. 577, 579, 57 Pac. Rep. 463.

86. TRUST RESULTING IN FAVOR OF PRIOR PURCHASER.—Subsequent purchaser with notice is bound by all equities of prior purchaser under deed from same grantor, holds it in trust for him, and is bound to convey to him.—Cannon vs. Handley, 72 Cal. 133, 143, 13 Pac. Rep. 315.

As to resulting trusts, see ante § 852 and note.

87. WATER.—Appropriator of use of water subsequent to conveyance of use of same water by owner thereof to his grantee is not purchaser within meaning of that term as used in Registry Acts of Montana.—Middle Creek D. Co. vs. Henry, 15 Mont. 553, 39 Pac. Rep. 1054.

§ 1215. CONVEYANCE DEFINED. The term "conveyance," as used in sections twelve hundred and thirteen and twelve hundred and fourteen, embraces every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged, or encumbered, or by which the title to any real property may be affected, except wills.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. All instruments affecting title.
3. Assignment of mortgage.
4. Attachment not conveyance.
5. Certificate of sheriff's sale.
6. "Instrument" defined.
7. Judgment not conveyance.
8. Lease is conveyance.
9. Lis pendens not conveyance.
10. "Map" not instrument affecting title.
11. Mortgage on land is conveyance.
12. Same—Not in strict sense.
13. Same—Not unless Recording Act involved.
14. Power of attorney—To convey land.
15. Same—To execute lease.
16. Sections of code construed together.
17. Stipulation assuming mortgage.
18. Subsequent purchasers only protected.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Odd Fellows Sav. Bank vs. Banton, 46 Cal. 603, 607, 608, 609 (construed and applied); Hassey vs. Wilke, 55 Cal. 525, 528 (cited); Hoag vs. Howard, 55 Cal. 564, 566

(cited); *In re Estate McConnell*, 74 Cal. 217, 218, 15 Pac. Rep. 746 (construed); *Tolman vs. Smith*, 74 Cal. 345, 349, 16 Pac. Rep. 189 (construed); *Warnock vs. Harlow*, 96 Cal. 298, 307, 31 Am. St. Rep. 209, 31 Pac. Rep. 166 (construed); *Stewart vs. Powers*, 98 Cal. 514, 518, 33 Pac. Rep. 486 (construed); *Garber vs. Gianella*, 98 Cal. 527, 529, 33 Pac. Rep. 458 (construed); *Watkins vs. Wilhoit*, 104 Cal. 395, 398, 38 Pac. Rep. 53 (cited with other sections in discussion); *Savings & L. Soc. vs. McKoon*, 120 Cal. 177, 179, 52 Pac. Rep. 305 (construed); *Commercial Bank vs. Pritchard*, 126 Cal. 600, 603, 606, 59 Pac. Rep. 130 (applied).

2. ALL INSTRUMENTS within definition of "conveyance," in any manner affecting title to real property, must be filed for record, and until so filed are void as against all persons who subsequently, in good faith, without notice, and for valuable consideration, acquire any interest therein as purchasers or encumbrancers.—*Odd Fellows Sav. Bank vs. Banton*, 46 Cal. 603, 607.

3. ASSIGNMENT OF MORTGAGE ON REAL PROPERTY is not "grant of estate in real property" within contemplation of Recording Act; its recordation is governed by Civil Code § 2952.—*Adler vs. Sargent*, 109 Cal. 42, 49, 41 Pac. Rep. 799.

4. ATTACHMENT not conveyance within meaning of statute.—*Hoag vs. Howard*, 55 Cal. 564, 565, 566. See *Warnock vs. Harlow*, 96 Cal. 298, 307, 31 Am. St. Rep. 209, 31 Pac. Rep. 166.

5. CERTIFICATE OF SHERIFF'S SALE is conveyance by which interest in property sold is created, and when immediately recorded has priority over mortgage on land improperly recorded.—*Cady vs. Purser*, 131 Cal. 552, 559, 82 Am. St. Rep. 391, 63 Pac. Rep. 844. See *Footman vs. Wallace*, 75 Cal. 552, 557, 17 Pac. Rep. 680.

6. "Instrument," as used in Recording Act, is construed to mean some written paper or instrument signed and delivered by one person to another, transferring title to or creating lien on property, or giving right to debt or duty.—*Warnock vs. Harlow*, 96 Cal. 298, 307, 31 Am. St. Rep. 209, 31 Pac. Rep. 166.

7. JUDGMENT NOT CONVEYANCE within meaning of statute.—*Wilcoxson vs. Miller*, 49 Cal. 193, 195; *Hoag vs. Howard*, 55 Cal. 564, 566.

8. LEASE IS CONVEYANCE OF LAND within definition of this section.—*Garber vs. Gianella*, 98 Cal. 527, 529, 33 Pac. Rep. 458; *Commercial Bank vs. Pritchard*, 126 Cal. 600, 603, 59 Pac. Rep. 130. See *Jones vs. Marks*, 47 Cal. 242, 247.

9. LIS PENDENS NOT CONVEYANCE such as statute contemplates.—*Warnock vs. Harlow*, 96 Cal. 298, 306, 307, 31 Am. St. Rep. 209, 31 Pac. Rep. 166. See *Baker vs. Bartlett*, 18 Mont. 446, 450, 56 Am. St. Rep. 594, 45 Pac. Rep. 1084.

10. "MAP" is not instrument affecting title to real property within meaning of recording statutes.—*Colton L. & W. Co. vs. Swartz*, 99 Cal. 273, 285, 33 Pac. Rep. 878.

11. MORTGAGES OF LAND are conveyances within statutes.—*Odd Fellows' Sav. Bank vs. Banton*, 46 Cal. 603, 607; *Hassey vs. Wilke*, 55 Cal. 525, 528; *In re Estate McConnell*, 74 Cal. 217, 218, 15 Pac. Rep. 746; *Tolman vs. Smith*, 74 Cal. 345, 349, 16 Pac. Rep. 189. See *Call vs. Hastings*, 3 Cal. 179, 184.

12. Not in fact conveyance in sense that corporation to which mortgage has been given can be said to "own" or "hold" mortgaged property within meaning of statute requiring corporation to file in office of county clerk of every county in which it holds property copy of its articles of incorporation, and providing for penalty for failure so to do.—*Savings & L. Soc. vs. McKoon*, 120 Cal. 177, 179, 52 Pac. Rep. 305.

13. Recording Act not being involved, there is no implication that mortgage is conveyance of real property, but rather contrary.—*Stewart vs. Powers*, 98 Cal. 514, 518, 33 Pac. Rep. 486.

See note 52 Am. St. Rep. 250-251.

14. POWER OF ATTORNEY authorizing agent to bind his principal in executory contract of sale of real estate was not entitled to record under § 27 of Recording Act of 1850.—See *De Rutte vs. Muldrow*, 16 Cal. 505; *Jones vs. Marks*, 47 Cal. 242, 247.

15. Authorizing agent to execute lease of his principal's land for term exceeding one year was entitled to record under Registry Recording Act of 1850.—*Jones vs. Marks*, 47 Cal. 242, 247.

16. Sections of code construed together.—See ante § 1158 and note.

17. STIPULATION BY GRANTEE ASSUMING MORTGAGE DEBT on land conveyed is entitled to record under this section, even though such stipulation be contained in separate instrument.—*Weaver vs. McKay*, 103 Cal. 546, 549, 41 Pac. Rep. 450.

18. SUBSEQUENT PURCHASERS, ETC., PROTECTED from common grantor, and statute does not affect rights of strangers to claim of title.—*Garber vs. Gianella*, 98 Cal. 527, 529, 33 Pac. Rep. 458. See *McCabe vs. Grey*, 20 Cal. 509, 516; *Sharon vs. Minnock*, 6 Nev. 377, 391.

§ 1216. POWERS OF ATTORNEY, HOW REVOKED. No instrument containing a power to convey or execute instruments affecting real property, which has been recorded, is revoked by any act of the party by whom it was executed, unless the instrument containing such revocation is also acknowledged or proved, certified and recorded, in the same office in which the instrument containing the power was recorded.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Power of attorney—How revoked.

1. Applied, cited, construed, referred to, etc., in: *Hoag vs. Howard*, 55 Cal. 564, 566 (re-

ferred to in connection with forty other sections).

2. Power of attorney—How revoked.—See monographic note 47 Am. Dec. 343-348.

§ 1217. UNRECORDED INSTRUMENT VALID BETWEEN THE PARTIES.

An unrecorded instrument is valid as between the parties thereto and those who have notice thereof. History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Construction—Other sections considered.
3. Same—Chattel mortgages.
4. Assignee in insolvency cannot attach mortgage.
5. Chattel mortgage unrecorded is valid.
6. Declaration of homestead entitled to priority.
7. Kinds of notice.
8. Knowledge of unrecorded deed.
9. Mortgage—Need not be recorded as between parties.
10. Same—Purchasers "in good faith and for value."
11. Same—Third person having title to portion of land.
12. Possession puts purchaser on inquiry.
13. Recitals in prior deeds.
14. Recordation—Effect of.
15. Source of information.
16. Same—Statements by recorder.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Dreyfus vs. Hirt*, 32 Cal. 621, 626, 23 Pac. Rep. 193 (applied); *Scheerer vs. Cuddy*, 85 Cal. 270, 272, 24 Pac. Rep. 713 (construed and applied); *Warnock vs. Harlow*, 96 Cal. 293, 305, 306, 31 Am. St. Rep. 209, 31 Pac. Rep. 166 (construed and applied); *Bank of Ukiah vs. Petaluma Savings Bank*, 100 Cal. 590, 591, 35 Pac. Rep. 170 (construed and applied); *Fette vs. Lane* (Cal. Sept. 21, 1894), 37 Pac. Rep. 914, 916 (construed and applied); *Watkins vs. Wilhoit*, 104 Cal. 395, 398, 38 Pac. Rep. 53 (cited with other sections in discussion); *Cardenas vs. Miller*, 108 Cal. 250, 252, 253, 255, 256, 49 Am. St. Rep. 84, 39 Pac. Rep. 783, 41 Id. 472 (cited); *Prouty vs. Devin*, 118 Cal. 258, 260, 50 Pac. Rep. 380 (construed); *County Bank vs. Fox*, 119 Cal. 61, 63, 51 Pac. Rep. 11 (applied); *Lee vs. Murphy*, 119 Cal. 364, 371, 51 Pac. Rep. 549, 51 Id. 955 (construed and held not applicable); *Beattie vs. Crewdson*, 124 Cal. 577, 579, 57 Pac. Rep. 463 (applied); *Farmers' Ex. Bank vs. Purdy*, 130 Cal. 455, 457, 62 Pac. Rep. 733 (construed and applied); *Adams vs. Hopkins* (Cal. June 5, 1902), 69 Pac. Rep. 223, 231 (referred to).

2. **CONSTRUCTION**—Other sections considered.—This section relates to same subject-matter as entire chapter of which it is one section, and which deals with real property and with recording instruments relating thereto.—*Cardenas vs. Miller*, 108 Cal. 250, 256, 49 Am. St. Rep. 84, 39 Pac. Rep. 783, 41 Pac. Rep. 472.

3. **Chattel mortgages**.—This section does not control § 2957, requiring chattel mortgages to be recorded in order to be valid as against creditors of mortgager and subsequent purchasers and encumbrancers of property in good

faith and for value.—*Cardenas vs. Miller*, 108 Cal. 250, 253, 49 Am. St. Rep. 84, 39 Pac. Rep. 783, 41 Id. 472.

See post § 2957 and note.

4. **ASSIGNEE IN INSOLVENCY CANNOT QUESTION** the validity of unrecorded mortgage given by his assignor prior to assignment.—*Farmers' Ex. Bank vs. Purdy*, 130 Cal. 455, 458, 62 Pac. Rep. 733.

5. **CHATTEL MORTGAGE UNRECORDED** is valid as against holder of subsequent mortgage who takes with notice.—*Fette vs. Lane* (Cal. Sept. 21, 1894), 37 Pac. Rep. 914, 916.

6. **DECLARATION OF HOMESTEAD FILED BY WIFE** should be given priority over mortgage given by her husband on same land, which, although executed prior to the declaration, was not entitled to be recorded because of void acknowledgment, even although wife at time of declaration had actual knowledge of execution and existence of mortgage.—*Lee vs. Murphy*, 119 Cal. 364, 371, 375, 51 Pac. Rep. 549, 955.

Judicial sale of homesteads,—as to, see generally post § 1241 and note.

7. **KINDS OF NOTICE**—Notice of existence of deed is of two kinds, actual or constructive. In most cases all descriptions of notices except positive—those in which acknowledgment of deed was brought directly home to party—are held to be included among constructive notices; but in others all notices that are not deduced as conclusive presumptions of law arising from given state of facts are considered to fall within class of actual notices.—*Fair vs. Stevenot*, 29 Cal. 486, 488. See *Williamson vs. Brown*, 15 N. Y. 354; *Dey vs. Dunham*, 3 John. Ch. (N. Y.) 182; *Grimstone vs. Carter*, 3 Paige Ch. (N. Y.) 421, 24 Am. Dec. 230; *Jackson vs. Van Valkenburgh*, 8 Cow. (N. Y.) 260; *Tuttle vs. Jackson*, 6 Wend. (N. Y.) 213, 21 Am. Dec. 306.

8. **Knowledge of unrecorded deed**.—See ante § 1214 and note.

9. **MORTGAGE**—Need not be recorded as between parties.—Recording of mortgage is not necessary as between parties to it. It is only necessary to give notice to third person.—*Downing vs. Le Du*, 82 Cal. 471, 473, 23 Pac. Rep. 202. See *Lee vs. Murphy*, 119 Cal. 364, 371, 51 Pac. Rep. 549, 955.

10. **Purchasers "in good faith and for value"**.—Subsequent purchasers and mortgagees are protected against prior unrecorded mortgages only when they take "in good faith and for value"; and they do not so take if they have actual notice of prior mortgage.—*Cardenas vs. Miller*, 108 Cal. 250, 252, 49 Am. St. Rep. 84, 39 Pac. Rep. 783, 41 Id. 472. See.

Wallace vs. McKenzie, 104 Cal. 130, 132, 37 Pac. Rep. 859.

11. Third person having title to portion of land.—Mortgagee who takes with knowledge that title to portion of land offered as security was in third person, and that for purchase of which mortgager was then negotiating, must be held to have known of terms of purchase and all of them, including facts that part of purchase was not paid at time of conveyance by such third person to mortgager, and that mortgage was executed to secure this unpaid portion of purchase money at same time deed was executed; and his mortgage must, under such circumstances, be postponed to such purchase-money mortgage, even though latter was recorded subsequently.—Montgomery vs. Keppel, 75 Cal. 128, 131, 7 Am. St. Rep. 125, 19 Pac. Rep. 178.

12. Possession puts purchaser on inquiry.—See ante § 1214 and note.

13. RECITALS IN INSTRUMENTS CONSTITUTING CHAIN OF TITLE.—See ante § 13 and note pars. 30-42.

14. RECORDATION—Effect of.—See ante § 1213 and note.

15. SOURCES OF INFORMATION.—Information sufficient in other respects to put purchaser of land upon inquiry need not necessarily come from one interested in property.—Lawton vs. Gordon, 37 Cal. 302, 305.

16. Statements by recorder to one about to purchase land, that deed conveying such land by same grantor had been filed in his office and taken away, are sufficient to put such intended purchaser upon inquiry.—Lawton vs. Gordon, 37 Cal. 302, 307.

§ 1218. RECORDING CERTIFIED COPY OF RECORDED INSTRUMENT.

A certified copy of an instrument affecting the title to real property once recorded may be recorded in any other county, and, when so recorded, the record thereof has the same force and effect as though it was of the original instrument.

History: Enacted at instance of Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 398; re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXLVI, p. 604.

CHAPTER V.

UNLAWFUL TRANSFERS.

§ 1227. Certain instruments void against purchasers, etc.

§ 1228. Not void against purchaser having notice, unless fraud is mutual.

§ 1229. Power to revoke, when deemed executed.

§ 1230. Same. [Deemed executed when entitled to execute.]

§ 1231. Other provisions.

§ 1227. CERTAIN INSTRUMENTS VOID AGAINST PURCHASERS, ETC.

Every instrument, other than a will, affecting an estate in real property, including every charge upon real property, or upon its rents or profits, made with intent to defraud prior or subsequent purchasers thereof, or encumbrancers thereon, is void as against every purchaser or encumbrancer, for value, of the same property, or the rents or profits thereof.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.

2, 3. Administrator—Entitled to maintain action.

4, 5. Fraud in conveyance—What will avoid.

6-11. Fraudulent transfer—When may be avoided.

12. Fraudulent transfer to wife.

13-15. Voluntary conveyances—What are—Valid between parties.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Hoag vs. Howard, 55 Cal. 564, 566 (referred to with forty other sections); Murphy vs. Clayton, 114 Cal. 526, 535, 43 Pac. Rep. 613, 46 Id. 460 (discussed in connection with § 1589 Code Civ. Proc. and other sections); Cook vs. Cookins, 117 Cal. 140, 146, 48 Pac. Rep. 1025 (discussed with other sections).

2. ADMINISTRATOR—Entitled to maintain action to have conveyance of decedent set aside under this section only in those cases where there are creditors of estate, and assets are insufficient to pay claims allowed.—Murphy vs. Clayton, 114 Cal. 526, 535-536, 43 Pac. Rep. 613, 46 Id. 460.

3. Disallowed claims not considered.—Ibid.

4. FRAUD IN CONVEYANCE OF REAL ESTATE,—as to, generally, see note 3 Am. Dec. 77-81.

5. What will avoid conveyance.—See note 55 Am. Dec. 411-415.

6. FRAUDULENT TRANSFER—As to creditors.—See post § 3439 and note.

7. As to exempt property, there can be none.—See note 30 Am. Rep. 150.

8. Interest of party question of fact for jury.—See post § 3442 and note.

9. Knowledge of vendee as affecting validity of.—See notes 15 Am. St. Rep. 695; 20 Am. St. Rep. 632; 34 Am. St. Rep. 395-402.

10. Same—Bona fide purchaser from fraudulent vendee,—as to, see notes 28 Am. Dec. 688; 28 Am. Dec. 734.

11. Same—Declarations of vendor as evidence against his vendee to show fraud.—See note 42 Am. Dec. 631.

12. FRAUDULENT TRANSFER TO WIFE

by insolvent husband,—as to, see *Cook vs. Cockins*, 117 Cal. 140, 146, 48 Pac. Rep. 1025.

See brief 57 L. R. A. 754; notes 19 Am. St. Rep. 657; 30 Am. St. Rep. 715; 90 Am. St. Rep. 497; and post § 3442 and note.

13. VOLUNTARY CONVEYANCE fraudulent, when.—See note 28 Am. St. Rep. 618.

14. VALIDITY AS BETWEEN PARTIES as to bona fide purchaser from vendee.—See 14 Am. Dec. 703; also post § 3447 note.

15. What are,—as to, see notes 7 Am. Dec. 703, 28 Am. Rep. 721; 14 Am. St. Rep. 739.

§ 1228. NOT VOID AGAINST PURCHASER HAVING NOTICE, UNLESS FRAUD IS MUTUAL. No instrument is to be avoided under the last section, in favor of a subsequent purchaser or encumbrancer having notice thereof at the time his purchase was made, or his lien acquired, unless the person in whose favor the instrument was made was privy to the fraud intended.

History: Enacted March 21, 1872, founded upon § 2, Act April 19, 1850, Stats. 1850, p. 266.

1. Applied, cited, construed, referred to, etc.
2. Fraudulent conveyance—Knowledge of grantee.
3. Trust deed—Revocation.

1. Applied, cited, construed, referred to, etc., in: *Hoag vs. Howard*, 55 Cal. 564, 566 (re-

ferred to in connection with forty other sections of Civil Code).

2. Fraudulent conveyance—Knowledge of grantee.—See ante § 1227 note par. 9.

3. Trust deed—Revocation of,—as to, see monographic note 20 Am. St. Rep. 353-364.

§ 1229. POWER TO REVOKE, WHEN DEEMED EXECUTED. Where a power to revoke or modify an instrument affecting the title to, or the enjoyment of, an estate in real property, is reserved to the grantor, or given to any other person, a subsequent grant of, or charge upon, the estate, by the person having the power of revocation, in favor of a purchaser or encumbrancer for value, operates as a revocation of the original instrument, to the extent of the power, in favor of such purchaser or encumbrancer.

History: Enacted March 21, 1872, founded upon § 4, Act April 19, 1850, Stats. 1850, p. 266.

§ 1230. SAME. [DEEMED EXECUTED WHEN ENTITLED TO EXECUTE.] Where a person having a power of revocation, within the provisions of the last section, is not entitled to execute it until after the time at which he makes such a grant or charge as is described in that section, the power is deemed to be executed as soon as he is entitled to execute it.

History: Enacted March 21, 1872, founded upon § 6, Act April 19, 1850, Stats. 1850, p. 267.

Applied, cited, construed, referred to, etc., in: *Hoag vs. Howard*, 55 Cal. 564, 566 (referred to with forty other sections).

§ 1231. OTHER PROVISIONS. Other provisions concerning unlawful transfers are contained in part two, division fourth, of this code, concerning the special relations of debtor and creditor.

History: Enacted March 21, 1872.

See post § 3439 et seq. and notes.

TITLE V.

HOMESTEADS.

Chapter I. GENERAL PROVISIONS, §§ 1237-1261.

II. HOMESTEAD OF THE HEAD OF A FAMILY, §§ 1262-1265.

III. HOMESTEAD OF OTHER PERSONS, §§ 1266-1269a.

CHAPTER I.

GENERAL PROVISIONS.

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|---|---|
| § 1237. Homestead, of what it consists. | § 1251. Same. [Determining value and divisibility.] |
| § 1238. From what may be selected. | § 1252. Same. [Report of appraisers, contents.] |
| § 1239. From what not. | § 1253. Same. [Setting off homestead exemption.] |
| § 1240. Exempt from forced sale. | § 1254. Same. [Order directing sale, when.] |
| § 1241. Sale on execution, when. | § 1255. Same. [What bid may be received.] |
| § 1242. How conveyed or encumbered. | § 1256. Same. [Application of proceeds of sale.] |
| § 1243. How abandoned. | § 1257. After sale, money equal to homestead exemption protected. |
| § 1244. Same. [Effectual from when.] | § 1258. Compensation of appraisers. |
| § 1245. Proceedings on execution against homestead. | § 1259. Costs. [How paid and collected.] |
| § 1246. Same. [Application, how made.] | § 1260. Who may select homestead, value of. |
| § 1247. Same. [Petition, where filed.] | § 1261. Head of a family defined. |
| § 1248. Same. [Notice of hearing, service.] | |
| § 1249. Same. [Appointing appraisers.] | |
| § 1250. Same. [Appraisers to be sworn.] | |

§ 1237. HOMESTEAD, OF WHAT IT CONSISTS. The homestead consists of the dwelling-house in which the claimant resides, and the land on which the same is situated, selected as in this title provided.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 228; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 398, held unconstitutional, see history, § 4 ante.

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| 1. Applied, cited, construed, referred to, etc. | 22. Same—Presumption rebuttable. |
| 2. Abandonment of homestead. | 23. Probate of homestead. |
| 3. Appraisement of homesteads. | 24. Property from which homestead may be carved. |
| 4. Constitutional law—Creation of homestead by constitution. | 25. Residence is necessary. |
| 5. Same—Impairment of obligation of contracts. | 26. Same—Both spouses must occupy premises. |
| 6. Same—Same—Prior debts collectable. | 27. Same—Business conducted on homestead. |
| 7. Same—Legislative power to protect and regulate homestead. | 28, 29. Same—Same—Illustrations. |
| 8, 9. Construction of homestead statutes liberal. | 30. Same—Same—Prior use discontinued. |
| 10. Contract between husband and wife concerning homestead. | 31. Same—Enlargement of building for foreign purposes. |
| 11. Conveyance and encumbrance of homestead. | 32. Same—Evidence—General report and understanding. |
| 12. Death—Provisions respecting homestead after. | 33. Same—Farm used to pasture cattle of others. |
| 13. Declaration as to residence is necessary. | 34. Same—Flats may be selected as homestead. |
| 14. Definition. | 35. Same—Garden attached to land. |
| 15. Same—Popular sense in which word is used. | 36. Same—Good faith necessary. |
| 16. "Dwelling-house" defined. | 37. Same—Hotel occupied by proprietor and family—Incidental use. |
| 17. Estates of decedents—Provisions respecting homestead. | 38. Same—Same—Principal use. |
| 18. Exemption of homestead. | 39. Same—More than one lot may be selected. |
| 19. Fraud—Disposition of courts to prevent. | 40. Same—Part of land only used as homestead. |
| 20. Object of statute in providing for homestead. | 41. Same—Physical fact and intent considered. |
| 21. Presumption arising from residence—Before adoption of code. | 42. Same—Principal use to which property is put is criterion. |

43. Same—Question of fact.
44. Same—Review of conflicting evidence on appeal.
45. Same—Roomers or lodgers.
46. Same—Sleeping with blanket for roof for one night.
47. Same—Strict construction.
48. Same—Tenant's possession insufficient.
49. Same—Same—Double house occupied by two families.
50. Same—Same—Entire house.
51. Same—Same—Part of building.
52. Same—Uninclosed land.
- 53, 54. Same—Wife's residence.
55. Second homestead—Attempt to acquire.
- 56, 57. Second tenement constructed after acquiring homestead.
58. Selection necessary.
59. Separate property of husband declared homestead.
60. Sojourners temporarily residing in state entitled to homestead.
61. Statute not in derogation of common law.
62. Tests of homestead—Same regardless of party against whom right asserted.
63. Value—Limitation upon.

1. APPLIED, OFFED, CONSTRUED, REFERRED TO, etc., in: Babcock vs. Gibbs, 52 Cal. 629, 630 (construed and applied); Ham vs. Santa Rosa Bank, 62 Cal. 125, 134 (cited); Tiernan vs. His Creditors, 62 Cal. 286, 289 (construed and applied); Grange vs. Gough (Cal. Dec. 2, 1884), 4 Pac. Rep. 1177, 1178 (cited); Skinner vs. Hall, 69 Cal. 195, 198, 10 Pac. Rep. 406 (referred to); King vs. Gots, 70 Cal. 236, 239, 11 Pac. Rep. 656 (referred to); In re Estate Crowery, 71 Cal. 300, 302, 303, 12 Pac. Rep. 230 (referred to); In re Estate Noah, 73 Cal. 590, 592, 2 Am. St. Rep. 334, 15 Pac. Rep. 290 (construed and applied); Maloney vs. Hefer, 75 Cal. 422, 424, 7 Am. St. Rep. 180, 17 Pac. Rep. 539 (construed and applied); In re Estate Burdick, 76 Cal. 639, 643, 18 Pac. Rep. 805 (referred to in dis. op.); Burkett vs. Burkett, 78 Cal. 310, 312, 12 Am. St. Rep. 53, 20 Pac. Rep. 715, 3 L. R. A. 731 (referred to); Brown vs. Starr, 79 Cal. 608, 610, 12 Am. St. Rep. 180, 21 Pac. Rep. 973 (referred to); In re Estate Armstrong, 80 Cal. 71, 73, 22 Pac. Rep. 79 (cited); Lubbock vs. McMann, 82 Cal. 226, 228, 237, 16 Am. St. Rep. 108, 22 Pac. Rep. 1145 (referred to); Alexander vs. Jackson, 92 Cal. 514, 519, 27 Am. St. Rep. 153, 28 Pac. Rep. 593 (referred to); Gaylord vs. Place, 98 Cal. 472, 478, 33 Pac. Rep. 484 (referred to); In re Ligget, 117 Cal. 352, 353, 355, 59 Am. St. Rep. 190, 49 Pac. Rep. 211 (construed and applied); Bank of Woodland vs. Oberhaus, 125 Cal. 320, 325, 57 Pac. Rep. 1070 (construed and applied); Reid vs. Englehart-Davidson Merc. Co., 126 Cal. 527, 528, 77 Am. St. Rep. 206, 58 Pac. Rep. 1063 (construed and applied).

2. Abandonment of homestead.—See post §§ 1243, 1244 and notes.

3. Appraisement of homesteads.—See post §§ 1245-1253 and notes.

4. CONSTITUTIONAL LAW—Creation of homestead by constitution.—Homestead has its

origin in the constitution, and not in legislation; it being provided by Const. 1879, art. 17, § 1, that "the legislature shall protect by law, from forced sale, a certain portion of homestead and other property of all heads of families."—Cook vs. McChristian, 4 Cal. 23, 25; Williams vs. Young, 17 Cal. 403, 406; In re Estate Burdick, 75 Cal. 639, 643, 18 Pac. Rep. 805; Lubbock vs. McMann, 82 Cal. 226, 228, 6 Am. St. Rep. 108, 22 Pac. Rep. 1145; Merced Bank vs. Rosenthal, 99 Cal. 39, 43, 31 Pac. Rep. 349; Lee vs. Murphy, 119 Cal. 364, 374, 51 Pac. Rep. 549, 955. See Noble vs. Hook, 34 Cal. 638, 640; Ham vs. Santa Rosa Bank, 62 Cal. 125, 133, 45 Am. Rep. 654; Beaton vs. Reid, 111 Cal. 484, 487, 44 Pac. Rep. 167.

5. Same—Impairment of obligation of contracts.—Statutes exempting homesteads are not unconstitutional as impairing obligation of contracts.—Noble vs. Hook, 34 Cal. 638, 639, 640.

6. Same—Same—Prior debts collectable.—Provision confirming privilege of homestead exemption as against debts incurred prior to its passage is in violation of inhibition against impairing obligation of contracts (dictum).—Barnett vs. Knight, 7 Colo. 365, 3 Pac. Rep. 747.

7. Same—Legislative power to protect and regulate homestead.—Subject of homesteads is one wholly committed by constitution to legislature, with simply the general mandate that the latter shall protect it by law from forced sale. The extent of the right, therefore, and mode of its protection, with limitation of rights of creditors therein, are purely matters of legislative prescription, and something with which courts have nothing to do but to construe and apply.—Lies vs. De Diablar, 12 Cal. 327, 329, 330; Lubbock vs. McMann, 82 Cal. 226, 228, 16 Am. St. Rep. 108, 22 Pac. Rep. 1145; Lee vs. Murphy, 119 Cal. 364, 374, 51 Pac. Rep. 549, 955. See Fittell vs. Leaky, 72 Cal. 477, 483, 14 Pac. Rep. 198.

8. CONSTRUCTION OF THE HOMESTEAD STATUTES LIBERAL.—Homestead statutes, being remedial in their nature, are to be construed liberally, and in favor of carrying out manifest purpose of legislature, rather than that their operation be restricted to strict letter in which they are framed.—Tyrrell vs. Baldwin, 78 Cal. 470, 475, 21 Pac. Rep. 116; Heathman vs. Holmes, 94 Cal. 291, 296, 29 Pac. Rep. 404; Gaylord vs. Place, 98 Cal. 472, 479, 33 Pac. Rep. 484; Keyes vs. Cyrus, 100 Cal. 322, 324, 325, 38 Am. St. Rep. 296, 34 Pac. Rep. 722; Quackenbush vs. Reed, 102 Cal. 493, 499, 37 Pac. Rep. 757; Beaton vs. Reid, 111 Cal. 484, 486, 487, 44 Pac. Rep. 167. See Schuyler vs. Broughton, 76 Cal. 524, 18 Pac. Rep. 650; Southwick vs. Davis, 78 Cal. 504, 21 Pac. Rep. 121; Barnett vs. Knight, 7 Colo. 365, 3 Pac. Rep. 747.

9. Compare: Tromans vs. Mahlman, 92 Cal. 1, 8, 27 Pac. Rep. 1094 (declaring that requirement as to residence at time declaration is filed is strictly construed).

10. Contract between husband and wife concerning homestead.—See ante § 153, par 31.

11. Conveyance and encumbrance of homestead.—See post § 1242 and notes.

12. Death.—Provisions respecting homestead after.—See Code Civ. Proc. §§1474-1486 and notes.

13. Declaration as to residence is necessary.—See post §1263 and note.

14. DEFINITION.—Homestead consists of dwelling-house in which claimant resides and land on which same is situated, selected as provided by law.—Cook vs. McChristian, 4 Cal. 23, 26, 27; Holden vs. Pinney, 6 Cal. 234, 236; In re Estate Delaney, 37 Cal. 176, 179; Ham vs. Santa Rosa Bank, 63 Cal. 125, 134, 45 Am. Rep. 654; Grange vs. Gough (Cal. Dec. 2, 1884), 4 Pac. Rep. 1177, 1178; Skinner vs. Hall, 69 Cal. 195, 198, 10 Pac. Rep. 406; King vs. Gotz, 70 Cal. 236, 239, 11 Pac. Rep. 656; Levins vs. Rovegno, 71 Cal. 273, 279, 12 Pac. Rep. 161; In re Estate Crowey, 71 Cal. 300, 303, 12 Pac. Rep. 230; In re Estate Burdick, 75 Cal. 639, 643, 18 Pac. Rep. 805; Brown vs. Starr, 79 Cal. 608, 610, 13 Am. St. Rep. 180, 21 Pac. Rep. 973; Alexander vs. Jackson, 92 Cal. 514, 519, 37 Am. St. Rep. 158, 28 Pac. Rep. 593; Kennedy vs. Gloster, 98 Cal. 143, 147, 32 Pac. Rep. 941; Moore vs. Hoffman, 125 Cal. 90, 93, 57 Pac. Rep. 769; Reid vs. Englehart-Davidson Merc. Co., 126 Cal. 527, 528, 77 Am. St. Rep. 206, 58 Pac. Rep. 1063; In re Estate Levy, 141 Cal. 646, 649, 75 Pac. Rep. 301. See Ackley vs. Chamberlain, 16 Cal. 181, 183, 76 Am. Dec. 516; Gregg vs. Bostwick, 33 Cal. 220, 91 Am. Dec. 687; In re Ligget, 117 Cal. 352, 353, 59 Am. St. Rep. 190, 49 Pac. Rep. 211.

15. Same.—Popular sense in which word is used.—"Both in the constitution and in the statute the word 'homestead' is used in its ordinary or popular sense—or, in other words, its legal sense is also its popular sense. It represents the dwelling-house at which family resides, with usual and customary appurtenances, including outbuildings of every kind necessary or convenient for family use, and lands used for purposes thereof."—Gregg vs. Bostwick, 33 Cal. 220, 227, 91 Am. Dec. 687; Keyes vs. Cyrus, 100 Cal. 322, 324, 38 Am. St. Rep. 296, 34 Pac. Rep. 722.

16. "DWELLING-HOUSE" IS DEFINED to mean "building" which is occupied as dwelling-house by family, and not such portion of building as may be actually used by family for residence purposes.—In re Estate Levy, 141 Cal. 646, 649, 75 Pac. Rep. 301.

17. Estates of Decedents.—Provisions respecting homestead.—See Code Civ. Proc. §§1474-1486 and notes.

18. Exemption of homestead.—See post §§1240, 1241 and notes.

19. FRAUD.—Disposition of courts to prevent.—Under homestead laws many frauds have been perpetrated, and the courts will not add to their number by liberal construction in cases of doubt.—See Benson vs. Aitken, 17 Cal. 163, 165; Shinn vs. McPherson, 53 Cal. 596, 599.

20. OBJECT OF STATUTE IN PROVIDING FOR HOMESTEAD was to thereby make a home for family which neither of spouses could encumber or dispose of without consent of the other, and which should at all times be protected against creditors.—Cook vs. McChristian, 4 Cal. 23, 26; Randall vs. Buffington, 10 Cal. 491; Culver vs. Rogers, 28 Cal. 521;

Tyrrell vs. Baldwin, 78 Cal. 470, 475, 21 Pac. Rep. 116; Gleason vs. Spray, 81 Cal. 217, 220, 15 Am. St. Rep. 47, 22 Pac. Rep. 551; Tromans vs. Mahlman, 92 Cal. 1, 7, 8, 27 Pac. Rep. 1094; Gaylord vs. Place, 98 Cal. 472, 479, 33 Pac. Rep. 484; Keyes vs. Cyrus, 100 Cal. 322, 324, 38 Am. St. Rep. 296, 34 Pac. Rep. 722; Moore vs. Hoffman, 125 Cal. 90, 92, 57 Pac. Rep. 769; Hart vs. Church, 126 Cal. 471, 476, 77 Am. St. Rep. 195, 58 Pac. Rep. 911. See Barber vs. Babel, 36 Cal. 11; Burkett vs. Burkett, 78 Cal. 310, 12 Am. St. Rep. 58, 20 Pac. Rep. 715, 3 L. R. A. 781; Heathman vs. Holmes, 94 Cal. 291, 29 Pac. Rep. 404; Simonson vs. Burr, 121 Cal. 582, 587, 54 Pac. Rep. 87; Hogan vs. Manners, 23 Kan. 551, 33 Am. Rep. 199; Kelly vs. Sparks, 54 Fed. Rep. 70, 72.

21. PRESUMPTION ARISING FROM RESIDENCE.—Before adoption of code and requirement therein that homestead should be selected by filing declaration, etc., occupancy of family was presumptive evidence of appropriation of place as homestead and was notice to all the world.—Cook vs. McChristian, 4 Cal. 23, 26, 27; Taylor vs. Hargous, 4 Cal. 268, 272, 60 Am. Dec. 606; Holden vs. Pinney, 6 Cal. 234, 236; Harper vs. Forbes, 15 Cal. 202, 203, 204; Cohen vs. Davis, 20 Cal. 186, 194 (cases decided prior to adoption of code). See Levins vs. Rovegno, 71 Cal. 273, 279, 12 Pac. Rep. 161.

22. Same.—Presumption rebuttable.—Although occupancy of premises is evidence of homestead, it is only presumptive evidence, and presumption is rebuttable.—Taylor vs. Hargous, 4 Cal. 268, 273, 60 Am. Dec. 606; Holden vs. Pinney, 6 Cal. 234, 236; Harper vs. Forbes, 15 Cal. 202, 204; Benson vs. Aitken, 17 Cal. 163, 164.

23. Probate of homestead.—See Code Civ. Proc. §§1474-1486.

24. Property from which homestead may be carved.—See post §§1238, 1239 and notes.

25. RESIDENCE IS NECESSARY.—Actual occupation as place of residence at time of filing declaration is necessary in order to impress upon premises character of homestead.—Reynolds vs. Pixley, 6 Cal. 165, 167; Holden vs. Pinney, 6 Cal. 234, 236; Rix vs. McHenry, 7 Cal. 89, 91; Benedict vs. Bunnell, 7 Cal. 245, 246; Ackley vs. Chamberlain, 16 Cal. 181, 183, 76 Am. Dec. 516; Gregg vs. Bostwick, 33 Cal. 220, 229; Mann vs. Rogers, 35 Cal. 316, 319; Prescott vs. Prescott, 45 Cal. 58, 59, 60; Babcock vs. Gibbs, 52 Cal. 629; Dorne vs. Howe, 52 Cal. 630; Aucker vs. McCoy, 56 Cal. 524, 527; Tiernan vs. His Creditors, 62 Cal. 286, 289; Laughlin vs. Wright, 63 Cal. 113, 116; Grange vs. Gough (Cal. Dec. 2, 1884), 4 Pac. Rep. 1177, 1178; Pfister vs. Dasey, 68 Cal. 572, 573, 10 Pac. Rep. 117; Skinner vs. Hall, 69 Cal. 195, 198, 10 Pac. Rep. 406; Levins vs. Rovegno, 71 Cal. 273, 279, 12 Pac. Rep. 161; In re Estate Crowey, 71 Cal. 300, 302, 12 Pac. Rep. 230; Maloney vs. Hefer, 75 Cal. 422, 424, 7 Am. St. Rep. 180, 17 Pac. Rep. 539; In re Allen, 78 Cal. 293, 295, 20 Pac. Rep. 679; In re Estate Armstrong, 80 Cal. 71, 74, 22 Pac. Rep. 79; Lubbock vs. McMann, 83 Cal. 226, 228, 16 Am. St. Rep. 108, 22 Pac. Rep. 1145; Tromans vs. Mahlman, 92 Cal. 1, 7, 27 Pac. Rep. 1094, 28 Id.

579, 111 Cal. 646, 647, 44 Pac. Rep. 327; Gaylord vs. Place, 98 Cal. 472, 478, 33 Pac. Rep. 484; McDowell vs. His Creditors, 103 Cal. 264, 267, 42 Am. St. Rep. 114, sub nom. In re McDowell's Estate, 35 Pac. Rep. 1031; Reid vs. Englehart-Davidson Merc. Co., 126 Cal. 527, 528, 77 Am. St. Rep. 206, 58 Pac. Rep. 1063; In re Estate Levy, 141 Cal. 646, 649, 75 Pac. Rep. 301; Lima vs. County Bank of San Luis Obispo, 142 Cal. 245, 247, 75 Pac. Rep. 846. See Broadus vs. Nelson, 16 Cal. 79, 81; Ornbaum vs. His Creditors, 61 Cal. 455, 458, 459; Ham vs. Santa Rosa Bank, 62 Cal. 125, 139, 45 Am. Rep. 654; Arendt vs. Mace, 76 Cal. 315, 9 Am. St. Rep. 207, 18 Pac. Rep. 376; Boreham vs. Byrne, 83 Cal. 23, 23 Pac. Rep. 212; Heathman vs. Holmes, 94 Cal. 291, 29 Pac. Rep. 404; Kennedy vs. Gloster, 98 Cal. 143, 147, 32 Pac. Rep. 941; In re Estate Ogburn, 105 Cal. 95, 98, 38 Pac. Rep. 627; In re Liggett, 117 Cal. 352, 353, 59 Am. St. Rep. 190, 49 Pac. Rep. 211; Simonson vs. Burr, 121 Cal. 582, 585, 54 Pac. Rep. 87.

26. **Same—Both spouses must occupy premises.**—In order to acquire homestead, both husband and wife must reside on homestead, and residence by one spouse is not sufficient.—Cary vs. Tice, 6 Cal. 625, 630; Benedict vs. Bunnell, 7 Cal. 245, 246.

27. **Same—Business conducted on homestead.**—If place claimed as homestead, in addition to being lived upon, is also used as place of business by family, which frequently happens, it does not therefore necessarily cease to be homestead if it would be necessary or convenient for family use independent of business.—Gregg vs. Bostwick, 33 Cal. 220, 228; In re Allen (Cal. Jan. 25, 1888), 6 Pac. Rep. 319, 320; In re Estate Levy, 141 Cal. 646, 650, 75 Pac. Rep. 301. See Ackley vs. Chamberlain, 16 Cal. 181; Hogan vs. Manners, 23 Kan. 551, 33 Am. Rep. 199.

28. **Same—Same—Gas factory or storehouse** does not acquire character of homestead by reason of owner occupying insignificant portion thereof in which to live.—Ackley vs. Chamberlain, 16 Cal. 181, 184, 76 Am. Dec. 516.

29. **Same—Same—Milliner and tinsmith.**—Where house is partitioned into two nearly equal parts, and one part is used for ordinary family living purposes and for millinery business conducted by wife and other half is used by husband as tin-shop, homestead character of premises is not destroyed either in whole or in part by fact that husband and wife thus worked in the house.—In re Estate Ogburn, 105 Cal. 95, 98, 38 Pac. Rep. 627.

30. **Same—Same—Prior use discontinued.**—It is immaterial that premises were used for business purposes where it appears that at time declaration was filed such business had been discontinued and the place was occupied by claimant and his family as residence and home without conducting any business there.—Lima vs. County Bank of San Luis Obispo, 142 Cal. 245, 247, 75 Pac. Rep. 846.

31. **Same—Enlargement of building for foreign purposes.**—Where claimants of homestead reside in building as homestead and enlarge it for purpose of using it as hotel, but con-

tinue to live in building, they do not thereby lose their homestead right.—Heathman vs. Holmes, 94 Cal. 291, 295, 296, 29 Pac. Rep. 404 (distinguishing Laughlin vs. Wright, 63 Cal. 113; Maloney vs. Hefer, 75 Cal. 422, 7 Am. St. Rep. 180, 17 Pac. Rep. 539).

32. **Same—Evidence—General report and understanding.**—Residence cannot be proved by testimony of witness as to what was generally reported and understood as to claimant's residence.—Pfister vs. Dasey, 68 Cal. 572, 573, 574, 10 Pac. Rep. 117.

33. **Same—Farm used to pasture cattle of others.**—Where whole tract is used as farm by its owners principally for pasturing and feeding their own cows and other domestic animals, fact that sometimes they take in other cattle to pasture and sell hay to others when they have more than their own cattle can consume, does not make farm such place of business as to bring it within rule that property used for business purposes only cannot be claimed as homestead.—Kennedy vs. Gloster, 98 Cal. 143, 147, 32 Pac. Rep. 941.

34. **Same—Flats may be selected as homestead.**—Where building consists of three stories or flats for renting purposes and having separate street entrances, and one of such stories or flats is actually occupied as family home, and occupation is solely for purposes of such home, and not merely incidental to some other purpose, owner is entitled to select entire building and land on which it is situated.—In re Estate Levy, 141 Cal. 646, 651, 75 Pac. Rep. 301. See Heathman vs. Holmes, 94 Cal. 291, 296, 29 Pac. Rep. 404.

35. **Same—Garden attached to land upon which home is situated may be part of homestead.**—Arendt vs. Mace, 76 Cal. 315, 316, 9 Am. St. Rep. 207, 18 Pac. Rep. 376.

36. **Same—Good faith necessary.**—Under Stats. 1851 it was necessary that residence or occupancy as family residence "should be with the good-faith intention to dedicate the premises to the purposes of a homestead, in order to impress upon them that character."—Levins vs. Rovegno, 71 Cal. 273, 279, 12 Pac. Rep. 161. See Holden vs. Pinney, 6 Cal. 234; Moss vs. Warner, 10 Cal. 296.

37. **Same—Hotel occupied by proprietor and family—Incidental use.**—Where hotel is occupied by owner with his family as residence and was so occupied before it was used as hotel, and nature and extent of business does not interfere with its general character as dwelling-house, there is such residence as the statute requires, and the property is exempt.—Ackley vs. Chamberlain, 16 Cal. 181, 183, 76 Am. Dec. 516.

38. **Same—Same—Principal use.**—When property is primarily and chiefly used as hotel for accommodation of public, although owner may reside there with his family for the purpose of carrying on the business, exemption cannot be claimed.—McDowell vs. His Creditors, 103 Cal. 264, 267, 42 Am. St. Rep. 114, sub nom. In re McDowell's Estate, 35 Pac. Rep. 1031; Beronio vs. Ventura Co. Lumber Co., 129 Cal. 232, 236, 61 Pac. Rep. 953. See Laughlin vs. Wright, 63 Cal. 113, 116.

As to roomers and lodgers, see par. 45 this note.

39. Same—More than one lot may be selected where they are all legitimately and bona fide used for living purposes, e. g. where claimant has family dwelling, chicken-house, cow-house, and other buildings reasonably intended for comfort of family.—*In re Allen* (Cal. Jan. 25, 1888), 6 Pac. Rep. 319, 320.

40. Same—Part of land only used as homestead.—If only part of land described in homestead declaration be actually used and appropriated as home of family, the remainder, not so used and appropriated, forms no part of homestead claim, in sense of statute.—*Maloney vs. Hefer*, 75 Cal. 422, 424, 7 Am. St. Rep. 180, 17 Pac. Rep. 539. See *Mann vs. Rogers*, 35 Cal. 316, 319; *King vs. Gotz*, 70 Cal. 236, 239, 11 Pac. Rep. 656.

41. Same—Physical fact and intent considered.—Physical fact of claimant's occupancy as well as intention with which he occupied are both elements to be considered in determining actual residence, and court is not bound to accept claimant's statement that he intended to reside thereon as conclusive if other facts to which he testified are inconsistent with such intention.—*Tromans vs. Mahlman*, 111 Cal. 646, 647, 44 Pac. Rep. 327.

42. Same—Principal use to which property is put is criterion.—It is principal use to which property is put, and not quantity, which furnishes test in determining question whether or not property is subject to dedication as homestead.—*In re Allen* (Cal. Jan. 25, 1888), 6 Pac. Rep. 319, 320; *Maloney vs. Hefer*, 75 Cal. 422, 424, 7 Am. St. Rep. 180, 17 Pac. Rep. 539; *In re Allen*, 78 Cal. 293, 295, 20 Pac. Rep. 679; *Heathman vs. Holmes*, 94 Cal. 291, 294, 29 Pac. Rep. 404; *Gaylord vs. Place*, 98 Cal. 473, 478, 33 Pac. Rep. 484; *McDowell vs. His Creditors*, 103 Cal. 364, 267, 42 Am. St. Rep. 114, sub nom. *In re McDowell's Estate*, 35 Pac. Rep. 1031; *In re Estate Ogburn*, 105 Cal. 95, 97, 38 Pac. Rep. 627; *Beronio vs. Ventura Co. Lumber Co.*, 129 Cal. 232, 236, 61 Pac. Rep. 958; *In re Estate Levy*, 141 Cal. 646, 650, 78 Pac. Rep. 301. See *Ackley vs. Chamberlain*, 16 Cal. 182, 76 Am. Dec. 516; *Gregg vs. Bostwick*, 33 Cal. 220, 91 Am. Dec. 637; *Skinner vs. Hall*, 69 Cal. 195, 10 Pac. Rep. 406; *In re Estate Crowey*, 71 Cal. 300, 305, 12 Pac. Rep. 230; *Lubbock vs. McMann*, 82 Cal. 226, 16 Am. St. Rep. 109, 22 Pac. Rep. 1145; *Hogan vs. Manners*, 23 Kan. 551, 33 Am. Rep. 199; *Rush vs. Gordon*, 33 Kan. 535; *Phelps vs. Rooney*, 9 Wis. 70 (extreme case, holding three-story building on business block homestead, although much more valuable for business than for residence purposes).

43. Same—Question of fact.—Whether claimant actually resided on premises at time declaration was filed is question of fact to be determined by court or jury from evidence before it.—*Cook vs. McChristian*, 4 Cal. 23, 27; *Holden vs. Pinney*, 6 Cal. 234, 236; *Tromans vs. Mahlman*, 111 Cal. 646, 647, 44 Pac. Rep. 327. See *Broadus vs. Nelson*, 16 Cal. 79, 81.

44. Same—Review of conflicting evidence on appeal.—Where claimant's residence and in-

tention with which he occupied premises are questions presented to trial court upon conflicting evidence, in accordance with familiar rule of appellate practice, on appeal such conflict of evidence presents no question for review.—*Tromans vs. Mahlman*, 111 Cal. 646, 647, 44 Pac. Rep. 327.

45. Same—Roomers or lodgers.—Where claimant of homestead occupies building, his residence within meaning of statute is not affected by the fact that he has roomers or lodgers in the house, and he may nevertheless claim entire premises as homestead (dictum).—*Tiernan vs. His Creditors*, 62 Cal. 286, 289.

As to hotels, see pars. 27, 33 this note.

46. Same—Sleeping with blanket for roof for one night does not constitute such residence as statute contemplates.—*Babcock vs. Gibbs*, 52 Cal. 629, 630.

47. Same—Strict construction.—Requirement as to residence at time declaration is filed is strictly construed, and such residence must be actual, e. g. real, and not assumed or pretended.—*Tromans vs. Mahlman*, 92 Cal. 1, 8, 27 Pac. Rep. 1094. See *Rix vs. McHenry*, 7 Cal. 39, 91; *Babcock vs. Gibbs*, 52 Cal. 629; *Skinner vs. Hall*, 69 Cal. 195, 198, 10 Pac. Rep. 406.

48. Same—Tenant's possession insufficient.—Claimant of homestead must actually reside thereupon (except in cases of temporary removal), and land which is resided upon by tenant cannot be claimed as homestead.—*Maloney vs. Hefer*, 75 Cal. 422, 425, 7 Am. St. Rep. 180, 17 Pac. Rep. 539.

49. Same—Same—Double house occupied by two families.—Where land has upon it double house, intended for and occupied by two families, and the owner and his family occupy only one half of the house, other one half being occupied by tenant, and such house has two distinct entrances, it is error to set apart as homestead that portion not occupied by owner.—*Tiernan vs. His Creditors*, 62 Cal. 286, 289. See *Maloney vs. Hefer*, 75 Cal. 422, 424, 7 Am. St. Rep. 180, 17 Pac. Rep. 539.

50. Same—Same—Entire house.—Where at time of making and filing declaration of homestead there is dwelling-house upon part of land claimed, and upon another part of land claimed, which was not used in connection with dwelling-house, there was situated another house which was leased, no homestead is acquired except as to portion of land claimed upon which the dwelling-house was situated and the dwelling-house.—*In re Ligget*, 117 Cal. 352, 353, 59 Am. St. Rep. 190, 49 Pac. Rep. 211.

51. Same—Same—Part of building.—Claimants of homestead do not lose their rights by leasing part of building where they continue to reside in part not leased.—*In re Allen* (Cal. Jan. 25, 1888), 6 Pac. Rep. 319, 320; *Heathman vs. Holmes*, 94 Cal. 291, 295, 29 Pac. Rep. 404.

52. Same—Uninclosed land.—Homestead is not necessarily confined to land upon which house is located and which is inclosed by fence, but land may have natural boundaries, such as mountains.—*Ornbaum vs. His Creditors*, 61 Cal. 455, 458, 459.

53. Same—Wife's residence.—In absence of any showing as to causes of absence of husband from homestead selected by his wife, or any proof that he had a home or fixed residence elsewhere, or any other family than his wife, she, having family of her own, may be allowed to select and establish homestead by her own residence upon land with her family.—*Gambette vs. Brook*, 41 Cal. 78, 84 (decided under Act April 28, 1860, Stats. 1860, p. 311).

54. Compare: *Cary vs. Tice*, 6 Cal. 625; *Benedict vs. Bunnell*, 7 Cal. 245; *Benson vs. Aitken*, 17 Cal. 163 (decided under previous statute).

55. SECOND HOMESTEAD.—Attempt to acquire.—See post § 1242 and note.

56. SECOND TENEMENT CONSTRUCTED AFTER ACQUIRING HOMESTEAD.—Where homestead character is attached to premises, and second building is constructed which is not used as place of residence by homesteader, if total value does not exceed five thousand dollars, such second building constitutes part of homestead, and does not impair rights of owner.—*Lubbock vs. McMann*, 32 Cal. 226, 227-232, 16 Am. St. Rep. 108, 22 Pac. Rep. 1145.

57. Compare: *In re Ligget*, 117 Cal. 352, 354, 59 Am. St. Rep. 190, 49 Pac. Rep. 211. See also *Huellmantel vs. Huellmantel*, 117 Cal. 407, 411, 49 Pac. Rep. 574.

58. Selection necessary.—Since the codes there can be no legal homestead merely from residence without selection.—*In re Estate Burdick*, 75 Cal. 639, 644, 18 Pac. Rep. 305; *Bank of Woodland vs. Oberhaus*, 125 Cal. 320, 57 Pac. Rep. 1070; *Reld vs. Englehart-Davidson Merc. Co.*, 126 Cal. 527, 528, 77 Am. St. Rep. 206, 58 Pac. Rep. 1063. See *Barnett vs. Knight*, 7 Colo. 365, 3 Pac. Rep. 747.

As to selection of homestead, see post §§ 1262-1264 and notes.

59. Separate property of husband declared homestead.—See post § 1238 and note par. 18.

60. SOJOURNERS TEMPORARILY RESIDING IN STATE ENTITLED TO HOMESTEAD.—Debtor living in state will not be deprived of homestead right because he is in state temporarily and has animus revertendi. Homestead law is not limited in its operation to any class, but is universal in its application; and all classes of persons are entitled to its benefits, without any distinction as to citizenship, or capability of becoming citizens. So long as the parties actually reside in the state and use the property as a home, they cannot be denied the benefits secured by the law.—*Dawley vs. Ayers*, 23 Cal. 108, 110.

61. STATUTE NOT IN DEROGATION OF COMMON LAW.—Statute creating homestead is not in derogation of common law, for at common law creditor had no right to sell debtor's land.—*Barnett vs. Knight*, 7 Colo. 365, 3 Pac. Rep. 747.

62. TESTS OF HOMESTEAD.—Same regardless of party against whom right asserted.—Homestead and tests by which it is ascertained are same, "whether the question arises between those claiming the homestead, or one of them and a vendee, a mortgagee, a creditor, or the heirs of the deceased husband or wife. There is not one homestead as against a creditor, and a different one when the survivor asserts his or her claims as against the heirs of the deceased."—*In re Estate Delaney*, 27 Cal. 176, 180.

63. Value—Limitation upon.—See post § 1260 and note.

§ 1238. FROM WHAT MAY BE SELECTED. If the claimant be married, the homestead may be selected from the community property, or the separate property of the husband, or, with the consent of the wife, from her separate property. When the claimant is not married, but is the head of a family, within the meaning of section one thousand two hundred and sixty-one, the homestead may be selected from any of his or her property.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 229.

1. Applied, cited, construed, referred to, etc.
2. Building independent of premises on which situated.
3. Claim of premises not subject of homestead harmless as to other land.
4. Community property may be selected.
5. Insolvency of debtor—Property purchased with non-exempt assets.
- 6, 7. Joint tenancy and tenancy in common—Acquisition of homestead in land held in, not permitted.
8. Same—Belief of claimant that he has entire title.
9. Same—Partnership property.
10. Same—Tenant in possession.
11. Same—Use of land by others for grazing.
12. Same—Wife may assert homestead—Act March 9, 1868.
13. Lease of premises prior to marriage.

14. Mineral land may constitute homestead.
15. Mortgaged property may be declared for.
16. Property "defined"—Every species of title included.
17. Separate and community property—Homestead may be created on.
18. Same—Husband's separate property—Effect of declaring homestead upon.
19. Several lots.
20. Same—Excess as respects value.
21. Same—Lot used by family for domestic purposes.
22. Same—Proximity necessary.
23. Tenancy in common—Property held in, cannot be set apart.
24. Title or estate of claimant—Acquisition of title not affected by asserting homestead.
25. Same—Same—In ejectment evidence inadmissible as to homestead.

26. Same—Claim attaches to such title or interest as claimant has.
27. Same—Leasehold estate sufficient.
28. Same—Not necessary to have title as against creditor.
29. Same—Superior title must be asserted against homestead.
30. Trust—Homestead subject to.
31. Wife's power to make selection in default of husband.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *King vs. Gotz*, 70 Cal. 236, 239, 240, 11 Pac. Rep. 656 (construed and applied); *Arendt vs. Mace*, 76 Cal. 315, 317, 9 Am. St. Rep. 307, 18 Pac. Rep. 376 (construed and applied); *Huellmantel vs. Huellmantel*, 117 Cal. 407, 409, 49 Pac. Rep. 574 (referred to); *Simonson vs. Burr*, 121 Cal. 532, 535, 54 Pac. Rep. 87 (referred to).

2. **BUILDING INDEPENDENT OF PREMISES ON WHICH SITUATED**.—Homestead right cannot be asserted merely to building, independent of land upon which building is erected. Building erected with community funds is to be regarded only as form in which common property was invested, and it constitutes community property.—*Smith vs. Smith*, 12 Cal. 316, 225, 73 Am. Dec. 533.

As to transmutation of property and preservation of character as community, see ante §164 and note para. 196-215.

3. **CLAIM OF PREMISES NOT SUBJECT OF HOMESTEAD** does not invalidate claim as to land which is subject to exemption.—*King vs. Gotz*, 70 Cal. 236, 241, 11 Pac. Rep. 656. See *Gregg vs. Bostwick*, 33 Cal. 220, 91 Am. Dec. 637; *Mann vs. Rogers*, 35 Cal. 316; *Tiernan vs. His Creditors*, 62 Cal. 286.

4. **COMMUNITY PROPERTY MAY BE SELECTED** as homestead if claimant is married.—*Gimmy vs. Doane*, 22 Cal. 635, 638; *King vs. Gotz*, 70 Cal. 236, 240, 11 Pac. Rep. 656. See *Taylor vs. Hargous*, 4 Cal. 268, 273, 60 Am. Dec. 606; *Revalk vs. Kraemer*, 8 Cal. 66, 71, 68 Am. Dec. 304; *Lies vs. De Diablar*, 12 Cal. 327, 330; *Gee vs. Moore*, 14 Cal. 472, 474.

As to what constitutes community property, see ante §164 and note.

5. **INSOLVENCY OF DEBTOR**.—Property purchased with non-exempt assets.—Insolvent debtor knowing himself to be insolvent may acquire homestead for himself and family and hold same exempt from his creditors, although purchased with non-exempt assets, and fraud is not imputable to him for such act.—*Kelly vs. Sparks*, 54 Fed. Rep. 70, 72 (wherein Foster, J., says: "The beneficent object of a wise and just homestead law must be conceded; but it seems harsh and unjust that a debtor may live in wealth, under the provisions of a homestead law, while his creditors are kept out of what is justly due them; but that matter rests in the discretion of the law-making power, and credit is given the debtor in full view of this comprehensive exemption").

6. **JOINT TENANCY AND TENANCY IN COMMON**.—Acquisition of homestead in land held in, not permitted.—Under homestead laws in force prior to Act March 9, 1868 (Stats.

1868, p. 116), and also under this section, it has been held that homestead cannot be carved out of land held by one in joint tenancy or as tenant in common.—*Wolf vs. Fleischacker*, 5 Cal. 244, 245, 68 Am. Dec. 121; *Holden vs. Pinney*, 6 Cal. 234, 236; *Giblin vs. Jordan*, 6 Cal. 416, 417; *Kellersberger vs. Kopp*, 6 Cal. 563, 565; *Bishop vs. Hubbard*, 23 Cal. 514, 517, 83 Am. Dec. 132; *Elias vs. Verdugo*, 27 Cal. 418, 425; *Seaton vs. Son*, 32 Cal. 481, 483; *Cameto vs. Dupuy*, 47 Cal. 79, 80; *First Nat. Bank Santa Barbara vs. De La Guerra*, 61 Cal. 109, 111; *Carroll vs. Ellis*, 63 Cal. 440, 442; *In re Estate Carriger*, 107 Cal. 618, 619, 40 Pac. Rep. 1032; *Rosenthal vs. Merced Bank*, 110 Cal. 198, 202, 203, 42 Pac. Rep. 640.

7. **Compare**: *Fitzgerald vs. Fernandez*, 71 Cal. 504, 507, 13 Pac. Rep. 562 (as to provisions of Act March 9, 1868, § 1, Stats. 1867-8, p. 116).

8. **Belief of claimant that he has entire title under deed to him does not affect rule**.—*Seaton vs. Son*, 32 Cal. 481, 483. See *Rosenthal vs. Merced Bank*, 110 Cal. 198, 202, 42 Pac. Rep. 640.

9. **Partnership property** is within rule and is liable for partnership debts, and fact that it has been and is occupied by one of them as homestead does not affect such liability.—*Bishop vs. Hubbard*, 23 Cal. 514, 517, 518, 83 Am. Dec. 132.

10. **Tenant in possession**.—No right of homestead can be carved out of land held in joint tenancy, or tenancy in common, even though claimant is in exclusive actual possession of premises. As between tenants in common and joint tenants adverse possession begins with actual ouster, and nothing short of actual ouster will sever the unity of possession.—*Seaton vs. Son*, 32 Cal. 481, 483, 484.

11. **Use of land by others for grazing**.—Fact that debtor's neighbor's grazed uninclosed portion of land in common with debtor, recognizing land as his, is not sufficient to avoid his claim to homestead.—*Ornbaum vs. His Creditors*, 61 Cal. 455, 458, 459.

12. **Wife may assert homestead in undivided interest in property held by husband as tenant in common with others**.—*Higgins vs. Higgins*, 46 Cal. 259, 266 (decided under Act March 9, 1868, Stats. 1867-8, p. 116).

13. **LEASE OF PREMISES PRIOR TO MARRIAGE**.—Lease made by debtor prior to marriage deprives premises of character of homestead, even after marriage, during term of lease.—*Benson vs. Aitken*, 17 Cal. 163, 164.

14. **MINERAL LAND MAY CONSTITUTE HOMESTEAD**.—Mineral land of United States which has been located and chiefly used as placer mining claim can be selected as homestead if, as well as being used as mine, it is used by owner as place of residence by himself and family and to some extent for pasturing stock and raising vegetables.—*Gaylord vs. Place*, 98 Cal. 472, 477-479, 33 Pac. Rep. 484.

15. **MORTGAGED PROPERTY MAY BE DECLARED FOR**.—Notwithstanding mortgage or deed of trust previously executed, debtor may file declaration of homestead and hold the premises as such against such of his cred-

itors as are not secured by trust deed or other lien.—*King vs. Gots*, 70 Cal. 236, 240, 11 Pac. Rep. 656; *Sacramento Bank vs. Alcorn*, 121 Cal. 379, 382, 53 Pac. Rep. 313.

As to title of grantor of trust property, see ante § 865 and note.

16. "PROPERTY" DEFINED.—Every species of title included.—"Term 'property,' as applied to lands, comprehends every species of title, inchoate or complete. It is supposed to embrace those rights which lie in contract; those which are executory as well as those which are executed."—*Soulard vs. United States*, 29 U. S. (4 Pet.) 511, bk. 7 L. ed. 938 (quoted with approval in *King vs. Gots*, 70 Cal. 236, 240, 11 Pac. Rep. 656).

17. SEPARATE AND COMMUNITY PROPERTY.—Homestead may be created on land consisting in part of separate and in part of community property, but this does not mean that husband by pursuing this course can create homestead on separate property of wife.—*Arendt vs. Mace*, 76 Cal. 315, 317, 318, 9 Am. St. Rep. 207, 18 Pac. Rep. 376.

18. Husband's separate property.—Effect of declaring homestead upon separate property of husband is to convert his separate title into joint title in himself and wife to extent of homestead.—*Burkett vs. Burkett*, 73 Cal. 310, 312, 12 Am. St. Rep. 58, 20 Pac. Rep. 715, 3 L. R. A. 731. See *Barber vs. Babel*, 36 Cal. 11, 14.

19. SEVERAL LOTS.—There is no objection to including more than one of several contiguous lots in homestead claim, provided their value does not exceed the statutory amount.—*McDonald vs. Badger*, 23 Cal. 393, 396, 33 Am. Dec. 123; *Englebrecht vs. Shade*, 47 Cal. 627, 629. See *Gregg vs. Bostwick*, 23 Cal. 220, 227, 91 Am. Dec. 637.

20. Excess as respects value.—If several lots are claimed and it is attempted to acquire homestead over property which exceeds statutory amount, homestead claim will be held void as to all separate lots over and above the one occupied as a residence.—*McDonald vs. Badger*, 23 Cal. 393, 396, 33 Am. Dec. 123.

21. Lot used by family for domestic purposes.—Where all land included in homestead claim is in one compact body, and portion of such land adjoins land upon which dwelling-house is situated, and such adjoining lot is used for purpose of drying clothes and as means of access to street, entire body of land is exempt.—*Englebrecht vs. Shade*, 47 Cal. 627, 629.

22. Proximity necessary.—Separate parcels of land which are distant fifty miles one from other cannot be selected as homestead; but it is necessary that two pieces of land should be so near together that they can be occupied and used for purposes of homestead.—In re *Estate Armstrong*, 80 Cal. 71, 74, 22 Pac. Rep. 79.

23. TENANCY IN COMMON.—Property of tenant in common cannot be set apart.—See para. 6-12 this note.

24. TITLE OR ESTATE OF CLAIMANT OF

HOMESTEAD.—Acquisition of title not affected by filing declaration.—Mere possession and use of premises as homestead does not of itself create any interest in property when parties claiming homestead have in fact no title or estate therein, but are mere trespassers upon property of another; and in such case it is not necessary to make wife party to action founded upon such trespass, as trespass is act of husband and not of wife.—*Calderwood vs. Tevis*, 23 Cal. 335, 337; *Brown vs. Starr*, 79 Cal. 608, 610, 12 Am. St. Rep. 180, 21 Pac. Rep. 973. See *Mann vs. Rogers*, 35 Cal. 316, 319; *Gilbert vs. Sleeper*, 71 Cal. 290, 294, 12 Pac. Rep. 172; *Snodgrass vs. Parks*, 79 Cal. 55, 21 Pac. Rep. 429; *Alexander vs. Jackson* (Cal. Dec. 23, 1890), 25 Pac. Rep. 415, 417.

25. Same.—In ejectment, evidence inadmissible as to plaintiff's declaration of homestead, because plaintiff could not by filing such declaration defeat or impair previously existing rights of defendant.—*Gilbert vs. Sleeper*, 71 Cal. 290, 294, 12 Pac. Rep. 172.

26. Claim attaches to such title or interest as claimant has.—Whatever character of title or interest in land held at time of filing declaration, claim will attach to such title or interest, and whatever may inure to or grow out of that title will be impressed with quality of homestead equally with original title.—*Alexander vs. Jackson*, 92 Cal. 514, 519, 27 Am. St. Rep. 158, 28 Pac. Rep. 593; *Perry vs. Ross*, 104 Cal. 15, 19, 43 Am. St. Rep. 66, 37 Pac. Rep. 757. See *Brown vs. Starr*, 79 Cal. 608, 610, 12 Am. St. Rep. 180, 21 Pac. Rep. 973; *Sanders vs. Russell*, 86 Cal. 119, 21 Am. St. Rep. 26, 24 Pac. Rep. 852; *Quackenbush vs. Reed*, 102 Cal. 493, 37 Pac. Rep. 755. *Iowa. Stinson vs. Richardson*, 44 Iowa 373. *Kam. Moore vs. Reaves*, 15 Kan. 150. *Mich. McKee vs. Wilcox*, 11 Mich. 358, 33 Am. Dec. 748. *Wis. McCabe vs. Mazzuchelli*, 13 Wis. 478.

27. Leasehold estate.—Homestead may be obtained on leasehold estate in land and dwelling-house thereon.—*Hogan vs. Manners*, 23 Kan. 551, 23 Am. Rep. 199.

28. Not necessary as against mere creditor.—If claimant of homestead resides on land he may have homestead on so much of it as does not exceed statutory amount in value against any person except one who has valid title, no matter what his own title is; and when execution creditor claims that debtor is holding more than he is entitled to, that question must be determined by value of land, and no question of title on part of debtor is involved.—*Brown vs. Starr*, 79 Cal. 608, 610, 12 Am. St. Rep. 180, 21 Pac. Rep. 973; *Gaylord vs. Place*, 98 Cal. 472, 478, 33 Pac. Rep. 484. See *Spencer vs. Geissman*, 37 Cal. 96, 99, 99 Am. Dec. 248; *Brooks vs. Hyde*, 37 Cal. 366, 373; In re *Estate Burton*, 68 Cal. 36, 64 Id. 428, 1 Pac. Rep. 702; *Alexander vs. Jackson*, 92 Cal. 514, 519, 27 Am. St. Rep. 158, 28 Pac. Rep. 593 (wherein it is declared that statute "does not require person who desires to make declaration of homestead to have fee in land, or any particular title thereto"); In re *Estate Groome*, 94 Cal. 69, 72, 29 Pac. Rep. 487.

29. Superior title must be asserted against

homestead.—Estate or interest of occupant, be it more or less, is exempt from forced sale, and land in occupancy of claimant has incidents of homestead as to everybody having no superior title.—*Spencer vs. Geissman*, 37 Cal. 96, 99, 99 Am. Dec. 248. See *Rich vs. Tubbs*, 41 Cal. 34, 36.

30. TRUST—Homestead subject to.—Claim-

ant of homestead in possession of and residing upon land, and having equitable title to such land subject to deed of trust, has such title as will enable him to claim homestead.—*King vs. Gots*, 70 Cal. 286, 240, 241, 11 Pac. Rep. 656.

31. WIFE'S POWER TO MAKE SELECTION IN DEFAULT OF HUSBAND.—See post § 1262 and note.

§ 1239. FROM WHAT NOT. The homestead cannot be selected from the separate property of the wife, without her consent, shown by her making or joining in making the declaration of homestead.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 229.

1. Applied, cited, construed, referred to, etc.
2. Void selection by husband.
3. Wife necessary party to declaration.

1. Applied, cited, construed, referred to, etc., in: *Beck vs. Soward*, 76 Cal. 527, 529, 18 Pac. Rep. 650 (construed and applied); *In re Estate Lahiff*, 86 Cal. 151, 154, 24 Pac. Rep. 850 (held inapplicable); *Simonson vs. Burr*, 121 Cal. 582, 585, 54 Pac. Rep. 87 (referred to); *Arkle vs. Beedie*, 141 Cal. 459, 462, 74 Pac. Rep.

1033 (construed and applied, holding husband's declaring wife's separate property, void).

2. Void selection by husband.—Attempt of husband to declare homestead out of wife's separate property is void.—*Arkle vs. Beedie*, 141 Cal. 459, 462, 74 Pac. Rep. 1033.

3. Wife necessary party to declaration, in consequence of this section, when it is sought to select her property.—*Beck vs. Soward*, 76 Cal. 527, 529, 18 Pac. Rep. 650.

§ 1240. EXEMPT FROM FORCED SALE. The homestead is exempt from execution or forced sale, except as in this title provided.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 399, held unconstitutional, see history, § 4 ante.

1. Applied, cited, construed, referred to, etc.
2. Alimony not payable out of homestead.
3. All homesteads exempt.
4. Appurtenance exempt—Water flowing over land.
5. Attachment—Levy before declaration of homestead.
6. Same—Sale under not permitted.
7. Constitutional right to exemption.
8. Equity will set aside sheriff's certificate.
9. "Except as in this title provided"—Statute mandatory.
10. Execution sale void.
11. Exemption from execution or forced sale.
12. Extent of exemption.
13. "Forced sale"—Commissioners' note.
14. Fraud—Homestead claimed pendente lite.
15. Garnishment not allowed.
- 16, 17. Grain raised on homestead.
18. Husband or wife may make defense in ejectment.
19. Injunction lies against execution sale.
20. Same—Recall of execution.
21. Insolvency proceedings do not reach homestead.
22. Judgment creates no lien.
23. Levy of execution creates no lien.
24. Liberal construction given statute.
25. Lien of judgment—Levy necessary.
26. Outstanding title purchased with borrowed money—Lender has no rights.
27. Partnership assets—Fraud in procuring homestead.
28. Purchaser at execution sale takes no title.
29. Quieting title.
30. Value of property immaterial.

31. Water—Appurtenance exempt.

32. Wife's judgment against homestead.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *McCracken vs. Harris*, 54 Cal. 81, 83 (applied); *Barrett vs. Sims*, 59 Cal. 615, 618 (construed and applied); *Richards vs. Shear*, 70 Cal. 187, 188, 11 Pac. Rep. 607 (construed and applied); *Fitzell vs. Leaky*, 72 Cal. 477, 483, 484, 14 Pac. Rep. 198 (construed and applied); *Walsh vs. McMenomy*, 74 Cal. 256, 261, 16 Pac. Rep. 17 (construed and applied); *Lubbock vs. McMann*, 82 Cal. 226, 233, 237, 16 Am. St. Rep. 108, 22 Pac. Rep. 1145 (referred to); *Keyes vs. Cyrus*, 100 Cal. 322, 327, 38 Am. St. Rep. 296, 34 Pac. Rep. 723 (construed and applied); *Security L. & T. Co. vs. Kauffman*, 108 Cal. 214, 220, 41 Pac. Rep. 467 (applied); *Beaton vs. Reid*, 111 Cal. 484, 486, 487, 44 Pac. Rep. 167 (construed); *Dickey vs. Gibson*, 112 Cal. 26, 31, 54 Am. St. Rep. 321, 45 Pac. Rep. 15 (referred to); *Simonson vs. Burr*, 121 Cal. 582, 587, 54 Pac. Rep. 87 (referred to in quotation from *Fitzell vs. Leaky*, 72 Cal. 477, 483, 14 Pac. Rep. 198); *San Joaquin Valley Bank vs. Dodge*, 125 Cal. 77, 83, 57 Pac. Rep. 687 (referred to); *Siddall vs. Haight*, 132 Cal. 320, 321, 64 Pac. Rep. 410 (cited); *Gray vs. Brunold*, 140 Cal. 615, 621, 74 Pac. Rep. 303 (referred to in quotation from *Fitzell vs. Leaky*, 72 Cal. 477, 483, 14 Pac. Rep. 198).

2. ALIMONY NOT PAYABLE OUT OF HOMESTEAD.—Where in action for divorce order for payment of alimony pendente lite is made and defendant is put in contempt for non-payment, in proceedings by habeas cor-

pus he is entitled to be released upon showing that he is not able to pay without selling or encumbering his homestead, because man cannot be held by duress of imprisonment to make such sale or encumbrance.—*Ex parte Silvia*, 123 Cal. 293, 294, 69 Am. St. Rep. 58, 55 Pac. Rep. 988.

3. ALL HOMESTEADS EXEMPT.—Provisions of this section must be held to apply to every homestead, whether selected and recorded by voluntary act of parties or by an order of the court.—*Keyes vs. Cyrus*, 100 Cal. 322, 327, 38 Am. St. Rep. 296, 34 Pac. Rep. 722. See *In re Estate Hamilton*, 120 Cal. 421, 429, 52 Pac. Rep. 708.

4. AN APPURTENANCE EXEMPT.—Water flowing over land is part of land, being appurtenant to and legally incorporated with homestead, and is exempt from forced sale to full extent that homestead is exempt.—*Fitzell vs. Leaky*, 72 Cal. 477, 483, 14 Pac. Rep. 198.

5. ATTACHMENT.—Levy before declaration of homestead.—Even though attachment be levied upon premises before filing declaration of homestead, unless judgment is founded upon debt secured by mortgage or mechanic's, laborer's, or vendor's lien, execution is not leviable.—*McCracken vs. Harris*, 54 Cal. 81, 83; *Sullivan vs. Hendrickson*, 54 Cal. 258, 259; *Wilson vs. Madison*, 58 Cal. 1, 2.

As to garnishment, see par. 15 this note.

6. Sale under not permitted.—Even though it be true that attachment may be levied upon homestead, no sale can be had except in manner provided by §§ 1241, 1245.—*Barrett vs. Sims*, 59 Cal. 615, 619. See *Gary vs. Eastabrook*, 6 Cal. 457; *Ackley vs. Chamberlain*, 16 Cal. 181, 76 Am. Dec. 516; *McCracken vs. Harris*, 54 Cal. 81.

7. CONSTITUTIONAL RIGHT TO EXEMPTION.—Exemption is constitutional right incidental to homestead.—*Lubbock vs. McMann*, 82 Cal. 226, 228, 16 Am. St. Rep. 108, 22 Pac. Rep. 1145. See *Ham vs. Santa Rosa Bank*, 62 Cal. 125, 138, 45 Am. Rep. 654.

As to constitutional origin of homestead, see ante § 1237 and note par. 4.

8. EQUITY HAS JURISDICTION TO SET ASIDE SHERIFF'S CERTIFICATE and to restrain him from executing deed where homestead has been wrongfully sold under execution.—*Dunn vs. Tozer*, 10 Cal. 167, 173.

9. "EXCEPT AS IN THIS TITLE PROVIDED"—Statute mandatory.—Since section says that homestead is exempt "except as in this title provided," in no other way can property which has been declared as homestead, no matter what may be its actual value, be subject to execution or forced sale; and provisions in this section referred to are contained in §§ 1241 and 1245.—*Barrett vs. Sims*, 59 Cal. 615, 618; *Roth vs. Insley*, 86 Cal. 134, 141, 24 Pac. Rep. 853. See *Sanders vs. Russell*, 86 Cal. 119, 120, 21 Am. St. Rep. 26, 24 Pac. Rep. 852.

See post §§ 1241, 1245 and notes.

10. EXECUTION SALE VOID.—Where homestead is sold under execution without taking proceedings provided by §§ 1245 et seq. the sale is void.—*Waggle vs. Worthy*, 74 Cal. 266, 268, 5 Am. St. Rep. 440, 15 Pac. Rep. 831.

11. EXEMPTION FROM EXECUTION OR FORCED SALE.—This section exempts homestead from execution or forced sale except in satisfaction of judgments obtained before declaration of homestead was filed which constitute liens on premises; on debts secured by mechanics', laborers', or vendors' liens; on mortgages executed and acknowledged by husband and wife; and on debts secured by mortgages executed and recorded before declaration of homestead was filed.—*Walsh vs. McMenomy*, 74 Cal. 356, 361, 16 Pac. Rep. 17. See *Riley vs. Pehl*, 23 Cal. 70, 75; *Bartholomew vs. Hook*, 23 Cal. 277, 279; *Spencer vs. Geissman*, 37 Cal. 96, 99, 99 Am. Dec. 248; *Englebrecht vs. Shade*, 47 Cal. 627, 629; *Barrett vs. Sims*, 59 Cal. 615, 618; *Eby vs. Foster*, 61 Cal. 282, 287; *Dascey vs. Harris*, 65 Cal. 361, 363, 4 Pac. Rep. 205; *Richards vs. Shear*, 70 Cal. 187, 188, 11 Pac. Rep. 607; *Levins vs. Rovigno*, 71 Cal. 273, 280, 12 Pac. Rep. 161; *Fitzell vs. Leaky*, 72 Cal. 477, 483, 14 Pac. Rep. 198; *Waggle vs. Worthy*, 74 Cal. 266, 268, 5 Am. St. Rep. 440, 15 Pac. Rep. 831; *Arendt vs. Mace*, 76 Cal. 315, 316, 9 Am. St. Rep. 207, 18 Pac. Rep. 276; *Tyrrrell vs. Baldwin*, 78 Cal. 470, 21 Pac. Rep. 116; *Farley vs. Hopkins*, 79 Cal. 203, 21 Pac. Rep. 737; *Lubbock vs. McMann*, 82 Cal. 226, 228, 16 Am. St. Rep. 108, 22 Pac. Rep. 1145; *Sanders vs. Russell*, 86 Cal. 119, 120, 21 Am. St. Rep. 26, 24 Pac. Rep. 852; *Roth vs. Insley*, 86 Cal. 134, 139, 24 Pac. Rep. 853; *Wise vs. Williams*, 88 Cal. 30, 33, 25 Pac. Rep. 1064; *Ontario State Bank vs. Gerry*, 91 Cal. 94, 97, 37 Pac. Rep. 531; *Heathman vs. Holmes*, 94 Cal. 291, 296, 29 Pac. Rep. 404; *Merced Bank vs. Rosenthal*, 99 Cal. 39, 31 Pac. Rep. 849; *Keyes vs. Cyrus*, 100 Cal. 322, 327, 38 Am. St. Rep. 296, 34 Pac. Rep. 722; *Perry vs. Ross*, 104 Cal. 15, 18, 43 Am. St. Rep. 66, 37 Pac. Rep. 757; *Palmer vs. Lavigne*, 104 Cal. 30, 34, 37 Pac. Rep. 775; *Security L. & T. Co. vs. Kauffman*, 108 Cal. 214, 220, 41 Pac. Rep. 467; *Store vs. Cofer*, 111 Cal. 482, 483, 44 Pac. Rep. 168; *Beaton vs. Reid*, 111 Cal. 484, 486, 44 Pac. Rep. 167; *Robinson vs. Dougherty*, 118 Cal. 299, 301, 50 Pac. Rep. 649; *Simonson vs. Burr*, 121 Cal. 582, 54 Pac. Rep. 87; *Ex parte Silvia*, 123 Cal. 293, 294, 69 Am. St. Rep. 58, 55 Pac. Rep. 988; *Siddall vs. Haight*, 132 Cal. 320, 321, 64 Pac. Rep. 410.

As to debts for which homestead is liable, see post § 1241 and note.

12. EXTENT OF EXEMPTION.—That which is covered by the exemption is land, and not any particular claim of title to it.—*Perry vs. Ross*, 104 Cal. 15, 18, 43 Am. St. Rep. 66, 37 Pac. Rep. 757.

13. "FORCED SALE."—Commissioners' note says: "Constitution [1849], art. XI, § 15. [Const. 1879, art. XVII, § 1] provides that: 'The legislature shall protect by law, from forced sale, a certain portion of the homestead and other property of all heads of families.' Our homestead laws are enacted to give effect to this provision. A 'forced sale' is not synonymous with a 'sale on execution,' etc. The latter may be, and often is, voluntary in every respect. When the owner consents to a sale under execution or other legal process, the sale is not forced, but it is as voluntary, within the full import of the term, as it is

when he directly effects the sale and executes the conveyance. Its quality, as being voluntary or forced, depends not upon the mode of its execution, but upon the presence or absence of the consent of the owner. If those terms were synonymous, the provision would have been that the homestead shall not be subject to sale under execution or other legal process. The meaning of a sale on execution or other final process is plain, and needs no interpretation, and the word 'forced,' unless it is to be rejected as insensible, must qualify the phrase with which it is connected. But there can be no question that enforced sale means a sale against the will of the owner. It is apparent that it was not the intent of the framers of the constitution to prevent the owner or owners of the homestead property from voluntarily alienating, changing, or otherwise affecting it. The homestead was not forced upon him, but he was at liberty to avail himself of its protection or not, at his election, and if accepted, to waive it at his election—the consent of his wife, if he was a married man, being required in order to secure to her, also, the protection of the homestead exemption. Where the owner of the homestead consents to a sale under execution or other legal process, it is not a forced sale. It makes no difference in respect to its being forced or voluntary, whether he consents directly to the sale or does the same indirectly by consenting to or doing those acts or things that necessarily or usually eventuate in a sale. A foreclosure sale, whether under the power of sale contained in the mortgage or in pursuance of a decree, is not a forced sale within the meaning of the constitution or the statute.—*Peterson vs. Hornblower*, 33 Cal. 266, 277. A judgment recovered against the husband is not a lien upon the homestead.—*Ackley vs. Chamberlain*, 16 Cal. 181, 76 Am. Dec. 516. If, while a judgment is standing against the husband, he and wife make a sale of the property and relinquish the homestead, so that the sale and relinquishment constitute but one transaction, and the homestead does not exceed in value five thousand dollars, the lien of the judgment will not attach; but if the relinquishment is made prior to the sale, the lien will attach.—*Marriner vs. Smith*, 27 Cal. 649. An insolvent may appropriate money to the payment of a mortgage upon his homestead, and the transaction will not be held in fraud of creditors.—*Randall vs. Buffington*, 10 Cal. 491."

14. **FRAUD—Homestead claimed pendente lite.**—Homestead claim is not invalid because made during progress of litigation which subsequently results in ordinary money judgment against homesteader or because made at any time before entry and docketing of such judgment; and notwithstanding pendency of litigation, homestead premises are exempt.—*Fitzell vs. Leaky*, 73 Cal. 477, 483, 14 Pac. Rep. 198.

15. **GARNISHMENT NOT ALLOWED.**—Policy of insurance having been procured on homestead, and house having been destroyed by fire, proceeds of insurance policy are not garnishable.—*Houghton vs. Lee*, 50 Cal. 101, 103.

As to attachment, see par. 5 this note.

16. **GRAIN RAISED UPON HOMESTEAD** and harvested is not exempt from execution for debts of husband, land being before declaration of homestead community property.—*Horgan vs. Amick*, 63 Cal. 401, 405, 408.

See Code Civ. Proc. § 690 and note.

17. **Compare:** *Dascey vs. Harris*, 65 Cal. 357, 4 Pac. Rep. 204 (holding that assignment by insolvent of all his property, real and personal, to assignee in insolvency does not include crop growing on homestead).

See Code Civ. Proc. § 690 and note.

18. **HUSBAND OR WIFE MAY MAKE DEFENSE IN EJECTMENT**, where plaintiff claims under sheriff's deed, that property constituted homestead and was not liable to be sold under execution.—*Williams vs. Young*, 17 Cal. 403, 406.

19. **INJUNCTION LIES AGAINST FORCED SALE.**—Where forced sale of homestead is impending or threatened, and such sale is to be for debt from which homestead is exempt, equity will grant injunction on theory that sale would cast cloud on title and that relief at law is not adequate.—*Fitzell vs. Leaky*, 73 Cal. 477, 483-485, 14 Pac. Rep. 198; *Roth vs. Insley*, 86 Cal. 134, 139, 24 Pac. Rep. 353. See *Pixley vs. Huggins*, 15 Cal. 127; *Culver vs. Rogers*, 28 Cal. 520, 527; *Cohen vs. Sharp*, 44 Cal. 29; *McCracken vs. Harris*, 54 Cal. 81, 83; *Porter vs. Pico*, 55 Cal. 165, 176; *Skinner vs. Hall*, 69 Cal. 195, 198, 10 Pac. Rep. 406; *Farley vs. Hopkins*, 79 Cal. 203, 21 Pac. Rep. 737; *Lubbock vs. McMann*, 82 Cal. 226, 230, 16 Am. St. Rep. 108, 22 Pac. Rep. 1145; *Wilhoit vs. Cunningham*, 87 Cal. 453, 457, 25 Pac. Rep. 675; *Heathman vs. Holmes*, 94 Cal. 291, 296, 29 Pac. Rep. 404; *Keyes vs. Cyrus*, 100 Cal. 323, 327, 38 Am. St. Rep. 296, 34 Pac. Rep. 722; *Beaton vs. Reid*, 111 Cal. 484, 487, 44 Pac. Rep. 167; *Simonsen vs. Burr*, 121 Cal. 582, 54 Pac. Rep. 87.

20. **Recall of execution.**—Claimant of homestead has not adequate remedy at law by making application for recall of execution.—*Roth vs. Insley*, 86 Cal. 134, 140, 24 Pac. Rep. 353.

21. **INSOLVENCY PROCEEDINGS DO NOT REACH HOMESTEAD.**—There is no statute authorizing sale in insolvency proceedings of property which has been declared homestead.—*Barrett vs. Simms*, 62 Cal. 440, 442. See *Dascey vs. Harris*, 65 Cal. 361, 362, 4 Pac. Rep. 205.

22. **JUDGMENT CREATES NO LIEN** upon property which constitutes homestead.—*Ackley vs. Chamberlain*, 16 Cal. 181, 183, 76 Am. Dec. 516; *Lubbock vs. McMann*, 82 Cal. 226, 16 Am. St. Rep. 108, 22 Pac. Rep. 1145; *Sanders vs. Russell*, 86 Cal. 119, 120, 21 Am. St. Rep. 26, 24 Pac. Rep. 352.

23. **LEVY OF EXECUTION CREATES NO LIEN**, but simply creates foundation for proceedings under §§ 1245, etc., for ascertainment of value of property covered by declaration of homestead, and procurement or order of court for partition or sale thereof, and application of excess to satisfaction of judgment.—*Sanders vs. Russell*, 86 Cal. 119, 120, 21 Am. St. Rep. 26, 24 Pac. Rep. 352. See *Barrett vs. Sims*, 59 Cal. 615, 618, 619; *Lubbock vs. McMann*, 82 Cal. 226, 230, 16 Am. St. Rep. 108, 22 Pac. Rep. 1145.

24. Liberal construction is given statute.—See ante § 1237 and note.

25. LIEN OF JUDGMENT—Levy necessary.—Judgment constitutes no lien upon homestead until execution has been levied, and levy creates no lien except for purpose of and as foundation for instituting and carrying on proceedings to have appraisal and sale in the mode provided by §§ 1241, 1245.—Barrett vs. Sims, 59 Cal. 615, 619. See Lubbock vs. MacMann, 82 Cal. 226, 230, 16 Am. St. Rep. 108, 22 Pac. Rep. 1145.

26. OUTSTANDING TITLE PURCHASED WITH BORROWED MONEY—No lien or resulting trust in favor of creditor.—If one having homestead borrows money to buy an outstanding title or claim of title against it, lender does not thereby acquire lien on homestead nor does any trust result in his favor.—Perry vs. Ross, 104 Cal. 15, 18, 43 Am. St. Rep. 66, 37 Pac. Rep. 757.

27. PARTNERSHIP ASSETS—Fraud in procuring homestead.—Insolvent partners will not be permitted to divide their property and defeat creditors by claiming homestead upon such property as belonging to them individually, and creditors of partnership will be permitted to attach land as if no such division had been made or homestead claimed.—Bishop vs. Hubbard, 23 Cal. 514, 517-519, 33 Am. Dec. 132. See Shinn vs. MacPherson, 53 Cal. 596, 599.

28. PURCHASER AT EXECUTION SALE TAKES NO TITLE, as against claim asserted by either husband or wife.—Williams vs. Young, 17 Cal. 403, 406. See McDonald vs. Badger, 23 Cal. 393, 400, 33 Am. Dec. 128; Def-felz vs. Pico, 46 Cal. 289, 292; note 84 Am. Dec. 571.

29. QUIETING TITLE.—Where land which is homestead is wrongfully sold under execution, sheriff's deed constitutes cloud on title, and equity has jurisdiction to remove such cloud.—Riley vs. Pehl, 23 Cal. 70, 75.

30. VALUE OF PROPERTY IMMATERIAL.—Property impressed with character of homestead, no matter what its value, is exempt from seizure and forced sale.—Sanders vs. Russell, 86 Cal. 119, 120, 21 Am. St. Rep. 26, 24 Pac. Rep. 852.

31. WATER—Appurtenance exempt.—See par. 4 this note.

32. JUDGMENT AGAINST HUSBAND.—Where married woman declares homestead on her separate property for joint benefit of her husband and herself, and subsequently she obtains decree of divorce, but after filing declaration and prior to divorce obtains money judgment against husband, subsequently to decree of divorce she cannot enforce judgment by levy and sale of homestead property, decree in action for divorce making no provision as to homestead.—Store vs. Cofer, 111 Cal. 432, 433, 44 Pac. Rep. 168. See Roth vs. Insley, 86 Cal. 124, 24 Pac. Rep. 853.

§ 1241. SALE ON EXECUTION, WHEN. The homestead is subject to execution or forced sale in satisfaction of judgments obtained:

1. Before the declaration of homestead was filed for record, and which constitute liens upon the premises.

2. On debts secured by mechanics, contractors, subcontractors, artisans, architects, builders, laborers of every class, materialmen's or vendors' liens upon the premises.

3. On debts secured by mortgages on the premises, executed and acknowledged by husband and wife, or by an unmarried claimant.

4. On debts secured by mortgages on the premises, executed and recorded before the declaration of homestead was filed for record.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 229; April 6, 1880, Code Amdts. 1880 (C. C. pt.), p. 7; March 9, 1887, Stats. and Amdts. 1887, p. 81. In force March 9, 1887.

1. Applied, cited, construed, referred to, etc.
2. Attachment levied before declaration of homestead.
3. Deed absolute intended as mortgage.
4. Enumeration of all debts collectable out of homestead.
5. Fraudulent discharge of liens by debtor.
- 6, 7. Homestead declaration filed pending foreclosure.
8. Judgment—Declaration filed after lien has attached.
9. Same—Justice's judgment—Abstract not recorded.
10. Same—Vendor's lien reduced to judgment.
11. Levy of execution before declaration of homestead.

12. Materialmen's liens—Amendment of statute.
13. Same—Materials furnished prior to amendment of statute.
14. Mechanics' liens—Constitutionality of statute as affecting prior contracts.
15. Same—Joint action of husband and wife unnecessary.
16. Mortgages—Are paramount when prior to homestead.
17. Same—Growing crops—Mortgage on.
18. Same—Purchase price—Mortgage to secure.
19. Same—Remedy of mortgagee—Defense in foreclosure proceedings.
20. Same—Subrogation—Fraudulent procurement of money to pay mortgage.
21. Same—Same—Second mortgagee who pays prior mortgage.

22. Same—Same—Same—Debt barred by statute of limitations.
23. Recordation of mortgage—Distinction between mortgages by husband and by husband and wife.
24. Same—Filing mortgage after office hours.
25. Redemption from sale under mortgage foreclosure.
26. Vendor's lien—Definition.
27. Same—Lien of vendor does not give right of entry or title.
28. Same—Paramount to homestead.
29. Same—Waiver of lien by taking mortgage.
30. Way of necessity—Sale under decree foreclosing prior mortgage.
31. Wife as mortgagee.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *McCracken vs. Harris*, 54 Cal. 81, 83 (referred to); *Wilson vs. Madison*, 58 Cal. 1, 2 (held applicable); *Barrett vs. Sims*, 59 Cal. 615, 618 (referred to with quotation from § 1245); *Chalmers vs. Stockton B. & L. Soc.*, 64 Cal. 77, 78, 28 Pac. Rep. 59 (construed); *Richards vs. Shear*, 70 Cal. 187, 188, 11 Pac. Rep. 607 (construed); *Magee vs. McManus*, 70 Cal. 553, 559, 12 Pac. Rep. 451 (referred to); *Hefner vs. Urton*, 71 Cal. 479, 480, 12 Pac. Rep. 486 (applied); *Fitzell vs. Leaky*, 72 Cal. 477, 484, 485, 14 Pac. Rep. 198 (construed); *Walsh vs. McMenomy*, 74 Cal. 356, 360, 16 Pac. Rep. 17 (construed); *Tyrrell vs. Baldwin*, 78 Cal. 470, 474, 31 Pac. Rep. 116 (referred to); *Davies Henderson L. Co. vs. Gottschalk*, 81 Cal. 641, 649, 22 Pac. Rep. 860 (construed and applied); *Lubbock vs. McMann*, 82 Cal. 226, 229, 16 Am. St. Rep. 108, 22 Pac. Rep. 1145 (referred to); *Roth vs. Insley*, 86 Cal. 134, 141, 24 Pac. Rep. 853 (referred to); *Ontario St. Bank vs. Gerry*, 91 Cal. 94, 97, 27 Pac. Rep. 531 (referred to); *First Nat. Bank vs. Bruce*, 94 Cal. 77, 79, 29 Pac. Rep. 488 (construed); *Palmer vs. Lavigne*, 104 Cal. 30, 34, 37 Pac. Rep. 775 (applied); *Security L. & T. Co. vs. Kauffman*, 108 Cal. 314, 320, 41 Pac. Rep. 467 (held inapplicable); *Van Sandt vs. Alvis*, 109 Cal. 165, 168, 50 Am. St. Rep. 25, 41 Pac. Rep. 1014 (applied); *Beaton vs. Reid*, 111 Cal. 484, 486, 487, 44 Pac. Rep. 167 (construed); *Dickey vs. Gibson*, 113 Cal. 26, 31, 54 Am. St. Rep. 321, 45 Pac. Rep. 15 (referred to); *Glas vs. Glas*, 114 Cal. 566, 567, 568, 55 Am. St. Rep. 90, 46 Pac. Rep. 667 (construed and applied); *Lee vs. Murphy*, 119 Cal. 364, 371, 372, 373, 51 Pac. Rep. 549, 955 (construed); *Edwards vs. Grand*, 121 Cal. 354, 356, 53 Pac. Rep. 796 (construed and applied); *Duncan vs. Curry*, 124 Cal. 106, 107, 56 Pac. Rep. 898 (referred to); *San Joaquin Valley Bank vs. Dodge*, 125 Cal. 77, 83, 57 Pac. Rep. 687 (applied); *Bank of Woodland vs. Oberhaus*, 125 Cal. 320, 325, 57 Pac. Rep. 1070 (applied); *Reid vs. Englehart-Davidson Merc. Co.*, 126 Cal. 527, 530, 77 Am. St. Rep. 206, 58 Pac. Rep. 1068 (applied); *Siddall vs. Haight*, 132 Cal. 320, 321, 64 Pac. Rep. 410 (referred to); *Kleinsorge vs. Kleinsorge*, 133 Cal. 412, 413, 414, 65 Pac. Rep. 376 (referred to).

2. Attachment levied before declaration of homestead.—See ante § 1240 and note par. 5.

3. DEED ABSOLUTE INTENDED AS MORTGAGE given by husband and recorded prior to filing declaration of homestead pre-

vents over such homestead.—*Loewenthal vs. Coonan*, 135 Cal. 381, 383, 384, 67 Pac. Rep. 324.

4. ENUMERATION OF ALL DEBTS COLLECTABLE.—Under this section and § 1240 homestead cannot be sold under execution upon judgment other than one of those enumerated in this section without taking steps prescribed in § 1245 et seq.—*Walsh vs. McMenomy*, 74 Cal. 356, 361, 16 Pac. Rep. 17; *Roth vs. Insley*, 86 Cal. 134, 141, 24 Pac. Rep. 853; *Ontario St. Bank vs. Gerry*, 91 Cal. 94, 97, 27 Pac. Rep. 531; *Lee vs. Murphy*, 119 Cal. 364, 372, 51 Pac. Rep. 549, 955; *Duncan vs. Curry*, 124 Cal. 106, 107, 56 Pac. Rep. 898.

5. FRAUDULENT DISCHARGE OF LIENS BY DEBTOR.—Where debtor in insolvent circumstances sells property to procure money with which to discharge debts which are liens or charges upon his homestead, for purpose of saving it to himself, transaction is one calculated to hinder, delay, or defraud creditors, and homestead remains answerable for debts charged upon it.—*Riddell vs. Shirley*, 5 Cal. 488, 490. See *Bishop vs. Hubbard*, 23 Cal. 514, 518, 83 Am. Dec. 132; *Shinn vs. Macpherson*, 58 Cal. 596, 599. Explaining: *Randall vs. Buffington*, 10 Cal. 491, 494. See *Reeves vs. Peterman*, 109 Ala. 366, 369, 19 So. Rep. 513; *Comstock vs. Bechtel*, 63 Wis. 656, 661, 24 N.W. Rep. 465; *Kelly vs. Sparks*, 54 Fed. Rep. 70, 72; *In re Henkel*, 2 Sawy. C. C. 305, 307, 11 Fed. Cas. 1124.

6. HOMESTEAD DECLARATION FILED PENDING FORECLOSURE.—Where mortgage is executed by husband alone and action to foreclose is instituted and lis pendens filed and judgment for plaintiff is ordered, but before judgment is entered wife files homestead claim, no homestead rights are acquired as against judgment of foreclosure, because wife had constructive notice of mortgage and also of action to foreclose.—*McNamara vs. Oakland B. & L. Assoc.*, 132 Cal. 247, 250, 64 Pac. Rep. 270.

7. This seems to be a labored method of arriving at result which is plainly dictated by statute; to wit, that homestead is subject to execution "on debt secured by mortgage on the premises, executed and recorded before declaration of homestead was filed for record," but court does not seem to have observed this provision.

8. JUDGMENT—Declaration filed after lien has attached.—Where declaration of homestead is not filed until after judgment lien has attached, homestead is liable to be sold under execution issued on such judgment.—*Bartholomew vs. Hook*, 23 Cal. 377, 379; *Noble vs. Hook*, 24 Cal. 638, 639. See *Smith vs. Richards*, 2 Idaho 464, 468, 21 Pac. Rep. 419; *Gage vs. Neblett*, 57 Tex. 374, 376.

9. Justice's judgment—Abstract not recorded.—Where attachment from justice's court is levied upon premises and judgment is had, but no abstract is filed or recorded, judgment does not constitute lien within meaning of this section.—*Wilson vs. Madison*, 58 Cal. 1, 2. See *McCracken vs. Harris*, 54 Cal. 81; *Sullivan vs. Hendrickson*, 54 Cal. 258.

10. Vendor's lien reduced to judgment.—Judgment on debt secured by vendor's lien

mentioned in subd. 2 of this section is judgment in suit brought to have vendor's lien and its amount declared and enforced upon real property sold and conveyed by vendor claiming lien. Such judgment relates back to date when conveyance was made, or when court of chancery decrees equity of vendor attached, and if homestead declared was filed after that date declarant cannot avail himself of his homestead protection against lien of his vendor.—*Fitzell vs. Leaky*, 72 Cal. 477, 485, 14 Pac. Rep. 198.

11. LEVY OF EXECUTION BEFORE DECLARATION OF HOMESTEAD.—Recovery of judgment in justice's court and levy of execution upon premises before declaration of homestead do not have effect to prevent premises from becoming homestead and entitled to protection from sale under such execution previously levied.—*Beaton vs. Reid*, 111 Cal. 484, 486, 487, 44 Pac. Rep. 167 (in which case court said, under Code Civ. Proc. § 900, there is "but one mode of constituting justice's judgment lien upon lands of judgment debtor, and that is filing of abstract thereof in office of recorder of county in which the land is situated").

12. MATERIALMEN'S LIENS.—Amendment of statute.—Section as originally enacted omitted mention of liens for material, and it was held that although doubtless such liens were within spirit of the act, nevertheless they could not be enforced against homestead; which defect in section was remedied by Act March 9, 1887.—See *Richards vs. Shear*, 70 Cal. 187, 188, 189, 11 Pac. Rep. 607 (cited under original section); *Davies Henderson L. Co. vs. Gottschalk*, 81 Cal. 641, 649, 22 Pac. Rep. 860 (decided under Act March 9, 1887).

13. Material furnished prior to amendment of statute may form basis for lien which will prevail against homestead.—*Davies Henderson L. Co. vs. Gottschalk*, 81 Cal. 641, 648, 649, 22 Pac. Rep. 860.

14. MECHANIC'S LIEN.—Constitutionality of statute as affecting prior contracts.—Mechanics have lien upon homestead after passage of act, even though contract was previously made, and there is no constitutional bar to such lien, as statute does not affect contract, but merely takes away right of homestead claimant to defeat just claim against his property.—*Davies Henderson L. Co. vs. Gottschalk*, 81 Cal. 641, 649, 22 Pac. Rep. 860.

15. Joint action by husband and wife unnecessary.—Mechanic's lien can be created upon homestead without joint action of husband and wife, although prior to amendment March 9, 1887, rule was otherwise.—*Palmer vs. Lavigne*, 104 Cal. 30, 34, 37 Pac. Rep. 775. See *Walsh vs. McMenomy*, 74 Cal. 356, 360, 16 Pac. Rep. 17.

16. MORTGAGES.—Are paramount when prior to homestead.—Mortgages recorded before homestead declared and filed for record are paramount to homestead, in accordance with plain dictates of section.—*Rix vs. McHenry*, 7 Cal. 89, 91, 92; *Lassen vs. Vance*, 8 Cal. 271, 274, 68 Am. Dec. 322; *Montgomery vs. Tutt*, 11 Cal. 190, 193; *McHendry vs. Reilly*,

12 Cal. 75, 76; *Chalmers vs. Stockton B. & L. Soc.*, 64 Cal. 77, 78, 28 Pac. Rep. 59; *Hefner vs. Urton*, 71 Cal. 479, 480, 12 Pac. Rep. 486; *Van Sandt vs. Alvis*, 109 Cal. 165, 168, 50 Am. St. Rep. 25, 41 Pac. Rep. 1014; *Hall vs. Glass*, 123 Cal. 500, 507, 69 Am. St. Rep. 77, 56 Pac. Rep. 336; *Kleinsorge vs. Kleinsorge*, 123 Cal. 412, 413, 65 Pac. Rep. 876; *Loewenthal vs. Coonan*, 135 Cal. 381, 383, 384, 37 Am. St. Rep. 115, 67 Pac. Rep. 324.

As to recordation of mortgages, see para. 23, 24 this note.

17. Growing crops—Mortgage on.—Where mortgage covers "all crop and products of whatever nature which are now standing, or growing, or which shall or may hereafter be sown, planted, cut, or harvested . . . during continuance of this mortgage," on land described, there being sufficient potential existence in coming crops to sustain a legal or equitable lien upon them, such lien will prevail against subsequent declaration of homestead.—*Hall vs. Glass*, 123 Cal. 500, 507, 69 Am. St. Rep. 77, 56 Pac. Rep. 336.

18. Purchase price—Mortgage to secure.—Where mortgage is executed at date of purchase of premises to secure purchase price thereof, no homestead can thereafter be carved out of property so as to impair rights of mortgage.—*Lassen vs. Vance*, 8 Cal. 271, 274, 68 Am. Dec. 322; *Montgomery vs. Tutt*, 11 Cal. 190, 193; *McHendry vs. Reilly*, 13 Cal. 75, 76; *Van Sandt vs. Alvis*, 109 Cal. 165, 168, 50 Am. St. Rep. 25, 41 Pac. Rep. 1014.

19. Remedy of mortgagee.—Whatever remedy may exist under this section by virtue of mortgage executed before declaration of homestead must be asserted in proceedings to foreclose, and not in proceedings before probate court for setting apart homestead.—*Chalmers vs. Stockton B. & L. Soc.*, 64 Cal. 77, 78, 28 Pac. Rep. 59.

20. Subrogation—Fraudulent procurement of money to pay off mortgage.—Where wife files declaration of homestead on premises subject to mortgage, and husband fraudulently abstracts funds from assets of partnership of which he is member and which was indebted to third person, and with such funds pays and discharges mortgage, thus leaving homestead clear and firm creditors defrauded, both husband and wife will be decreed to hold homestead subject to lien for payment of amount for which mortgage was discharged.—*Shinn vs. Macpherson*, 58 Cal. 596, 598, 599.

21. Second mortgagee who pays prior mortgage.—Where single man executes mortgage and afterwards marries and mortgaged premises becomes homestead, and husband without joinder of wife executes second mortgage to mortgagee, who pays off first mortgage, second mortgage is subrogated to first mortgagee, and second mortgage is valid as against homestead, notwithstanding wife's failure to join in it.—*Carr vs. Caldwell*, 10 Cal. 380, 385, 70 Am. Dec. 740; *Swift vs. Kraemer*, 13 Cal. 526, 530, 73 Am. Dec. 603; *Himmelmann vs. Schmidt*, 23 Cal. 117, 120; *Shaffer vs. McCloskey*, 101 Cal. 576, 580, 36 Pac. Rep. 196; *Van Sandt vs. Alvis*, 109 Cal. 165, 168-170, 50 Am. St. Rep. 25, 41 Pac. Rep. 1014; *Van Loben Sels vs. Bunnell*, 120 Cal. 680, 53 Pac. Rep. 266.

22. Same—Debt barred by statute of limitations.—Mortgage executed by husband does not entitle mortgagee to subrogation where it is given to secure new note extending time of payment of debt which is barred by statute of limitations.—*Barber vs. Babel*, 36 Cal. 11, 21, 22.

23. RECORDATION OF MORTGAGE—Distinction between mortgages by husband and by husband and wife.—Construing together subd. 3 and subd. 4 of this section, one of which relates to mortgages executed by husband and wife, and other of which relates to mortgages not executed by both husband and wife, they mean that mortgage not recorded before declaration of homestead is filed cannot be enforced against homestead unless it was executed by both husband and wife; but where mortgage was executed by both, it will be enforced against subsequent homestead, even though it was not recorded before declaration of homestead was filed.—*Duncan vs. Curry*, 124 Cal. 106, 107, 56 Pac. Rep. 898; *Kleinsorge vs. Kleinsorge*, 133 Cal. 412, 413, 65 Pac. Rep. 876. See *Downing vs. Le Du*, 82 Cal. 471, 473, 23 Pac. Rep. 202; *Ontario St. Bank vs. Gerry*, 91 Cal. 94, 27 Pac. Rep. 531; *First Nat. Bank vs. Bruce*, 94 Cal. 77, 29 Pac. Rep. 488; *Lee vs. Murphy*, 119 Cal. 364, 51 Pac. Rep. 549, 955; *Edwards vs. Grand*, 121 Cal. 254, 256, 53 Pac. Rep. 796; *Campan vs. Molle*, 124 Cal. 415, 57 Pac. Rep. 208.

24. Filing mortgage after office hours.—Where mortgage is taken to office of recorder and delivered to recorder few minutes after statutory time when office is required to be open, with request that it be recorded "the first thing" on opening office on the next morning; and before office hours next morning declaration of homestead on premises covered by mortgage is handed to recorder on street with request that he record it "first thing after opening office"; and recorder enters two instruments as having been filed simultaneously at 9 o'clock a. m., mortgage takes precedence, and is to be deemed as having been filed on previous day, as indorsing the fact and time of its deposit is not essential part of filing.—*Edwards vs. Grand*, 121 Cal. 254, 256, 53 Pac. Rep. 796.

25. REDEMPTION FROM SALE UNDER A MORTGAGE FORECLOSURE.—Judgment creditor having lien by virtue of docketed deficiency arising from mortgage sale is not authorized to redeem from purchaser at mortgage sale.—*Hershey vs. Dennis*, 53 Cal. 77, 80 (wherein there were two mortgages on homestead and it was held that second mortgagee could not redeem).—See *Black vs. Gerichten*, 58 Cal. 56, 58.

26. VENDOR'S LIEN—DEFINITION.—Vendor's lien mentioned in this section (subd. 2) is same lien mentioned in § 3046.—*Lee vs. Murphy*, 119 Cal. 364, 373, 51 Pac. Rep. 549.

27. Lien of vendor does not give any right of entry or title to him, but mere lien, title,

and right of possession remaining in debtor until sale under decree foreclosure lien; and sale by sheriff under judgment at law is not an enforcement of vendor's lien. Vendor, to secure his paramount right, must resort to equity to enforce his lien.—*Williams vs. Young*, 17 Cal. 403, 406.

28. Paramount to homestead.—Where land is sold and is not paid for and vendor retains lien, while equitable estate in land held by vendee is subject to be impressed with lien of homestead as fully as estate in fee, declaration of homestead is subordinate to right and claim of vendor, who holds legal title.—*Carr vs. Caldwell*, 10 Cal. 380, 385, 70 Am. Dec. 740 (declaring that clear title to homestead does not vest until payment of purchase money); *Himmelmänn vs. Schmidt*, 23 Cal. 117, 120; *Snodgrass vs. Parks*, 79 Cal. 55, 58, 21 Pac. Rep. 429; *Longmaid vs. Coulter*, 123 Cal. 208, 217, 55 Pac. Rep. 791. See *Lassen vs. Vance*, 8 Cal. 271, 274, 68 Am. Dec. 322; *Sparks vs. Hess*, 15 Cal. 186, 194; *Williams vs. Young*, 17 Cal. 403, 406; *Peterson vs. Hornblower*, 33 Cal. 266; *Alexander vs. Jackson*, 92 Cal. 514, 27 Am. St. Rep. 158, 28 Pac. Rep. 593; *Lee vs. Murphy*, 119 Cal. 364, 371-375, 51 Pac. Rep. 549, 955; *Burnap vs. Cook*, 16 Iowa 149, 85 Am. Dec. 507.

29. Waiver of lien by taking mortgage.—Where mortgage is given by husband alone to secure purchase money paid for land which constitutes homestead, but such mortgage is not recorded until after declaration of homestead has been filed for record, mortgage is not enforceable against homestead, and vendor's lien is waived; the case not being one for application of general principles of equitable cognizance, because it is controlled entirely by legislative enactment.—*Lee vs. Murphy*, 119 Cal. 364, 371-375, 51 Pac. Rep. 549, 955. See *Burnap vs. Cook*, 16 Iowa 149, 85 Am. Dec. 507.

30. WAY OF NECESSITY—Sale under decree of foreclosure of prior mortgage.—Where mortgage is executed prior to acquisition of homestead and after homestead has been declared is foreclosed and land is sold pursuant to decree of foreclosure, homestead is burdened with ways of necessity in like manner as if claimant of homestead had sold land himself upon acquiring homestead.—*San Joaquin Valley Bank vs. Dodge*, 125 Cal. 77, 81-83, 57 Pac. Rep. 687. See *Howton vs. Frearson*, 8 Durnf. & E. (8 T. R.) 50, 4 Rev. Rep. 581 (decided by Lord Kenyon).

31. WIFE AS MORTGAGEE.—Husband cannot defeat mortgage which he has executed to his wife, nor its foreclosure, by subsequently filing declaration of homestead upon mortgaged premises, and notwithstanding such declaration of homestead wife may foreclose.—*Glas vs. Glas*, 114 Cal. 566, 567, 568, 55 Am. St. Rep. 90, 46 Pac. Rep. 667.

As to power of husband and wife to contract with each other, see ante § 158 and note.

§ 1242. HOW CONVEYED OR ENCUMBERED. The homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Abandonment of homestead.
3. Acknowledgment is necessary.
4. Adverse possession extinguishes homestead.
5. Alienation permissible.
6. Same—Mortgage is valid.
7. Caveat emptor applies.
8. Consideration for wife's joining in homestead is necessary.
9. Constitution construed.
10. Construction—Sections in pari materia.
11. Contract by wife with husband to release homestead rights.
12. Death of one spouse—Survivor has right of alienation.
13. Same—Second marriage.
14. Dedication of street by husband void.
15. Description of premises as homestead in mortgage.
16. Divorce—Mortgage executed by wife after.
17. Ejectment not maintainable by purchaser of homestead.
18. Fraud in procuring deed from husband and wife—Cancellation.
19. Guardian of husband cannot transfer title to homestead.
20. Husband and wife—Deeds inter se—From husband to wife.
- 21, 22. Same—Mortgage by wife to husband void—Estoppel to deny validity.
23. Lease by husband alone invalid.
24. Loss of character as homestead after execution of invalid instrument.
25. Mandatory provision—Joinder of husband and wife necessary.
26. Same—Mortgage by one valid, but inferior to homestead.
- 27-29. Same—Subsequent mortgage by husband and wife—Notice of prior invalid mortgage—Recordation.
30. Same—Subsequent ratification of instrument by other spouse.
31. Title tendered by husband who makes deed.
32. Object of statute.
33. Same—Wife's interest protected.
34. Part may be sold—Effect.
35. Parties—Defense by husband in foreclosure.
36. Same—Ejectment not maintainable by wife.
37. Same—Executrix—Wife sued as.
38. Same—Intervention by wife in suit to foreclose mortgage.
39. Same—Joinder of wife necessary in foreclosure.
40. Same—Wife may sue alone under Code Civil Procedure.
41. Payment of mortgage on homestead not in fraud of creditors.
42. Permanence of home.
43. Power of attorney by husband to convey invalid.
44. Prior encumbrance.
45. Reciprocal rights of husband and wife.
46. Reformation of mortgage—Mistake.
47. Rescission of mortgage executed by one spouse.
48. Relation back of subsequently acquired title.

49. Reservation of homestead in mortgage.
50. Rights of purchaser or encumbrancer.
51. Separate instruments by husband and wife.
52. Undivided moiety conveyed by husband and wife.
53. Vendor's rights paramount to homestead right.
54. Wife's interest in homestead.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Burkett vs. Burkett*, 78 Cal. 310, 312, 12 Am. St. Rep. 58, 20 Pac. Rep. 715, 3 L. R. A. 781 (referred to); *Gleason vs. Spray*, 31 Cal. 217, 220, 221, 15 Am. St. Rep. 47, 22 Pac. Rep. 551 (construed and applied); *Lubbock vs. McMann*, 32 Cal. 226, 229, 16 Am. St. Rep. 108, 22 Pac. Rep. 1145 (cited); *Merced Bank vs. Rosenthal*, 99 Cal. 39, 48, 31 Pac. Rep. 349, 33 Id. 732 (referred to); *Powell vs. Patison*, 100 Cal. 236, 238, 34 Pac. Rep. 677 (construed and applied); *Mathews vs. Davis*, 102 Cal. 202, 207, 36 Pac. Rep. 358 (construed and applied); *Security L. & T. Co. vs. Kaufman*, 103 Cal. 214, 220, 41 Pac. Rep. 467 (cited); *Dickey vs. Gibson*, 113 Cal. 26, 32, 54 Am. St. Rep. 321, 45 Pac. Rep. 15 (construed and held inapplicable); *In re Estate Liggett*, 117 Cal. 352, 354, 59 Am. St. Rep. 190, 49 Pac. Rep. 211 (referred to); *San Francisco vs. Grote*, 120 Cal. 59, 61, 65 Am. St. Rep. 155, 52 Pac. Rep. 127, 41 L. R. A. 335 (construed and applied); *San Joaquin V. Bank vs. Dodge*, 125 Cal. 77, 83, 57 Pac. Rep. 687 (held inapplicable); *Hart vs. Church*, 126 Cal. 471, 476, 77 Am. St. Rep. 195, 58 Pac. Rep. 910 (cited); *Freiermuth vs. Steigleman*, 130 Cal. 392, 393, 80 Am. St. Rep. 138, 62 Pac. Rep. 615 (applied); *California F. Trans. Co. vs. Anderson*, 79 Fed. Rep. 404, 406 (construed and applied).

2. Abandonment of homestead.—See post §§ 1243, 1244 and notes.

3. ACKNOWLEDGMENT IS NECESSARY.—Statute requires both execution and acknowledgment by both husband and wife and agreement by them to convey homestead which is not acknowledged cannot be made the basis of decree for specific performance.—*Mathews vs. Davis*, 102 Cal. 202, 207, 36 Pac. Rep. 358.

Acknowledgment by husband and wife.—See ante §§ 1180-1194 and notes.

4. Adverse possession extinguishes homestead.—See post § 1243 and note par. 3.

5. ALIENATION PERMISSIBLE.—Although by this provision homestead is exempt from forced sale, its voluntary alienation is not inhibited. Right of disposition is restricted only by necessity, if head of family be married, of obtaining consent of wife in form prescribed by law.—*Dorsey vs. McFarland*, 7 Cal. 342, 346; *Gee vs. Moore*, 14 Cal. 472, 475, 476. See *Bowman vs. Norton*, 16 Cal. 213, 214, 216-218; *Peterson vs. Hornblower*, 33 Cal. 266, 274; *Barnett vs. Knight*, 7 Colo. 365, 3 Pac. Rep. 747; *Sampson vs. Williamson*, 6 Tex. 102, 109, 55 Am. Dec. 762.

6. Mortgage is valid where it is executed by both husband and wife, even though given for borrowed money.—*Gluckauf vs. Bliven*, 23 Cal. 312, 313, 314. See *Cohen vs. Davis*, 30

Cal. 187; *Brown vs. Orr*, 29 Cal. 120, 122; *Ions vs. Harbison*, 112 Cal. 260, 266, 44 Pac. Rep. 572.

7. **CAVEAT EMPTOR APPLIES.**—Whether declarant is married person or not is question of fact which must be determined by whoever would take conveyance or encumbrance of property; and no statement or act of husband alone can obviate necessity of wife uniting in instrument of conveyance or encumbrance, or deprive her of her estate in property. Record of declaration is sufficient notice to all persons to put them upon inquiry; and if they fail to make such inquiry or to take such steps as will protect them in their dealings with husband, loss should fall on them rather than on wife, who has in no respect contributed thereto.—*Security L. & T. Co. vs. Kauffman*, 108 Cal. 214, 220, 221, 41 Pac. Rep. 467.

8. **CONSIDERATION FOR WIFE'S JOINING IN MORTGAGE IS NECESSARY**, and where mortgage is given by husband and wife to secure husband's antecedent debts, without any new consideration moving from creditor to either husband or wife, demurrer to bill to foreclose will be sustained.—*California F. Trans. Co. vs. Anderson*, 79 Fed. Rep. 404, 406 (case arising in California and construing this section).

9. **CONSTITUTION CONSTRUED.**—Provision of constitution only requires legislation exempting property from forced sale. It does not look to legislation in restraint of voluntary alienation, and statute which not only exempts homestead from forced sale but declares that no mortgage sale or alienation of any kind by owner, if married man, shall be valid without signature and acknowledgment of wife, goes beyond the constitutional provision. Husband's absolute power of alienation of his separate property or of community property can be restrained only so far as may be necessary for protection of homestead, and no farther; and notwithstanding statute to contrary, husband's deed passes estate to grantee subject to right of spouses to enjoy and use premises as homestead until another homestead is acquired or character as homestead of premises conveyed is lost.—*Gee vs. Moore*, 14 Cal. 472, 474-477.

10. **CONSTRUCTION.**—Sections in pari materia.—This and the two next succeeding sections are in pari materia. They must be read together and effect given to each.—*Gleason vs. Spray*, 81 Cal. 217, 220, 221, 15 Am. St. Rep. 47, 22 Pac. Rep. 551.

See post § 1243, 1244 and notes.

11. **CONTRACT BY WIFE WITH HUSBAND TO RELEASE HOMESTEAD RIGHTS.**—Where husband contracts to sell property and thereafter wife declares homestead upon such property, and husband in order to obtain her joinder in execution of deed transfers to her bank-book, such transfer is valid and effectual to vest title in wife.—*Schuler vs. Savings & L. Soc.*, 64 Cal. 397, 398, 399, 1 Pac. Rep. 479.

12. **DEATH OF ONE SPOUSE.**—Where one of spouses dies, survivor, in whom title vests absolutely, has right of alienation.—*Dickey vs. Gibson*, 113 Cal. 26, 32, 54 Am. St. Rep. 321,

45 Pac. Rep. 15. See *Revalk vs. Kraemer*, 3 Cal. 66, 72, 63 Am. Dec. 304; *Benson vs. Aitken*, 17 Cal. 163, 164; *Himmelman vs. Schmidt*, 23 Cal. 117, 120.

12. **Second marriage.**—Title to homestead property having vested in husband at death of his wife, his power of alienation is not affected by his second marriage.—*Dickey vs. Gibson*, 113 Cal. 26, 32, 54 Am. St. Rep. 321, 45 Pac. Rep. 15. See *Graham vs. Stewart*, 68 Cal. 274, 279, 9 Pac. Rep. 555.

14. **DEDICATION OF STREET BY HUSBAND VOID.**—It is not in power of husband to dedicate homestead to public use, e. g. for street, without concurrence of wife, however clear his intention to do so.—*San Francisco vs. Grote*, 120 Cal. 59, 61, 62, 65 Am. St. Rep. 155, 52 Pac. Rep. 127, 41 L. R. A. 335.

15. **DESCRIPTION OF PREMISES AS HOMESTEAD.**—In mortgage upon homestead premises need not be described as such.—*Pfeiffer vs. Riehn*, 13 Cal. 642, 649.

16. **DIVORCE.**—Mortgage executed by wife after.—Where during marriage wife files declaration of homestead on community property and after divorce husband conveys all of his title in and to such property and wife subsequently executes mortgage thereon, such mortgage is valid.—*Grupe vs. Byers*, 73 Cal. 271, 14 Pac. Rep. 363.

17. **EJECTMENT NOT MAINTAINABLE BY PURCHASER OF HOMESTEAD.**—Where husband without his wife joining in deed sells homestead, ejectment is not maintainable by purchaser to recover excess of value of premises over \$5,000, amount exempted. If purchaser has any rights, he must establish them in different action.—*Cook vs. McChristian*, 4 Cal. 23, 27. See *Bunting vs. Saltz*, 84 Cal. 168, 24 Pac. Rep. 167.

18. **FRAUD IN PROCURING DEED FROM HUSBAND AND WIFE.**—Cancellation.—Where husband and wife convey homestead and by collusion purchase money is attached before it is paid, equity will cancel deed.—*Still vs. Saunders*, 3 Cal. 231, 237.

See par. 47 this note.

19. **GUARDIAN OF HUSBAND CANNOT TRANSFER TITLE TO HOMESTEAD**, statute being mandatory that homestead can only be alienated by instrument executed by husband and wife.—*Flege vs. Garvey*, 47 Cal. 371, 376, 377 (in which case husband was insane).

20. **HUSBAND AND WIFE.**—Deeds inter se.—From husband to wife.—Conveyance by husband to wife, without her joinder therein, is not in derogation of her homestead rights, and leaves homestead intact, but has effect of vesting title in her subject to homestead.—*Burkett vs. Burkett*, 73 Cal. 210, 212, 313, 12 Am. St. Rep. 53, 20 Pac. Rep. 715, 3 L. R. A. 781. See *Grupe vs. Byers*, 73 Cal. 271, 272, 14 Pac. Rep. 363.

See post § 1243 and note par. 8.

21. **Mortgage by wife to husband void.**—Where homestead is declared on community property mortgage by wife to husband is void, and doctrine that law will not require vain thing to be done is inapplicable, because

statute forbids transfer of homestead to any one except in mode prescribed.—*Freiermuth vs. Steigleman*, 130 Cal. 392, 394, 80 Am. St. Rep. 138, 62 Pac. Rep. 615.

22. Same—Estoppel to deny validity of mortgage.—Mortgage being absolutely void and husband not having been misled, doctrine of estoppel is not applicable.—*Freiermuth vs. Steigleman*, 130 Cal. 392, 395, 80 Am. St. Rep. 138, 62 Pac. Rep. 615.

23. LEASE BY HUSBAND ALONE without joinder of wife is invalid.—See *Mauldin vs. Cox*, 87 Cal. 387, 390, 7 Pac. Rep. 804; *Tappendorff vs. Moranda*, 134 Cal. 419, 66 Pac. Rep. 491.

24. LOSS OF CHARACTER AS HOMESTEAD AFTER EXECUTION OF INSTRUMENT BY HUSBAND ALONE.—Conveyance or mortgage of homestead by husband alone is inoperative and void, and does not become valid by premises subsequently losing their character as homestead.—*Powell vs. Patison*, 100 Cal. 236, 238, 34 Pac. Rep. 677.

25. MANDATORY PROVISION.—Joinder of husband and wife necessary.—Homestead can be conveyed or encumbered only in mode prescribed by statute, which is mandatory, and unless husband and wife join, attempted conveyance or encumbrance by one spouse is void, unless instrument is upheld in favor of innocent purchaser without notice.—*Taylor vs. Hargous*, 4 Cal. 283, 273, 60 Am. Dec. 606; *Poole vs. Gerrard*, 6 Cal. 71, 73, 65 Am. Dec. 481; *Dorsey vs. McFarland*, 7 Cal. 342, 346; *Van Reynegan vs. Revalk*, 8 Cal. 75, 76; *Dunn vs. Tozer*, 10 Cal. 167, 172; *Lies vs. De Diablar*, 12 Cal. 327, 330; *McHendry vs. Reilly*, 13 Cal. 75, 76; *Gee vs. Moore*, 14 Cal. 473, 474, 475; *Bowman vs. Norton*, 16 Cal. 213, 217; *Clarkin vs. Lewis*, 20 Cal. 634, 637; *McQuade vs. Whaley*, 31 Cal. 526, 530; *Barber vs. Babel*, 36 Cal. 11, 15; *Flege vs. Garvey*, 47 Cal. 371, 376; *Gagliardo vs. Dumont*, 54 Cal. 496, 501; *Porter vs. Campman*, 65 Cal. 365, 4 Pac. Rep. 237; *Dacey vs. Harris*, 65 Cal. 357, 4 Pac. Rep. 204; *Graves vs. Baker*, 68 Cal. 133, 3 Pac. Rep. 691; *Tipton vs. Martin*, 71 Cal. 325, 12 Pac. Rep. 244; *Burkett vs. Burkett*, 78 Cal. 310, 312, 13 Am. St. Rep. 58, 30 Pac. Rep. 715, 3 L. R. A. 781; *Gleason vs. Spray*, 81 Cal. 217, 219, 15 Am. St. Rep. 47, 22 Pac. Rep. 551; *Lubbock vs. McMann*, 82 Cal. 226, 16 Am. St. Rep. 108, 22 Pac. Rep. 1145; *Alexander vs. Jackson*, 92 Cal. 514, 520, 27 Am. St. Rep. 153, 28 Pac. Rep. 593; *Watts vs. Gallagher*, 97 Cal. 47, 51, 31 Pac. Rep. 626; *Merced Bank vs. Rosenthal*, 99 Cal. 39, 48, 31 Pac. Rep. 849, 33 Id. 732; *McClure vs. McClure*, 100 Cal. 339, 342, 34 Pac. Rep. 823; *Powell vs. Patison*, 100 Cal. 236, 238, 34 Pac. Rep. 677; *Mathews vs. Davis*, 102 Cal. 202, 207, 36 Pac. Rep. 358; *Quackenbush vs. Reed*, 103 Cal. 493, 500, 37 Pac. Rep. 755; *Perry vs. Ross*, 104 Cal. 15, 19, 43 Am. St. Rep. 66, 37 Pac. Rep. 757; *Security L. & T. Co. vs. Kauffman*, 108 Cal. 214, 220, 41 Pac. Rep. 467; *San Francisco vs. Grote*, 120 Cal. 59, 65 Am. St. Rep. 155, 52 Pac. Rep. 127, 41 L. R. A. 335; *Edwards vs. Grand*, 121 Cal. 254, 256, 53 Pac. Rep. 796; *Hart vs. Church*, 126 Cal. 471, 477, 77 Am. St. Rep. 195, 58 Pac. Rep. 910; *Freiermuth vs. Steigleman*, 130 Cal. 392, 393, 80 Am. St. Rep. 138, 62

Pac. Rep. 615; *California F. Co. vs. Anderson*, 79 Fed. Rep. 404, 406 (case arising in California). See *Cook vs. Klink*, 3 Cal. 347, 352; *Bunting vs. Salts*, 34 Cal. 163, 24 Pac. Rep. 167.

26. Mortgage by one valid, but inferior to homestead.—Although party may mortgage undivided interest in land, such mortgage will not be permitted to destroy the homestead quality of the premises, and purchaser at foreclosure sale will take subject to homestead rights.—*Hoppe vs. Hoppe*, 104 Cal. 94, 101, 37 Pac. Rep. 894; *McQuade vs. Whaley*, 31 Cal. 526, 534. See *Gee vs. Moore*, 14 Cal. 473, 477; *Bowman vs. Norton*, 16 Cal. 213, 216.

27. Subsequent mortgage by husband and wife is valid as against mortgage executed by husband alone without setting aside such first mortgage.—*Dorsey vs. McFarland*, 7 Cal. 342, 346; *Van Reynegan vs. Revalk*, 8 Cal. 75, 76.

28. Same.—Notice of invalid mortgage immaterial, and subsequent mortgagee from husband and wife takes title as against prior mortgage by husband alone, even though such subsequent mortgagee had notice.—*Dorsey vs. McFarland*, 7 Cal. 342, 346.

29. Same.—Recordation of subsequent mortgage after death of wife is immaterial, and notwithstanding her previous death it takes precedence.—*Van Reynegan vs. Revalk*, 8 Cal. 75, 76.

30. Subsequent ratification of instrument by other spouse.—Where wife executes mortgage without joinder of husband, fact that husband five months thereafter writes upon such instrument statement that he joins and concurs therein, and signs and acknowledges such declaration, does not add validity to instrument.—*Hart vs. Church*, 126 Cal. 471, 477, 77 Am. St. Rep. 195, 58 Pac. Rep. 911.

31. Title tendered by husband who makes deed.—Where husband makes contract to sell homestead, and tenders deed executed by himself, purchaser is not bound to accept such conveyance, as it is not sufficient to pass title.—*Clarkin vs. Lewis*, 20 Cal. 634, 636.

32. OBJECT OF STATUTE in requiring instrument by both husband and wife, "is to place it beyond power of either spouse, acting alone, to destroy homestead character impressed upon real estate, or encumbering it in any way."—*Freiermuth vs. Steigleman*, 130 Cal. 392, 394, 80 Am. St. Rep. 138, 62 Pac. Rep. 615.

See ante § 1237 and note par. 20.

33. Wife's interest protected.—This provision was enacted in interest of wife, and no conveyance in derogation of her rights under homestead can be effective unless she joins in same.—*Burkett vs. Burkett*, 78 Cal. 310, 312, 12 Am. St. Rep. 58, 20 Pac. Rep. 715, 3 L. R. A. 781. See *Barber vs. Babel*, 36 Cal. 11, 14; *Flege vs. Garvey*, 47 Cal. 371, 375; *Gagliardo vs. Dumont*, 54 Cal. 496, 498; *Porter vs. Campman*, 65 Cal. 365, 4 Pac. Rep. 237; *Graves vs. Baker*, 68 Cal. 133, 3 Pac. Rep. 691; *Tipton vs. Martin*, 71 Cal. 325, 12 Pac. Rep. 244.

34. PART MAY BE SOLD.—Effect.—As husband and wife may, by joining in conveyance,

destroy homestead right already acquired, by selling whole, so they may equally destroy it by selling and conveying part of it, if it be done in shape of an undivided moiety, so as to turn estate into tenancy in common; and when it has been thus destroyed, no question of homestead can be raised against creditor.—*Kellersberger vs. Kopp*, 6 Cal. 563, 565.

35. PARTIES—Defense by husband in foreclosure.—In action to foreclose mortgage given by husband alone he cannot individually set up defense that wife did not join, nor can he individually assert fact that she did not join, in motion to set aside under foreclosure decree.—*Cook vs. Klink*, 8 Cal. 347, 353.

36. Ejectment not maintainable by wife without joinder of husband to recover alleged homestead upon ground of invalidity of husband's conveyance, made without her signature.—*Guiood vs. Guiood*, 14 Cal. 506, 508, 76 Am. Dec. 440 (decided before adoption of code).

See par. 40 this note.

37. Executrix—Wife sued as.—In order to conclude wife she must be made party defendant individually, and where she is sued as executrix and appears as such judgment of foreclosure does not affect her individual rights.—*Stockton B. & L. Assoc. vs. Chalmers*, 75 Cal. 332, 334, 335, 7 Am. St. Rep. 173, 17 Pac. Rep. 229 (Paterson, J., dissenting).

38. Intervention by wife in suit to foreclose mortgage.—Wife if not made party defendant may intervene, or, by permission of court, she may be allowed to file separate answer with leave to plaintiff to amend if she files such answer.—*Moss vs. Warner*, 10 Cal. 296, 297; *Mabury vs. Ruiz*, 58 Cal. 11, 14, 15.

39. Joinder of wife necessary.—In action to foreclose mortgage on property upon which homestead has been declared decree is void as against wife unless she is made party.—*Brackett vs. Banegas*, 116 Cal. 273, 283, 53 Am. St. Rep. 165, 43 Pac. Rep. 90. See *Moss vs. Warner*, 10 Cal. 296, 297; *Mabury vs. Ruiz*, 58 Cal. 11, 14, 15; *Hefner vs. Urton*, 71 Cal. 479, 480, 12 Pac. Rep. 486; *Stockton B. & L. Assoc. vs. Chalmers*, 75 Cal. 332, 334, 7 Am. St. Rep. 173, 17 Pac. Rep. 229; *Watts vs. Gallagher*, 97 Cal. 47, 51, 31 Pac. Rep. 626; *Ludwig vs. Murphy*, 143 Cal. 473, 475, 77 Pac. Rep. 150.

40. Wife may sue alone under Code Civil Procedure § 370 with respect to homestead carved out of her separate property, and consequently, she being under no disability by reason of coverture, statute runs against her in favor of one in adverse possession of homestead.—*Mauldin vs. Cox*, 67 Cal. 387, 390, 7 Pac. Rep. 804. See *Wilson vs. Wilson*, 36 Cal. 447, 95 Am. Dec. 194; *Kapp vs. Grifith*, 42 Cal. 408.

See par. 36 this note.

As to action by wife to enforce rights in separate property, see ante § 162 and note pars. 135, 141, 142.

41. PAYMENT OF MORTGAGE ON HOMESTEAD NOT IN FRAUD OF CREDITORS.—Insolvent debtor who has mortgaged homestead may take money in hand and pay off such mortgage without being guilty of defrauding unsecured creditors, and payment of

such mortgage is not preference.—*Randall vs. Buffington*, 10 Cal. 491, 494 (distinguishing *Riddell vs. Shirley*, 5 Cal. 488, where fraudulent and collusive sale of debtor's property to discharge lien upon homestead was made, vendee not being creditor receiving payment of debt, and no claim against homestead being asserted).

42. PERMANENCE OF HOME.—It is not necessary that homestead shall be and remain permanent home. It may be sold or abandoned by claimants at any time.—*Gaylord vs. Place*, 98 Cal. 472, 479, 33 Pac. Rep. 484.

As to conveyance, encumbrance, and abandonment of homestead, see post §§ 1243, 1244 and notes.

43. POWER OF ATTORNEY BY HUSBAND TO CONVEY INVALID, because, having no capacity to convey homestead independently of his wife, he cannot delegate to another power which he himself does not possess.—*Gagliardo vs. Dumont*, 54 Cal. 496, 500.

44. Prior encumbrances.—See ante § 1241 and note.

45. RECIPROCAL RIGHTS OF HUSBAND AND WIFE.—Obligation between husband and wife in respect to preservation of homestead is reciprocal, and its destruction is prohibited, except by joint act of both in mode provided by statute.—*Gagliardo vs. Dumont*, 54 Cal. 496, 501.

46. REFORMATION OF MORTGAGE—Mistake.—Where husband and wife execute mortgage on homestead and there is mistake in description, so that all land that was intended was not included, and husband and wife take advantage of mortgagee's ignorance as to such mistake, equity will reform mortgage in accordance with its familiar jurisdiction to reform deeds.—*Stevens vs. Holman*, 113 Cal. 345, 349-352, 53 Am. St. Rep. 216, 44 Pac. Rep. 670 (distinguishing *Barrett vs. Tewksbury*, 9 Cal. 13, 14, and *Leonis vs. Lazzarovich*, 55 Cal. 52). See *Dickey vs. Gibson*, 113 Cal. 26, 34, 54 Am. St. Rep. 321, 45 Pac. Rep. 15.

As to reformation of married women's contracts in general, see ante §§ 153, 162 and notes.

47. RESCISSION OF MORTGAGE EXECUTED BY ONE SPOUSE.—Where mortgage is executed by one spouse only, and under duress and undue influence, court will decree that it be surrendered up and canceled.—*Hart vs. Church*, 126 Cal. 471, 479-481, 77 Am. St. Rep. 195, 58 Pac. Rep. 910.

See par. 13 this note.

48. RELATION BACK OF SUBSEQUENTLY ACQUIRED TITLE.—Mortgage by husband without joinder of wife is void, and subsequently acquired title does not relate back so as to give effect to such void instrument.—*Powell vs. Patison*, 100 Cal. 236, 238, 34 Pac. Rep. 677.

Retroactive effect of abandonment.—See post § 1243 and note par. 25.

49. RESERVATION OF HOMESTEAD IN MORTGAGE.—In mortgaging land mortgager may reserve homestead rights or frame mortgage so that it shall only operate on excess over exemption, and following proviso is ef-

fective for such purpose: "Excepting and reserving to said party of first part his homestead right and claim of, in, and to the said premises, as same may be appraised and set off to him according to law, and this conveyance is made subject to said homestead claim—said premises being same on which I now reside."—*Grogan vs. Thrift*, 58 Cal. 378, 379.

50. RIGHTS OF PURCHASER OR ENCUMBRANCER.—Bona fide purchaser or encumbrancer for valuable consideration takes home or residence entirely free from claim or objection on part of mere general creditor.—*Barnett vs. Knight*, 7 Cole. 365, 3 Pac. Rep. 747.

51. SEPARATE INSTRUMENT BY HUSBAND AND WIFE.—Although statute does not use term "jointly" or "concurrently" it means that homestead cannot be alienated or encumbered by separate instruments separately executed by husband and wife, and that it can only be so alienated or encumbered by joint and concurrent execution of instrument by the two.—*Hart vs. Church*, 136 Cal. 471, 476, 77 Am. St. Rep. 195, 58 Pac. Rep. 911. See *Poole vs. Gerrard*, 6 Cal. 71, 78, 65 Am. Dec. 481.

52. UNDIVIDED MOIETY CONVEYED BY HUSBAND AND WIFE.—Where statute does not permit homestead to be carved out of land held in joint tenancy or cotenancy, as husband and wife may, by joining in conveyance, destroy homestead right already acquired, so they may equally destroy it by selling and conveying part of it, if it be done in shape of undivided moiety, so as to turn estate into tenancy in common; and when it has been thus destroyed, no question of homestead can be raised against creditor.—*Kellersberger vs. Kopp*, 6 Cal. 563, 565. See *Carroll vs. Ellis*, 63 Cal. 440, 442.

53. VENDOR'S RIGHTS PARAMOUNT TO HOMESTEAD RIGHT.—See ante § 1241 and note.

54. WIFE'S INTEREST.—This statute relates not only to form and manner in which homestead is to be conveyed or encumbered, but it recognizes interest which wife has in it.—*California F. Trans. Co. vs. Anderson*, 79 Fed. Rep. 404, 406 (case arising in California and construing this section).

§ 1243. HOW ABANDONED. A homestead can be abandoned only by a declaration of abandonment, or a grant thereof, executed and acknowledged:

1. By the husband and wife, if the claimant is married;
2. By the claimant, if unmarried.

History: Enacted March 21, 1878; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 399, held unconstitutional, see history, § 4 ante.

1. Applied, cited, construed, referred to, etc.
2. Adultery of wife and leaving husband.
3. Adverse possession extinguishes homestead.
4. Attempt to acquire second homestead.
5. Conditions and reservations—Abandonment notwithstanding.
6. Construction—Of instrument.
7. Same—Of statute—Sections in *pari materia*.
8. Deeds between husband and wife—From husband to wife.
9. Same—From wife to husband—Contract of separation.
10. Efforts to sell.
11. Exclusive method of abandonment prescribed.
12. "Grant" defined.
- 13, 14. Same—Mortgage—Deed absolute intended as mortgage.
15. Same—Quitclaim deed amounts to abandonment.
16. Husband's power to abandon—Before adoption of code.
17. Lease by husband and wife.
18. Joint conveyance amounts to abandonment.
19. Object of statute in requiring joinder of spouses.
- 20, 21. Removal from premises—Does not constitute abandonment.
22. Same—Exercise of citizenship in another state.
23. Same—Sale by husband without joinder of wife.
24. Same—Temporary removal.
25. Retroactive effect of abandonment.
26. Separation of husband and wife—Effect upon homestead.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Mabury vs. Ruiz*, 58 Cal. 11, 15 (referred to); *Porter vs. Chapman*, 65 Cal. 365, 368, 4 Pac. Rep. 237 (construed); *Graves vs. Baker*, 68 Cal. 133, 134, 3 Pac. Rep. 691 (cited); *Tipton vs. Martin*, 71 Cal. 325, 328, 13 Pac. Rep. 244 (referred to); *Waggie vs. Worthy*, 74 Cal. 266, 268, 5 Am. St. Rep. 440, 15 Pac. Rep. 831 (construed and applied); *Burkett vs. Burkett*, 78 Cal. 310, 312, 12 Am. St. Rep. 58, 20 Pac. Rep. 715, 3 L. R. A. 781 (referred to); *Gleason vs. Spray*, 81 Cal. 217, 221, 15 Am. St. Rep. 47, 22 Pac. Rep. 551 (referred to); *Lubbock vs. McMann*, 82 Cal. 226, 229, 16 Am. St. Rep. 108, 22 Pac. Rep. 1145 (referred to); *Falvre vs. Daley*, 98 Cal. 664, 668, 670, 29 Pac. Rep. 256 (construed); *Oaks vs. Oaks*, 94 Cal. 66, 68, 29 Pac. Rep. 330 (construed and applied); *Kennedy vs. Gloster*, 98 Cal. 143, 147, 32 Pac. Rep. 941 (construed); *McClure vs. McClure*, 100 Cal. 339, 342, 34 Pac. Rep. 822 (applied); *Bank of Suisun vs. Stark*, 106 Cal. 202, 205, 39 Pac. Rep. 531 (construed and applied); *Dickey vs. Gibson*, 113 Cal. 26, 31, 54 Am. St. Rep. 321, 45 Pac. Rep. 15 (referred to); *In re Estate Liggett*, 117 Cal. 352, 354, 59 Am. St. Rep. 190, 49 Pac. Rep. 211 (referred to); *In re Estate Winslow*, 121 Cal. 92, 94, 53 Pac. Rep. 363 (construed and applied); *Simonson vs. Burr*, 121 Cal. 532, 536, 54 Pac. Rep. 87 (cited);

Freiermuth vs. Steigleman, 130 Cal. 392, 393, 30 Am. St. Rep. 138, 62 Pac. Rep. 615 (cited).

2. ADULTERY OF WIFE and abandonment by her of her husband do not divest property of its character as homestead.—*Lies vs. De Diablar*, 12 Cal. 327, 329.

3. ADVERSE POSSESSION EXTINGUISHES HOMESTEAD, and ripens into title in adverse occupant in accordance with general principles governing law of adverse possession.—*McCormack vs. Silsby*, 82 Cal. 72, 76, 22 Pac. Rep. 874. See *Mauldin vs. Cox*, 67 Cal. 387, 391, 7 Pac. Rep. 804.

4. ATTEMPT TO ACQUIRE SECOND HOMESTEAD.—Party cannot have two homesteads, and if he attempts to acquire second while first is in force, second is void, and second being void, land comprehended therein is subject to lien of judgment.—*Waggle vs. Worthy*, 74 Cal. 266, 268, 5 Am. St. Rep. 440, 15 Pac. Rep. 331.

5. CONDITIONS AND RESERVATIONS.—Abandonment notwithstanding.—Where husband and wife join in deed which purports to convey homestead in present, but they reserve to themselves right to live in and occupy house on premises and to be supported and clothed out of yearly proceeds of premises so long as they shall live, and deed contains provision that it is made upon express conditions that certain payments shall be made to children of grantors, such deed vests title in grantee at once, and is grant within meaning of this section such as constitutes abandonment.—*Suisun vs. Stark*, 106 Cal. 202, 205-208, 39 Pac. Rep. 531.

6. CONSTRUCTION OF INSTRUMENT.—Meaning of instrument intended as abandonment is determined by same rules which control interpretation of other contracts.—*In re Estate Winslow*, 121 Cal. 92, 94, 53 Pac. Rep. 362.

7. CONSTRUCTION OF STATUTE—Sections *in pari materia*.—See ante § 1242 and note par. 10.

8. DEEDS BETWEEN HUSBAND AND WIFE.—From husband to wife, although it operates to vest legal title to property in wife as her separate property, does not constitute abandonment of homestead.—*In re Estate Lamb*, 95 Cal. 397, 405, 406, 30 Pac. Rep. 568. See *Burkett vs. Burkett*, 78 Cal. 310, 12 Am. St. Rep. 58, 20 Pac. Rep. 715, 3 L. R. A. 731.

9. From wife to husband—Contract of separation.—Where spouses, pursuant to §§ 153, 159, enter into contract in writing whereby they agree to separate and equally divide their property between them as nearly as possible, and such contract is duly acknowledged and recorded, and wife, pursuant to such contract, executes deed to husband conveying "as and for his sole and separate property" community property upon which is homestead, this constitutes an abandonment thereof.—*In re Estate Winslow*, 121 Cal. 92, 94, 95, 53 Pac. Rep. 362.

As to deeds and contracts between husband and wife, see ante §§ 153, 159 and notes.

See notes 88 Am. Dec. 54; 99 Am. Dec. 599; 9 Am. St. Rep. 323; 90 Am. St. Rep. 497.

10. EFFORTS TO SELL.—Fact that both husband and wife were anxious and willing to sell homestead, believing that it was bewitched, does not constitute abandonment.—*Dunn vs. Tozer*, 10 Cal. 167, 172.

11. EXCLUSIVE METHOD OF ABANDONMENT PRESCRIBED.—Homestead having once been regularly created out of parcel of land in accordance with statute it continues to be homestead until such character is put end to in mode pointed out by statute.—*Porter vs. Chapman*, 65 Cal. 365, 368, 4 Pac. Rep. 237. See *Mabury vs. Ruiz*, 58 Cal. 11, 15; *Bull vs. Coe* (Cal. Sept. 30, 1887), 15 Pac. Rep. 123, 125; *Graves vs. Baker*, 68 Cal. 133, 134, 8 Pac. Rep. 691; *Waggle vs. Worthy*, 74 Cal. 266, 268, 5 Am. St. Rep. 440, 15 Pac. Rep. 331; *Burkett vs. Burkett*, 78 Cal. 310, 312, 12 Am. St. Rep. 58, 20 Pac. Rep. 715, 3 L. R. A. 731; *Lubbock vs. McMann*, 82 Cal. 226, 229, 16 Am. St. Rep. 108, 22 Pac. Rep. 1145; *In re Estate Winslow*, 121 Cal. 92, 94, 53 Pac. Rep. 362; *Simonson vs. Burr*, 121 Cal. 532, 536, 54 Pac. Rep. 37; *Freiermuth vs. Steigleman*, 130 Cal. 392, 393, 30 Am. St. Rep. 138, 62 Pac. Rep. 615.

12. "GRANT" DEFINED.—To determine what constitutes grant reference must be had to § 1053, which declares that grant is transfer in writing, and § 1039, which declares that transfer is an act of parties or of law by which title of property is conveyed from one person to another.—*Suisun vs. Stark*, 106 Cal. 202, 205, 39 Pac. Rep. 531. See *Mabury vs. Ruiz*, 58 Cal. 11, 15.

See ante §§ 1039, 1053 and notes.

13. Mortgage does not operate as grant; therefore does not amount to abandonment of homestead.—*Kennedy vs. Gloster*, 98 Cal. 143, 147, 32 Pac. Rep. 941.

14. Same—Deed absolute in form intended as mortgage does not operate as abandonment.—*Mabury vs. Ruiz*, 58 Cal. 11, 15; *Bull vs. Coe* (Cal. Sept. 30, 1887), 15 Pac. Rep. 123, 125.

15. Quitclaim deed amounts to abandonment.—As quitclaim deed passes all title which grantor has, such deed from husband and wife is "grant," and operates as abandonment of their homestead right and conveys to grantee all interest they have in property.—*Faivre vs. Daley*, 93 Cal. 664, 669, 670, 29 Pac. Rep. 256 (citing as to effect of quitclaim deed *Lawrence vs. Ballou*, 37 Cal. 513).

16. HUSBAND'S POWER TO ABANDON.—Wife is bound by her marital obligations to live with her husband, and when he changes his place of residence she must accompany him; consequently by his act alone without her consent homestead may be abandoned.—*Brennan vs. Wallace*, 25 Cal. 103, 115. See *Guilod vs. Guilod*, 14 Cal. 506, 507, 76 Am. Dec. 440 (cases decided prior to adoption of code); *Mauldin vs. Cox*, 67 Cal. 387, 391, 7 Pac. Rep. 403.

17. LEASE BY HUSBAND AND WIFE of homestead property and purchase of other property for homestead purposes, does not show abandonment of homestead.—*Simonson vs. Burr*, 121 Cal. 532, 536, 54 Pac. Rep. 37.

18. JOINT CONVEYANCE by husband and

wife under this section operates as abandonment of homestead.—*Oaks vs. Oaks*, 94 Cal. 66, 68, 29 Pac. Rep. 330. See *In re Estate Winslow*, 121 Cal. 92, 94, 53 Pac. Rep. 362.

19. OBJECT OF STATUTE IN REQUIRING JOINDER OF HUSBAND AND WIFE.—See ante § 1242 and note.

20. REMOVAL FROM PREMISES—Does not constitute abandonment.—In case of homestead selected by husband and wife under provisions of Act 1860, subsequently embodied in code, only evidence of abandonment is declaration of abandonment or grant, etc., and removal from premises does not destroy homestead rights, although it was otherwise under Act 1851, which made homestead right depend upon occupancy of premises.—*Tipton vs. Martin*, 71 Cal. 325, 326-328, 12 Pac. Rep. 244. See *Taylor vs. Hargous*, 4 Cal. 268, 272, 273, 60 Am. Dec. 606; *Holden vs. Pinney*, 6 Cal. 234, 236; *Dunn vs. Tozer*, 10 Cal. 167, 172; *Porter vs. Chapman*, 65 Cal. 365, 4 Pac. Rep. 237; *Waggle vs. Worthy*, 74 Cal. 266, 268, 5 Am. St. Rep. 440, 15 Pac. Rep. 331; *Lubbock vs. McMann*, 82 Cal. 226, 229, 16 Am. St. Rep. 108, 22 Pac. Rep. 1145; *Simonson vs. Burr*, 121 Cal. 582, 586, 54 Pac. Rep. 37.

21. Compare: *Harper vs. Forbes*, 15 Cal. 202, 204; *Broadus vs. Nelson*, 16 Cal. 79, 81; *Brennan vs. Wallace*, 25 Cal. 108, 114, 116; *Laughlin vs. Wright*, 68 Cal. 113, 116 (to effect that removal from premises is evidence of intent to abandon, but that such evidence is not conclusive).

22. Exercise of citizenship in another state.—Where husband and wife remove to another state, but with intention to return, even though husband votes and runs for office in such other state, there is no abandonment.—*Porter vs. Chapman*, 65 Cal. 365, 366, 4 Pac. Rep. 237.

23. Sale by husband without joinder of wife.—Where husband and wife remove from premises after sale by husband in which wife did not join, such removal does not constitute abandonment of homestead, but is on contrary very case in which statute intends to provide.—*Taylor vs. Hargous*, 4 Cal. 268, 272, 273, 60 Am. Dec. 606.

24. Temporary removal.—Removal for temporary purposes, e. g. for repair or reconstruction of building upon premises, does not constitute abandonment of homestead, and premises remain subject to right of head of family to claim exemption.—*Guilod vs. Guilod*, 14 Cal. 506, 507, 508, 76 Am. Dec. 440. See *Harper vs. Forbes*, 15 Cal. 202, 204; *Tipton vs. Martin*, 71 Cal. 325, 326, 12 Pac. Rep. 244.

25. RETROACTIVE EFFECT OF ABANDONMENT.—Where homestead is abandoned, abandonment has no retroactive effect so as to give validity to prior ineffectual deed executed by husband alone.—*Gleason vs. Spray*, 81 Cal. 217, 221, 222, 15 Am. St. Rep. 47, 22 Pac. Rep. 551.

26. Separation of husband and wife—Effect upon homestead.—See ante § 159 and note.

§ 1244. SAME. [EFFECTUAL FROM WHEN.] A declaration of abandonment is effectual only from the time it is filed in the office in which the homestead was recorded.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Construction—Sections in *pari materia*.
3. Exclusive method of abandonment.
4. Mandatory provisions.

1. Applied, cited, construed, referred to, etc. in: *Porter vs. Chapman*, 65 Cal. 365, 368, 4 Pac. Rep. 237 (referred to); *Tipton vs. Martin*, 71 Cal. 325, 328, 12 Pac. Rep. 244 (referred to); *Gleason vs. Spray*, 81 Cal. 217, 221, 15 Am. St. Rep. 47, 22 Pac. Rep. 551 (cited); *In re Estate Lamb*, 95 Cal. 397, 405, 30 Pac. Rep. 568 (construed and applied); *McClure vs. McClure*, 100 Cal. 339, 342, 34 Pac. Rep. 823 (referred to); *Dickey vs. Gibson*, 118 Cal. 26, 31, 54 Am. St. Rep. 321, 45 Pac. Rep. 15 (referred to); *In re*

Estate Winslow, 121 Cal. 92, 94, 53 Pac. Rep. 362 (referred to); *Simonson vs. Burr*, 121 Cal. 582, 586, 54 Pac. Rep. 37 (referred to).

2. Construction—Sections in *pari materia*.—See ante § 1242 and note par. 10.

3. Exclusive method of abandonment is prescribed by this and next preceding section.—See ante § 1243 and note par. 11.

4. Mandatory provisions.—Homestead is not abandoned by agreement between husband and wife for its division between them unless such agreement is recorded, statute being mandatory.—*In re Estate Lamb*, 95 Cal. 397, 405, 30 Pac. Rep. 568.

§ 1245. PROCEEDINGS ON EXECUTION AGAINST HOMESTEAD. When an execution for the enforcement of a judgment obtained in a case not within the classes enumerated in section one thousand two hundred and forty-one is levied upon the homestead, the judgment creditor may apply to the superior court of the county in which the homestead is situated for the appointment of persons to appraise the value thereof.

History: Enacted March 21, 1872; amended April 6, 1880, Code Amdts. 1880 (C. C. pt.), p. 7; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 399, held unconstitutional, see history, § 4 ante.

1. Applied, cited, construed, referred to, etc.
2. Appeal from order.
3. Appraisal of homestead—Division of property when value excessive.
4. Encumbrance on premises not considered.
5. Exclusive mode prescribed.
6. Insolvency proceedings pending do not oust jurisdiction.
7. Jurisdiction dependent upon location of property.
8. Necessity to comply with statute.
9. Special proceeding.
10. Value—Limitation of.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Barrett vs. Sims*, 59 Cal. 615, 618, 619 (referred to); *Ham vs. Santa Rosa Bank*, 62 Cal. 125, 138, 45 Am. Rep. 654 (referred to); *Magee vs. McManus*, 70 Cal. 553, 559, 12 Pac. Rep. 451 (referred to); *Waggle vs. Worthy*, 74 Cal. 266, 268, 5 Am. St. Rep. 440, 15 Pac. Rep. 831 (cited); *Brown vs. Starr*, 75 Cal. 163, 164, 16 Pac. Rep. 760 (construed); *Stone vs. McCann*, 79 Cal. 460, 461, 21 Pac. Rep. 863 (referred to); *Brown vs. Starr*, 79 Cal. 608, 609, 12 Am. St. Rep. 130, 21 Pac. Rep. 973 (referred to); *Lubbock vs. McMann*, 82 Cal. 226, 230, 16 Am. St. Rep. 108, 22 Pac. Rep. 1145 (referred to); *Demartin vs. Demartin*, 85 Cal. 71, 74, 24 Pac. Rep. 594 (cited); *Sanders vs. Russell*, 86 Cal. 119, 120, 121, 21 Am. St. Rep. 26, 24 Pac. Rep. 852 (referred to); *Roth vs. Insley*, 86 Cal. 134, 141, 24 Pac. Rep. 853 (cited).

2. **Appeal from order**.—See par. 9 this note.

3. **Appraisal of homestead—Division of property when value excessive**.—See Code Civ. Proc. § 1479 and note.

4. **ENCUMBRANCE ON PREMISES NOT CONSIDERED**.—Fact that mortgage liens amounting to five thousand five hundred dollars rested upon homestead property is matter wholly immaterial. In fixing valuation of homestead premises, liens or encumbrances of any character are not element entering into

question.—In *re Estate Herbert*, 122 Cal. 329, 331, 54 Pac. Rep. 1109.

5. **EXCLUSIVE MODE PRESCRIBED**.—Excess in value, if there be any, is subject to claims of creditors, but it can be taken only in manner provided by statute for its admeasurement and application, to wit: in mode prescribed in §§ 1245, 1256.—*Barrett vs. Sims*, 59 Cal. 615, 618, 619; *Demartin vs. Demartin*, 85 Cal. 71, 74, 24 Pac. Rep. 594. See *Lubbock vs. McMann*, 82 Cal. 226, 230, 16 Am. St. Rep. 108, 22 Pac. Rep. 1145; *Roth vs. Insley*, 86 Cal. 134, 141, 24 Pac. Rep. 853.

6. **INSOLVENCY PROCEEDINGS PENDING DO NOT OUST JURISDICTION** of district court to make order setting aside homestead.—*Rix vs. McHenry*, 7 Cal. 89, 91, 92.

7. **JURISDICTION DEPENDENT UPON LOCATION OF PROPERTY**.—Application must be made to superior court of county in which property is situated, and is not necessarily to be made to court which rendered judgment.—*Brown vs. Starr*, 75 Cal. 163, 164, 16 Pac. Rep. 760.

8. **NECESSITY TO COMPLY WITH STATUTE**.—Homestead being exempt from execution if land is worth more than five thousand dollars, proceedings provided by §§ 1245-1256 should be taken, and an attempted sale without taking such proceedings is void.—*Waggle vs. Worthy*, 74 Cal. 266, 268, 5 Am. St. Rep. 440, 15 Pac. Rep. 831.

9. **SPECIAL PROCEEDING**.—Application of creditor under this section is not proceeding in action, but is independent or special proceeding, especially where homestead is situated in different county from that in which judgment was rendered, and therefore an order made in such proceeding is not appealable as special order made after final judgment.—*Brown vs. Starr*, 75 Cal. 163, 164-166, 16 Pac. Rep. 760.

10. **Value—Limitation of**.—See post § 1260 and note.

§ 1246. SAME. [APPLICATION, HOW MADE.] The application must be made upon a verified petition showing:

1. The fact that an execution has been levied upon the homestead;
2. The name of the claimant;
3. That the value of the homestead exceeds the amount of the homestead exemption.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Exclusive mode prescribed.
3. Petition—Requisites of.
4. Demurrer or answer to petition not allowed.

1. **Applied, cited, construed, referred to**, etc., in: *Ham vs. Santa Rosa Bank*, 62 Cal. 125, 138, 45 Am. Rep. 654 (cited in connection with other sections); *Stone vs. McCann*, 79 Cal. 460, 461, 21 Pac. Rep. 863 (referred to); *Lubbock vs. McMann*, 82 Cal. 226, 230, 16 Am. St. Rep. 108, 22 Pac. Rep. 1145 (cited in connection with other sections).

2. **Exclusive mode prescribed**—See ante § 1245 and note par. 5.

3. **Petition—Requisites of**.—If petition does not set forth facts required by statute, court shall refuse to entertain it, but if it does state requisite facts no plea should be allowed and court should proceed as directed by statute.—*Stone vs. McCann*, 79 Cal. 460, 461, 21 Pac. Rep. 863.

4. **Demurrer or answer to petition**.—Under this section and sections in pari materia no demurrer or answer to petition is authorized. If petition sets forth facts required by provisions of this section, and copy thereof, with notice and time of place and hearing, has been served upon homestead claimant at least two days before hearing, it is duty of judge upon

proof thereof to appoint appraisers. If petition does not state facts required by statute,

court should refuse to entertain it.—*Stone vs. McCann*, 79 Cal. 460, 461, 21 Pac. Rep. 863.

§ 1247. SAME. [PETITION, WHERE FILED.] The petition must be filed with the clerk of the superior court.

History: Enacted March 21, 1872; amended April 6, 1880, Code Amdts. 1880 (C. C. pt.), p. 8; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 399, held unconstitutional, see history, § 4 ante.

1. Applied, cited, construed, referred to, etc.
2. Exclusive mode prescribed.

Cal. 226, 230, 16 Am. St. Rep. 108, 22 Pac. Rep. 1145 (referred to in connection with other sections).

1. Applied, cited, construed, referred to, etc., in: *Ham vs. Santa Rosa Bank*, 62 Cal. 125, 133, 45 Am. Rep. 654 (referred to in connection with other sections); *Lubbock vs. McMann*, 82

2. Exclusive mode prescribed.—See ante § 1245 and note par. 5.

§ 1248. SAME. [NOTICE OF HEARING, SERVICE.] A copy of the petition, with a notice of the time and place of hearing, must be served upon the claimant, at least two days before the hearing.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 399, held unconstitutional, see history, § 4 ante.

1. Applied, cited, construed, referred to, etc.
2. Exclusive mode prescribed.
3. Hearing—Claimant is entitled to.

78 Pac. Rep. 1038 (cited with § 1249 in discussing appointment of appraisers).

2. Exclusive mode prescribed.—See ante § 1245 and note par. 5.

1. Applied, cited, construed, referred to, etc., in: *Ham vs. Santa Rosa Bank*, 62 Cal. 125, 133, 45 Am. Rep. 654 (referred to in connection with other sections); *Lubbock vs. McMann*, 82 Cal. 226, 230, 16 Am. St. Rep. 108, 22 Pac. Rep. 1145 (referred to in connection with other sections); *Harrier vs. Bassford*, 145 Cal. 529, 533,

3. Hearing—Claimant is entitled to.—Although it is not proper to frame and try issues as in action at law, homestead claimant is entitled to hearing, this being reason why notice is required.—*Stone vs. McCann*, 79 Cal. 460, 461, 462, 21 Pac. Rep. 863.

§ 1249. SAME. [APPOINTING APPRAISERS.] At the hearing the judge may, upon proof of the service of a copy of the petition and notice, and of the facts stated in the petition, appoint three disinterested residents of the county to appraise the value of the homestead.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 400, held unconstitutional, see history, § 4 ante.

1. Applied, cited, construed, referred to, etc.
2. Exclusive mode prescribed.
3. Mandamus to compel hearing of petition.
4. Vacancy among appraisers may be filled by court.

2. Exclusive mode prescribed.—See ante § 1245 and note par. 5.

3. Mandamus to compel hearing of petition will not be allowed where it appears that the court did not abuse its discretion in continuing hearing five days.—*Stone vs. McCann*, 79 Cal. 460, 462, 463, 21 Pac. Rep. 863.

1. Applied, cited, construed, referred to, etc., in: *Ham vs. Santa Rosa Bank*, 62 Cal. 125, 133, 45 Am. Rep. 654 (referred to in connection with other sections); *Lubbock vs. McMann*, 82 Cal. 226, 230, 16 Am. St. Rep. 108, 22 Pac. Rep. 1145 (referred to in connection with other sections); *Demartin vs. Demartin*, 85 Cal. 71, 74, 24 Pac. Rep. 594 (referred to in connection with other sections); *Harrier vs. Bassford*, 145 Cal. 529, 533, 78 Pac. Rep. 1038 (construed).

4. Vacancy may be filled by court.—Where absence of one of appraisers from county causes vacancy in board of appraisers, court has authority to appoint another person without further notice, although either party would have right to move court to vacate such appointment, upon reasonable showing that such appointee was unfit, incompetent, or disqualified.—*Harrier vs. Bassford*, 145 Cal. 529, 533, 78 Pac. Rep. 1038.

§ 1250. SAME. [APPRAISERS TO BE SWORN.] The persons appointed, before entering upon the performance of their duties, must take an oath to faithfully perform the same.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Exclusive mode prescribed.

1. Applied, cited, construed, referred to, etc., in: *Ham vs. Santa Rosa Bank*, 62 Cal. 125, 133, 45 Am. Rep. 654 (referred to in connection with

other sections); *Lubbock vs. McMann*, 32 Cal. 226, 230, 16 Am. St. Rep. 103, 22 Pac. Rep. 1145 (referred to in connection with other sections).

2. Exclusive mode prescribed.—See ante § 1245 and note par. 5.

§ 1251. SAME. [DETERMINING VALUE AND DIVISIBILITY.] They must view the premises and appraise the value thereof, and if the appraised value exceeds the homestead exemption they must determine whether the land claimed can be divided without material injury.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Divisibility of property—Question for appraisers.
3. Exclusive mode prescribed.
4. Life tenant set off portion in fee.

1. Applied, cited, construed, referred to, etc., in: *Ham vs. Santa Rosa Bank*, 62 Cal. 125, 133, 45 Am. Rep. 654 (referred to in connection with other sections); *Brown vs. Starr*, 79 Cal. 608, 610, 12 Am. St. Rep. 180, 21 Pac. Rep. 973 (construed and applied with other sections); *Lubbock vs. McMann*, 32 Cal. 226, 230, 16 Am. St. Rep. 103, 22 Pac. Rep. 1145 (referred to in connection with other sections).

2. Divisibility of property—Question for ap-

praisers.—Question whether land can be divided without material injury is question for appraisers.—*Brown vs. Starr*, 79 Cal. 608, 610, 12 Am. St. Rep. 180, 21 Pac. Rep. 973.

3. Exclusive mode prescribed.—See ante § 1245 and note par. 5.

4. Life tenant set off portion in fee.—Where homestead claimant has life estate in property which is of value of \$15,000 and it can be easily divided, it is proper to set off as homestead part of land, including dwelling-house of claimant and most of his improvements, same being of value of \$5,000.—*Brown vs. Starr*, 79 Cal. 608, 610, 611, 12 Am. St. Rep. 180, 21 Pac. Rep. 973.

§ 1252. SAME. [REPORT OF APPRAISERS, CONTENTS.] Within fifteen days after their appointment they must make to the judge a report in writing, which report must show the appraised value and their determination upon the matter of a division of the land claimed.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 400, held unconstitutional, see history, § 4 ante.

1. Applied, cited, construed, referred to, etc.
2. Exclusive mode prescribed.
3. Hearing upon report of appraisers.
4. Same—Discretion of court as to fixing time.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Ham vs. Santa Rosa Bank*, 62 Cal. 125, 133, 45 Am. Rep. 654 (referred to in connection with other sections); *Lubbock vs. McMann*, 32 Cal. 226, 230, 16 Am. St. Rep. 103, 22 Pac. Rep. 1145 (referred to in connection with other sections).

2. EXCLUSIVE MODE PRESCRIBED.—See ante § 1245 and note par. 5.

3. HEARING UPON REPORT OF AP-

PRASERS.—When report of appraisers is filed, time should be fixed for hearing, due notice of hearing should be given to claimant of homestead, and questions whether homestead exceeds in value sum of five thousand dollars and whether it may be divided without material injury should be determined upon evidence produced by parties.—*Stone vs. McCann*, 79 Cal. 460, 462, 21 Pac. Rep. 862.

4. Discretion of court as to fixing time.—Court is clothed with discretion to allow reasonable time in which to prepare for such hearing.—*Stone vs. McCann*, 79 Cal. 460, 462, 21 Pac. Rep. 862 (where it was held that five days' time was not unreasonable).

§ 1253. SAME. [SETTING OFF HOMESTEAD EXEMPTION.] If, from the report, it appears to the judge that the land claimed can be divided without material injury, he must, by an order, direct the appraisers to set off to the claimant so much of the land, including the residence, as will amount in value to the homestead exemption, and the execution may be enforced against the remainder of the land.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 400, held unconstitutional, see history, § 4 ante.

1. Applied, cited, construed, referred to, etc.
2. Appeal not allowed from order.
3. Divisibility of property.
4. Exclusive mode prescribed.
5. Title of homesteader immaterial.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc.**, in: Babcock vs. Gibbs, 52 Cal. 629, 630 (citing this section erroneously instead of § 1262); Ham vs. Santa Rosa Bank, 62 Cal. 125, 138, 45 Am. Rep. 654 (referred to in connection with other sections); Brown vs. Starr, 75 Cal. 163, 165, 16 Pac. Rep. 760 (cited), 79 Cal. 608, 610, 12 Am. St. Rep. 180, 21 Pac. Rep. 973 (cited); Lubbock vs. McMann, 82 Cal. 226, 230, 16 Am. St. Rep. 108, 22 Pac. Rep. 1145 (referred to in connection with other sections).

2. **APPEAL NOT ALLOWED FROM ORDER** directing appraisers to proceed to make division and denying motion to remand for further report, as application of creditor "to superior court of county in which property is situated" is not proceeding in action, but is special proceeding, at least where homestead is situated in different county from that in which judgment was rendered, and statute does not mean that such applications are held to be of different natures according to place in which they may happen to be made; nor is

either of such orders final judgment in special proceedings.—Brown vs. Starr, 75 Cal. 163, 165, 16 Pac. Rep. 760.

3. **Divisibility of property.**—See ante § 1251 and note para. 2, 4.

4. **Exclusive mode prescribed.**—See ante § 1245 and note para. 5.

5. **TITLE OF HOMESTEAD CLAIMANT IMMATERIAL**, but it is "the land, including the residence, that 'must amount in value,' etc. There is no provision of code on subject of homestead which makes any allusion to title or kind of tenure by which claimant holds the property, or requires any appraisalment of interest which he has therein. If he resides on land, he may have homestead on so much of it as does not exceed in value five thousand dollars, against any person, except one who has better title, no matter what his own title is; and when execution creditor claims that he is holding as homestead more than he is entitled to, that question must be determined by value of land."—Brown vs. Starr, 75 Cal. 608, 610, 12 Am. St. Rep. 180, 21 Pac. Rep. 973.

As to title of homesteader, see ante § 1233 and note.

§ 1254. SAME. [ORDER DIRECTING SALE, WHEN.] If, from the report, it appears to the judge that the land claimed exceeds in value the amount of the homestead exemption, and that it cannot be divided, he must make an order directing its sale under the execution.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 400, held unconstitutional, see history, § 4 ante.

1. Applied, cited, construed, referred to, etc.
2. Exclusive mode prescribed.

Rep. 363 (referred to and discussed in connection with other sections.).

1. Applied, cited, construed, referred to, etc., in: Stone vs. McCann, 79 Cal. 460, 461, 21 Pac.

2. **Exclusive mode prescribed.**—See ante § 1245 and note para. 5.

§ 1255. SAME. [WHAT BID MAY BE RECEIVED.] At such sale no bid must be received, unless it exceeds the amount of the homestead exemption.

History: Enacted March 21, 1872.

Exclusive mode prescribed.—See ante § 1245 and note para. 5.

§ 1256. SAME. [APPLICATION OF PROCEEDS OF SALE.] If the sale is made, the proceeds thereof, to the amount of the homestead exemption, must be paid to the claimant, and the balance applied to the satisfaction of the execution.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 400, held unconstitutional, see history, § 4 ante.

1. Applied, cited, construed, referred to, etc.
2. Exclusive mode prescribed.

Pac. Rep. 594 (referred to and discussed in connection with § 1260).

1. Applied, cited, construed, referred to, etc., in: Demartin vs. Demartin, 35 Cal. 71, 74, 24

2. **Exclusive mode prescribed.**—See ante § 1245 and note para. 5.

§ 1257. AFTER SALE, MONEY EQUAL TO HOMESTEAD EXEMPTION PROTECTED. The money paid to the claimant is entitled, for the period of six

months thereafter, to the same protection against legal process and the voluntary disposition of the husband, which the law gives to the homestead.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 230.

§ 1258. **COMPENSATION OF APPRAISERS.** The court must fix the compensation of the appraisers, not to exceed five dollars per day each for the time actually engaged.

History: Enacted March 21, 1872.

§ 1259. **COSTS. [HOW PAID AND COLLECTED.]** The execution creditor must pay the costs of these proceedings in the first instance; but in the cases provided for in sections twelve hundred and fifty-three and twelve hundred and fifty-four the amount so paid must be added as costs on execution, and collected accordingly.

History: Enacted March 21, 1872.

Applied, cited, construed, referred to, etc., vs. McMann, 82 Cal. 226, 230, 16 Am. St. Rep. 103, 22 Pac. Rep. 1145 (referred to).
in: Ham vs. Santa Rosa Bank, 62 Cal. 125, 138, 45 Am. Rep. 654 (referred to); Lubbock

§ 1260. **WHO MAY SELECT HOMESTEAD, VALUE OF.** Homesteads may be selected and claimed:

1. Of not exceeding five thousand dollars in value by any head of a family;
2. Of not exceeding one thousand dollars in value by any other person.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Actual value is criterion.
3. Constitution does not limit value.
4. Evidence of value—Is necessary.
5. Same—Presumption not indulged.
6. Excess invalidates homestead pro tanto.
7. Increase of value diminishes area.
8. Limit of amount fixed.
9. Mortgage not element in ascertaining value.
10. Quantity immaterial if value not exceeded.
11. Several lots not exceeding statutory value.
12. "Value" and "estimate of value" distinguished.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc.,** in: Ham vs. Santa Rosa Bank, 62 Cal. 125, 135, 136-138, 45 Am. Rep. 654 (construed); In re Estate Burdick, 76 Cal. 639, 644, 13 Pac. Rep. 805 (construed); Demartin vs. Demartin, 85 Cal. 71, 74, 24 Pac. Rep. 594 (cited); Roth vs. Insley, 86 Cal. 134, 141, 24 Pac. Rep. 353 (referred to); Security L. & T. Co. vs. Kauffman, 108 Cal. 214, 219, 41 Pac. Rep. 467 (referred to); Simonson vs. Burr, 121 Cal. 582, 585, 54 Pac. Rep. 87 (referred to); Reid vs. Englehart-Davidson Merc. Co., 126 Cal. 527, 528, 77 Am. St. Rep. 206, 58 Pac. Rep. 1063 (referred to).

2. **ACTUAL VALUE IS CRITERION.**—Right of exemption depends on actual value, and not on declarant's estimate of value.—Ham vs. Santa Rosa Bank, 62 Cal. 125, 136, 45 Am. Rep. 654; King vs. Gotz, 70 Cal. 236, 242, 11 Pac. Rep. 656. See Tiernan vs. His Creditors, 62 Cal. 286; Southwick vs. Davis, 78 Cal. 504, 21 Pac. Rep. 121; Lubbock vs. McMann, 82 Cal. 226, 230, 16 Am. St. Rep. 103, 22 Pac. Rep. 1145.

3. **CONSTITUTION DOES NOT LIMIT VALUE,** but it leaves it to the legislature to

determine what portion of property shall be exempt.—Lubbock vs. McMann, 82 Cal. 226, 230, 16 Am. St. Rep. 103, 22 Pac. Rep. 1145.

4. **EVIDENCE OF VALUE—Is necessary.**—Essential thing to be established by widow in making proof of homestead is value of premises.—In re Estate Delaney, 37 Cal. 176, 182.

5. **Presumption as to value not indulged.**—Court does not indulge presumption that value of property remains unchanged during series of years, and where widow asserts right to homestead, in absence of proof upon question of value it is impossible for court to determine what should be set off to her.—In re Estate Delaney, 37 Cal. 176, 182.

6. **EXCESS IN VALUE DOES NOT INVALIDATE SELECTION,** if it is otherwise valid under §§ 1262, 1263, but "excess, though used in fact as homestead, is always subject to claims of creditors of owner," and such claims are enforceable in mode prescribed by §§ 1245-1259.—Ham vs. Santa Rosa Bank, 62 Cal. 125, 138, 45 Am. Rep. 654; Magee vs. McManus, 70 Cal. 553, 559, 12 Pac. Rep. 451; Lubbock vs. McMann, 82 Cal. 226, 230, 16 Am. St. Rep. 103, 22 Pac. Rep. 1145; Demartin vs. Demartin, 85 Cal. 71, 74, 24 Pac. Rep. 594.

See ante §§ 1245-1259 and notes.

7. **INCREASE OF VALUE WORKS DIMINUTION OF AREA.**—At its inception it is limited to \$5,000 in value, and when property is enhanced in value so that it exceeds statutory limit, excess does not constitute part of statutory homestead. After premises are worth \$5,000, every increase of value works reduction in area of homestead, until point is reached when it cannot be further cut down

and leave homestead of value of \$5,000 without material injury, and after that point is reached no part of premises constitutes statutory homestead, but value or proceeds of premises, to extent of \$5,000, has benefit of exemption from forced sale, etc.—In re Estate Delaney, 37 Cal. 176, 180. See Ham vs. Santa Rosa Bank, 62 Cal. 125, 139, 45 Am. Rep. 654.

8. **LIMIT OF AMOUNT FIXED.**—Sum of five thousand dollars allowed in case of any head of family who is married cannot be exceeded.—In re Estate Burns, 54 Cal. 223, 228; In re Estate Burdick, 76 Cal. 639, 644, 18 Pac. Rep. 805. See Lubbock vs. McMann, 82 Cal. 226, 229, 280, 16 Am. St. Rep. 108, 22 Pac. Rep. 1145.

See Code Civ. Proc. § 1475 and note; and consult **KERR'S SYNTHETICAL INDEX** to this work.

9. **MORTGAGE IS NOT ELEMENT IN ASCERTAINING VALUE.**—Existence of mortgage

on premises is no element in ascertaining property to be set apart as homestead or of its value.—Tiernan vs. His Creditors, 62 Cal. 286, 289.

10. **QUANTITY OF LAND IMMATERIAL IF VALUE NOT EXCEEDED.**—Only limitation is that homestead shall not exceed \$5,000 in value, and it is immaterial how great may be the extent of its area, provided it is used chiefly as residence, and does not exceed statutory amount in value.—Gaylord vs. Place, 98 Cal. 472, 478, 33 Pac. Rep. 484.

11. **Several lots not exceeding statutory value.**—See ante § 1238 and note par. 19.

12. **"VALUE" AS USED IN THIS SECTION** refers to value in opinion of other persons, while "estimate of value," in § 1263 post, refers to estimate of value in opinion of declarant.—Ham vs. Santa Rosa Bank, 62 Cal. 125, 136, 45 Am. Rep. 654.

See post § 1263 and note.

§ 1261. **HEAD OF A FAMILY DEFINED.** The phrase "head of a family," as used in this title, includes within its meaning:

1. The husband, when the claimant is a married person.
2. Every person who has residing on the premises with him or her, and under his or her care and maintenance, either: (1) His or her minor child, or minor grandchild, or the minor child of his or her deceased wife or husband; (2) a minor brother or sister, or the minor child of a deceased brother or sister.
3. A father, mother, grandfather, or grandmother.
4. The father, mother, grandfather, or grandmother of a deceased husband or wife.
5. An unmarried sister, or any other of the relatives mentioned in this section, who have attained the age of majority, and are unable to take care of or support themselves.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 230; March 9, 1893, Stats. and Amdts. 1893, pp. 123, 124. In force March 9, 1893.

1. Applied, cited, construed, referred to, etc.
2. Bastardy—Mother of bastard.
3. Claimant must be head of family.
4. Husband when he and wife make declaration.
5. Married person—Head of family need not be.
6. Son with whom mother resides.
7. Same—Effect of death of mother.
8. Statement in declaration as to being head of family.
9. Others than heads of families—Mode of selection by.
10. Widower with children.
11. Wife has no right independent of husband.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO,** etc., in: Roth vs. Insley, 86 Cal. 134, 138, 141, 24 Pac. Rep. 353 (construed and applied); Security L. & T. Co. vs. Kauffman, 108 Cal. 214, 219, 41 Pac. Rep. 467 (referred to); Robinson vs. Dougherty, 118 Cal. 299, 301, 50 Pac. Rep. 649 (referred to); Simonson vs. Burr, 121 Cal. 582, 585, 54 Pac. Rep. 87 (construed and applied).

2. **BASTARDY**—Mother of bastard who is unmarried is head of family within meaning of statute.—Ellis vs. White, 47 Cal. 73, 75, 76.

3. **CLAIMANT OF HOMESTEAD MUST BE HEAD OF FAMILY.**—Primary object of law is protection of family, and none but head of family is entitled to claim homestead.—Revalk vs. Kraemer, 8 Cal. 66, 71, 68 Am. Dec. 304. See McQuade vs. Whaley, 31 Cal. 526, 535.

4. **HUSBAND AND WIFE BEING DECLARANTS,** husband is "head of family."—Simonson vs. Burr, 121 Cal. 582, 585, 54 Pac. Rep. 87.

5. **MARRIED PERSON**—Head of family need not be.—It is not necessary that head of family should be married person.—Revalk vs. Kraemer, 8 Cal. 66, 71, 68 Am. Dec. 304; McQuade vs. Whaley, 31 Cal. 526, 535.

See pars. 2, 6 this note.

6. **SON WITH WHOM MOTHER RESIDES** under his care and maintenance is head of family under subd. 3 of this section.—Roth vs. Insley, 86 Cal. 134, 138, 24 Pac. Rep. 353.

7. **Death of mother** does not end or put stop to homestead exempted in name of son as head of family.—Roth vs. Insley, 86 Cal. 134, 138, 24 Pac. Rep. 353. See Robinson vs. Dougherty, 118 Cal. 299, 301, 50 Pac. Rep. 649.

8. Statement in declaration as to declarant being head of family.—See post § 1263 and note.

9. Others than heads of families—Mode of selection by.—See post § 1266 and note.

10. WIDOWER WITH CHILDREN, but

with no other claim to be head of family, ceases to occupy such position when his children become of age.—*Santa Cruz Bank vs. Cooper*, 56 Cal. 339, 341.

11. Wife has no right independent of husband.—See ante § 1237 and note.

CHAPTER II.

HOMESTEAD OF THE HEAD OF A FAMILY.

§ 1262. Mode of selection.

§ 1263. Declaration of homestead. [Must contain what.]

§ 1264. Declaration must be recorded.

§ 1265. Tenure by which homestead is held.

§ 1262. **MODE OF SELECTION.** In order to select a homestead, the husband or other head of a family, or in case the husband has not made such selection, the wife, must execute and acknowledge, in the same manner as a grant of real property is acknowledged, a declaration of homestead, and file the same for record.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 230.

1. Applied, cited, construed, referred to, etc.
2. Acknowledgment.
3. Same—Certificate of acknowledgment.
4. Same—Same—Same—Declaration is not aided by certificate.
- 5, 6. Same—Same—Form of certificate.
- 7, 8. Same—Examination of married woman apart from husband.
- 9, 10. Same—Officer authorized to take acknowledgment.
11. Action against claimant is no bar to selection.
12. Declaration—Executed as grant.
- 13, 14. Same—Construction.
- 15, 16. Same—Effect of declaration.
17. Same—Oath.
- 18, 19. Selection must be made pursuant to statute.
20. Same—Time of making selection.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Ham vs. Santa Rosa Bank*, 62 Cal. 125, 134 (referred to), 137 (construed), 138 (construed and applied), 45 Am. Rep. 654; *Jones vs. Waddy*, 66 Cal. 457, 458, 6 Pac. Rep. 92 (referred to); *Beck vs. Soward*, 76 Cal. 527, 529, 18 Pac. Rep. 650 (applied); *In re Burdick*, 76 Cal. 639, 644, 18 Pac. Rep. 805 (cited dis. op.); *Farley vs. Hopkins*, 79 Cal. 203, 205, 21 Pac. Rep. 737 (construed and applied); *Kennedy vs. Gloster*, 98 Cal. 143, 143, 32 Pac. Rep. 941 (cited); *Security L. & T. Co. vs. Kauffman*, 108 Cal. 214, 219, 41 Pac. Rep. 467 (applied and cited); *Rosenthal vs. Merced Bank*, 110 Cal. 198, 203, 42 Pac. Rep. 640 (cited); *Simonson vs. Burr*, 121 Cal. 532, 535, 54 Pac. Rep. 87 (referred to); *Reid vs. Englehart-Davidson Merc. Co.*, 126 Cal. 527, 528, 77 Am. St. Rep. 206, 58 Pac. Rep. 1063 (referred to).

2. **ACKNOWLEDGMENT** must be in same manner as grant of real property is acknowledged.—*Beck vs. Soward*, 76 Cal. 527, 529, 18 Pac. Rep. 650.

3. Certificate of acknowledgment must be made in substantial conformity to require-

ments of statute, otherwise declaration of homestead will not be entitled to record.—*Kennedy vs. Gloster*, 98 Cal. 143, 143, 32 Pac. Rep. 941.

4. Same—Declaration is not aided by certificate, as certificate of acknowledgment is no part of declaration.—*Reid vs. Englehart-Davidson Merc. Co.*, 126 Cal. 527, 530, 77 Am. St. Rep. 206, 58 Pac. Rep. 1063.

5. Same—Form of certificate as in grants of land is sufficient, and it is immaterial that it names claimant as person known to officer, instead of reciting that person making acknowledgment is known to officer to be same person "whose name is subscribed to within instrument."—*Southwick vs. Davis*, 78 Cal. 504, 509, 21 Pac. Rep. 121. See *Quackenbush vs. Reed*, 102 Cal. 493, 497, 37 Pac. Rep. 755.

6. Same—Official character of officer may be shown by recital in certificate that he is county clerk, and by his appending to his signature words "County Clerk, El Dorado County."—*Southwick vs. Davis*, 78 Cal. 504, 509, 21 Pac. Rep. 121.

7. Examination of married woman apart from husband was required by § 1186.—*Beck vs. Soward*, 76 Cal. 527, 530, 18 Pac. Rep. 650; *Kennedy vs. Gloster*, 98 Cal. 143, 143, 32 Pac. Rep. 941.

8. Same—Separate examination of wife is unnecessary, unless required by statute.—*Clements vs. Stanton*, 47 Cal. 60, 61. See *Beck vs. Soward*, 76 Cal. 527, 529, 18 Pac. Rep. 650.

9. Officer authorized to take acknowledgment may be court commissioner under Act April 1, 1880, amending Code Civ. Proc. § 259.—*Malone vs. Bosch*, 104 Cal. 680, 682, 33 Pac. Rep. 516.

10. Same—Deputy county clerk may take acknowledgment.—*Emmal vs. Webb*, 36 Cal. 197, 203. See *Touchard vs. Crow*, 20 Cal. 150, 157, 31 Am. Dec. 108.

11. **ACTION AGAINST CLAIMANT IS NO BAR TO SELECTION**, and homestead selected pending litigation against him is not invalid

as being in fraud of creditors.—*Fitzell vs. Leaky*, 72 Cal. 477, 483, 14 Pac. Rep. 198; *Simmonson vs. Burr*, 121 Cal. 532, 536, 54 Pac. Rep. 87. See *Beaton vs. Reid*, 111 Cal. 484, 487, 44 Pac. Rep. 167.

12. **DECLARATION** must be executed in same manner as grant of real property is executed.—*Beck vs. Soward*, 76 Cal. 527, 529, 18 Pac. Rep. 650.

13. **Construction**—Declaration is not a "conveyance," as that word is generally used in code.—*Ontario St. Bank vs. Gerry*, 91 Cal. 94, 97, 27 Pac. Rep. 531.

14. **Same**—Homesteader is not a purchaser, within doctrine that unrecorded deeds and mortgages are good except as against subsequent purchasers for valuable consideration.—*Ontario St. Bank vs. Gerry*, 91 Cal. 94, 97, 27 Pac. Rep. 531.

15. **Effect of declaration** is not to create homestead regardless of use of premises.—*Gregg vs. Bostwick*, 33 Cal. 220, 229, 91 Am. Dec. 637.

16. **Same**—Declaration constitutes public record of what is in fact homestead, and is public declaration of intention to secure benefit of statute.—*Gregg vs. Bostwick*, 33 Cal. 220, 229, 91 Am. Dec. 637.

17. **OATH** is not required.—*Ham vs. Santa Rosa Bank*, 62 Cal. 125, 135, 45 Am. Rep. 654.

18. **SELECTION MUST BE MADE PURSUANT TO STATUTE**, and the formalities and conditions prescribed will not be disregarded by courts.—*Rosenthal vs. Merced Bank*, 110 Cal. 198, 203, 42 Pac. Rep. 640; *Reid vs. Englehart-Davidson Merc. Co.*, 126 Cal. 527, 529, 77 Am. St. Rep. 206, 58 Pac. Rep. 1063.

19. **Mere residence is insufficient**, and in addition to residence there must be selection required by statute.—*Bank of Woodland vs. Oberhaus*, 125 Cal. 320, 325, 57 Pac. Rep. 1070.

20. **Time of making selection** must be such as is prescribed by statute; and under Act 1862, § 6, requiring claimant of homestead under Act 1851 to make declaration on or before June 1, 1862, failure to make such statutory time was held to be fatal.—In re *Estate Reed*, 23 Cal. 410, 412; *Noble vs. Hook*, 24 Cal. 638, 639. See *Riley vs. Pehl*, 23 Cal. 71, 74.

As to residence, necessity for, and what constitutes, see ante § 1237 and note.

As to recording, see post § 1264 and note.

As to selection by wife, see ante §§ 1233, 1239 and notes.

As to what declaration must contain, see post § 1263 and note.

As to who is "head of family," see ante § 1261 and note.

§ 1263. **DECLARATION OF HOMESTEAD. [MUST CONTAIN WHAT.]** The declaration of homestead must contain:

1. A statement, showing that the person making it is the head of a family, and, if the claimant is married, the name of the spouse; or, when the declaration is made by the wife, showing that her husband has not made such declaration, and that she therefore makes the declaration for their joint benefit;

2. A statement that the person making it is residing on the premises, and claims them as a homestead;

3. A description of the premises;

4. An estimate of their actual cash value.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 231; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 400, held unconstitutional, see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXLVII, p. 400.

I. In General.

1. Applied, cited, construed, referred to, etc.
2. Compliance with statute—Is necessary.
3. Same—Substantial compliance sufficient.
4. Construction of declaration.
- 5, 6. Evidence—Necessity to prove recitals—Value of property.

II. Head of Family and Wife as Declarants.

7. Head of family—Declaration must show that declarant is.
- 8-10. Same—Form of statement.
11. Joinder of wife with husband unnecessary.
- 12, 13. Wife's declaration—Requisite statements.
14. Same—Statute not retroactive.

III. Claim of Homestead and Residence on Premises.

15. Claim of homestead—Must be stated.

16. Same—Statement by husband.

17, 18. Residence on premises—Must be stated.

19. Same—Husband's and wife's statement as to.

20. Same—Portion of land claimed but not resided on not exempt.

IV. Description of Premises.

21. Clear designation sufficient.

22. Mistake in description fatal.

23-25. Natural objects—Description by.

26. Reference to map and deed permissible.

V. Estimate of "Actual Cash Value."

27. Definition of "actual cash value."

28. Estimate of cash value necessary.

29-32. Form of statement.

33. No limit as to quantity or value.

34. Perjury not incurred by false statement of value.

I. IN GENERAL.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Babcock vs. Gibbs*, 52 Cal. 629, 630 (§1253 erroneously cited instead of §1263); *Dorn vs. Howe*, 52 Cal. 630, 635 (cited); *Ashley vs. Olmstead*, 54 Cal. 616, 618 (cited), 620 (construed); *Ames vs. Eldred*, 55 Cal. 186 (construed and applied); *Aucker vs. McCoy*, 56 Cal. 524, 527 (applied); *Ham vs. Santa Rosa Bank*, 62 Cal. 125, 135 (cited), 136 (cited in connection with §1260), 137 (cited in connection with §1262), 138 (construed), 45 Am. Rep. 654; *Read vs. Rahm*, 65 Cal. 343, 4 Pac. Rep. 111 (construed and applied); *Jones vs. Waddy*, 66 Cal. 457, 458, 6 Pac. Rep. 92 (construed and applied); *Skinner vs. Hall*, 69 Cal. 195, 198, 10 Pac. Rep. 406 (cited); *In re Estate Crowey*, 71 Cal. 300, 303, 304, 12 Pac. Rep. 230 (construed and applied); *Schuyler vs. Broughton*, 76 Cal. 524, 525, 18 Pac. Rep. 436 (cited); *In re Estate Burdick*, 76 Cal. 639, 644, 18 Pac. Rep. 805 (referred to in dis. op.); *Farley vs. Hopkins*, 79 Cal. 203, 205, 21 Pac. Rep. 737 (construed); *Lubbock vs. McMann*, 82 Cal. 226, 228, 16 Am. St. Rep. 108, 23 Pac. Rep. 1145 (cited); *Knock vs. Bunnell* (Cal. July 1, 1889), 21 Pac. Rep. 961 (construed); *Bunnell vs. Stockton*, 83 Cal. 319, 320, 23 Pac. Rep. 301 (referred to); *Tromans vs. Mahlman*, 92 Cal. 1, 4, 27 Pac. Rep. 1094 (referred to); *Kennedy vs. Gloster*, 98 Cal. 143, 148, 33 Pac. Rep. 941 (referred to); *Security L. & T. Co. vs. Kauffman*, 108 Cal. 214, 219, 41 Pac. Rep. 467 (cited); *Rosenthal vs. Merced Bank*, 110 Cal. 198, 203, 42 Pac. Rep. 640 (cited in connection with other sections); *Simonson vs. Burr*, 121 Cal. 582, 585, 54 Pac. Rep. 87 (applied); *Cunha vs. Hughes*, 122 Cal. 111, 113, 68 Am. St. Rep. 27, 54 Pac. Rep. 535 (construed and applied); *Reid vs. Englehart-Davidson Merc. Co.*, 126 Cal. 527, 528, 77 Am. St. Rep. 206, 58 Pac. Rep. 1063 (construed and applied); *Harris vs. Duarte*, 141 Cal. 497, 500, 70 Pac. Rep. 298 (cited).

2. **COMPLIANCE WITH STATUTE**—Is necessary.—Unless declaration conforms to statute, no homestead is created.—*Boreham vs. Byrne*, 83 Cal. 23, 27, 23 Pac. Rep. 212; *Rosenthal vs. Merced Bank*, 110 Cal. 198, 203, 42 Pac. Rep. 640.

See *Rich vs. Tubbs*, 41 Cal. 36.

3. **Substantial compliance with statute** is sufficient to create and establish valid homestead upon premises described in declaration.—*Simonson vs. Burr*, 121 Cal. 582, 585, 54 Pac. Rep. 87.

4. **CONSTRUCTION OF DECLARATION**—*Maxim "ut res magis valeat quam pereat"* applies in construing declaration of homestead.—*Ornbaum vs. His Creditors*, 61 Cal. 455, 459.

5. **EVIDENCE OF RECITALS IN DECLARATION IS NECESSARY**, as against third persons, as it is mere ex parte statement not under oath.—*In re Estate Delaney*, 37 Cal. 176, 181; *Apprate vs. Faure*, 121 Cal. 466, 467, 53 Pac. Rep. 917.

6. **Value of property must be proved by evidence allunde**, and not by statements in declaration.—*In re Estate Delaney*, 37 Cal. 176, 181.

II. HEAD OF FAMILY AND WIFE AS DECLARANTS.

7. **HEAD OF FAMILY**.—Declaration must show that claimant is head of family; otherwise declaration will be invalid to create homestead.—*Reid vs. Englehart-Davidson Merc. Co.*, 126 Cal. 527, 529, 77 Am. St. Rep. 206, 58 Pac. Rep. 1063. See *Ashley vs. Olmstead*, 54 Cal. 616.

8. **Form of statement may be in so many words** that declarant is the head of family, without stating facts or going into particulars.—*Jones vs. Waddy*, 66 Cal. 457, 458, 6 Pac. Rep. 92; *Security L. & T. Co. vs. Kauffman*, 108 Cal. 214, 219, 41 Pac. Rep. 467.

9. **Statement of declarant as to being married is insufficient**; there is nothing to show sex of declarant, and name of declarant appears only in signature to declaration, but nothing to show whether declarant is husband or wife.—*Reid vs. Englehart-Davidson Merc. Co.*, 126 Cal. 527, 529, 77 Am. St. Rep. 206, 58 Pac. Rep. 1063.

10. **Use of masculine pronoun in acknowledgment not sufficient** to cure failure of declaration to show that declarant is head of a family, because acknowledgment is not part of declaration.—*Reid vs. Englehart-Davidson Merc. Co.*, 126 Cal. 527, 530, 77 Am. St. Rep. 206, 58 Pac. Rep. 1063.

11. **JOINDER OF WIFE WITH HUSBAND IS UNNECESSARY**; husband alone is authorized to make declaration, even though premises are community property, and fact that wife does not join him in making declaration does not in any way impair or affect its validity.—*Simonson vs. Burr*, 121 Cal. 582, 585, 54 Pac. Rep. 87.

12. **WIFE'S DECLARATION**—Must show that husband has not made such declaration, and that she therefore makes declaration for their joint benefit, and unless declaration contains this statement it is ineffective to impress land with incidents of homestead so as to give her right to survivorship.—*Booth vs. Galt*, 58 Cal. 254; *Cunha vs. Hughes*, 122 Cal. 111, 113, 68 Am. St. Rep. 27, 54 Pac. Rep. 535.

13. **REASON FOR WIFE MAKING DECLARATION NEED NOT BE STATED**, but it is sufficient for her to say that her husband has not made any and that she has.—*Farley vs. Hopkins*, 79 Cal. 203-206, 21 Pac. Rep. 737.

14. **Statute not retroactive**.—By amendment which took effect July 1, 1874, it was provided that when the declaration is made by wife her statement must show that "her husband has not made such declaration" and that she, therefore, makes declaration for their joint benefit; but it was held that this amendment did not apply to declaration made before such amendment went into effect.—*Ashley vs. Olmstead*, 54 Cal. 616, 619.

III. CLAIM OF HOMESTEAD AND RESIDENCE ON PREMISES.

15. **CLAIM OF HOMESTEAD**—Must be stated.—*Skinner vs. Hall*, 69 Cal. 195, 198, 19 Pac. Rep. 406.

16. Statement by husband and wife that they claim homestead by declaring that "we do hereby claim same as a homestead" is sufficient and equivalent to declaration that each of declarants claim same as homestead, under Code Civil Procedure § 17, which provides "that the singular number includes the plural and the plural the singular."—*Simonson vs. Burr*, 121 Cal. 582, 586, 54 Pac. Rep. 87.

17. RESIDENCE ON PREMISES must be stated.—*Babcock vs. Gibbs*, 52 Cal. 629, 630; *Dorn vs. Howe*, 52 Cal. 630, 635; *Skinner vs. Hall*, 69 Cal. 195, 198, 10 Pac. Rep. 406; *Boreham vs. Byrne*, 33 Cal. 23, 27, 23 Pac. Rep. 212.

18. Actual residence is not alone sufficient, but it must be stated in declaration.—*Boreham vs. Byrne*, 33 Cal. 23, 28, 23 Pac. Rep. 212.

19. Husband and wife's statement that they reside on community property may be made by declaring that "we do now, at time of making this declaration, actually reside on the land," and such statement is equivalent to declaration that each of declarants is actually residing on the premises, under Code Civil Procedure § 17, which provides "that the singular number includes the plural and the plural the singular."—*Simonson vs. Burr*, 121 Cal. 582, 586, 54 Pac. Rep. 87.

20. Portion of land claimed, but not resided on, is not exempt as homestead, even though entire quantity claimed is less than five thousand dollars in value.—*Gregg vs. Bostwick*, 33 Cal. 220, 229, 91 Am. Dec. 637.

IV. DESCRIPTION OF PREMISES.

21. CLEAR DESIGNATION OF THE PREMISES IS SUFFICIENT, as where it is stated that premises are on certain street in named village and constitute lot 5 of said village, as laid out by F's division of said village, etc.—*In re Ogburn*, 105 Cal. 95-97, 38 Pac. Rep. 498.

22. MISTAKE IN DESCRIPTION IS FATAL, and if declarant gives description of land upon which he does not reside, his statement that he resides upon the land cannot enlarge its boundaries.—*Harris vs. Duarte*, 141 Cal. 497, 500, 70 Pac. Rep. 293.

23. NATURAL OBJECTS may be given as boundaries in describing premises.—*Ornbaum vs. His Creditors*, 61 Cal. 455, 458.

24. Comb of mountain or dividing line of ridge is taken as boundary when mountain or ridge of mountains is given as boundary.—*Ornbaum vs. His Creditors*, 61 Cal. 455, 458.

25. Middle of natural object given as boundary is usually taken as dividing line.—*Ornbaum vs. His Creditors*, 61 Cal. 455, 458.

26. REFERENCE MAY BE MADE TO MAP AND DEED for particular description of premises, if such map and deed afford sufficient description.—*Quackenbush vs. Reed*, 102 Cal. 493, 499, 37 Pac. Rep. 755. See *Ornbaum vs. His Creditors*, 61 Cal. 455, 459.

V. ESTIMATE OF "ACTUAL CASH VALUE."

27. "ACTUAL CASH VALUE" IS TRUE AND ABSOLUTE VALUE, or actual existing value of the land, as opposed to its potential or possible value.—*Read vs. Rahm*, 65 Cal. 343, 344, 4 Pac. Rep. 111.

28. ESTIMATE OF CASH VALUE NECESSARY, and unless declaration sets forth such estimate homestead declaration is void.—*Ashley vs. Olmstead*, 54 Cal. 616, 619, 620; *Knock vs. Bunnell* (Cal. July 1, 1839), 21 Pac. Rep. 961.

29. FORM OF STATEMENT.—Statement in declaration "that cash value of said above described premises is three thousand dollars," is equivalent to declaration that sum named is "actual" cash value, and is sufficient; rule being that when statutory right can be acquired by execution of instrument, instrument is sufficient in form if it contains every essential statement required by statute.—*Read vs. Rahm*, 65 Cal. 343, 4 Pac. Rep. 111.

30. Cash value of said homestead about four thousand dollars gold coin, is sufficient as statement of value.—*Graves vs. Baker*, 68 Cal. 134, 135, 8 Pac. Rep. 693. See *Steiner vs. Graves*, No. 5276, unreported.

31. "Does not exceed in value sum of \$5,000," is sufficient statement.—*Southwick vs. Davis*, 73 Cal. 504, 506, 21 Pac. Rep. 121.

32. Vague statement that actual cash value "is \$5,000 and over" is not compliance with statute.—*Ames vs. Eldred*, 55 Cal. 136.

33. NO LIMIT AS TO QUANTITY OR VALUE in "selection" of homestead, although homestead is not exempt except to extent of \$5,000 in value, and placing value at greater sum does not vitiate homestead.—*Ham vs. Santa Rosa Bank*, 62 Cal. 125, 135, 45 Am. Rep. 654; *Tiernan vs. His Creditors*, 62 Cal. 286, 289; *King vs. Gotz*, 70 Cal. 236, 242, 11 Pac. Rep. 656; *Lubbock vs. McMann*, 32 Cal. 226, 230, 16 Am. St. Rep. 108, 22 Pac. Rep. 1145; *Demartin vs. Demartin*, 85 Cal. 71, 74, 24 Pac. Rep. 594.

34. PERJURY IS NOT INCURRED BY FALSE STATEMENT OF VALUE, because declaration need not be under oath.—*Ham vs. Santa Rosa Bank*, 62 Cal. 125, 135, 45 Am. Rep. 654.

§ 1264. DECLARATION MUST BE RECORDED. The declaration must be recorded in the office of the recorder of the county in which the land is situated.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Agent may file declaration.
3. Index of recorder.
- 4, 5. Notice of declaration is given by record.
6. Omission from record book of part of acknowledgment.
- 7, 8. Priority between declaration and mortgage.
9. Residence on premises sufficient in absence of statute.
10. Time of filing.
11. Where land is situated partly in two counties.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Kennedy vs. Gloster*, 98 Cal. 143, 148, 32 Pac. Rep. 941 (referred to); *Rosenthal vs. Merced Bank*, 110 Cal. 198, 203, 42 Pac. Rep. 640 (referred to).

2. AGENT MAY FILE DECLARATION.—*Farley vs. Hopkins*, 79 Cal. 203, 205, 21 Pac. Rep. 737.

3. INDEX OF RECORDER if it fails to note recordation of declaration will not thereby affect validity of homestead.—*Southwick vs. Davis*, 78 Cal. 504, 509, 21 Pac. Rep. 121.

4. NOTICE OF DECLARATION GIVEN BY RECORDER to all world.—*Ham vs. Santa Rosa Bank*, 62 Cal. 125, 135, 45 Am. Rep. 654.

5. Compare: *Quackenbush vs. Reed*, 102 Cal. 493, 498, 37 Pac. Rep. 755 (wherein it is said that there is no provision making the record notice to any one).

6. OMISSION FROM RECORD BOOK OF PART OF ACKNOWLEDGMENT, to wit, words "and who is personally known to me to be the person whose name is subscribed to the said annexed instrument as a party thereto," does not vitiate the homestead.—*Quackenbush vs. Reed*, 102 Cal. 493, 497, 37 Pac. Rep. 755.

7. PRIORITY BETWEEN DECLARATION AND MORTGAGE depends upon priority of recordation.—*Bank of Woodland vs. Oberhaus*, 125 Cal. 320, 325, 57 Pac. Rep. 1070.

8. Priority of wife's declaration over husband's mortgage depends upon priority of recordation, and mortgage executed before but not recorded until after declaration has been filed, cannot be enforced as against homestead.—*Ontario St. Bank vs. Gerry*, 91 Cal. 94, 97, 27 Pac. Rep. 531.

9. RESIDENCE ON PREMISES SUFFICIENT IN ABSENCE OF STATUTE requiring declaration to be recorded, and creates prima facie presumption that premises are held as homestead.—*Cook vs. McChristian*, 4 Cal. 23, 26; *Dorsey vs. McFarland*, 7 Cal. 342, 345; *Stafford vs. Lick*, 7 Cal. 479, 490. See *Taylor vs. Hargous*, 4 Cal. 268, 273, 60 Am. Dec. 606.

10. TIME OF FILING may be on day subsequent to acknowledgment.—*Farley vs. Hopkins*, 79 Cal. 203, 205, 21 Pac. Rep. 737.

11. WHERE LAND IS SITUATED PARTLY IN TWO COUNTIES recordation may be effected by executing instrument in duplicate and filing one copy in one county and other copy in other county, and it is not necessary that same paper should be filed in each county.—*Kennedy vs. Gloster*, 98 Cal. 143, 146, 32 Pac. Rep. 941.

As to sufficiency of filing for record without actual recordation, see post § 1265 and note.

§ 1265. TENURE BY WHICH HOMESTEAD IS HELD. From and after the time the declaration is filed for record, the premises therein described constitute a homestead. If the selection was made by a married person from the community property, the land, on the death of either of the spouses, vests in the survivor, subject to no other liability than such as exists or has been created under the provisions of this title; in other cases, upon the death of the person whose property was selected as a homestead, it shall go to his heirs or devisees, subject to the power of the superior court to assign the same for a limited period to the family of the decedent; but in no case shall it be held liable for the debts of the owner, except as provided in this title.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 231; April 6, 1880, Code Amdts. 1880 (C. C. pt.), p. 8.

1. Applied, cited, construed, referred to, etc.
2. Adverse possession by one spouse against another.
3. Conveyance and encumbrance of homestead—Concurrence of both spouses necessary.
4. Debts for which homestead is liable in hands of survivor.
5. Descent and devise of homestead.
6. Same—Setting apart homestead to survivor or minor children.
7. Same—Statutes in pari materia.
8. Same—Same—Latest expression of legislative will.
9. Same—Wife's separate property selected.
10. Evidence—Homestead presumed to be in community property.
11. Excess above five thousand dollars goes to creditors.
- 12, 13. Joint tenancy of husband and wife.
14. Same—Character of property immaterial.
15. Same—Distinction between homestead and joint tenancy.
16. Same—Statute declaring spouses joint tenants.
17. Same—Survivorship.
18. Same—Same—Homestead continues.
19. Same—Same—Homestead selected from community property.
20. Same—Same—Statute in force at time of death.
21. Legal title is in husband.
22. Same—Restraint upon husband's power of alienation.
23. Nature of tenure by which homestead is held.
24. Pleading and practice—Complaint.
25. Same—Parties plaintiff.
26. Same—Parties defendant.
27. "Premises therein described constitute homestead."
28. Recordation—Time of filing.

29. Vesting of estate.

30. Wife has no right independent of husband.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in:** *Mawson vs. Mawson*, 50 Cal. 539, 543 (cited); *In re Estate Headen*, 52 Cal. 294, 296-298 (construed); *Gagliardo vs. Dumont*, 54 Cal. 496, 501 (construed); *Schuler vs. Savings & L. Soc.*, 64 Cal. 397, 398, 1 Pac. Rep. 479 (construed); *Beck vs. Soward*, 76 Cal. 527, 531, 18 Pac. Rep. 650 (construed and applied); *In re Estate Burdick* (dis. op.), 76 Cal. 639, 644, 18 Pac. Rep. 805 (construed and applied); *Burkett vs. Burkett*, 78 Cal. 310, 312, 12 Am. St. Rep. 58, 20 Pac. Rep. 715, 3 L. R. A. 781 (cited in connection with other sections); *Tyrrell vs. Baldwin*, 78 Cal. 470, 474, 21 Pac. Rep. 116 (construed); *Farley vs. Hopkins*, 79 Cal. 203, 205, 21 Pac. Rep. 737 (cited and construed); *In re Ackerman*, 80 Cal. 203, 209, 13 Am. St. Rep. 116, 22 Pac. Rep. 141 (cited and construed); *Gleason vs. Spray*, 81 Cal. 217, 219, 15 Am. St. Rep. 47, 22 Pac. Rep. 551 (cited and construed); *Gruwell vs. Seybolt*, 82 Cal. 7, 10, 22 Pac. Rep. 938 (referred to); *Mechanics' B. & L. Assoc. vs. King*, 88 Cal. 440, 442, 23 Pac. Rep. 376 (applied); *Demartin vs. Demartin*, 85 Cal. 71, 74, 24 Pac. Rep. 594 (applied); *Hutchinson vs. McNally*, 85 Cal. 619, 621, 24 Pac. Rep. 1071 (applied); *Roth vs. Insley*, 86 Cal. 134, 139, 24 Pac. Rep. 853 (construed and applied); *In re Estate Lahiff*, 86 Cal. 151, 153, 24 Pac. Rep. 850 (referred to); *In re Estate Croghan*, 92 Cal. 370, 371, 28 Pac. Rep. 570 (cited in connection with Code Civ. Proc. §§ 1168, 1474); *Alexander vs. Jackson*, 92 Cal. 514, 519, 27 Am. St. Rep. 158, 28 Pac. Rep. 593 (referred to); *Kennedy vs. Gloster*, 98 Cal. 143, 148, 32 Pac. Rep. 941 (referred to); *Gaylord vs. Place*, 98 Cal. 472, 473, 33 Pac. Rep. 484 (referred to); *Collins vs. Scott*, 100 Cal. 446, 451, 34 Pac. Rep. 1085 (applied); *Neary vs. Godfrey*, 102 Cal. 338, 341, 36 Pac. Rep. 655 (referred to in connection with § 146 and Code Civ. Proc. § 1474); *In re Estate Walkerly*, 108 Cal. 627, 654, 43 Am. St. Rep. 97, 41 Pac. Rep. 772 (construed in connection with Code Civ. Proc. § 1474); *City Store vs. Cofer*, 111 Cal. 482, 483, 44 Pac. Rep. 168 (applied); *Dickey vs. Gibson*, 113 Cal. 26, 54 Am. St. Rep. 321, 45 Pac. Rep. 15 (construed and applied); *Robinson vs. Dougherty*, 118 Cal. 299, 300 (referred to), 301 (construed in connection with § 1261), 50 Pac. Rep. 649; *In re Estate Matheny*, 121 Cal. 267, 53 Pac. Rep. 800 (referred to in connection with Code Civ. Proc. § 1463); *In re Estate Fath*, 132 Cal. 609, 611, 64 Pac. Rep. 995 (cited in connection with Code Civ. Proc. § 1474); *In re Estate Neff*, 139 Cal. 71, 72, 73 Pac. Rep. 632 (referred to in connection with Code Civ. Proc. §§ 1465, 1469, 1474).

2. **ADVERSE POSSESSION BY ONE SPOUSE AGAINST ANOTHER.**—During coverture neither spouse can claim homestead adversely to other.—*First Nat. Bank vs. De La Guerra*, 61 Cal. 109, 113; *Mauldin vs. Cox*, 67 Cal. 337, 391, 7 Pac. Rep. 804.

3. **CONVEYANCE AND ENCUMBRANCE OF HOMESTEAD.**—Concurrence of both spouses necessary.—See ante § 1242 and note.

4. **DEBTS FOR WHICH HOMESTEAD IS LIABLE IN HANDS OF SURVIVOR.**—Statute is peremptory that homestead shall not be liable for debts of owner after it is vested in survivor except as provided in title in which section is found, and such provision is mandatory.—*Tyrrell vs. Baldwin*, 78 Cal. 470, 474, 21 Pac. Rep. 116; *City Store vs. Cofer*, 111 Cal. 482, 483, 44 Pac. Rep. 168. See *In re Estate Ackerman*, 80 Cal. 203, 209, 13 Am. St. Rep. 116, 22 Pac. Rep. 141; *Mechanics' B. & L. Assoc. vs. King*, 88 Cal. 440, 442, 23 Pac. Rep. 376.

As to debts for which homestead can be taken, see ante § 1241 and note, and particularly par. 13 et seq.

5. **DESCENT AND DEVISE OF HOMESTEAD.**—See post §§ 1386, 1402 and notes; and Code Civ. Proc. §§ 1474, 1475 and notes; and consult KERR'S SYNTHETICAL INDEX to this work.

6. **Setting apart homestead to survivor of minor children.**—See Code Civ. Proc. § 1465 and note.

7. **Statutes in pari materia.**—Separate property upon which homestead has been claimed vests in heirs subject to power of court to assign it for limited period to family of decedent; and this section and Code Civil Procedure § 1474, in so providing, are substantially to same effect.—*Beck vs. Soward*, 76 Cal. 527, 531, 18 Pac. Rep. 650; *Neary vs. Godfrey*, 102 Cal. 338, 341, 36 Pac. Rep. 655; *In re Estate Walkerly*, 108 Cal. 627, 654, 43 Am. St. Rep. 97, 41 Pac. Rep. 772; *In re Estate Neff*, 139 Cal. 71, 72, 73 Pac. Rep. 632. See *Mawson vs. Mawson*, 50 Cal. 539, 543; *In re Estate Ackerman*, 80 Cal. 203, 209, 13 Am. St. Rep. 116, 22 Pac. Rep. 141; *Sanders vs. Russell*, 86 Cal. 119, 120, 21 Am. St. Rep. 26, 24 Pac. Rep. 852; *In re Estate Croghan*, 92 Cal. 370, 371, 372, 28 Pac. Rep. 570; *Collins vs. Scott*, 100 Cal. 446, 450, 34 Pac. Rep. 1085; *Robinson vs. Dougherty*, 118 Cal. 299, 300, 50 Pac. Rep. 649; *Weinreich vs. Hensley*, 121 Cal. 647, 653, 54 Pac. Rep. 354.

8. **Latest expression of legislative will.**—Provisions of this section with respect to survivorship are superseded by Code Civil Procedure § 1474, which is later expression of legislative will.—*In re Estate Fath*, 132 Cal. 609, 611, 64 Pac. Rep. 995. See *Weinreich vs. Hensley*, 121 Cal. 647, 653, 54 Pac. Rep. 354.

9. **Wife's separate property selected.**—Where homestead has been selected not from community property but from wife's separate property, upon her death it descends to her heirs; and there being more than one child and a surviving husband, one third of it is succeeded to by husband and remaining two thirds in equal shares by children, etc., as provided in § 1386.—*Beck vs. Soward*, 76 Cal. 527, 531, 18 Pac. Rep. 650.

See post § 1386 and note.

10. **EVIDENCE.**—Homestead presumed to be in community property where there is no evidence whether property before making and filing declaration of homestead was separate property of husband or community property.—*Schuler vs. Savings & L. Soc.*, 64 Cal. 397, 398, 1 Pac. Rep. 479. See *Althoff vs. Conheim*, 88 Cal. 230, 233, 99 Am. Dec. 363.

11. EXCESS ABOVE FIVE THOUSAND DOLLARS GOES TO CREDITORS of deceased, and is in all cases subject to his debts under last clause in § 1265 (dis. op.).—In re Estate Burdick, 76 Cal. 639, 644, 18 Pac. Rep. 805.

12. JOINT TENANCY OF HUSBAND AND WIFE—Acquisition of estate in joint tenancy, as respects homestead character of property, results from declaring homestead, or, as it is sometimes expressed, husband and wife have estate which is in nature of joint tenancy, although they may not be strictly joint tenants.—Taylor vs. Hargous, 4 Cal. 268, 273, 60 Am. Dec. 606; In re Buchanan's Estate, 8 Cal. 507, 509; McQuade vs. Whaley, 31 Cal. 526, 531, 533; Barber vs. Babel, 36 Cal. 11, 15; Flege vs. Garvey, 47 Cal. 371, 375; Schuler vs. Savings & L. Soc., 64 Cal. 397, 398, 1 Pac. Rep. 479; Mauldin vs. Cox, 67 Cal. 387, 391, 7 Pac. Rep. 304; Levins vs. Rovegno, 71 Cal. 273, 282, 12 Pac. Rep. 161; Tipton vs. Martin, 71 Cal. 325, 327, 12 Pac. Rep. 244; Gleason vs. Spray, 81 Cal. 217, 219, 15 Am. St. Rep. 47, 22 Pac. Rep. 551; Porter vs. Bucher, 98 Cal. 454, 461, 33 Pac. Rep. 335. See Poole vs. Gerrard, 6 Cal. 71, 73, 65 Am. Dec. 481; Dunn vs. Tozer, 10 Cal. 167, 171; In re Estate Tompkins, 12 Cal. 114; Gimmy vs. Doane, 22 Cal. 635, 638; Houghton vs. Lee, 50 Cal. 101, 103; In re Estate Headen, 52 Cal. 294, 296; Gagliardo vs. Dumont, 54 Cal. 496, 500; Burkett vs. Burkett, 78 Cal. 310, 12 Am. St. Rep. 53, 20 Pac. Rep. 715, 3 L. R. A. 731.

13. Contra: Gee vs. Moore, 14 Cal. 472, 478 (overruling Taylor vs. Hargous, 4 Cal. 268, 273, 60 Am. Dec. 606; Poole vs. Gerrard, 6 Cal. 71, 65 Am. Dec. 481; and Revalk vs. Kraemer, 3 Cal. 66, 73, 68 Am. Dec. 304; and declaring that contrary doctrine announced in those cases "has never met the approbation of the profession, and is not warranted by any language of the constitution or statute"). See Bowman vs. Norton, 18 Cal. 213, 216; Brennan vs. Wallace, 25 Cal. 108, 114; Johnston vs. Bush, 49 Cal. 198, 201.

Husband and wife may be joint tenants or tenants in common, etc.—See ante § 161 and note.

14. Character of property immaterial.—It is immaterial whether property before homestead was declared was community property or separate property of husband.—Gleason vs. Spray, 81 Cal. 217, 219, 15 Am. St. Rep. 47, 22 Pac. Rep. 551.

15. Distinction between homestead and joint tenancy is want of power in one of parties to sever tenancy or convey without concurrence of other in mode prescribed.—Barber vs. Babel, 36 Cal. 11, 17.

16. Statute declaring spouses joint tenants.—Act 1860, § 1, specially provided that husband and wife should become and be joint tenants in homestead with right of survivorship.—Levins vs. Rovegno, 71 Cal. 273, 282, 12 Pac. Rep. 161 (in which case court declared it saw no reason why legislature should not declare husband and wife to be joint tenants, in like manner that it might enact that lineal foot should consist of 13 inches).

17. Survivorship.—Upon death of one spouse there is right of survivorship such as is inci-

dental to joint tenancy.—Taylor vs. Hargous, 4 Cal. 268, 273, 60 Am. Dec. 606; In re Estate Headen, 52 Cal. 294, 297; Gagliardo vs. Dumont, 54 Cal. 496, 501; Collins vs. Scott, 100 Cal. 446, 450, 451, 34 Pac. Rep. 1085; Dickey vs. Gibson, 113 Cal. 36, 30, 54 Am. St. Rep. 321, 45 Pac. Rep. 15.

18. Homestead continues.—Property is protected to survivor in same manner that it had been to whole family, and is still homestead.—Building & L. Assoc. vs. King, 38 Cal. 440, 442, 443, 23 Pac. Rep. 376; Dickey vs. Gibson, 113 Cal. 36, 30, 54 Am. St. Rep. 321, 45 Pac. Rep. 15. See In re Estate Ackerman, 80 Cal. 208, 209, 13 Am. St. Rep. 116, 22 Pac. Rep. 141.

19. Homestead selected from community property.—It is only homestead selected from community property during existence of community to which law of title by survivorship applies.—In re Gilmore, 81 Cal. 240, 243, 22 Pac. Rep. 655.

See Code Civ. Proc. § 1474 and note.

20. Statute in force at time of death, and not that in force at time of declaration of homestead, controls rights of survivor.—Grwell vs. Seybolt, 82 Cal. 7, 10, 22 Pac. Rep. 938. See Herrold vs. Reen, 58 Cal. 443; Tyrrell vs. Baldwin, 78 Cal. 470, 21 Pac. Rep. 116.

21. LEGAL TITLE IS IN HUSBAND if premises were separate property of husband or common property of both husband and wife before they became homestead.—Gee vs. Moore, 14 Cal. 472, 476.

22. Restraint upon husband's power of alienation extends only so far as may be necessary for protection of homestead, and no farther.—Gee vs. Moore, 14 Cal. 472, 476.

23. NATURE OF TENURE BY WHICH HOMESTEAD IS HELD.—Character or quality which law adds to tenure by which homestead is held as so much property, to make it statutory homestead "consists in restrictions placed upon power to alienate or encumber it, its exemption from forced sale under execution, and in disposition of it upon death of either" spouse.—Merced Bank vs. Rosenthal, 99 Cal. 39, 43, 31 Pac. Rep. 349.

24. PLEADING AND PRACTICE—Complaint.—Allegation that separate homestead of husband was set apart to widow will not be taken to mean that such homestead was set off to family.—Hutchinson vs. McNally, 85 Cal. 619, 621, 24 Pac. Rep. 1071.

25. Parties plaintiff.—Husband and wife must join as plaintiffs in action to recover where homestead constitutes community property.—Poole vs. Gerrard, 6 Cal. 72, 73, 65 Am. Dec. 481; Gulod vs. Guidol, 14 Cal. 506, 507, 76 Am. Dec. 440. See Taylor vs. Hargous, 4 Cal. 268, 60 Am. Dec. 606.

26. Parties defendant.—Husband and wife must be joined as defendants in action involving homestead, and if wife is not joined with husband rights of neither will be affected.—Revalk vs. Kraemer, 3 Cal. 66, 72, 68 Am. Dec. 304.

27. "PREMISES THEREIN DESCRIBED CONSTITUTE HOMESTEAD."—Under clause providing that from and after time declara-

tion is filed for record, "premises therein described constitute homestead," whatever be character of title or interest in land held at time of filing declaration, "claim will attach to such title or interest, and whatever may inure to or grow out of that title will be impressed with lien [of homestead] equally with original title."—*Alexander vs. Jackson*, 92 Cal. 514, 519, 27 Am. St. Rep. 158, 28 Pac. Rep. 593.

As to title of homestead, see ante § 1238 and note para. 24-29.

25. **RECORDATION**—Time of filing.—See ante § 1264 and note par. 10.

29. **VESTING OF ESTATE**.—Homestead

right and joint interests are created by executing, acknowledging, and recording of declaration. The new character of estate, with its new incidents, commences at that moment, and new rights vest in both parties at same time.—*Barber vs. Babel*, 36 Cal. 11, 16.

30. **WIFE HAS NO RIGHT INDEPENDENT OF HUSBAND**.—Statute confers upon wife no right to homestead independent of husband which she can enforce against his consent. It affords protection to him and only through him to wife and children.—*Guilod vs. Guilod*, 14 Cal. 506, 507, 76 Am. Dec. 440. See *Brennan vs. Wallace*, 35 Cal. 108, 114.

CHAPTER III.

HOMESTEAD OF OTHER PERSONS.

§ 1266. Mode of selection.

§ 1267. Declaration of homestead.

§ 1268. Declaration must be recorded.

§ 1269. Effect of filing for record the declaration of homestead.

§ 1266. **MODE OF SELECTION**. Any person other than the head of a family, in the selection of a homestead, must execute and acknowledge, in the same manner as a grant of real property is acknowledged, a "declaration of homestead."

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 400, held unconstitutional, see history, § 4 ante.

Constitutionality of statute.—Act 1862 requiring declaration and recordation thereof is not unconstitutional, as constitution does not of itself create homestead rights or vest them

in debtors, but is simply directory to legislature.—*Noble vs. Hook*, 24 Cal. 638, 639, 640. See *In re Estate Reed*, 23 Cal. 410.

§ 1267. **DECLARATION OF HOMESTEAD**. The declaration must contain everything required by the second, third, and fourth subdivisions of section twelve hundred and sixty-three.

History: Enacted March 21, 1872.

Applied, cited, construed, referred to, etc., in: *Roth vs. Insley*, 86 Cal. 134, 141, 24 Pac. Rep. 853 (referred to in concurring opinion

of Beatty, C. J., in discussing sufficiency of declaration).

§ 1268. **DECLARATION MUST BE RECORDED**. The declaration must be recorded in the office of the county recorder of the county in which the land is situated.

History: Enacted March 21, 1872.

As to duty of recorder, see Pol. Code § 4235 and note.

§ 1269. **EFFECT OF FILING FOR RECORD THE DECLARATION OF HOMESTEAD**. From and after the time the declaration is filed for record, the land described therein is a homestead.

History: Enacted March 21, 1872.

Applied, cited, construed, referred to, etc., in: *Lubbock vs. McMann*, 82 Cal. 226, 229, 16 Am. St. Rep. 108, 22 Pac. Rep. 1145 (cited with other sections in discussing constitutional pro-

vision for homestead); *Roth vs. Insley* (conc. op. Beatty, C. J.), 86 Cal. 134, 141, 24 Pac. Rep. 853 (cited in discussing sufficiency of declaration of homestead).

CHAPTER IV.

ALIENATION OF HOMESTEADS OF INSANE PERSONS.

§ 1269a. Petition for sale or mortgage of homestead where husband or wife is insane.
 § 1269b. Notice of application for order.

§ 1269c. When an order may be made to sell or mortgage the homestead of an insane person.

§ 1269a. PETITION FOR SALE OR MORTGAGE OF. In case of a homestead, if either the husband or wife becomes hopelessly insane, the husband or wife not insane may petition the superior court of the county in which such homestead is situated for an order permitting the husband or wife, not insane, to sell and convey, or mortgage, such homestead to raise moneys to satisfy a lien or charge thereon, or to provide for the support and care either of the sane or insane spouse, or of their minor children. Such petition must be subscribed and sworn to by the applicant, setting forth the name and age of the insane husband or wife; the number, age, and sex of the children, if any, of such insane husband or wife; a description of the premises constituting the homestead; the value of the same; the county in which it is situated; and such facts, in addition to that of the insanity of the husband or wife, relating to the circumstances and necessities of the applicant and his or her family, as he or she may rely upon in support of the petition.

History: Enacted March 22, 1905, Stats. and Amdts. 1905, c. DLX, pp. 725, 726; a codification of §§ 1 and 3, Act March 25, 1874, Stats. 1873-4, pp. 582, 583.

- 1, 2. Constitutionality of statute.
3. Effect of insanity of spouse.
4. Statute must be strictly complied with.
5. Value must be alleged in petition.

1. CONSTITUTIONALITY OF STATUTE.—Act March 25, 1874 (Stats. 1873-4, p. 582, 583), which is prototype of this chapter, is constitutional; not being open to objection that it disturbs vested rights or that procedure prescribed is not due process of law.—*Rider vs. Regan*, 114 Cal. 667, 671-674, 46 Pac. Rep. 320.

2. TITLE OF ACT SUFFICIENT, and it was not open to objection on that ground.—*Jones vs. Falvella*, 126 Cal. 24, 25, 58 Pac. Rep. 311.

3. EFFECT OF INSANITY OF SPOUSE is not to deprive him or her of benefits of homestead or to give to other spouse any greater interest therein or authority to encumber it except in mode prescribed.—*Security L. & T. Co.*

vs. Kauffman, 108 Cal. 214, 220, 41 Pac. Rep. 467.

4. STATUTE MUST BE STRICTLY COMPLIED WITH.—Statutory prerequisites to execution of power conferred by this chapter, although arbitrary, must be strictly complied with; and court acquires jurisdiction only upon filing of petition sufficient in form.—*Jones vs. Falvella*, 126 Cal. 24, 25, 58 Pac. Rep. 311. See *Townsend vs. Gordon*, 19 Cal. 188, 189; *Thatcher vs. Powell*, 19 U. S. (6 Wheat.) 119, bk. 5 L. ed. 221.

5. VALUE MUST BE ALLEGED IN PETITION.—Where there is total absence of allegation of value in petition and no averments from which an expression of value may be derived, court acquires no jurisdiction to order sale.—*Jones vs. Falvella*, 126 Cal. 24, 25, 58 Pac. Rep. 311.

§ 1269b. NOTICE OF APPLICATION FOR ORDER. Notice of the application for such order must be given by publication of the same, in a newspaper published in the county in which such homestead is situated, if there is a newspaper published therein, once each week for three successive weeks, prior to the hearing of such application, and a copy of such notice must also be personally served upon the nearest male relative of such insane husband or wife, resident in this state, at least three weeks prior to such application; and in case there is no such male relative known to the applicant, a copy of such notice must be so served upon the public administrator of the county in which such homestead is situated; and in such case it is the duty of such public administrator to appear and represent the interests of such insane person. For all such services rendered by the public administrator he must be allowed a reasonable fee, to be fixed by the court, and

the same must be taxed as costs against the person making application for the order herein provided for.

History: Enacted March 22, 1905, Stats. and Amdts. 1905, c. DLX; a codification of § 2, Act March 25, 1874, Stats. 1873-4, pp. 582, 583.

§ 1269c. WHEN ORDER MAY BE MADE AND EFFECT OF ORDER.

If it appears to the court that such husband or wife is hopelessly insane, the court may make an order permitting the husband or wife, not insane, to sell and convey, or mortgage, such homestead, and thereafter any sale, conveyance, or mortgage made in pursuance of such order is as valid and effectual as if the property affected thereby was the absolute property of the person making such sale, conveyance, or mortgage. If a sale is ordered it must be reported to and confirmed by the court. Such husband or wife must, before executing any mortgage or conveyance, give a bond, to be approved by the judge of the court, in double the amount of the mortgage, or double the value of the property to be sold, conditioned to account for the proceeds of the mortgage or sale and to apply such proceeds only as the court may direct.

History: Enacted March 22, 1905, Stats. and Amdts. 1905, c. DLX; a codification of § 4, Act March 25, 1874, Stats. 1873-4, p. 583.

TITLE VI.

WILLS.

Chapter I. EXECUTION AND REVOCATION OF WILLS, §§ 1270-1313.

II. INTERPRETATION OF WILLS, §§ 1317-1351.

III. GENERAL PROVISIONS RELATING TO WILLS, §§ 1357-1377.

CHAPTER I.

EXECUTION AND REVOCATION OF WILLS.

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| § 1270. Who may make a will. | § 1295. Revocation of duplicate. |
| § 1271. Monomaniac incompetent. | § 1296. Revocation by subsequent will. |
| § 1272. Will, or part thereof, procured by fraud. | § 1297. Antecedent not revived by revocation of subsequent will. |
| § 1273. Will of married woman. | § 1298. Revocation by marriage and birth of issue. |
| § 1274. What may pass by will. | § 1299. Effect of marriage of a man on his will. |
| § 1275. Who may take by will. | § 1300. Effect of a marriage of a woman on her will. |
| § 1276. Written will, how to be executed. | § 1301. Contract of sale not a revocation. |
| § 1277. Definition of a holographic will. | § 1302. Mortgage not a revocation of will. |
| § 1278. Witness to add residence. | § 1303. Conveyance, when not a revocation. |
| § 1279. Mutual will. | § 1304. When it is a revocation. |
| § 1280. Competency of subscribing witness. | § 1305. Revocation of codicils. |
| § 1281. Conditional will. | § 1306. After-born child, unprovided for, to succeed. |
| § 1282. Gifts to subscribing witness void. Creditors competent witnesses. | § 1307. Children or issue of children of testator unprovided for by his will. |
| § 1283. Witness who is a devisee entitled to share to amount of devise. | § 1308. Share of after-born child, out of what part of estate to be paid. |
| § 1284. Will made out of this state (repealed). | § 1309. Advancement during lifetime of testator. |
| § 1285. Will not duly executed, void. | § 1310. Death of devisee, being relation of testator, in lifetime of testator, leaving lineal descendants. |
| § 1286. Subsequent change of domicile (repealed). | § 1311. Devises of land, how construed. |
| § 1287. Republication by codicil. | § 1312. Wills pass estate subsequently acquired. |
| § 1288. Nuncupative will, how to be executed. | § 1313. Restriction on devise for charitable uses. |
| § 1289. Requisites of a valid nuncupative will. | |
| § 1290. Proof of nuncupative wills. | |
| § 1291. Probate of nuncupative wills. | |
| § 1292. Written will, how revoked. | |
| § 1293. Evidence of revocation. | |
| § 1294. Revocation by obliteration on face of will (repealed). | |

§ 1270. **WHO MAY MAKE A WILL.** Every person over the age of eighteen years, of sound mind, may, by last will, dispose of all his estate, real and personal, and such estate not disposed of by will is succeeded to as provided in title seven of this part, being chargeable in both cases with the payment of all the decedent's debts, as provided in the Code of Civil Procedure.

History: Enacted March 21, 1872, founded upon § 1, Act April 10, 1850, Stats. 1850, p. 177.

I. In General.

1. Applied, cited, construed, referred to, etc.
2. Construed as to legislative intention.
3. Same—With reference to payment of debts.
4. Difference between attested will and a holographic will.
- 5, 6. Interpreted with reference to law governing and property passing.
- 7-10. Jurisdiction—Chancery, common law, probate.

II. What Are Wills.

- 11-13. Definition and essential characteristics.
- 14-22. Form and language—Necessity and construction of.
- 23-29. Same—Documents and papers referred to in will and part thereof.
- 30-33. Intention—Necessity of, must appear, etc.
- 34, 35. Same—How shown.
- 36, 37. Same—When not shown.
- 38-45. Illustrations—Held wills.
- 46-48. Same—Not wills.
49. Jury—Province of in determining.
50. Will—When considered conveyance.
51. Evidence—Burden of proof that instrument is a will, on proponent.

III. Power to Make Will.

52. Laws of state do not limit.
53. Same—Determine capacity.
- 54-61. Right to make will—How regulated and restrained.
62. Same—Subordinate to authority of probate court.
63. Same—Rule as to intention not invoked in construing statute regarding.

IV. Testamentary Capacity—1. Who May Make Will.

64. Capacity to make not question of fact.
- 65-68. Person construed with reference to age, mind, and memory.
- 69-71. Husband's power over community property.

V. Same—2. How Affected by Age, etc.

72. Capacity determined with reference to free action, and not physical condition.
- 73-78. Bodily ailments—What extent to which they affect capacity.
- 79-83. Old age—Extent to which it affects capacity.

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- 84-89. Extent to which does not affect testamentary capacity.
- 90-99. When testamentary capacity considered affected.

100. Proper question for consideration laid down.

- 101, 102. Evidence—Sufficiency of.
- 103-105. Same—Submitted to jury as special issue, etc.
106. Same—Opinions of physical experts, how considered.
107. Narcotics, etc.—To what extent affect testamentary capacity.

VII. Same—4. Unnatural, Inequitable Wills.

108. Courts have no power to dictate.
- 109-113. Right to dispose of, not affected by prejudices, reasoning, caprice.
- 114-116. Unreasonable provisions, how dealt with.
- 117, 118. Questions to be considered in passing upon.
- 119-122. When given effect to.
- 123, 124. Jury's opinion not to be considered.
125. Will disinheriting wife and children, how considered.
126. Evidence—Value of estate as proving reasonable division.

VIII. Same—5. Unsoundness of Mind.

127. Testamentary capacity—Dr. Taylor's rule as to.
128. Inheritance of insanity not assumed.
129. Strength or soundness of mind does not determine freedom from delusions.
130. Sound mind—What is.
- 131-134. Soundness of mind as determining testamentary capacity.
135. Weak and strong minds, difference between.
- 136-138. When sound mind exists and questions to be considered.
- 139, 140. Delusions—What are, and how guarded.
- 141-147. Insane delusions, essential elements to constitute.
- 148-153. Partial insanity—How testamentary capacity affected by.
154. Knowledge of disposition as affecting instrument.
- 155-157. Insane delusions—How considered in regard to person, mind, and will.
- 158-165. Same—How shown—By belief, circumstance, etc.
- 166-191. Same—How not shown—Belief, circumstance, disposition to insanity, etc.

IX. Evidence.

- 192-194. Burden of proof—When cast on contestant.
195. Same—When not shifted to proponent.
196. Same—When cast on proponent.
- 197-199. Presumption as to sanity—Continuance of.
200. Parol evidence—Admissibility of.
- 201-203. Conversations and declarations with testator—When admissible.

- 204-210. Same—When not admissible.
 211-216. Opinions of non-experts, when admissible.
 217-222. Same—How far limited to expert and intimate acquaintance.
 223-225. Privileged communications—Attorney's right to give evidence.
 226, 227. Same—Nurse attending in sick-room.
 228-238. Same—Physician's right to give evidence considered.
 239. Register—Copy of when not admissible where mental capacity is in issue.
 240. Value of estate—When taken into consideration in considering capacity.
 241-247. Verdict of jury—Instructions, inference, verdict.

I. IN GENERAL.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: In re Estate Hinckley, 58 Cal. 457, 516 (construed with other sections); In re Estate Ross, 140 Cal. 282, 289, 73 Pac. Rep. 976 (construed with other sections).

As to burden of proof of testamentary capacity, see monographic note by B. A. Rich, 17 L. R. A. 494-497.

As to competency to make will, see monographic notes by Robert Desty, 1 L. R. A. 161, 2 L. R. A. 668, 6 L. R. A. 167.

As to drunkenness as affecting testamentary capacity, see monographic note by F. H. Bowlby, 39 L. R. A. 220-227.

As to presumption and burden of proof as to testator's sanity, see monographic note by F. H. Bowlby, 36 L. R. A. 621-641.

As to declaration of testator to impeach or invalidate will, see notes 3 Am. Dec. 395, 52 Am. Dec. 167, 62 Am. Dec. 80.

As to effect of morphinism on testamentary capacity, see monographic note by F. H. Bowlby, 39 L. R. A. 262-265.

As to effect of spiritualism, and belief in, upon testamentary capacity, see note 36 Am. Rep. 426.

As to fraud and undue influence in connection with drunkenness, see monographic note by F. H. Bowlby, 39 L. R. A. 220.

As to old age and physical infirmity as affecting testamentary capacity, see monographic note by Robert Desty, 6 L. R. A. 167.

As to opinions of subscribing witnesses as to testamentary capacity, see monographic note by F. H. Bowlby, 39 L. R. A. 715-722.

As to presumption arising when partial insanity has been shown, see note 41 Am. Rep. 686, 688.

As to testamentary capacity and insane delusions, see note 3 Am. Rep. 184.

As to testamentary capacity generally, see note 84 Am. Dec. 240.

As to testamentary capacity, insanity and partial insanity, and its effect upon will, see note 41 Am. Rep. 686.

As to what constitute testamentary writings or wills, see notes 92 Am. Dec. 234, 30 Am. St. Rep. 717, 39 Am. St. Rep. 486.

As to what instruments will be deemed wills, see note 30 Am. St. Rep. 717.

As to when insane delusions will invalidate will, see note 53 Am. St. Rep. 94.

2. CONSTRUED WITH OTHER SECTIONS of the chapter as showing that legislature used terms "devise" and "legacy" in their well-recognized common-law sense and distinction; one as testamentary disposition of land, the other like disposition of personalty.—In re Estate Ross, 140 Cal. 282, 289, 73 Pac. Rep. 976.

3. With section 1313 as charging estate in both testate and intestate estates with payment of debts.—In re Estate Hinckley, 58 Cal. 457, 516.

4. Difference between attested will and holographic will exists in form of execution.—In re Estate Soher, 78 Cal. 477, 480, 21 Pac. Rep. 8.

5. Will must be interpreted according to law of state where it was made and where property upon which it operates is situated.—Norris vs. Harris, 15 Cal. 226, 252.

6. As applying only to property over which testator has disposing power.—In re Estate Gilmore, 81 Cal. 240, 242, 22 Pac. Rep. 655. See In re Estate Silvey, 42 Cal. 210, 212; King vs. Lagrange, 50 Cal. 328, 332.

7. JURISDICTION—Court of chancery has no power to determine validity of will.—State vs. McGlynn, 20 Cal. 233, 266, 81 Am. Dec. 118.

8. Has in some cases, in order to defeat fraudulent practices, deprived parties of benefit of fraudulent will by decreeing that such parties shall hold property in trust for parties entitled if will not probated.—State vs. McGlynn, 20 Cal. 233, 266, 81 Am. Dec. 118.

9. Courts of common law have no jurisdiction over questions of due execution of will, sanity of testator, or attestation of witnesses.—Castro vs. Richardson, 18 Cal. 478, 480.

10. Probate court has exclusive jurisdiction of wills.—Castro vs. Richardson, 18 Cal. 478, 480.

II. WHAT ARE WILLS.

As to sufficiency of letter as will, see note by J. G. Green, 15 L. R. A. 635.

11. DEFINITION—Will defined as instrument which does not pass an interest until after death of maker.—President etc. Bowdoin Col. vs. Merritt, 75 Fed. Rep. 480, 483.

12. ESSENTIAL CHARACTERISTIC of instrument testamentary in its nature is that it operates only upon and by reason of death of maker, and up to that time it is ambulatory. Nichols vs. Emery, 109 Cal. 323, 329, 50 Am. St. Rep. 43, 41 Pac. Rep. 1089.

13. True test of character of instrument is not testator's realization that it is will, but his intention to create revocable disposition of his property to accrue and take effect only upon his death, and passing no present interest.—Nichols vs. Emery, 109 Cal. 323, 329, 50 Am. St. Rep. 43, 41 Pac. Rep. 1089.

14. FORM AND LANGUAGE.—Particular form of instrument is not necessary.—Clarke vs. Ransom, 59 Cal. 595, 600.

15. Particular words not necessary to show testamentary intent.—Mitchell vs. Donohue, 100

Cal. 202, 208, 38 Am. St. Rep. 279, 34 Pac. Rep. 614.

16. Will may be informally drawn and may consist of one or more parts.—*Mitchell vs. Donohue*, 100 Cal. 202, 207-208, 38 Am. St. Rep. 279, 34 Pac. Rep. 614.

17. Language of instrument will be construed in light of surrounding circumstances in order to determine whether instrument was intended to be testamentary.—*Clarke vs. Ransom*, 50 Cal. 595, 600.

18. Court will supply obviously omitted words wherever such words are apparent and no other will supply the defect.—*Mitchell vs. Donohue*, 100 Cal. 202, 208, 38 Am. St. Rep. 279, 34 Pac. Rep. 614. See *In re Estate Wood*, 36 Cal. 75; *In re Estate Skerrett*, 67 Cal. 535, 8 Pac. Rep. 181.

19. Order in which words of will are written will be transposed, if by so doing intention of testator can be ascertained.—*In re Estate Stratton*, 112 Cal. 513, 518, 44 Pac. Rep. 1023.

20. Word which has been manifestly omitted and is essential to understanding of intention will be supplied.—*In re Estate Stratton*, 112 Cal. 513, 518, 44 Pac. Rep. 1023. See *Mitchell vs. Donohue*, 100 Cal. 202, 38 Am. St. Rep. 279, 34 Pac. Rep. 614.

21. Word having no meaning, or inserted as repugnant to clear intention manifested in other parts of the will, will be regarded as surplusage and restricted in its application.—*In re Estate Wood*, 36 Cal. 75, 80. See *Bartlet vs. King*, 12 Mass. 586, 542, 7 Am. Dec. 99; *Wright vs. Denn ex d. Page*, 28 U. S. (10 Wheat.) 204, 239, bk. 6 L. ed. 303; *Finlay vs. King*, 28 U. S. (3 Pet.) 346, 376, bk. 7 L. ed. 701.

22. Will not invalid by reason that it is not finished for several days after it is commenced, as required by Mexican law, where it is shown that delay was occasioned through party writing will supposing that some formula was necessary, and suspending completion until he could consult some person competent to give directions as to form and words.—*Castro vs. Castro*, 6 Cal. 158, 161.

23. DOCUMENTS WHICH ARE NOT ATTESTED may be referred to in attested will.—*In re Estate Soher*, 78 Cal. 477, 480, 21 Pac. Rep. 8. See *In re Estate Shillaber*, 74 Cal. 144, 5 Am. St. Rep. 433, 15 Pac. Rep. 453. *Ind. Fessler vs. Simpson*, 53 Ind. 37; *Pickle vs. Snapp*, 97 Ind. 289, 291, 49 Am. Rep. 449. *Mass. Newton vs. Seaman's F. Soc.*, 130 Mass. 91, 39 Am. Rep. 433. *N. Y. Brown vs. Clark*, 77 N. Y. 377. *Oreg. Gerrish vs. Gerrish*, 8 Oreg. 351, 34 Am. Rep. 535. *Pa. Baker's Appeal*, 107 Pa. St. 381, 52 Am. Rep. 478.

24. Paper referred to may be part of will, if in existence at time of execution of will.—*In re Estate Shillaber*, 74 Cal. 144, 146, 5 Am. St. Rep. 433, 15 Pac. Rep. 453.

25. Paper referred to in will, whether attested or not, must be identified and clearly described in will.—*In re Estate Shillaber*, 74 Cal. 144, 146, 5 Am. St. Rep. 433, 15 Pac. Rep. 453.

26. Paper not in existence at time will executed will not be taken as part thereof, although intention of testator was to leave instructions to executor by letter may be declared in will.—*In re Estate Shillaber*, 74 Cal. 144, 146, 5 Am. St. Rep. 433, 15 Pac. Rep. 453.

27. Contents of paper referred to and described as then existing, and as capable of being then ascertained, may be ascertained by parol evidence, and only question is whether such evidence is sufficient.—*In re Estate Shillaber*, 74 Cal. 144, 146, 5 Am. St. Rep. 433, 15 Pac. Rep. 453. See *Allen vs. Maddock*, 11 Moore P. C. 454.

28. Reference to paper named in will may be in such terms as to exclude parol evidence, as where it is not written at time, or reference is so vague as to be incapable of being applied to any particular instrument.—*In re Estate Shillaber*, 74 Cal. 144, 146, 5 Am. St. Rep. 433, 15 Pac. Rep. 453. See *Allen vs. Maddock*, 11 Moore P. C. 454.

29. Letter written after execution of will referring to will and to bequest of personal property to nephew to be disposed of as letter directs, setting forth disposition to be made thereof, though not entitled to probate as part of will, may be sufficient to enable beneficiaries named in it to proceed in equity after property is distributed to executor, to compel execution of trust in accordance with directions of such letter.—*In re Estate Shillaber*, 74 Cal. 144, 147, 5 Am. St. Rep. 433, 15 Pac. Rep. 453. See *In re Estate Fleetwood*, L. R. 15 Ch. Div. 594.

30. INTENTION.—Document will be given effect to as testamentary where all circumstances show that such was intention, and language is consistent therewith.—*Clarke vs. Ransom*, 50 Cal. 595, 600; *In re Estate Scott*, 128 Cal. 57, 70-71, 60 Pac. Rep. 527.

31. To dispose of property must appear.—*Mitchell vs. Donohue*, 100 Cal. 202, 208, 38 Am. St. Rep. 279, 34 Pac. Rep. 614.

32. Must clearly appear, otherwise court will not declare paper to be testamentary disposition of testator's estate.—*In re Estate Meade*, 118 Cal. 428, 431, 62 Am. St. Rep. 244, 50 Pac. Rep. 541. See *In re Estate Richardson*, 94 Cal. 63, 65, 29 Pac. Rep. 484, 15 L. R. A. 635.

33. Plainly apparent that document should stand for last will and testament.—*In re Estate Meade*, 118 Cal. 428, 430, 62 Am. St. Rep. 244, 50 Pac. Rep. 541.

34. Shown by deed read in connection with letter written by testator pointing out uncertainties of life, and that he wanted party to whom it was addressed to be provided for during his life, and so that such party would have his property to depend upon and make him independent while he lived.—*In re Estate Skerrett*, 67 Cal. 535, 538, 8 Pac. Rep. 181.

35. Surrounding circumstances may be looked to in order to determine whether instrument was intended to be testamentary.—*Clarke vs. Ransom*, 50 Cal. 595, 600; *Mitchell vs. Donohue*, 100 Cal. 202, 208, 38 Am. St. Rep. 279, 34 Pac. Rep. 614. See *In re Estate Wood*,

36 Cal. 75; In re Estate Skerrett, 67 Cal. 585, 3 Pac. Rep. 181.

36. Not determined by order in which words of will are written.—In re Estate Stratton, 113 Cal. 513, 518, 44 Pac. Rep. 1028.

37. Not shown where party disposes of his property in his lifetime to avoid administration of his estate after death, as by gift absolute during life or in trust or by way of voluntary settlement, as such disposition of property shows not only absence of testamentary intent but absolute hostility thereto.—Nichols vs. Emery, 109 Cal. 323, 321-322, 59 Am. St. Rep. 43, 41 Pac. Rep. 1089.

38. ILLUSTRATIONS.—Deed executed, but never delivered, purporting to convey property to sister, not witnessed and not in hand of deceased, copy of which was found with letter addressed to sister, written, dated, and signed by deceased himself, and referred to deed, given effect to, along with letter as will.—In re Estate Soher, 78 Cal. 477, 482, 21 Pac. Rep. 8. See Miller vs. Miller, 32 La. Ann. 441.

39. Document disposing of testator's property to his brother after paying all debts, but naming no executor, valid will.—In re Estate Barton, 52 Cal. 533, 540.

40. Document nominating executor, providing for payment of debts, without giving any legacy or devising any part of testator's property, is a will.—In re Estate Hickman, 101 Cal. 609, 613, 36 Pac. Rep. 118; In re Estate Meade, 118 Cal. 428, 430, 62 Am. St. Rep. 244, 50 Pac. Rep. 541. See Jolliffe vs. Fanning, 10 Rich. (S. C.) Eq. 186.

41. Document as follows: "I wish \$5,000 to go to..... in the event of my dying intestate, and the balance of my property to be held by..... to be disposed of by him as his judgment may dictate," dated, signed, and witnessed by two witnesses, constitutes good testamentary disposition.—In re Estate Wood, 36 Cal. 75, 80.

42. Document as follows: "This is to scrify that I levet to me y wife Real and persnal and she to dispose of them as she wis" construed as showing sufficient intention to dispose of property, real and personal, to his wife, being signed and written by testator, and entitled to probate as will.—Mitchell vs. Donohue, 100 Cal. 202, 208, 38 Am. St. Rep. 279, 34 Pac. Rep. 614.

43. Document written in lead pencil by attesting witness at request of deceased, read over to latter in presence of subscribing witnesses, in whose presence deceased affixed her mark, being physically too weak to write her name, given effect to as valid will.—In re Estate Gullfoyle, 96 Cal. 593, 600, 31 Pac. Rep. 553, 22 L. R. A. 370.

44. Letter addressed to attorney, containing instructions for will, may constitute testamentary disposition.—Scott's Estate, 147 Pa. St. 89, 30 Am. St. Rep. 713, 717, 23 Atl. Rep. 212.

45. Letter written by one during last illness expressing wish to give watch, two shawls and also \$5,000 to party to whom addressed, even though full name of beneficiary is not mentioned, and no reference is made to

anticipated death.—Clarke vs. Ransom, 50 Cal. 595, 599, 600.

46. INSTRUMENT IN WRITING denoting desire or wish to make certain party gift of specific sum duly signed and witnessed, is not, in absence of evidence of testamentary intention, sufficient to constitute will.—In re Estate Scott, 128 Cal. 57, 70-71, 60 Pac. Rep. 527. See Clarke vs. Ransom, 50 Cal. 595.

47. Letter addressed to undertaker showing disposition to be made of body after death and requesting him to apprise brother of death and intimating intention to write at future date substance of desires, but intimating that in case of accident letter would answer purpose, and that brother would take charge of estate and be sole administrator, does not amount to will.—In re Estate Meade, 118 Cal. 428, 431, 62 Am. St. Rep. 244, 50 Pac. Rep. 541.

48. Written by brother inquiring about his mother and his sister and her children and stating his own ill health, and that his sister and children would get everything, and that he wanted his nephew to get best of education, without circumstances unmistakably evincing intention that such letter should be testamentary disposition of his estate to his sister and children, does not constitute will, especially where he is not in extremis and there is nothing to show that he contemplated immediate or very proximate dissolution, necessitating final disposition of his estate.—In re Estate Richardson, 94 Cal. 63, 65, 29 Pac. Rep. 484, 15 L. R. A. 635.

49. PROVINCE OF JURY IN DETERMINING WHETHER PAPER is will is to take into consideration mental and physical condition of testator at time it was written, who his relatives are and claims they naturally have upon him, any prior declarations he may have made going to show his intention as to disposition of property after his death, and circumstances, if any existed, that before he signed paper he had formed in his mind settled purpose as to disposition of his property, and whole testimony bearing upon questions, including contents of will itself.—Mitchell vs. Donohue, 100 Cal. 202, 212, 38 Am. St. Rep. 279, 34 Pac. Rep. 614.

50. WILL REGARDED AS CONVEYANCE and as taking effect as deed on proof of its execution, unless there is some express statute requiring it to be probated.—Castro vs. Castro, 6 Cal. 153, 161.

51. EVIDENCE—Burden of proving that paper was intended by decedent to be his will is upon proponent.—Mitchell vs. Donohue, 100 Cal. 202, 208, 38 Am. St. Rep. 279, 34 Pac. Rep. 614.

III. POWER TO MAKE WILL.

52. POWER OF DISPOSITION BY WILL is not limited by laws of this state.—Norris vs. Harris, 15 Cal. 226, 256.

53. LAW OF STATE IN WHICH WILL MADE must be resorted to, to determine capacity of testator, and extent of his power of disposition.—Norris vs. Harris, 15 Cal. 226, 252.

54. RIGHT OF TESTAMENTARY DISPOSITION, although instinctive, nevertheless de-

pends solely on municipal law, and has never been regarded as natural or inalienable right.—*Patton vs. Patton*, 39 Ohio St. 590, 597.

55. Right to make will, matter of statutory regulation.—In re Estate Comassi, 107 Cal. 1, 4, 40 Pac. Rep. 15, 23 L. R. A. 414.

56. Right to make testamentary disposition of property rests wholly upon legislative will, and is derived entirely from statutes.—In re Estate Walker, 110 Cal. 387, 390, 52 Am. St. Rep. 104, 42 Pac. Rep. 315, 30 L. R. A. 460.

57. Right to make testamentary disposition of property is not unrestrained right nor right to citizenship, nor is it even right granted by constitution.—In re Estate Walker, 110 Cal. 387, 390, 52 Am. St. Rep. 104, 42 Pac. Rep. 315, 30 L. R. A. 460.

58. Testamentary power is not referred to in terms either in state or in United States constitution, right to dispose of property conferred in bill of rights relating only to living persons.—*Patton vs. Patton*, 39 Ohio St. 590, 593.

59. Power of legislature to limit class of persons competent to make will is unquestioned.—In re Estate Comassi, 107 Cal. 1, 4, 40 Pac. Rep. 15, 23 L. R. A. 414.

60. RIGHT OF TESTAMENTARY DISPOSITION—Subject to legislative power, which is not limited by constitutional provisions.—*Patton vs. Patton*, 39 Ohio St. 590, 597.

61. Legislative mandates supreme, and confer no rights to make testamentary disposition except upon compliance with those mandates.—In re Estate Walker, 110 Cal. 387, 391, 52 Am. St. Rep. 104, 42 Pac. Rep. 315, 30 L. R. A. 460.

62. Power of testamentary disposition of property as conferred and denied by statute, is not paramount, but subordinate to authority conferred upon probate court to appropriate part for support of family and for homestead purposes and for payment of debts.—*Sulsberger vs. Sulsberger*, 50 Cal. 385, 387.

63. RULE THAT INTENTION OF TESTATOR MUST GOVERN Interpretation of wills cannot be invoked in construction of statute regulating execution.—In re Estate Walker, 110 Cal. 387, 390, 52 Am. St. Rep. 104, 42 Pac. Rep. 315, 30 L. R. A. 460. See In re Estate O'Neil, 91 N. Y. 516, 520, 521.

IV. TESTAMENTARY CAPACITY—1. WHO MAY MAKE WILL.

64. CAPACITY TO MAKE WILL is not simple question of fact, but conclusion which law draws from certain facts as premises.—In re Estate Taylor, 92 Cal. 564, 566, 28 Pac. Rep. 603.

65. Person of full age, sound and disposing mind and memory, and under no restraint, may make such disposition of his property as does not conflict with law.—In re Estate Donovan, 140 Cal. 390, 393, 73 Pac. Rep. 1081. See In re Estate McDevitt, 95 Cal. 17, 33, 30 Pac. Rep. 101; In re Estate Kaufman, 117 Cal. 283, 289, 59 Am. St. Rep. 179, 49 Pac. Rep. 192; *President etc. Bowdoin Col. vs. Merritt*, 75 Fed. Rep. 480, 483.

66. CAPABLE OF RATIONALLY THINKING, reasoning, acting and determining for himself, capable of making a will.—In re Estate Black, Myrick's Prob. Rep. 24, 27.

67. Free from restraint and undue influence is competent to make will.—In re Estate Black, Myrick's Prob. Rep. 24, 27.

68. Must have memory, and if he has not this faculty, he cannot be said to possess understanding to any degree whatever or for any purpose.—*President etc. Bowdoin Col. vs. Merritt*, 75 Fed. Rep. 480, 492. See *Stevens vs. Vancleve*, 4 Wash. C. C. 362, 23 Fed. Cas. 35.

69. HUSBAND HAS POWER to make testamentary disposition of half of community property subject to payment of debts, other half vests in wife surviving.—In re Estate Frey, 52 Cal. 653, 661.

70. Presumed to know law with reference to disposition of community property by will.—In re Estate Gilmore, 81 Cal. 240, 242, 22 Pac. Rep. 655.

71. General devise by husband of all his property, both real and personal, of which he may die possessed, construed as applying only to one half of community property.—In re Estate Gilmore, 81 Cal. 240, 242, 22 Pac. Rep. 655. See *Morrison vs. Bowman*, 29 Cal. 337, 347; In re Estate Frey, 52 Cal. 653, 660.

V. SAME—2. HOW AFFECTED BY AGE. ETC.

72. MENTAL CAPACITY AND FREE AND UNTRAMMELED ACTION of mind is question to be determined, not physical condition, of pain or absence of pain, for long or short period.—*President etc. Bowdoin Col. vs. Merritt*, 75 Fed. Rep. 480, 487. See *Carty vs. Connolly*, 91 Cal. 15, 20, 27 Pac. Rep. 599; *Rothrock vs. Rothrock*, 22 Oreg. 551, 30 Pac. Rep. 453.

73. BODILY AILMENTS—Party may be in extreme bodily or mental weakness or disease, but may yet possess sufficient understanding to direct his power of disposing of property.—In re Estate Nelson, 122 Cal. 182, 190, 64 Pac. Rep. 294.

74. HOWEVER SEVERE, which do not affect mental capacity to such extent as to unfit party from attending to ordinary business or comprehending ordinary relations or duty to society, furnish no ground for setting aside instrument executed by him.—*President etc. Bowdoin Col. vs. Merritt*, 75 Fed. Rep. 480, 487.

75. Fact that testator's memory is imperfect and greatly impaired by age or disease that he cannot recollect name and asks odd questions, not sufficient to show that his understanding is not sufficiently sound for many of ordinary transactions of life.—*President etc. Bowdoin Col. vs. Merritt*, 75 Fed. Rep. 480, 492. See *Stevens vs. Vancleve*, 4 Wash. C. C. 362, 23 Fed. Cas. 35.

76. Feeble in health, suffering from disease, aged and infirm, but able to understand and carry in mind nature and situation of his property and his relation to his relatives, with clear remembrance as to those in whom, and those things in which, he has been mostly

interested, capable of understanding what he is doing, and relation in which he stands to object of his bounty, free from any delusion which might lead him to dispose of his property otherwise than he would if he knew and understood what he was doing, is capable of making will.—In re Estate Mota, 136 Cal. 558, 562, 69 Pac. Rep. 294. See *Whitney vs. Twombly*, 136 Mass. 146.

77. Mere physical weakness does not necessarily affect mental capacity.—*President etc. Bowdoin Col. vs. Merritt*, 75 Fed. Rep. 480, 487.

78. Person of perfect mental capacity, acting freely and voluntarily, but sick with mortal illness, may make voluntary transfer of his property as fully and completely as when experiencing perfect health, even though such disposition would seem unreasonable, unjust, and unnatural, question being one of mental capacity and free and untrammelled action of the mind.—*Carty vs. Connolly*, 91 Cal. 15, 20, 27 Pac. Rep. 599.

79. OLD AGE IS NO DISQUALIFICATION of persons, as soundness of mind and not body is question to be considered in sustaining execution of such instruments.—In re Estate Dole (Cal. June 20, 1905), 81 Pac. Rep. —; *President etc. Bowdoin Col. vs. Merritt*, 75 Fed. Rep. 480, 487.

80. Fact that testator had infirmities incident to old age and was often obliged to resort to medical assistance, his sight and memory were considerably impaired so that he would often repeat questions during conversation, and did not always recognize people with whom he was well acquainted, shows impaired mental and bodily powers, but is not sufficient to show that testator did not understand his relation to his children and to others, and condition of his property, and nature and effect of his testamentary act.—*President etc. Bowdoin Col. vs. Merritt*, 75 Fed. Rep. 480, 491. See *Horn vs. Pullman*, 72 N. Y. 270, 272.

81. Sufficient intelligence remaining, neither age, sickness, extreme distress, nor disability of body will affect capacity.—*President etc. Bowdoin Col. vs. Merritt*, 75 Fed. Rep. 480, 483. See *Soberanes vs. Soberanes*, 97 Cal. 141, 146, 31 Pac. Rep. 910; *Chrisman vs. Chrisman*, 16 Oreg. 128, 138, 18 Pac. Rep. 6.

82. Question whether evidence of old age might possibly have so impaired mental faculties of testator as to render him incompetent, would be sufficient to justify verdict upsetting his will in case of clear proof that he was competent at time of testamentary act, mooted but not passed upon.—In re Estate Wilson, 117 Cal. 262, 277, 49 Pac. Rep. 172, 2 Prob. Rep. Ann. 7. See *Carty vs. Connolly*, 91 Cal. 15, 27 Pac. Rep. 599.

83. Validity of will does not depend upon testator's ability to reason logically or upon his freedom from prejudice.—In re Estate Scott, 128 Cal. 57, 67, 60 Pac. Rep. 527; In re White's Will, 121 N. Y. 406, 24 N. E. Rep. 985.

VI. SAME—3. INTOXICATION.

84. DRUNKENNESS DOES NOT OF ITSELF TAKE AWAY CAPACITY to make will.—In re Estate Wilson, 117 Cal. 262, 276, 49 Pac. Rep.

172, 711. See *N. J. Andress vs. Weller*, 3 N. J. Eq. (2 Gr.) 604; *Kahl vs. Schober*, 35 N. J. Eq. (8 Stew.) 461; *Elkinton vs. Brick*, 44 N. J. Eq. (17 Stew.) 154, 1 L. R. A. 161; *Bannister vs. Jackson*, 45 N. J. Eq. (18 Stew.) 702, 17 Atl. Rep. 692. *N. Y. Peck vs. Cary*, 27 N. Y. 9, 84 Am. Dec. 220. *Pa. Harmony Lodge's Appeal*, 127 Pa. St. 269, 276, 18 Atl. Rep. 10. *Eng. Ayres vs. Hill*, 3 Addams Ecc. 268; *Wheeler vs. Alderson*, 3 Hagg. 211.

85. Fact that man is drunkard does not as rule of law make him of unsound mind.—In re Estate Johnson, 57 Cal. 529, 530.

86. Does not prove unsound mind of testator.—In re Estate Lang, 65 Cal. 19, 20, 2 Pac. Rep. 491.

87. Will made by party under influence of intoxicating liquor at time, is not for that reason void.—*Peck vs. Cary*, 27 N. Y. 9, 84 Am. Dec. 220.

88. One addicted to habits of excessive indulgence in strong drink need not be wholly free from its influence when executing will.—*Peck vs. Cary*, 27 N. Y. 9, 84 Am. Dec. 220.

89. Memory and understanding may be as correct as in total absence of exciting qualities when slight degree of excitement is produced by liquor.—*Peck vs. Cary*, 27 N. Y. 9, 84 Am. Dec. 220.

90. INTOXICATION TO VITIATE—Must be such as to disorder faculties and pervert judgment.—*Peck vs. Cary*, 27 N. Y. 9, 84 Am. Dec. 220.

91. Must be so extended and so excessive as to permanently disable mind.—In re Estate Black, Myrick's Prob. Rep. 24, 28.

92. Excessive use which causes disease, weakens body and mind, producing mental disease and physical death, impairing intellect so as to render party confirmed invalid, with mind entirely gone, renders party incapable.—In re Estate Hannigan, Myrick's Prob. Rep. 135, 138.

93. Inordinate use of intoxicating liquor will incapacitate man from making will.—In re Estate Black, Myrick's Prob. Rep. 24, 34.

94. MENTAL DISEASE SUPERVENING UPON INTEMPERATE HABITS renders party incompetent and irresponsible for his acts.—*Peck vs. Cary*, 27 N. Y. 9, 84 Am. Dec. 220. See *United States vs. Drew*, 5 Mas. C. C. 28, 25 Fed. Cas. 913.

95. Natural and necessary effect of liquor permanently impairing intellect, and followed by mental disease, renders person incompetent and irresponsible for making will.—In re Estate Hannigan, Myrick's Prob. Rep. 135, 138.

96. One temporarily overcome by single debauch, or on spree, is for time being of unsound mind and has not testamentary capacity.—In re Estate Black, Myrick's Prob. Rep. 24, 34; In re Estate Cunningham, 52 Cal. 465, 466.

97. One to whom intoxication has become such habit that his intellect is disordered, and he has lost rational control of his mental faculties, is of unsound mind and incapable of making will.—In re Estate Black, Myrick's Prob. Rep. 24, 34.

98. Party so excited by present intoxication as not to be master of himself, is incapacitated from executing legal will.—*Peck vs. Cary*, 27 N. Y. 9, 84 Am. Dec. 220.

99. Will made during time person is overcome by delirium of intoxication, is invalid where it is shown that effect of use of liquor has either temporarily or permanently overcome judgment and unsettled reason.—*In re Estate Black*, *Myrick's Prob. Rep.* 24, 28.

100. QUESTION FOR CONSIDERATION IS WHETHER MIND WAS VIGOROUS and active in its normal condition, or was it so enfeebled by intemperate habits that deceased could not fairly and rationally consider character and extent of property, his relations to others, his ties of blood, affinity, and friendship, duties and responsibilities, persons to whom and proportions in which he wished his property to go.—*In re Estate Black*, *Myrick's Prob. Rep.* 24, 34.

101. Evidence must show that testator was excited by liquor, or so conducted himself during particular act as to be at moment legally disqualified from giving effect to it, in order to set aside will on ground of incapacity occasioned through intemperance.—*Peck vs. Cary*, 27 N. Y. 9, 84 Am. Dec. 220.

102. Showing that deceased had been on drunk for five days and continued to drink afterwards, and on day he signed will, which does not further indicate want of ordinary intelligence or entire sanity, is not sufficient to set aside will on ground of testamentary incapacity, especially when there is nothing unnatural or unreasonable in the will itself.—*See In re Estate Cunningham*, 52 Cal. 465, 466; *Peck vs. Cary*, 27 N. Y. 9, 84 Am. Dec. 220.

103. Same.—Of drunkenness should not be submitted to jury as special issue, where unsoundness of mind relied upon to defeat will.—*In re Estate Gharky*, 57 Cal. 274, 278. *See In re Estate Cunningham*, 52 Cal. 465, 466.

104. Of intemperate habits on part of deceased incompetent to go to jury to determine soundness or unsoundness of mind.—*In re Estate Gharky*, 57 Cal. 274, 278. *See In re Estate Cunningham*, 52 Cal. 465, 466.

105. Acts of inebriety or other causes are to go to jury, from which they are to find question of testamentary capacity, when unsoundness of mind is ultimate fact to be found.—*In re Estate Gharky*, 57 Cal. 274, 279. *See In re Estate Cunningham*, 52 Cal. 465, 466.

106. OPINIONS OF PHYSICAL EXPERTS.—As to unsoundness of mind as the result of long-continued intoxication, not entitled to as much weight as facts, especially where there is conflict between opinion and facts—opinion may be based upon speculation—operation and condition of human mind being beyond possibility of human knowledge.—*In re Estate O'Keefe*, *Myrick's Prob. Rep.* 154, 155.

107. NARCOTICS, ETC.—Mere fact that testator was in habit of taking laudanum, morphine, and other narcotics, is not sufficient to show unsoundness of mind, or want of testamentary capacity, but it must be shown that

at time of executing will he was so far under their influence as not to be of sound and disposing mind.—*In re Estate Crittenden*, *Myrick's Prob. Rep.* 50, 52.

VII. SAME—4. UNNATURAL, INEQUITABLE WILLS.

108. NEITHER COURTS NOR JURIES CAN DICTATE to people as to persons to whom they shall leave their property.—*In re Estate Crittenden*, *Myrick's Prob. Rep.* 50, 51.

109. RIGHT TO DISPOSE OF ESTATE—Depends neither upon justice of testator's prejudices nor soundness of his reasoning.—*In re Estate Spencer*, 96 Cal. 448, 452, 31 Pac. Rep. 453; *In re Estate Kaufman*, 117 Cal. 288, 295, 59 Am. St. Rep. 179, 49 Pac. Rep. 192. *See Clapp vs. Fullerton*, 34 N. Y. 190, 90 Am. Dec. 681.

110. PARTY MAKING WILL HAS RIGHT TO DISPOSE of property in such way as to him seems fit.—*In re Estate Crittenden*, *Myrick's Prob. Rep.* 50, 52.

111. Has right to make unjust, unreasonable, or even cruel will.—*In re Estate McDevitt*, 95 Cal. 17, 33, 30 Pac. Rep. 101; *In re Estate Wilson*, 117 Cal. 262, 278, 49 Pac. Rep. 172, 711.

112. Has legal right to cut out every relative and friend, and leave all to some benevolent object or even stranger, and fact that younger brothers and sisters are minors makes no difference.—*In re Estate Crittenden*, *Myrick's Prob. Rep.* 50, 51.

113. TESTAMENTARY CAPACITY IS NOT AFFECTED BY MERE FACT THAT WILL IS UNJUST or capricious.—*In re Estate Kaufman*, 117 Cal. 288, 295, 59 Am. St. Rep. 179, 49 Pac. Rep. 192.

114. Effect given to will, though its provisions are unreasonable and unjust, where there is no defect of testamentary capacity, undue influence, or fraud.—*In re Estate Spencer*, 96 Cal. 448, 453, 31 Pac. Rep. 453.

115. Dispositive parts of will examined to see whether dispositions are extravagant and unreasonable, or whether they are such as might probably be expected from one in situation of testator.—*Peck vs. Cary*, 27 N. Y. 9, 84 Am. Dec. 220.

116. Judicious use of property is not to be considered, and does not affect right to dispose of property by will.—*In re Estate Wilson*, 117 Cal. 262, 270, 49 Pac. Rep. 172, 711.

117. QUESTION FOR CONSIDERATION is whether there is such violent departure from what would be considered natural that making of will cannot fairly be referred to any cause other than that of disordered intellect, and not whether gifts are such upon whole as would be advisable under circumstances.—*Peck vs. Cary*, 27 N. Y. 9, 84 Am. Dec. 220.

118. Whether will is or is not "unnatural," e. g. different from what it might have been expected to be, is of no importance, except where there is evidence immediately tending to show mental incapacity, fraud, or undue influence.—*In re Estate Wilson*, 117 Cal. 262, 277, 49 Pac. Rep. 172, 711. *See In re Estate Langford*, 103 Cal. 608, 41 Pac. Rep. 701.

119. **WILL GIVEN EFFECT TO**, though provisions unreasonable and unjust, where there is no defect in testamentary capacity.—In re Estate Kaufman, 117 Cal. 288, 295, 59 Am. St. Rep. 179, 49 Pac. Rep. 192. See Clapp vs. Fullerton, 34 N. Y. 190, 90 Am. Dec. 681.

120. Not unnatural by reason of its being in favor of person for whom sane testator entertains strong affections.—In re Estate Rufino, 116 Cal. 304, 316, 48 Pac. Rep. 127.

121. Paramount, and not affected by reason that his motives are founded on dislikes or resentments against those who might be thought worthy of his bounty.—In re Estate Kaufman, 117 Cal. 288, 295, 59 Am. St. Rep. 179, 49 Pac. Rep. 192. See In re Estate McDevitt, 95 Cal. 17, 30 Pac. Rep. 101; Clapp vs. Fullerton, 34 N. Y. 190, 90 Am. Dec. 681; Woodward vs. James, 3 Strob. (S. C.) 552, 51 Am. Dec. 649.

122. Will of uncle for dividing property equally between nephews and nieces not inequitable.—In re Estate McDevitt, 95 Cal. 17, 31, 30 Pac. Rep. 101.

123. **JURY'S OPINION**.—Will not upset because in opinion of jury or court it is unnatural.—In re Estate Wilson, 117 Cal. 262, 277, 49 Pac. Rep. 172, 711. See In re Estate Langford, 108 Cal. 608, 41 Pac. Rep. 701.

124. Court abrogates its functions when it permits prejudices of jury to set aside will merely upon suspicion or because it does not conform to jury's ideas of what is just and proper.—In re Estate Kaufman, 117 Cal. 288, 295, 59 Am. St. Rep. 179, 49 Pac. Rep. 192. See In re Estate McDevitt, 95 Cal. 17, 30 Pac. Rep. 101.

125. **WILL OF MAN DISINHERITING WIFE AND CHILDREN**, or other near relatives, with whom he is intimate, and for whom he had shown great affection, might be called an "unnatural" will (dictum).—In re Estate Carpenter, 79 Cal. 332, 337, 21 Pac. Rep. 335; Field vs. Shorb, 99 Cal. 661, 671, 34 Pac. Rep. 504.

126. Evidence of value of testator's estate admissible in action contesting will on ground of mental incapacity, as proving reasonableness of division.—In re Estate Flint, 100 Cal. 391, 399, 34 Pac. Rep. 863.

VIII. SAME—5. UNSOUNDNESS OF MIND.

127. **TESTAMENTARY CAPACITY** — Dr. Taylor's rule, as laid down in Med. Jur., p. 658 (ed. 1861), for testing the mental capacity of person is as follows: "If a medical man be present when the will is made, he may easily satisfy himself of the state of mind of the testator by requiring him to repeat from memory the mode in which he has disposed of the bulk of his property. Medical men have sometimes placed themselves in a serious position by becoming witnesses to wills under these circumstances without first assuring themselves of the actual mental condition of the testator. It would always be a good ground of justification if, at the request of the witness, the testator had been made to repeat substantially the leading provisions of his will from memory. If a dying or sick person (or

any other one) cannot do this without prompting or suggestion, there is reason to believe that he has not a sane or disposing mind."

128. **INHERITANCE OF INSANITY** will not be assumed even where disposition thereto has existed.—In re Estate Redfield, 116 Cal. 637, 654, 48 Pac. Rep. 794.

See post par. 173 this note.

129. **STRENGTH OF MIND** does not determine its freedom from delusion.—In re Estate Tittel, Myrick's Prob. Rep. 12, 13.

130. Sound mind is one wholly free from delusions.—In re Estate Tittel, Myrick's Prob. Rep. 12, 13.

131. Soundness of mind, e. g. its healthy condition and healthy action, determines its testamentary capacity.—In re Estate Black, Myrick's Prob. Rep. 24, 27.

132. Soundness of mind sufficient to uphold testamentary capacity is not necessarily that soundness which men in good health and vigor possess.—In re Estate Nelson, 132 Cal. 182, 190, 64 Pac. Rep. 294.

133. Soundness or unsoundness of mind, and not particular state of bodily health, must control.—In re Estate Nelson, 132 Cal. 182, 190, 64 Pac. Rep. 294.

134. **SAME—DOES NOT DETERMINE** testamentary capacity.—In re Estate Black, Myrick's Prob. Rep. 24, 27.

135. Weak minds differ from strong minds only in extent and power of their faculties, and unless they betray symptoms of delusion, soundness cannot be questioned.—In re Estate Tittel, Myrick's Prob. Rep. 12, 13.

136. Person is of sound and disposing mind who has mental capacity to fairly and rationally consider character of property to be disposed of, nature of the ties of blood, affinity, marriage, or friendship, persons to whom he wishes his property to go, and means of disposing of it.—In re Estate Crittenden, Myrick's Prob. Rep. 50, 51. See In re Estate Black, Myrick's Prob. Rep. 24, 28.

137. **QUESTION IS WHETHER HIS MIND AND MEMORY** were sufficiently sound to enable him to know and understand business in which he was engaged at time he executed will.—President etc. Bowdoin Col. vs. Merritt, 75 Fed. Rep. 480, 492. See Stevens vs. Vancleve, 4 Wash. C. C. 262, 23 Fed. Cas. 35.

138. Is one of capacity to know, and not of actual knowledge; and want of latter cannot be made test of existence of other.—President etc. Bowdoin Col. vs. Merritt, 75 Fed. Rep. 480, 490. See Brown vs. Mitchell, 75 Tex. 9, 10, 16, 12 S. W. Rep. 606.

139. Delusions are conceptions originating spontaneously in mind without evidence of any kind to support them, and can be accounted for on no reasonable hypothesis, the mind imagining something to exist, or imputed in existence, of offense, which no rational person would believe to exist, or to have been committed, without some evidence to support it.—In re Estate Scott, 128 Cal. 57, 62, 60 Pac. Rep. 527. See In re Estate Carpenter, 94 Cal. 406, 29 Pac. Rep. 1101; Potter

184. MISTAKEN BELIEF THAT RELATIVES MISTREATED HIM does not, as matter of law, prove insane delusion.—In re Estate Carpenter, 94 Cal. 406, 417, 29 Pac. Rep. 1101.

185. PREJUDICES, DISLIKES, AND ANTI-PATHIES, however ill-founded or strongly entertained, as every delusion is not insane delusion.—In re Estate Kendrick, 130 Cal. 360, 364, 62 Pac. Rep. 605.

186. SPIRITUALISM IS NOT OF ITSELF INSANITY.—In re Estate Spencer, 96 Cal. 448, 453, 31 Pac. Rep. 453.

187. STRANGE ACTIONS, WHICH DO NOT DROWN EXCELLENT INTELLIGENCE and common sense, which characterized life of testator.—President etc. Bowdoin Col. vs. Merritt, 75 Fed. Rep. 480, 491.

188. TEMPORARY BICKERINGS AND PASSIONATE UTTERANCES between husband and wife are consistent with conjugal relation and with devotion of each to other in preference to all other persons.—In re Estate Stratton, 112 Cal. 513, 520, 44 Pac. Rep. 1028.

189. UNFRIENDLY TREATMENT OF WIFE by husband cannot be given in evidence; incompetent to authorize conclusion that either of them intended to exclude other from his estate.—In re Estate Stratton, 112 Cal. 513, 520, 44 Pac. Rep. 1028.

190. WHERE TESTATOR HAS REASONABLE UNDERSTANDING of nature of property disposed of, and persons to whom, and manner in which it was distributed, and so expressed himself.—In re Estate Tittel, Myrick's Prob. Rep. 12, 17.

191. WHERE TESTATOR HAS SUFFICIENT MEMORY AND INTELLIGENCE to fairly and rationally comprehend effect of what he is doing, to appreciate his relations to natural objects of his bounty, and understand character and effect of provisions of will.—In re Estate Tittel, Myrick's Prob. Rep. 12, 17. See In re Estate Crittenden, Myrick's Prob. Rep. 50, 53.

IX. EVIDENCE.

192. BURDEN OF PROOF—Contestant is plaintiff, and as to all matters in issue must go forward.—In re Estate Collins, Myrick's Prob. Rep. 73. See In re Estate Dalrymple, 67 Cal. 444, 7 Pac. Rep. 906; In re Estate Doyle, 73 Cal. 564, 15 Pac. Rep. 125; In re Estate Burrell, 77 Cal. 479, 19 Pac. Rep. 880; In re Estate Gregory, 133 Cal. 131, 65 Pac. Rep. 315 (distinguishing Malone vs. Ruffino, 129 Cal. 514, 79 Am. St. Rep. 127, 62 Pac. Rep. 93).

193. On party contesting will, to prove testator was not of sound mind and memory at time of execution.—In re Estate Crittenden, Myrick's Prob. Rep. 50, 53; Panaud vs. Jones, 1 Cal. 488, 493; In re Estate Wilson, 117 Cal. 262, 270, 49 Pac. Rep. 173, 711; In re Estate Scott, 128 Cal. 57, 60 Pac. Rep. 527; In re Estate Black, 132 Cal. 392, 64 Pac. Rep. 695; In re Estate Nelson, 132 Cal. 182, 191, 64 Pac. Rep. 294; In re Estate Gregory, 133 Cal. 131, 65 Pac. Rep. 315; In re Estate Motz, 136 Cal. 558, 560, 69 Pac. Rep. 294; In re Estate Latour, 140 Cal. 414, 419, 73 Pac. Rep. 1070, 74 Id. 441;

In re Estate McKenna, 143 Cal. 580, 586, 77 Pac. Rep. 461.

194. Contestant's evidence called first, and proponent is not called upon to submit evidence until he rests.—In re Estate Gregory, 133 Cal. 131, 137, 65 Pac. Rep. 315.

195. Mere fact that testator was unable to speak articulately, and only communication made by him consisted of signs, does not shift the burden of proof to proponent of will.—In re Estate Latour, 140 Cal. 414, 415, 73 Pac. Rep. 1070, 74 Id. 441.

196. THE COURT WILL REQUIRE PROOF FROM PROPONENT as to matters or acts necessary to validity of will not put in issue by contestant.—In re Estate Gregory, 133 Cal. 131, 137, 65 Pac. Rep. 315. See In re Estate Gharky, 57 Cal. 274; In re Estate Dalrymple, 67 Cal. 444, 7 Pac. Rep. 906; In re Estate Burrell, 77 Cal. 479, 19 Pac. Rep. 880.

197. Presumption of law is that party is of sound mind at time of execution of will.—In re Estate Nelson, 132 Cal. 182, 191, 64 Pac. Rep. 294. See In re Estate Scott, 128 Cal. 57, 60 Pac. Rep. 527.

198. Especially where judge before whom same executed certified that testator appeared to be of sound mind and perfect memory.—Panaud vs. Jones, 1 Cal. 488, 493.

199. Continues until contrary is proven by preponderance of evidence.—In re Estate Nelson, 132 Cal. 182, 191, 64 Pac. Rep. 294.

200. Parol evidence of attending circumstances admissible.—Mitchell vs. Donohue, 100 Cal. 202, 208, 38 Am. St. Rep. 279, 34 Pac. Rep. 614.

201. Conversations had with testatrix prior and subsequent to making of will may be admitted, not for purpose of proving what was said to witness, or to establish matters referred to as facts, but to permit jury to judge of mental conditions of testatrix at those times.—In re Estate McKenna, 143 Cal. 580, 586, 77 Pac. Rep. 461.

202. Declarations made at or prior to time of making will, to extent that they bear upon state of mind at time of execution of will, mental capacity, condition of mind towards the objects of testator's bounty, as well as those surrounding him, and correspondence of his acts with feelings and purposes entertained at time of executing will, are properly admitted, and are entitled to consideration by jury, although to extent that they purport to be declarations or acts of others or of testator's own acts, they are but matters of hearsay and not entitled to weight by jury.—In re Estate Calkins, 112 Cal. 296, 300, 44 Pac. Rep. 577.

203. MENTAL CONDITION MADE MANIFEST TO OTHERS by statements of individual, his declarations and conversations, as well as his conduct, and when state of his mind at time of execution of document is fact to be shown, his contemporaneous declarations or statements furnish most satisfactory evidence of that fact.—In re Estate Calkins, 112 Cal. 296, 301, 44 Pac. Rep. 577.

204. Declarations of testator are inadmissible, except as they may illustrate his mental state and give picture of condition of his mind contemporaneous with declarations themselves.—In re Estate Calkins, 112 Cal. 296, 301, 44 Pac. Rep. 577.

205. Declarations made by party, whether before or after its execution, inadmissible in evidence, either to support or destroy its validity, or to control its construction.—President etc. Bowdoin Col. vs. Merritt, 75 Fed. Rep. 480, 485. See Garlick vs. Bowers, 66 Cal. 122, 4 Pac. Rep. 1138; Mowry vs. Heney, 36 Cal. 471, 476, 25 Pac. Rep. 17.

206. Declarations made by deceased during last illness that he was of unsound mind and under influence of wife at time of execution of document, does not prove or tend to prove truth of matters declared by him, even though competent evidence, as it is for contestants to establish such unsoundness at time of last illness.—In re Estate Lang, 65 Cal. 19, 20, 2 Pac. Rep. 491.

207. Declarations made by testator, five years after date of will, to his executor as to what was intended by his will and who wrote it, not admissible in evidence as part of res gesta.—In re Estate Gilmore, 81 Cal. 240, 243, 22 Pac. Rep. 655. See In re Estate Garraud, 35 Cal. 336; Nelson vs. McClanahan, 55 Cal. 308.

208. STATEMENTS OF TESTATOR as to effect any act or suggestion of another produced upon him at some previous time, is mere hearsay, and not admissible.—In re Estate Calkins, 112 Cal. 296, 301, 44 Pac. Rep. 577.

209. Statements of testator as to his feeling or disposition at time of making statement, being mere expression in words of his condition, is admissible in so far as it produces a picture thereof.—In re Estate Calkins, 112 Cal. 296, 301, 44 Pac. Rep. 577.

210. Statements made by testatrix some months after execution of will, and about three weeks before her death, to the effect that she did not know what was in the will, and was sorry that certain party was not mentioned, not admissible in order to impeach its validity.—In re Estate Kaufman, 117 Cal. 288, 295, 59 Am. St. Rep. 179, 49 Pac. Rep. 192. See In re Estate Calkins, 112 Cal. 296, 44 Pac. Rep. 577.

211. OPINION OF WITNESS AS TO MENTAL SOUNDNESS OF TESTATOR, in connection with facts upon which opinion is based, admissible.—In re Estate Taylor, 92 Cal. 564, 567, 28 Pac. Rep. 603. See In re Estate Toomes, 54 Cal. 509, 516, 35 Am. Rep. 83.

212. Of non-expert witnesses are not admissible, as a general rule, but they must state facts and not opinions as to acts and language deduced from facts, and leave it to jury to draw proper inference from facts stated.—Holland vs. Zollner, 102 Cal. 633, 637, 36 Pac. Rep. 930, 37 Id. 231.

213. Of ordinary witnesses as to mental condition of party derived from observation, are admissible in evidence when, from nature of subject under investigation, no better evi-

dence can be obtained.—Holland vs. Zollner, 102 Cal. 633, 638, 36 Pac. Rep. 930, 37 Id. 231.

214. Of witnesses must be brought to test of facts in order that court may judge what estimate opinion is entitled to.—In re Estate Redfield, 116 Cal. 637, 655, 48 Pac. Rep. 794.

215. Witness may be asked his opinion as to mental capacity of testator to discharge duty in question, and court will judge proper weight to be given to such opinion from facts and circumstances upon which it is founded.—In re Estate Redfield, 116 Cal. 637, 655, 48 Pac. Rep. 794. See In re Estate Toomes, 54 Cal. 509, 516, 35 Am. Rep. 83.

216. Witness who has been asked facts relating to a change in man's habit of thought, may be asked as to whether or not there has been any change in his mental condition or capacity, such evidence being based on facts and not on conclusion.—In re Estate Carpenter, 79 Cal. 382, 387, 21 Pac. Rep. 835.

217. OPINION AS TO PERSON'S SANITY OR INSANITY IS LIMITED TO EXPERT and intimate acquaintances, but limitation goes no farther.—Marceau vs. Travelers' Ins. Co., 101 Cal. 338, 345, 35 Pac. Rep. 856, 36 Id. 813; In re Estate Carpenter, 94 Cal. 406, 29 Pac. Rep. 1101.

218. Evidence of persons more or less intimate with testator prior to his death, as to their knowledge of his business and social habits, expressing their opinions as to his mental condition, is admissible.—In re Estate Brooks, 54 Cal. 471, 474; In re Estate Carpenter, 94 Cal. 406, 416, 29 Pac. Rep. 1101; In re Estate Wax, 106 Cal. 343, 350, 39 Pac. Rep. 624.

219. Evidence of intimate acquaintances as to state of mind of testator is left largely to discretion of trial court, and its ruling will not be reversed upon appeal where it is reasonably consistent and there is no abuse of discretion.—Wheelock vs. Godfrey, 100 Cal. 578, 583-584, 35 Pac. Rep. 817. See People vs. Pico, 62 Cal. 50, 53; People vs. Levy, 71 Cal. 618, 623, 12 Pac. Rep. 791; In re Estate Carpenter, 79 Cal. 382, 21 Pac. Rep. 835; In re Estate Carpenter, 94 Cal. 406, 407, 29 Pac. Rep. 1101.

220. Question of intimate acquaintance sufficient to determine testamentary capacity of testator, must be submitted to discretion of trial court, and when passed upon by that tribunal will not be interfered with in absence of clear abuse of discretion.—In re Estate McKenna, 143 Cal. 530, 534, 77 Pac. Rep. 461. See In re Estate Carpenter, 94 Cal. 406, 29 Pac. Rep. 1101; Wheelock vs. Godfrey, 100 Cal. 578, 35 Pac. Rep. 817; In re Estate Wax, 106 Cal. 343, 350, 39 Pac. Rep. 624.

221. Right to give opinion as to person's sanity, which is limited to expert and intimate acquaintances, does not apply to matters of mere observation.—Marceau vs. Travelers' Ins. Co., 101 Cal. 338, 345, 35 Pac. Rep. 856, 36 Pac. Rep. 813; In re Estate Carpenter, 94 Cal. 406, 29 Pac. Rep. 1101.

222. MERE OPINIONS OF WITNESSES, however numerous or respectable, will not be

sufficient to justify court in deciding against testamentary capacity of testator, no matter whether such opinions are medical or those of any other professional man.—*In re Estate Redfield*, 116 Cal. 637, 655, 48 Pac. Rep. 794.

223. Attorney may testify as to information confided to him by deceased in taking instructions for will, for reason that attorney is made medium through whom right which testator seeks to create may be established.—*In re Estate Nelson*, 132 Cal. 182, 188, 64 Pac. Rep. 294.

224. Attesting witness to will, may testify as to mental capacity of testator at time, as testator's act in procuring him as witness waives right of confidential communication.—*In re Estate Mullin*, 110 Cal. 252, 254, 42 Pac. Rep. 645. See *In re Estate Wax*, 106 Cal. 343, 349, 39 Pac. Rep. 624; *In re Estate Coleman*, 111 N. Y. 220, 19 N. E. Rep. 71.

225. Conversations between attorney and testator, and latter's instruction concerning will, are admissible upon determination of question as to testator's mental capacity at time of testamentary act, which immediately followed such conversations.—*In re Estate Mullin*, 110 Cal. 252, 254, 42 Pac. Rep. 645.

226. Nurse attending in sick-room may testify as to what transpired in room at time of execution of a will.—*In re Estate Flint*, 100 Cal. 391, 399, 34 Pac. Rep. 863.

227. Memoranda made by nurse as to what transpired in sick-room may be referred to by her in giving evidence in order to refresh her memory.—*In re Estate Flint*, 100 Cal. 391, 399, 34 Pac. Rep. 863.

228. PHYSICIAN CANNOT GIVE OPINION AS TO CAPACITY of party to make will.—*In re Estate Taylor*, 92 Cal. 564, 566, 28 Pac. Rep. 603. See *Connor vs. Stanley*, 67 Cal. 315, 7 Pac. Rep. 723; *Walker vs. Walker*, 34 Ala. 470; *Gibbons vs. Gibbons*, 9 Yerg. (Tenn.) 329.

229. Cannot be questioned as to whether or not testator's mind was affected.—*In re Estate Redfield*, 116 Cal. 637, 644, 48 Pac. Rep. 794.

230. Evidence of doctor attending testator during last illness, with regard to his mental capacity, to effect that his information is acquired from decedent and from his observation of him while in attendance upon him for purpose of prescribing as physician, is inadmissible.—*In re Estate Nelson*, 132 Cal. 182, 187, 64 Pac. Rep. 294. See *In re Estate Flint*, 100 Cal. 391, 34 Pac. Rep. 863; *In re Estate Redfield*, 116 Cal. 637, 48 Pac. Rep. 794.

230. Evidence of doctor attending testator that he prescribed for him for mental trouble, not admissible, as such evidence could not be given without presence of patient, or with his consent.—*In re Estate Flint*, 100 Cal. 391, 395, 34 Pac. Rep. 863. See *Freel vs. Market St. R. Co.*, 97 Cal. 40, 31 Pac. Rep. 730; *Briggs vs. Briggs*, 20 Mich. 34; *Streeter vs. Breckenridge*, 23 Mo. App. 244.

232. In answer to hypothetical question as to his opinion as an expert as to the mental condition of deceased, based upon state of facts, describing deceased's physical condition and testified to by such doctor, admis-

sible in evidence.—*In re Estate Flint*, 100 Cal. 391, 397, 34 Pac. Rep. 863; *In re Estate Blake*, 136 Cal. 306, 308, 39 Am. St. Rep. 135, 68 Pac. Rep. 327.

233. On cross-examination, to effect that testator was mentally sane and thoroughly rational in his conversation and competent, and his brain was not affected by his physical condition, not objected to at time, cannot be stricken out upon motion.—*Wheelock vs. Godfrey*, 100 Cal. 578, 587, 35 Pac. Rep. 317.

234. Physician testifying that he treated testator for consumption, and not for mental disorder, and got no information about her condition, either physical or mental, except as a physician to enable him to take care of her.—*In re Estate Redfield*, 116 Cal. 637, 644, 48 Pac. Rep. 794.

235. Physician testifying as to mental capacity of testator may be cross-examined as to soundness of his judgment and his qualifications as an alienist, character of his patient's infirmities, and facts and circumstances upon which his judgment was exercised and his conclusion reached.—*In re Estate Mullin*, 110 Cal. 252, 256-257, 42 Pac. Rep. 645.

236. Physician attending testator in his last sickness, and attesting will as witness, is competent witness upon question of testamentary capacity, privileged communication being waived by his witnessing will.—*In re Estate Mullin*, 110 Cal. 252, 255, 42 Pac. Rep. 645.

237. Physician attending deceased some time after execution of will and during existence of trouble with sons, and in such close and intimate connection as to afford him great facilities of forming opinion as to mental condition, speaking from personal acquaintance, business intercourse, and professional and scientific knowledge as to mental capacity at time of execution of will, may be cross-examined with respect to statements made by him to other parties to effect that deceased was not in his right mind.—*Wixom vs. Goodcell*, 90 Cal. 622, 626, 27 Pac. Rep. 419.

238. COPY OF COUNTY REGISTER SHOWING AGE OF DECEASED at time of registration, not admissible on behalf of contestants in action to set aside will on ground of mental incapacity, entry not being made by him.—*In re Estate Crozier*, 74 Cal. 180, 182, 15 Pac. Rep. 618.

239. EVIDENCE AS TO VALUE OF TESTATOR'S ESTATE ADMISSIBLE in action contesting validity of will upon ground of mental incapacity and undue influence, is proper element for consideration in determining state of mind of testator, and as showing reasonable disposition of his property to parties entitled.—*In re Estate Flint*, 100 Cal. 391, 399, 34 Pac. Rep. 863.

240. THE COURT SHOULD DETERMINE whether there is any satisfactory evidence to justify conclusion arrived at by jury.—*In re Estate Redfield*, 116 Cal. 637, 656, 48 Pac. Rep. 794.

241. INSTRUCTION TO JURY to effect that evidence of medical experts upon question of

mental capacity of testator is unsatisfactory, stating reasons therefor, is erroneous.—In re Estate Blake, 136 Cal. 306, 303, 39 Am. St. Rep. 135, 68 Pac. Rep. 827.

242. Instructions to jury that they should find insanity or insane delusion, if they find certain enumerated facts, omitting facts necessary to reach that conclusion, is erroneous, especially where facts recited in instruction do not warrant direction with which it concludes.—In re Estate Calef, 139 Cal. 673, 675, 73 Pac. Rep. 539.

243. **INSANE PREJUDICE AS TERM USED IN INSTRUCTIONS TO JURY** upon question of testamentary capacity, is confusing, if not misleading, inasmuch as it is not well defined, and is not recognized as having exact meaning as is term "insane delusion."—In re Estate Kendrick, 130 Cal. 360, 371, 62 Pac. Rep. 605.

244. **JURY MUST DRAW INFERENCE OF FACTS FROM EVIDENCE** before them, regulated by rules of law stated to them by court.—In re Estate Redfield, 116 Cal. 637, 656, 48 Pac. Rep. 794.

245. **Finding of court and jury as to unsoundness of mind of testator**, will not be disturbed where there is evidence in support of such unsoundness, although it may be contradicted, and there may be substantial conflict, and question as to whether court correctly considered verdict as only advisory is of no consequence.—In re Estate Langley, 140 Cal. 126, 130, 73 Pac. Rep. 824.

246. **Special verdict in regard to mental unsoundness based upon evidence showing unsoundness of mind and incompetency to make will at time**, and that testator's failure to provide for his family was based upon insane delusions, is sufficient to sustain an order vacating probate of will, and will not be open upon appeal, in absence of errors of law.—In re Estate Carpenter, 94 Cal. 406, 413, 29 Pac. Rep. 1101.

247. **VERDICT OF JURY GIVEN ON TRIAL** that deceased was of sound mind at time of execution of will, rendered upon conflicting evidence, not subject to review upon appeal.—In re Estate Nelson, 132 Cal. 182, 187, 64 Pac. Rep. 294.

§ 1271. MONOMANIAC INCOMPETENT (repealed).

History: Enacted March 21, 1872, repealed March 30, 1874, Code Amdt. 1873-4, p. 232.

§ 1272. **WILL, OR PART THEREOF, PROCURED BY FRAUD.** A will, or part of a will, procured to be made by duress, menace, fraud, or undue influence, may be denied probate; and a revocation, procured by the same means, may be declared void.

History: Enacted March 21, 1872.

I. Undue Influence—1. In General.

1. Applied, cited, construed, referred to, etc.
2. Construed with § 1575 by implication.
- 3, 4. Necessity of alleging.
- 5-8. Necessity of liberty and freedom from controlling influence.

II. Same—2. What Constitutes.

- 9-13. Definition of undue influence.
- 14, 15. Considered as allied to fraud.
16. Distinguished from unsoundness of mind.
17. Not inferred from opportunity.
- 18-20. Must not be influenced through gratitude, affection, etc.
- 21-24. Not shown by general influence, foolish or unjust will, draft by beneficiary.
25. Question is effect of influence upon mind, not moral character.
26. Understanding and knowledge—When immaterial.
- 27, 28. Undue restraint—What has reference to.
- 29-37. When undue influence exists.
- 38-47. When not shown.

III. Same—3. Extent of.

- 48-63. Must vitiate will, amount of force, bear directly upon action, etc.

IV. Same—4. Time When Practiced.

- 64, 65. Pre-existing threat—When sufficient.

V. Same—5. Parties Exercising.

66. Beneficiary—Need not have exercised.
67. Same—Act of other parties sufficient.
- 68-70. Mistress—Acts of, when amount to.
- 71, 72. Partners—Acts of, when amount to.
- 73-75. Spiritual adviser—Acts of, when amount to.

VI. Evidence.

81. Burden of proof—When upon plaintiff to allege facts.
82. Same—When upon party holding confidential relation.
- 83, 84. Same—When upon contestant.
85. Same—When upon spiritualistic medium.
- 86, 87. Confidential relation—Effect of suspicion and jealousy arising from.
88. Inability to articulate—Effect on burden of proof.
- 89-92. Presumption as to undue influence.
- 93-98. Circumstantial evidence—When and to what extent admissible.
- 99-111. Declarations of testator—Prior and subsequent, to what extent admissible.
112. Question of animosity or friendship—Whom considered.
113. Same—Fairness of allotment—When considered.
114. Weakness of mind—How far considered.
115. When evidence of elicit relation not competent.

116. When evidence of amount owned by beneficiary not admissible.

117-133. Sufficiency and insufficiency of evidence.

VII. Fraud.

134. Applications of provisions of § 1572.

135. Definition—Fraudulent misrepresentations.

136-138. Fraud never imputed, presumed but proved.

139-143. What facts and circumstances must be shown and proved.

I. UNDUE INFLUENCE—1. IN GENERAL.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *In re Estate Kohler*, 79 Cal. 313, 316, 21 Pac. Rep. 758 (construed and applied by implication with § 1575).

As to fraud and undue influence in connection with will, see monographic notes by Robert Desty, 3 L. R. A. 668; 4 L. R. A. 732; 3 L. R. A. 261.

As to honest intercession, argument, and persuasion, see monographic note 16 Am. Dec. 257-259.

As to influence gained by kindness and affection, see monographic note 16 Am. Dec. 257-259.

As to provision of will, as affecting issue of undue influence, see monographic note 6 Prob. Rep. Ann. 300.

As to presumption of undue influence, see notes 16 Am. Dec. 257; 44 Am. Rep. 537; 31 Am. St. Rep. 94.

As to undue influence arising from illicit relations between parties, see monographic note 16 Am. Dec. 257-263.

As to undue influence by mistress, see monographic note 4 Prob. Rep. Ann. 475.

As to what amount of undue influence affects will, see notes 31 Am. St. Rep. 670; 3 Prob. Rep. Ann. 117.

As to what influence or importunity will invalidate will, see monographic note 16 Am. Dec. 257-263.

2. CONSTRUED BY IMPLICATION with provisions as to undue influence contained in § 1575, post, as applying to wills as well as other instruments.—*In re Estate Kohler*, 79 Cal. 313, 316, 21 Pac. Rep. 758.

3. EXERCISE OF UNDUE INFLUENCE must be distinctly alleged.—*Goodwin vs. Goodwin*, 59 Cal. 560, 562.

4. Mere statement in language of statute, or of evidence of fact, is not sufficient allegation of facts necessary to sustain claim that will not properly signed or witnessed.—*In re Estate Burrell*, 77 Cal. 479, 481, 19 Pac. Rep. 830. See *In re Estate Gharky*, 57 Cal. 274; *In re Estate Dalrymple*, 67 Cal. 444, 7 Pac. Rep. 906.

5. Testator must enjoy full liberty and freedom in making his will, and possess power to withstand all contradiction and control.—*In re Estate Tittel*, Myrick's Prob. Rep. 12, 16. See *In re Estate Crittenden*, Myrick's Prob. Rep. 50, 52.

6. Will depends upon abuse of controlling influence more than upon fact of its existence.

—*In re Estate Low*, Myrick's Prob. Rep. 143, 147.

7. Will produced by undue influence, is not will of testator, but that of some other party.—*In re Estate Low*, Myrick's Prob. Rep. 143, 145.

8. Cannot stand.—*In re Estate Tittel*, Myrick's Prob. Rep. 12, 16.

II. SAME—2. WHAT CONSTITUTES.

9. UNDUE INFLUENCE IS THAT WHICH AMOUNTS TO CONSTRAINT which substitutes will of another for that of testator.—*President etc. Bowdoin Col. vs. Merritt*, 75 Fed. Rep. 480, 493. See *Eckert vs. Flowry*, 43 Pa. St. 46; *Conley vs. Nailor*, 118 U. S. 127, 134, bk. 30 L. ed. 112, 6 Sup. Ct. Rep. 1001.

10. Any kind of influence, either through fear, coercion, or importunity, by which testator is prevented from exercising his true mind.—*In re Estate Tittel*, Myrick's Prob. Rep. 12, 16. See *In re Estate Crittenden*, Myrick's Prob. Rep. 50, 52.

11. Is such as to compel or procure testator to do that which it was not his will to do, and which procures instrument which is not free and expressed intention of testator, will vitiate will.—*In re Estate Motz*, 136 Cal. 553, 563, 69 Pac. Rep. 294.

12. That degree of importunity which deprives testator of his free agency, which is such that he is too weak to resist, renders instrument not his free and unrestrained act.—*In re Estate Calkins*, 112 Cal. 296, 304, 44 Pac. Rep. 577.

13. That which compels testator to do against his will, through fear, or desire of peace, or some feeling which he is unable to resist, but for which will would not have been made as it was.—*In re Estate Low*, Myrick's Prob. Rep. 143, 146.

14. CLEARLY ALLIED TO ACTUAL FRAUD, and when resorted to by adroit and crafty person, its presence often becomes exceedingly difficult to detect.—*In re Estate Calkins*, 112 Cal. 296, 304, 44 Pac. Rep. 577.

15. Not so nearly allied to fraud as to be identical, so that undue influence would comprehend fraud.—*Boyd vs. Boyd*, 66 Pa. St. 233, 293.

16. ENTIRELY DISTINCT FROM UNSOUNDNESS OF MIND, as man may be of sound and disposing mind and yet be victim of such influence.—*In re Estate Black*, Myrick's Prob. Rep. 24, 31.

17. Undue influence cannot be inferred from opportunity and interest.—*In re Estate Low*, Myrick's Prob. Rep. 143, 147.

18. Undue influence must not be exercised through gratitude, affection, or esteem.—*In re Estate Low*, Myrick's Prob. Rep. 143, 147.

19. Must not be mere desire of gratifying will of another in order to overcome will.—*In re Estate Low*, Myrick's Prob. Rep. 143, 147.

20. Not be influence of affection and attachment, nor mere desire to gratify wishes of another, as that would be strong ground in

support of testamentary act.—*Goodwin vs. Goodwin*, 59 Cal. 560, 561.

21. NOT SHOWN BY GENERAL INFLUENCE NOT BROUGHT TO BEAR UPON TESTAMENTARY ACT, is not undue influence such as will afford ground for setting aside of will of person of sound mind.—In re Estate Donovan, 140 Cal. 390, 393, 73 Pac. Rep. 1081. See In re Estate McDevitt, 95 Cal. 17, 30 Pac. Rep. 101; In re Estate Langford, 108 Cal. 608, 609, 41 Pac. Rep. 701; In re Estate Calkins, 112 Cal. 296, 44 Pac. Rep. 577; In re Estate Willson, 117 Cal. 262, 49 Pac. Rep. 172, 711.

22. Not shown by mere fact that testator makes foolish, unnatural, or unjust will.—In re Estate Donovan, 140 Cal. 390, 393, 73 Pac. Rep. 1081. See In re Estate McDevitt, 95 Cal. 17, 30 Pac. Rep. 101; In re Estate Kaufman, 117 Cal. 288, 289, 59 Am. St. Rep. 179, 49 Pac. Rep. 192.

23. Fact that will is drafted by beneficiary is of itself ground for suspicion, and circumstances of its execution will be closely scrutinized.—In re Estate Byrne, Myrick's Prob. Rep. 1, 2.

24. Especially where testator is old and in extremis.—*Harvey vs. Sullens*, 46 Mo. 147, 2 Am. Rep. 491.

25. Question in all cases of undue influence is as to effect of influence upon testator's mind, not as to its moral character or its source, although in some cases character of person exerting influence may be important factor in determining its effect.—In re Estate Ruffino, 116 Cal. 304, 316, 48 Pac. Rep. 127.

26. UNDERSTANDING AND KNOWLEDGE OF MEANING OR CONSTRUCTION OF WILL is immaterial where testator is under restraint or undue influence, as not being able to express his real wishes, his knowledge that he is not so doing not being material.—In re Estate Black, Myrick's Prob. Rep. 24, 35.

27. Restraint has reference to physical restraint, rather than mental influence.—In re Estate Tittel, Myrick's Prob. Rep. 12, 16.

28. Restraint is that kind of influence which is exercised by force, threats, or coercion, physical or mental, which testator is not able to resist, or through fear, by which he is prevented from exercising and expressing his own judgment and desire.—In re Estate Black, Myrick's Prob. Rep. 24, 31.

29. UNDUE INFLUENCE EXISTS WHERE one holding confidential relation toward another takes advantage of same in favor of himself, or deals with other upon terms of his own making.—*Ross vs. Conway*, 92 Cal. 632, 636, 23 Pac. Rep. 785. See *Casborne vs. Barsham*, 2 Beav. 76, 78, 17 Eng. Ch. 76; *Dent vs. Bennett*, 4 Myl. & C. 269, 277, 18 Eng. Ch. 268; *Gibson vs. Jeyes*, 6 Ves. 266, 278, 5 Rev. Rep. 668; *Huguenin vs. Baseley*, 14 Ves. 273, 300, 9 Rev. Rep. 276.

30. Degree of importunity or undue influence which will deprive testator of his free agency, if such that he is too weak to resist, and renders instrument not his free and unrestrained act, will vitiate it.—In re Estate Tittel, Myrick's Prob. Rep. 12, 16.

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31. "Influence which has prevented unnatural, unjust and vicious will, by overcoming and controlling testator to extent that will is not his spontaneous act, is unlawful."—In re Estate Ruffino, 116 Cal. 304, 316, 48 Pac. Rep. 127.

32. This would seem to carry the doctrine of undue influence to too great a length. It is thought that, as an academical question, the prevention of an unnatural, unjust, and vicious act ought to be looked upon as leading testator to deal with his property in right direction and therefore as an influence for good. But it is admitted that in practice a bad and oppressive precedent might be established.

33. Instrument executed by physical compulsion, or by fear or coercion, is obtained by undue restraint.—In re Estate Tittel, Myrick's Prob. Rep. 12, 16.

34. Will in favor of poor relative changed in favor of one who was wealthy, made by testatrix after attack of paralysis, and after interview with rich relative in which beneficiary under former will was slandered, the testatrix being in enfeebled condition, circumstances show breach of confidence and undue influence.—In re Estate Kendrick, 130 Cal. 360, 368-369, 62 Pac. Rep. 605.

35. Shown by proof of circumstances showing that facts are inconsistent with claim that will was spontaneous act of alleged testator.—In re Estate Kendrick, 130 Cal. 360, 368-369, 62 Pac. Rep. 605. See In re Estate Langford, 108 Cal. 608, 41 Pac. Rep. 701.

36. Undue influence sufficient to upset will made in favor of spiritualistic medium shown by evidence that testator had most exalted opinion of powers of such medium, and was much under his control, and that such medium had great influence over testator whenever he was around; evidence also showing that medium himself had stated that testator was crazy and that he could do anything in world with him.—*Connor vs. Stanley*, 73 Cal. 556, 559, 1 Am. St. Rep. 34, 14 Pac. Rep. 306.

37. Will executed at time when testator so surrounded by those desiring to sustain will, that he could not and did not express his own wishes and exercise his own judgment, is obtained under restraint.—In re Estate Tittel, Myrick's Prob. Rep. 12, 16.

38. UNDUE INFLUENCE NOT SHOWN BY GENERAL INFLUENCE not brought to bear upon testamentary act, however strong or controlling.—In re Estate McDevitt, 95 Cal. 17, 30 Pac. Rep. 101.

39. By mere advice, persuasion, or entreaty, especially where there is no fraud, deceit, or fiduciary relation, or no force or coercion, or imposition or duress, or other improper or prohibitive means.—*President etc. Bowdoin Col. vs. Merritt*, 75 Fed. Rep. 480, 511. See *Goodwin vs. Goodwin*, 59 Cal. 560.

40. By mere fact that testator disinherits every child and leaves property to strangers, where it is shown that he understands his legal right to make whatever disposition of his property he pleases, and that his act was free, and made with proper understanding.—

In re Estate Tittel, Myrick's Prob. Rep. 12, 17.

41. By mere fact that beneficiary drafts will where testator was in possession of his faculties, and made will as he desired, and evidence showed that there was no undue influence.—In re Estate Byrne, Myrick's Prob. Rep. 1, 2.

42. By mere opportunity to exercise undue influence offense.—In re Estate Black, 132 Cal. 392, 395, 64 Pac. Rep. 695. See In re Estate Carpenter, 94 Cal. 406, 29 Pac. Rep. 1101; In re Estate McDevitt, 95 Cal. 17, 30 Pac. Rep. 101; In re Estate Langford, 103 Cal. 608, 610, 41 Pac. Rep. 701; In re Estate Calkins, 112 Cal. 296, 301, 44 Pac. Rep. 577; In re Estate Kaufman, 117 Cal. 288, 295, 59 Am. St. Rep. 179, 49 Pac. Rep. 192.

43. By mere prompting will, not sufficient to invalidate will upon that ground.—In re Estate Tittel, Myrick's Prob. Rep. 12, 17.

44. Misapprehension alone, to have that effect it must have been caused by fraudulent misrepresentation.—In re Estate Tittel, Myrick's Prob. Rep. 12, 18.

45. By suggestions and recommendations made by friends and relatives or legal advisers, party must be left to free exercise of his own will, notwithstanding such suggestions.—In re Estate Black, Myrick's Prob. Rep. 24, 32.

46. Where one in prime of life and in full possession of mental powers goes alone to lawyer's office, directs him to prepare will, and same is prepared according to his instructions and executed and subscribed by lawyer and another as witnesses, no relatives being present.—In re Estate Carriger, 104 Cal. 81, 84, 37 Pac. Rep. 735.

47. Will of married woman under no restraint, at her own suggestion, prompted by gratitude, made in favor of her physician, with knowledge that she had not long to live, and that disposition of same in favor of her husband, an invalid, would not benefit him, will not be upset on ground of undue influence exercised by such physician, where it is further shown that property would ultimately go to stranger, and will is prepared by an attorney selected at her suggestion.—In re Estate Wickes, 129 Cal. 195, 202, 72 Pac. Rep. 902.

III. SAME—3. EXTENT OF.

48. EXTENT—Influence must be undue in order to vitiate will.—In re Estate Mots, 136 Cal. 558, 563, 69 Pac. Rep. 294.

49. True content of undue influence is fact that it overcomes will without convincing judgment.—In re Estate Donovan, 140 Cal. 390, 394, 73 Pac. Rep. 1081.

50. UNDUE INFLUENCE MUST AMOUNT TO FORCE and coercion.—In re Estate Carpenter, 94 Cal. 406, 412, 29 Pac. Rep. 1101. See Goodwin vs. Goodwin, 59 Cal. 560; President etc. Bowdoin Col. vs. Merritt, 75 Fed. Rep. 480, 483. See Conley vs. Nailor, 118 U. S. 127, 184, bk. 30 L. ed. 112, 6 Sup. Ct. Rep. 1001.

51. Bear directly upon testamentary act.—In re Estate Donovan, 140 Cal. 390, 394, 73 Pac. Rep. 1081. See Goodwin vs. Goodwin, 59 Cal.

560; Englert vs. Englert, 193 Pa. St. 326, 327, 82 Am. St. Rep. 308, 47 Atl. Rep. 940.

52. Be such as he is too weak to resist, and which renders instrument not his free and unconstrained act.—President etc. Bowdoin Col. vs. Merritt, 75 Fed. Rep. 480, 493. See Conley vs. Nailor, 118 U. S. 127, 184, bk. 30 L. ed. 112, 6 Sup. Ct. Rep. 1001; Eckert vs. Flowry, 43 Pa. St. 46; Davis vs. Calvert, 5 Gill & J. (Md.) 269, 302, 35 Am. Dec. 282.

53. Destroys testator's free agency, and substitutes for his own will that of another.—In re Estate Mots, 136 Cal. 558, 563, 69 Pac. Rep. 294. See Goodwin vs. Goodwin, 59 Cal. 560; In re Estate Carpenter, 94 Cal. 406, 412, 29 Pac. Rep. 1101; Eckert vs. Flowry, 43 Pa. St. 46; President etc. Bowdoin Col. vs. Merritt, 75 Fed. Rep. 480, 483; Conley vs. Nailor, 118 U. S. 127, 184, bk. 30 L. ed. 112, 6 Sup. Ct. Rep. 1001.

54. At time and in very act of making testament.—In re Estate Donovan, 140 Cal. 390, 394, 73 Pac. Rep. 1081. See Goodwin vs. Goodwin, 59 Cal. 560.

55. Influence adequate to control free agency of testator.—In re Estate Tittel, Myrick's Prob. Rep. 12, 16.

56. Make mind of testator submissive to that of another.—In re Estate Low, Myrick's Prob. Rep. 143, 146.

57. Overpower inclination and judgment.—In re Estate Low, Myrick's Prob. Rep. 143, 148.

58. Produce effect upon mind so that will executed is not expression of testator's own desire.—In re Estate Nelson, 182 Cal. 182, 194, 64 Pac. Rep. 294. See In re Estate Calkins, 112 Cal. 296, 44 Pac. Rep. 577.

59. Such as influences mind of testator with relation to will itself.—In re Estate Kaufman, 117 Cal. 288, 295, 59 Am. St. Rep. 179, 49 Pac. Rep. 192. See Eckert vs. Flowry, 43 Pa. St. 46.

60. Such that party making it has no free will, but stands in vinculis.—President etc. Bowdoin Col. vs. Merritt, 75 Fed. Rep. 480, 493. See Conley vs. Nailor, 118 U. S. 127, 184, bk. 30 L. ed. 112, 6 Sup. Ct. Rep. 1001.

61. Unlawful in so far as it affects testamentary disposition favorable to unlawful relation and unfavorable to lawful heirs.—In re Estate Ruffino, 116 Cal. 304, 315, 48 Pac. Rep. 127. See Dean vs. Negley, 41 Pa. St. 312, 80 Am. Dec. 620.

62. Upon very act of making the will.—In re Estate Low, Myrick's Prob. Rep. 143, 147.

63. Used directly to procure will except where beneficiaries or parties instrumental in having will executed, sustain confidential relation to testator.—In re Estate McDevitt, 95 Cal. 17, 33, 30 Pac. Rep. 101.

IV. SAME—4. TIME WHEN PRACTISED.

64. TIME—Threats or violence in order to avoid will need not be practised or resorted to at time of making will, but it is enough that will was made after threats or violence under general controlling and continuing influence of fear of dominion over testator by party so putting him in fear.—In re Estate Black, Myrick's Prob. Rep. 24, 31.

65. Influence at any time effect of which produced will without fair concurrence of testator's mind, sufficient to avoid it.—In re Estate Low, Myrick's Prob. Rep. 143, 147. See Goodwin vs. Goodwin, 59 Cal. 560; In re Estate McDevitt, 95 Cal. 17, 33, 30 Pac. Rep. 101; In re Estate Donovan, 140 Cal. 390, 394, 73 Pac. Rep. 1081.

V. SAME—5. PARTIES EXERCISING.

66. PARTIES EXERCISING—Undue influence in order to effect validity of will need not to have been exercised by beneficiary.—In re Estate Cahill, 74 Cal. 52, 54, 15 Pac. Rep. 364.

67. MAY BE ACT OF ANY PARTY, no matter whether he gains by will or not.—In re Estate Cahill, 74 Cal. 52, 54, 15 Pac. Rep. 364.

68. MISTRESS—Impertunities of, not over-coming will of testator do not make will void, though it is made in her favor.—In re Estate Ruffino, 116 Cal. 304, 316, 48 Pac. Rep. 127.

69. Mistress not be permitted to exercise her influence on execution of will to same extent as would a wife.—In re Estate Flint, 100 Cal. 391, 393, 34 Pac. Rep. 363. See In re Estate Ruffino, 116 Cal. 304, 316, 48 Pac. Rep. 127.

70. Undue influence is not proved by fact that some of property devised by testator to his mistress morally belonged to his sisters, as loaned by them through affection, although such fact would make will seem unnatural and might be proper circumstance to be considered with other facts tending to prove undue influence.—In re Estate Ruffino, 116 Cal. 304, 317, 48 Pac. Rep. 127.

71. PARTNERS—UNDUE INFLUENCE NOT SHOWN by fact that family of partner of testator was supported by partnership, does not amount to fraud, or show circumstances tending to induce testator to make will in favor of partner's children rather than his own.—In re Estate Carpenter, 94 Cal. 406, 411, 29 Pac. Rep. 1101.

72. Fact that partner of testator had more influence in management of partnership business would not tend to prove that he unduly influenced testator in making testamentary disposition.—In re Estate Carpenter, 94 Cal. 406, 413, 29 Pac. Rep. 1101.

73. SPIRITUAL ADVISER.—Undue influence existing by spiritual adviser over testator, who is about to die, sufficient to set document aside, whether benefit accrues to adviser or to some other recipient benefited through such influence.—Ross vs. Conway, 92 Cal. 632, 636, 23 Pac. Rep. 785. See Connor vs. Stanley, 73 Cal. 556, 1 Am. St. Rep. 84, 14 Pac. Rep. 306.

74. Especially where mind is impaired by physical weakness.—Ross vs. Conway, 92 Cal. 632, 636, 23 Pac. Rep. 785.

75. Will in favor of spiritual adviser and his church, made by party in last sickness, when mind and body were both impaired through weakness, circumstances showing that deceased had no independent advice, and attorney drawing will was procured by such spiritual adviser, and that they were only parties with whom deceased had any inter-

course, upset on ground of undue influence.—Ross vs. Conway, 92 Cal. 632, 636, 23 Pac. Rep. 785.

76. WIFE—UNDUE INFLUENCE.—Impertunities of wife destroying free will of testator make will void.—In re Estate Ruffino, 116 Cal. 304, 316, 48 Pac. Rep. 127.

77. Influence of wife over husband acquired by good qualities and kind attentions in his lifetime not sufficient to overcome will made in her favor when not unduly exercised.—In re Estate Low, Myrick's Prob. Rep. 143, 148.

78. Legal presumption against validity of provision made by husband in favor of his wife does not exist, as she may justly influence making of her husband's will for her own benefit or that of others, so long as she does not act fraudulently or extort benefits from him when he is not in condition to exercise his faculties as free agent.—In re Estate Donovan, 140 Cal. 390, 395, 73 Pac. Rep. 1081. See In re Estate Langford, 108 Cal. 603, 41 Pac. Rep. 701; Latham vs. Udell, 33 Mich. 232.

79. UNDUE INFLUENCE NOT SHOWN BY FACT THAT TESTATOR left each of his children only one dollar, and bulk of his property to his wife.—In re Estate Donovan, 140 Cal. 390, 396, 73 Pac. Rep. 1081.

80. Not shown by fact that wife had and exercised an influence over husband in conduct of home affairs, or in business of his life.—In re Estate Donovan, 140 Cal. 390, 394, 73 Pac. Rep. 1081. See Small vs. Small, 4 Greenl. (Me.) 220, 16 Am. Dec. 253, 255; Peery vs. Peery, 94 Tenn. 328, 29 S. W. Rep. 1.

VI. EVIDENCE.

81. BURDEN OF PROOF ON PLAINTIFF to allege all facts necessary to sustain claim that will not properly signed and witnessed.—In re Estate Burrell, 77 Cal. 479, 481, 19 Pac. Rep. 380. See In re Estate Gharky, 57 Cal. 274; In re Estate Dalrymple, 67 Cal. 444, 7 Pac. Rep. 906.

82. Showing that testamentary disposition in favor of party holding confidential relation was freely and voluntarily made is upon party claiming same.—In re Estate Wickes, 139 Cal. 195, 202, 72 Pac. Rep. 902.

83. Is on part of party contesting will in first instance.—In re Estate Latour, 140 Cal. 414, 419, 73 Pac. Rep. 1070, 74 Id. 441; In re Estate Low, Myrick's Prob. Rep. 143, 148; McMechen vs. McMechen, 17 W. Va. 683, 41 Am. Rep. 632 (overruling Riddell vs. Johnson's Executors, 26 Gratt. (Va.) 152, and Evans vs. Arnold, 52 Ga. 169).

84. To prove undue influence of proponent, a female, non-relative of testator, who had deserted his wife and lived at her house and was entirely helpless and wholly dependent upon her, although she sent for lawyer and was with others present when lawyer asked testator if he wanted to leave his property to her, does not shift the burden of proof to proponent to show that she exerted undue influence over testator.—In re Estate Latour, 140 Cal. 414, 423-424, 73 Pac. Rep. 1070, 74 Id. 441.

85. Upon spiritualistic medium, who had

exercised considerable influence and control over deceased, to show want of undue influence in will made in his favor.—*Connor vs. Stanley*, 72 Cal. 556, 558, 1 Am. St. Rep. 34, 14 Pac. Rep. 306.

86. **CONFIDENTIAL RELATION EXCITES SUSPICION** and jealousy of courts, and casts duty upon beneficiary to affirmatively satisfy conscience of judge that such suspicion is unfounded; in other words, that undue influence does not exist.—*In re Estate Wickes*, 139 Cal. 195, 202, 72 Pac. Rep. 902.

87. Existence of confidential relation does not prevent free exercise of power of disposition in favor of one of parties where mental capacity and volition of testator is apparent.—*In re Estate Wickes*, 139 Cal. 195, 202, 72 Pac. Rep. 902.

88. Fact that testator was unable to articulate properly, and was compelled to communicate by signs, does not shift the burden of proof, or make it essential for the proponent to show that those engaged in the preparation of the will put the questions or made suggestions as to mode of disposition.—*In re Estate Latour*, 140 Cal. 414, 423, 73 Pac. Rep. 1070, 74 Id. 441.

89. **PRESUMPTION.**—Undue influence will not be presumed *per se* from fact that principal devisee and legatee was partner for many years with testator, although it may be circumstance to be considered upon question of undue influence.—*In re Estate Brooks*, 54 Cal. 471, 474; *In re Estate Low*, *Myrick's Prob. Rep.* 143, 148.

90. Not raised by proof of interest and opportunity alone.—*In re Estate Nelson*, 132 Cal. 182, 184, 64 Pac. Rep. 294. See *In re Estate Langford*, 108 Cal. 608, 41 Pac. Rep. 701.

91. Not presumed from fact that partner is made beneficiary under will.—*In re Estate Brooks*, *Myrick's Prob. Rep.* 141, 142.

92. **PRESUMPTION RAISED AGAINST WILL WHEN TESTATOR IS WEAK PHYSICALLY AND MENTALLY**, and will, procured by those having exclusive access to him, would seem unnatural.—*In re Estate McDevitt*, 95 Cal. 17, 33, 30 Pac. Rep. 101.

93. **CIRCUMSTANTIAL.**—Undue influence need not be shown by direct proof, but may be inferred from circumstances leading justly to inference that such influence was employed and that will does not express real wishes of deceased.—*In re Estate Calkins*, 112 Cal. 296, 303, 44 Pac. Rep. 577.

94. Inferred from nature of transaction, true state of testator's affections from groundless suspicions against members of his family, if any have been proved, and from all surrounding circumstances.—*In re Estate Low*, *Myrick's Prob. Rep.* 143, 147.

95. Pressure brought to bear directly upon testamentary act need not be directly proved; circumstantial evidence will be sufficient as to its raising suspicion.—*In re Estate McDevitt*, 95 Cal. 17, 33, 30 Pac. Rep. 101; *In re Estate Calkins*, 112 Cal. 296, 304, 44 Pac. Rep. 577.

96. Must amount to proof and must have the force of proof only when circumstances are

proven which are inconsistent with claim that will was spontaneous act of testator.—*In re Estate McDevitt*, 95 Cal. 17, 34, 30 Pac. Rep. 101; *In re Estate Nelson*, 132 Cal. 182, 184, 64 Pac. Rep. 294.

97. Must do more than raise suspicion of undue influence.—*In re Estate Nelson*, 132 Cal. 182, 184, 64 Pac. Rep. 294.

98. Must have force, and must prove circumstances which are inconsistent with claim that will was testator's spontaneous act.—*In re Estate Calkins*, 112 Cal. 296, 304, 44 Pac. Rep. 577.

99. **DECLARATIONS, ETC.**—Neither prior nor subsequent declarations made by testator are competent evidence where will is disputed on ground of fraud, duress, imposition, or other like causes not drawing into question testator's mental capacity at time of its execution.—*In re Estate Donovan*, 140 Cal. 390, 396, 73 Pac. Rep. 1081. See *In re Estate Gregory*, 133 Cal. 131, 137, 65 Pac. Rep. 315; *Waterman vs. Whitney*, 11 N. Y. 157, 62 Am. Dec. 71.

100. **EXTERNAL FACTS CONSTITUTING EXERCISE OF UNDUE INFLUENCE** must be established by other evidence than declarations of testator.—*In re Estate Calkins*, 112 Cal. 296, 301, 44 Pac. Rep. 577.

101. By testatrix prior or subsequent to making of will are not admissible to show either that influence was exercised or that it affected testator's actions, where will is contested on ground of undue influence not drawing into question mental capacity of deceased at time of execution.—*In re Estate Gregory*, 133 Cal. 131, 133, 65 Pac. Rep. 315. See *In re Estate Calkins*, 112 Cal. 296, 302, 44 Pac. Rep. 577.

102. Declarations of testator are incompetent to show either that influence was exercised or that it affected his actions.—*In re Estate Calkins*, 112 Cal. 296, 301, 44 Pac. Rep. 577.

103. Declarations made by testator as to influence exercised over him by his wife are not admissible where soundness of testator's mind is not in question.—*In re Estate Donovan*, 140 Cal. 390, 396, 73 Pac. Rep. 1081. See *In re Estate Calkins*, 112 Cal. 296, 302, 44 Pac. Rep. 577.

104. Declarations of testator as to menace or duress or as to fact of his signature are hearsay, and not admissible where it is claimed that will was not signed or that signature was obtained through duress.—*In re Estate Gregory*, 133 Cal. 131, 133, 65 Pac. Rep. 315. See *In re Estate James*, 124 Cal. 653, 57 Pac. Rep. 578, 1003.

105. Declarations or expressions made by deceased as to his testamentary intentions may be admitted to prove friendly relations existing between him and contestants, but such declarations, unless made so near time that will was executed as to constitute a part of *res gestæ* will not tend to prove that will was procured through undue influence merely because it does not conform to such expressions.—*In re Estate McDevitt*, 95 Cal. 17, 35, 30 Pac. Rep. 101.

106. Declarations made by testator bearing upon question that will obtained by forgery and undue influence are not admissible in action questioning validity of such will upon ground of forgery and undue influence where such declarations do not touch upon question of want of testamentary capacity.—In re Estate Gregory, 133 Cal. 131, 135, 65 Pac. Rep. 315.

107. Declarations made by testator five years after date of his will to his executor not admissible as part of *res gestæ*.—In re Estate Gilmore, 81 Cal. 240, 243, 22 Pac. Rep. 655. See In re Estate Garraud, 85 Cal. 236; Nelson vs. McClanahan, 55 Cal. 308.

108. Declarations made by testator regarding statements or acts of those whose influence it is alleged induced making of will are not admissible in evidence, as they are mere matters of hearsay, truth resting in veracity of utterer, of whom there is no opportunity for cross-examination or explanation.—In re Estate Calkins, 112 Cal. 296, 302, 44 Pac. Rep. 577; In re Estate Gregory, 133 Cal. 131, 133, 65 Pac. Rep. 315.

109. Declarations made by deceased to party producing draft of will to effect that he would not have certain of his relations named as beneficiaries, admissible as part of *res gestæ* in order to prove no exercise of undue influence.—Nelson vs. McClanahan, 55 Cal. 308, 310.

110. Declarations made by testatrix with reference to her husband's treatment of her are inadmissible as not indicating her feelings with respect to him, except as might lead jury by inference to conclude that such treatment ought to make her unfriendly to him.—In re Estate Calkins, 112 Cal. 296, 302, 44 Pac. Rep. 577.

111. Evidence of wife as to what conversations she had with her husband relative to will, and as to his reasons for not making provisions for son, in order to show what his feelings were towards his son, is properly rejected in action by son contesting his father's will.—In re Estate Low, Myrick's Prob. Rep. 143, 144.

112. Evidence of authority, of animosity, or of friendliness is admissible upon contest of will upon grounds of undue influence, if not too remote in time.—In re Estate Tibbetts, 137 Cal. 123, 129, 69 Pac. Rep. 978.

113. Fair and reasonable allotment of property to parties who might be considered to be entitled to his bounty, admissible as indicating mental soundness and freedom from all improper influences.—In re Estate Flint, 100 Cal. 391, 399, 34 Pac. Rep. 563.

114. Weakness of mind may afford opportunity of exercise of undue influence and when such influence has been exercised may be evidence tending to show that it affected testator's acts.—In re Estate Nelson, 132 Cal. 182, 194, 64 Pac. Rep. 294.

115. **UNDUE INFLUENCE.**—Evidence purpose of which is to show an illicit relation existing between testator and devisee under his will, which existed some years previous to making thereof, and while his first wife was alive, without any chain of subsequent facts

tending to show any other exercise of undue influence, is not admissible, being too remote.—In re Estate Flint, 100 Cal. 391, 397-398, 34 Pac. Rep. 563. See Webber vs. Sullivan, 53 Iowa 260, 13 N. W. Rep. 319; Batchelder vs. Batchelder, 139 Mass. 1, 29 N. E. Rep. 61; Pierce vs. Pierce, 38 Mich. 412, 413.

116. Evidence showing amount of property owned by beneficiaries and their husbands, and that contestant was comparatively poor, introduced for purpose of impressing upon jury fact that contestant had been unjustly treated, excluded in determining question of undue influence or testamentary capacity.—In re Estate Kaufman, 117 Cal. 233, 295, 59 Am. St. Rep. 179, 49 Pac. Rep. 191.

117. Sufficiency of general evidence of power exercised over testator, especially if he is of comparatively weak mind from old age or bodily infirmities, though not to such an extent as to destroy testamentary capacity, raises presumption to be met and overcome before such will can be established.—Boyd vs. Boyd, 66 Pa. St. 233, 293.

118. **PROOF OF UNDUE INFLUENCE.**—Must be sufficient to raise more than mere conjecture or surmise of fact in mind of jury.—In re Estate Nelson, 132 Cal. 182, 184, 64 Pac. Rep. 294. See Janin vs. London & S. F. Bank, 92 Cal. 14, 27 Am. St. Rep. 32, 27 Pac. Rep. 1100, 14 L. R. A. 320.

119. Exertion of undue influence upon very act must be proved.—Goodwin vs. Goodwin, 59 Cal. 560, 562; In re Estate Carpenter, 94 Cal. 406, 412, 29 Pac. Rep. 1101.

120. Evidence must show that act was obtained by such coercion, by importunity, which could not be resisted, and that act was performed merely for sake of peace, so that motive was tantamount to force or fear.—Goodwin vs. Goodwin, 59 Cal. 560, 561.

121. Evidence must show pressure directly upon testamentary act.—In re Estate Motz, 136 Cal. 553, 563, 69 Pac. Rep. 294. See In re Estate McDewitt, 95 Cal. 17, 33, 30 Pac. Rep. 101; In re Estate Carpenter, 94 Cal. 406, 412, 413, 29 Pac. Rep. 1101.

122. Pressure overpowering volition of testator at time will was made must be given in order to set aside will for undue influence.—In re Estate Motz, 136 Cal. 553, 560, 69 Pac. Rep. 294. See In re Estate Langford, 103 Cal. 608, 623, 41 Pac. Rep. 701.

123. **UNDUE INFLUENCE.**—Some substantial proof of pressure overpowering volition of testator at time will made must be shown.—In re Estate Nelson, 132 Cal. 182, 194, 64 Pac. Rep. 294. See In re Estate Langford, 103 Cal. 608, 41 Pac. Rep. 701.

124. **UNDUE INFLUENCE.**—That undue influence exercised produced effect upon mind of testator so that will executed is not expression of his own desires.—In re Estate Calkins, 112 Cal. 296, 301, 44 Pac. Rep. 577.

125. Independent advice need not be shown to have been given in case of will claimed to have been obtained through undue influence resulting from confidential relation between physician and patient where will was volun-

tary act of patient.—In re Estate Wickes, 139 Cal. 195, 203, 72 Pac. Rep. 902.

126. EVIDENCE.—Preponderance of evidence to point that such influence was actually exercised to influence mind of testatrix at time of making will, and induced disposition contrary to what otherwise would have been made.—In re Estate Black, 132 Cal. 392, 395, 64 Pac. Rep. 695.

127. Question whether or not will is unnatural is of no importance except in case where there is evidence immediately tending to show mental incapacity, fraud, or undue influence.—In re Estate Langford, 108 Cal. 603, 624, 41 Pac. Rep. 701.

128. Circumstance that testatrix was unfit to transact business on account of influence of liquor is pertinent in connection with other circumstances to prove undue influence.—In re Estate Cunningham, 53 Cal. 465, 466.

129. Evidence is insufficient to prove undue influence which does not amount to proof that will was not spontaneous act of testator.—In re Estate McDevitt, 95 Cal. 17, 33, 30 Pac. Rep. 101; In re Estate Langford, 108 Cal. 603, 622, 41 Pac. Rep. 701; In re Estate Calkins, 112 Cal. 396, 304, 44 Pac. Rep. 577; In re Estate Redfield, 116 Cal. 637, 645, 48 Pac. Rep. 794. See also In re Estate Wilson, 117 Cal. 362, 369, 49 Pac. Rep. 172, 711.

130. Circumstances which amount merely to suspicion not sufficient.—In re Estate Langford, 108 Cal. 603, 622, 41 Pac. Rep. 701; In re Estate Redfield, 116 Cal. 637, 645, 48 Pac. Rep. 794; Penn Mutual Life Ins. Co. vs. Union Trust Co., 83 Fed. Rep. 391. See President etc. Bowdoin Col. vs. Merritt, 75 Fed. Rep. 480, 493, holding further fraud not shown.

131. Mental weakness not sufficient to establish more than conjecture that will is result of undue influence in absence of evidence of any actual attempt to exercise same.—In re Estate Nelson, 132 Cal. 182, 194, 64 Pac. Rep. 394.

132. Mere naked facts that will is in favor of one person, and that such person has opportunity to coerce mind of testator, are not sufficient to justify conclusion that undue influence was exercised where evidence only raises suspicion thereof.—In re Estate Kendrick, 130 Cal. 360, 368, 62 Pac. Rep. 605.

133. CIRCUMSTANCES HELD NOT SUFFICIENT to prove undue influence.—In re Estate Calef, 139 Cal. 673, 675, 73 Pac. Rep. 539.

VII. FRAUD.

134. PROVISIONS AS TO FRAUD contained in § 1572, post, apply to wills as well as other documents.—In re Estate Kohler, 79 Cal. 313, 316, 21 Pac. Rep. 753.

135. Fraudulent misrepresentations are such as exist by reason of representations made to party that certain state of things exists when in truth it does not exist, and which such party could not by reasonable inquiry ascertain to be false, and in faith of which he has made will different from what he would otherwise have made, same being done intentionally to prevent testator from knowing what disposition he was making of his property.—In re Estate Black, Myrick's Prob. Rep. 24, 33.

136. Fraud never to be imputed or inferred.—In re Estate Kidder, 66 Cal. 487, 490, 6 Pac. Rep. 326.

137. Fraud never to be presumed.—In re Estate Kidder, 66 Cal. 487, 490, 6 Pac. Rep. 326.

138. Fraud must be proved by satisfactory evidence.—In re Estate Kidder, 66 Cal. 487, 490, 6 Pac. Rep. 326.

139. Fraud complained of as grounds for relief must show facts and circumstances constituting same.—In re Estate Kidder, 66 Cal. 487, 490, 6 Pac. Rep. 326.

140. Suppression of letters may not be evidence of fraud in procuring will.—In re Estate Carpenter, 94 Cal. 406, 411, 29 Pac. Rep. 1101.

141. Delusion or insanity not subject for consideration in determining whether will has been executed under fraudulent misrepresentations, as testator may be perfectly sound and yet be influenced by fraud.—In re Estate Tittel, Myrick's Prob. Rep. 12, 18.

142. Property obtained under will provisions of which are not fully communicated to testator by reason of same being wrongly read to him, so that he is induced to believe different state of facts, is obtained by fraudulent misrepresentations.—In re Estate Tittel, Myrick's Prob. Rep. 12, 18. See In re Estate Crittenden, Myrick's Prob. Rep. 50, 52.

143. Testator laboring under effect of fraudulent misrepresentations may, so far as such representations are concerned, know true meaning and construction of his will, but same will be void by reason of false production.—In re Estate Black, Myrick's Prob. Rep. 24, 35.

§ 1273. WILL OF MARRIED WOMAN. A married woman may dispose of all her separate estate by will, without the consent of her husband, and may alter or revoke the will in like manner as if she were single. Her will must be executed and proved in like manner as other wills.

History: Enacted March 21, 1872, founded upon § 2 Act April 10, 1850, Stats. 1850, p. 177; amended March 30, 1874, Code Amdts. 1873-4, p. 232.

1. Applied, cited, construed, referred to, etc.
2, 3. Common-law rule.

4-6. Power over personal property with consent of husband.

7-12. Power under state statute.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: In re Estate Learned, 70 Cal. 140, 142, 11 Pac. Rep. 537 (erroneously cited for § 1277).

See ante § 655 par. 3 note.

As to power of married women to dispose of property by will, see monographic note 57 Am. Dec. 340-349.

2. AT COMMON LAW married woman has no power to make will.—In re Estate Comassi, 107 Cal. 1, 4, 40 Pac. Rep. 15, 28 L. R. A. 414.

3. Even with consent of her husband in absence of statutory enactment.—Reed vs. Blaisdell, 16 N. H. 194, 41 Am. Dec. 722. See Osgood vs. Breed, 12 Mass. 525, 532; Marston vs. Norton, 5 N. H. 205.

4. Married women, it would seem, have right to dispose of personal estate with consent of husband, by will, in absence of statutory provisions.—Fisher vs. Kimball, 17 Vt. 323, 328.

5. Married woman has power to dispose of chose in action with husband's consent.—Reed vs. Blaisdell, 16 N. H. 194, 41 Am. Dec. 722; Richards vs. Clark, 18 N. J. Eq. (8 C. R. Gr.) 327.

6. Fact of placing money in hands of married woman for sole and separate use, whether by husband or stranger, and whether before or after marriage, carries with it power of testamentary disposition without express words.—Emery vs. Neighbour, 7 N. J. L. (2 Hal.) 142, 11 Am. Dec. 541.

7. GENERAL RULE THAT GENERAL STATUTE empowering all persons over certain age and of sound mind "to dispose of all his estate, real and personal, by will," does not include married women, recognized by legis-

lature, hence provision of the code in favor of married women.—Scott vs. Harkness, 6 Idaho 736, 59 Pac. Rep. 556.

8. MARRIED WOMEN HAVE POWER TO MAKE WILL in this state, and upon proof of due execution, such will is entitled to probate in same manner as that of any other party, unless shown to have been revoked.—In re Estate Comassi, 107 Cal. 1, 4, 40 Pac. Rep. 15, 28 L. R. A. 414.

9. STATUTE EXPRESSLY EXCEPTING FROM RIGHT TO MAKE WILLS, persons not of full age, supposed to include right of married women.—Fisher vs. Kimball, 17 Vt. 323, 328.

10. STATUTE GIVING WIFE POWER TO DISPOSE OF PROPERTY BY WILL, construed as not giving her power to make holographic will.—Scott vs. Harkness, 6 Idaho, 736, 59 Pac. Rep. 556.

11. UNDER A STATUTE GIVING MARRIED WOMAN, non-resident, power to convey her property as though sole, held that she had no power to dispose thereof by will, statute only giving her power to manage property during life.—Foote vs. Nickerson, 70 N. H. 496, 48 Atl. Rep. 1053, 54 L. R. A. 554.

12. UNDER TEXAS STATUTE—Married women have power to dispose of property by will subject to liability for community debts so far as it may consist of community property.—Williams vs. Noland, 10 Tex. Civ. App. 629, 32 S. W. Rep. 323.

§ 1274. WHAT MAY PASS BY WILL. Every estate and interest in real or personal property, to which heirs, husband, widow, or next of kin might succeed, may be disposed of by will, except as otherwise provided in sections fourteen hundred and one and fourteen hundred and two.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Construed with § 1402.
- 3, 4. Widow—Right by succession, etc.
5. Probate court—Jurisdiction of.
6. Corpse—Power to dispose of.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: In re Estate Burdick, 112 Cal. 387, 395, 44 Pac. Rep. 734 (construed).

As to testamentary power of husband and wife over community property, see post § 1402 and note.

2. CONSTRUED WITH § 1402 as determining that both husband and wife take interest in community property by succession.—In re Estate Burdick, 112 Cal. 387, 395, 44 Pac. Rep. 734.

3. Widow surviving husband takes her right in community property by succession.—Cunha vs. Hughes, 122 Cal. 111, 112, 63 Am. St.

Rep. 27, 54 Pac. Rep. 535. See In re Estate Burdick, 112 Cal. 387, 44 Pac. Rep. 734.

4. Right of widow in estate of which husband died seized ascertained by same means as right of any claimant to his estate, no matter whether she takes by succession or by will.—Cunha vs. Hughes, 122 Cal. 111, 112, 63 Am. St. Rep. 27, 54 Pac. Rep. 535.

5. JURISDICTION OF PROBATE SIDE OF SUPERIOR COURT is merely to determine person entitled to take under will or by succession, or their grantees.—More vs. More, 133 Cal. 489, 495, 65 Pac. Rep. 1044. See In re Estate Burdick, 112 Cal. 387, 395, 44 Pac. Rep. 734; In re Estate Crooks, 125 Cal. 459, 461, 53 Pac. Rep. 89.

6. DISPOSITION OF REMAINS OF DECEASED PERSON may be determined absolutely by will.—Scott vs. Riley, 16 Phila. 106. See ante § 655 and note pars. 3, 4, 5.

§ 1275. WHO MAY TAKE BY WILL. A testamentary disposition may be made to any person capable by law of taking the property so disposed of, except that corporations other than counties, municipal corporations, and corporations formed for scientific, literary, or solely educational or hospital purposes, cannot

take under a will, unless expressly authorized by statute; subject, however, to the provisions of section thirteen hundred and thirteen.

History: Enacted March 21, 1872; amended March 29, 1874, Code Amdts. 1873-4, p. 275; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 402, held unconstitutional, see history, § 4 ante; amendment substantially re-enacted March 20, 1903, Stats. and Amdts. 1903, p. 258, merely omitting the words "counties, municipal corporations," and this amendment of the Code Commission restored, by inserting the omitted words, March 21, 1905, Stats. and Amdts. 1905, c. CDLVIII, p. 605.

I. In General.

1. Applied, cited, construed, referred to, etc.
2. Construed with reference to its application.
- 3, 4. Term "person"—What included in.
- 5-7. Term "corporation"—What includes.
8. Corporation—Effect of misnomer of.
- 9, 10. Same—Construction of power to hold land.
11. Same—Right of heirs to dispute power.
12. Same—Statutes limiting rights—How construed.

II. Charitable Bequest.

- 13, 14. Charitable bequest favored and carried into effect.
- 15-20. Illustrations—Held valid.
- 21-23. Same—Held invalid.

I. IN GENERAL.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: In re Estate Bulmer, 59 Cal. 131 (construed and applied with § 1575 Pol. Code); In re Estate Eastman, 60 Cal. 303, 309 (construed and applied); In re Estate Robinson, 63 Cal. 620, 621 (construed and applied with § 1313); In re Estate Royer, 123 Cal. 614, 624, 56 Pac. Rep. 461, 44 L. R. A. 364 (construed and applied with § 1313); In re Estate Tobin, Myrick's Prob. Rep. 134, 135 (construed and applied with § 1313); In re Estate Wright, Myrick's Prob. Rep. 213 (construed and applied).

As to capacity of corporation to take title to real estate, see monographic note 94 Am. Dec. 381-387.

As to capacity of corporation to take by devise, see monographic note 2 Prob. Rep. Ann. 674-679.

As to collateral attack upon right of corporation to take by devise, see monographic note 2 Prob. Rep. Ann. 674-679.

As to devise to charitable uses, see note 30 Am. Dec. 315.

As to devise to corporations, see note 18 Am. Dec. 541; 80 Am. Dec. 315.

As to extrinsic evidence as applied to wills, see monographic note 4 Prob. Rep. Ann. 467-476.

As to gifts by will designating no donee, see note 30 Am. Dec. 314.

As to misnomer in gift to legatee, see note 4 Prob. Rep. Ann. 81.

As to position of municipal corporations as legatees or devisees, see monographic note 4 Prob. Rep. Ann. 113-116.

As to right of private persons to contest power of corporation to take or hold property, see monographic note by H. P. Farnham, 32

L. R. A. 293-297; In re Estate McGraw, 111 N. Y. 66, 19 N. E. Rep. 233, 2 L. R. A. 337.

As to whether heirs of a testator may assail a devise or bequest to a corporation, see monographic note 60 Am. St. Rep. 318-321.

2. CONSTRUED WITH § 1313 AS APPLYING to gift to municipality for charitable purposes, executed more than thirty days prior to death of testator.—In re Estate Robinson, 63 Cal. 620, 622.

3. Term "person" used in statute held to apply to natural and not artificial persons.—United States vs. Fox, 94 U. S. 315, bk. 24 L. ed. 192. See White vs. Howard, 46 N. Y. 144, 164.

See ante § 14 note pars. 31-35.

4. Term "corporation" as used in statute held to apply to such as are created under state laws.—United States vs. Fox, 94 U. S. 315, bk. 24 L. ed. 192. See White vs. Howard, 46 N. Y. 144, 164.

5. School district person within meaning of section, capable of taking by will.—In re Estate Bulmer, 59 Cal. 131.

6. School district corporation within meaning of § 1575 Pol. Code and § 1275 Civ. Code.—In re Estate Bulmer, 59 Cal. 131. See Dean vs. Davis, 51 Cal. 406.

7. University of California public corporation formed for scientific, literary, or solely educational purposes, capable of taking by will.—In re Estate Royer, 123 Cal. 614, 624, 56 Pac. Rep. 461, 44 L. R. A. 364. See In re Estate Bulmer, 59 Cal. 131.

8. MISNOMER OF CORPORATION will not affect power to take under will where it is sufficiently identified, and the testator's bounty can be ascertained from will itself, or by evidence aliunde.—In re Estate Gibson, 75 Cal. 329, 331, 17 Pac. Rep. 438. See Lanning vs. Sisters of St. Francis, 35 N. J. Eq. (8 Stew.) 392; Lefevre vs. Lefevre, 59 N. Y. 434.

9. POWER TO TAKE BY PURCHASE held not to apply to land devised.—McCartee vs. Orphan Asylum Soc., 9 Cow. (N. Y.) 437, 18 Am. Dec. 516.

10. POWER TO HOLD LAND "by direct purchase or otherwise," held to include land devised.—Downing vs. Marshall, 28 N. Y. 366, 30 Am. Dec. 230.

11. Of corporation to take property by devise or bequest in excess of amount prescribed by charter, cannot be taken advantage of by heirs at law or next of kin.—In re Stickney's Will, 85 Md. 79, 60 Am. St. Rep. 303, sub nom. Congregational Church Bldg. Soc. vs. Everett, 36 Atl. Rep. 654, 35 L. R. A. 693, 2 Prob. Rep. Ann. 664. See Hanson vs. Little Sisters of

Poor. 79 Md. 434, 440, 32 Atl. Rep. 1052, 32 L. R. A. 293.

12. RULE IN INTERPRETATION OF STATUTES LIMITING RIGHTS and interests, not construed to embrace sovereign power of government unless same is expressly named therein or intimated by necessary implication.—In re Estate Royer, 123 Cal. 614, 624, 56 Pac. Rep. 461, 44 L. R. A. 364. See Mayrhofer vs. Board of Education, 89 Cal. 110, 23 Am. St. Rep. 451, 26 Pac. Rep. 646; United States vs. Hoar, 2 Mas. C. C. 311, 26 Fed. Cas. 329.

II. CHARITABLE REQUESTS.

13. CHARITABLE DONATIONS LOOKED upon with favor and carried into effect when consistent with rules of law.—In re Estate Willey, 128 Cal. 1, 12, 60 Pac. Rep. 471. See In re Estate Hinckley, 58 Cal. 457.

14. Not void, and no authority exists to construe it legally void, if it can possibly be made good.—In re Estate Willey, 128 Cal. 1, 12, 60 Pac. Rep. 471.

15. Bequest as follows, "wish to contribute my mite toward suppressing the rebellion and restoring the Union, I give and devise the rest and residue of my estate to the United States of America," held valid under the Massachusetts statute, which made no restriction as to who should be devisees or legatees.—Dickson vs. United States, 125 Mass. 311, 313, 28 Am. Rep. 230 (distinguishing United States vs. Fox, 94 U. S. 315, bk. 24 L. ed. 192, affirming 52 N. Y. 530, in which such devise was held void under the New York statute).

See par. 22 this note.

16. Bequest for "deserving, aged, native-born in the town of Southborough, Massachusetts, needing such aid, to be used as in his judgment he may think best," valid bequest.—Fay vs. Howe, 136 Cal. 599, 601, 69 Pac. Rep. 423. See In re Estate Hinckley, 58 Cal. 457, 471; In re Estate Robinson, 63 Cal. 620; In re Estate Hewitt, 94 Cal. 376, 29 Pac. Rep. 775; In re Estate Pearsons, 98 Cal. 603, 33 Pac.

Rep. 451; In re Estate Royer, 123 Cal. 614, 56 Pac. Rep. 461, 44 L. R. A. 364; In re Estate Upham, 127 Cal. 90, 59 Pac. Rep. 315; In re Estate Willey, 128 Cal. 1, 60 Pac. Rep. 471; In re Estate Winchester, 133 Cal. 271, 65 Pac. Rep. 475, 54 L. R. A. 281.

17. Bequest to the Boys' Roman Catholic Orphan Asylum, valid under § 1275 and § 1313.—In re Estate Tobin, Myrick's Prob. Rep. 134, 135.

18. Bequest to Masonic body for use of widows and orphans' funds of said lodge, valid bequest.—In re Estate Willey (Cal. Mar. 4, 1899), 56 Pac. Rep. 550.

19. Bequest to mayor, common council, and commonality of city of San Francisco to be used by them and their successors, invested to best advantage, interest accruing to be paid out to destitute women and children of city in such manner as mayor and common council might deem proper and beneficial, held valid.—In re Estate Robinson, 63 Cal. 620, 622.

20. Devise to wardens and vestrymen at St. John's Episcopal Church, at Stockton, for purpose of purchasing a chime of bells, valid, same being a corporation organized and incorporated under state statute, and authorized to take by will.—In re Estate Eastman, 60 Cal. 308, 309-310.

21. Devise to Colored Episcopal Church of city and county of San Francisco held void under § 1275.—In re Estate Wright, Myrick's Prob. Rep. 213.

22. Devise to government of United States by citizen of New York held void, upon ground that New York statutes allowed real estate to be devised only to natural persons and corporations established by state legislature.—United States vs. Fox, 94 U. S. 315, bk. 24 L. ed. 192 (affirming 52 N. Y. 530, 11 Am. Rep. 751).

23. Distinguished: Dickson vs. United States, 125 Mass. 311, 313, 28 Am. Rep. 230.

See par. 15 this note.

§ 1276. WRITTEN WILL, HOW TO BE EXECUTED. Every will, other than a nuncupative will, must be in writing; and every will, other than an olographic [holographic] will, and a nuncupative will, must be executed and attested as follows:

1. It must be subscribed at the end thereof by the testator himself, or some person in his presence and by his direction must subscribe his name thereto;

2. The subscription must be made in the presence of the attesting witnesses, or be acknowledged by the testator to them to have been made by him or by his authority;

3. The testator must, at the time of subscribing or acknowledging the same, declare to the attesting witnesses that the instrument is his will; and,

4. There must be two attesting witnesses, each of whom must sign the same as a witness, at the end of the will, at the testator's request and in his presence.

History: Enacted March 21, 1872, founded upon § 3 Act April 10, 1850, Stats. 1850, p. 177; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 402, held unconstitutional, see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDLVIII, p. 605.

I. In General.

1. Applied, cited, construed, referred to, etc.
2. Construed as conserving formalities.
3. Same—As distinguished from English statute.
- 4-7. Same—By Pennsylvania court as recognizing mark.
- 8-10. Same—With reference to regulation, and with other sections.
11. Same—When copied from statute of another state.
12. Distinguished from English statute.
13. Legislative power—Right to prescribe formalities.
- 14-19. Same—Nature of, and necessity of compliance with.
20. Same—Omission to observe legislative requirements.
21. Same—Waiver of formalities.
22. Same—What statute governs execution.
- 23-26. Probate—Power of court to pass upon execution.
27. Rule governing interpretation—Right to consider in construing statute on execution.

II. Signature of Testator.

28. Signature of testator—Necessity of.
- 29-35. Same—Place of—End of will.
- 36-41. Same—Sufficiency and insufficiency of.
42. Same—Time of.
- 43, 44. "Subscribe" and "subscription"—Meaning of.
45. Signature by mark—Signature or subscription includes.
46. Same—Parties incapable of writing may sign by mark.
- 47-49. Same—Necessity for name or initials of testator.
50. Same—Place for mark.
- 51-53. Same—Sufficiency and insufficiency of.
54. Signature—By party holding hand.
- 55-58. Same—By subscribing witness.

III. Acknowledgment of Will.

- 59-61. Distinguished from request and subscription.
- 62-69. How expressed—Acts, declarations, communications, etc.
- 70, 71. Necessity of.
- 72, 73. Relation to signing.
- 74-76. Sufficiency of.
- 77, 78. Time when to be made.
- 79-91. When shown.
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IV. Witnesses.

- 95-98. Necessity of—Before code—Mexican law.
99. Custom—To what extent prevailed before code.
- 100, 101. Information—Provisions of will—Deeds referred to.
- 102, 103. Law governing—In existence at the time of death.
104. Signature—Necessity of seeing testator sign.
- 105-107. Same—Necessity and effect of witnesses.
108. Same—Previous signature—Acknowledgment not sufficient.

109-112. Same—When not sufficient.

113-116. Signature by mark—When valid—What includes.

117. Same—Word "subscribe" includes.

118. Request to witness—Constituted by words or signs without form—Implied.

119-123. Same—Direct not necessary—Third party.

124. Same—Omission of—Effect of in attestation clause.

125. Same—Sufficiency of, how shown.

126. Same—Evidence of disposing mind.

V. Evidence.

127. Burden of proof—On party offering instrument to prove execution.

128-130. Execution—Subscription and publication must be shown—Inference—Statutory requirements.

131. Same—Knowledge—Of testator must be proved.

132-135. Same—Presumption as to how far indulged in.

136, 137. Same—Proved by third parties.

138-140. Same—Sufficiency of evidence to prove.

141-145. Same—When not proved—Parol evidence.

I. IN GENERAL.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: In re Estate Toomes, 54 Cal. 509, 512, 35 Am. Rep. 83 (construed and applied); In re Estate McCabe, 68 Cal. 519, 520, 521, 9 Pac. Rep. 554 (construed and applied); In re Estate Guilfoyle, 96 Cal. 598, 600, 601, 31 Pac. Rep. 553, 22 L. R. A. 370 (construed and applied); In re Estate Comassi, 107 Cal. 1, 6, 40 Pac. Rep. 15, 28 L. R. A. 414 (construed and applied); In re Estate Walker, 110 Cal. 387, 390, 391, 393, 53 Am. St. Rep. 104, 42 Pac. Rep. 315, 30 L. R. A. 460 (construed and applied); In re Estate Tyler (Cal. Nov. 4, 1897), 50 Pac. Rep. 927 (construed and applied); In re Estate Lynch, 143 Cal. 373, 375, 75 Pac. Rep. 1086 (construed and applied); In re Estate Cilsby, 145 Cal. 407, 409, 78 Pac. Rep. 964 (construed and applied with § 1277 and § 1309 of Code Civ. Proc.); In re Estate Seaman (Cal. April 3, 1905), 80 Pac. Rep. 700, 702, 704 (construed and applied); In re Estate Taney, Myrick's Prob. Rep. 210, 211 (construed and applied); In re Estate Donoho, Myrick's Prob. Rep. 140 (construed and applied with § 1277).

As to acknowledgment by testator, and attestation of witnesses, see note by Robert Desty, 5 L. ed. N. Y. Ch. Rep. 855.

As to attestation by mark, see monographic note by Irwin Taylor, 23 L. R. A. 370-373.

As to execution, publication, and attestation of will, and sufficiency thereof, see notes 37 Am. Dec. 260; 40 Am. Dec. 231; 45 Am. Dec. 442; 53 Am. Dec. 105; 76 Am. Dec. 677; 80 Am. Dec. 242, and monographic notes by Robert Desty, 1 L. R. A. 161, 491, 3 Id. 822.

As to how far an unexecuted will is valid, see monographic note 36 Am. Dec. 316-322.

As to law concerning signing of wills, see note 42 Am. Dec. 571.

As to mere want of recollection of witness to signing and attestation, see notes 37 Am. Dec. 260; 45 Am. Dec. 448.

As to proof of due execution of will, see note by Robert Desty, 5 L. ed. N. Y. Ch. Rep. 855.

As to publication of will and the necessity and sufficiency thereof, see note 37 Am. Dec. 260.

As to requisites of statutes to be complied with in execution and proof of wills, see note by Robert Desty, 5 L. ed. N. Y. Ch. Rep. 855.

As to signature by mark, see monographic note by Irwin Taylor, 22 L. R. A. 370-373.

As to signature of witnesses before testator, see note by B. A. Rich, 14 L. R. A. 160.

As to what is a signature or subscription, see ante § 14 note para. 67-77.

As to what is sufficient attestation to a will, see note 92 Am. Dec. 679; 30 Am. St. Rep. 332.

As to what is sufficient execution of will, see note 30 Am. St. Rep. 332.

2. CONSTRUED AS CONSERVING RIGHT TO DISPOSE OF PROPERTY by reasonable formalities.—In re Estate McCabe, 63 Cal. 519, 521, 9 Pac. Rep. 554.

3. As directly opposed to provisions of English statute of wills, so that decisions thereunder are not entitled to any consideration in interpreting section.—In re Estate Seaman (Cal. April 3, 1905), 80 Pac. Rep. 700; In re Estate Walker, 110 Cal. 387, 392-396, 52 Am. St. Rep. 104, 42 Pac. Rep. 315, 30 L. R. A. 460. See In re Conway's Will, 124 N. Y. 455, 26 N. E. Rep. 1023, 11 L. R. A. 796.

4. As imposing duty upon testator to subscribe will, and upon attesting witnesses to each sign name as witness.—In re Estate Walker, 110 Cal. 387, 391, 52 Am. St. Rep. 104, 42 Pac. Rep. 315, 30 L. R. A. 460.

5. As making each one of four facts mentioned in section as essential as others to validity of will.—In re Estate Taney, Myrick's Prob. Rep. 210, 211.

6. As not taking away any natural right to dispose of property.—In re Estate McCabe, 63 Cal. 519, 521, 9 Pac. Rep. 554.

7. By Pennsylvania court, as recognizing signature by mark, and as differing from provisions of Pennsylvania statutes.—In re Flannery's Will, 34 Pa. St. 502, 507.

8. With reference to its regulation of the formalities in execution of wills.—In re Estate McCabe, 63 Cal. 519, 520, 9 Pac. Rep. 554.

9. With § 1277 and § 1309 of Code Civ. Proc., according to approved usage of language.—In re Estate Cilsby, 145 Cal. 407, 409, 78 Pac. Rep. 964.

10. With § 1277 as showing distinction between signatures required for holographic and other wills.—In re Estate Donoho, Myrick's Prob. Rep. 140.

11. When statute copied from another state, generally construed along same lines of construction as that placed upon it by courts of state from which adopted.—Rigg vs. Wilton, 18 Ill. 15, 54 Am. Dec. 419.

See par. 27 this note.

12. DISTINCTION BETWEEN CALIFORNIA AND ENGLISH STATUTE of wills.—See ante par. 8 this note.

Interpretation.—See para. 11, 27 this note.

13. LEGISLATIVE POWER.—Legislature may prescribe formalities to be observed in execution of will.—In re Estate McCabe, 63 Cal. 519, 520, 9 Pac. Rep. 554.

14. Legislature prescribing formalities for execution of will does not interfere with right, from whatever source it arises, of disposing of property by will.—In re Estate McCabe, 63 Cal. 519, 520, 9 Pac. Rep. 554.

15. Legislative mandates are supreme, and no right to make testamentary disposition exists except upon compliance therewith.—In re Estate Walker, 110 Cal. 387, 391, 52 Am. St. Rep. 104, 42 Pac. Rep. 315, 30 L. R. A. 460.

16. Must be complied with, with reference to signing at end thereof, and no other mode will answer purpose, or subserve statutory requirements.—In re Estate Walker, 110 Cal. 387, 396, 52 Am. St. Rep. 104, 42 Pac. Rep. 315, 30 L. R. A. 460.

17. Must be complied with to enable court to decree probate of will.—In re Estate Tyler (Cal. Nov. 4, 1897), 50 Pac. Rep. 927; In re Estate Walker, 110 Cal. 387, 390, 52 Am. St. Rep. 104, 42 Pac. Rep. 315, 30 L. R. A. 460. See Lewis vs. Lewis, 11 N. Y. 220; In Matter O'Neil, 91 N. Y. 516, 520, 521.

18. Must be regarded, and there must be concurrence of all to give validity to act.—Remsen vs. Brinckerhoff, 26 Wend. (N. Y.) 325, 37 Am. Dec. 351.

19. Substantial compliance with statute sufficient; law looking to substance of transaction, and requiring only evidence that all safeguards against improvidence and fraud have been substantially observed.—Lewis vs. Lewis, 11 N. Y. 220. See Chaffee vs. Baptist Missionary Con., 10 Paige Ch. (N. Y.) 85, 40 Am. Dec. 225.

20. OMISSION OF ANY FOUR REQUISITES of the statute is fatal to validity of will.—Remsen vs. Brinckerhoff, 26 Wend. (N. Y.) 325, 37 Am. Dec. 351.

21. Waiver.—Formalities required by statute cannot be waived without impairing status of instrument.—In re Estate Walker, 110 Cal. 387, 390, 391, 52 Am. St. Rep. 104, 42 Pac. Rep. 315, 30 L. R. A. 460.

22. What statute governs.—Statutes in force at time of execution of will must govern question of sufficiency of execution.—In re Estate McCloud, Myrick's Prob. Rep. 23; Jauncey vs. Thorne, 2 Barb. Ch. (N. Y.) 40, 45 Am. Dec. 424.

See par. 103 this note.

23. PROBATE—POWER OF COURT.—Court cannot admit will to probate without proof of all acts necessary to construe execution of valid will, and court alone will hear and pass upon proof of acts to which contest is not addressed, and such facts must not be submitted to and passed upon by jury.—In re Estate Cartery, 56 Cal. 470, 472.

24. Court cannot declare any mode of execution or authentication, other than that prescribed by legislature, subserve same purpose and is equally efficient to validate instrument.—In re Estate Walker, 110 Cal. 387, 390.

391, 52 Am. St. Rep. 104, 42 Pac. Rep. 815, 30 L. R. A. 460.

25. Question of construction of proposed will is not before court where will is presented for probate, only question for consideration of court being mental capacity of testator and whether will is duly executed, etc.—In re Estate Murphy, 104 Cal. 554, 566, 38 Pac. Rep. 543. See In re Estate Cobb, 49 Cal. 599, 604.

26. INTENTION OF LEGISLATURE—As expressed in language of statute, and not that of testator, only can be considered by court in determining whether will has been properly executed, and whether, as presented, it shows compliance with statute.—In re Estate Seaman (Cal. April 3, 1905), 80 Pac. Rep. 700; In re Estate Walker, 110 Cal. 387, 390, 52 Am. St. Rep. 104, 42 Pac. Rep. 815, 30 L. R. A. 460.

27. RULE GOVERNING INTERPRETATION OF WILLS—Cannot be invoked in construing statute regulating their execution.—In re Estate Walker, 110 Cal. 387, 390, 52 Am. St. Rep. 104, 42 Pac. Rep. 815, 30 L. R. A. 460. See In Matter O'Neil, 91 N. Y. 515, 520, 521.

II. SIGNATURE OF TESTATOR.

28. SIGNATURE OF TESTATOR.—Necessity of will must be actually signed, unless signature is prevented by state of health and condition of the testator.—Stricker vs. Groves, 5 Whart. (Pa.) 386, 397.

Execution.—See "signature," para. 28-53 this note.

Execution.—As to right to consider rule governing interpretation, see par. 27 this note.

Execution.—By what law governed.—See par. 22 this note.

Execution.—Necessity of complying with legislative requirements.—See para. 13-21 this note.

29. Same—Place of.—At end thereof, and will signed otherwise than as provided will not be entitled to probate under section.—In re Estate Donoho, Myrick's Prob. Rep. 140, 141.

30. "To say that, where the name is, there is the end of the will, is not to observe the statute. That requires that, where the end of the will is, there shall be the name. It is to make a new law to say that, when we find the name, there is the end of the will. The instrument offered is to be scanned to learn where is the end of it, as a completed whole, and at the end thus found must the name of the testator be subscribed."—In re Estate Seaman (Cal. April 3, 1905), 80 Pac. Rep. 700 (quoting language of the court in McGuire vs. Kerr, 2 Bradf. Sur. (N. Y.) 244. See Sisters of Charity of St. V. De P. vs. Kelly, 67 N. Y. 409; In Matter O'Neil, 91 N. Y. 516, 522; In Matter Andrews, 162 N. Y. 1, 76 Am. St. Rep. 294, 56 N. E. Rep. 529, 48 L. R. A. 662.

31. Blank of entire page between written matter and name of testator would indicate discharge of statutory requirements, whether resulting from ignorance or intention, sufficient to prevent its admission to probate.—In re Estate Seaman (Cal. April 3, 1905), 80 Pac. Rep. 700. See Soward vs. Soward, 1 Duv. (Ky.) 126.

32. Slight blank, or space of line, or even

more, between written matter and name would not impair validity.—In re Estate Seaman (Cal. April 3, 1905), 80 Pac. Rep. 700.

33. Requirements that name shall be subscribed "at" end of will not satisfied by having name written at any place "after" termination of written matter irrespective of relation which such place bears to concluding portion of will.—In re Estate Seaman (Cal. April 3, 1905), 80 Pac. Rep. 700.

34. Signature of testator must be placed upon face of instrument, so as to make it appear not only that he intended to place it at end of testamentary provisions, but that he has in fact placed it in such proximity as to constitute substantial compliance with statutory requirements.—In re Estate Seaman (Cal. April 3, 1905), 80 Pac. Rep. 700.

35. "Will" at whose end name is to be subscribed is not sheet of paper, or other material, upon which these testamentary provisions are written, but it is declaration which testator has written thereon for his testamentary disposition, and "end thereof" is not foot or physical end of sheet of paper upon which "will" is written, but is physical termination of testamentary provisions which constitute will.—In re Estate Seaman (Cal. April 3, 1905), 80 Pac. Rep. 700.

36. SAME—SUFFICIENCY OF SUBSCRIPTION when either made or acknowledged in presence of those attesting will.—Baskin vs. Baskin, 36 N. Y. 416, 419.

37. Any signing by which alone, or by which, aided by parol evidence, identity of subscriber may be ascertained, substantial compliance with statute.—In re Estate Walker, 110 Cal. 387, 392, 52 Am. St. Rep. 104, 42 Pac. Rep. 815, 30 L. R. A. 460.

38. Face of instrument must show that its physical execution is in accordance with requirements of statute.—In re Estate Seaman (Cal. April 3, 1905), 80 Pac. Rep. 700. See Patterson vs. Ransom, 55 Ind. 402; In Matter Hewitt's Will, 91 N. Y. 261; Warwick vs. Warwick, 86 Va. 596, 10 S. E. Rep. 843, 6 L. R. A. 775.

39. Must show on its face that signing was intended or regarded as signing to authenticate it as complete and final act.—Waller vs. Waller, 1 Gratt. (Va.) 454, 42 Am. Dec. 564.

40. Signature of testator placed at end of disposing part of will, and before clause appointing executor, sufficient so far as preceding portion of will is concerned, and will admitted to probate with administrator with will annexed.—In re Estate McCullough, Myrick's Prob. Rep. 76.

41. Signature by testator writing his name in clause appointing executor and in attestation clause after witnesses had signed so that latter read "subscribed by John Kelly, the testator," etc., not sufficient execution to satisfy statute.—Sisters of Charity of St. V. De P. vs. Kelly, 67 N. Y. 409.

42. SAME—TIME OF.—Before witnesses subscribe their names, as there is no will until it has been signed by testator.—Simmons vs. Leonard, 91 Tenn. 122, 30 Am. St. Rep. 875, 13 S. W. Rep. 286.

43. "SUBSCRIBE" AND "SUBSCRIPTION"—MEANING OF.—Term "subscribe," although unquestionably meaning signing of name, yet has comprehensive meaning, and may be held to include mark of writing by testator meant by him to be his name, and to take place of his signature, or to serve for his identification.—In re Estate Walker, 110 Cal. 337, 391, 52 Am. St. Rep. 104, 42 Pac. Rep. 815, 30 L. R. A. 460.

44. Word "subscription" held to apply to person whose name is written by another, and who makes mark thereto.—Simmons vs. Leonard, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. Rep. 280.

45. SIGNATURE BY MARK.—Signature or subscription included mark.—Simmons vs. Leonard, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. Rep. 280.

See ante § 14 note par. 69 et seq.

46. Persons physically incapable of writing their names by reason of sickness or other cause and of sound mind, are not prevented from making will and subscribing same by mark.—In re Estate Guilfoyle, 96 Cal. 598, 601, 31 Pac. Rep. 553, 22 L. R. A. 370.

47. Necessity for mark.—By testator to his name written by another, to good execution of the will, under California statute.—In re Flannery's Will, 24 Pa. St. 502, 507.

48. Same.—Name of testator must appear near mark in order to show that mark was intended to represent signature.—In re Estate Guilfoyle, 96 Cal. 598, 600, 31 Pac. Rep. 553, 22 L. R. A. 370.

49. Same.—Initials of testator's name would also seem to suffice where mark is sufficient.—In re Estate Walker, 110 Cal. 337, 392, 52 Am. St. Rep. 104, 42 Pac. Rep. 815, 30 L. R. A. 460.

50. Place.—Good when at end of instrument.—Chaffee vs. Baptist Missionary Con., 10 Paige Ch. (N. Y.) 85, 40 Am. Dec. 225.

51. Sufficiency of.—Mark may be sufficient signature, although testator may be unable to write, and his name may not appear upon face of will.—In re Estate Walker, 110 Cal. 337, 392, 52 Am. St. Rep. 104, 42 Pac. Rep. 815, 30 L. R. A. 460.

52. Same.—Mark made by testator holding pen in his hand trembling so that he cannot write his name, by party supporting his wrist and hand, and steadying same, sufficient signature.—In re Estate Mullin, 110 Cal. 352, 358, 42 Pac. Rep. 645.

53. Same.—Mark made with declaration by testator that it was his last will and testament, made in presence and hearing of witnesses, who subscribed same at his request in his presence and in presence of each other, sufficient.—In re Estate Toomes, 54 Cal. 509, 518, 35 Am. Rep. 82.

54. Party may hold testator's hand and aid him in making his signature where testator has testamentary capacity, but is unable, from palsy or other cause, to steady his hand so as to make to his will signature required by law, and it is not necessary to prove any express request from testator for such assistance.—Vandruv vs. Bishart, 23 Pa. St. 232, 234.

See par. 53 this note.

55. "Subscription by a witness to a will of the name of the testatrix, made under her direction, in her presence, and at her request, is sufficient execution of will, although person signing her name omits to write his own name near by as witness to her signature."—In re Estate Langan, 74 Cal. 353, 16 Pac. Rep. 183.

56. The above, taken from the syllabi, is no doubt a good interpretation of rule of law governing execution of will, but it would not seem to be borne out, or indeed raised by opinion, which nowhere passes upon question of sufficiency of signature of testator.—See Chaffee vs. Baptist Missionary Con., 10 Paige Ch. (N. Y.) 85, 40 Am. Dec. 225.

57. Same.—In testator's presence to paper acknowledged by him in some satisfactory manner to be his, is sufficient compliance with terms of statute.—Hogan vs. Grosvenor, 51 Mass. (10 Met.) 54, 43 Am. Dec. 414.

58. Same.—Who wrote whole will, by making testator's mark above place where testator's name was written, is sufficient signature by mark, as it clearly appeared that same was intended to represent name of testatrix.—In re Estate Guilfoyle, 96 Cal. 598, 600, 31 Pac. Rep. 553, 22 L. R. A. 370.

See par. 54 this note.

III. ACKNOWLEDGMENT OF WILL.

59. DISTINGUISHED FROM REQUEST.—Act of publication and act of requiring witnesses to sign are distinct in their nature or quality, but their performance may be joint or connected.—Coffin vs. Coffin, 23 N. Y. 9, 30 Am. Dec. 235.

60. Distinct in their nature as well as purpose, and omission to comply with either is fatal to validity of the instrument.—Baskin vs. Baskin, 36 N. Y. 416, 419.

61. Independent facts, each of which is essential to complete execution.—Baskin vs. Baskin, 36 N. Y. 416, 419.

62. HOW EXPRESSED.—No particular form of words necessary.—Brown vs. De Selding, 4 Sandf. (N. Y.) 10, 14. See Doe vs. Roe, 2 Barb. (N. Y.) 200; Jauncey vs. Thorne, 2 Barb. Ch. (N. Y.) 40, 45 Am. Dec. 424; Nelson vs. McGiffert, 3 Barb. Ch. (N. Y.) 153, 163, 49 Am. Dec. 170; Remsen vs. Brinckerhoff, 26 Wend. 325, 332, 37 Am. Dec. 251.

63. By any act or declaration carrying by implication an averment of fact.—Ela vs. Edwards, 82 Mass. (16 Gray) 91. See Nickerson vs. Buck, 66 Mass. (12 Cush.) 342.

64. Communication of some sort must be made to witnesses indicating that testator intended to give effect to paper as his will, but any communication of his idea, to this effect, is sufficient.—Remsen vs. Brinckerhoff, 26 Wend. (N. Y.) 325, 37 Am. Dec. 251.

65. May be made by words or acts.—In re Estate Fusilier, Myrick's Prob. Rep. 40, 41.

66. Otherwise than by his express declaration.—Ela vs. Edwards, 82 Mass. (16 Gray) 91.

67. Must be declared in manner required by statute; otherwise will not be entitled to probate.—In re Estate Fusilier, Myrick's Prob.

Rep. 40, 41. See *Van Hooser vs. Van Hooser*, 1 Redf. (N. Y.) 365; *Hunt vs. Mottlie*, 3 Bradf. (N. Y.) 323; *Brinckerhoff vs. Remsen*, 3 Paige Ch. (N. Y.) 488; *Chaffee vs. Baptist Mission Con.*, 10 Paige Ch. (N. Y.) 85, 40 Am. Dec. 225.

68. Performance of some act necessary which if remembered would enable witness to swear to identity of paper, as if no such acts were done there could be no valid subscription.—*Simmons vs. Leonard*, 91 Tenn. 183, 30 Am. St. Rep. 875, 1 S. W. Rep. 280.

69. Testator must inform each of attesting witnesses that he wishes them to understand that instrument is his will at time it is executed.—In re *Estate Fusilier*, Myrick's Prob. Rep. 40, 41. See *Brown vs. De Selding*, 4 Sandf. (N. Y.) 10, 14; *Seymour vs. Van Wyck*, 6 N. Y. 120.

70. NECESSITY OF ACKNOWLEDGMENT OF SIGNATURE.—Signature of testator if not made in presence of witnesses must be acknowledged to them.—In re *Estate Taney*, Myrick's Prob. Rep. 210, 211.

71. Cannot be dispensed with.—*Remsen vs. Brinckerhoff*, 26 Wend. (N. Y.) 325, 37 Am. Dec. 251.

72. RELATION TO SIGNING.—Equivalent to signing in presence of witnesses when made in their presence.—*Brown vs. De Selding*, 4 Sandf. (N. Y.) 10, 14; *Burwell vs. Corbin*, 1 Rand. (Va.) 131, 10 Am. Dec. 494.

73. Sufficient proof of signing thereof if it further appear that paper has signature.—*Burwell vs. Corbin*, 1 Rand. (Va.) 131, 10 Am. Dec. 494.

74. SUFFICIENCY OF.—Sufficient if testator verifies subscription as authentic without reference to form in which the acknowledgment is made.—*Baskin vs. Baskin*, 36 N. Y. 416, 419.

75. Declaration of testator to attesting witness that instrument is his will, may be made by testator in person or by some person in his presence by his authority.—In re *Estate Fusilier*, Myrick's Prob. Rep. 40, 41.

76. Sufficient, which complies in substance with requirements of statute.—*Brown vs. De Selding*, 4 Sandf. (N. Y.) 10, 14. See *Doe vs. Roe*, 2 Barb. (N. Y.) 200; *Jauncey vs. Thorne*, 2 Barb. Ch. (N. Y.) 40, 45 Am. Dec. 424; *Nelson vs. McGiffert*, 3 Barb. Ch. (N. Y.) 153, 163, 49 Am. Dec. 170; *Remsen vs. Brinckerhoff*, 26 Wend. (N. Y.) 325, 323, 37 Am. Dec. 251.

77. TIME WHEN TO BE MADE.—At termination of testamentary disposition.—In re *Estate Seaman* (Cal. April 3, 1905), 30 Pac. Rep. 700.

78. At time of signing or acknowledging and in presence of witness.—*Remsen vs. Brinckerhoff*, 26 Wend. (N. Y.) 325, 37 Am. Dec. 251.

79. HOW SHOWN.—By acknowledgment made to witness at time he is requested to attest will, where testator acknowledged signature and declared it to be his will, and requested witness to sign it as witness, and same is witnessed in testator's presence.—*Willis vs. Mott*, 36 N. Y. 436.

80. Acknowledgment by testator sufficient

made after witnesses have signed, in answer to question asked by scrivener if paper was his will, transaction being looked upon as one and entire, declaration being made before parties separated.—In re *Estate Johnson*, 57 Cal. 529, 531. See *Vaughan vs. Burford*, 3 Bradf. (N. Y.) 78; *Jackson vs. Jackson*, 39 N. Y. 153.

81. By general acknowledgment by testator which may be equivalent to special acknowledgment by him that will was signed by him at his request by hand of another.—*Burwell vs. Corbin*, 1 Rand. (Va.) 131, 10 Am. Dec. 494.

82. By presenting document to witness for attestation and publishing it as his will, is most equivocal acknowledgment of signature existing.—*Baskin vs. Baskin*, 36 N. Y. 416, 419.

83. By production of paper to which testator has personally affixed his signature with declaration that it was his last will and testament and request to witnesses to attest same, as he verifies subscription as authentic.—*Baskin vs. Baskin*, 36 N. Y. 416, 419.

84. By production of will with testator's name signed so that same may be signed by witnesses, accompanied by request that they witness it as will.—*Simmons vs. Leonard*, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. Rep. 280.

85. By production of will with signature attached when requesting witness to attest same.—*Jauncey vs. Thorne*, 2 Barb. Ch. (N. Y.) 40, 45 Am. Dec. 424.

86. Request made by testator to witness to read acknowledgment contained in attestation clause, although silent.—*Remsen vs. Brinckerhoff*, 26 Wend. (N. Y.) 325, 37 Am. Dec. 251.

87. By request made by testator, who wrote will with his own hand, to witnesses to attest his signature, to two of whom he declared in terms that it was his will, and to third pointed out place where he should sign, which was under words, "signed, sealed, published, and declared by the above named _____ to be his last will," etc.—*Hogan vs. Grosvenor*, 51 Mass. (10 Met.) 54, 43 Am. Dec. 414.

88. By statement made by party drawing will in presence of testator that it was his will and requesting witnesses to sign same.—*Gilbert vs. Knox*, 52 N. Y. 125.

89. By statement made by testator, "I desire you to attest this instrument as my last will and testament," as same imports not only request, but clear publication.—*Coffin vs. Coffin*, 23 N. Y. 9, 30 Am. Dec. 235.

90. By statement made by testator after signing will by mark in answer to question "What is this instrument?" to the effect that it was his will and further requesting the parties present to witness same.—In re *Estate Mullin*, 110 Cal. 252, 258, 42 Pac. Rep. 645. See In re *Estate Guilfoyle*, 96 Cal. 593, 31 Pac. Rep. 553, 22 L. R. A. 370.

91. By statement made by testator in answer to question, that he requested him to sign paper as witness to his will.—*Coffin vs. Coffin*, 23 N. Y. 9, 30 Am. Dec. 235.

92. WHEN NOT SHOWN BY PUBLICATION

OF INSTRUMENT as last will and testament where same is signed by another than testator and signature is purposely concealed from testator's view and that of attesting witnesses.—*Baskin vs. Baskin*, 36 N. Y. 416, 419. See *Rutherford vs. Rutherford*, 1 Den. (N. Y.) 33, 43 Am. Dec. 644; *Chaffee vs. Baptist Missionary Con.*, 10 Paige Ch. (N. Y.) 85, 91, 40 Am. Dec. 225; *Lewis vs. Lewis*, 11 N. Y. 220.

93. By requesting witnesses to sign as attestation clause was either read by witnesses paper produced contained requisites to valid will, as attention of witnesses must be directly called to his signature.—In re *Estate Taney*, *Myrick's Prob. Rep.* 210, 211.

94. Where evidence fails to prove that attestation clause was either read by witnesses or that testator stated that instrument was his will, and mere acknowledgment that same was his hand and seal for the purposes therein mentioned is not sufficient.—*Remsen vs. Brinckerhoff*, 26 Wend. (N. Y.) 325, 27 Am. Dec. 251.

IV. WITNESSES.

95. BEFORE CODE.—Under Mexican law, as enforced in California, will was made valid if made in presence of three witnesses, and this number was not absolutely essential under established custom which obtained force of positive law, and made two witnesses sufficient.—*Tevis vs. Pitcher*, 10 Cal. 465, 467. See *Panaud vs. Jones*, 1 Cal. 488; *Castro vs. Castro*, 6 Cal. 153, 160.

96. Under Mexican and Spanish law, sealed testament of testator is required to be signed by witnesses with testator upon envelope, escribano placing his hand and seal thereto.—*Panaud vs. Jones*, 1 Cal. 488, 501-502.

97. Will signed by alcalde and two witnesses, valid under Mexican and Spanish laws.—*Panaud vs. Jones*, 1 Cal. 488, 508.

98. Signed by two witnesses before sindaco, who also signed, held valid although not signed by sindaco strictly as witness.—*Tevis vs. Pitcher*, 10 Cal. 465, 478.

99. Custom requiring two witnesses with regard to execution of wills prevailed generally and for long time in California, notwithstanding Mexican laws required three witnesses.—*Tevis vs. Pitcher*, 10 Cal. 465, 478. See *Panaud vs. Jones*, 1 Cal. 488.

100. INFORMATION.—Witness need not be informed of provisions in will.—*Simmons vs. Leonard*, 91 Tenn. 183, 30 Am. St. Rep. 375, 18 S. W. Rep. 280.

101. Deed referred to in will need not be shown to witness attesting same.—In re *Estate Willey*, 128 Cal. 1, 7, 60 Pac. Rep. 471.

102. LAW GOVERNING.—Law existing at time of death must govern will.—In re *Estate Barker*, *Myrick's Prob. Rep.* 78, 79.

103. Will invalid as not witnessed as required by law in force at time of its execution may be valid under law existing at time of testator's death as a holographic will, to which witnesses not necessary.—In re *Estate Barker*, *Myrick's Prob. Rep.* 78, 79.

See par. 22 this note.

104. SIGNATURE.—Witnesses need not see testator sign.—*Simmons vs. Leonard*, 91 Tenn. 183, 30 Am. St. Rep. 375, 18 S. W. Rep. 280.

See para. 59-94 this note.

105. Witnesses simply signing names without anything of what is known as attesting clause, is good.—In re *Estate Crittenden*, *Myrick's Prob. Rep.* 50, 55.

106. Witnesses subscribing will separately and apart from each other sufficient where they each sign in presence of testator and at his request.—*Gaylor's Appeal*, 43 Conn. 82. See *Ga. Webb vs. Fleming*, 30 Ga. 808, 76 Am. Dec. 675. *Mass. Dewey vs. Dewey*, 42 Mass. (1 Met.) 349, 35 Am. Dec. 367; *Ela vs. Edwards*, 32 Mass. (16 Gray.) 91. N. Y. *Hoysradt vs. Kingman*, 22 N. Y. 372; *Jauncey vs. Thorne*, 2 Barb. Ch. 40, 45 Am. Dec. 424.

107. Attesting signature, attests that everything was rightly done unless act attested be impeached, not negatively merely, but positively.—*Kirk vs. Carr*, 54 Pa. St. 285.

108. Acknowledgment of previous signature of witness not sufficient.—*Lord vs. Lord*, 58 N. H. 7, 42 Am. Rep. 565. See *Chase vs. Kittredge*, 33 Mass. (11 Allen) 49, 37 Am. Dec. 687.

109. Not sufficient—Where witness signs by initials of given name indistinctly, but yet discernible, with surname so light that no person could tell from examination what full name was.—In re *Estate Winslow*, *Myrick's Prob. Rep.* 124.

110. Same—Where one signs his initials and testator's surname as witness by mistake.—In re *Estate Walker*, 110 Cal. 387, 390, 52 Am. St. Rep. 104, 42 Pac. Rep. 315, 30 L. R. A. 460.

111. Same—Witnesses writing their names on outside of fourth page of sheet after it had been folded and across it as so folded, not compliance with statute.—*Soward vs. Soward*, 1 Duv. (Ky.) 126. See In re *Estate Seaman* (Cal. April 3, 1905), 30 Pac. Rep. 700.

112. SAME—ATTESTATION CLAUSE AS FOLLOWS: "In witness whereof I have hereunto set my hand and seal in the presence of John Heard and _____, who I require to sign their name thereto as subscribing witnesses," signed by testator and by two witnesses, held not sufficient compliance with statute.—In re *Estate Tyler* (Cal. Nov. 4, 1897), 50 Pac. Rep. 927.

113. BY MARK.—Validity of attestation depends upon signing of name of witness by his authority, and in his presence, and not upon fact of his making mark or doing any other manual act in connection with signature.—*Lord vs. Lord*, 58 N. H. 7, 42 Am. Rep. 565. See *Gillis vs. Gillis*, 96 Ga. 1, 51 Am. St. Rep. 121, 23 S. E. Rep. 107, 30 L. R. A. 143; *Upchurch vs. Upchurch*, 16 B. Mon. (Ky.) 102; *Jesse vs. Parker*, 6 Gratt. (Va.) 57, 52 Am. Dec. 102.

114. Witness may subscribe his name by mark or by initials or by fictitious name if latter is used without purpose of personating another and his hand may be guided in case he cannot write.—*Lord vs. Lord*, 58 N. H. 7, 42 Am. Rep. 565.

115. Third party may sign name of witness who is unable to write, in his presence and in

presence of testator, without such witness touching pen.—*Schnee vs. Schnee*, 61 Kan. 643, 60 Pac. Rep. 738.

116. Witness writing name of associate witness who is unable to write, and writing his own name as witness to mark of such witness, is good witnessing of will.—In re Estate Derry, Myrick's Prob. Rep. 202, 203.

117. Word "subscribe" as applied to witness of will includes person whose name is written by another, and who makes his mark thereto as good attesting witness.—*Simmons vs. Leonard*, 91 Tenn. 183, 30 Am. St. Rep. 876, 18 S. W. Rep. 280. See *Ford vs. Ford*, 7 Humph. (Tenn.) 96, 97.

118. REQUEST.—Request may be by words or signs without form, or implied from acts.—In re Estate Crittenden, Myrick's Prob. Rep. 50, 54. See *Brown vs. De Selding*, 4 Sandf. (N. Y.) 10, 14.

119. Direct request of testator not absolutely necessary.—*Bundy vs. McKnight*, 48 Ind. 502; *Higgins vs. Carlton*, 23 Md. 115, 92 Am. Dec. 666.

120. May be made by testator or by another at his request.—In re Estate Crittenden, Myrick's Prob. Rep. 50, 54.

121. Anything which conveys idea that testator desires parties to become witnesses is good request.—In re Estate Crittenden, Myrick's Prob. Rep. 50, 54.

122. Same.—Knowing acquiescence may be equivalent to actual request in words.—In re Estate Crittenden, Myrick's Prob. Rep. 50, 55. See *Higgins vs. Carlton*, 23 Md. 115, 92 Am. Dec. 666.

123. By party drawing will, in presence of testator and in his hearing, to attest and subscribe will as witnesses, sufficient where such witnesses subscribe same in testator's presence and with his knowledge and without objection.—*Bundy vs. McKnight*, 48 Ind. 502.

124. SAME.—SUFFICIENCY OF.—Request sufficiently shown where witnesses sent for by attendant in testator's presence and without objection and where he executes will upon their introduction and delivers it when executed to them, in order that they may sign, and their signatures are affixed in his presence.—*Brown vs. De Selding*, 4 Sandf. (N. Y.) 10, 14. See *Rutherford vs. Rutherford*, 1 Den. (N. Y.) 33, 43 Am. Dec. 644; *Doe vs. Roe*, 2 Barb. (N. Y.) 200.

See pars. 115-118 this note.

125. OMISSION TO STATE REQUEST IN ATTESTATION CLAUSE that testator requested witnesses to sign as such is of itself of no consequence.—In re Estate Crittenden, Myrick's Prob. Rep. 50, 55.

126. EVIDENCE.—Request to sign is evidence of a disposing mind if there is no incapacity.—*Hogan vs. Grosvenor*, 51 Mass. (10 Met.) 54, 43 Am. Dec. 414.

V. EVIDENCE.

127. BURDEN OF PROOF on party offering instrument to prove its execution in conformity with statute.—*Ela vs. Edwards*, 82 Mass. (16 Gray) 91; *Lewis vs. Lewis*, 11 N. Y.

220; *Chaffee vs. Baptist Missionary Con.*, 10 Paige (N. Y.) 85, 40 Am. Dec. 225.

128. EXECUTION.—Evidence must show subscription and publication in presence of two witnesses.—*Baskin vs. Baskin*, 36 N. Y. 416, 419.

129. Formal execution and publication may be inferred from circumstances as well as established by direct and positive evidence of attesting witnesses.—*Lewis vs. Lewis*, 11 N. Y. 220.

130. Question whether will has been properly executed must be determined by showing a compliance with requirements of statute.—In re Estate Comassi, 107 Cal. 1, 4, 40 Pac. Rep. 15, 28 L. R. A. 414.

131. Knowledge.—Evidence must show that instrument is will and was known and executed by testator as such.—*Gerrish vs. Nason*, 22 Me. 433, 39 Am. Dec. 539.

Parol evidence.—See para. 143-145 this note.

132. Presumption that all details of statutory requirements have been complied with arise in favor of will, where witnesses are dead or where their memory fails, no matter whether attestation clause states fact or not, where there is no evidence to contrary.—In re Estate Tyler, 121 Cal. 405, 410, 53 Pac. Rep. 923.

133. Distinguishing: In re Estate Walker, 110 Cal. 387, 397, 52 Am. St. 104, 42 Pac. Rep. 815, 30 L. R. A. 460, upon ground that in that case court was not dealing with general question of sufficiency of proof of execution, only question being whether or not alleged witness had subscribed his name to document.

134. Not indulged in where there is nothing on face of will to show compliance therewith.—In re Estate Tyler (Cal. Nov. 4, 1897), 50 Pac. Rep. 927.

135. Formal execution and publication will not be presumed in opposition to positive testimony merely upon ground that attestation clause is in some form and states that everything has been done which was required.—*Lewis vs. Lewis*, 11 N. Y. 220.

136. FORMAL EXECUTION AND PUBLICATION of will may be proved by others than subscribing witnesses.—*Lewis vs. Lewis*, 11 N. Y. 220; *Simmons vs. Leonard*, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. Rep. 280.

137. PROOF OF OTHER PARTIES WILL NOT SUFFICE unless it was shown that all formalities required were observed.—*Simmons vs. Leonard*, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. Rep. 280.

138. SUFFICIENCY OF PROOF OF EXECUTION of will is not prescribed by statute, and is different question from question of what is sufficient execution.—In re Estate Tyler, 121 Cal. 405, 409, 53 Pac. Rep. 923.

139. Evidence of witness that testatrix said "she wanted me to witness a document; that she has been making a little disposition of her effects and would like me to sign as witness. She put her finger to line where she wished me to sign," taken with evidence of another witness to effect that testatrix passed

him bundle of papers asking him to sign his name as witness, and instructing him where to sign, sufficient proof to support will, signature of witnesses proving to be genuine.—*Ella vs. Edwards*, 32 Mass. (16 Gray) 91.

140. Evidence showing that testator signed in presence of one witness and clearly acknowledged his signature in presence of other, sufficient to support will.—*Webb vs. Fleming*, 30 Ga. 808, 77 Am. Dec. 676.

141. WHEN NOT PROVED.—Signature not proved by evidence of witness who saw the will signed by third person in testator's presence, but did not hear him acknowledge it, saw witnesses sign latter, and then heard testator say that it was his will, where it is not shown that there was any acknowledgment of the signature.—*Burwell vs. Corbin*, 1 Rand. (Va.) 131, 10 Am. Dec. 494.

142. Where evidence shows that testator neither read nor heard will read and nothing

was said in presence of attesting witnesses whether writing attested was will or not.—*Gerrish vs. Nason*, 22 Me. 438, 39 Am. Dec. 539.

143. Under § 1276 parol evidence not admissible to prove intention of testator to execute his will in conformity with requirements of statute.—In re Estate Seaman (Cal. April 3, 1905), 80 Pac. Rep. 700.

144. PAROL EVIDENCE NOT ADMISSIBLE to show that testator intended that space signed by him to be at end of will if upon inspection of instrument it appears that it is not in fact at end.—In re Estate Seaman (Cal. April 3, 1905), 80 Pac. Rep. 700.

145. EVIDENCE NOT ADMITTED TO PROVE that testator intended to comply with requirements of statute if it appears upon face of instrument that he had not in fact so complied.—In re Estate Seaman (Cal. April 3, 1905), 80 Pac. Rep. 700.

See par. 126 this note.

§ 1277. DEFINITION OF AN [H]OLOGRAPHIC WILL. An [h]olographic will is one that is entirely written, dated, and signed by the hand of the testator himself. It is subject to no other form, and may be made in or out of this state, and need not be witnessed.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Commissioners' note.
- 3-7. Construed with reference to application, definition, meaning, requirements, etc.
- 8-10. Codicil—When entitled to probate with will.
11. Same—Party in—When superseded by party in will.
- 12, 13. Date—Effect of Abbreviation—Defect in.
14. Difference between holographic and attested wills.
- 15, 16. Formalities—What dispensed with.
17. Forms—Legislative, must be observed.
18. Holographic will—How construed.
19. Same—Effect of printing portion.
- 20-23. Intention—How determined from circumstances—Transposition of words.
24. Omissions—Right to supply omitted words.
25. Reference to other documents—Right to refer to documents not in testator's handwriting.
26. Requisites of holographic will—Legislative requirements.
- 27-30. Signature—Place of, considered.
31. Same—Identification by exemplars.
- 32, 33. State statutes—Oregon and Wyoming laws construed.
34. Witnesses—Opinions as to handwriting.
- 35-37. Words and phrases—Meaning of writing.
- 38-52. What amount to.
- 53-58. What do not amount to.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: In re Estate Martin, 53 Cal. 530, 533 (construed and applied); In re Estate Rand, 61 Cal. 468, 475, 44 Am. Rep. 555 (construed and applied); In re Estate Billings, 64 Cal. 427, 1 Pac. Rep. 701 (construed and applied); In re Estate Learned, 70 Cal. 140, 144, 11 Pac. Rep. 587 (construed and applied); Mitchell vs. Donohue, 100 Cal. 202, 208, 33 Am. C. C.—65

St. Rep. 279, 84 Pac. Rep. 614 (construed and applied); In re Estate Stratton, 112 Cal. 518, 519, 44 Pac. Rep. 1028 (construed and applied); In re Estate Lakemeyer, 135 Cal. 28, 29, 37 Am. St. Rep. 96, 66 Pac. Rep. 961 (construed and applied); In re Estate Fay, 145 Cal. 32, 33, 78 Pac. Rep. 340 (construed and applied); In re Estate Clisby, 145 Cal. 407, 409, 78 Pac. Rep. 964 (construed and applied with other sections); In re Estate of Donoho, Myr. Prob. Rep. 140 (construed and applied with § 1276).

As to meaning of term holographic, see note 52 Am. Dec. 591.

As to necessity of attestation of holographic will, see note 52 Am. Dec. 592.

As to necessity of mentioning place of execution, see note 52 Am. Dec. 592.

As to necessity of mentioning place where holographic will may be deposited or found, see note 52 Am. Dec. 592.

As to what constitutes signing of holographic will, see note 52 Am. Dec. 592.

For definition of date as used in holographic will, see note 52 Am. Dec. 592.

2. COMMISSIONERS' NOTE TO THIS SECTION SAYS: "The tendency of courts to recognize the desires of decedents, however informally expressed, as shown in note to § 1317, post, is one reason for the adoption of this section; and while it obviates many difficulties and annoyances, may not, and, indeed, it is confidently claimed in those countries where holographic wills are recognized does not, give rise to as many attempts at fraudulent will making and disposition of property as where it does not exist; simply because the testator's intentions are unknown."

3. CONSTRUED AS APPLYING TO DOCUMENT executed before passing of code where

testator died subsequent thereto.—In re Estate Learned, 70 Cal. 140, 143, 11 Pac. Rep. 537. See In re Estate Barker, Myrick's Prob. Rep. 78, 79; Bishop vs. Bishop, 4 Hill (N. Y.) 139; De Peyster vs. Glendining, 3 Paige Ch. (N. Y.) 295.

4. As defining holographic will.—Mitchell vs. Donohue, 100 Cal. 202, 207, 33 Am. St. Rep. 279, 34 Pac. Rep. 614.

5. As meaning that whole of instrument must be written, dated, and signed by hand of testator.—In re Estate Billings, 64 Cal. 427, 1 Pac. Rep. 701.

6. As not requiring holographic will to be subscribed at the end thereof.—In re Estate Stratton, 112 Cal. 513, 519, 44 Pac. Rep. 1023.

7. With § 1276 as showing distinction between signatures required for holographic and other wills.—In re Estate Donoho, Myrick's Prob. Rep. 140.

Attestation.—See para. 15, 16 this note.

Circumstances.—See para. 20-23 this note.

8. CODICIL.—Document in handwriting of third party purporting to be codicil to holographic will entitled to probate as part of such will.—In re Estate Soher, 73 Cal. 477, 481, 21 Pac. Rep. 3.

9. Dated, signed, and written by testator in his own handwriting showing desire that party not mentioned in will should have full charge of his estate, and declaring same to be part of his will, admitted to probate along with will.—In re Estate Ringot, 124 Cal. 45, 47, 56 Pac. Rep. 781.

10. Fact that codicil to holographic will purports to be witnessed does not prevent its being admitted to probate with holographic will.—In re Estate Soher, 73 Cal. 477, 479, 21 Pac. Rep. 3.

11. Party mentioned in codicil to holographic will as person who testator wanted to have full charge of his estate, held to supersede party named in holographic will not appointing party executor in express terms.—In re Estate Ringot, 124 Cal. 45, 47, 56 Pac. Rep. 781.

Construction.—See para. 13, 25, 26, 32, 33, 35, 37 this note.

12. DATE IN HOLOGRAPHIC WILL may be abbreviated where same is wholly in handwriting of testator.—In re Estate Lakemeyer, 135 Cal. 23, 37 Am. St. Rep. 96, 66 Pac. Rep. 961.

13. Defect in date not remedied by fact that testator declares his age in holographic will.—In re Estate Martin, 53 Cal. 530, 533.

14. DIFFERENCE BETWEEN HOLOGRAPHIC WILL AND ATTESTED WILL is in form of execution.—In re Estate Soher, 73 Cal. 477, 480, 21 Pac. Rep. 3.

Difference in parts of will.—See par. 19.

Executor.—See par. 9 this note.

15. FORMALITIES AS TO WITNESSES dispensed with if instrument is all in handwriting of testator.—In re Estate Soher, 73 Cal. 477, 480, 21 Pac. Rep. 3.

16. FORMALITIES OF ATTESTATION not required in document referred to by an attested will or codicil, the corresponding formalities are not required in a document referred to by

the holographic will or codicil.—In re Estate Soher, 73 Cal. 477, 481, 21 Pac. Rep. 3.

17. FORMS PRESCRIBED BY LEGISLATURE FOR HOLOGRAPHIC WILLS must be observed.—In re Estate Rand, 61 Cal. 463, 475, 44 Am. Rep. 555.

18. HOLOGRAPHIC WILL WHEN AUTHENTICATED by signature construed with remaining portion as expressing will of testator, and effect will be given to all language found therein if possible.—In re Estate Stratton, 112 Cal. 513, 519, 44 Pac. Rep. 1023.

19. Written portion of holographic will not entitled to probate where other portion of instrument is printed.—In re Estate Rand, 61 Cal. 463, 475, 44 Am. Rep. 555.

Holographic.—See para. 35, 37 this note.

20. INTENTION.—The surrounding circumstances will be looked to in determining whether instrument propounded was intended to be testamentary paper, and language will be construed in light of such circumstances.—Clarke vs. Ransom, 50 Cal. 595, 600. See cases cited.

21. Circumstances showing that instrument was intended as his testamentary will entitle document to probate where court can give effect to intention consistently with language, its form being immaterial.—Clarke vs. Ransom, 50 Cal. 595, 600.

22. Order in which words are written is not determinative of testator's intention.—In re Estate Stratton, 112 Cal. 513, 518, 44 Pac. Rep. 1023.

23. Order in which words are written will be transposed if intention of testator can be ascertained by so doing.—In re Estate Stratton, 112 Cal. 513, 518, 44 Pac. Rep. 1023.

Legislature.—See para. 17, 26 this note.

24. OMISSIONS.—Word manifestly omitted and essential to understanding of intention will be supplied.—In re Estate Stratton, 112 Cal. 513, 518, 44 Pac. Rep. 1023. See Mitchell vs. Donohue, 100 Cal. 202, 33 Am. St. Rep. 279, 34 Pac. Rep. 614.

Opinion.—See par. 34 this note.

Party.—As to party named in codicil superseding party named in will, see par. 11 this note.

Probate.—See para. 3-10, 19 this note.

25. REFERENCE TO OTHER DOCUMENTS.—Holographic will may refer to document which is not in handwriting of testator.—In re Estate Soher, 73 Cal. 477, 480, 21 Pac. Rep. 3. See In re Estate Shillaber, 74 Cal. 144, 5 Am. St. Rep. 433, 15 Pac. Rep. 453, also cases cited.

26. REQUISITES TO HOLOGRAPHIC WILL.—Legislature requires holographic will to be written, dated, and signed by hand of testator.—In re Estate Martin, 53 Cal. 530, 532.

Residuary legatee.—What words held to create when no one specifically mentioned.—See par. 37 this note.

27. SIGNATURE OF TESTATOR—Need not be at end of holographic will, requirements of descriptions at end applying only to wills referred to in § 1276.—In re Estate Barker, Myrick's Prob. Rep. 78, 79; In re Estate Johnson,

Myrick's Prob. Rep. 5; In re Estate Donoho, Myrick's Prob. Rep. 140, 141.

28. May appear anywhere in instrument.—In re Estate Johnson, Myrick's Prob. Rep. 5.

29. Providing paper shows on its face that it is complete testamentary paper.—In re Estate Donoho, Myrick's Prob. Rep. 140, 141.

30. Sufficient if at beginning or in any other part of document.—In re Estate Stratton, 112 Cal. 513, 519, 44 Pac. Rep. 1028. See In re Estate Walker, 110 Cal. 387, 52 Am. St. Rep. 104, 42 Pac. Rep. 815, 30 L. R. A. 460.

31. Identification.—Mere circumstance that exemplars exhibited to witness to enable him to identify signature and handwriting of testator had not been proven to be genuine signature of deceased by direct evidence, held to amount to nothing.—In re Estate Marchall, 126 Cal. 95, 96, 58 Pac. Rep. 449.

32. STATE STATUTES.—Oregon statutes require every will to be in writing, signed by testator or some one under his direction and in his presence, and attested by two or more competent witnesses subscribing their names in his presence, and same must be acknowledged by him in presence of witnesses.—Luper vs. Werts, 19 Oreg. 122, 23 Pac. Rep. 850.

33. Holographic wills as defined by provisions of California code are not included under § 2237 of the Wyoming code, under which "all wills" must be in writing and witnessed by two competent witnesses.—Neer vs. Cowhick, 4 Wyo. 49, 21 Pac. Rep. 262, 18 L. R. A. 588.

Transposition of words.—See para. 20-23 this note.

34. WITNESSES' OPINIONS.—Witness may give an opinion as to genuineness of document where he is personally familiar with handwriting of deceased, and fact that he is only familiar with her signature is immaterial.—In re Estate Marchall, 126 Cal. 95, 96, 58 Pac. Rep. 449.

Witnesses.—See para. 15, 16 this note.

35. WORDS AND PHRASES.—Term "writing" as used with reference to date and as including printed words as well as ordinary writing does not apply to holographic wills.—Succession of Robertson, 49 La. Ann. 868, 62 Am. St. Rep. 672, 21 So. Rep. 586; Succession of Armant, 43 La. Ann. 310, 26 Am. St. Rep. 182, 9 So. Rep. 50.

36. Term "writing" when used with reference to holographic will must be taken in its ordinary sense—to set down legible characters with pen and ink.—Succession of Robertson, 49 La. Ann. 868, 62 Am. St. Rep. 672, 21 So. Rep. 586.

37. Words "my husband, Thomas Stratton," written underneath and at left-hand corner of will, with no mention made of such legatee in body of will, construed as making him residuary legatee.—In re Estate Stratton, 112 Cal. 513, 518, 44 Pac. Rep. 1028.

Words.—As to order in which written, see para. 20-23 this note.

38. WHAT AMOUNT TO.—Whatever would be good as attested will or codicil is good as holographic one if written, dated, and signed

by hand of testator.—In re Estate Soher, 78 Cal. 477, 481, 21 Pac. Rep. 8.

39. SHOWN AND WILL ADMITTED TO PROBATE where bottom of sheet was torn off, including signature of testator, where testator's name had been written in initial clause, evidence showing that document was wholly in testator's handwriting.—In re Estate Camp, 184 Cal. 233, 236-237, 66 Pac. Rep. 227. See In re Estate Stratton, 112 Cal. 513, 44 Pac. Rep. 1028.

40. By document as follows, "property of S. W. Cilsby, Oct. 1, 1902," enumerating testator's estate, and ending with devise to wife, and to her alone, signed by testator.—In re Estate Cilsby, 145 Cal. 407, 409, 78 Pac. Rep. 964.

41. By document dated and commenced one day and completed at subsequent period, valid as holographic will, where evidence is not produced to show that it was not intended to be one continuous instrument.—In re Estate Cilsby, 145 Cal. 407, 409, 78 Pac. Rep. 964. See In re Estate Taylor, 126 Cal. 97, 98, 99, 58 Pac. Rep. 454.

42. Distinguishing: In re Estate Skerrett, 67 Cal. 535, 3 Pac. Rep. 181.

43. By document in handwriting of deceased bequeathing property to executor, with request to dispose of same in manner specified in letter to him of same date, without letters.—In re Estate Shillaber, 74 Cal. 144, 146, 5 Am. St. Rep. 433, 15 Pac. Rep. 453.

44. By document in handwriting of testator bequeathing personal property to executor requesting him "to dispose of the same in the manner specified in my letter to him of this date" a holographic will without letter, as same was not written until after execution of will.—In re Estate Shillaber, 74 Cal. 144, 146, 5 Am. St. Rep. 433, 15 Pac. Rep. 453.

45. By document signed, dated, and wholly in testator's handwriting, as follows: "this is to certify that I leave to my wife Real and personal and she to dispose of them as she wis."—Mitchell vs. Donohue, 100 Cal. 202, 207, 28 Am. St. Rep. 279, 24 Pac. Rep. 614.

46. By document written on two sheets of paper with different dates where same properly dated and proved to be written and signed by testator.—In re Estate Taylor, 126 Cal. 97, 99, 58 Pac. Rep. 454.

47. By instrument written, dated, and subscribed by deceased himself as follows: "This is to show that if anything should happen to me, and I should fall suddenly, I, the undersigned, will, after paying all debts, all my property to ——— brothers."—In re Estate Barton, 52 Cal. 538, 539.

48. By letter written by testator to attorney announcing his marriage and declaring that he wanted his will changed so as to give his wife all that belonged to him entitled along with will as showing testamentary disposition and intention.—Barney vs. Hays, 11 Mont. 571, 28 Am. St. Rep. 495, 29 Pac. Rep. 282.

49. By letter written, dated few days before death, as follows: "Dear Old Nance: I wish to give my watch, two shawls, and also \$5000.00. Your Old Friend, E. A. Gordon," al-

though there was nothing on face to indicate testamentary document, and full name of beneficiary not mentioned and no reference was made to anticipated death.—*Clarke vs. Ransom*, 50 Cal. 595, 599.

50. By letters written on same day, substantially same, varying only with reference to future contingencies which may never happen, entitled to probate, question of variance not affecting their validity.—In re Estate of *Murphy*, 104 Cal. 554, 565, 38 Pac. Rep. 543.

51. By will wholly written, dated, and signed by testator, in his own handwriting, with date abbreviated as follows: "New York Nov. 22/97."—In re Estate *Lakemeyer*, 135 Cal. 28, 87 Am. St. Rep. 26, 66 Pac. Rep. 961.

52. Where will contained in two documents which seem to be substantially same and of same date, but showed some little inconsistency with respect to future contingencies, where question of the validity was not affected.—In re Estate *Murphy*, 104 Cal. 554, 565, 38 Pac. Rep. 543.

53. NOT SHOWN BY DOCUMENT AS FOLLOWS, "In the name of God, Amen, John Waller, _____ gives and bequeathes _____" and concluding, "in witness whereof I have hereunto set my hand this _____ day of _____, signed and acknowledged in the presence of," with blank for date not filled out, and tes-

tator's name not signed, and no witnesses.—*Waller vs. Waller*, 1 Gratt. (Va.) 454, 43 Am. Dec. 564.

54. By instrument written and signed by deceased bearing no date and not witnessed.—In re Estate *Martin*, 53 Cal. 530, 532.

55. By letter written by testator to executor containing direction as to disposition of personal estate after date of will or part thereof.—In re Estate *Shillaber*, 74 Cal. 144, 146, 5 Am. St. Rep. 433, 15 Pac. Rep. 453.

56. By letter written to undertaker, instructing him as to disposition of deceased's body and as to persons to be apprised of his death, and intimating intention to write in substance at later date, not showing sufficient testamentary disposition.—In re Estate *Meade*, 118 Cal. 423, 430, 62 Am. St. Rep. 244, 50 Pac. Rep. 541.

57. By will written by testator upon sheet of paper with printed letter-head stating business and location of firm with year printed, date of day and month being filled in by him, is not holographic will.—In re Estate *Billings*, 64 Cal. 427, 1 Pac. Rep. 701.

58. By will written on stationer's blank partly printed and partly in handwriting of testator not holographic will.—In re Estate *Rand*, 61 Cal. 463, 475, 44 Am. Rep. 555.

§ 1278. WITNESS TO ADD RESIDENCE. A witness to a written will must write, with his name, his place of residence; and a person who subscribes the testator's name, by his direction, must write his own name as a witness to the will. But a violation of this section does not affect the validity of the will.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Referred to in construing testatrix's signature by subscribing witness.

1. Applied, cited, construed, referred to, etc., in: In re Estate *Toomes*, 54 Cal. 509, 513, 35 Am. Rep. 33 (referred to).

2. Referred to in construing and determin-

ing that signature of testatrix, affixed by subscribing witness to her mark, where testatrix declared instrument to be her will in presence and hearing of witnesses, who subscribed same, at her request, in her presence, as witnesses.—In re Estate *Toomes*, 54 Cal. 509, 513, 35 Am. Rep. 33. See In re Estate *Langan*, 74 Cal. 353, 16 Pac. Rep. 138.

§ 1279. MUTUAL WILL. A conjoint or mutual will is valid, but it may be revoked by any of the testators, in like manner with any other will.

History: Enacted March 21, 1872.

- 1, 2. Agreement to make mutual will—Nature and effect of.
3. Same—Enforceable in equity.
4. Same—When within statute of frauds.
- 5, 6. Joint wills—When valid.
- 7-10. Same—Validity of between particular parties.
- 11, 12. Execution—How executed and construed.
13. Operation—When joint wills take effect.
14. Probate—When entitled to.
15. Revocation—What amounts to.

As to validity of joint wills, see notes 63 Am. Dec. 407, 410; 73 Am. Dec. 754; 82 Am. Dec. 455.

Upon the subject of joint wills, see monographic note 63 Am. Dec. 407-410.

1. AGREEMENT TO MAKE MUTUAL

WILLS when properly proved, binding upon parties and enforced in equity.—*Durour vs. Ferrara*, 2 Harg. 304, 1 Dick. 419; *Walpole vs. Orford*, 3 Ves. Jr. 402, 4 Rev. Rep. 38. See *Owens vs. McNally*, 113 Cal. 444, 443, 45 Pac. Rep. 710, 33 L. R. A. 369; *Wyche vs. Clapp*, 43 Tex. 543, 543.

2. Effect of such agreement is not to render wills made in pursuance of them irrevocable.—*Wyche vs. Clapp*, 43 Tex. 543, 543.

3. Enforceable in equity against estate of defaulting party, after his death, on ground of attaching equitable trust.—*Wyche vs. Clapp*, 43 Tex. 543, 543. See *Isard vs. Middleton*, 1 Des. (S. C.) 116.

4. Pursuant to which other party makes will is within statute of frauds.—*Gould vs. Mansfield*, 103 Mass. 408, 4 Am. Rep. 578.

5. **JOINT WILL BY TWO DISPOSING** of all estate of one dying first to survivor valid.—*Lewis vs. Scofield*, 26 Conn. 452, 454, 68 Am. Dec. 404.

Contrast: *Hershy vs. Clark*, 35 Ark. 17, 37 Am. Rep. 1; *Hobson vs. Blackburn*, 1 Add. Ecc. 274, 277.

6. **VALIDITY OF**—Combining reciprocal disposition in one instrument valid.—In *Matter Diez*, 50 N. Y. 88, 94. See *Conn. Lewis vs. Scofield*, 26 Conn. 452, 68 Am. Dec. 404. *Ga. Evans vs. Smith*, 28 Ga. 98, 78 Am. Dec. 751. *N. Y. Ex parte Day*, 1 Bradf. 476.

7. **By two parties in joint or mutual will**, or separate will of either, where it purported to be joint implied agreement.—*Clayton vs. Liverman*, 2 Dev. & B. (N. C.) 558.

8. **By tenants in common of real estate**, each bequeathing personal property, and devising their undivided share of real estate to certain persons by one instrument, valid as will, revocable, and entitled to probate.—*Betts vs. Harper*, 39 Ohio St. 639, 641, 48 Am. Rep. 477 (*limiting Walker vs. Walker*, 14 Ohio St. 157, 32 Am. Dec. 474).

9. **By husband and wife**—Joint or mutual wills executed by husband and wife in favor of each other, reciprocally, valid.—In *Matter Diez*, 50 N. Y. 88, 94; *Wyche vs. Clapp*, 43 Tex. 543, 548.

10. **Same**—Need not be separately acknowledged by wife separate and apart from her

husband.—*March vs. Huyter*, 50 Tex. 248, 252. See *Schumaker vs. Schmidt*, 44 Ala. 454, 4 Am. Rep. 135.

11. **EXECUTION**—Joint wills should be executed according to provisions of statute.—*Towle vs. Wood*, 60 N. H. 434, 49 Am. Rep. 326.

As to execution of joint will of married woman, see par. 10 this note.

12. **EXECUTION OF INSTRUMENT IN FORM OF JOINT WILL**, will not be construed to have effect of contract or agreement to make mutual wills, which will authorize court of equity to fasten trust upon defaulting party, or warrant its dealing with survivor as debtor previous to his death for his half of legacy so bequeathed.—*Wyche vs. Clapp*, 43 Tex. 543, 548.

13. **OPERATION**—Joint or mutual wills cannot operate or have effect as joint or mutual wills of parties while one of them survives, as during such time if it is will it is subject to revocation.—*Wyche vs. Clapp*, 43 Tex. 543, 548.

14. **PROBATE**—Joint or mutual wills entitled to probate on decease of parties, if otherwise unobjectionable.—*Wyche vs. Clapp*, 43 Tex. 543, 548. See *Me. Rogers' Appeal*, 2 Fairf. 303. *N. Y. Ex parte Day*, 1 Bradf. 477. *Eng. In re Stracey*, 1 Dea. & Sw. 6, 1 Jur. N. S. 1177.

15. **REVOCATION**—Mutual will revoked by subsequent will of either party.—*Schumaker vs. Schmidt*, 44 Ala. 454, 4 Am. Rep. 135.

§ 1280. **COMPETENCY OF SUBSCRIBING WITNESS.** If the subscribing witnesses to a will are competent at the time of attesting its execution, their subsequent incompetency, from whatever cause it may arise, does not prevent the probate and allowance of the will, if it is otherwise satisfactorily proved.

History: Enacted March 21, 1872, founded upon § 4 Act April 10, 1850, Stats. 1850, p. 177.

1. "Credible" and "competent"—How far equivalent.
2. Competency—Time to be considered in arriving at.
- 3, 4. Same—Convict—How far competent.
5. Recollection—How far effects.
6. Same—Veracity—How far effects probate.
7. Evidence—Burden of proof on party attacking witness.

As to competency of witnesses, see notes 30 Am. St. Rep. 882; 51 Am. St. Rep. 134; 77 Am. St. Rep. 459.

As to effect of pardon of a witness, see note 47 Am. St. Rep. 915.

As to meaning of words "credible" and "competent" when used with reference to witnesses, see note 20 Am. Dec. 488.

1. **"CREDIBLE" EQUIVALENT TO "COMPETENT"** in its meaning with regard to witnesses.—*Smalley vs. Smalley*, 70 Me. 545, 35 Am. Rep. 352. See *Warren vs. Baxter*, 48 Me. 193; *Hawes vs. Humphrey*, 26 Mass. (9 Pick.) 350, 361, 20 Am. Dec. 481; *Haven vs. Hilliard*, 40 Mass. (23 Pick.) 10; *Carlton vs. Carlton*, 40 N. H. 14.

2. **COMPETENCY OF WITNESS**—Time of

execution of will is to be considered in passing upon question of competency of witness, and fact that witness subsequently becomes incompetent does not affect validity of will.—*Hawes vs. Humphrey*, 26 Mass. (9 Pick.) 350, 20 Am. Dec. 481. See *Ga. Gillis vs. Gillis*, 96 Ga. 1, 51 Am. St. Rep. 121, 23 S. E. Rep. 107, 30 L. R. A. 143. *Mass. Sullivan vs. Sullivan*, 106 Mass. 474, 8 Am. Rep. 356. *Mich. In re Sullivan's Will*, 114 Mich. 189, 72 N. W. Rep. 185. *Minn. In re Holt's Will*, 56 Minn. 37, 45 Am. St. Rep. 434, 57 N. W. Rep. 219, 22 L. R. A. 481. *Vt. Morrill vs. Morrill*, 53 Vt. 74, 78, 38 Am. Rep. 659.

3. **CONVICT**—Party convicted of felony who has fully served his term or been pardoned is competent witness to will.—*Diehl vs. Rodgers*, 169 Pa. St. 316, 47 Am. St. Rep. 908, 32 Atl. Rep. 424.

4. **Party pleading guilty to indictment for forgery is good witness**.—In *Matter Will of Noble*, 124 Ill. 266, sub nom. *Robinson vs. Savage*, 15 N. E. Rep. 850. See *Wood vs. Fitzgerald*, 3 Oreg. 563; *Hunnicutts vs. State*, 18 Tex. Ct. App. 498.

5. **Recollection**—Mere want of recollection of witness that testator intended instrument

to be his will after signing attestation clause is not per se evidence of non-compliance with statute, but there should be affirmative proof of want of publication.—*Remsen vs. Brinckerhoff*, 26 Wend. (N. Y.) 325, 37 Am. Dec. 251; *Lewis vs. Lewis*, 11 N. Y. 220. See *Me. Barnes vs. Barnes*, 66 Me. 286. *Mass. Nickerson vs. Buck*, 66 Mass. (12 Cush.) 332. *Mich. Abbott vs. Abbott*, 41 Mich. 540, 2 N. W. Rep. 310.

6. VERACITY OF WITNESS would not seem to affect right to probate.—*Abbott vs. Abbott*, 41 Mich. 540, 2 N. W. Rep. 310. See *In re Sullivan's Will*, 114 Mich. 189, 72 N. W. Rep. 135.

7. BURDEN OF PROOF ON PARTY attacking competency of witness.—*Perine vs. Grand Lodge A. O. U. W.*, 48 Minn. 82, 50 N. W. Rep. 1022.

§ 1281. **CONDITIONAL WILL.** A will, the validity of which is made by its own terms conditional, may be denied probate, according to the event, with reference to the condition.

History: Enacted March 21, 1872.

1. Conditional will—When admitted to probate.
- 2, 3. Same—What amounts to.
- 4-7. Conditions in wills—What considered valid.
8. Same—How implied from words "in case," etc.
9. Gift over—Necessity of.

As to conditional wills, see note 59 Am. Rep. 46, 48; 2 Am. St. Rep. 617.

As to conditions precedent, subsequent, conditional devises, operation, effect, and enforcement of, see monographic notes by Robert Desty, 1 L. R. A. 337; 9 L. R. A. 165.

As to distinction between words of limitation and condition in wills, see monographic note by Robert Desty, 9 L. R. A. 165.

As to interpretation and effect of conditional wills, see post §§ 1345-1349 and notes.

1. **CONDITIONAL WILL** not admitted to probate until the contingency has happened.—*Morrow's Appeal*, 116 Pa. St. 440, 2 Am. St. Rep. 616, 9 Atl. Rep. 660. See *In re Todd's Will*, 2 Watts & S. (Pa.) 145; *Parsons vs. Lance*, 1 Ves. Sr. 191.

2. **WHAT AMOUNT TO.**—Will by party upon leaving home, disposing of his property and adding words, "in case if I shouldn't get back, do as I say on this paper," conditional will, and not entitled to probate where testator returns.—*In re Morrow's Appeal*, 116 Pa. St. 440, 2 Am. St. Rep. 616, 9 Atl. Rep. 660.

3. **Statement annexed to draft of intended will as follows:** "I intend this as a sketch of my will which I intend making on my return home," held conditional will, as the final instructions were valid and death alone prevented its execution.—*Torre vs. Castle*, 1 Comb. 303.

4. **WHAT CONDITIONS VALID.**—Condition for revocation of will in case devisee disputes

it, valid.—*Holt vs. Holt*, 42 N. J. Eq. (15 Stew.) 388, 59 Am. Rep. 43, 7 Atl. Rep. 856. See *Hyde vs. Baldwin*, 34 Mass. (17 Pick.) 302; *Cooke vs. Turner*, 15 Mees. & W. 727, 14 Sim. 493, 37 Eng. Ch. 218; *Gretton vs. Haward*, 1 Swanst. 409, 18 Rev. Rep. 95; *Dillon vs. Parker*, 1 Swanst. 359, 394, 18 Rev. Rep. 72; *Streatfield vs. Streatfield*, Cas. T. Talb. 183, 1 W. & T. Lead. Cas. Eq. 273.

5. In will that "if any or either of my children shall enter a caveat against this my will, he or they shall pay all the expenses of both sides," held to be valid.—*Holt vs. Holt*, 42 N. J. Eq. (15 Stew.) 388, 59 Am. Rep. 43, 7 Atl. Rep. 856.

6. That if any of heirs were dissatisfied and went to law to break will, that they should take no part of the estate, and barring them from any part of estate whatever, valid condition with respect to both real and personal estate.—*Bradford vs. Bradford*, 19 Ohio St. 546, 2 Am. Rep. 419. See *Cooke vs. Turner*, 15 Mees. & W. 727, 14 Sim. 493, 37 Eng. Ch. Rep. 218.

7. There seems to be no distinction between a condition attached to a particular testamentary disposition and a condition attached to the operation of the instrument.—*In re Todd's Will*, 2 Watts & S. (Pa.) 145; *Parsons vs. Lance*, 1 Ves. Sr. 191.

8. **How implied.**—Words "in case" imply condition as explicit as "if," "upon," and the like, and express contingency when used in will.—*Robert's Appeal*, 59 Pa. St. 70, 98 Am. Dec. 312.

9. **GIFT OVER.**—As to necessity of a gift over, see *Bradford vs. Bradford*, 19 Ohio St. 546, 2 Am. Rep. 419; *Chew's Appeal*, 45 Pa. St. 228; *Morris vs. Burroughs*, 1 Atk. 404; *Loyd vs. Spillet*, 3 Pr. Wms. 344; *Powell vs. Morgan*, 2 Vern. 90.

§ 1282. **GIFTS TO SUBSCRIBING WITNESSES VOID. CREDITOR COMPETENT WITNESS.** All beneficial devises, legacies, and gifts whatever, made or given in any will to a subscribing witness thereto, are void, unless there are two other competent subscribing witnesses to the same; but a mere charge on the estate of the testator for the payment of debts does not prevent his creditors from being competent witnesses to his will.

History: Enacted March 21, 1872, founded upon § 5 Act April 10, 1850, Stats. 1850, p. 177.

1. Applied, cited, construed, referred to, etc.
- 2-4. Competency of witness—How tested and arrived at.
- 5, 6. Legacy to witness—When void.
7. Same—When not void.
- 8-11. Who competent—Heir at law, of testator, of executor.
- 12, 13. Same—Husband—When not incompetent.
14. Same—Legatee—When competent.
- 15, 16. Who incompetent—Husband, wife.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Murray vs. Tulare Irr. Co.*, 120 Cal. 311, 315, 49 Pac. Rep. 563, 52 Id. 586 (referred to).

2. **COMPETENCY OF WITNESS**.—Tested by state of facts existing at time of attestation, and not by state of facts existing at time will presented for probate, nor by state of facts existing at time when interested parties contest validity of instrument.—*Slingsloff vs. Bruner*, 174 Ill. 561, 51 N. E. Rep. 772. See *Fisher vs. Spence*, 150 Ill. 253, 41 Am. St. Rep. 360, 37 N. E. Rep. 314.

3. "Creditable witness" construed as meaning "competent witness," that is, such persons as are not legally disqualified from testifying in courts of justice, by reason of mental incapacity, interest, or commission of crime, or other cause excluding them from testifying generally, or rendering them incompetent in respect to particular matter, or in particular suit.—In *Matter Will of Noble*, 124 Ill. 266, sub nom. *Robinson vs. Savage*, 15 N. E. Rep. 850. *Comm. Cornwell vs. Isham*, 1 Day 85, 2 Am. Dec. 50. *Ga. Hall vs. Hall*, 18 Ga. 40. *Mass. Hawes vs. Humphrey*, 26 Mass. (9 Pick.) 350, 20 Am. Dec. 481. *Miss. Rucker vs. Lambdin*, 12 Smedes & M. 230. *S. C. Taylor vs. Taylor*, 1 Rich. L. 531.

See ante § 1280 and note.

4. Word "credible" used as equivalent of "competent" with respect to competency of witnesses attesting wills.—*Smalley vs. Smalley*, 70 Me. 545, 35 Am. Rep. 353. See *Me. Warren vs. Baxter*, 48 Me. 193. *Mass. Hawes vs. Humphrey*, 26 Mass. (9 Pick.) 350, 20 Am. Dec. 481; *Haven vs. Hilliard*, 40 Mass. (23 Pick.) 10. *N. H. Carlton vs. Carlton*, 40 N. H. 14.

See ante § 1230 and note.

5. **LEGACY—When void**.—Interest to disqualify witness must be present vested interest, and not uncertain and contingent, and if interest is of doubtful nature, objection goes to credit and not to contingency of witness.—*Hawes vs. Humphrey*, 26 Mass. (9 Pick.) 350, 357, 2 Am. Dec. 481. See *Lord vs. Lord*, 58 N. H. 7, 42 Am. Rep. 565.

6. **Witnesses must be disinterested**.—*Simmons vs. Leonard*, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. Rep. 280.

7. **When not void**.—Legacy to husband or wife of attesting witness is not void under statute, which only annuls legacies or de-

vises that are made to subscribing witnesses.—In *re Holt's Will*, 56 Minn. 33, 45 Am. St. Rep. 434, 57 N. W. Rep. 219, 22 L. R. A. 481.

8. **WHO COMPETENT**.—Heir at law when disinherited competent witness to support will.—*Smalley vs. Smalley*, 70 Me. 545, 35 Am. Rep. 353. See *Sparhawk vs. Sparhawk*, 92 Mass. (10 Allen) 155; In *re Hoppe's Will*, 102 Wis. 54, 78 N. W. Rep. 183.

9. **Same**.—Of testator cut off from participating in estate except as to one dollar, competent witness to will.—*Smalley vs. Smalley*, 70 Me. 545, 35 Am. Rep. 353.

10. **Same**.—Losing estate by will under which he is legatee for cent or dollar cannot in any ordinary language be considered gainer or beneficially interested unless loss is determined to be gain.—*Smalley vs. Smalley*, 70 Me. 545, 35 Am. Rep. 353.

11. **Heir of executor having no interest**, competent witness.—*Lord vs. Lord*, 58 N. H. 7, 42 Am. Rep. 565.

12. **Husband not incompetent witness** to will devising legacy to wife under statute which only annuls devises or legacies made to subscribing witnesses.—In *re Holt's Will*, 56 Minn. 33, 45 Am. St. Rep. 434, 57 N. W. Rep. 219, 22 L. R. A. 481. See *Iowa. Hawkins vs. Hawkins*, 54 Iowa 443, 6 N. W. Rep. 699; *Bates vs. Officer*, 70 Iowa 343, 30 N. W. Rep. 608. *Minn. Wilson vs. Wilson*, 43 Minn. 398, 45 N. W. Rep. 710. *Tenn. Maxwell vs. Hill*, 89 Tenn. 584, 15 S. W. Rep. 253.

13. **Husband of sister of testatrix competent witness** to attestation of will leaving nothing to wife.—*Slingsloff vs. Bruner*, 174 Ill. 561, 51 N. E. Rep. 772.

14. **Legatees may be credible witnesses** where it is matter of indifference to witnesses whether will under which they are legatees and to which they are witnesses is valid or not.—*Smalley vs. Smalley*, 70 Me. 545, 35 Am. Rep. 353.

15. **WHO INCOMPETENT**.—Husband or wife of legatee incompetent witness.—*Hodgman vs. Kittredge*, 67 N. H. 254, 68 Am. St. Rep. 661, 32 Atl. Rep. 158. See *Ill. Fisher vs. Spence*, 150 Ill. 253, 41 Am. St. Rep. 360, 37 N. E. Rep. 314. *Mass. Sullivan vs. Sullivan*, 106 Mass. 474, 8 Am. Rep. 356. *N. Y. Jackson vs. Woods*, 1 John. Cas. 163; *Jackson vs. Durland*, 2 John. Cas. 314. *Vt. Giddings vs. Turgeon*, 58 Vt. 106, 110, 4 Atl. Rep. 711. *Wis. In re Lyon's Will*, 96 Wis. 339, 65 Am. St. Rep. 52, 71 N. W. Rep. 362. *Fed. Lucas vs. Brooks*, 85 U. S. (18 Wall.) 436, 453, bk. 21 L. ed. 779.

16. **Wife incompetent as interested witness** to sustain will in husband's favor if objected to while probate of will is under consideration.—*Fortune vs. Buck*, 23 Conn. 1; *Fisher vs. Spence*, 150 Ill. 253, 41 Am. St. Rep. 360, 37 N. E. Rep. 314.

§ 1283. **WITNESS WHO IS A DEVISEE, ENTITLED TO SHARE TO AMOUNT OF DEVISE, WHEN.** If a witness, to whom any beneficial devise, legacy, or gift, void by the preceding section, is made, would have been entitled to any share of the estate of the testator, in case the will should not be established,

he succeeds to so much of the share as would be distributed to him, not exceeding the devise or bequest made to him in the will, and he may recover the same of the other devisees or legatees named in the will, in proportion to and out of the parts devised or bequeathed to them.

History: Enacted March 21, 1872, founded upon § 6 Act April 10, 1850, Stats. 1850, p. 177; amended March 30, 1874, Code Amdts. 1873-4, p. 232.

§ 1284. WILL MADE OUT OF THIS STATE (repealed).

History: Enacted March 21, 1872, founded upon § 23 Act April 10, 1850, Stats. 1850, p. 179; repealed March 30, 1874, Code Amdts. 1873-4, p. 232.

§ 1285. WILL MADE OUT OF STATE NOT VALID, UNLESS. No will made out of this state is valid as a will in this state, unless executed according to the provisions of this chapter, except that a will made in a state or country in which the testator is domiciled at the time of his death, and valid as a will under the laws of such state or country, is valid in this state so far as the same relates to personal property, subject, however, to the provisions of section thirteen hundred and thirteen.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 232; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 402, held unconstitutional, see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXLVIII, p. 606.

- 1-3. Construction of statutes.
4. Personal property—No locality.
5. Same—General rule follows law of domicile.
- 6-11. Same—Conformity to laws, sufficiency of.
- 12, 13. Same—Rights to, how ascertained.
14. Same—When intestacy occurs.
- 15-18. Real property—General rule follows law of state where situated.
- 19, 20. Same—Will must be proved to affect property in state.
- 21, 22. Foreign laws—Assumption as to—Matter of fact.

As to conflict of laws, and testator's domicile controlling as to personal estate, see note 2 Am. Dec. 454.

As to conflict of laws and probate of will made prior to passing of probate act, see note 65 Am. Dec. 547.

As to effect of probate in another state, see monographic note by Irwin Taylor, 48 L. R. A. 130-153.

As to interstate comity and conflict of laws, see monographic note 3 Prob. Rep. Ann. 267-271.

As to legislative intent governing in construction of statutes, see note 74 Am. Dec. 534.

As to statutes regarding probate of copy of will in other states, see 73 Am. Dec. 56-62.

As to trust in personal property, see monographic note by Robert Desty, 3 Paige Ch. (N. Y.) 4 L. ed. 434-436.

As to what laws govern execution of will, see notes 43 Am. Dec. 519; 51 Am. Dec. 574.

As to what law governs in cases of foreign wills of real and personal estate, see monographic note 5 Prob. Rep. Ann. 206-208.

1. CONSTRUCTION OF STATUTE—COURT MUST ASCERTAIN AND DECLARE what is in terms or in substance declared in statute, and must not insert what has been omitted

or omit what has been inserted.—In re Estate Walker, 110 Cal. 387, 396, 52 Am. St. Rep. 104, 42 Pac. Rep. 315, 30 L. R. A. 460.

2. PLAIN AND OBVIOUS MEANING OF STATUTE must be looked to in construing it.—Me. Coffin vs. Rich, 45 Me. 507, 71 Am. Dec. 559. Md. Parkinson vs. State, 14 Md. 184, 74 Am. Dec. 522. R. L. Lippitt vs. Huston, 8 R. I. 115, 94 Am. Dec. 115.

3. SOLE CONSIDERATION BEFORE COURT in proving instrument is whether or not legislative mandates have been complied with.—In re Estate Walker, 110 Cal. 387, 396, 52 Am. St. Rep. 104, 42 Pac. Rep. 315, 30 L. R. A. 460.

4. PERSONAL PROPERTY HAS NO LOCALITY.—Parsons vs. Lyman, 20 N. Y. 103; Desesbats vs. Berquier, 1 Binn. (Pa.) 326, 2 Am. Dec. 448.

5. DISPOSITION OF PERSONAL PROPERTY, whether by act inter vivos, will, or intestacy, is governed by laws of domicile of owner, and is now considered and may be treated as part of jus gentium.—In re Estate Apple, 66 Cal. 432, 436, 6 Pac. Rep. 7; Whitney vs. Dodge, 105 Cal. 192, 197, 38 Pac. Rep. 636; McCully vs. Cooper, 114 Cal. 258, 262, 55 Am. St. Rep. 66, 46 Pac. Rep. 82, 35 L. R. A. 492. See Conn. In re Irwin's Appeal, 33 Conn. 128. Mass. Goodwin vs. Jones, 3 Mass. 514, 3 Am. Dec. 173; Richards vs. Dutch, 8 Mass. 506; Dawes vs. Boylston, 9 Mass. 337, 6 Am. Dec. 72. N. Y. Parsons vs. Lyman, 20 N. Y. 103; Bascom vs. Albertson, 34 N. Y. 584; Cross vs. United States Trust Co., 131 N. Y. 330, 27 Am. St. Rep. 597, 30 N. E. Rep. 125, 15 L. R. A. 606; Dammert vs. Osborn, 140 N. Y. 30, 35 N. E. Rep. 407, 141 N. Y. 564, 35 N. E. Rep. 1088; Holmes vs. Remsen, 4 John. Ch. 460, 3 Am. Dec. 581; Shultz vs. Pulver, 3 Paige Ch. 182, 11 Wend. 363; Vroom vs. Van Horne, 10 Paige Ch. 549, 42 Am. Dec. 94. N. D. Penfield vs. Tower, 1 N. D. 216, 4 N. W. Rep. 413. Pa.

Desesbats vs. Berquier, 1 Binn. 336, 2 Am. Dec. 448; *Guier vs. O'Daniel*, 1 Binn. 348(a). *Wis. Ford vs. Ford*, 70 Wis. 19, 5 Am. St. Rep. 117, 33 N. W. Rep. 188. *Fed. Grattan vs. Appleton*, 3 Story C. C. 755, 10 Fed. Cas. 392; *Harvey vs. Richards*, 1 Mas. C. C. 381, 11 Fed. Cas. 746; *Perry Mfg. Co. vs. Brown*, 2 Woodb. & M. C. C. 449, 19 Fed. Cas. 399; *Harrison vs. Nixon*, 34 U. S. (9 Pet.) 483, bk. 9 L. ed. 301. *Eng. Bruce vs. Bruce*, 2 Bos. & P. 231; *Ommaney vs. Bingham*, 5 Ves. 753; *Somerville vs. Somerville*, 5 Ves. 750; *Hunter vs. Potts*, 4 Durnf. & E. (4 T. R.) 182, 3 H. Bl. 403, 2 Rev. Rep. 353; *Larpent vs. Sindry*, 1 Hag. Ecc. 332; *Stanley vs. Bernes*, 3 Hag. Ecc. 373; *Moore vs. Darrell*, 4 Hag. Ecc. 343; *Ferraris vs. Marquis of Hartford*, Curt. Ecc. 463; *Price vs. Dewhurst*, 4 Myl. & C. 75, 80, 13 Eng. Ch. 74.

6. **WILL MUST BE EXECUTED** according to law of testator's domicile at time of death.—*Nat vs. Coons*, 10 Mo. 543.

7. **TRUSTS AND PROVISIONS OF WILL** must depend for their validity upon law as it was when it took effect by death of testator.—*Moultrie vs. Hunt*, 23 N. Y. 394. See *Bishop vs. Bishop*, 4 Hill (N. Y.) 138; *De Peyster vs. Clendinning*, 3 Paige Ch. (N. Y.) 295.

8. **WILL DULY EXECUTED AND TAKING EFFECT** in other states and countries according to laws in force there, recognized as valid acts so far as concerns disposition of personal property.—*Parsons vs. Lyman*, 20 N. Y. 103; *Moultrie vs. Hunt*, 23 N. Y. 394.

9. **WILL MADE IN CONFORMITY TO LAWS OF ANOTHER STATE**, and mode of execution so far conforming to laws of state into which testator removes, as to render it valid in such state, subsequent removal to state will not invalidate it, although it was not republished.—*Nat vs. Coons*, 10 Mo. 543.

10. **WILL MADE BY CITIZEN OF STATE, ACCORDING TO LAWS OF THAT STATE**, cannot be set up in courts of another state, to which he afterwards removes, if not executed according to requirements of laws of state to which he removes.—*Nat vs. Coons*, 10 Mo. 543.

11. **PARTY MUST DIE LEAVING WILL VALID AS TO PERSONAL ESTATE** according to laws of state of domicile, and existence of will duly executed and attested at one period during testator's lifetime and valid under laws of another state, is circumstance of no importance.—*Moultrie vs. Hunt*, 23 N. Y. 394. See *Betts vs. Jackson*, 6 Wend. (N. Y.) 173.

12. **RIGHT OF INDIVIDUAL TO PERSONAL PROPERTY** in one country under title from person domiciled in another, can only be ascertained by legal instrumentalities which institutions of country where the claim is made have provided.—*Parsons vs. Lyman*, 20 N. Y. 103.

13. **VALIDITY OF BEQUEST OF PERSONAL PROPERTY**, and all questions of succession thereto and rights therein, must be determined under laws of domicile of testator, and by courts of that state, when property or those having possession and control of it are

within its jurisdiction.—*White vs. Howard*, 46 N. Y. 144, 159.

14. **Intestacy occurs** where party after making will valid as to personal property in one state, removes to another and dies there, and will is invalid because not executed according to laws of the latter state.—*Moultrie vs. Hunt*, 23 N. Y. 394.

15. **WILL AS TO REAL PROPERTY MUST BE EXECUTED** according to laws of the state in which the property is situated.—*In re Langbein*, 1 Dem. (N. Y.) 448; *In re Estate Shearer*, 1 N. Y. Civ. Proc. Rep. 455. See *Ala. Goodman vs. Winter*, 64 Ala. 410, 38 Am. Rep. 13; *Dickey vs. Vann*, 81 Ala. 425, 3 So. Rep. 195. *Fla. Williams vs. Kimball*, 35 Fla. 49, 48 Am. St. Rep. 238, 16 So. Rep. 783, 26 L. R. A. 746. *Ga. Knight vs. Wheedon*, 104 Ga. 309, 30 S. E. Rep. 794. *Ill. Harrison vs. Weatherby*, 180 Ill. 418, 54 N. E. Rep. 237. *Ind. Evansville I. & C. S. Co. vs. Winsor*, 148 Ind. 632, 48 N. E. Rep. 592. *Iowa. Otis vs. Doty*, 61 Iowa 23, 25, 15 N. W. Rep. 573. *Me. De Puy vs. Standard Min. Co.*, 88 Me. 202. *Mass. Dublin vs. Chadbourn*, 16 Mass. 433; *Cutter vs. Davenport*, 18 Mass. (1 Pick.) 81, 11 Am. Dec. 149. *Mo. Keith vs. Keith*, 97 Mo. 223, 224, 10 S. W. Rep. 597. *N. J. Bentley vs. Whittemore*, 18 N. J. Eq. (2 Gr.) 366, 374. *N. Y. Hosford vs. Nichols*, 1 Paige Ch. 220; *Lockwood vs. Lockwood*, 51 Hun 337, 3 N. Y. Supp. 887, 2 L. R. A. 425; *Vogel vs. Lehnritter*, 139 N. Y. 223, 34 N. E. Rep. 914. *N. D. Penfield vs. Tower*, 1 N. D. 216, 46 N. W. Rep. 413. *Ohio. Jones vs. Robinson*, 17 Ohio St. 171; *Wills vs. Cowper*, 2 Ohio 124. *Pa. Williams vs. Maus*, 6 Watts 278, 81 Am. Dec. 465, 467. *Tenn. Carpenter vs. Bell*, 96 Tenn. 294, 34 S. W. Rep. 209. *Vt. Walton vs. Hall*, 66 Vt. 455, 461, 29 Atl. Rep. 803. *Va. Ex parte Povall*, 3 Leigh 816. *W. Va. Thrasher vs. Ballard*, 33 W. Va. 285, 25 Am. St. Rep. 394, 10 S. E. Rep. 411. *Wis. Ford vs. Ford*, 70 Wis. 19, 5 Am. St. Rep. 117, 33 N. W. Rep. 188. *Fed. United States vs. Crosby*, 11 U. S. (7 Cr.) 115, bk. 3 L. ed. 287; *Clark vs. Graham*, 19 U. S. (6 Wheat.) 577, bk. 5 L. ed. 334; *Kerr vs. Moon*, 23 U. S. (9 Wheat.) 555, bk. 6 L. ed. 161.

16. **Property in this state must be disposed of according to laws of this state**.—*Turner vs. McDonald*, 76 Cal. 177, 181, 9 Am. St. Rep. 189, 18 Pac. Rep. 262.

17. **Validity of devise as to real estate situated in foreign country** must be determined by law and courts of such country, irrespective of domicile of testator.—*White vs. Howard*, 46 N. Y. 144, 159. See *Hosford vs. Nichols*, 1 Paige Ch. (N. Y.) 220.

18. **WILL MADE BY DOMICILED INHABITANT** of one state, and executed in conformity to its laws, will have no effect as to real estate in another state, unless it complies with the laws of latter.—*In re Irwin's Appeal*, 33 Conn. 123.

19. **WILL MUST BE PROVED IN THIS STATE** before it can affect property situated here.—*Turner vs. McDonald*, 76 Cal. 177, 181, 9 Am. St. Rep. 189, 18 Pac. Rep. 262.

20. **Party claiming under quitclaim deed from devisee under will executed in foreign**

country and not proved in this state, takes no valid title.—*Turner vs. McDonald*, 76 Cal. 177, 181, 9 Am. St. Rep. 189, 18 Pac. Rep. 262.

21. LAWS OF FOREIGN COUNTRY WILL BE ASSUMED TO BE SAME as those of this state, where there is no evidence tending to show what law was in foreign country touching the questions raised.—*Wickersham vs. Johnston*, 104 Cal. 407, 411, 43 Am. St. Rep. 118, 38 Pac. Rep. 89. See *Norris vs. Harris*, 15 Cal. 226, 254; *Hickman vs. Alpaugh*, 21

Cal. 226; *Hill vs. Grigsby*, 32 Cal. 55; *Marsters vs. Lash*, 61 Cal. 622, 624; *Monroe vs. Douglass*, 5 N. Y. 447; *Liverpool & G. W. Steam Co. vs. Phenix Ins. Co.*, 129 U. S. 397, 445, bk. 32 L. ed. 788, 9 Sup. Ct. Rep. 469.

22. Law of foreign country is matter of fact which courts cannot be presumed to be acquainted with, or have judicial knowledge of, unless pleaded and proved.—*Wickersham vs. Johnston*, 104 Cal. 407, 411, 43 Am. St. Rep. 118, 38 Pac. Rep. 89.

§ 1286. SUBSEQUENT CHANGE OF DOMICILE (repealed).

History: Enacted March 21, 1872; repealed March 30, 1874, Code Amdts. 1873-4, p. 232.

§ 1287. REPUBLICATION BY CODICIL. The execution of a codicil, referring to a previous will, has the effect to republish the will, as modified by the codicil.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
- 2, 3. Construed as to application and preservation of all provisions.
- 4, 5. Definition—Codicil, how defined.
6. Alteration—Determination to make—Effect upon intention.
- 7, 8. Codicil—Effect upon will.
9. Same—Date from which speaks.
- 10-14. Same—How construed with reference to will.
- 15-20. Same—Operation and effect of.
- 21-24. Revocation—Codicil when not considered.
25. Will and codicil—When not considered single instrument.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: In re Estate Ladd, 94 Cal. 670, 673, 30 Pac. Rep. 99 (construed and applied with other sections); In re Estate McCauley, 138 Cal. 432, 435, 436, 438, 71 Pac. Rep. 512 (construed and applied).

As to effect of destruction of codicil upon a will, see note 55 Am. Dec. 126-129.

As to effect of unattested codicil, see note 55 Am. Dec. 126-129.

As to construction and effect of a codicil, see note 55 Am. Dec. 126-129.

As to revival and republication of will, see monographic note by Robert Desty, 7 L. R. A. 485-488.

As to revocation of will by subsequent will and revival of former by destruction of the latter, see monographic note by Roswell Shinn, 37 L. R. A. 561-579.

Holographic will.—As to effect of codicil to holographic will, see ante § 1277 and note.

2. CONSTRUED SO AS TO CARRY OUT, if possible, the known intention of testator.—In re Estate McCauley, 138 Cal. 432, 436, 71 Pac. Rep. 512.

3. CONSTRUED SO AS TO PRESERVE LETTER and spirit of all provisions of statute so far as possible.—In re Estate McCauley, 138 Cal. 432, 436, 71 Pac. Rep. 512.

4. DEFINITION.—Codicil duly executed is an addition or supplement to a will.—In re Estate Laveaga, 119 Cal. 651, 656, 51 Pac. Rep. 1074.

5. Codicil is part of will to which it is

attached or refers, and must be taken and construed together as one will—one instrument.—*Beall vs. Cunningham*, 3 B. Mon. (Ky.) 390, 39 Am. Dec. 469; *Harvey vs. Chouteau*, 14 Mo. 587, 55 Am. Dec. 121.

6. ALTERATION.—Determination expressed to make alteration in one particular, negatives by implication any intention to alter it in any other respect.—In re Estate Ladd, 94 Cal. 670, 675, 30 Pac. Rep. 99. See *Quincy vs. Rogers*, 63 Mass. (9 Cush.) 291, 296.

7. CODICIL AMOUNTS TO REPUBLICATION OF ORIGINAL WILL, in absence of declaration showing contrary.—*Musser vs. Curry*, 3 Wash. C. C. 481, 482, 17 Fed. Cas. 1072. See *Mo. Harvey vs. Chouteau*, 14 Mo. 587, 55 Am. Dec. 121. *N. Y. Mooers vs. White*, 6 John. Ch. 360, 375; *Van Cortlandt vs. Kip*, 1 Hill 591. *Eng. Attorney-General vs. Downing*, 2 Amb. 571; *Acherly vs. Vernon*, 1 Comyn. 381; *Goodlittle vs. Meredith*, 2 Mau. & Sel. 13; *Barnes vs. Crowe*, 1 Ves. Jr. 486, 2 Rev. Rep. 154; *Pigott vs. Waller*, 7 Ves. 98.

8. Codicil does not disturb will except so far as it is inconsistent with it, or in terms, or by necessary intendment, revokes it.—In re Estate McCauley, 138 Cal. 432, 436, 71 Pac. Rep. 512.

9. Codicil only speaks from its date so far as it is requisite that it should so speak.—In re Estate McCauley, 138 Cal. 432, 436, 71 Pac. Rep. 512; *Haven vs. Foster*, 31 Mass. (14 Pick.) 534; *Brimmer vs. Sohler*, 55 Mass. (1 Cush.) 118.

10. CONSTRUED.—Whole of original will and codicil construed as single instrument executed at date of codicil so as, if possible, to form one consistent whole.—In re Estate Ladd, 94 Cal. 670, 674, 30 Pac. Rep. 99. See In re Estate McCauley, 138 Cal. 432, 435, 71 Pac. Rep. 512.

11. Change made by codicil construed as limiting by the "extent" to which testator has declared intention to make alterations.—In re Estate Ladd, 94 Cal. 670, 675, 30 Pac. Rep. 99.

12. Codicil never construed to disturb disposition of will further than absolutely necessary for purpose of giving effect thereto.—

In re Estate Ladd, 94 Cal. 670, 674, 30 Pac. Rep. 99; In re Estate McCauley, 138 Cal. 432, 435, 71 Pac. Rep. 512.

12. **Codicil purporting to modify only one clause of will, not to be construed as limited to republication of such clause alone, and effect of execution of such codicil will be to republish entire will, and not merely clause so modified.**—In re Estate Ladd, 94 Cal. 670, 673, 30 Pac. Rep. 99; In re Estate McCauley, 138 Cal. 432, 435, 71 Pac. Rep. 512; Doe vs. Walker, 12 Mees. & W. 597.

14. **Words of will at time of republication must be considered; their sense cannot be enlarged, but their operation may, if time or accident should increase amount or number of particulars comprised within compass of its expressions.**—Reynolds vs. Shirley, 7 Ohio (Pt. 2), 39, 47.

15. **Operation and effect of.**—Execution of codicil republishes will, as modified thereby, as of date of codicil.—In re Estate McCauley, 138 Cal. 432, 435, 71 Pac. Rep. 512. See Payne vs. Payne, 18 Cal. 291, 302; In re Estate Ladd, 94 Cal. 670, 30 Pac. Rep. 99.

16. **So that bequest shall not be revoked unless no other construction can be fairly put upon the language used by the testator in such codicil.**—In re Estate Ladd, 94 Cal. 670, 674, 30 Pac. Rep. 99.

17. **So that different parts of will, or of will and codicil, shall be reconciled if possible.**—In re Estate Ladd, 94 Cal. 670, 674, 30 Pac. Rep. 99. See In re Estate McCauley, 138 Cal. 432, 435, 71 Pac. Rep. 512. Conn. Colt vs. Colt, 32 Conn. 422, 446. Md. Johns Hopkins University vs. Pinckney, 55 Md. 365. N. Y. Wetmore vs. Parker, 52 N. Y. 450, 462.

18. **Codicil referring to will operates as its republication, and two instruments are to be regarded as forming but one, speaking from the date of codicil.**—Payne vs. Payne, 18 Cal. 291, 302; Haven vs. Foster, 31 Mass. (14 Pick.) 534, 543; Van Cortlandt vs. Kip, 1 Hill (N. Y.) 591.

19. **CODICIL "PUBLISHED AS, and declared to be, together with the will set forth**

on the preceding pages . . . last will," and leaving charitable bequest untouched, republication of will.—In re Estate McCauley, 138 Cal. 432, 435, 71 Pac. Rep. 512.

20. **Will speaks from date of codicil only so far as codicil requires that it should so speak.**—In re Estate McCauley, 138 Cal. 432, 436, 71 Pac. Rep. 512; Van Cortlandt vs. Kip, 1 Hill (N. Y.) 591.

21. **REVOCATION.**—Codicil no revocation of will, except in precise degree in which it is inconsistent therewith, in the absence of words of revocation.—In re Estate Laveaga, 119 Cal. 651, 656, 51 Pac. Rep. 1074. See In re Estate Ladd, 94 Cal. 670, 30 Pac. Rep. 99.

22. **Clear disposition made by will not construed as revoked by doubtful expression or inconsistent disposition in codicil.**—In re Estate Ladd, 94 Cal. 670, 674, 30 Pac. Rep. 99. See In re Estate McCauley, 138 Cal. 432, 435, 71 Pac. Rep. 512; Kane vs. Astor, 5 Sandf. (N. Y.) 467, 533.

23. **Intention to deprive wife of estate given to her by will not shown by codicil in which there is no express language or necessary implication leading to such intention, mere fact of testator's making different disposition of income will not be held to show intent to deprive her of provision previously made for her receiving portion or estate upon his death according to provisions of will.**—In re Estate Ladd, 94 Cal. 670, 675, 30 Pac. Rep. 99.

24. **PRESUMPTION IN FAVOR OF TESTATOR'S USE OF TERMS, in making codicil to will, with reference to provisions of will as they would be construed under facts then existing, and with knowledge of what property will provided should be held in trust, and as making no further change except as expressly declared by the codicil.**—In re Estate Ladd, 94 Cal. 670, 673, 30 Pac. Rep. 99. See Payne vs. Payne, 18 Cal. 291, 302.

25. **WILL AND CODICIL NOT CONSIDERED AS SINGLE INSTRUMENT** where manifest intention requires otherwise.—In re Estate McCauley, 138 Cal. 432, 436, 71 Pac. Rep. 512. See Alsop's Appeal, 9 Pa. St. 374.

§ 1288. NUNCUPATIVE WILL, HOW TO BE EXECUTED. A nuncupative will is not required to be in writing, nor to be declared or attested with any formalities.

History: Enacted March 21, 1872.

1. Common-law doctrine—Borrowed from civil law.
2. Same—Does not favor.
- 3-5. Definition—Nuncupative will defined.
- 6-12. How made—Verbal declarations—Form of words—Intention.
- 13-17. Statutory requirements—Necessity of complying with.
18. Same—Reason for complying with.
19. Same—Writing, not a compliance with.

As to nuncupative wills, see monographic notes by Robert Desty, 8 L. R. A. 39-41; 9 L. R. A. 829.

As to probate of nuncupative will, see § 1344 Code Civ. Proc. and note.

As to what is necessary to make a valid nuncupative will, see note 74 Am. Dec. 431.

1. **COMMON-LAW DOCTRINE WITH REGARD TO NUNCUPATIVE WILLS** is borrowed from the civil law.—Hubbard vs. Hubbard, 8 N. Y. 196, 202. See Drummond vs. Parish, 3 Curt. Ecc. 522, 531.

2. **NOT FAVORED BY LAW.**—Wills of this description are not favored by law.—Taylor's Appeal, 47 Pa. St. 31; In re Rutt's Estate, 200 Pa. St. 549, 50 Atl. Rep. 171. See In Matter Yarnall's Will, 4 Rawle (Pa.) 46, 28 Am. Dec. 115; Mitchell vs. Vickers, 20 Tex. 377, and cases par. 17 this note.

3. **DEFINITION.**—Nuncupative will is a will that is not in writing.—Stamper vs. Hooks, 22 Ga. 603, 68 Am. Dec. 511. See In re Hebden's Will, 20 N. J. Eq. (5 C. E. Gr.) 473.

4. Is when testator, without any writing,

doth declare his will before sufficient number of witnesses.—*Stamper vs. Hooks*, 22 Ga. 603, 63 Am. Dec. 511.

5. "When a man lieth languishing for fear of sudden death, dareth not to state the writing of his testament and therefore he prayeth his curate and others to bear witness of his last will, and declareth by word what his last will is."—*In re Hebden's Will*, 20 N. J. Eq. (5 C. E. Gr.) 473. See *Prince vs. Hazleton*, 20 John. (N. Y.) 502, 11 Am. Dec. 307.

6. **HOW MADE.**—Nuncupative will can only be verbal declaration made in presence of witnesses called on to notice it, not reduced to writing by direction of testator.—*In re Hebden's Will*, 20 N. J. Eq. (5 C. E. Gr.) 473.

7. No particular form of words is necessary.—*Weir vs. Chidester*, 63 Ill. 453, 455; *Hubbard vs. Hubbard*, 3 N. Y. 196, 201.

8. Neither is it material whether the testator speaks properly or improperly, so long as his meaning appears.—*Hubbard vs. Hubbard*, 3 N. Y. 196, 201.

9. Any words expressing clear intention to give estate to certain person will be sufficient to pass property.—*Weir vs. Chidester*, 63 Ill. 453, 455.

10. Any words which adequately communicate intention to make will and amount to request that person to whom they are addressed should bear witness to it, are sufficient.—*Scales vs. Thornton's Heirs*, 113 Ga. 93, 44 S. E. Rep. 857.

11. Any form of expression, however imperfectly uttered, so that it conveys to mind of those to whom it is addressed the idea that he desires them, or some of them, to bear witness to disposition he is making of his property, is sufficient compliance with statute.—*Weir vs. Chidester*, 63 Ill. 453, 455. See *Arnett vs. Arnett*, 27 Ill. 247, 31 Am. Dec. 227.

12. Use of exact words of statute not necessary.—*Weir vs. Chidester*, 63 Ill. 453, 455.

13. **STRICT COMPLIANCE** with statute necessary.—*In re Hebden's Will*, 20 N. J. Eq. (5 C. E. Gr.) 473; *In re Wiley's Estate*, 187 Pa. St. 82, 67 Am. St. Rep. 569, 40 Atl. Rep. 980. See also cases par. 17 this note.

14. With each requisite of statute necessary.—*In re Rutt's Estate*, 200 Pa. St. 549, 50

Atl. Rep. 171; *In re Wiley's Estate*, 187 Pa. St. 82, 67 Am. St. Rep. 569, 40 Atl. Rep. 980.

15. To entitle will to probate, an absence of due proof of strict compliance will be fatal.—*In Matter Yarnall's Will*, 4 Rawle (Pa.) 46, 26 Am. Dec. 115. See *Bennett vs. Jackson*, 2 Phill. 190; *Parsons vs. Miller*, 3 Phill. 194.

16. Provisions in statute in regard to nuncupative wills must have rigid and strict construction, and must be strictly enforced by courts.—*Morgan vs. Stevens*, 73 Ill. 287.

17. "An examination of the following cases will throw much light on the subject, and show with how little favor these wills have been regarded and how strict the rules are as to the quantum of proof necessary."—*Cobb, J., in Scales vs. Thornton's Heirs*, 113 Ga. 93, 44 S. E. Rep. 857. *Ala. Sykes vs. Sykes*, 2 Stew. 364, 20 Am. Dec. 40, 44. *Ga. Scaife vs. Emmons*, 84 Ga. 619, 20 Am. St. Rep. 333, 10 S. E. Rep. 1097. *Ill. Morgan vs. Stevens*, 73 Ill. 287; *Harrington vs. Stees*, 32 Ill. 50, 25 Am. Rep. 290; *In re Estate Grossman*, 175 Ill. 425, 51 N. E. Rep. 750. *Ky. Offutt vs. Offutt*, 3 B. Mon. 162, 38 Am. Dec. 183. *La. Babineau's Heirs vs. Le Blanc*, 14 La. Ann. 729. *Me. Parsons vs. Parsons*, 2 Greenl. 293. *Md. Biddle vs. Biddle*, 36 Md. 630. *Miss. Burch vs. Stovall*, 27 Miss. 725; *Broach vs. Sing*, 57 Miss. 115; *Garner vs. Lansford*, 13 Smed. & M. 558. *N. C. Brown vs. Brown*, 6 N. C. 350; *Bundrick vs. Haygood*, 106 N. C. 468, 11 S. E. Rep. 423. *N. H. Dockum vs. Robinson*, 6 Fost. 372. *N. J. In re Hebden's Will*, 20 N. J. Eq. (5 C. E. Gr.) 473. *Pa. In re Wiley's Estate*, 187 Pa. St. 82, 67 Am. St. Rep. 569, 40 Atl. Rep. 980; *In re Yarnall's Will*, 4 Rawle 46, 26 Am. Dec. 115. *Tenn. Smith vs. Thurman*, 3 Heisk. 110; *Baker vs. Dodson*, 4 Humph. 342, 40 Am. Dec. 650; *Gwin vs. Wright*, 8 Humph. 639. *Va. Winn vs. Bob*, 3 Leigh 140, 23 Am. Dec. 258; *Weeden vs. Bartlett*, 6 Munf. 123. *Wis. Dawson's Appeal*, 23 Wis. 69.

18. **STRICT PROOF REQUIRED**, because of the opportunity for fraud and likelihood of mistake.—*Scales vs. Thornton's Heirs*, 113 Ga. 93, 44 S. E. Rep. 857.

19. **DOCUMENT WRITTEN AND SIGNED** by testator, is not nuncupative will.—*Stamper vs. Hooks*, 22 Ga. 603, 63 Am. Dec. 511.

§ 1289. REQUISITES OF A VALID NUNCUPATIVE WILL. To make a nuncupative will valid, and to entitle it to be admitted to probate, the following requisites must be observed:

1. The estate bequeathed must not exceed in value the sum of one thousand dollars.

2. It must be proved by two witnesses who were present at the making thereof, one of whom was asked by the testator, at the time, to bear witness that such was his will, or to that effect.

3. The decedent must, at the time, have been in actual military service in the field, or doing duty on shipboard at sea, and in either case in actual contemplation, fear, or peril of death, or the decedent must have been, at the time, in expectation of immediate death from an injury received the same day.

History: Enacted March 21, 1872, founded upon § 7 Act April 10, 1850, Stats. 1850, p. 177; amended March 30, 1874, Code Amdts. 1873-4, p. 233.

L. In General.

- 1-3. Legislative requirements—Necessity of complying with.
- 4, 5. Intention—Necessity of verbal declaration of.
- 6-8. What amount to.
- 9-13. What do not amount to.

II. Time When Made.

- 14-16. Expectation of immediate death—In extremis.
- 17-19. Last sickness—Provisions of Kansas statute construed.

III. Declaration of Will.

20. Dictation—Necessity of.
- 21, 22. Necessity and sufficiency of declaration.
- 23-25. Insufficient declaration—What amount to.
- 26-28. Evidence—Sufficiency of, to prove declaration.

IV. Witnesses—Request to and Number.

- 29-31. Necessity of request.
- 32-35. How made and shown.
- 36-39. Number of witnesses—Statutory requirements as to.

V. Evidence—Capacity and Animus Testandi—Declaration.

- 40, 41. General rule—What must be proved—Factum.
- 42-45. Capacity and animus testandi—How shown.
- 46-49. Declarations of testator—Necessity of witnesses agreeing as to.

I. IN GENERAL.

As to necessity of witnesses to nuncupative wills, see note 81 Am. Dec. 230.

As to nuncupative wills, see monographic notes 18 Am. Dec. 512; 20 Am. Dec. 44-48; 67 Am. St. Rep. 572-579; 30 Am. & Eng. Encyc. of L. (3d ed.) 560-571.

1. **LEGISLATIVE PROVISIONS.**—Provisions of state legislation must be strictly complied with.—*Ill. Arnett vs. Arnett*, 27 Ill. 247, 81 Am. Dec. 227; *Morgan vs. Stevens*, 78 Ill. 287. *Md. Dorsey vs. Sheppard*, 13 Gill & J. 192, 37 Am. Dec. 77. *N. J. In re Hebden's Will*, 20 N. J. Eq. (5 C. E. Gr.) 473. *Pa. In re Wiley's Estate*, 187 Pa. St. 32, 67 Am. St. Rep. 569, 40 Atl. Rep. 980; *In re Rutt's Will*, 200 Pa. St. 549, 50 Atl. Rep. 171; *In Matter Yarnall's Will*, 4 Rawle 46, 26 Am. Dec. 115. *Eng. Bennett vs. Jackson*, 3 Phill. 190; *Parsons vs. Miller*, 2 Phill. 194.

2. **Substantial compliance with all provisions of statute is necessary to validate nuncupative will.**—*Arnett vs. Arnett*, 27 Ill. 247, 81 Am. Dec. 227.

3. **Exact conformity to literal requirement of statute in publication of nuncupative will would not seem necessary.**—*Arnett vs. Arnett*, 27 Ill. 247, 81 Am. Dec. 227.

4. **INTENTION.**—Testator must intend the verbal declaration to be his will.—*In re Hebden's Will*, 20 N. J. Eq. (5 C. E. Gr.) 473.

See para. 42-45 this note.

5. **Testamentary words must be spoken with intent to bequeath, not in any loose, idle discourse, and testator must require by-**

standers to bear witness to such, his intention.—*In Matter Yarnall's Will*, 4 Rawle (Pa.) 46, 26 Am. Dec. 115.

6. **WHAT AMOUNTS TO.**—Nuncupative may be made not only by proper motions of testator, but also at interrogation of another.—*Hubbard vs. Hubbard*, 8 N. Y. 196, 201.

7. **Will made by interrogatories is valid**, but when so made court must be more upon its guard against importunity, more jealous of capacity, and more strict in requiring proof that act was spontaneous on part of testator than in ordinary cases.—*Dorsey vs. Sheppard*, 12 Gill & J. (Md.) 192, 37 Am. Dec. 77. See *Green vs. Skipworth*, 1 Eng. Ecc. 32.

8. **Nuncupative wills made by captain of vessel on voyage while lying at anchor in arm of sea in which tide ebbs and flows, valid.**—*Hubbard vs. Hubbard*, 8 N. Y. 196, 202.

9. **WHAT DO NOT AMOUNT TO.**—Nuncupative will not shown where testatrix, during last sickness, made statement to effect that she wanted her husband to have everything, and also that she wanted another person to have something out of her estate, but she would finish it in day or two, where she lingered for six days, and might have made will in writing.—*Morgan vs. Stevens*, 78 Ill. 287.

10. **Fact that testator speaks words in presence of those who might bear witness to it, without making use of words indicating his desire or wish that those present or one of them should bear witness that such is his will, is not sufficient.**—*Arnett vs. Arnett*, 27 Ill. 247, 81 Am. Dec. 227.

11. **Nuncupative will attested by three witnesses, dictated by testator to a notary public in the French language, which is not understood by one witness, void.**—*Breaux vs. Gallusseaux*, 14 La. Ann. 233, 74 Am. Dec. 430.

12. **Nuncupative will commencing thus: "Listen all of you what I, _____ do say," questioned as not being full compliance with statute.**—*Lemann vs. Bonsall*, 1 Add. Ecc. 339.

13. **Nuncupative will resting upon testimony of notary and two witnesses does not comply with the law.**—*Breaux vs. Gallusseaux*, 14 La. Ann. 233, 74 Am. Dec. 430.

II. TIME WHEN MADE.

14. **NUNCUPATIVE WILLS ALLOWED ONLY WHEN IN EXTREMIS** and dangerous sickness, testator having neither time nor opportunity to make written will, he sincerely and deliberately declaring his intention respecting disposition of his estate before number of witnesses called for that purpose.—*In Matter Yarnall's Will*, 4 Rawle (Pa.) 46, 26 Am. Dec. 115. See *Ala. Sykes vs. Sykes*, 2 Stew. 364, 20 Am. Dec. 40. *Ga. Ellington vs. Dillard*, 42 Ga. 361; *Scaife vs. Emmons*, 84 Ga. 619, 20 Am. St. Rep. 333, 10 S. E. Rep. 1097; *Bellamy vs. Peeler*, 96 Ga. 467, 23 S. E. Rep. 387. *Ill. Morgan vs. Stevens*, 78 Ill. 287. *Md. O'Neill vs. Smith*, 33 Md. 569; *Hammett vs. Shanks*, 41 Md. 201. *Miss. Sadler vs. Sadler*, 60 Miss. 257. *N. J. Carroll vs. Bonham*, 42 N. J. Eq. (15 Stew.) 625, 9 Atl. Rep.

§71. *N. Y. Prince vs. Hazleton*, 20 John. 502, 11 Am. Dec. 307. *Pa.* In re Conaughton's Will, 11 Pa. Co. Ct. Rep. 460; *Taylor's Appeal*, 47 Pa. St. 31; In re Wildey's Estate, 187 Pa. St. 32, 67 Am. St. Rep. 569, 40 Atl. Rep. 980; In re Rutt's Estate, 200 Pa. St. 549, 50 Atl. Rep. 171; In re Yarnall's Will, 4 Rawle 46, 26 Am. Dec. 115; *Boyer vs. Frick*, 4 Watts & S. 357. *Va.* *Reese vs. Hawthorn*, 10 Gratt. 548.

15. *Contra*: *Johnson vs. Glasscock*, 2 Ala. 218; *Harrington vs. Stees*, 32 Ill. 50, 25 Am. Rep. 290; *Nolan vs. Gardner*, 7 Helsk. (Tenn.) 215.

16. *Sickness must be so sudden, unexpected, and violent as to prevent putting of testamentary wishes into writing.*—*Taylor's Appeal*, 47 Pa. St. 31.

17. **LAST SICKNESS**—*Kansas statute.*—Words "last sickness," as used in *Kansas statute*, do not mean testator must be in extremis, or in articulo mortis, nor is it necessary that he be prevented from making written will by surprise of sudden death.—*Baird vs. Baird* (Kan. Jan. 7, 1905), 79 Pac. Rep. 163.

18. *Requirement that verbal will must be made in last sickness is satisfied if disease of which testator dies has progressed to such a point that he expects death at any time, and is liable to die therefrom at any time, and in view of such expectation, and as preparatory thereto, makes the will, and death occurs from such sickness.*—*Baird vs. Baird* (Kan. Jan. 7, 1905), 79 Pac. Rep. 163.

19. *Will made under circumstances which show that disease has progressed to such point as to lead to expectation of death at any time, and as preparatory to death, is not affected by fact of prior preparation to make it, or by elapsing of sufficient time and opportunity to make written will.*—*Baird vs. Baird* (Kan. Jan. 7, 1905), 79 Pac. Rep. 163.

III. DECLARATION OF WILL.

Intention.—See pars. 4, 5 this note.

20. **DICTATION OF WILL BY TESTATOR IS NECESSARY.**—*Prendergast vs. Prendergast*, 16 La. Ann. 319, 79 Am. Dec. 575.

21. **NECESSITY AND SUFFICIENCY OF.**—Will must be declared in presence of both witnesses present at same time.—In *Matter Yarnall's Will*, 4 Rawle (Pa.) 46, 26 Am. Dec. 115. See *Arnett vs. Arnett*, 27 Ill. 247, 81 Am. Dec. 227.

22. *Declaration of testator must be in presence of all witnesses, and not first in presence of one and then another.*—In re *Rutt's Estate*, 200 Pa. St. 549, 50 Atl. Rep. 171.

See pars. 24, 25 this note.

23. **INSUFFICIENT DECLARATION.**—Mere fact of utterance of words of will, and that attention of witnesses was called to them, is not sufficient.—*Dawson's Appeal*, 23 Wis. 69, 90.

24. *Mere declaration made by testator not made in presence of witnesses requested to be present by him for purpose of hearing*

such declaration, is not nuncupative will.—In re *Rutt's Estate*, 200 Pa. St. 549, 50 Atl. Rep. 171.

See par. 22 this note.

25. *Fact that testator declares his will first in presence of one witness and then in presence of another is not sufficient.*—In re *Yarnall's Will*, 4 Rawle (Pa.) 46, 26 Am. Dec. 115; In re *Rutt's Estate*, 200 Pa. St. 459, 50 Atl. Rep. 171.

26. **EVIDENCE MUST PLAINLY SHOW** that instrument proposed to be proved contains at least true substance and import of declarations made by deceased.—In re *Rutt's Estate*, 200 Pa. St. 549, 50 Atl. Rep. 171.

27. **DECLARATION OF TESTATOR THAT SUCH WAS HIS WILL**, or some other unequivocal act or fact of equal import showing that actual testamentary disposition of property was intended, must be proved.—*Dawson's Appeal*, 23 Wis. 69, 90.

28. **ESSENCE AND SUBSTANCE OF MATTER IS THAT testator shall intend declaration so made to be his will.**—In re *Hebden's Will*, 20 N. J. Eq. (5 C. E. Gr.) 473.

IV. WITNESSES—REQUEST TO—NUMBER.

29. **NECESSITY OF REQUEST.**—Each requisite of statute strictly proved.—In re *Rutt's Estate*, 200 Pa. St. 549, 50 Atl. Rep. 171.

30. *Request made by testator to those around him to witness that the words spoken by him were his last will must be shown.*—*Taylor's Appeal*, 47 Pa. St. 31.

31. *Request to witnesses.*—Calling upon witnesses by testator himself, essential to validity of nuncupative will.—In re *Hebden's Will*, 20 N. J. Eq. (5 C. E. Gr.) 473. See *Ill. Arnett vs. Arnett*, 27 Ill. 247, 81 Am. Dec. 227. *N. C.* *Brown vs. Brown*, 2 Murph. 350. *Tenn.* *Ridely vs. Coleman*, 1 Sneed 616; *Gwin vs. Wright*, 8 Humph. 639. *Va.* *Winn vs. Bob*, 3 Leigh, 140, 23 Am. Dec. 358.

32. **HOW MADE AND SHOWN.**—Testator must request witnesses to take notice that what he is saying is his will.—*Mitchell vs. Vickers*, 20 Tex. 377.

33. *Requirement that testator should call upon some person present to bear testimony is complied with where testator says to those standing near, "I want you to see that it [referring to the verbal will], is carried out the way I want it to be."*—*Baird vs. Baird* (Kan. Jan. 7, 1905), 79 Pac. Rep. 163.

34. *Affirmative evidence must be given that testator bade persons who testified to bear witness that what he was saying was his will, or that he used some expression equivalent to request.*—In re *Wiley's Estate*, 187 Pa. St. 32, 67 Am. St. Rep. 569, 40 Atl. Rep. 980.

35. *Testator need not call upon persons present by name to become witnesses to his will.*—*Weir vs. Chidester*, 63 Ill. 453, 455.

36. **NUMBER OF.**—Nuncupative wills must be proved by requisite number of witnesses.—In *Matter Yarnall's Will*, 4 Rawle (Pa.) 46, 26 Am. Dec. 115. See *Sykes vs. Sykes*, 2 Stew. (Ala.) 364, 20 Am. Dec. 40.

37. Requisite number of witnesses must be present and called on at the time to attest will.—In re Rutt's Estate, 200 Pa. St. 549, 50 Atl. Rep. 171.

38. Requirements of statute requiring two witnesses to nuncupative will to be present at time it is spoken and published is not satisfied where they do not agree upon facts of their being requested to bear witness to words spoken as will, testimony conflicting upon point.—Morgan vs. Stevens, 78 Ill. 287. See Mitchell vs. Vickers, 20 Tex. 377.

39. Rogatio testium must be at time alleged nuncupative will is made, and be proved by requisite witnesses then present.—In re Rutt's Estate, 200 Pa. St. 549, 50 Atl. Rep. 171.

V. EVIDENCE—CAPACITY, ANIMUS TESTANDI, DECLARATION.

40. GENERAL RULE.—Substance of will, intent to will, calling upon disinterested persons to bear witness to it as witness, necessity of resorting to and depending upon verbal will, must each and all appear with great clearness in order to amount to proof.—In re Rutt's Estate, 200 Pa. St. 549, 50 Atl. Rep. 171. See Haus vs. Palmer, 21 Pa. St. 296; Taylor's Appeal, 47 Pa. St. 31.

41. Factum of nuncupative will must be proved by evidence much stricter than that of written one in every single particular.—In Matter Yarnall's Will, 4 Rawle (Pa.) 46, 26 Am. Dec. 115.

42. CAPACITY AND ANIMUS TESTANDI AT TIME ALLEGED nuncupation must appear in clearest and most indisputable testimony, and proof must embody real testamentary intentions of deceased.—Morgan vs. Stevens, 78 Ill. 287. See Ala. Sykes vs. Sykes, 2 Stew. 364, 20 Am. Dec. 40. Me. Parsons vs. Parsons, 2 Greenl. 298. Md. Dorsey vs. Sheppard, 12 Gill & J. 192, 37 Am. Dec. 77. Miss. Burch vs. Stovall, 27 Miss. 725. N. Y. Prince vs.

Hazleton, 20 John. 503, 11 Am. Dec. 807. Pa. In re Wiley's Estate, 187 Pa. St. 82, 67 Am. St. Rep. 569, 40 Atl. Rep. 980; In Matter Yarnall's Will, 4 Rawle 46, 26 Am. Dec. 115. Tenn. Baker vs. Dodson, 4 Humph. 342, 40 Am. Dec. 650; Gwin vs. Wright, 8 Humph. 639. Wis. Dawson's Appeal, 28 Wis. 69, 90.

43. Must be proved by clearest and most indisputable testimony.—In re Rutt's Estate, 200 Pa. St. 549, 50 Atl. Rep. 171.

44. Must be clearly and satisfactorily proved.—Hubbard vs. Hubbard, 8 N. Y. 196, 202.

45. Sufficiently proved by evidence showing that testator is sick and apprehends death, and in answer to questions about his will, replies that he wishes his wife to have all, and requested his mate to settle his affairs.—Hubbard vs. Hubbard, 8 N. Y. 196, 202. See Parsons vs. Parsons, 2 Greenl. (Me.) 298, 300; How vs. Godfrey, Finch 361.

46. DECLARATION OF TESTATOR.—Witnesses must agree as to bequest and disposition, and if testimony of one does not sustain that of others with respect to material legacies or directions it will not be sufficient to sustain will.—Mitchell vs. Vickers, 20 Tex. 377.

47. TESTIMONY OF WITNESSES must agree at least substantially as to words spoken or dispositions made by deceased.—Mitchell vs. Vickers, 20 Tex. 377.

48. Will is not proved if witnesses cannot concur as to what in substance was such disposition.—Mitchell vs. Vickers, 20 Tex. 377.

49. EVIDENCE OF NOTARY PUBLIC TO PROVE that he explained language of testator to attesting witness who did not understand it at time it was spoken, not admissible to prove will or to competency of witness.—Breux vs. Gallusseaux, 14 La. Ann. 233, 74 Am. Dec. 430.

§ 1290. PROOF OF NUNCUPATIVE WILLS. No proof must be received of any nuncupative will, unless it is offered within six months after speaking the testamentary words, nor unless the words, or the substance thereof, were reduced to writing within thirty days after they were spoken.

History: Enacted March 21, 1872, founded upon § 8 Act April 10, 1850, Stats. 1850, p. 178.

1. Declaration of testator—Necessity of reducing to writing.
- 2-4. Writing—What must be shown by.
5. Same—Letter, when not sufficient.

See §§ 1344-1346 Code Civ. Proc. and notes. See also ante §§ 1288, 1289 and notes.

1. Words spoken, or their substance, must be committed to writing as proof of bequest, and be preserved as such within time specified by statute, otherwise nuncupative will cannot be established.—Taylor's Appeal, 47 Pa. St. 31.

2. Writing must set forth words of testamentary kind to show animus testandi and disposition of property.—Taylor's Appeal, 47 Pa. St. 31. See Sykes vs. Sykes, 2 Stew. (Ala.) 364, 20 Am. Dec. 40.

3. So that, from them testamentary disposition may appear, must be shown.—Taylor's Appeal, 47 Pa. St. 31.

4. Facts in addition to testamentary words or their substance should be stated, such as request to bystander to bear witness that words used are his will.—Taylor's Appeal, 47 Pa. St. 31.

5. Letter written by party announcing death of testator and in general way disposition of his property, without showing how and in what manner, is not sufficient evidence of nuncupative will, especially where it is not produced or shown to have been lost or destroyed by the testator.—Taylor's Appeal, 47 Pa. St. 31, 36-37.

§ 1291. PROBATE OF NUNCUPATIVE WILLS. No probate of any nuncupative will must be granted for fourteen days after the death of the testator, nor must any nuncupative will be at any time proved, unless the testamentary words, or the substance thereof, be first committed to writing, and process issued to call in the widow, or other persons interested, to contest the probate of such will, if they think proper.

History: Enacted March 21, 1872, founded upon § 9 Act April 10, 1850, Stats. 1850, p. 178.

1. Letters of administration with will annexed, when granted.
2. Effect of probate.

See ante §§ 1288, 1289, 1291 and notes.

Probate of nuncupative wills.—See Code Civ. Proc. §§ 1344-1346.

1. LETTERS OF ADMINISTRATION CUM TESTAMENTO ANNEXO granted on nuncu-

pative will where no executors appointed.—Prince vs. Hasleton, 20 John. (N. Y.) 502, 522, 11 Am. Dec. 307; How vs. Godfrey, Finch 361.

2. EFFECT OF PROBATE.—Nuncupative wills being authorized by statute, must, when duly proved, be allowed and established.—Mitchell vs. Vickers, 20 Tex. 277.

§ 1292. WRITTEN WILL, HOW REVOKED. Except in the cases in this chapter mentioned, no written will, nor any part thereof, can be revoked or altered otherwise than:

1. By a written will, or other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which a will should be executed by such testator; or,

2. By being burnt, torn, canceled, obliterated, or destroyed, with the intent and for purpose of revoking the same, by the testator himself, or by some person in his presence and by his direction.

History: Enacted March 21, 1872.

I. In General.

1. Applied, cited, construed, referred to, etc.
2. Construed as regards subdivision 1 with respect to revival of prior will.
- 3, 4. Same.—With § 1970 of Code Civ. Proc.
5. Common law—Nature of revocation at common law.
- 6-8. Modes of revocation—Statutory requirements must govern.
- 9-15. Essentials—Intent and physical act.
- 16-18. How shown—Cancellation by striking out and changing.
- 19-22. Same—By codicil.
- 23, 24. Same—By destruction.
- 25-27. Same—By erasure of signature.
- 28, 29. Same—Fraudulent destruction.
- 30, 31. Statute—Terms declaring such revocation or alteration, construed and complied with.

II. Evidence.

32. Burden of proof—Upon whom cast.
- 33-36. Declarations of testator—When admissible in evidence.
37. Parol evidence of revocation—When admissible.

I. IN GENERAL.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Clarke vs. Ransom, 50 Cal. 595, 601 (construed and applied with § 1970 Code Civ. Proc.); In re Tillman's Estate (Cal. Dec. 7, 1892), 31 Pac. Rep. 563 (construed and applied); In re Estate Hickman, 101 Cal. 609, 614, 38 Pac. Rep. 118 (construed and applied);

In re Estate Comassi, 107 Cal. 1, 5, 6, 8, 40 Pac. Rep. 15, 28 L. R. A. 414 (construed and applied with other sections); In re Estate Lones, 108 Cal. 688, 690, 41 Pac. Rep. 771 (construed); In re Estate Olmsted, 123 Cal. 224, 229, 233, 54 Pac. Rep. 745 (applied); In re Estate McCauley, 138 Cal. 432, 436, 71 Pac. Rep. 512 (construed with other sections).

As to admissibility of parol evidence to prove non-revocation of will by mistake, see monographic note 48 Am. St. Rep. 198-202.

As to declarations as evidence of will, see monographic notes 45 Am. Rep. 327-344; 28 Am. St. Rep. 361.

As to effect of cancellation by mistake, see monographic note 48 Am. St. Rep. 198-202.

As to implied revocation of will, see monographic note 15 Am. Dec. 659-661.

As to revocation of will, and what acts amount to, see monographic note 12 Am. Dec. 377-380; 45 Am. Rep. 327-338; 22 Am. St. Rep. 344, 363.

As to revocation upon erroneous assumption of fact, see monographic note 48 Am. St. Rep. 198-202.

As to revocation by mistake, see monographic note 48 Am. St. Rep. 198-202.

As to revocation by obliteration, see monographic note 45 Am. Rep. 327-342.

As to revocation by third party, see post § 1293 and note.

2. CONSTRUED—As showing by subd. 1 what sort of revocation will by its terms re-

vive prior will.—In re Estate Lones, 103 Cal. 688, 690, 41 Pac. Rep. 771.

3. With § 1970 of Code of Civil Procedure as then in force as identical in legal effect therewith.—Clarke vs. Ransom, 50 Cal. 595, 601.

4. With § 1970 of the Code of Civil Procedure as doing away with document of implied revocation.—In re Estate Comassi, 107 Cal. 1, 5, 40 Pac. Rep. 15, 28 L. R. A. 414.

5. COMMON LAW.—Revocation of will at common law, either express or implied,—latter were termed revocations in law, and were effected in two ways, by total alteration in circumstances of deviser, or by actual or intended alteration in his estate.—Graves vs. Sheldon, 2 D. Chip. (Vt.) 71, 15 Am. Dec. 653.

6. MODES OF.—Governed entirely by provisions of code.—In re Estate Olmsted, 122 Cal. 224, 229, 54 Pac. Rep. 745.

7. Compliance with requirements of statute must be looked to in order to determine whether will has been properly revoked or whether after its execution there has been such change in status or personal relations of testator as in law will effect its revocation.—In re Estate Comassi, 107 Cal. 1, 4, 40 Pac. Rep. 15, 28 L. R. A. 414.

8. Will duly executed remains will until revoked as section prescribes.—In re Estate McCauley, 138 Cal. 432, 436, 71 Pac. Rep. 512.

9. ESSENTIALS.—Performance of some act within statute, as act of burning, tearing, cancelling or otherwise destroying, with animus revocandi, must be shown.—In re Estate Olmsted, 122 Cal. 224, 229, 54 Pac. Rep. 745. See Gains vs. Gains, 2 A. K. Marsh. (Ky.) 190, 12 Am. Dec. 375; Rich vs. Gilkey, 73 Me. 595, 601; Graham vs. Burch, 47 Minn. 171, 23 Am. St. Rep. 339, 49 N. W. Rep. 697.

10. Intent without physical act of destruction not enough.—In re Estate Olmsted, 122 Cal. 224, 229, 54 Pac. Rep. 745.

11. Intention to revoke cannot be substituted for act itself.—Gains vs. Gains, 2 A. K. Marsh. (Ky.) 190, 12 Am. Dec. 375.

12. Physical destruction, no matter how complete, not alone sufficient, as fraud, mistake, etc., may have intervened.—In re Estate Olmsted, 122 Cal. 224, 229, 54 Pac. Rep. 745.

13. Physical destruction by insane testator is without lawful intent.—In re Estate Olmsted, 122 Cal. 224, 229, 54 Pac. Rep. 745.

14. Union of act and intention requisite to revocation under subd. 2.—In re Estate Olmsted, 122 Cal. 224, 229, 54 Pac. Rep. 745. See Gains vs. Gains, 2 A. K. Marsh. (Ky.) 190, 12 Am. Dec. 375.

15. Failure to perform some one of acts designated to constitute full revocation cannot be excused.—Graham vs. Burch, 47 Minn. 171, 23 Am. St. Rep. 339, 49 N. W. Rep. 697. See Ky. Gains vs. Gains, 2 A. K. Marsh. 190, 12 Am. Dec. 375. N. C. Hise vs. Fincher, 10 Ired. 139, 51 Am. Dec. 383. Ohio. Kent vs. Mahaffey, 19 Ohio St. 204. Pa. Clingan vs. Mitchellree, 31 Pa. St. 25. Va. Malone vs. Hobbs, 1 Rob. 346, 39 Am. Dec. 263.

16. CANCELLATION.—Primal significance C. C.—66

of word means latticework, nullification of writing by drawing upon its face lines in form of latticework—"crisscross."—In re Estate Olmsted, 122 Cal. 224, 230, 54 Pac. Rep. 745.

17. Accomplished at law by drawing of any lines over or across words with intent to nullify them.—In re Estate Olmsted, 122 Cal. 224, 230, 54 Pac. Rep. 745.

18. Cancellation by striking out some legacies and changing others, considered only in light thrown upon general act of revocation of whole instrument.—In re Estate Olmsted, 122 Cal. 224, 229, 54 Pac. Rep. 745.

19. BY CODICIL.—Codicil does not disturb will except so far as it is inconsistent with it, or in terms or by necessary implication revokes it.—In re Estate McCauley, 138 Cal. 432, 436, 71 Pac. Rep. 512.

20. Bequests not revoked by republication of will, codicil remodifying will when same is not inconsistent with construction of statute and institution of testator.—In re Estate McCauley, 138 Cal. 432, 438, 71 Pac. Rep. 512. See Neff's Appeal, 48 Pa. St. 501, Hamilton's Estate, 74 Pa. St. 69; Bradish vs. McClellan, 100 Pa. St. 607.

21. Intention to revoke is shown by codicil wherein testator refers to bequest of life estate made by him in his will and of death of another legatee in following language: "the amount I did bequest to my friend, _____, now deceased, I now desire, or rather ordain, be given to the young man, _____, to whom I have left my ranch _____, but do so no more, and I do bequest said ranch to my cousin _____," so far as bequest of ranch mentioned in will is concerned.—In re Estate De Laveaga, 119 Cal. 651, 657, 51 Pac. Rep. 1074.

22. Revocation clause inserted by mistake.—Presumption of law is in favor of devise or legacy that it is not annulled by clause of revocation in codicil, if mistake as to fact moves testator to write it and continue it in force, and he states in writing what the fact is, and therein shows revocation is made conditional upon its existence.—Giddings vs. Giddings, 65 Conn. 149, 43 Am. St. Rep. 192, 33 Atl. Rep. 334. See Dunham vs. Averill, 45 Conn. 61, 62, 29 Am. Rep. 642.

23. BY DESTRUCTION.—Revocation by destruction may be total or partial; will may be wholly burned or totally obliterated, or partially destroyed and still legible.—In re Estate Olmsted, 122 Cal. 224, 230, 54 Pac. Rep. 745.

24. Slight act sufficient within statute, provided intent clearly appears.—In re Estate Olmsted, 122 Cal. 224, 230, 54 Pac. Rep. 745.

25. BY ERASURE OF SIGNATURE.—Act of drawing pencil or pen lengthwise through name, with upright line through each word thereof, accompanied by declaration revoking will, shows revocation.—Glass vs. Scott, 14 Colo. App. 377, sub nom. In re Estate Glass, 60 Pac. Rep. 186.

26. Will found after testator's death with signature torn off, evidence showing that prior to his decease he stated that he had destroyed his will, and he thought that he had better fix his affairs, and that he ought to do some-

thing about will, shows intention.—*King vs. Ponton*, 82 Cal. 420, 423, 22 Pac. Rep. 1087.

27. Tearing signature from will when of unsound mind does not amount to revocation by testator.—In *re Estate Lang*, 65 Cal. 19, 20, 2 Pac. Rep. 491.

28. FRAUDULENT DESTRUCTION.—Question of fraudulent destruction of will is one of fact, as fraud is never presumed or imputed or inferred.—In *re Estate Kidder*, 66 Cal. 487, 490, 6 Pac. Rep. 326. See *Timon vs. Claffy*, 45 Barb. (N. Y.) 438, 446.

29. Evidence showing that when will was brought to testator he partially withdrew it from envelope and then returned it and allowed it to fall from his hands into fire, where it was wholly consumed, in presence of nurse who made no attempt to save it from flames, is not proof of fraudulent destruction.—In *re Estate Kidder*, 66 Cal. 487, 490, 6 Pac. Rep. 326.

30. STATUTE.—Terms "declaring such revocation or alteration" as employed in statute mean nothing more than it shall appear from provisions of last will that it was intended to alter or revoke former in whole or in part.—*Clarke vs. Ransom*, 50 Cal. 595, 602.

31. Finding of court that testator canceled and obliterated his will and signature "for purpose of revoking same" sufficiently complies with meaning and intent of statute.—In *re Estate Olmsted*, 122 Cal. 224, 232, 54 Pac. Rep. 745.

II. EVIDENCE.

32. BURDEN OF PROOF ON CONTESTANTS to prove revocation.—In *re Estate Olmsted*, 122 Cal. 224, 230, 54 Pac. Rep. 745.

§ 1293. EVIDENCE OF REVOCATION. When a will is canceled or destroyed by any other person than the testator, the direction of the testator, and the fact of such injury or destruction, must be proved by two witnesses.

History: Enacted March 21, 1872, founded upon § 10 Act April 10, 1850, Stats. 1850, p. 178.

- 1, 2. Revocation by third party—How shown.
- 3, 4. Declarations of testator—How far admissible to prove.
5. Letter directing third party to destroy—How far evidence.
- 6, 7. When not shown.

As to revocation of will by third party, see 30 Am. & Eng. Encyc. of L. (2d ed.) 630.

1. WILL MAY BE REVOKED BY DESTRUCTION OR OBLITERATION by testator or by third person by his direction with intention to revoke.—*Howard vs. Hunter*, 115 Ga. 357, 90 Am. St. Rep. 121, 41 S. E. Rep. 638.

2. In presence of testator.—Conn. Appeal of Miles, 68 Conn. 237, 242, 36 Atl. Rep. 39, 36 L. R. A. 176. N. H. *Morey vs. Sohler*, 63 N. H. 507, 56 Am. Rep. 528, 3 Atl. Rep. 636. N. J. *Mundy vs. Mundy*, 15 N. J. Eq. (2 McC.) 290. Pa. *Heise vs. Heise*, 31 Pa. St. 246.

3. DECLARATIONS OF TESTATOR as to revocation of will by destroying same, are admissible in evidence where there is no direct evidence to prove whether same is can-

33. DECLARATION OF TESTATOR.—Contemporaneous declarations of testator afford strong corroborative evidence upon presumption of intent with which act of revocation as shown by prima facie evidence was performed.—In *re Estate Olmsted*, 122 Cal. 224, 231, 54 Pac. Rep. 745.

See post § 1293 para. 2, 4 note.

34. Declarations and statements made by testator at time of committing act which is claimed to work revocation of will may be admitted as part of res gestæ in order to prove intention.—*Glass vs. Scott*, 14 Colo. App. 377, sub nom. In *re Estate Glass*, 60 Pac. Rep. 186.

35. Subsequent declarations made by testator as to contents of a will are admissible upon the question of intention to revive former existing will.—*Pickens vs. Davis*, 134 Mass. 252, 45 Am. Rep. 322. See Conn. In *re Johnson's Will*, 40 Conn. 587. Ga. *Patterson vs. Hickey*, 32 Ga. 156. Mich. *Lawyer vs. Smith*, 8 Mich. 411, 77 Am. Dec. 460. Eng. *Sugden vs. Lord St. Leonards*, 1 Prob. Div. 154; *Keen vs. Keen*, L. R. 3 Prob. & D. 405.

36. Declarations and statements made by testator subsequent to performance of act claimed to work revocation of will are not admissible as part of res gestæ.—*Glass vs. Scott*, 14 Colo. App. 377, sub nom. In *re Estate Glass*, 60 Pac. Rep. 186; *Caeman vs. Van Harke*, 33 Kan. 323, 6 Pac. Rep. 620.

37. PAROL EVIDENCE OF REVOCATION not admissible on behalf of heirs to prove revocation without proof of existence of will and destruction of prior will or of fruitless search therefor.—*Caeman vs. Van Harke*, 33 Kan. 323, 6 Pac. Rep. 620.

celebrated by testator or by third party.—*Lawyer vs. Smith*, 8 Mich. 411, 77 Am. Dec. 460; *Harring vs. Allen*, 25 Mich. 505; *Pierce vs. Pierce*, 33 Mich. 412, 420.

See ante § 1292 pars. 33-36 note.

4. Declarations made by testator prior to his death as to his being unable to find his will, and informing his attorney that he had lost same, would have to make another one just like it if he did not find it, who afterwards found it and showed sealed envelope containing it to his attorney, admissible upon question of existence or non-existence of such will, and to rebut presumption that same was revoked or destroyed by him or by his wife with his knowledge and with intention to revoke.—*Gavitt vs. Moulton*, 119 Wis. 35, 96 N. W. Rep. 295.

5. Letter written by testator to his attorney directing him to destroy will, does not ipso facto operate as revocation thereof.—*Tynan vs. Paschal*, 27 Tex. 286, 302, 84 Am. Dec. 619.

6. Revocation by third party not shown by evidence of wife that in answer to request from

her husband, testator, to produce will so that he might destroy it, she replied that she had already done so by burning.—*Mundy vs. Mundy*, 15 N. J. Eq. (2 McC.) 290.

7. **DESTRUCTION OF WILL BY THIRD PARTY** (wife of testator) by his directions and in his presence is not proved by facts showing

that he was careless regarding his papers and that during time that he was unconscious his wife, who had been disowned by him, was present and had access to papers and after his death refused to deliver them up.—*Gavitt vs. Moulton*, 119 Wis. 35, 96 N. W. Rep. 395.

§ 1294. REVOCATION BY OBLITERATION ON FACE OF WILL (repealed).

History: Enacted March 21, 1872, repealed March 30, 1874, Code Amdts. 1873-4, p. 233.

§ 1295. **REVOCATION OF DUPLICATE.** The revocation of a will, executed in duplicate, may be made by revoking one of the duplicates.

History: Enacted March 21, 1872.

- 1, 2. Cancellation of one duplicate—Effect of.
- 3, 4. Presumption—Cancellation of former will—When presumed.
- 5-7. Same—When not presumed or shown.

1. **CANCELATION OF ONE DUPLICATE WILL**, only other being left entire, is effectual cancellation of will.—*Onions vs. Tyrer*, 2 Vern. 742, 1 Pr. Wms. 343, Gilb. Eq. Rep. 130, Fra. Ch. 149.

2. **Of one of two duplicate wills** is revocation of will of such testator, and thus revokes both.—*Crossman vs. Crossman*, 95 N. Y. 145. See *O'Neill vs. Farr*, 1 Rich. (S. C.) L. 80; *Doe ex d. Strickland vs. Strickland*, 8 Man. G. & S. 724, 65 Eng. C. L. 724; *Hubbard vs. Alexander*, 3 Ch. Div. 738.

3. **PRESUMPTION IS THAT CANCELLATION OF ONE DUPLICATE** of will cancels other, though both are in testator's possession, and canceled instrument has been altered.—*Pemberton vs. Pemberton*, 13 Ves. 290, 310.

4. **Of one duplicate will cancels other** is weaker in case where both wills are in his possession, and canceled one has been altered.—*Pemberton vs. Pemberton*, 13 Ves. 290, 310.

5. **Of revocation does not arise** through cancellation of one instrument, where other is carefully preserved by testator and is in his possession at his death.—*Roberts vs. Round*, 3 Hagg. Ecc. 543.

6. **Not shown where he kept one copy** of will himself and gave other to his wife, and copy so given to his wife could not be found after his death, and it was not shown that it ever got back into his possession.—*Snider vs. Burks*, 84 Ala. 53, 4 So. Rep. 225.

7. **Not shown where two papers** are exact duplicate of each other, no matter whether second was void or merely formal, second paper was identical as to contents, and there was no animus revocandi.—*Odenwaelder vs. Schorr*, 3 Mo. App. 453.

§ 1296. **REVOCATION BY SUBSEQUENT WILL.** A prior will is not revoked by a subsequent will, unless the latter contains an express revocation, or provisions wholly inconsistent with the terms of the former will; but in other cases the prior will remains effectual so far as consistent with the provisions of the subsequent will.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Construed with §§ 1320 and 1326 as applying to holographic wills.
- 3, 4. Intention to revoke must be shown.
- 5, 6. What sufficient to show revocation.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: In re Estate Murphy, 104 Cal. 554, 568, 33 Pac. Rep. 543 (construed and applied with other sections).

2. **CONSTRUED WITH § 1320 AND § 1326 AS APPLYING TO HOLOGRAPHIC WILLS** contained in two letters of same date, contents of which were substantially same, with exception of contingency mentioned in one, happening of which might never arise.—In re Estate Murphy, 104 Cal. 554, 568, 33 Pac. Rep. 543.

3. **WILL VALID WHEN MADE** can only be

revoked or altered by subsequent writing duly executed or by obliteration or destruction with intent to revoke.—In re Estate Hickman, 101 Cal. 609, 613, 614, 33 Pac. Rep. 113.

4. **SUBSEQUENT REVOCATORY WILL DULY EXECUTED** ends first will.—In re Estate Lones, 108 Cal. 683, 690, 41 Pac. Rep. 771.

5. **Read to testator by attorney** preparing same, containing clause, "revoking all former wills," signed and declared by testator to be his last will, sufficient revocation.—In re Barnes' Will, 75 N. Y. Supp. 373, 70 App. Div. 523; In re Myer's Will, 59 N. Y. Supp. 908, 23 Misc. Rep. 359.

6. **Wholly in handwriting** of testator, executed with requisite formality, need not show upon its face that it was intended to revoke or alter former will.—*Clarke vs. Ransom*, 50 Cal. 595, 602.

§ 1297. **ANTECEDENT NOT REVIVED BY REVOCATION OF SUBSEQUENT WILL.** If, after making a will, the testator duly makes and executes a second

will, the destruction, cancelation, or revocation of such second will does not revive the first will, unless it appears by the terms of such revocation that it was the intention to revive and give effect to the first will, or unless, after such destruction, cancelation, or revocation, the first will is duly republished.

History: Enacted March 21, 1872, founded upon § 11 Act April 10, 1850, Stats. 1850, p. 178.

1. Applied, cited, construed, referred to, etc.
2. Act of making second will—How far revocation.
- 3, 4. Necessity of republication.
- 5-8. Revocation of subsequent will—When not a revival of former will.
- 9-15. Same—When a revival.
16. Subsequent will—When a revocation pro tanto.
17. Same—Effect of, when invalid.
18. Same—Effect of, when invalid.
19. Same—Effect of, when invalid.
20. Revival by cancelation—Is question of fact.
21. Same—Circumstances must be proved.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *In re Estate Lones*, 108 Cal. 688, 690, 41 Pac. Rep. 771 (construed and applied).

As to revival of one will by revocation of another, see monographic note 76 Am. Dec. 653-656.

As to revocation of will by subsequent will, and revival of former by destruction of latter, see monographic note by Roswell Shinn, 37 L. R. A. 561-579.

2. ACT OF MAKING SECOND WILL IS REVOCATION OF PRECEDING TESTAMENT, so far as personal estate is concerned.—*Boudinot vs. Bradford*, 3 U. S. (3 Dall.) 266, bk. 1 L. ed. 375.

3. Containing an express clause revoking former will, operates as revocation at once, and former will thus revoked cannot be substantially revived except by republication and is not renewed by destruction of latter will.—*Cheever vs. North*, 106 Mich. 390, 58 Am. St. Rep. 499, 64 N. W. Rep. 455, 37 L. R. A. 561. See *Comm. James vs. Marvin*, 3 Conn. 576. *Mass. Pickens vs. Davis*, 134 Mass. 252, 45 Am. Rep. 322. *Mich. Scott vs. Fink*, 45 Mich. 241, 7 N. W. Rep. 799. *N. Y. Nelson vs. McGiffert*, 3 Barb. Ch. 153, 49 Am. Dec. 170. *Fed. Boudinot vs. Bradford*, 3 U. S. (3 Dall.) 266, bk. 1 L. ed. 375.

4. Even where evidence of rest of its contents cannot be ascertained.—*Wallis vs. Wallis*, 114 Mass. 510.

5. WHEN NOT A REVIVAL.—Revocation or cancelation of will does not revive former will, unless made in manner declared by section.—*In re Estate Lones*, 108 Cal. 688, 690, 41 Pac. Rep. 771; *Harwell vs. Lively*, 30 Ga. 315, 76 Am. Dec. 649.

6. In absence of evidence showing republication by instrument in writing or by codicil.—*Harwell vs. Lively*, 30 Ga. 315, 76 Am. Dec. 649.

7. Unless such revival is shown by terms of revocation.—*In re Estate Lones*, 108 Cal. 688, 690, 41 Pac. Rep. 771.

8. Fact that second will inconsistent with first, perfect in form and execution, is incapable of operating as will on account of some circumstance dehors instrument, does not revive former, and may be set up as revocation of first.—*Carpenter vs. Miller*, 3 W. Va. 174, 100 Am. Dec. 744. See *Laughton vs. Atkins*, 18 Mass. (1 Pick.) 535, 644.

9. WHEN A REVIVAL.—Cancelation of second will revoking former will by implication leaves former in force if in possession of testator at his death, uncanceled.—*Flintham vs. Bradford*, 10 Pa. St. 82.

10. By testator for reason that he relies upon subsequent will as valid when it is not, will amount to revival of first will.—*Pringle vs. McPherson*, 2 Brev. (S. C.) 279, 3 Am. Dec. 713.

11. Destroyed, without further act, preceding will not having been canceled is, generally speaking, ipso facto revived.—*Boudinot vs. Bradford*, 3 U. S. (3 Dall.) 266, bk. 1 L. ed. 375.

12. Fact of destruction of subsequent will has same effect as if it never existed, unless it is clearly proved that testator destroyed it with intention of dying intestate.—*Lawson vs. Morrison*, 3 Dall. (Pa.) 286, 1 Am. Dec. 233. See *Harwood vs. Goodright*, Cowp. 92.

13. Mere circumstance that testator made second will, is not virtually revocation of former will, where contents of such second will are unknown, and it does not appear to be in existence at his death, and circumstances would lead to conclusion that it was canceled or destroyed.—*Lawson vs. Morrison*, 3 Dall. (Pa.) 286, 1 Am. Dec. 233.

14. Will containing no express clause of revocation does not have effect, of its own force, to revoke former will, and destruction of latter will will effect revival of earlier one, upon ground that wills are ambulatory until testator's death, at which time only they become operative.—*Cheever vs. North*, 106 Mich. 390, 58 Am. St. Rep. 499, 64 N. W. Rep. 455, 37 L. R. A. 561; *Scott vs. Fink*, 45 Mich. 241, 7 N. W. Rep. 799. See *Comm. Peck's Appeal*, 50 Conn. 562, 47 Am. Rep. 635. *N. Y. Simmons vs. Simmons*, 26 Barb. 63. *Pa. Flintham vs. Bradford*, 10 Pa. St. 82.

15. Will revoked by execution of subsequent one, but not canceled, is republished by cancelation of subsequent will.—*Lawson vs. Morrison*, 3 U. S. (3 Dall.) 286, bk. 1 L. ed. 384, 1 Am. Dec. 233.

16. SUBSEQUENT WILL INCONSISTENT WITH FORMER WILL in some of its provisions only, amounts to revocation pro tanto.—*Nelson vs. McGiffert*, 3 Barb. Ch. (N. Y.) 153, 49 Am. Dec. 170. See *Brant vs. Willson*, 8 Cow. (N. Y.) 56; *Robinson vs. Smith*, 13 Abb. Pr. (N. Y.) 359, 369.

17. Invalid on ground of undue influence, except as to clause of revocation therein contained, is not sufficient to show intention to revoke former will.—*Rudy vs. Ulrich*, 69 Pa. St. 177, 8 Am. Rep. 238.

18. EVIDENCE.—Burden of proof is upon party who asserts that latter will contained clause of revocation.—*Cheever vs. North*, 106 Mich. 290, 295, 58 Am. St. Rep. 499, 64 N. W. Rep. 455, 37 L. R. A. 561. See *Caeman vs. Van Harke*, 33 Kan. 333, 6 Pac. Rep. 620.

19. Party claiming that second will revokes first must establish fact that will contained clause of revocation by fair preponderance of evidence.—*Caeman vs. Van Harke*, 33 Kan. 333,

6 Pac. Rep. 620; *Cheever vs. North*, 106 Mich. 290, 53 Am. St. Rep. 499, 64 N. W. Rep. 455, 37 L. R. A. 561.

20. Question whether by cancellation of second will testator meant to revive former instrument or to die intestate, is one of fact to be proved by jury from testimony of witnesses.—*Boudinot vs. Bradford*, 2 U. S. (2 Dall.) 266, bk. 1 L. ed. 375.

21. SECOND WILL CANCELED UNDER CIRCUMSTANCES manifesting intention either to revive or not to revive preceding will, those circumstances must be proved.—*Boudinot vs. Bradford*, 2 U. S. (2 Dall.) 266, bk. 1 L. ed. 375.

§ 1298. REVOCATION BY MARRIAGE AND BIRTH OF ISSUE. If, after having made a will, the testator marries, and has issue of such marriage, born either in his lifetime or after his death, and the wife or issue survives him, the will is revoked, unless [1] provision has been made for such issue by some settlement, or [2] unless such issue are provided for in the will, or [3] in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of such revocation can be received.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
- 2-4. Construed with reference to application and meaning.
5. Common-law rule—Abrogation of.
6. Policy of the law—Provision for wife and children.
7. Adopted child—Position of.
8. Child—Effect of father surviving.
9. Conveyance by husband to wife—How regarded.
- 10, 11. Probate court—Jurisdiction of.
12. Evidence—Burden of proof—Upon whom cast.
13. Presumption of revocation—Upon what dependent.
14. Same—Subsequent marriage raises presumption—Evidence to contrary—Provision.
15. Sufficiency of—To defeat probate.
16. Subsequent marriage—Birth of children—When not revocation.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Sanders vs. Simcich*, 65 Cal. 50, 52, 2 Pac. Rep. 741 (construed and applied); In re *Estate Comassi*, 107 Cal. 1, 7, 40 Pac. Rep. 15, 28 L. R. A. 414 (construed and applied).

As to revocation of will by marriage and birth of issue, see monographic note 15 Am. Dec. 659-661, 28 Am. Dec. 516, 518, and monographic notes 2 Prob. Rep. Ann. 238, and notes by Robert Desty 5 L. R. A. 346, 7 L. R. A. 485, 10 L. R. A. 57.

See post § 1299 and note.

2. CONSTRUED AS MEANING that testator should not only have married, but also should have issue of marriage in order to work revocation of his will.—In re *Estate Comassi*, 107 Cal. 1, 7, 40 Pac. Rep. 15, 28 L. R. A. 414.

3. As not applying to will of married woman.—In re *Estate Comassi*, 107 Cal. 1, 7, 40 Pac. Rep. 15, 28 L. R. A. 414.

4. With § 1299 as declaring that where unmarried person has made will and afterwards marries, marriage, whether followed by birth of issue or not, operates in case of surviving wife or children, if any, as revocation of will, in absence of specific provision made by will or by marriage contract for surviving wife or by some settlement or provision for surviving children of marriage.—*Sanders vs. Simcich*, 65 Cal. 50, 52, 2 Pac. Rep. 741.

5. COMMON-LAW RULE REVOKING WILL ON MARRIAGE of unmarried man and birth of child, unless provisions have been made therefor by settlement, not abrogated by Kansas statute of 1897, ch. 110, §§ 34-37.—*Shorten vs. Judd*, 60 Kan. 72, 55 Pac. Rep. 286.

6. POLICY OF LAW.—Policy of law is that wife and children must be provided for.—*Sanders vs. Simcich*, 65 Cal. 50, 52, 2 Pac. Rep. 741.

7. Adoption of stranger in blood is not issue of marriage within provisions of this section, neither can it be treated as its equivalent.—In re *Estate Comassi*, 107 Cal. 1, 7, 40 Pac. Rep. 15, 28 L. R. A. 414. See *Ind. Davis vs. Fogle*, 124 Ind. 41, 23 N. E. Rep. 860, 7 L. R. A. 485. N. Y. In matter *Estate Gregory*, 15 Misc. N. Y. 407, 37 N. Y. Supp. 925. N. C. *Davis vs. King*, 39 N. C. 441.

8. Fact that testator survived child will not have effect of reviving will.—*Ash vs. Ash*, 9 Ohio St. 333.

9. Conveyance made by husband during marriage to wife will be regarded as gift rather than provision for her, which will prevent his antenuptial will from being revoked by his marriage.—*Corker vs. Corker*, 37 Cal. 643, 650, 25 Pac. Rep. 922.

10. PROBATE COURT.—Jurisdiction of probate court in case of antenuptial will claimed to have been revoked by subsequent marriage extends only to refusal of probate and grant-

ing of administration.—*Corker vs. Corker*, 87 Cal. 643, 650, 25 Pac. Rep. 922.

11. Court will not receive evidence that instrument which does not on its face purport to make provision for wife, in lieu of testamentary provision, for the purpose of showing that such was the intention of the parties.—*Corker vs. Corker*, 87 Cal. 643, 649, 25 Pac. Rep. 922.

12. Burden of proof cast upon proponent to show existence of one of conditions which excepted from rule, and if wife is not mentioned in will it must be shown that provision has been made for her by marriage contract.—*Corker vs. Corker*, 87 Cal. 643, 648, 25 Pac. Rep. 922.

13. PRESUMPTION OF REVOCATION depends upon question of survivorship.—*Sanders vs. Simcich*, 65 Cal. 50, 52, 2 Pac. Rep. 741.

14. That subsequent marriage brings about such change in condition in life as to cause

testator to destroy or cancel previous will, and does not admit of evidence to contrary unless provision has been made for wife and children surviving him according to law.—*Sanders vs. Simcich*, 65 Cal. 50, 52, 2 Pac. Rep. 741.

15. Surviving wife in order to defeat probate of will need only show that she was married to testator subsequent to its execution.—*Corker vs. Corker*, 87 Cal. 643, 648, 25 Pac. Rep. 922.

16. WHEN NOT REVOCATION.—Will of an unmarried man providing annuity for one with whom he cohabited, and directing trustee and executor in case he should have any child or children by such party to raise certain amount to be paid among such children and devise remainder of his estate to his relatives, is not revoked by his subsequent marriage to such party and birth of children, as objects of will have been contemplated and provided for.—*Kenebel vs. Scaffron*, 2 East 530.

§ 1299. EFFECT OF MARRIAGE OF A MAN ON HIS WILL. If, after making a will, the testator marries, and the wife survives the testator, the will is revoked, unless [1] provision has been made for her by marriage contract, or [2] unless she is provided for in the will, or [3] in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation must be received.

History: Enacted March 21, 1872, founded upon § 12 Act April 10, 1850, Stats. 1850, p. 178.

1. Applied, cited, construed, referred to, etc.
- 2-4. Construed with reference to its application, meaning, etc.
- 5-7. Marriage contract—Power of court to inquire into—To receive evidence.
8. Evidence—Proponent, to what limited.
9. Same—Wife—Extent of proof by.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Sanders vs. Simcich*, 65 Cal. 50, 52, 2 Pac. Rep. 741 (construed and applied); *Corker vs. Corker*, 87 Cal. 643, 648, 25 Pac. Rep. 922 (construed and applied); In re Estate Comassi, 107 Cal. 1, 7, 40 Pac. Rep. 15, 28 L. R. A. 414 (construed and applied).

As to effect of marriage upon prior will, see notes 80 Am. Dec. 516, 49 Am. Rep. 329, and monographic notes by Robert Desty, 5 L. R. A. 346, and 7 L. R. A. 485.

See ante § 1298 and note.

2. CONSTRUED as allowing no other evidence to rebut presumption of revocation and as emphasizing the rule that instrument itself is only mode of proof.—*Corker vs. Corker*, 87 Cal. 643, 648, 25 Pac. Rep. 922.

3. As meaning that unless instrument shows upon face it is marriage contract within the meaning of section, and that by it provision has been made for wife and that such provision was intended to take place of testamentary provision for her, will is revoked.—*Corker vs. Corker*, 87 Cal. 643, 649, 25 Pac. Rep. 922.

4. As not applying to case of husband surviving wife.—In re Estate Comassi, 107 Cal. 1, 7, 40 Pac. Rep. 15.

5. MARRIAGE CONTRACT.—Court cannot inquire into character or extent or reasonableness of provisions where instrument is marriage contract and purports to make provision for wife any more than it can in other contracts between parties who are sui juris.—*Corker vs. Corker*, 87 Cal. 643, 649, 25 Pac. Rep. 922.

6. Court cannot receive evidence for purpose of showing intention of party to instrument or for the relative conditions of wealth at time it is executed or effect which will result from its enforcement.—*Corker vs. Corker*, 87 Cal. 643, 649, 25 Pac. Rep. 922.

7. Question whether marriage contract referred to in § 1299 is limited to antenuptial contracts, or whether the postnuptial agreement may be so framed as to constitute marriage contract, discussed but not decided.—*Corker vs. Corker*, 87 Cal. 643, 648, 25 Pac. Rep. 922.

8. PROPONENT IS LIMITED in his proof to the marriage contract itself.—*Corker vs. Corker*, 87 Cal. 643, 649, 25 Pac. Rep. 922.

9. Wife is not called upon to introduce any further proof.—*Corker vs. Corker*, 87 Cal. 643, 649, 25 Pac. Rep. 922.

10. Revocation by marriage,—as to, see *Corker vs. Corker*, supra; *Baacke vs. Baacke*, 50 Neb. 18, 21, 69 N. W. Rep. 308; also note 28 Am. St. Rep. 344-362.

§ 1300. EFFECT OF A MARRIAGE OF A WOMAN ON HER WILL. A will, executed by a woman, is revoked by her subsequent marriage, and is not revived by the death of her husband.

History: Enacted March 21, 1872, founded upon § 13 Act April 10, 1850, Stats. 1850, p. 178; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 402, held unconstitutional, see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXLVIII, p. 606.

1. Applied, cited, construed, referred to, etc.
2. Amendment of 1895—Presumed effect of.
- 3-8. Construed with respect to its application, limitation, etc.
9. Common-law rule—Effect of.
10. Same—Effect of statute upon.
- 11, 12. Marriage—Effect of.
- 13, 14. Republication—When effected by codicil.
15. Revival—Death of husband as.
- 16-19. Antenuptial contract—Effect of.
- 20, 21. Power of appointment—Effect of.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in:** In re Estate Comassi, 107 Cal. 1, 5, 40 Pac. Rep. 15, 28 L. R. A. 414 (construed and applied).

As to meaning of words "unmarried" and "without having been married," see monographic note by B. A. Rich, 15 L. R. A. 292-293.

As to implied revocation of will from marriage of a woman, see monographic note 28 Am. St. Rep. 344-358.

2. **WORD "UNMARRIED"**—Which heretofore appeared before word "women" in this section of the code is omitted from amendment 1905, so that this section will now apply to wills executed by married as well as unmarried women. The manifest purpose of the amendment is to apply the same rule to wills executed by married and unmarried women. Former decisions will not be applicable to the section as amended.

3. **CONSTRUED** as applicable only to will executed by unmarried woman.—In re Estate Comassi, 107 Cal. 1, 5, 40 Pac. Rep. 15, 28 L. R. A. 414. See amendment 1905.

4. **As limiting such revocation** "to will executed by unmarried woman."—In re Estate Comassi, 107 Cal. 1, 6, 40 Pac. Rep. 15, 28 L. R. A. 414. See amendment 1905.

5. **As limiting result to will executed by unmarried woman in language which gives no opportunity for construing code as extending to will executed by married woman.**—In re Estate Comassi, 107 Cal. 1, 7, 40 Pac. Rep. 15, 28 L. R. A. 414. See amendment 1905.

6. **As not applying to case of execution of will by a married woman whose husband was at the time living.**—In re Estate Comassi, 107 Cal. 1, 5, 40 Pac. Rep. 15, 28 L. R. A. 414. See amendment 1905.

7. **As not applying unless testatrix was unmarried at time she executed will.**—In re Estate Comassi, 107 Cal. 1, 6, 40 Pac. Rep. 15, 28 L. R. A. 414. See amendment 1905.

8. **As not declaring that every will of unmarried woman shall be revoked by subsequent marriage.**—In re Estate Comassi, 107 Cal. 1, 6, 40 Pac. Rep. 15, 28 L. R. A. 414.

9. **COMMON-LAW RULE.**—Marriage of wo-

man revokes any will that she had previously made at common law.—In re Estate Comassi, 107 Cal. 1, 4, 40 Pac. Rep. 15, 28 L. R. A. 414. See Roane vs. Hollingshead, 76 Md. 369, 35 Am. St. Rep. 438, 25 Atl. Rep. 307, 17 L. R. A. 592; Hodsden vs. Lloyd, 2 Brown's Ch. 534; Forse's Case, 2 Coke 439; Doe vs. Staple, 2 Durnf. & E. (2 T. R.) 684, 695, 1 Rev. Rep. 595.

10. **Effect of statute upon.**—State statute enabling married women to execute wills is said to have taken away reason for common-law rule which held that marriage revoked will, and consequently rule is no longer applicable.—In re Estate Comassi, 107 Cal. 1, 6, 40 Pac. Rep. 15, 28 L. R. A. 414. See Me. Emery's Appeal In re Estate Hunt, 81 Me. 275, 17 Atl. Rep. 68. Md. Roane vs. Hollingshead, 76 Md. 369, 35 Am. St. Rep. 438, 25 Atl. Rep. 307, 17 L. R. A. 592. N. J. Webb vs. Jones, 36 N. J. Eq. (9 Stew.) 163. Wis. In re Ward's Will, 70 Wis. 251, 5 Am. St. Rep. 174, 35 N. W. Rep. 731.

11. **MARRIAGE—EFFECT OF.**—Marriage operates per se as revocation.—McAnnulty vs. McAnnulty, 120 Ill. 26, 60 Am. Rep. 552, 11 N. E. Rep. 397; Hudnall vs. Ham, 183 Ill. 486, 75 Am. St. Rep. 124, 56 N. E. Rep. 172, 48 L. R. A. 557.

12. **Will executed before marriage is absolutely revoked by marriage as to all persons.**—Hudnall vs. Ham, 183 Ill. 486, 75 Am. St. Rep. 124, 56 N. E. Rep. 172, 48 L. R. A. 557. See McAnnulty vs. McAnnulty, 120 Ill. 26, 60 Am. Rep. 552, 11 N. E. Rep. 397.

13. **REPUBLICATION.**—Codicil executed by married woman referring to will executed by her before marriage, declaring same to be codicil to such will, amounts to republication thereof.—Brown vs. Clark, 77 N. Y. 369.

14. **Declaration made by married woman expressing wish that her property should go as directed in will made by her before marriage, without production of will, does not amount to republication thereof, so as to make it valid under statute securing to married women right to dispose of their separate estate.**—In re Fransen's Will, 26 Pa. St. 202.

15. **REVIVAL—DEATH OF HUSBAND.**—Subsequent death of husband does not revive will made by married woman, until republished.—Osgood vs. Breed, 12 Mass. 525.

16. **ANTENUPTIAL CONTRACT.**—Will of feme sole made previous to marriage not revoked at common law, where her power of disposing of her separate property after marriage preserved by antenuptial agreement.—N. Y. Bradish vs. Gibbs, 3 John. Ch. 523. Pa. Barnes vs. Irwin, 2 U. S. (2 Dall.) 199, 1 bk. L. ed. 548, 1 Am. Dec. 278; Barnes vs. Hart, 1 Yeates 221. Wis. In re Ward's Will, 70 Wis. 251, 5 Am. St. Rep. 174, 35 N. W. Rep. 731. Eng. Wright vs. Englefield, 1 Amb. 468; Rippon vs.

Dowling, 3 Amb. 565; Rich vs. Beaumont, 6 Brown Parl. Cas. 152; Logan vs. Bell, 1 Man. G. & S. 872, 50 Eng. C. L. 872; Doe vs. Bird, 2 Nev. & M. 679; Downes vs. Timperon, 4 Russ. 324; Dillon vs. Grace, 2 Sch. & L. 458.

17. Will made by feme sole under agreement with intended husband declaring that property owned by her should be held to her sole and separate use and considered as her separate estate, is not revoked by subsequent marriage, even though state statute may provide that every will of man or woman shall be revoked by his or her marriage, except will made in exercise of power of appointment, when estate thereby appointed would not, in default of such appointment, pass to his or her heir, personal representative, or next of kin.—Stewart vs. Mulholland, 88 Ky. 38, 21 Am. St. Rep. 320, 10 S. W. Rep. 125. See Osgood vs. Bliss, 141 Mass. 474, 55 Am. Rep. 488, 6 N. E. Rep. 527; Barnes vs. Irwin, 2 U. S. (2 Dall.) 199, 1 bk. L. ed. 348, 1 Am. Dec. 278.

18. Will revoked by subsequent marriage not revived by antenuptial contract entered into between husband and wife as to disposition of estate, in ignorance of law that marriage

would revoke will.—Hudnall vs. Ham, 133 Ill. 486, 75 Am. St. Rep. 124, 56 N. E. Rep. 172, 48 L. R. A. 557.

See note 75 Am. St. Rep. 123.

19. Parties named as devisee and legatee under will executed before marriage pursuant to agreement, cannot take under it, unless antenuptial agreement and will, taken and construed together, constitute equitable assignment of property to them enforceable in equity.—Hudnall vs. Ham, 133 Ill. 486, 75 Am. St. Rep. 124, 56 N. E. Rep. 172, 48 L. R. A. 557.

20. POWER OF APPOINTMENT.—Power contained in marriage settlement to appoint by writing or by last will or codicil as follows: "The existing will or codicil to be deemed as appointment until the making of some other appointment," is valid execution of power, and not revoked by marriage.—McMahon vs. Allen, 4 E. D. Smith (N. Y.) 519; Lant's Appeal, 95 Pa. St. 279, 40 Am. Rep. 646.

21. Will made by feme sole pursuant to agreement prior to marriage giving her power to appoint in writing or by will, is good as appointment in equity.—Taylor vs. Rains, 7 Mod. Rep. 148.

§ 1301. **CONTRACT OF SALE NOT A REVOCATION.** An agreement made by a testator, for the sale or transfer of property disposed of by a will previously made, does not revoke such disposal; but the property passes by the will, subject to the same remedies on the testator's agreement, for a specific performance or otherwise against the devisees or legatees, as might be had against the testator's successors, if the same had passed by succession.

History: Enacted March 21, 1872, founded upon § 14 Act April 10, 1850, Stats. 1850, p. 178.

1. Effect of agreement—At law, in equity.
2. Same—Devisee's right to purchase money.
3. Performance—How far enforceable against heirs.
4. Evidence—Parol evidence to prove intent to revoke, how far admissible.

1. **AGREEMENT ENTERED INTO BY TESTATOR TO SELL LAND** not revocation of will previously made at law, although equity might consider it as an absolute disposition.—Hall vs. Bray, 1 N. J. L. (Coxe) 212. See Abney vs. Miller, 2 Atk. 593; Archer vs. Bokenham, 11 Mod. 148; Rider vs. Wager, 2 Pr. Wms. 328; Cotter vs. Laver, 2 Pr. Wms. 623; Willet vs. Sandford, 1 Ves. Sr. 177; Vernon vs. Jones, 2 Vern. 241.

2. Made by testator subsequent to execution of will for sale of real estate gives devisee

right to purchase money.—Langdon vs. Astor, 3 Duer (N. Y.) 477, 605.

3. **PERFORMANCE**—Question whether specific performance of agreement to sell land, made by testator subsequent to execution of his will, whereby he devised life estate with remainder over to his heirs, could be specifically enforced against devisees so as to bar others who may be actually heirs, considered but not decided.—Knight vs. Weatherwax, 7 Paige Ch. (N. Y.) 182. See Nodine vs. Greenfield, 7 Paige Ch. (N. Y.) 544, 84 Am. Dec. 363.

4. **EVIDENCE**—Parol evidence of actual intent to revoke devise or bequest which could not be implied by court from mere knowledge of different situation of testator's family and property at time of making his will and afterwards, is wholly inadmissible.—Adams vs. Winne, 7 Paige Ch. (N. Y.) 97.

§ 1302. **MORTGAGE NOT A REVOCATION OF WILL.** A charge or encumbrance upon any estate, for the purpose of securing the payment of money or the performance of any covenant or agreement, is not a revocation of any will relating to the same estate which was previously executed; but the devise and legacies therein contained must pass, subject to such charge or encumbrance.

History: Enacted March 21, 1872, founded upon § 15 Act April 10, 1850, Stats. 1850, p. 178.

1. Distinction—Mortgage to devisee or stranger.
2. Effect of mortgage—To stranger.
3. Same—To devisee.
4. Same—In trust for creditors.

1. Distinction previously existing between mortgage to devisees and mortgage to stranger is expressly exploded.—*McTaggart vs. Thompson*, 14 Pa. St. 149; *Baxter vs. Dyer*, 5 Ves. 657.

2. Mortgage or other encumbrance imposed upon property by testator subsequent to execution of will, does not revoke same, but property passes to devisee subject to such mortgage or encumbrance.—*Langdon vs. Astor*, 3 Duer (N. Y.) 477, 605.

3. Mortgage to devisee executed by testator subsequent to execution of will amounts to revocation pro tanto.—*McTaggart vs. Thompson*, 14 Pa. St. 149.

4. Mortgages or conveyances in trust for creditors to secure payment of debts amount to revocation only pro tanto.—*Livingston vs. Livingston*, 2 John. Ch. (N. Y.) 148; *Herrington vs. Budd*, 5 Den. (N. Y.) 321, 323; *Parsons vs. Freeman*, 3 Atk. 741; *Lamb vs. Parker*, 2 Vern. 495.

§ 1303. CONVEYANCE, WHEN NOT A REVOCATION. A conveyance, settlement, or other act of a testator, by which his interest in a thing previously disposed of by his will is altered, but not wholly divested, is not a revocation; but the will passes the property which would otherwise devolve by succession.

History: Enacted March 21, 1872.

1. Conveyance—Effect of before code.
2. Devisee—Interest under mortgage to secure purchase money.
3. Revocation—Necessity of alleging.

As to revocation of will by change of testator's circumstances and by sale of property, see monographic note 28 Am. St. Rep. 356-357.

1. Property conveyed, or contracted to be conveyed by testator in his lifetime, does not pass to devisee.—*Bruck vs. Tucker*, 32 Cal. 425, 431 (decided before the code).

2. Devisee takes no interest under mortgage given to testator to secure purchase money.—*Brown vs. Brown*, 16 Barb. (N. Y.) 569; *Vandemark vs. Vandemark*, 26 Barb. (N. Y.) 416; *Langdon vs. Astor*, 16 N. Y. 9, 39; *McNaughton vs. McNaughton*, 34 N. Y. 301, 303.

3. Revocation of will claimed to have been made by conveyance by testator must be alleged in order to entitle party to set aside probate of will upon that ground.—*In re Tillman's Estate* (Cal. Dec. 7, 1892), 31 Pac. Rep. 562.

§ 1304. WHEN IT IS A REVOCATION. If the instrument by which an alteration is made in the testator's interest in a thing previously disposed of by his will expresses his intent that it shall be a revocation, or if it contains provisions wholly inconsistent with the terms and nature of the testamentary disposition, it operates as a revocation thereof, unless such inconsistent provisions depend on a condition or contingency by reason of which they do not take effect.

History: Enacted March 21, 1872.

1. Will—Property upon which operated.
- 2, 3. Same—When revoked by sale.
4. Same—By conveyance to daughter, land devised to son.
5. Same—By proceedings, eminent domain.
6. Voluntary alienation—Devisee, how affected by.
- 7-9. Same—Proceeds, how considered—Bond and mortgage.
- 10-12. When not revoked—Agreement to sell—Devisee subject to mortgage.

As to passing of proceeds of land under a devise of realty, see monographic note by C. W. Phillips 58 L. R. A. 719-722.

1. WILL OPERATES ONLY UPON PROPERTY LEGALLY AND EQUITABLY belonging to testator at time of his death.—*Bruck vs. Tucker*, 32 Cal. 425, 431; *In re Estate Tillman* (Cal. Dec. 7, 1892), 31 Pac. Rep. 563.

2. Revoked by sale and conveyance.—*Crist vs. Crist*, 1 Ind. 570, 50 Am. Dec. 481, 483. See *McNaughton vs. McNaughton*, 41 Barb. (N. Y.) 50, 54; *Beck vs. McGillis*, 9 Barb. (N. Y.) 569, 572; *In re Estate Dowd*, 58 How. Pr. (N. Y.) 107, 109, 8 Abb. N. C. 120.

3. By utter passing away of title from tes-

tator.—*Nutzhorn vs. Sittig*, 70 N. Y. Supp. 287, 34 Misc. Rep. 486.

4. By conveyance by father to daughter of land devised to son, revokes so far as son's devise is construed.—*Hattersley vs. Bissett*, 51 N. J. Eq. (6 Dick.) 597, 40 Am. St. Rep. 532, 29 Atl. Rep. 187.

5. By proceedings under eminent domain whereby property is taken during lifetime of testator.—*Ametrano vs. Downs*, 170 N. Y. 388, 88 Am. St. Rep. 671, 63 N. E. Rep. 340, 58 L. R. A. 719.

6. VOLUNTARY ALIENATION OF PROPERTY BY DEED WORKS REVOCATION of will, so that devisee has no claim to proceeds of sale.—*Ametrano vs. Downs*, 170 N. Y. 388, 88 Am. St. Rep. 671, 63 N. E. Rep. 340, 58 L. R. A. 719.

7. PROCEEDS—HOW CONSIDERED.—Testator devising real estate and selling it before will takes effect makes proceeds personal estate.—*Ametrano vs. Downs*, 170 N. Y. 388, 88 Am. St. Rep. 671, 63 N. E. Rep. 340, 58 L. R. A. 719. See *McNaughton vs. McNaughton*, 34 N. Y. 201.

8. Sale made by testator with bond and

mortgage for purchase money, is revocation of devise, and property and proceeds are personal estate under residuary devise contained in will.—*Adams vs. Winne*, 7 Paige Ch. (N. Y.) 97. See *Emery vs. Union Soc. Savannah*, 79 Me. 334, 342, 9 Atl. Rep. 891; *Peck vs. McGillis*, 9 Barb. (N. Y.) 52; *Barstow vs. Goodwin*, 2 Bradf. (N. Y.) 413, 415.

9. Proceeds of property taken under eminent domain during lifetime of testator will not pass to devisee of such land in lieu thereof.—*Ametrano vs. Downs*, 170 N. Y. 388, 88 Am. St. Rep. 671, 63 N. E. Rep. 340, 58 L. R. A. 719.

10. WHEN NOT RECORDED.—Agreement to sell, no deed being given, does not amount

to revocation.—*Nutzhorn vs. Sittig*, 70 N. Y. Supp. 287, 34 Misc. 486. See *Knight vs. Weatherwax*, 7 Paige Ch. (N. Y.) 182.

11. Conveyance of real estate operates as revocation of real and personal estate pro tanto; that is to say, so far as real estate is concerned.—*Brown vs. Thorndike*, 32 Mass. (15 Pick.) 388.

Where will is of personal and real property it is revoked pro tanto, but stands as a will of personal property.—*Ibid*.

12. Devise of property subject to mortgage is not revoked by contract for sale made by testator in his lifetime and completed by executors after his death.—*Nutzhorn vs. Sittig*, 70 N. Y. Supp. 287, 34 Misc. 486.

§ 1305. REVOCATION OF CODICILS. The revocation of a will revokes all its codicils.

History: Enacted March 21, 1872.

1. Generic term "will"—What included in.
- 2, 3. Codicil—How far dependent upon will—Implied revocation.
4. Same—Effect of slightly modifying will.
- 5, 6. Destruction of will—Effect of.
7. Same—Intention—How ascertained.
8. Revocation—Presumption of revocation, how repelled.
- 9, 10. Codicil—When deemed independent.

1. GENERIC TERM "WILL" INCLUDES codicil, and legal provisions relating to wills must be understood as embracing codicils.—*Fry vs. Morrison*, 159 Ill. 244, 42 N. E. Rep. 774.

2. CODICIL IS PRIMA FACIE DEPENDENT UPON WILL, and cancellation of will is implied revocation of codicil.—In re *Estate Brookman*, 33 N. Y. Supp. 575, 11 Misc. 675.

3. So connected with will by reason of legatees in codicil being "two trustees" named in and appointed by will, is revoked by revocation of such will, and no longer retains character as part of will, as will and codicil must be taken as one instrument.—In re *Brookman*, 33 N. Y. Supp. 575, 11 Misc. 675. See *Brown vs. Clark*, 77 N. Y. 369; *Medlycott vs. Assheton*, 2 Add. Ecc. 229; *Coppin vs. Dillon*, 4 Hagg. Ecc. 369.

4. Which merely modifies the will in few particulars, and in other respects ratifies and confirms it, must be taken as part of will and of same instrument, and both must be considered as will, and revocation of will therefore works revocation of codicil.—In re *Brookman*, 33 N. Y. Supp. 575, 11 Misc. 675; *Brown vs. Clark*, 77 N. Y. 369.

5. DESTRUCTION OF WILL BY TESTATOR WORKS revocation of codicil where same is

dependent upon and inseparably blended with the provisions of will.—In re *Brookman*, 33 N. Y. Supp. 575, 11 Misc. 675. See *Medlycott vs. Assheton*, 2 Add. Ecc. 229; *Coppin vs. Dillon*, 4 Hagg. Ecc. 369.

See pars. 2-4 this note.

6. Provisions of codicil which are inseparably blended with those of will so that such codicil standing alone, as separate instrument, would utterly fail to make intelligent or total disposition of estate, and would not be legal entity independent of existence of will, must fall with revocation of will.—In re *Brookman*, 33 N. Y. Supp. 575, 11 Misc. 675; *Brown vs. Clark*, 77 N. Y. 369.

7. Intention.—Surrounding circumstances must be taken into consideration in solving question whether testator intended to revoke the whole or only a part of the instrument.—In re *Estate Brookman*, 33 N. Y. Supp. 575, 11 Misc. 675.

8. REVOCATION.—Presumption that arises that revocation of will revokes codicil, may be repelled by showing that testator intended codicil to operate notwithstanding revocation of will.—In re *Brookman*, 33 N. Y. Supp. 575, 11 Misc. 675. See *Medlycott vs. Assheton*, 2 Add. Ecc. 229.

See par. 6 this note.

9. Codicil may constitute a will in itself.—*Ellis vs. Dick*, 165 Ill. 637, 46 N. E. Rep. 710. See *Fry vs. Morrison*, 159 Ill. 244, 42 N. E. Rep. 774.

10. Codicil which is independent of and unconnected with will may be established though will may be held invalid, question being one altogether of intention.—In re *Brookman*, 33 N. Y. Supp. 575, 11 Misc. 675. See *Medlycott vs. Assheton*, 2 Add. Ecc. 229.

§ 1306. AFTER-BORN CHILD, UNPROVIDED FOR, TO SUCCEED. Whenever a testator has a child born after the making of his will, either in his lifetime or after his death, and dies leaving such child [1] unprovided for by any settlement, and [2] neither provided for nor in any way mentioned in his will, the child succeeds to the same portion of the testator's real and personal property that he would have succeeded to if the testator had died intestate. But such succession does not impair or affect the validity of any sale of property made by

authority of such will in accordance with the provisions of section fifteen hundred and sixty-one of the Code of Civil Procedure.

History: Enacted March 21, 1872, founded upon § 16 Act April 10, 1850, Stats. 1850, p. 178; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 402, held unconstitutional, see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXLVIII, p. 606.

1. Applied, cited, construed, referred to, etc.
- 2-4. Construed with § 1307 as showing and declaring position of pretermitted child.
- 5-14. Position of posthumous child—Right to take.
15. Same—How affected by codicil.
16. Same—When takes fee simple.
17. Statutory remedies—Effect of.
- 18, 19. Term "children"—How construed.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: In re Estate Wardell, 57 Cal. 484, 490 (construed with § 1307); Smith vs. Olmstead, 88 Cal. 582, 585, 22 Am. St. Rep. 336, 26 Pac. Rep. 521, 12 L. R. A. 46 (construed and applied); Painter vs. Painter, 113 Cal. 371, 376, 45 Pac. Rep. 689 (construed and applied); In re Estate Smith, 145 Cal. 118, 120, 78 Pac. Rep. 369 (construed and applied).

As to right of unborn child to take by descent, devise, and distribution, see ante § 29 note pars. 67-134, and monographic note 12 Am. St. Rep. 99.

As to what is a provision in will for after-born children, see monographic note 15 Am. St. Rep. 592-595.

2. **CONSTRUED WITH § 1307 AS SHOWING CHILD SUCCEEDS** to the same portion of the testator's real and personal property that he would have succeeded to if the testator had died intestate.—In re Estate Wardell, 57 Cal. 484, 489.

3. **With § 1307 as declaring that pretermitted child succeeds immediately** by operation of law to same portion of testator's real property as if no will had been made, and that as to such portion the testator is to be regarded as dying intestate, and its succession is directed by law and not by will.—Smith vs. Olmstead, 88 Cal. 582, 585, 22 Am. St. Rep. 336, 26 Pac. Rep. 521, 12 L. R. A. 46.

4. **Legal consequence of this construction** would show that every provision in will directly or indirectly attempting to dispose of such portion of estate, except for discharge of decedents, or other charges accruing in due course of administration, is inoperative as against such child.—Smith vs. Olmstead, 88 Cal. 582, 585, 22 Am. St. Rep. 336, 26 Pac. Rep. 521, 12 L. R. A. 46.

5. **POSITION OF POSTHUMOUS CHILD.**—Posthumous children not provided for by will are provided for by law.—Bancroft vs. Ives, 69 Mass. (3 Gray) 367, Warner vs. Beach, 70 Mass. (4 Gray) 162, 164.

6. **Will considered as not existing** so far as posthumous child is concerned.—In re Estate Smith, 145 Cal. 118, 121, 78 Pac. Rep. 369.

7. **Entitled equally with those born in testator's lifetime.**—Jenkins vs. Freyer, 4 Paige Ch. (N. Y.) 47, 52.

8. **Entitled to one half of common or separate property under devise of all to mother**, no

provision to contrary being contained in will of its father.—In re Estate Buchanan, 8 Cal. 507, 509.

9. **Entitled to same portion of corpus of estate** which he would have been entitled to had father died intestate.—Painter vs. Painter, 113 Cal. 371, 376, 45 Pac. Rep. 689. See Mich. Catholic Mut. Ben. Assoc. vs. Firnane, 50 Mich. 82, 14 N. W. Rep. 707. N. Y. Mitchell vs. Blain, 5 Paige Ch. 588; Sanford vs. Sanford, 61 Barb. 292, 295; Rockwell vs. Geery, 4 Hun 606, 611; Smith vs. Robertson, 89 N. Y. 555. Fed. Chicago, B. & Q. R. Co. vs. Wasserman, 22 Fed. Rep. 372, 377.

10. **Entitled to take same share as it would have taken if father died intestate** when not provided for in will of its father leaving everything to mother, will manifesting no intention to exclude such child.—Chicago, B. & Q. R. Co. vs. Wasserman, 22 Fed. Rep. 372, 376. See Me. Waterman vs. Hawkins, 63 Me. 156. Pa. Walker vs. Hall, 34 Pa. St. 483; Hollingsworth's Appeal, 51 Pa. St. 518. Wis. Breesee vs. Stiles, 23 Wis. 120.

11. **Not provided for or mentioned in will of testator** devising partnership interest to his partner, succeeds to the same portion of his father's estate that he would have succeeded to had he died intestate.—Painter vs. Painter, 113 Cal. 371, 376, 45 Pac. Rep. 689.

12. **Succeeds immediately, by operation of law**, subject to provisions of § 1308.—In re Estate Smith, 145 Cal. 118, 121, 78 Pac. Rep. 369.

13. **Takes same interest in estate as if father had died intestate**, under will leaving property to wife and making no mention whatever of children of either of them, and showing omission to provide for them was intentional, children taking as tenants in common with wife subject to administration, exact proportion of interest of each depending upon question whether real property was community or separate property of decedent.—In re Estate Grider, 81 Cal. 571, 575, 22 Pac. Rep. 908. See Pearson vs. Pearson, 46 Cal. 609; In re Estate Wardell, 57 Cal. 484.

14. **Testator presumed to have died intestate as to portion taken by after-born child.**—In re Estate Smith, 145 Cal. 118, 121, 78 Pac. Rep. 369. See Smith vs. Olmstead, 88 Cal. 582, 22 Am. St. Rep. 336, 26 Pac. Rep. 521, 12 L. R. A. 46.

15. **CODICIL REFERRING TO AND SPECIFICALLY NAMING** and enumerating sons who were living at time it was made cannot affect rights of after-born children to take under provisions of code.—Painter vs. Painter, 113 Cal. 371, 376, 45 Pac. Rep. 689.

16. **ESTATE DEVISED TO WIFE FOR LIFE WITH REMAINDER TO CHILDREN** and their heirs forever, and if one, then to such child and its heirs forever, with remainder ever in

default of issue, vests estate in fee simple in child at its birth subject to be opened and let in after-born children.—*Doe vs. Perry*, 3 Durn. & E. 484 (3 T. R.), 1 Rev. Rep. 757.

17. REMEDIES GIVEN BY STATUTE AGAINST DEVISEE to recover portion of property where only portion descends to after-born child, do not operate to subject estate of such child to power of sale contained in will or to confine its remedies to pursuit of proceeds of sale.—*Chicago, B. & Q. R. Co. vs. Wasserman*, 22 Fed. Rep. 872, 877. See *Smith vs. Robertson*, 39 N. Y. 555.

18. TERM "CHILDREN"—Was a statutory and not common-law meaning, and includes all children upon whom has been conferred by law capacity of inheritance.—*In re Estate Wardell*, 57 Cal. 484, 491.

19. Courts not restricted to meaning of word as at common law, otherwise all children born of unlawful marriage, all children by adoption or acknowledgment of their father, and all children whose parents intermarry subsequent to their birth, will be excluded from rights of inheritance or succession.—*In re Estate Wardell*, 57 Cal. 484, 491.

§ 1307. CHILDREN OR ISSUE OF CHILDREN OF TESTATOR UNPROVIDED FOR BY HIS WILL [TO SUCCEED]. When any testator omits to provide in his will [1] for any of his children, or [2] for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, has the same share in the estate of the testator as if he had died intestate, and succeeds thereto as provided in the preceding section. But such succession does not impair or affect the validity of any sale of property made by authority of such will in accordance with the provisions of section fifteen hundred and sixty-one of the Code of Civil Procedure.

History: Enacted March 21, 1872, founded upon § 17 Act April 10, 1850, Stats. 1850, p. 178; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 408, held unconstitutional, see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXLVIII, p. 606.

1. Applied, cited, construed, referred to, etc.
- 2-13. Construed with reference to its application, meaning, modification, etc.
- 14, 15. Object of statute—Protection—Not compulsion.
- 16-19. Position of child—When legitimate.
- 20, 21. Same—When illegitimate.
- 22-27. Position of grandchild—Upon what dependent.
28. Same—Presumption as to forgetting—When not rebutted.
- 29-31. Intention to omit—How indicated.
- 32-34. Same—How ascertained from will and codicil.
- 35-40. Same—When shown—Illustrations.
- 41, 42. Same—When not shown.
43. Evidence—Declarations of deceased—How far admissible.
44. Parol evidence—How far admissible to prove intention.
45. Presumption—As to intention—Rebuttal of.
46. Probate—How far conclusive.
47. Words and phrases—"Omit to provide."

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *In re Estate Wardell*, 57 Cal. 484, 490, 491 (construed and applied); *In re Estate Grider*, 81 Cal. 571, 575, 22 Pac. Rep. 908 (construed and applied); *Smith vs. Olmstead* (Cal. Jan. 25, 1890), 22 Pac. Rep. 1143 (cited and applied); *In re Estate Stevens*, 83 Cal. 322, 328, 17 Am. St. Rep. 252, 23 Pac. Rep. 879 (construed and applied); *In re Estate Barter*, 86 Cal. 441, 443, 25 Pac. Rep. 15 (construed); *Smith vs. Olmstead*, 88 Cal. 582, 585, 22 Am. St. Rep. 336, 26 Pac. Rep. 521, 12 L. R. A. 46 (construed and applied); *Rhoton vs. Blevin*, 99 Cal. 645, 647, 34 Pac. Rep. 513 (construed and applied); *In re Salmon*, 107 Cal.

614, 616, 48 Am. St. Rep. 164, 40 Pac. Rep. 1039 (construed and applied); *In re Estate Callaghan*, 119 Cal. 571, 574, 575, 51 Pac. Rep. 860, 39 L. R. A. 639 (construed and applied); *In re Estate Ross*, 140 Cal. 282, 291, 73 Pac. Rep. 976 (construed and applied); *In re Estate Wardell*, *Myrick's Prob. Rep.* 224, 225 (applied, cited, and construed).

As to children omitted from will, see monographic note 12 Am. St. Rep. 97.

As to gift to a class such as "children" and who are entitled to take, see monographic note 73 Am. St. Rep. 413-440.

As to right of adopted children, see monographic note 12 Am. St. Rep. 100.

As to right of illegitimate children, see monographic note 12 Am. St. Rep. 101.

As to rights of child or issue unintentionally omitted from will, see monographic note 39 Am. Dec. 740-744.

As to when will deemed to furnish sufficient evidence of intentional omission, see monographic note 39 Am. Dec. 740-744.

As to who are entitled to share as children of a decedent, see monographic note 12 Am. St. Rep. 80, 97-113.

2. CONSTRUED AS APPLYING SOLELY TO DEVISES, and not to legacies.—*In re Estate Ross*, 140 Cal. 282, 291, 73 Pac. Rep. 976.

3. As dealing only with omissions, and as plainly and clearly declaring what effect of omissions to provide for child or issue of deceased child shall be.—*In re Estate Ross*, 140 Cal. 282, 291, 73 Pac. Rep. 976.

4. As expressing no intention to in any way limit disposing power of testator or to compel him to provide for any child.—*In re Estate Callaghan*, 119 Cal. 571, 574, 51 Pac. Rep. 860, 39 L. R. A. 639.

5. As intending to put child or children of deceased children on same footing at time when will was made and published and when intentions of testator are to control in construction of will.—In re Estate Barter, 86 Cal. 441, 444, 25 Pac. Rep. 15.

6. As meaning that child succeeds to same portion of testator's real and personal estate that he would have succeeded to if testator had died intestate.—In re Estate Wardell, 57 Cal. 484, 490.

7. As not applying to mere mistake made in wills.—In re Estate Ross, 140 Cal. 282, 291, 73 Pac. Rep. 976.

8. As not intended as limitation of power to dispose of property, but as applying only to case where child of decedent is unknown or forgotten, or for some reason unintentionally overlooked.—In re Estate Callaghan, 119 Cal. 571, 574, 51 Pac. Rep. 860, 39 L. R. A. 639.

9. As not modifying common-law rule which limited investigation for determining testator's intention to face of will.—In re Estate Salmon, 107 Cal. 614, 617, 48 Am. St. Rep. 164, 40 Pac. Rep. 1080.

10. As not protecting any grandchildren except those who as presumptive heirs at law would be entitled, had no will been made, to inherit at time will was published.—In re Estate Barter, 86 Cal. 441, 443, 25 Pac. Rep. 15.

11. As putting child or children, and issue of any deceased child or children, in same category so far as if omitted to be provided for in will; they are entitled to share in estate as though no will had been made, unless it appears omission was intentional.—Rhoton vs. Blevin, 99 Cal. 645, 647, 34 Pac. Rep. 513.

12. So as to allow illegitimate child to take under will of mother.—In re Estate Wardell, 57 Cal. 484, 492. See Bennett vs. Toler, 15 Gratt. (Va.) 588, 78 Am. Dec. 638; Garland vs. Harrison, 3 Leigh (Va.) 368; Rodgers vs. Weller, 5 Biss. C. C. 166, 20 Fed. Cas. 1130.

13. With § 1337 as giving illegitimate children same right to take and inherit through mother as legitimate children.—In re Estate Wardell, Myrick's Prob. Rep. 224. See ante § 1306 note pars. 2-4.

14. OBJECT OF STATUTE IS TO PROTECT CHILDREN from omission or oversight, which not unfrequently arises from sickness, old age, or other infirmity or peculiar circumstances under which will is executed; but when children are present in mind of testator, and fact that they are mentioned by him is conclusive evidence of this, statute affords no protection if provision is not made for them, and inference follows that no provision was intended.—Payne vs. Payne, 18 Cal. 292. See Terry vs. Foster, 1 Mass. 146; Wild vs. Brewer, 2 Mass. 570; Church vs. Crocker, 3 Mass. 17, 18; Wilder vs. Goss, 14 Mass. 357.

15. Not compelling of parents to make testamentary provision for their children, but prevention of consequences of forgetfulness or oversight, and to produce intestacy only when children or descendants of such children are unknown or forgotten and thus unintentionally omitted.—Gerrish vs. Gerrish, 3 Oreg. 351, 354,

34 Am. Rep. 585. See Hockensmith vs. Slusher, 26 Mo. 237.

16. POSITION OF CHILD—LEGITIMATE.—Pretermitted child takes same share in estate and holds by same title as if testator had died intestate.—Pearson vs. Pearson, 46 Cal. 609 (decided under §§ 16, 17 of the act concerning wills, in force prior to adoption of code).

17. Takes by succession like one born after the making of the will.—In re Estate Wardell, 57 Cal. 484, 490.

18. Minor children not provided for in will, where it does not show that omission to provide for them was intentional, cannot be cut out by purchaser upon sale by wife under absolute power to sell "without application to any court and without approval or authority of any court whatever," and where such sale is not shown to be necessary in order to pay family allowances or debts of decedent outstanding; or debts, expenses for charges of administration, or legacies.—Smith vs. Olmstead, 33 Cal. 552, 555, 22 Am. St. Rep. 336, 26 Pac. Rep. 521, 12 L. R. A. 46.

19. Amendment of 1905 renders holding of court in above case inapplicable.

20. Illegitimate children.—Omission to provide for illegitimate child by its mother in her will does not affect its legal rights unless intention to exclude was expressed on face of will.—In re Estate Wardell, 57 Cal. 484, 492. See In re Estate Garraud, 35 Cal. 336; In re Estate Utz, 43 Cal. 200; Bush vs. Lindsey, 44 Cal. 121.

21. Term "children" relates to status and not to origin, to capacity to inherit, and not to legality of relations which may have existed between those of whom they have been begotten.—In re Estate Wardell, 57 Cal. 484, 491.

22. POSITION OF GRANDCHILD.—Right of grandchild to be mentioned in grandfather's will where father is dead is not dependent on whether grandfather believed or did not believe that father was alive, but solely upon fact whether at time will was made and published he was dead.—In re Estate Ross, 140 Cal. 282, 291, 73 Pac. Rep. 976.

23. Fact that grandchildren were omitted from will in which their mother, daughter-in-law of testator, was mentioned, does not show that the omission was intentional.—In re Estate Salmon, 107 Cal. 614, 617, 48 Am. St. Rep. 164, 40 Pac. Rep. 1080.

24. Fact that legacy is left to deceased father of grandchild who was unprovided for, such grandchild taking nothing as lineal descendant of her father, does not affect its rights as pretermitted heir.—In re Estate Ross, 140 Cal. 282, 291, 73 Pac. Rep. 976.

25. Fact that legacy is left to child who was dead, and which therefore lapses, is not material upon question of omission to provide for grandchildren.—In re Estate Ross, 140 Cal. 282, 291, 73 Pac. Rep. 976.

26. Fact that testator mentions his son who was dead, and who in no proper sense could be his heir, does not meet requirements of law that his will must show intentional omission

to provide for issue of son.—In re Estate Ross, 140 Cal. 282, 291, 78 Pac. Rep. 976.

27. **Mention of daughter-in-law, widow of deceased son, not sufficient to show that grandchildren were in testator's mind.**—In re Estate Salmon, 107 Cal. 614, 617, 48 Am. St. Rep. 164, 40 Pac. Rep. 1030.

28. **Presumption that grandchildren were forgotten is not rebutted by fact that their mother, daughter-in-law of testator, was mentioned in the will.**—In re Estate Salmon, 107 Cal. 614, 617, 48 Am. St. Rep. 164, 40 Pac. Rep. 1030.

29. **INTENTION TO OMIT.—Will must show upon its face and must indicate an intent directly or by implication equally as strong that testator had person omitted in his mind, and, having him so in his mind, omitted to make any mention of him, in order to cut off such person from taking under will.**—In re Estate Stevens, 83 Cal. 322, 329, 330, 17 Am. St. Rep. 252, 23 Pac. Rep. 379.

30. **Face of will must be looked to in order to determine question whether or not parties were intentionally omitted therefrom by testator.**—Rhoton vs. Blevin, 99 Cal. 645, 647, 34 Pac. Rep. 513.

31. **Words of will must show that testator had person omitted in his mind, and having him so in his mind, has omitted him from provisions of his will.**—Rhoton vs. Blevin, 99 Cal. 645, 647, 34 Pac. Rep. 513. See In re Estate Garraud, 35 Cal. 336, 339; In re Estate Stevens, 83 Cal. 322, 17 Am. St. Rep. 252, 23 Pac. Rep. 379.

32. **Codicil referring to children is to be read along with will where they are omitted in order to determine question whether omission in will was intentional or not.**—Payne vs. Payne, 18 Cal. 292, 302.

33. **Codicil referring to will operates as its republication, and two are to be regarded as forming but one instrument speaking from date of codicil.**—Payne vs. Payne, 18 Cal. 292, 302. See Haven vs. Foster, 31 Mass. (14 Pick.) 534, 543; Van Cortlandt vs. Kip, 1 Hill (N. Y.) 590, 591.

34. **Mention of child in codicil shows that there was intentional omission in will where such child is not mentioned therein.**—Payne vs. Payne, 18 Cal. 292, 302.

35. **WHEN SHOWN.—Child named in will without legacy being given to him, or other provision made for him, sufficient to exclude him from distributive share under statute as showing intention to omit.**—Wilson vs. Fosket, 47 Mass. (6 Met.) 400, 39 Am. Dec. 736, 740. See Wild vs. Brewer, 2 Mass. 570; Church vs. Crocker, 3 Mass. 17; Wilder vs. Goss, 14 Mass. 357.

36. **Devise to children of daughter, describing them, without giving legacy to daughter, held to show an intention to omit.**—Wilson vs. Fosket, 47 Mass. (6 Met.) 400, 39 Am. Dec. 736, 740.

37. **Grandchildren whose parents are living at time will made, and are intentionally omitted therefrom, are not within provisions of statute.**—In re Estate Barter, 36 Cal. 441, 444, 25 Pac. Rep. 15.

38. **Living at time will made and was intentionally omitted therefrom and unprovided for, and therefore not protected by statute, have no rights as heirs.**—In re Estate Barter, 36 Cal. 441, 444, 25 Pac. Rep. 15.

39. **Intention to omit shown by will containing provision as follows: "In thus bequeathing all my estate to my wife, to the exclusion of all my children, I am moved by no want of paternal affection for any of said children, but by the belief that their own interests will be better served thereby, and well knowing that my wife will make the best use and disposition of the estate which her industry has largely contributed to acquire."**—Rhoton vs. Blevin, 99 Cal. 645, 646, 34 Pac. Rep. 513.

40. **Omission to mention children, but referring to and adopting another will in which they are named, shows sufficient intention to omit.**—Gerrish vs. Gerrish, 8 Oreg. 351, 34 Am. Rep. 585.

41. **WHEN NOT SHOWN.—Fact that testator mentions one closely related by blood or intimately associated in family relations with omitted heir, does not show, as matter of construction, that omitted one was in his mind and that omission was intentional.**—In re Estate Salmon, 107 Cal. 614, 617, 48 Am. St. Rep. 164, 40 Pac. Rep. 1030. See In re Estate Utz, 43 Cal. 200; Bush vs. Lindsey, 44 Cal. 121; In re Estate Stevens, 83 Cal. 322, 17 Am. St. Rep. 252, 23 Pac. Rep. 379.

42. **Naming deceased daughter but not her children, sufficient provision for such grandchildren, who were represented by their mother, who was in testator's mind at time although dead.**—Guitar vs. Gordon, 17 Mo. 408. See Beck vs. Metz, 25 Mo. 70; McCourtney vs. Mathes, 47 Mo. 533; Block vs. Block, 3 Ohio 495.

See post § 1308 para. 6-8 note.

43. **EVIDENCE.—Declarations made by testator contemporaneous with writing and execution of his will showing that his children were intentionally omitted are inadmissible.**—In re Estate Stevens, 83 Cal. 322, 328, 17 Am. St. Rep. 252, 23 Pac. Rep. 379. See In re Estate Garraud, 35 Cal. 336, 339; In re Estate Utz, 43 Cal. 201; Bush vs. Lindsey, 44 Cal. 121; In re Estate Wardell, 57 Cal. 484; In re Estate Salmon, 107 Cal. 614, 616, 48 Am. St. Rep. 164, 40 Pac. Rep. 1030; In re Estate Callaghan, 119 Cal. 571, 574, 51 Pac. Rep. 860, 39 L. R. A. 689; Bradley vs. Bradley, 24 Mo. 311; Pounds vs. Dale, 48 Mo. 270; Chase vs. Chase, 6 R. I. 607.

44. **Parol evidence admissible to prove intention to exclude child, for reason that such evidence is not offered to control the written instrument, as the party claiming distributive share claims under provisions of statute and not under will, question whether he was omitted by design or accident being an issue of strong character not necessarily conflicting with tenor of will.**—Wilson vs. Fosket, 47 Mass. (6 Met.) 400, 39 Am. Dec. 736, 740.

45. **Presumption that omission was unintentional may be rebutted when tenor of will or any part of it indicates that child or grandchildren are not forgotten.**—Gerrish vs. Gerrish, 8 Oreg. 351, 354, 34 Am. Rep. 585. See Hockensmith vs. Slusher, 26 Mo. 237.

46. Probate of will is conclusive only as to its due execution, and does not determine title of property which is claimed under it.—Chicago, B. & Q. R. Co. vs. Wasserman, 22 Fed. Rep. 872, 877. See Pettit vs. Black, 18 Neb. 142, 13 N. W. Rep. 841; Evans vs. Anderson, 15 Ohio St. 324.

47. WORDS AND PHRASES.—Words "omit to provide" mean simply an omission to make provision in the will, and have no reference to the pecuniary value of such provision.—In re Estate Callaghan, 119 Cal. 571, 574, 51 Pac. Rep. 860, 39 L. R. A. 639.

§ 1308. SHARE OF AFTER-BORN CHILD, OUT OF WHAT PART OF ESTATE TO BE PAID. When any share of the estate of a testator is [1] assigned to a child born after the making of a will, or [2] to a child, or [3] the issue of a child, omitted in the will, as hereinbefore mentioned, the same must first be taken from the estate not disposed of by the will, if any; if that is not sufficient, so much as may be necessary must be taken from all the devisees or legatees, in proportion to the value they may respectively receive under the will, unless the obvious intention of the testator in relation to some specific devise or bequest, or other provision in the will, would thereby be defeated; in such case, such specific devise, legacy, or provision, may be exempted from such apportionment, and a different apportionment, consistent with the intention of the testator, may be adopted.

History: Enacted March 21, 1872, founded upon § 18 Act April 10, 1850, Stats. 1850, p. 178.

1. Applied, cited, construed, referred to, etc.
2. Construed with reference to meaning.
- 3-5. Contribution—Extent to which child entitled.
- 6-8. Intention to omit—Specific language as showing.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: In re Estate Ross, 140 Cal. 282, 292, 78 Pac. Rep. 976 (construed and applied); In re Estate Smith, 145 Cal. 118, 121, 122, 78 Pac. Rep. 369 (construed and applied).

2. CONSTRUED AS MEANING that all legacies and devises, whatever their character, must contribute to share of posthumous child, unless obvious intention of testator in relation to some particular legacy or devise would be thereby defeated.—In re Estate Smith, 145 Cal. 118, 122, 78 Pac. Rep. 369.

3. CONTRIBUTION.—Devises and legacies must contribute in proportion to value to make up share of posthumous child not intentionally omitted from will.—In re Estate Smith, 145 Cal. 118, 121, 78 Pac. Rep. 369. See In re Estate Ross, 140 Cal. 282, 293, 78 Pac. Rep. 976.

4. EXEMPTION OF SPECIFIC DEVISE is only warranted when obvious intention of

testator in relation to it would be defeated if contribution required.—In re Estate Ross, 140 Cal. 282, 293, 78 Pac. Rep. 976. In re Estate Smith, 145 Cal. 118, 121, 78 Pac. Rep. 369.

5. FACT THAT ONE LEGACY IS SPECIFIC AND THAT ANOTHER IS IN ITS NATURE RESIDUARY, does not show obvious intention contemplated under § 1308.—In re Estate Smith, 145 Cal. 118, 121, 78 Pac. Rep. 369.

6. INTENTION.—Obvious intention must appear from language in which specific devise was created or from the general terms of the will.—In re Estate Ross, 140 Cal. 282, 293, 78 Pac. Rep. 976.

7. Distinguishing: Boven vs. Hoxie, 137 Mass. 530, upon ground that Massachusetts statute, although generally similar in its provisions, says nothing about "obvious intention."

8. Mere fact that testatrix was about to give birth to child, is not sufficient to show that she must have had the child in mind and must have presumed to have known that such child, if born alive, would, under law, succeed, nor to show obvious intention to omit such child.—In re Estate Smith, 145 Cal. 118, 123, 78 Pac. Rep. 369. See ante § 1307 pars. 29-42 note.

§ 1309. ADVANCEMENT DURING LIFETIME OF TESTATOR. If such [1] children, or [2] their descendants, so provided for, had an equal proportion of the testator's estate bestowed on them in the testator's lifetime, by way of advancement, they take nothing in virtue of the provisions of the three preceding sections.

History: Enacted March 21, 1872, founded upon § 19 Act April 10, 1850, Stats. 1850, p. 179.

As to advancements, see post §§ 1351, 1395-1399 and notes, and Code Civ. Proc. § 1386 and note.

§ 1310. ON DEATH OF LEGATEE, BEFORE TESTATOR, LINEAL DESCENDANTS TAKE ESTATE. When any estate is devised or bequeathed to any child, or other relation of the testator, and the devisee or legatee dies before the testa-

tor, leaving lineal descendants, such descendants take the estate so given by the will, in the same manner as the devisee or legatee would have done had he survived the testator.

History: Enacted March 21, 1872, founded upon § 20 Act April 10, 1850, Stats. 1850, p. 179; amended March 18, 1905, Stats. and Amdts. 1905, c. CLV, p. 150.

1. Applied, cited, construed, referred to, etc.
- 2-5. Construed with reference to application, limitation, etc.
6. Distinguished from § 1343.
- 7, 8. Relation—What included in term.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in:** In re Estate Sutro, 139 Cal. 87, 89, 72 Pac. Rep. 827 (construed and applied with other sections); In re Estate Ross, 140 Cal. 282, 289, 290, 73 Pac. Rep. 976 (construed and applied).

2. **CONSTRUED AS APPLICATION** solely to devisees, and not as applying to legacies.—In re Estate Ross, 140 Cal. 282, 290, 73 Pac. Rep. 976.

3. **As limited to devise.**—In re Estate Ross, 140 Cal. 282, 290, 73 Pac. Rep. 976.

4. **As not applying to lapsed legacy to de-**

ceased child.—In re Estate Ross, 140 Cal. 282, 293, 73 Pac. Rep. 976.

5. **With § 1343 as lapsing all devisees and legacies,** where the devisee or legatee dies before testator, except as protected by this section.—In re Estate Ross, 140 Cal. 282, 290, 73 Pac. Rep. 976.

6. **DISTINGUISHED** from § 1343.—In re Estate Ross, 140 Cal. 282, 290, 72 Pac. Rep. 976.

7. **RELATION.**—Terms “any child or other relation of testator” to include only relation connected by consanguinity and not those connected by affinity.—In re Estate Pfeulb, 48 Cal. 643, 644. See *Storer vs. Whitney*, 1 Pa. St. 506.

8. **Wife not relation of husband** within meaning of statute so as to allow son by former marriage to take, by virtue of statute, bequest to her by her husband.—*Esty vs. Clark*, 101 Mass. 36.

§ 1311. **DEVISES OF LAND, HOW CONSTRUED.** Every devise of land in any will conveys all the estate of the devisor therein, which he could lawfully devise, unless it clearly appears by the will that he intended to convey a less estate.

History: Enacted March 21, 1872, founded upon § 21 Act April 10, 1850, Stats. 1850, p. 179.

1-3. **Construction—Will—How construed** with reference to property.

4-6. **When entire estate passes—Illustrations.**

7-11. **Devise of another's property—Effect of acceptance of gift.**

As to devise of community property, see post §§ 1401, 1402 and notes.

As to devise of all one's estate, see post § 1331 and note.

As to property passing subject to debts, see post §§ 1359, 1363 and notes.

As to right of election under will in general, and effect thereof, see §§ 1401, 1402 and note.

As to when will raises duty of election by widow, see 11 Am. & Eng. Encyc. of L. (2d ed.) 81-96.

1. **CONSTRUCTION OF WILL.**—Reference made by testator in his will to actually existing state of things will be held to refer to date of his will, and not to time of his death.—In re Estate Pearsons, 99 Cal. 30, 34, 33 Pac. Rep. 751.

2. **Will construed as passing only such portion of property as belongs to testator** where he holds jointly with others.—In re Estate Pearsons, 99 Cal. 30, 35, 33 Pac. Rep. 751.

3. **Testator cannot be presumed to design disposition of property which did not belong to him** where there is no manifest intention to the contrary in the will.—*Morrison vs. Bowman*, 29 Cal. 337, 350; In re Estate Gilmore,

31 Cal. 240, 242, 22 Pac. Rep. 655; In re Estate Smith, 108 Cal. 115, 119, 40 Pac. Rep. 1037.

4. **DEVISE OF CENTER OR OTHER SECTION OF ENTIRE AND HOMOGENEOUS THING** with all other sections pertaining thereto, passes whole.—*Bruck vs. Tucker*, 32 Cal. 425, 429.

5. **Devise of “four-mill with land** pertaining thereto, half league, more or less,” passes entire tract where there was no evidence to show that any of land lying between mill, taken as center, and exterior limits of unsold section described, had any special relations to business carried on at mill.—*Bruck vs. Tucker*, 32 Cal. 425, 429.

6. **Devise for benefit of daughter and grandsons, sons of deceased son, giving widow of another deceased son privilege of possession of premises included in devise, gives devisee title in fee, subject to widow's life interest.**—*Bernal vs. Wade*, 46 Cal. 663, 667.

7. **DEVISE OF ANOTHER'S PROPERTY.**—Acceptance of bequest or devise under will disposing of property to third party, confirms disposition and works election to take.—*Noe vs. Splivalo*, 54 Cal. 207, 209.

8. **Operates to give effect to will as entire disposition by testator, and is confirmation of disposition made by will.**—*Morrison vs. Bowman*, 29 Cal. 337, 350; *Etcheborne vs. Auzeais*, 45 Cal. 121; *Eproson vs. Wheat*, 53 Cal. 715; *Noe vs. Splivalo*, 54 Cal. 207, 209; In re *Stewart*, 74 Cal. 98, 104, 15 Pac. Rep. 445; In re *Estate*

Gilmore, 81 Cal. 240, 243, 22 Pac. Rep. 655; In re Estate Smith, 108 Cal. 115, 40 Pac. Rep. 1037; In re Estate Lufkin, 131 Cal. 291, 293, 63 Pac. Rep. 469; Smithsonian Inst. vs. Meech, 169 U. S. 398, bk. 42 L. ed. 793, 18 Sup. Ct. Rep. 396.

9. Works election to take such benefits and estops him from claiming property so disposed of.—Morrison vs. Bowman, 29 Cal. 337, 347; Noe vs. Splivalo, 54 Cal. 207, 209.

10. By wife of devise under will of her husband of provision made for by will, does not work an election to take which will bar her rights in community property where there is no

such manifest intent made by the will.—In re Estate Gilmore, 81 Cal. 240, 243, 22 Pac. Rep. 655. See Beard vs. Knox, 5 Cal. 252, 63 Am. Dec. 125; Payne vs. Payne, 18 Cal. 291, 301; In re Estate Silvey, 42 Cal. 210; King vs. Lagrange, 50 Cal. 328, 331; In re Estate Frey, 52 Cal. 658.

As to when will raises duty to elect, see 11 Am. & Eng. Encyc. of L. (2d ed.) 81.

11. Party cannot accept benefit under will and at same time reject it by asserting in opposition to it, his own inconsistent proprietary rights.—Noe vs. Splivalo, 54 Cal. 207, 209. See Morrison vs. Bowman, 29 Cal. 337, 347.

§ 1312. **WILLS PASS ESTATE SUBSEQUENTLY ACQUIRED.** Any estate, right, or interest in lands acquired by the testator after the making of his will, passes thereby and in like manner as if title thereto was vested in him at the time of making the will, unless the contrary manifestly appears by the will to have been the intention of the testator. Every will made in express terms, devising, or in any other terms denoting the intent of the testator to devise all the real estate of such testator, passes all the real estate which such testator was entitled to devise at the time of his decease.

History: Enacted March 21, 1872, founded upon § 22 Act April 10, 1850, Stats. 1850, p. 179; amended March 30, 1874, Code Amdts. 1873-4, p. 233.

- 1, 2. Common-law rule.
- 3-5. General rule—What property passes—Death of testator.
6. By what rule governed—Rei site.
- 7-9. Statutory power—Intention.
10. Same—Intention shown by will prevails.
- 11-13. Same—Same—Presumption as to.
- 14-20. Intention—When shown.
21. Same—When not shown.
- 22, 23. What constitutes after-acquired property.
24. When passes.
25. Evidence—Extrinsic—When admissible.

As to when after-acquired property, both real and personal, passes by will, see 30 Am. & Eng. Encyc. of L. (2d ed.) 617-620.

1. **COMMON-LAW RULE.**—After-acquired property did not pass by will at common law.—In re Estate Hopper, 66 Cal. 80, 82, 4 Pac. Rep. 984.

2. Will held inoperative upon real estate of which testator was owner at time of making will and afterwards sold, repurchased, and died seized of.—In re Estate Hopper, 66 Cal. 80, 82, 4 Pac. Rep. 984.

General devise.—See par. 9 this note.

3. **GENERAL RULE.**—Will speaks from testator's death, and whatever estate he then possesses passes according to its terms.—Henderson vs. Ryan, 37 Tex. 670.

4. Otherwise when its language shows contrary intention.—Clarke's Estate, 82 Pa. St. 528. See Hammond vs. Hammond, 55 Md. 582; Bourke vs. Boone, 94 Md. 472, 51 Atl. Rep. 396; Board of Education vs. Ladd, 26 Ohio St. 210.

5. Where it refers to actual existing state of things and a prospective event.—Clarke's Estate, 82 Pa. St. 528. See Board of Education vs. Ladd, 26 Ohio St. 210.

6. **LAW GOVERNING.**—Law of the place where property is situated is to be construed

in determining whether such property passes by will.—Applegate vs. Smith, 31 Mo. 166.

7. **STATUTORY POWER.**—After-acquired property passes under statute, where intention of testator appears.—Liggat vs. Hart, 23 Mo. 127.

8. Under Oregon act of 1849 which was adopted from the Missouri statute.—Hardenbergh vs. Ray, 151 U. S. 112, bk. 38 L. ed. 93, 14 Sup. Ct. Rep. 305.

9. Testamentary power existing to make disposition of after-acquired property, same will pass under a general devise by will.—Hardenbergh vs. Ray, 151 U. S. 112, bk. 38 L. ed. 93, 14 Sup. Ct. Rep. 305.

10. Intention of testator as shown by his will, must prevail when same is consistent with the rules of law.—Hardenbergh vs. Ray, 151 U. S. 112, bk. 38 L. ed. 93, 14 Sup. Ct. Rep. 305.

11. Question of intention to pass after-acquired property must be gathered from the whole will.—Hardenbergh vs. Ray, 151 U. S. 112, bk. 38 L. ed. 93, 14 Sup. Ct. Rep. 305.

12. Presumption is that testator intended to settle final distribution of his estate at time of his death, as will cannot take effect until that time, and until event happens all his property remains at his disposal.—In re Estate Hopper, 66 Cal. 80, 82, 4 Pac. Rep. 984. See Brimmer vs. Sohler, 55 Mass. (1 Cush.) 118.

13. Presumption that testator meant to die intestate as for any portion of his estate is not shown where words of will show by a fair inference that he intended to devise the whole of the property that he died seized and possessed of.—Hardenbergh vs. Ray, 151 U. S. 112, bk. 38 L. ed. 93, 14 Sup. Ct. Rep. 305.

14. **INTENTION—WHEN SHOWN.**—By direction to executors to sell whole of real and personal and mixed property and to dispose

of the proceeds thereof, together "with what cash I may die possessed of" as directed by such will, shows sufficient intention to pass all real property owned at the time of his death.—*Liggat vs. Hart*, 23 Mo. 127.

15. By bequest "of all the residue of his funds" and "all the residue and remainder of the estate or estates, of whatever nature or whenever acquired of which I may die seized or possessed."—*Perry vs. Hunter*, 2 R. I. 80.

16. By clause in will as follows: "What property it hath pleased God to bless me with in this life, I give and bequeath in manner and form following," ineffective to pass any estate so as to disinherit heir unless the will plainly or by necessary implication directs to whom the estate should go.—*Bourke vs. Boone*, 94 Md. 472, 51 Atl. Rep. 396. See *Chamberlain vs. Owings*, 30 Md. 447.

17. By clause in will inserted after devising specific property to children to effect that "balance of my property, should there be any left," with desire that it be "equally divided" between specified parties.—*Webb vs. Archibald* (Mo. Nov. 12, 1894), 23 S. W. Rep. 80.

18. By devise of "all rest, residue and remainder of my estate, real, personal, mixed and wherever situated, intending and meaning to include therein all reversionary devises and bequests, real and personal estate, the use of which I have hereinbefore given."—*Clayton vs. Hallett*, 30 Colo. 231, 97 Am. St. Rep. 117, 70 Pac. Rep. 429, 59 L. R. A. 407.

19. By devise "of the whole of my lands and buildings lying and being within the town of —," mentioning the town subsequently, republished by codicil.—*Wait vs. Belding*, 41 Mass. (24 Pick.) 129.

20. By gift, devise, and disposition of all estate, real and personal, "together with any and all estate, right of interest in lands which

I may acquire after date of will."—*Kimball vs. Ellison*, 128 Mass. 41.

21. When not shown.—Circumstances shown which would not amount to devise passing after-acquired property.—*Havens vs. Havens*, 1 Sand. (N. Y.) 324.

22. PROPERTY MORTGAGED TO TESTATOR, title to which subsequently vests in him absolutely, is after-acquired property.—*Webster vs. Wiggin*, 19 R. I. 73, 31 Atl. Rep. 824. See *Ballard vs. Carter*, 22 Mass. (5 Pick.) 112; *Brigham vs. Winchester*, 42 Mass. (1 Met.) 390; *Mardley vs. Holland*, L. Rep. 20 Eq. 423; *Strode vs. Russel*, 2 Vern. 624.

23. PROPERTY MORTGAGED TO TESTATOR AND SUBSEQUENTLY SOLD and conveyed to trustee in trust for him prior to the making of the will is not after-acquired property.—*Webster vs. Wiggin*, 19 R. I. 73, 31 Atl. Rep. 824.

24. REAL ESTATE OWNED BY TESTATOR AT TIME OF MAKING HIS WILL and afterwards sold by him, but subsequently repurchased and in his possession at time of his decease, will pass to devisee under will, where it appears that testator intended to devise all property of which he should die seized.—*In re Estate Hopper*, 66 Cal. 80, 82, 4 Pac. Rep. 984. See *Mass. Brimmer vs. Sohler*, 55 Mass. (1 Cush.) 118, 132; *Winchester vs. Forester*, 57 Mass. (3 Cush.) 369. Mo. *Liggat vs. Hart*, 23 Mo. 127. N. Y. *Quinn vs. Hardenbergh*, 54 N. Y. 87.

25. Extrinsic evidence is admissible, when meaning of will or other instrument is certain and intelligible, for purpose of ascertaining subject or object to which it is to be applied.—*Wheeler vs. Bolton*, 66 Cal. 83, 87, 4 Pac. Rep. 981. See *Stanley vs. Green*, 12 Cal. 148; *Bruck vs. Tucker*, 32 Cal. 425; *Case vs. Young*, 3 Minn. 209; *Morgan vs. Burrows*, 45 Wis. 211, 30 Am. Rep. 717.

§ 1313. CHARITABLE, ETC., BEQUESTS. LIMITATION AS TO TIME AND AMOUNT. No estate, real or personal, shall be bequeathed or devised [1] to any charitable or benevolent society or corporation, or [2] to any person or persons in trust for charitable uses, except the same be done by will duly executed at least thirty days before the decease of the testator; and if so made, at least thirty days prior to such death such devise or legacy and each of them shall be valid; provided, that no such devises or bequests shall collectively exceed one third of the estate of the testator, leaving legal heirs, and in such case a pro rata deduction from such devises or bequests shall be made so as to reduce the aggregate thereof to one third of such estate; and all dispositions of property made contrary hereto shall be void, and go to the residuary legatee or devisee, next of kin, or heirs, according to law.

History: Enacted March 18, 1874, Code Amdts. 1873-4, p. 276. In force March 18, 1874.

1. Applied, cited, construed, referred to, etc.
2-16. Construed with reference to its application and qualification and limitation of power.

17. Direction to sell is not contravened.
18, 19. Law of rei site—Compliance with.
20-24. Extent of devise—To what applies—Distributable assets—Presumption.

25. Time—Will exceeding—Codicil within.
26. When void.
27-30. When valid.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: In re Estate Hinchley, 53 Cal. 457, 463, 485, 511, 514, 516, 517 (construed and applied); In re Estate Robinson,

63 Cal. 620, 622 (construed and applied); In re Estate Hewitt, 94 Cal. 376, 378, 379, 29 Pac. Rep. 775 (construed and applied); In re Estate Pearsons, 98 Cal. 603, 606, 611, 33 Pac. Rep. 451 (construed and applied); In re Estate Bates, 105 Cal. 646, 647, 38 Pac. Rep. 941 (applied); In re Estate Royer, 123 Cal. 614, 624, 56 Pac. Rep. 461, 44 L. R. A. 364 (construed and applied); People ex rel. Stone vs. Jefferts, 126 Cal. 296, 301, 58 Pac. Rep. 704 (referred to); In re Estate Willey, 128 Cal. 1, 12, 13, 56 Pac. Rep. 550, 60 Id. 471 (construed and applied); In re Estate McCauley, 138 Cal. 432, 434, 71 Pac. Rep. 512; In re Estate McCauley, 138 Cal. 546, 547, 548, 550, 71 Pac. Rep. 453 (construed and applied); In re Estate Gay, 138 Cal. 552, 557, 558, 94 Am. St. Rep. 70, 71 Pac. Rep. 707 (cited in discussion); In re Estate Stewart, 26 Wash. 32, 66 Pac. Rep. 148 (construed and applied); In re Estate Tobin, Myrick's Prob. Rep. 134, 135 (construed and applied); In re Estate Hinckley, Myrick's Prob. Rep. 189, 200 (construed and applied); President etc. Bowdoin College vs. Merritt, 75 Fed. Rep. 480, 482 (construed and applied).

As to charitable uses and trusts, see ante § 715 pars. 27-59 and note.

2. **CONSTRUED AS ALLOWING CHARITABLE** and benevolent societies and corporations to take by will.—In re Estate Tobin, Myrick's Prob. Rep. 134, 135.

3. **As enacted in view of provisions in Code Civil Procedure** establishing mode of conducting probate cases.—In re Estate Hinckley, 58 Cal. 457, 517.

4. **As enacted for protection of heirs or persons** holding like position against excessive gifts for charities.—In re Estate Hinckley, 58 Cal. 457, 514.

5. **As not destroying intention of testator**, but merely preventing it from being carried into effect where more than one half of estate devised.—In re Estate Pearsons, 98 Cal. 603, 606, 33 Pac. Rep. 451.

6. **As not depriving heirs of the benefit of estate** unless the language unmistakably requires it.—In re Estate Hinckley, 58 Cal. 457, 514.

7. **As not overcoming effect of statutory enactments** prohibiting perpetuities.—In re Estate Hinckley, 58 Cal. 457, 463.

8. **As only making void "dispositions"** of property made contrary thereto, but as not affecting any other disposition of property contained in the will or impairing power of sale given by will for converting estate into money.—In re Estate Pearsons, 98 Cal. 603, 611, 33 Pac. Rep. 451.

9. **As placing charitable and benevolent corporations upon the same footing.**—In re Estate Hinckley, 58 Cal. 457, 511.

10. **As prohibiting devises or bequests to charitable uses for more than one third of the estate** remaining after payment of debts and charges of administration.—In re Estate Hinckley, 58 Cal. 457, 516.

11. **As qualifying terms of § 1275.**—In re Estate Tobin, Myrick's Prob. Rep. 134, 135.

12. **As recognizing right to convey or settle to charitable uses.**—In re Estate Hinckley, 58 Cal. 457, 485.

13. **As recognizing right of testator to gift of charitable uses with such limitations** as legislature deems sufficient to prevent extravagant donation—"to the disherison of natural heirs."—In re Estate Robinson, 63 Cal. 620, 622.

14. **As removing doubt which might exist by insertion of the word "benevolent"** in a will as destroying charitable gift.—In re Estate Hinckley, 58 Cal. 457, 511.

15. **As showing that term "trust to charitable uses"** includes same purposes as those for which corporations named may be organized.—In re Estate Hinckley, 58 Cal. 457, 511.

16. **With Code Civil Procedure, as construing scheme for settlement of estates of deceased persons.**—In re Estate Hinckley, 58 Cal. 457, 517.

17. **DIRECTION BY TESTATOR FOR PROPERTY** to be sold by auction does not contravene section.—In re Estate Pearsons, 98 Cal. 603, 611, 33 Pac. Rep. 451.

18. **LAW OF PLACE WHERE REAL ESTATE** is situated must be complied with.—In re Estate Stewart, 26 Wash. 32, 66 Pac. Rep. 148 (construing this section of the code).

19. **Foreign laws must be pleaded and proven as any other fact, and in this regard law of another state is as law of foreign country.**—In re Estate Stewart, 26 Wash. 32, 66 Pac. Rep. 148 (construing this section of the code).

20. **ONE THIRD OF ESTATE WHICH MAY BE GIVEN** to charitable uses, is one third of distributable assets.—In re Estate Pearsons, 98 Cal. 603, 611, 33 Pac. Rep. 451. See In re Estate Hinckley, 58 Cal. 457.

21. **Relates to one third of the gross estate, as estate consists of amount of property, and not amount less debts.**—In re Estate Hinckley, Myrick's Prob. Rep. 189, 200.

22. **Amount of residue of estate presumed to be less than one third distributable portion of estate, where estate is not set forth in record or in bill of expulsion, and there is no data from which amount of estate can be determined, court assuming that any matters supporting order of court were presented to it, and were made basis of action.**—In re Estate Bates, 105 Cal. 646, 647, 38 Pac. Rep. 941 (which is an appeal from the decree of distribution). See Caruthers vs. Hensley, 90 Cal. 559, 27 Pac. Rep. 411.

23. **Consequences following charitable bequests or devises of more than one third are that in such cases pro rata deduction from such devises or bequests shall be made, so as to reduce aggregate thereof to one third of such estate.**—In re Estate Willey, 128 Cal. 1, 13, 56 Pac. Rep. 550, 60 Id. 471.

24. **Question whether devise exceeds one third of the estate of testator is one of fact.**—In re Estate Royer, 123 Cal. 614, 624, 56 Pac. Rep. 461, 44 L. R. A. 364.

25. **TIME.**—Gifts not invalidated by fact that will executed more than thirty days prior to decease, where codicil is executed shortly before death and within period.—In re Estate McCauley, 138 Cal. 432, 433, 71 Pac. Rep. 512.

26. WHEN VOID.—DEVISE OR BEQUEST OF OVER one half of estate is void under provisions of section.—In re Estate Hinckley, Myrick's Prob. Rep. 189, 200.

27. WHEN VALID.—Bequest to the "Boys' Roman Catholic Orphan Asylum of San Rafael" valid, as same is a charitable and benevolent society.—In re Estate Tobin, Myrick's Prob. Rep. 134, 135.

28. DEVISE TO BOARD of Trustees of Reform Presbyterian Church is a charitable gift.

—In re Estate Hewitt, 94 Cal. 376, 378, 29 Pac. Rep. 775.

29. DEVISE TO TRUSTEES FOR "MISSIONARY purposes, same to be equally divided between foreign and domestic missions," is charitable devise within statute.—In re Estate Hewitt, 94 Cal. 376, 379, 29 Pac. Rep. 775.

30. MUNICIPAL CORPORATION MAY HOLD property in trust for charitable purposes under will.—In re Estate Robinson, 63 Cal. 620, 622.

CHAPTER II.

INTERPRETATION OF WILLS, AND EFFECT OF VARIOUS PROVISIONS.

- § 1317. Testator's intention to be carried out.
- § 1318. Intention to be ascertained from the will.
- § 1319. Rules of interpretation.
- § 1320. Several instruments are to be taken together.
- § 1321. Harmonizing various parts.
- § 1322. In what case devise not affected.
- § 1323. When ambiguous or doubtful.
- § 1324. Words taken in ordinary sense.
- § 1325. Words to receive an operative construction.
- § 1326. Intestacy to be avoided.
- § 1327. Effect of technical words.
- § 1328. Technical words not necessary.
- § 1329. Certain words not necessary to pass a fee.
- § 1330. Power to devise, how executed by terms of will.
- § 1331. Devise or bequest of all real or all personal property, or both.
- § 1332. Residuary clause.
- § 1333. Same. [Bequest of residue, effect.]

- § 1334. "Heirs," "relatives," "issue," "descendants," etc.
- § 1335. Words of donation and of limitation.
- § 1336. To what time words refer.
- § 1337. Devise or bequest to a class.
- § 1338. When conversion takes effect.
- § 1339. When child born after testator's death takes under will.
- § 1340. Mistakes and omissions.
- § 1341. When devises and bequests vest.
- § 1342. When cannot be divested.
- § 1343. Death of devisee or legatee.
- § 1344. Interests in remainder are not affected.
- § 1345. Conditional devises and bequests.
- § 1346. Condition precedent, what.
- § 1347. Effect of condition precedent.
- § 1348. Conditions precedent, when deemed performed.
- § 1349. Conditions subsequent, what.
- § 1350. Devisees, etc., take as tenants in common.
- § 1351. Advancements, when adoptions.

§ 1317. TESTATOR'S INTENTION TO BE CARRIED OUT. A will is to be construed according to the intention of the testator. Where his intention cannot have effect to its full extent, it must have effect as far as possible.

History: Enacted March 21, 1872.

I. In General.

- 1. Applied, cited, construed, referred to, etc.
- 2. Adjudged cases—Value of.
- 3. Construction of deeds and wills, similar.
- 4-25. General rules for construction of wills.
- 26. Same—Devise in fee in trust to convey.
- 27-34. Same—Intention of testator to prevail.
- 35, 36. Same—Intention contravening law.
- 37-40. Same—General and particular intent.
- 41. Same—Intention not sufficient, when.
- 42-45. Same—Valid clause as affected by invalid.
- 46-49. Same—Court cannot correct illegal will.
- 50. Same—Time for construction.

II. Construction of Certain Particular Wills.

- 51. Annuities preferred to legacies, when.
- 52. Codicil subject to conditions of original will.
- 53. Conditional devise to daughter and her children.
- 54. Contingent interest entitling devisees to hold estate intact.

- 55. Debts, how to be paid.
- 56. Determinable life estate and intestacy.
- 57. Direction to hand deeds, not a devise of land.
- 58. Direction to sell land "so soon as" leases are canceled.
- 59. Discretionary trust, void.
- 60. Express trustee not made, when.
- 61. Fee subject to life estate.
- 62. Fee subject to trust.
- 63. Fee, when given by will.
- 64. Fee in widow, no trust for children.
- 65, 66. Giving executor or devisee power to convert into cash.
- 67, 68. Life estate not created, when.
- 69, 70. Life estate, remainder to children.
- 71. Life estate with power to sell, effect of.
- 72. Letter as showing testamentary intention.
- 73-76. "Mill with land pertaining thereto" carries what.
- 77. Money to remain in executor's hands, when.
- 78. Monthly income, when to begin.

- 79-82. "Orphan asylum" construed.
 83. "Protestant Episcopal Old Ladies' Home" takes, when.
 84. Perpetuity not created, when.
 85. "Right to graze" certain cattle includes what.
 86. Residuary bequest to red cross society construed.
 87. Substituted legacy—Presumption as to.
 88. Substitutionary legacy—How created.
 89. Selling and repurchasing land devised, effect of.
 90. "Sisters of mercy" take, when.
 91. "Support and education" includes what.
 92. Survivor to take, when.
 93. Testator acquiring title to property excepted from will.
 94. Trust only conveyed.
 95. Trust not created, when.
 96. Trust fund for burial lot—Effect of.
 97. Trust to convey real property, void.
 98. University of California, description.
 99. Unincorporated society may take, when.

I. IN GENERAL.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Rosenberg vs. Frank*, 58 Cal. 387, 404 (cited); *In re Estate Reinhardt*, 74 Cal. 365, 368, 16 Pac. Rep. 13 (applied); *Rhodon vs. Blevin*, 99 Cal. 645, 648, 34 Pac. Rep. 513 (applied); *In re Estate Royer*, 123 Cal. 614, 625, 56 Pac. Rep. 461, 44 L. R. A. 364 (applied); *In re Willey's Estate*, 128 Cal. 1, 11, 60 Pac. Rep. 471 (construed); *In re Estate Fair*, 132 Cal. 523, 566, 567, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000 (construed and applied); *In re Estate Lakemeyer*, 135 Cal. 28, 29, 87 Am. St. Rep. 96, 66 Pac. Rep. 961 (applied); *In re Estate Fair*, 136 Cal. 79, 83, 68 Pac. Rep. 306 (construed and applied); *In re Estate McCauley*, 138 Cal. 432, 436, 71 Pac. Rep. 512 (cited in discussion); *Colton vs. Colton*, 127 U. S. 300, 311, bk. 32 L. ed. 138, 8 Sup. Ct. Rep. 1164 (referred to with other sections).

2. ADJUDGED CASES—VALUE OF.—Except for establishment of general principles very little aid can be procured from adjudged cases in construction of will, as it seldom happens that two cases can be found precisely alike.—*Le Breton vs. Cook*, 107 Cal. 410, 416, 40 Pac. Rep. 552.

3. CONSTRUCTION OF DEEDS AND WILLS.—Intent in both cases being the same, rules of law as to construction of deeds and wills are similar.—*In re Estate Fair*, 132 Cal. 523, 548, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

4. GENERAL RULES FOR CONSTRUCTION OF WILLS.—Under this section bequest will not be held to have failed because fund is inadequate to carry out testator's original intent unless evidence clearly shows that to be fact.—*In re Estate Royer*, 123 Cal. 614, 625, 56 Pac. Rep. 461, 44 L. R. A. 364.

5. CLAUSE IN WILL CONTAINING INDEFINITE RESTRAINT upon alienation is void and of no effect as limiting devise in fee in will.—*Williams vs. Williams*, 73 Cal. 99, 103, 14 Pac. Rep. 394.

6. Devises of large properties and estates

should not be divided by acute speculations about what might possibly occur after death of devisees.—*Estate Murphy*, 104 Cal. 554, 568, 38 Pac. Rep. 543.

7. Devise of common property when there was none would not convey separate property.—*In re Estate Reinhardt*, 74 Cal. 365, 369, 16 Pac. Rep. 13.

8. Direction in will that certain attorney should be selected as attorney of estate and consulted on all questions pertaining thereto, does not show an intention to constitute such attorney executor of estate.—*In re Estate Ogler*, 101 Cal. 381, 386, 40 Am. St. Rep. 61, 35 Pac. Rep. 900.

9. Direction in will to executors to collect rents and maintain estate for two years is not restraint upon its alienation during that period, nor is provision for its sale at expiration of two years prohibition against its sale prior to that time.—*In re Estate Pforr*, 144 Cal. 121, 126, 77 Pac. Rep. 825.

10. Doctrine against perpetuities does not apply where bequest is left for charitable purposes.—*In re Estate Merchant*, 143 Cal. 537, 544, 77 Pac. Rep. 475.

11. If central or any other section of entire or homogeneous thing be devised together with "all" other sections "pertaining" thereto, entire thing will pass as matter of law.—*Bruck vs. Tucker*, 32 Cal. 425, 429.

12. In construction and interpretation of will made in Texas, courts of this state, in absence of any proof as to what law of Texas is, will presume that it is same as law of California.—*Norris vs. Harris*, 15 Cal. 226, 253.

13. Provision in will selecting attorney for estate and directing executor to consult and employ such attorney in all matters pertaining to distribution of estate and requirements of will is not obligatory upon executor, but is merely advice which executor may regard or disregard.—*In re Estate Ogler*, 101 Cal. 381, 385, 40 Am. St. Rep. 61, 35 Pac. Rep. 900.

14. Provision in will authorizing executors to execute all conveyances necessary to disposing of said estate is merely incidental to power conferred on them, and cannot be regarded as creating in them any different estate in the land.—*Bennalack vs. Richards*, 116 Cal. 405, 410, 48 Pac. Rep. 622.

15. Recommendations made by testator in will as to what disposition shall be made of estate by legatees, are not obligatory upon such legatees.—*In re Estate Whitcomb*, 86 Cal. 265, 273, 24 Pac. Rep. 1028.

16. Rule of construction of wills now is that beneficiaries take per stirpes unless language used in devise or bequest is such as to exclude that intention.—*Kidwell vs. Ketler* (Cal. Jan. 20, 1905), 79 Pac. Rep. 514.

17. Substituted or additional legacy is prima facie payable out of same funds and subject to same incidents and conditions as is original legacy, irrespective of whether result is or is not advantageous to legatees.—*In re Estate De Laveaga*, 119 Cal. 651, 653, 51 Pac. Rep. 1074.

18. Testamentary provision in lieu of devisees' or legatees' proprietary right, in order

to render it such upon acceptance of it, must be declared in terms to be given in lieu of such right; or that intention must be deduced by clear and manifest implication from will.—*Morrison vs. Bowman*, 29 Cal. 327, 349.

19. Testator will be presumed not to have intended to have devised any property over which he had no power of testamentary disposition, and therefore will should be read as applying only to his property within such power.—In re Estate Gilmore, 81 Cal. 240, 242, 32 Pac. Rep. 655. See *King vs. Lagrange*, 50 Cal. 328, 332; In re Estate Silvey, 42 Cal. 210, 212.

20. Testator will be presumed to have known law applicable to disposition of property by will, and therefore to have known that he had no power to dispose by will of his wife's interest in community property, but only of his own interest therein.—In re Estate Gilmore, 81 Cal. 240, 242, 32 Pac. Rep. 655. See *Morrison vs. Bowman*, 29 Cal. 327, 347; In re Estate Frey, 52 Cal. 658, 660.

21. WHERE WILL DEVISES PROPERTY TO TRUSTEES subject to void trust in favor of certain beneficiaries, property will go to such beneficiaries as by direct devise.—In re Estate Fair, 132 Cal. 523, 546, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

22. Where rejection of false terms in description of land contained in will still leaves description uncertain and imperfect, devise is wholly void.—In re Estate Lynch, 142 Cal. 373, 376, 75 Pac. Rep. 1086.

23. While desire of testator for disposal of his estate is mere request, when addressed to his devisee, it is to be construed as command when addressed to his executor.—In re Estate Pforr, 144 Cal. 121, 128, 77 Pac. Rep. 825. See In re Estate Marti, 132 Cal. 666, 61 Pac. Rep. 964, 64 Id. 1071.

24. Where testator directs in his will his executor to sell certain real estate, proceeds to be disposed of in certain trust, such executor is not limited to one year in which to sell such real estate, unless there are express words in will prohibiting such sale unless made within year.—*Kidwell vs. Brummagin*, 32 Cal. 436, 444.

25. Will appointing executor with power to sell does not limit such power to executor named in will, but such power passes to administrator with will annexed.—*Kidwell vs. Brummagin*, 32 Cal. 436, 440.

26. Devise to A in fee in trust to convey to B cannot be equivalent, by any possible rules of construction, of direct devise to B.—In re Estate Fair, 132 Cal. 523, 547, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

27. INTENTION OF TESTATOR TO PREVAIL.—Construction of wills should be such that intention of testator will govern, although to some of words of will it may be diametrically opposed.—In re Estate Fair, 132 Cal. 523, 566, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

28. First great rule in exposition of wills, to which all other rules must bend, is that intention of testator expressed in his will shall prevail, provided it be consistent with

rules of law.—In re Estate Whitcomb, 86 Cal. 265, 272, 24 Pac. Rep. 1028; In re Estate Rogers, 94 Cal. 526, 530, 29 Pac. Rep. 962; In re Estate Lakemeyer, 135 Cal. 28, 29, 87 Am. St. Rep. 96, 66 Pac. Rep. 961. See *Smith vs. Bell*, 31 U. S. (6 Pet.) 68, bk. 8 L. ed. 322; *Colton vs. Colton*, 127 U. S. 300, 309, bk. 32 L. ed. 138, 3 Sup. Ct. Rep. 1164.

29. Fundamental principle of interpretation that contracts and wills are to be interpreted according to intention of parties applies equally to holographic wills as to others.—In re Estate Lakemeyer, 135 Cal. 28, 29, 87 Am. St. Rep. 96, 66 Pac. Rep. 961. See *Estate Stratton*, 113 Cal. 513, 516, 44 Pac. Rep. 1023; *Mitchell vs. Donohue*, 100 Cal. 202, 208, 209, 38 Am. St. Rep. 279, 34 Pac. Rep. 614.

30. Intention, being clear, should control meaning that would otherwise be given to particular words or phrases used by testator.—In re Estate Fair, 132 Cal. 523, 566, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

31. In construction of will due regard must be had to directions of will, and true intent and meaning of testator, in all matters brought before court.—*Shadden vs. Hembree*, 17 Oreg. 14, 18 Pac. Rep. 572.

32. No matter how poorly language in will may be expressed, nor how ungrammatical may be sentences, it is duty of court to interpret it and carry out intention of testatrix, if that intention can be ascertained, provided no law is violated in so doing.—In re Estate Reith, 144 Cal. 314, 316, 77 Pac. Rep. 942.

33. Will is to be construed according to intention of testator; where his intention cannot have effect to its full extent, it must have effect as far as possible.—*Rhoton vs. Blevin*, 99 Cal. 645, 648, 34 Pac. Rep. 513.

34. Wills are to be literally construed so as to effectuate intention of testator.—*Welch vs. Huse*, 49 Cal. 506; In re Estate Rogers, 94 Cal. 526, 531, 29 Pac. Rep. 962.

35. SAME—INTENTION CONTRAVENING LAW.—Contravention of law by intention of testator, renders will invalid, not for reason that will does not express intention of testator, but because law will not permit such intention to be carried into effect.—In re Estate Fair, 132 Cal. 523, 567, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

36. In determining whether language of will would permit effect to be given to intention, the question is not whether language would bear some other construction,—construction which will defeat intention, or render provisions of will illegal and void,—but whether it will permit lawful intention to have effect.—In re Estate Fair, 132 Cal. 523, 566, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000. See *Everitt vs. Everitt*, 29 N. Y. 39, 95.

37. SAME—GENERAL AND PARTICULAR INTENT.—General intention controls particular intention, especially when particular intention relates to manner by which general intention is to be effectuated.—In re Estate Fair, 132 Cal. 523, 566, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000. See *Malcolm vs. Malcolm*, 57 Mass. (3 Cush.) 477.

38. General intention being ascertained, it will control any particular intention which relates merely to manner in which such general intention is to be carried into effect; and terms used by testator are to be liberally construed for purpose of giving it effect, provided, however, that it is consistent with rules of law.—*In re Estate Fair*, 132 Cal. 523, 566, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000. See *Welch vs. Huse*, 49 Cal. 506, 509.

39. Full effect should be given to particular intent, as well as to general intent, of testator, as far as it is ascertainable by will, and is not inconsistent either with his general intent, or rules of law.—*Clark vs. Hornthal*, 47 Miss. 539.

40. Particular intent of testator shown by single provision which in instrument stands by itself must invariably yield to general intent, which is ascertained from whole instrument.—*Phelps vs. Bates*, 54 Conn. 11, 1 Am. St. Rep. 92, 5 Atl. Rep. 301.

41. Intention not sufficient, when.—Testator must do more than merely evince intention to disinherit before heirs' right of succession can be cut off. He must make valid disposition of his property.—*In re Estate Walkerly*, 108 Cal. 627, 652, 49 Am. St. Rep. 97, 41 Pac. Rep. 772. See *Hawley vs. James*, 16 Wend. (N. Y.) 61, 150; *Haynes vs. Sherman*, 117 N. Y. 433, 22 N. E. Rep. 938; *Habergham vs. Vincent*, 2 Ves. Jr. 204.

42. Valid clause as affected by invalid.—Where there are valid and invalid clauses in will question whether valid clauses can stand depends upon whether or not invalid ones are so interwoven with them that they cannot be eliminated without interfering with and changing main scheme of testator.—*In re Estate Pichoir*, 139 Cal. 632, 685, 73 Pac. Rep. 606, following *In re Estate Fair*, 136 Cal. 79, 68 Pac. Rep. 306.

43. Where will is good in part and bad in part, part otherwise valid is void if it work such distribution of estate as from whole testament taken together it was evidently never design of testator. Otherwise, where good part is so far independent it would have stood had testator been aware of invalidity of all rest.—*In re Estate Fair*, 136 Cal. 79, 68 Pac. Rep. 306.

44. Trust created in personal property by same will creating void trust in real property which is so interwoven with invalid trust as to be impossible to be separated must fall and be held invalid with main trust scheme of testator.—*In re Estate Fair*, 136 Cal. 79, 68 Pac. Rep. 306.

45. Estate of Fair, 132 Cal. 523, 532, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000, holding that trust in real property created by will for benefit of testator's children during their lives, and thereafter to convey to certain beneficiaries, was void trust to convey, and defeated trust scheme of testator, rendering entire trust invalid and void, is affirmed.—*In re Estate Fair*, 136 Cal. 79, 68 Pac. Rep. 306.

46. SAME—COURT CANNOT CORRECT ILLEGAL WILL.—If mode provided by testator for vesting of his estate was legal but de-

fective in substantial, court could not create new mode.—*In re Estate Fair*, 132 Cal. 523, 547, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

47. In attempting to vest estate, if only mode prescribed for purpose by testator is illegal, courts cannot close their eyes to that mode and substitute in lieu thereof legal mode.—*In re Estate Fair*, 132 Cal. 523, 546, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

48. Where will devises estate to trustees in fee, subject to execution of trust, and trust so created is void, and testator does not provide in that event for any other mode for disposing of the property, the will must fall by reason of prohibited trust.—*In re Estate Fair*, 132 Cal. 523, 549, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

49. While general intent may be found in will indicating that certain beneficiaries should have property devised, still if only mode provided by testator for them to get it is illegal and prohibited by law, court has no power to provide legal mode.—*In re Estate Fair*, 132 Cal. 523, 546, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

50. TIME FOR CONSTRUCTION.—Court has nothing to do with construction of will after same has been admitted to probate.—*In re Estate Cobb*, 49 Cal. 599, 604.

II. CONSTRUCTION OF CERTAIN PARTICULAR WILLS.

51. ANNUITIES PREFERRED TO LEGACIES, WHEN.—Will giving certain legacies in cash and then providing that executors deposit in bank in San Francisco all rents derived from property owned by testator in Virginia City, Nevada, and all rents and profits derived from his estate should be applied by them to payment of annuity created by said will to his mother, and to education of certain nephews and nieces, shows intention on part of testator that proceeds of property should be applied to such annuity and to education of said nephews and nieces before they are to be applicable for payment of money legacies.—*In re Estate Radovich*, 54 Cal. 540, 542.

52. CODICIL SUBJECT TO CONDITIONS OF ORIGINAL WILL.—Where will left certain legacy to certain person, amount of which was made contingent upon proceeds of sale of testator's ranch, and afterwards by codicil changed name of legatee, such legacy will be subject to same contingency of sale of ranch as provided in original will.—*In re Estate De Laveaga*, 119 Cal. 651, 656, 51 Pac. Rep. 1074.

53. CONDITIONAL DEVISE TO DAUGHTER AND HER CHILDREN.—Devise to daughter and her children, on conditions to be performed by daughter, does not show intention on part of testator that daughter alone take under devise.—*In re Estate Utz*, 43 Cal. 200, 205.

54. CONTINGENT INTEREST ENTITLING DEVISEES TO HOLD ESTATE INTACT.—Under will leaving property to trustees to pay income thereof to her children, or in event of their lawful separation from their husbands, to pay them whole of their share, and providing that in the event of death of

any of said children, then to convey share of said child to surviving lawful issue of such deceased child, children last mentioned have interest in property devised and are entitled to have it remain undisposed of until conditions of will are complied with, and to inherit same upon death of their parents before condition shall happen.—*Born vs. Horstmann*, 80 Cal. 452, 460, 22 Pac. Rep. 169, 338, 5 L. R. A. 577.

55. DEBTS—How to be paid.—Where testator, before his death, had conveyed portions of real estate to his children by deeds which he placed in escrow to be delivered after his death, and by his will provided that his debts were to be paid from proceeds of his unproductive property, will reciting execution of the deeds and devising residue of his estate to his wife, it was intention of testator that debts of estate should be paid from proceeds of property devised by will and not from proceeds of property deeded to his children.—*In re Estate Heydenfeldt*, 106 Cal. 434, 439, 39 Pac. Rep. 788.

56. DETERMINABLE LIFE ESTATE AND INTESTACY.—Testatrix bequeathed to her husband use of income of all her property of which she might die possessed, to his sole use and benefit as long as he should remain her widower, he is not to sell, convey, or dispose of or in any way encumber any of such property. "But in case he should marry again, then I direct that my share in common property shall go to my children." Held that under said will husband took use and income of all estate as long as he remained widower of deceased, viz., determinable life estate only under the will, and as to all estate except this determinable life estate, testatrix died intestate.—*In re Estate Reinhardt*, 74 Cal. 365, 373, 16 Pac. Rep. 13.

57. DIRECTION TO HAND DEEDS NOT DEVISE OF LAND.—Language in will "to my husband my bank-book shall be handed to him with gold watch and chain, also two deeds," is not sufficient to denote intention on part of testatrix to devise to husband land described in deeds.—*In re Estate Young*, 123 Cal. 337, 344, 55 Pac. Rep. 1011.

58. DIRECTION TO SELL LAND "SO SOON AS" LEASES ARE CANCELED.—Will directing that "so soon as leases of rented lands are canceled, I desire the land to be sold," does not forbid sale or place land beyond power of those having interest therein to unite and convey absolute interest in possession, and there was at no time after death of testatrix that absolute interest in possession could not have been conveyed.—*Toland vs. Toland*, 123 Cal. 140, 144, 55 Pac. Rep. 681.

59. DISCRETIONARY TRUST, VOID.—Devise to trustees in trust to receive rents, issues, and profits and apply net income of same to such extent and at such time or times as in their judgment may be proper to and for use and benefit of beneficiary, is invalid because not imperative, but merely discretionary.—*In re Estate Sanford*, 136 Cal. 97, 101, 68 Pac. Rep. 494.

60. EXPRESS TRUSTEE NOT MADE, WHEN.—Will "commending all minor details"

to lawyer, does not make him trustee or create express trust in relation to land, and a provision therein that said lawyer "should receive" all rents has no greater effect than to make him trustee of rents.—*Toland vs. Toland*, 123 Cal. 140, 144, 55 Pac. Rep. 681.

61. FEE SUBJECT TO LIFE ESTATE.—Will devising rancho to testator's children and containing clause, "I declare that whereas the widow of my deceased son Jose Maria has a house established on the portion of said land which is called Chino, it is my will that said widow be permitted to remain in permanency and tranquillity in the establishment of her house," devises said rancho to testator's children in fee subject to life estate in that portion called Chino to Jose Maria.—*Bernal vs. Wade*, 46 Cal. 663, 667.

62. FEE SUBJECT TO TRUST.—Will devising remainder of estate to trustees, and to their successors in office, in trust for certain purposes, to have and to hold same in trust during lives of testator's daughters, and at certain time named therein to convey said estate to certain persons, vests in trustees estate in fee subject to execution of trust.—*In re Estate Fair*, 132 Cal. 523, 545, 34 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

63. FEE—When given by will.—Will bequeathing real estate to three devisees, one third to each of them to hold their lifetime, and then go to their heirs and assigns, but never to sell it, shows an intention on part of the testatrix to give a fee.—*Norris vs. Hensley*, 37 Cal. 439, 450.

64. FEE IN WIDOW—No trust for children.—Will of testator giving to his wife whole of his property for her use and benefit, and to maintain and support testator's children with, same to be hers absolutely, does not create trust in favor of children, but vests fee in widow.—*In re Estate Molk*, Myrick's Prob. Rep. 212.

65. GIVING AN EXECUTOR OR DEVISEE POWER TO CONVERT INTO CASH.—Will empowering an executor to sell, dispose of, and convey all testator's property, both real and personal, without obtaining any order of any court therefor, clearly shows an intention of the testator to withdraw his estate from the operation of the probate act and vest in his executor full power to convert in his own way the estate into cash.—*Larco vs. Casaneuava*, 30 Cal. 560, 568.

66. Will of testator giving all his estate, real and personal, to his wife and children, in equal interest one with other, and investing his wife with sole and entire control of whole estate, during her life, for benefit of herself and children, free from control and guidance of courts, in any state where she might reside at time of his death, and with authority in her own name and as guardian of children to sell or exchange estate or any part thereof, and to purchase with proceeds other property without interposition of any court whatever, shows intention of testator to invest his wife not merely with entire control of estate during her life, but with absolute power of disposition without guidance or interposition of

courts of law.—*Norris vs. Harris*, 15 Cal. 226, 255.

67. LIFE ESTATE NOT CREATED, WHEN.—Under a will devising estate in trust, and directing that after certain payments be made that the whole of the income thereof be given to testatrix's son during the term of his natural life, the son does not take a life estate in the property, but the fee vests in the trustee subject to the execution of the trust.—*In re Estate Dolan*, 79 Cal. 65, 68, 21 Pac. Rep. 545.

68. Under will devising residue of testator's estate to trustees, and containing provision that said trustees are to deliver possession of homestead to testatrix's sister, and that she is to be allowed to occupy and use same until her death, free of rent, sister does not take life estate in homestead, but merely right to use and occupy it during her life; homestead vested in trustees, and they hold legal title, subject to trust.—*Le Breton vs. Cook*, 107 Cal. 410, 418, 40 Pac. Rep. 552.

69. LIFE ESTATE, REMAINDER TO CHILDREN.—Will devising property to testator's daughter, to have use, rents, issues, and profits thereof during term of her natural life, but without power of selling property, and providing that should daughter die leaving her surviving any issue of her body, property, on her death, to go to such issue, to be divided share and share alike, gives daughter life estate in property, remainder at her death to go to her children, if any; if not, to heirs of testator.—*Estate McDonnell*, *Myrick's Prob. Rep.* 94, 96.

70. Words in will clearly and unequivocally expressing intention of testator to invest first taker or immediate devisee with estate for life only, with remainder in fee to children or issue or heirs of body of tenant for life, such intention should be carried into effect if it be not inconsistent with rules of law so to do.—*Norris vs. Hensley*, 27 Cal. 439, 449.

71. LIFE ESTATE WITH POWER TO SELL.—Effect of.—Will devising to testator's wife all of his property to use and expend as she may see fit during her lifetime, with full power to sell, transfer, or dispose of whole or any portion thereof and to convey fee simple title to any of real estate, and after her death directing that from any money remaining to testator's estate, certain legacies be paid, vested wife with absolute power of disposition of testator's estate, and upon wife disposing and conveying same after testator's death, nothing remains for legatees.—*Hovey vs. Walbank*, 100 Cal. 192, 198, 34 Pac. Rep. 650.

72. LETTER AS SHOWING TESTAMENTARY INTENTION.—Letter written from brother to his sister, brother being in poor health but not in extremis, stating "you and your children get anything," does not show intention that letter should be testamentary disposition of his estate to his sister and her children.—*In re Estate Richardson*, 94 Cal. 63, 65, 29 Pac. Rep. 484, 15 L. R. A. 635.

73. "MILL WITH LAND PERTAINING THERETO" CARRIES WHAT.—Devise by testator of flour-mill with land pertaining thereto and half league, although same was

not especially pertaining to mill.—*Bruck vs. Tucker*, 32 Cal. 425, 429.

74. Where testator devised mill with land pertaining thereto and half league more or less, and tract was less than half league, it will be presumed that he intended to devise whole tract.—*Bruck vs. Tucker*, 32 Cal. 425, 429.

75. Devise to testator's daughter of "flour-mill with land pertaining thereto and half league more or less," testator holding large tract of land around mill uninclosed, will carry whole tract.—*Bruck vs. Tucker*, 32 Cal. 425, 429.

76. Devise of mill and "all land which pertains to said mill half league more or less" is accurate in expression and certain in its application to subject of devise.—*Bruck vs. Tucker*, 42 Cal. 346, 356.

77. MONEY TO REMAIN IN EXECUTOR'S HANDS, WHEN.—Will providing that in certain contingencies certain legacies shall be paid by executors to certain persons, necessarily implies that money must remain in executor's hands until time arrives when no contingency could happen under will making it payable to others.—*In re Estate Fair*, 103 Cal. 342, 348, 37 Pac. Rep. 406.

78. MONTHLY INCOME, WHEN TO BEGIN.—Where a sum was bequeathed to certain trustees out of which to pay monthly income, intention of testatrix must have been that payments were not to begin until fund from which it was to be produced was distributed to trustees, who were to make payment.—*In re Estate Brown*, 143 Cal. 450, 455, 77 Pac. Rep. 160.

79. "ORPHAN ASYLUM" CONSTRUED.—Will leaving property to be divided among orphan asylums of city and county of San Francisco will not include "technical school," primary and principal purpose of which is to take such girls as choose to go to it, who are fourteen years old or more, and to give them such special training as will fit them for certain vocations in life.—*In re Estate Pearsons*, 125 Cal. 285, 287, 57 Pac. Rep. 1015.

80. Under will bequeathing money among different orphan asylums of city and county of San Francisco, fact that phrase "orphan asylum" does not occur in name of one of them is of no consequence, provided it be in fact an orphan asylum.—*In re Estate Pearsons*, 113 Cal. 577, 586, 45 Pac. Rep. 849.

81. Devise to different orphan asylums of city and county of San Francisco does not include such asylums outside of city and county of San Francisco, although they may be supported entirely by citizens of San Francisco, and their inmates may be composed entirely of children from city and county of San Francisco.—*In re Estate Pearsons*, 113 Cal. 577, 585, 45 Pac. Rep. 849.

82. Will bequeathing sum of money to be divided amongst different orphan asylums of city and county of San Francisco, and requesting judge of probate to designate such asylums, requires judge to designate all of orphan asylums in said city, and not such as he deems fit.—*In re Estate Pearsons*, 113 Cal. 577, 583, 45 Pac. Rep. 849.

83. THE "PROTESTANT EPISCOPAL OLD LADIES' HOME" TAKES, WHEN.—Where legacy was bequeathed to "Old Ladies' Home of San Francisco," there being no such institution, but it appearing that there were three institutions in San Francisco known as the "Protestant Episcopal Old Ladies' Home," the "Old People's Home," and the "Sisters of Mercy," which, among other things, cared for old ladies or old women, the court held, although question was not directly before it, that institution known as Protestant Episcopal Old Ladies' Home came more nearly within provisions of will than either of others, and that under liberal rules of construction applicable to legacies to charitable institutions court might properly have distributed the money to it.—In re Estate Casement, 78 Cal. 136, 141, 20 Pac. Rep. 362.

84. PERPETUITY NOT CREATED, WHEN.—Under will bequeathing personal property to trustees upon trust to invest same and divide and pay income thereof to certain persons during their lives, and after their deaths, then in trust in equal shares for their children who shall attain twenty-one years of age or marry, said persons only to receive income and get no portion of corpus, but children of said persons receive corpus of trust property when they attain age of twenty-one years, or marry. Such will does not create perpetuity or unlawfully suspend power of alienation.—Goldtree vs. Thompson, 79 Cal. 613, 617, 22 Pac. Rep. 50.

85. "RIGHT TO GRAZE" CERTAIN CATTLE INCLUDES WHAT.—Will devising to testator's widow one fourth part of his personal property, including horned cattle, horses, and sheep, with "right to graze, maintain, and keep cattle and live stock hereby bequeathed to her upon said farm or rancho," confers upon her right of pasturage for number of cattle and live stock equal to number devised to her, irrespective of whether they are identical cattle or live stock or others substituted for them.—Welch vs. Huse, 49 Cal. 506, 510.

86. RESIDUARY BEQUEST TO RED CROSS SOCIETY was not for benefit of individuals who happened at death of testatrix to constitute membership of society, but for benefit of society in its organized capacity, and through it for benefit of charitable objects to promote which it was formed.—In re Estate Merchant, 143 Cal. 537, 541, 77 Pac. Rep. 475.

87. SUBSTITUTED LEGACY—Presumption as to.—Where life estate in ranch is devised by will and afterwards expressly revoked by codicil and the devisee of such life estate was in such codicil named substitutionary legatee of sum of money in place of legatee in original will, who had died, it is not to be inferred, unless language of will so indicates, that substituted legacy was given to legatee in lieu of life estate in ranch.—In re Estate De Laveaga, 119 Cal. 651, 653, 51 Pac. Rep. 1074.

88. SUBSTITUTIONARY LEGACY—How created.—Where by codicil to will testator says, "The amount I did bequest to my friend, W. Brodersen, now deceased, I desire or rather ordain be given to another person," such language takes from legacy the character of

substantive and independent legacy and renders it merely substitutionary of that for which it is substituted.—In re Estate De Laveaga, 119 Cal. 651, 655, 51 Pac. Rep. 1074.

89. SELLING AND PURCHASING LAND DEVISED—Effect of.—Will devising tract of land, inclosed and occupied by testator's son, to his son, after which testator sold piece of land so devised and afterwards repurchased it, shows intention on part of testator that portion so sold and repurchased should go to son along with other portions of said tract.—In re Estate Hopper, 66 Cal. 80, 82, 4 Pac. Rep. 384.

90. "SISTERS OF MERCY" TAKE, WHEN.—Where testator's will devised remainder of his estate "to the Old Ladies' Home, at present near Rincon Hill at St. Mary's Hospital," it appearing that establishment was generally known as St. Mary's Hospital, and that one department thereof is called the Old Ladies' Home, and that the Old Ladies' Home was originally in same building with hospital, but was recently removed into another building about fifty feet from hospital, and that there is no other old ladies' home in vicinity of Rincon Hill, both institutions being under control and expenses thereof being paid by corporation known as "Sisters of Mercy," Sisters of Mercy was entitled to take bequest.—In re Estate Gibson, 75 Cal. 329, 332, 17 Pac. Rep. 438.

91. "SUPPORT AND EDUCATION" INCLUDES WHAT.—Will providing for support and education of certain illegitimate children, without naming any amount to be applied toward their support, determination what shall be style and manner of their education and support must be on fair and just interpretation of will's provisions, considering all circumstances which surround testator and motives which probably actuated him.—Williams vs. MacDougall, 39 Cal. 80, 84.

92. SURVIVOR TO TAKE, WHEN.—Where will devised an estate to two persons, on death of one survivor to take share of other, and one of devisees transfers her share to third person and then dies, other devisee is entitled to share so transferred.—In re Estate Cronin, Myrick's Prob. Rep. 252, 254.

93. TESTATOR ACQUIRING TITLE TO PROPERTY EXCEPTED FROM WILL.—Where will devised certain piece of real property, except certain portion thereof, which he held jointly with others and afterwards he acquired title to portion excepted, he will be presumed to have intended by will not to devise to such person that portion afterwards acquired.—In re Estate Pearsons, 99 Cal. 30, 35, 33 Pac. Rep. 751.

94. TRUST ONLY CONVEYED.—Devise of two nineteenths of testator's property to trustees in trust for testator's son, trustees to manage and hold property and pay to son such portion of principal or interest as in their judgment would be for best advantage of son, and at death of son trust to terminate and his said portion to go to his heirs, conveys no interest to son which he can assert in action against trustees, but creates valid trust,

to be terminated at death of son or sooner if trustees saw fit.—*Cutter vs. Hardy*, 48 Cal. 568, 571.

95. TRUST NOT CREATED, WHEN.—A will leaving part of property in trust for certain purposes, and other portions of his property to certain individuals, recommending them to make certain dispositions of such property, among other things, in certain contingencies recommending them to leave such property to Harvard College, such will does not show any intention to create trust in favor of Harvard College.—In re Estate Whitcomb, 86 Cal. 265, 274, 24 Pac. Rep. 1028.

96. TRUST FUND FOR BURIAL LOT—Effect of.—A clause in will attempting to create trust fund for care of burial lot is not charitable use, and is void as creating perpetuity.—In re Estate Gay, 138 Cal. 552, 553, 94 Am. St. Rep. 70, 71 Pac. Rep. 707.

97. TRUST TO CONVEY REAL PROPERTY, VOID.—Clause in will creating trust to convey real property to certain beneficiaries is void.—In re Estate Fair, 132 Cal. 523 (followed and approved in re Estate Sanford, 136 Cal. 97, 59, 68 Pac. Rep. 494).

98. UNIVERSITY OF CALIFORNIA—Description.—Devise to University of State of California shows intention to devise to University of California.—In re Estate Royer, 123 Cal. 614, 616, 56 Pac. Rep. 461, 44 L. R. A. 364.

99. UNINCORPORATED SOCIETY HAVING FOR ITS OBJECT to advance study and promote knowledge of various branches of natural history, having name, governed by constitution and by-laws, and having regularly elected officers, is capable of taking legacy under will, and when society afterwards becomes incorporated, members being same, and objects same, there can be no objection to its receiving gift.—In re Estate Winchester, 133 Cal. 271, 278, 65 Pac. Rep. 475, 54 L. R. A. 281.

As to what is a will, see ante § 1270.

As to what are holographic wills, see § 1277.

As to trust created by or under wills, see ante § 848 et seq. and notes and § 852 and note and post §§ 2221, 2222 and notes.

As to inheritance of pretermitted child or issue of pretermitted child, see ante § 1307.

Construction and interpretation of wills made before the code went into effect and not affected by the code.—See post § 1375.

As to law governing interpretation of foreign wills, see post § 1376.

As to oral declarations of testator as evidence of intention, see next section.

As to construction of terms in wills generally, see note by Robert Desty, 1 L. R. A. 433.

Intention of testator governs.—See notes by Robert Desty, 3 L. R. A. 847; 8 L. R. A. 740; 9 L. R. A. 584; 10 L. R. A. 816.

§ 1318. INTENTION TO BE ASCERTAINED FROM THE WILL. In case of uncertainty arising upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, exclusive of his oral declarations.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Abbreviation.
- 3-9. Children of heirs—How disinherited.
- 10-15. Circumstances as aids in construing intent.
16. Construction of particular will—Precatory words.
- 17-18. Same—Residuary bequest.
19. Devise of land not owned.
- 20-31. Evidence, parol or extrinsic, to ascertain intent.
- 32-34. Same—Declaration not admissible.
- 35-44. Intent ascertained from words of will.
45. Order of words in will.
46. Practice.
- 47-50. Presumption as to property devised.
51. Style and manner of support and education.
52. Survivorship—To what period to relate.
53. Surplusage disregarded.
- 54-56. Testamentary intent.
- 57-59. Trusts, how created.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc. in: *Rosenberg vs. Frank*, 58 Cal. 387, 404 (cited); In re Estate Gilmore, 81 Cal. 240, 243, 22 Pac. Rep. 655 (applied); In re Estate MacKay, 107 Cal. 303, 308, 40 Pac. Rep. 558 (cited in discussion); In re Estate Walkerly, 108 Cal. 627, 659, 49 Am. St. Rep. 97, 41 Pac. Rep. 772 (applied); In re Es-

tate Young, 123 Cal. 337, 341, 55 Pac. Rep. 1011 (construed and applied); In re Estate Langdon, 129 Cal. 451, 453, 62 Pac. Rep. 73 (applied); In re Estate Tompkins, 132 Cal. 173, 176, 64 Pac. Rep. 268 (applied); In re Estate Marti, 132 Cal. 666, 669, 61 Pac. Rep. 964, 64 Id. 1071 (applied); In re Estate Brown, 143 Cal. 450, 456, 77 Pac. Rep. 160 (cited in discussion); *Colton vs. Colton*, 127 U. S. 300, 311, bk. 32 L. ed. 138, 8 Sup. Ct. Rep. 1164 (referred to with other sections).

2. ABBREVIATIONS.—Intention of testator may be as effectually discerned from abbreviations used in the will as by words fully written or spoken, if such abbreviations are commonly used and generally recognized.—In re Estate Lakemeyer, 135 Cal. 28, 29, 87 Am. St. Rep. 96, 66 Pac. Rep. 961.

3. CHILDREN OR HEIRS—How disinherited.—Heirs at law are not to be disinherited unless such intention is clearly manifested in will.—In re Estate Meade, 118 Cal. 428, 430, 62 Am. St. Rep. 244, 50 Pac. Rep. 541.

4. Effect must be given to intention of testator if that can be discovered and is consistent with rules of law, but intention must be expressed with legal certainty; otherwise title of heirs at law must prevail.—In re Estate Meade, 118 Cal. 428, 430, 62 Am. St. Rep. 244, 50 Pac. Rep. 541.

5. Under statute providing that where testator shall omit to provide for his or her child, unless it shall appear that such omission was intentional such child shall have same share in estate of testator as if he or she had died intestate, such intention must appear from will, and cannot be supplied by extrinsic evidence.—*In re Estate Garraud*, 35 Cal. 336, 343.

6. Where testator in his will leaves all of his property to his wife, and shows unmistakable intention to omit from will all of his children and to leave them nothing, such omission of children will include also his grandchildren, two children of his two deceased daughters.—*Rhton vs. Blevin*, 99 Cal. 645, 648, 34 Pac. Rep. 513.

7. Will leaving to testator's wife all of testator's property of every kind and nature, and omitting to make any mention of testator's children, does not on its face show any intention to disinherit testator's children, and therefore will not have that effect.—*In re Estate Stevens*, 83 Cal. 322, 330, 17 Am. St. Rep. 252, 23 Pac. Rep. 379.

8. Will, to disinherit child, must show on its face, from words which indicate such intention, directly or by implication, equally as strong that it was intention of testator to disinherit.—*In re Estate Stevens*, 83 Cal. 322, 329, 17 Am. St. Rep. 252, 23 Pac. Rep. 379.

9. Words of will must show that testator had omitted child in his mind, and having her so in his mind, had omitted to make any mention of it.—*In re Estate Stevens*, 83 Cal. 322, 330, 17 Am. St. Rep. 252, 23 Pac. Rep. 379; *Rhton vs. Blevin*, 99 Cal. 645, 648, 34 Pac. Rep. 513.

10. CIRCUMSTANCES AS AIDS IN CONSTRUING INTENT.—Cardinal rule for construction of all wills is to ascertain intention of testator, and this intention is to be ascertained from words of his will, taking into view when necessary or appropriate circumstances under which it was made.—*In re Estate Martl*, 132 Cal. 666, 668, 61 Pac. Rep. 964, 64 Id. 1071; *Kauffman vs. Gries*, 141 Cal. 295, 74 Pac. Rep. 846.

11. Circumstances surrounding execution of will to be construed as but aids and facilities to be availed of in searching for true sense in which language has been used.—*Bruck vs. Tucker*, 42 Cal. 346, 355.

12. Circumstances under which will made are to be taken in view only when there is an uncertainty arising upon face of will, and only for ascertaining from words of will intention of testator.—*In re Estate Tompkins*, 132 Cal. 173, 176, 64 Pac. Rep. 268.

13. In determining whether an instrument propounded was intended to be testamentary, reference will be had to surrounding circumstances, and language will be construed in light of these circumstances.—*Clarke vs. Ransom*, 50 Cal. 595, 600.

14. Provisions of will are to be construed with reference to circumstances by which testator was or understood himself to be surrounded, and conditions present to his mind at time will was written.—*In re Estate Pearsons*, 99 Cal. 30, 34, 33 Pac. Rep. 751.

15. Testator's intention must be ascertained from words of will, taking into view circumstances under which it was made, exclusive of his oral declarations.—*In re Estate Mackay*, 107 Cal. 302, 308, 40 Pac. Rep. 558.

16. CONSTRUCTION OF PARTICULAR WILLS.—Precatory words.—Will devising all of testator's estate to his wife, to have and to hold same or any parcel thereof, with privilege to dispose of same or any portion thereof for her use and interest or those of their children, shows an intention to give estate to his wife and to authorize her to dispose of it and its proceeds as she should deem proper and not to create trust for benefit of children, the words being precatory.—*Estate Glass*, *Myrick's Prob. Rep.* 213, 214.

17. Residuary bequest.—Residuary bequest of property for benefit and advancement of Oakland Red Cross Society, and if there be hospital used in connection with work of said society that such residue be used to equip such hospital, so far as same may be necessary, and that same be used for soldiers who come from Pacific Coast, shows an intention that residue of estate should be used for benefit of society in carrying out its charitable objects.—*In re Estate Merchant*, 143 Cal. 537, 541, 77 Pac. Rep. 475.

18. Residuary clause in will dividing balance of estate between testator's sisters, Eliese Frank, Henerietta Rosenfeld, Hanna Roseberg, and Therese Weinman, Lena Cohn and children of Mary Fuller, deceased, namely, Hannah Goldsmith, Carry Manheimer, and Rosa Fuller, said first three being sisters of whole-blood of testator and said Therese Weinman and Lena Cohn being his sisters of half-blood, and last three being his nieces, daughters of his sister of whole-blood, held: when taken in connection with another clause of said will, leaving to his sisters of whole-blood one hundred thousand dollars each and his said sisters of half-blood fifty thousand dollars each, and to his said three nieces one hundred and fifty thousand dollars, to express testator's intention that said sisters of whole-blood should each receive one two-elevenths part of said residuary estate, and that said sisters of half-blood should each receive one one-eleventh part thereof, and that said nieces should each receive one one-eleventh part thereof.—*Rosenberg vs. Frank*, 58 Cal. 337, 406.

19. DEVISE OF LAND NOT OWNED.—It cannot be held that will which devised piece of land by description which testator did not own.—*Estate of Lynch*, 142 Cal. 373, 377, 75 Pac. Rep. 1086.

20. EVIDENCE.—Parol or extrinsic, to ascertain intent.—Inaccuracy in will in designating person nominated as executor may be explained by testimony extrinsic to will where it can be fairly determined who such person is.—*In re Estate Colette*, *Myrick's Prob. Rep.* 116, 117.

21. It is incompetent to show by any extrinsic evidence, that testator has, by his own mistake or that of some other person, given legacy of less value or of different character from that which he in fact actually meant to

give.—In re Estate Tompkins, 132 Cal. 173, 176, 64 Pac. Rep. 268.

22. It must appear only maker intended by his will to dispose of property after his death, and parol evidence as to attending circumstances is admissible.—*Mitchell vs. Donohue*, 100 Cal. 202, 208, 38 Am. St. Rep. 279, 34 Pac. Rep. 614.

23. No more in wills than in any other writing is parol evidence admissible to vary terms of instrument.—In re Estate Young, 123 Cal. 337, 341, 55 Pac. Rep. 1011.

24. Omission of child from testator's will may be shown by extrinsic evidence to have been intentional.—*Coulam vs. Doull*, 4 Utah 267, 9 Pac. Rep. 568.

25. Paper reading, "Dear Old Nance: I wish to give you my watch, two shawls, and also five thousand dollars," may be shown by extrinsic evidence and circumstances to be intended as last will and testament.—*Clarke vs. Ransom*, 50 Cal. 595, 601.

26. Parol evidence is never admissible to explain patent ambiguity in a will.—In re Estate Young, 123 Cal. 337, 342, 55 Pac. Rep. 1011.

27. Parol evidence as to attending circumstances is admissible to prove intent of maker of will.—*Mitchell vs. Donohue*, 100 Cal. 202, 208, 38 Am. St. Rep. 279, 34 Pac. Rep. 614.

28. Residuary bequest to three nephews in equal portions may, under this section, be construed by aid of parol testimony to ascertain whether testatrix intended nephews to take as class.—In re Estate Langdon, 129 Cal. 451, 454, 62 Pac. Rep. 73.

29. Rule which allows parol evidence in case of patent ambiguities in wills or to establish implied trust, or to perfect imperfect descriptions of beneficiaries, or of subject matter of devise or bequest, does not allow such evidence for purpose of changing expressed intent of testator, but merely aids court in determining what in fact was that intent.—In re Estate Young, 123 Cal. 337, 342, 55 Pac. Rep. 1011.

30. Temporary bickerings and passionate utterances between husband and wife are consistent with conjugal affection, and evidence of such are inadmissible to prove that testatrix intended to exclude her husband from benefits under her will.—In re Estate Stratton, 112 Cal. 513, 520, 44 Pac. Rep. 1028.

31. SAME—WHEN MEANING OF WILL IS CERTAIN and intelligible subject or object to which it is to be applied may be ascertained by extrinsic evidence, and when so ascertained, will be taken as meaning of testator.—In re Estate Hopper, 66 Cal. 80, 87, 4 Pac. Rep. 984. See *Stanley vs. Green*, 13 Cal. 143; *Bruck vs. Tucker*, 32 Cal. 425.

32. Declaration not admissible.—Declarations made by testator five years after date of will are no part of res gesta, and are not admissible as to what was intended by his will and who wrote it.—In re Estate Gilmore, 81 Cal. 240, 243, 22 Pac. Rep. 655.

33. Intention of testator to omit children from his will cannot be shown by declarations of testator.—In re Estate Stevens, 83 Cal. 322, 328, 17 Am. St. Rep. 252, 23 Pac. Rep. 379. See

In re Estate Garraud, 35 Cal. 336, 339; In re Estate Uts, 43 Cal. 200, 201; *Bush vs. Lindsey*, 44 Cal. 121; In re Estate Wardell, 57 Cal. 484; *Bradley vs. Bradley*, 24 Mo. 311; *Pounds vs. Dale*, 48 Mo. 270; *Chace vs. Chace*, 6 R. L. 407, 78 Am. Dec. 446.

34. Parol evidence, even declarations of the testator, is never admissible to modify, change, or vary his expressed intention. This must be deduced from face of will, or bequest or devise fails.—In re Estate Young, 123 Cal. 337, 341, 55 Pac. Rep. 1011.

35. INTENT ASCERTAINED FROM WORDS OF WILL.—Construction of will depends upon intention of testimony to be ascertained from full view of everything contained within four corners of instrument.—*Williams vs. McKinney*, 34 Kan. 514, 9 Pac. Rep. 265.

36. Construing a will, intention is to be sought for not only by consulting words of will, but also by rules of interpretation which have been from time to time adapted by courts of law for its ascertainment.—*Norris vs. Hensley*, 27 Cal. 439, 445.

37. Duty devolves upon court, in all cases, to ascertain the intent of testator from language of will.—In re Estate Walkerly, 108 Cal. 627, 659, 49 Am. St. Rep. 97, 41 Pac. Rep. 772.

38. It is not sufficient that intention should depend on inference or presumable reasons; it must be manifested by words which are explicit.—*Norris vs. Hensley*, 27 Cal. 439, 446.

39. Inquiry of the court in construing will comes to an end when intent has been discovered from language of will; it is never at liberty to supply omissions or to wrest language from its plain import or give it such meaning as it may be guessed testatrix would have intended if she had known that her own efforts to create a legal devise had resulted in failure.—In re Estate Young, 123 Cal. 337, 344, 55 Pac. Rep. 1011. See In re Estate Walkerly, 108 Cal. 627, 659, 49 Am. St. Rep. 97, 41 Pac. Rep. 772.

40. Intention of testator is to be deduced from words of will; that meaning of words used in will evinces intent and ignorance of testator of significance of words used by him in will does not affect meaning which should attach to them.—In re Estate Reinhardt, 74 Cal. 365, 368, 16 Pac. Rep. 13.

41. Question whether intent be consistent with rules of law or not can never arise until it is settled what that intention was. This can only be discovered by taking whole will together.—*Norris vs. Hensley*, 27 Cal. 439, 446.

42. Rule that the intention of the testator must prevail includes proposition that intention must be found in the will itself.—In re Estate Fair, 132 Cal. 523, 530, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

43. Will must be interpreted by language used therein, and cannot be affected by instrument made by testatrix seven years previous and to which she makes no reference in will.—In re Estate Tompkins, 132 Cal. 173, 176, 64 Pac. Rep. 268.

44. Wills are to be construed as they are written, and courts are not authorized to

transpose their conditions and thereby change their meaning.—In re Estate Schedel, 73 Cal. 594, 598, 15 Pac. Rep. 297.

45. ORDER IN WHICH WORDS OF WILL ARE WRITTEN is not determinative of testator's intention, and this order will be transposed if thereby intention of testator can thereby be ascertained.—In re Estate Stratton, 112 Cal. 513, 518, 44 Pac. Rep. 1028.

46. PRACTICE—Uncertainty arising from face of will as to testator's intention in making residuary disposition of his estate presents issue of law.—In re Estate Langdon, 129 Cal. 451, 453, 62 Pac. Rep. 73.

47. PRESUMPTION AS TO PROPERTY DEVISED.—Of two permissible constructions, that which favors conclusion that testator was disposing only of his own moiety of community property will be adopted.—In re Estate Smith, 108 Cal. 115, 119, 40 Pac. Rep. 1037. See Silvey's Estate, 42 Cal. 210; In re Estate Gwin, 77 Cal. 313, 19 Pac. Rep. 527; In re Estate Gilmore, 81 Cal. 240, 22 Pac. Rep. 655.

48. Presumption that testator intended to dispose only of his own property, and did not intend to make devise of property over which he had no control, is no part of will, and court cannot insert it in will by construction in order to make it operative; there must be words in will itself indicating such intention.—In re Estate Lynch, 142 Cal. 373, 377, 75 Pac. Rep. 1086. See In re Estate Young, 123 Cal. 337, 55 Pac. Rep. 1011. **III. Kurtz vs. Hibner,** 55 Ill. 514, 8 Am. Rep. 665; **Bingel vs. Volz,** 142 Ill. 214, 34 Am. St. Rep. 64, 31 N. E. Rep. 13, 16 L. R. A. 321. **Imd. Funk vs. Davis,** 103 Ind. 281, 2 N. E. Rep. 739; **Sturgis vs. Work,** 122 Ind. 184, 17 Am. St. Rep. 349, 22 N. E. Rep. 996. **Kam. Zirkle vs. Leonard,** 61 Kan. 636, 60 Pac. Rep. 318.

49. Trial courts will presume that testator meant to deal with that property only over which he had testamentary power of disposition, but this presumption cannot prevail against unequivocal intention expressed in will.—In re Estate Smith, 108 Cal. 115, 119, 40 Pac. Rep. 1037. See **Morrison vs. Bowman,** 29 Cal. 337, 347.

50. Where whole language of will when taken together shows that intention of testator was to dispose of whole of community property and not half thereof, such will be construction put upon his will.—In re Estate Stewart, 74 Cal. 98, 15 Pac. Rep. 445.

51. STYLE AND MANNER OF SUPPORT AND EDUCATION OF AN ILLEGITIMATE CHILD provided for by will of child's father shall be determined by reference to will, and on fair and just interpretation of provisions thereof, considering all circumstances which surrounded testator and motives which probably actuated him.—**Williams vs. MacDougall,** 39 Cal. 80, 84.

52. SURVIVORSHIP, TO WHAT PERIOD

TO RELATE.—Question as to what period survivorship is to relate according to terms of will must depend upon apparent intention of testator in each case rather than upon any rigid rule or technical words. And then intention is to be collected either from particular disposition or general context of will.—In re Estate Winter, 114 Cal. 186, 188, 45 Pac. Rep. 1063. See **Denny vs. Kettell,** 135 Mass. 138, 139; **Newton vs. Ayscough,** 19 Ves. 534, 536.

53. SURPLUSAGE DISREGARDED.—Words having no meaning, or which are absurd, or are repugnant to clear intention manifested in other parts of will, may be regarded as surplusage, or restricted in their application.—In re Estate Wood, 36 Cal. 75, 81. See **Bartlet vs. King,** 13 Mass. 536, 542, 7 Am. Dec. 99; **Wright vs. Den ex d. Page,** 23 U. S. (10 Wheat.) 204, 239, bk. 6 L. ed. 303; **Finlay vs. King's Lessee,** 28 U. S. (3 Pet.) 346, 376, bk. 7 L. ed. 701.

54. TESTAMENTARY INTENT.—Intention of deceased that paper signed by him should stand for his last will and testament must be plainly apparent.—In re Estate Meade, 118 Cal. 423, 430, 62 Am. St. Rep. 244, 50 Pac. Rep. 541.

55. Particular words are unnecessary to show testamentary intent.—**Mitchell vs. Donohue,** 100 Cal. 202, 208, 38 Am. St. Rep. 279, 34 Pac. Rep. 614.

56. WILL IN FOLLOWING WORDS: "this is to serify that ie levet to mey wife Real and persnal and she to dispose for them as she wis," construed to mean: "this is to certify that I leave to my wife my real and personal [property] and she to dispose of them as she wishes," and to show testamentary intent.—**Mitchell vs. Donohue,** 100 Cal. 202, 208, 38 Am. St. Rep. 279, 34 Pac. Rep. 614.

57. TRUSTS, HOW CREATED.—Precatory words used in will may or may not create trust, according as they are used, and whether in any particular will they have been used for this purpose will depend upon construction to be given to that will.—In re Estate Marti, 132 Cal. 666, 669, 61 Pac. Rep. 964, 64 Id. 1071.

58. When property is given absolutely and without restriction trust is not to be lightly imposed upon mere words of recommendation and confidence.—In re Estate Marti, 132 Cal. 666, 669, 61 Pac. Rep. 964, 64 Id. 1071. See **Hess vs. Singler,** 114 Mass. 56.

59. In order to make a devisee trustee it must appear that testator intended to impose imperative obligation upon him and for that purpose has used words which excluded exercise of discretion or option in reference to act in question.—In re Estate Marti, 132 Cal. 666, 669, 61 Pac. Rep. 964, 64 Id. 1071.

As to admissibility or declaration of testators, see monographic note 3 Am. Dec. 395.

As to extrinsic evidence to aid in the interpretation or application of wills, see monographic note 46 Am. Rep. 72.

§ 1319. RULES OF INTERPRETATION. In interpreting a will, subject to the law of this state, the rules prescribed by the following sections of this chapter are to be observed, unless an intention to the contrary clearly appears.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Construction matter of law.
3. Construction not to be forced.
4. Decided cases little aid to construction.
5. Law at testator's death to govern.
6. Liberal construction, when.
7. Refers to certain succeeding sections.
8. Rules prescribed by code same as by courts.

1. **Applied, cited, construed, referred to, etc., in:** Colton vs. Colton, 127 U. S. 300, 311, bk. 32 L. ed. 138, 8 Sup. Ct. Rep. 1164 (referred to with other sections).

2. **Construction matter of law.**—Construction of devise is always matter of law and is never to be submitted to jury.—Bruck vs. Tucker, 42 Cal. 346, 355.

3. **Construction not to be forced.**—Court is not allowed in construing language of will to force construction of sentence or even word in order that particular result may be reached, even though such construction be absolutely necessary to save document from complete condemnation.—In re Estate Fair, 132 Cal. 523, 544, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

4. **Decided cases little aid to construction.**—In interpretation of will, decided cases afford but little aid in arriving at correct inter-

pretation, as it seldom happens that two cases can be found precisely alike.—Rosenberg vs. Frank, 58 Cal. 387, 411.

5. **Law at testator's death to govern.**—Will is to be construed under the law in force at time of death of testator.—In re Estate Pfielb, 48 Cal. 643, 644.

6. **Liberal construction, when.**—Wills in aid of charitable trust are to be construed liberally, and courts will treat as certain that which may reasonably be said to be capable of being made certain.—Fay vs. Howe, 136 Cal. 599, 602, 69 Pac. Rep. 423.

7. **Refers to certain succeeding sections.**—This section evidently has reference to those succeeding sections which deal with subject of "interpreting will," and § 1343 does not deal with that subject; it is independent substantive provision, having nothing to do with interpretation.—In re Estate Sutro, 139 Cal. 87, 89, 72 Pac. Rep. 827.

8. **Rules prescribed by code for interpretation of wills** are in accord with those heretofore laid down by courts for such interpretation.—Rosenberg vs. Frank, 58 Cal. 387, 404.

As to what law governs validity and interpretation of wills, see ante § 1285 and note, and post § 1376 and note.

§ 1320. SEVERAL INSTRUMENTS ARE TO BE TAKEN TOGETHER.

Several testamentary instruments, executed by the same testator, are to be taken and construed together as one instrument.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Codicil not to disturb will unless necessary.
3. Cumulative legacies, what are.
- 5, 6. Paper referred to in will, how identified.
7. Rights of legatee in codicil.
8. Two instruments presented for probate.
- 9, 10. Will and codicil single instrument.
11. Will may be controlled by letter.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in:** In re Estate Murphy, 104 Cal. 554, 568, 38 Pac. Rep. 543 (cited).

2. **CODICIL IS NEVER CONSTRUED TO DISTURB DISPOSITION OF THE WILL** further than is absolutely necessary for purpose of giving effect to codicil.—In re Estate Ladd, 94 Cal. 670, 674, 30 Pac. Rep. 99; In re Estate McCauley, 138 Cal. 432, 71 Pac. Rep. 512.

3. **CUMULATIVE LEGACIES—What are.**—Where testator gives legacy of quantity simpliciter and also second legacy and quantity to same legatee, second legacy is regarded as cumulative and not as substitutionary, unless language of second will or codicil shows intent to contrary, or unless two legacies are for same sum and both testamentary instruments express same motive for gift.—In re Estate Zelle, 74 Cal. 125, 131, 15 Pac. Rep. 455.

4. **Where testator makes two wills, second one supplementary to first, and leaves legacies in both wills to same legatees, it will be presumed that legacies were intended to be cumulative, unless language used by testator shows that those bequeathed by second will**

were to be in substitution.—In re Estate Zelle, 74 Cal. 125, 140, 15 Pac. Rep. 455.

5. **PAPER REFERRED TO IN WILL, HOW IDENTIFIED.**—Identification of paper referred to by and incorporated in will must be had from description given in will itself; otherwise will is not wholly in writing, as our law requires, but rests partly upon writing and partly in parol.—In re Estate Young, 123 Cal. 337, 342, 55 Pac. Rep. 1011. See In re Estate Shillaber, 74 Cal. 144, 5 Am. St. Rep. 433, 15 Pac. Rep. 453. Conn. Phelps vs. Robbins, 40 Conn. 250. N. C. Chambers vs. McDaniel, 6 Ired. 226. Eng. Habbergham vs. Vincent, 1 Ves. Jr. 204, 209; Smart vs. Prujean, 6 Ves. Jr. 560.

6. **Existing writing may be by reference incorporated into and made part of will, but before such extrinsic document may be so incorporated, description of it in will itself must be so clear, explicit, and unambiguous as to leave its identity free from doubt.**—In re Estate Young, 123 Cal. 337, 342, 55 Pac. Rep. 1011.

7. **RIGHTS OF LEGATEE IN CODICIL** who had been substituted for another legatee in original will, are not changed or enlarged by fact that several years elapsed between making of will and codicil.—In re Estate De Lavaega, 119 Cal. 651, 656, 51 Pac. Rep. 1074.

8. **TWO INSTRUMENTS PRESENTED FOR PROBATE.**—Where two instruments of even date, executed on same day, are presented for probate as last will of decedent, they should be taken and construed together unless they

are wholly inconsistent.—In re Estate Murphy, 104 Cal. 554, 568, 38 Pac. Rep. 543.

9. WILL AND CODICIL ARE TO BE CONSTRUED AS SINGLE INSTRUMENT executed at date of codicil, and of which all parts are to be construed "so as if possible to form one consistent whole."—In re Estate Ladd, 94 Cal. 670, 674, 30 Pac. Rep. 99.

10. Will and codicil together constitute testamentary disposition of property, and are all to be considered for purpose of arriving at intention of testator.—In re Estate De Laveaga, 119 Cal. 651, 656, 51 Pac. Rep. 1074.

§ 1321. HARMONIZING VARIOUS PARTS. All the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole; but where several parts are absolutely irreconcilable, the latter must prevail.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Application of section.
3. Different parts to be reconciled if possible.
4. Holographic will.
- 5, 6. Surplusage.
- 7, 8. Valid and invalid clauses.
9. Vested fee cannot be limited.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Rosenberg vs. Frank, 58 Cal. 387, 404 (cited); In re Estate Ladd, 94 Cal. 670, 674, 30 Pac. Rep. 99 (applied); In re Estate Marti, 132 Cal. 666, 668, 61 Pac. Rep. 964, 64 Id. 1071 (cited); In re Estate McCauley, 138 Cal. 432, 435, 71 Pac. Rep. 512 (cited); Colton vs. Colton, 127 U. S. 800, 311, bk. 32 L. ed. 138, 3 Sup. Ct. Rep. 1164 (referred to with other sections).

2. APPLICATION OF SECTION.—Latter part of will expressing testator's desire, with reference to testamentary disposition of property by devisee, not being irreconcilable with other parts of testament, § 1321 is not applicable.—In re Estate Marti, 132 Cal. 666, 668, 61 Pac. Rep. 964, 64 Id. 1071.

3. DIFFERENT PARTS TO BE RECONCILED IF POSSIBLE.—The different parts of will, or of will and codicil, shall be reconciled if possible, and when bequest has once been made it shall not be revoked, unless no other construction can be fairly put upon language used by testator.—In re Estate Ladd, 94 Cal. 670, 674, 30 Pac. Rep. 99; In re Estate McCauley, 138 Cal. 432, 435, 71 Pac. Rep. 512. See Conn. Colt vs. Colt, 32 Conn. 422, 446. Md. Johns Hopkins University vs. Pinckney, 56 Md. 365. N. Y. Wetmore vs. Parker, 52 N. Y. 450, 462.

4. HOLOGRAPHIC WILL.—When authenticated by signature of testator, all remaining portion of a holographic will is to be construed as expressing will of testator, and ef-

11. WILL MAY BE CONTROLLED BY LETTER.—Will devising estate in fee to testator's nephew may be controlled and modified by letter written by testator on same day as date of will to his nephew giving certain directions as to disposition of estate and income thereof, on which letter nephew in writing binds himself to faithfully execute requests and directions therein contained.—De Laurencel vs. De Boom, 48 Cal. 581, 585.

Consideration of other instrument in ascertaining intent of testator.—See ante § 1318 and note para. 3, 3.

fect, if possible, is to be given to all of language found therein.—In re Estate Stratton, 112 Cal. 513, 518, 44 Pac. Rep. 1028.

5. SURPLUSAGE.—Will containing clause: "I wish five thousand dollars to go to John C. Cole, in event of my dying intestate" words "in the event of my dying intestate," will be rejected as surplusage, as being repugnant to will and its intention.—In re Estate Wood, 36 Cal. 75, 81.

6. Words in will conveying no meaning, or absurd or repugnant to clear intention manifested in other parts of will, may be regarded as surplusage or restricted in its application.—In re Estate Wood, 36 Cal. 75, 81.

7. VALID AND INVALID CLAUSES.—Where there are valid and invalid clauses in will, question whether valid clauses can stand depends upon whether or not invalid ones are so interwoven with them they cannot be eliminated without interfering with and changing main scheme of testator.—In re Estate Fair, 132 Cal. 523, 540, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

8. Certain bequests made in will being void for uncertainty, if will is effective in other parts, it is properly admitted to probate.—In re Estate Shillaber, 74 Cal. 144, 147, 5 Am. St. Rep. 433, 15 Pac. Rep. 453.

9. VESTED FEE CANNOT BE LIMITED.—Provision in will that there shall be vested absolutely in legatee therein named certain sum of money, distribution to be made three years after testator's death, unless extended by executor therein named two years further, creates vested interest in fee in legatee, postponed merely in its enjoyment and its alienation cannot be limited or restrained by another clause in will.—Williams vs. Williams, 73 Cal. 99, 103, 14 Pac. Rep. 394.

See note by Robert Desty, 8 L. R. A. 740.

§ 1322. IN WHAT CASE DEVISE NOT AFFECTED. A clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by an inaccurate recital of or reference to its contents in another part of the will.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Absolute devise not limited by words less clear.
3. Alteration by codicil—Implication.
4. Codicil—Presumption as to.
5. Condition repugnant to gift.
6. "Deserving" and "needing such aid" construed.
- 7, 8. "Desire of" testator—Effect of.
9. Devise subject to direction to sell.
10. Devise of common property—There being none.
11. Doubtful expression in codicil.
12. Doubtful clause of no effect.
13. Expression of hope or confidence—Effect of.
14. Invalidity of particular bequest.
15. Residuary bequest not revoked, when.
16. Subsequent clause without operative words.
17. Valid clause as affected by invalid clause.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Williams vs. Williams*, 73 Cal. 99, 103, 14 Pac. Rep. 394 (cited in discussion); In re *Estate Upham*, 127 Cal. 90, 97, 59 Pac. Rep. 315 (applied); In re *Estate Marti*, 132 Cal. 666, 672, 61 Pac. Rep. 964, 64 Id. 1071 (construed and applied); *Colton vs. Colton*, 127 U. S. 300, 312, bk. 32 L. ed. 138, 8 Sup. Ct. Rep. 1164 (referred to with other sections).

2. **ABSOLUTE DEVISE NOT LIMITED BY WORDS LESS CLEAR**.—When absolute estate has been conveyed in one clause of will, it will not be cut down or limited by subsequent words, except such as indicate as clear an intention therefor as was shown by words creating estate.—In re *Estate Marti*, 132 Cal. 666, 672, 61 Pac. Rep. 964, 64 Id. 1071; In re *Estate Granniss*, 142 Cal. 1, 6, 75 Pac. Rep. 324.

3. **ALTERATION BY CODICIL**—Implication.—Determination expressed in codicil to make alteration in will in one part negatives, by implication, any intention to alter it in any other respect.—In re *Estate Ladd*, 94 Cal. 670, 675, 30 Pac. Rep. 99. See *Quincy vs. Rogers*, 9 Cush. (63 Mass.) 291, 296.

4. **CODICIL**—Presumption as to.—Testator, in making codicil to will, assumed to use terms therein with reference to provisions of will as they would be construed under facts then existing, and with knowledge of what property will provided that executors should hold in trust, and that he intended that no further change should be made in will than was expressly declared in codicil.—In re *Estate Ladd*, 94 Cal. 670, 673, 30 Pac. Rep. 99.

5. **CONDITION REPUGNANT TO GIFT**.—If condition in will deferring time of payment is repugnant to gift bequeathed by will, condition and not gift would be void.—In re *Estate Young*, 123 Cal. 837, 346, 55 Pac. Rep. 1011.

6. **"DESERVING" AND "NEEDING SUCH AID" CONSTRUED**.—Where testator left certain sum of money to be used in mitigating wants of "aged" needing such aid in certain place and for deserving poor needing such aid, word "deserving" must be construed in connection with phrase "needing such aid," and coupled with that phrase and donation of money, it means practically same thing, and such bequest is not void for uncertainty.—

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Fay vs. Howe, 136 Cal. 599, 602, 69 Pac. Rep. 423.

7. **"DESIRE" OF TESTATOR**—Effect of.—While desire of testator for disposition of his estate will be construed as command when addressed to his executors, it will not, when addressed to his legatees, be construed as limitation upon estate or interest which he has given to them in absolute terms.—In re *Estate Marti*, 132 Cal. 666, 671, 61 Pac. Rep. 964, 64 Id. 1071.

8. Where testator had by previous clause in his will given and bequeathed to his wife certain property without any words of limitation or qualification, subsequent clause in same will stating that upon her death he desired that one half of property bequeathed to her should be devised by her to his relatives, is of no force and effect, and does not limit title in fee devised to his wife.—In re *Estate Marti*, 132 Cal. 666, 672, 61 Pac. Rep. 964, 64 Id. 1071.

9. **DEVISE SUBJECT TO DIRECTION TO SELL**.—Clause in will, "I give, bequeath, and devise to certain beneficiaries one sixth part of my estate," is subordinate to his direction in previous part of same item in will, that property be sold, and must yield thereto.—In re *Estate Pforr*, 144 Cal. 121, 128, 77 Pac. Rep. 825.

10. **DEVISE OF COMMON PROPERTY**.—There being none.—Fact that there was no common property of testatrix, does not alter words of devise of common property.—In re *Estate Reinhardt*, 74 Cal. 365, 368, 16 Pac. Rep. 13.

11. **DOUBTFUL EXPRESSION IN CODICIL**.—Dispositions made by will are not to be disturbed by codicil further than is absolutely necessary in order to give it effect, and clear disposition made by will is not revoked by doubtful expression or inconsistent disposition in codicil.—In re *Estate Ladd*, 94 Cal. 670, 674, 30 Pac. Rep. 99; In re *Estate McCauley*, 138 Cal. 432, 435, 71 Pac. Rep. 512.

12. **DOUBTFUL CLAUSE OF NO EFFECT**.—Where absolute estate has been conveyed in one clause in will, subsequent clause which merely raises doubt or suggests inference will not affect estate thus conveyed, and any doubt which may be suggested by reason of such subsequent words must be resolved in favor of estate first conveyed.—In re *Estate Marti*, 132 Cal. 666, 672, 61 Pac. Rep. 964, 64 Id. 1071; In re *Estate Granniss*, 142 Cal. 1, 6, 75 Pac. Rep. 324.

13. **EXPRESSION OF HOPE OR CONFIDENCE**—Effect of.—Prima facie mere request or expression of hope or confidence or expectation does not import command, when used in will.—In re *Estate Marti*, 132 Cal. 666, 671, 61 Pac. Rep. 964, 64 Id. 1071.

14. **INVALIDITY OF PARTICULAR BEQUEST**.—Validity or invalidity of particular bequest does not affect rest of the will if it is otherwise valid.—*Toland vs. Toland*, 123 Cal. 140, 144, 55 Pac. Rep. 681.

15. **RESIDUARY BEQUEST NOT REVOKED, WHEN**.—Residuary bequest is not re-

voided, annulled, or rendered inoperative by subsequent provision in will providing that if estate "should be more or less than sufficient to provide for and pay all before-mentioned devises, bequests, and legacies, then all said devises, bequests, and legacies shall be increased or diminished ratably."—In re Estate Upham, 127 Cal. 90, 97, 59 Pac. Rep. 315.

16. **SUBSEQUENT CLAUSE WITHOUT OPERATIVE WORDS** which expressly refers to and recognizes as existing a previous clause cannot be held to revoke or destroy latter.—

In re Estate Upham, 127 Cal. 90, 97, 59 Pac. Rep. 315.

17. **VALID CLAUSE AS AFFECTED BY INVALID CLAUSE.**—Where there are valid and invalid clauses in will question whether valid clauses can stand depend upon whether or not invalid ones are so interwoven with them that they cannot be eliminated without interfering with and changing main scheme of testator.—In re Estate Fair, 136 Cal. 79, 81, 68 Pac. Rep. 306.

As to intention of testator, see § 1317 et seq.

§ 1323. **WHEN AMBIGUOUS OR DOUBTFUL.** Where the meaning of any part of a will is ambiguous or doubtful, it may be explained by any reference thereto, or recital thereof, in another part of the will.

History: Enacted March 21, 1872.

1. Patent ambiguity.
2. Void for uncertainty.

1. **Patent ambiguity.**—Will providing that to testatrix's husband her "bank-book shall be handed to him with gold watch and chain, also two deeds." does not refer to deeds with sufficient definiteness to insure certainty in their identification, and there is patent ambiguity in language of will which attempts designation of deeds.—In re Estate Young, 123 Cal. 337, 342, 55 Pac. Rep. 1011.

2. **Void for uncertainty.**—Provision in will requiring executors to purchase "at price not exceeding \$—— a tract of land at or near the residence of said Wilsons at Santa Barbara for cattle pasture," is void for uncertainty.—In re Estate Traylor, 81 Cal. 9, 10, 15 Am. St. Rep. 17, 22 Pac. Rep. 297.

As to extrinsic evidence to explain will, see monographic note 50 Am. St. Rep. 279-284.

As to bequests void for uncertainty, see 44 Am. Dec. 94, and note 98, 101, 54 Am. Rep. 213, and note 222.

§ 1324. **WORDS TAKEN IN ORDINARY SENSE.** The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained.

History: Enacted March 21, 1872.

I. In General.

1. Applied, cited, construed, referred to, etc.
2. Abbreviations.
3. Ignorance of testator—Effect of.
4. Technical informalities or grammatical errors.
5. Word occurring more than once.
6. Words to be taken in ordinary sense.

II. Particular Words—Construction of.

7. "Aforesaid."
8. "Between."
9. "Children," "grandchildren," "nephew," "niece," "cousin."
- 10, 11. "Desire."
12. "Family."
13. "Herein."
14. "Money."
15. "Ornaments."
16. "Property."
17. "Pro rata."
18. "Residue."
19. "Revert."

I. IN GENERAL.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc.,** in: Rosenberg vs. Frank, 58 Cal. 387, 404 (cited with other section in discussion); In re Estate Reinhardt, 74 Cal. 365, 368, 16 Pac. Rep. 13 (applied); Toland vs. Toland, 123 Cal. 140, 143, 55 Pac. Rep. 681 (applied); In re Estate Marti, 132 Cal. 666, 671, 61 Pac. Rep. 964, 64 Id. 1071 (construed and applied); Colton vs. Colton, 127 U. S. 300,

312, bk. 32 L. ed. 138, 8 Sup. Ct. Rep. 1164 (referred to with other sections).

2. **ABBREVIATIONS USED IN WILL** will be given meaning ordinarily understood by such terms.—In re Estate Lakemeyer, 135 Cal. 28, 30, 87 Am. St. Rep. 96, 66 Pac. Rep. 961.

3. **IGNORANCE OF TESTATOR OF SIGNIFICATION OF WORDS** used by him in will does not affect meaning which he attached to them.—In re Estate Reinhardt, 74 Cal. 365, 368, 16 Pac. Rep. 13.

4. **ALL TECHNICAL INFORMALITIES OR GRAMMATICAL ERRORS** or words which in legal language are inapt to express evident intention of testator will be construed as though proper legal phraseology had been implied; but there must be some language used to effectuate that which is claimed to have been intention of testator.—In re Estate Fair, 132 Cal. 523, 529, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

5. **A WORD OCCURRING MORE THAN ONCE IN WILL** is presumed to be used always in same sense unless contrary intention appear from context.—Le Breton vs. Cook, 107 Cal. 410, 417, 40 Pac. Rep. 552.

6. **WORDS TO BE TAKEN IN ORDINARY SENSE.**—Words of will are to be taken in their ordinary or primary sense, unless it appears from text of will they were probably used in some other sense, or unless by reference to extrinsic circumstances use of words

in their primary sense would render provisions of will insensible or inoperative.—In re Estate Schedel, 73 Cal. 594, 596, 15 Pac. Rep. 297; Toland vs. Toland, 123 Cal. 140, 143, 55 Pac. Rep. 681; Kauffman vs. Gries, 141 Cal. 295, 300, 74 Pac. Rep. 846. See In re Estate Marti, 132 Cal. 666, 61 Pac. Rep. 964, 64 Id. 1071.

II. PARTICULAR WORDS—CONSTRUCTION OF.

7. **"AFORESAID" IN WILL** may be construed to mean not only that which immediately precedes it, but all that precedes it.—In re Estate Pearsons, 98 Cal. 603, 609, 33 Pac. Rep. 451.

8. **"BETWEEN"**—Indicates what.—Where will directs that residue of testator's estate be divided "between" certain persons, word "between" indicates that such persons are to equally share estate, notwithstanding omission of clause "share and share alike."—In re Estate Morrison, 138 Cal. 401, 405, 71 Pac. Rep. 453.

9. **"CHILDREN" OR "GRANDCHILDREN," "NEPHEW," "NIECE," "COUSIN,"** or any similar term, must be presumed to have been used in its primary and natural sense, and this sense cannot be enlarged or qualified unless there be something on face of will clearly indicating such intent in testator's mind at time of making will.—Rhoton vs. Blevin, 99 Cal. 645, 648, 34 Pac. Rep. 513.

10. **"DESIRE"**—Imports what.—"I desire that my real estate shall be sold" are equivalent to words "I will" that it be sold.—In re Estate Pforr, 144 Cal. 121, 127, 77 Pac. Rep. 325. See Appeal of Philadelphia, 113 Pa. St. 470, 4 Atl. Rep. 4.

11. **"Desire" does not import trust or charge** when used in will.—In re Estate Marti, 132 Cal. 666, 671, 61 Pac. Rep. 964, 64 Id. 1071.

12. **"FAMILY"**—Meaning of.—Where testator provides in his will that in case of death of any of legatees under will before distribution, portion so bequeathed to such legatee shall revert to children of family of which such legatee was member, word "family" is to be construed to mean immediate family of children to which they belong, and not to brothers and sisters of testator by half-blood.—In re Estate Bennett, 134 Cal. 320, 324, 66 Pac. Rep. 370.

13. **"HEREIN"**—As used in will is locative adverb, and its meaning is to be determined by context; it may refer to particular portion

or to entire instrument in which it is used.—In re Estate Pearsons, 98 Cal. 603, 609, 33 Pac. Rep. 451.

14. **"MONEY"**—Intention of testator in use of word "money," in making devise in will, will be presumed to mean both real and personal property, if such appears on face of instrument and from context thereof.—In re Estate Miller, 48 Cal. 165, 170.

15. **"ORNAMENTS"**—Bequeathed in will includes jewelry such as women usually wear for personal decoration.—In re Estate Traylor, 75 Cal. 189, 190, 16 Pac. Rep. 774.

16. **"PROPERTY"**—Meaning of as used.—Testator devised certain pieces of land to his two aunts, also property in which he and his aunts owned jointly, directing that in event of death of either aunt, that all property bequeathed to them shall vest in survivor, and that in event of death of both aunts property bequeathed to them shall be sold at public auction, proceeds to go to certain orphan asylums, and giving remainder of his property to said aunts subject to reversion before stated. The court held the "property" which testator directed to be sold at public auction included "all property" devised by will.—In re Estate Pearsons, 98 Cal. 603, 609, 33 Pac. Rep. 451.

17. **"PRO RATO"**—When used in a will, will be construed to mean pro rata.—Rosenberg vs. Frank, 58 Cal. 387, 405.

18. **"RESIDUE"**—Where manifest from context, and from provisions of will, that testator used word in some more restricted sense, it will be given meaning in which it is clear that testator used it, rather than as provided for in §§ 1332 and 1333 of this code.—Le Breton vs. Cook, 107 Cal. 410, 416, 40 Pac. Rep. 552.

19. **"REVERT"**—Meaning of.—In clause in will that in case of death of any of legatees under will before distribution portion so bequeathed to such legatee shall revert to children of family of which legatee is member, word "revert" is to be construed to mean "go."—In re Estate Bennett, 134 Cal. 320, 323, 66 Pac. Rep. 370.

As to what property passes by the word "goods," see note 1 Am. Dec. 294.

As to what words vest an estate in married woman to exclusion of husband, see monographic note 39 Am. Dec. 773.

As to construction of words and expressions in wills, see notes by Robert Desty, 3 L. R. A. 740; 10 L. R. A. 816.

As to what words will pass real estate, see monographic note 14 Am. Dec. 572.

§ 1325. WORDS TO RECEIVE AN OPERATIVE CONSTRUCTION. The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Devise of life estate.
- 3, 4. Effect to be given to all language.
5. "Unless necessary" confers authority.

1. Applied, cited, construed, referred to, etc.. in: Rosenberg vs. Frank, 58 Cal. 387,

404 (cited with other sections in discussion); Rhoton vs. Blevin, 99 Cal. 645, 648, 34 Pac. Rep. 513 (applied); In re Estate Tompkins, 132 Cal. 173, 177, 64 Pac. Rep. 268 (applied); Colton vs. Colton, 127 U. S. 300, 312, bk. 32 L. ed. 133, 3 Sup. Ct. Rep. 1164 (referred to with other sections).

2. If language of will fail to devise greater estate, but did devise estate for life, latter estate is surely created, and is in all respects perfect estate.—In re Estate Murphy, 104 Cal. 554, 568, 38 Pac. Rep. 543.

3. Will is to be construed as to give effect, if possible, to all of language found therein.—In re Estate Stratton, 112 Cal. 518, 519, 44 Pac. Rep. 1028.

4. Words of will are to receive interpretation which will give to every expression some

effect rather than one which will render any of expressions inoperative.—Rhoton vs. Blevin, 99 Cal. 646, 648, 34 Pac. Rep. 513; In re Estate Tompkins, 132 Cal. 173, 177, 64 Pac. Rep. 268.

5. "Unless necessary" confers authority.—Will providing that testator's residence be not sold or disposed of unless necessary, and that same shall be used by his wife and children as their home, gives authority to sell if necessary.—Etcheborne vs. Auzerais, 45 Cal. 121, 125. See ante §§ 1303, 1311, 1312.

§ 1326. **INTESTACY TO BE AVOIDED.** Of two modes of interpreting a will, that is to be preferred which will prevent a total intestacy.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 403, held unconstitutional, see history, § 4 ante.

1. Applied, cited, construed, referred to, etc.
2. Bequest not revoked, when.
- 3-5. Construction leading to intestacy not favored.
6. Devises should not be defeated by acute speculation.
7. Legal effect of expressed intent to govern.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc.,** in: In re Estate Murphy, 104 Cal. 554, 568, 38 Pac. Rep. 543 (applied); Toland vs. Toland, 123 Cal. 140, 143, 55 Pac. Rep. 681 (applied); In re Estate Young, 128 Cal. 337, 343, 344, 55 Pac. Rep. 1011 (applied); In re Estate Fair, 132 Cal. 523, 566, 60 Pac. Rep. 442, 64 Id. 1000 (applied).

2. **BEQUEST ONCE MADE SHALL NOT BE REVOKED** unless no other construction can fairly be put upon language used by testator.—In re Estate McCauley, 138 Cal. 432, 436, 71 Pac. Rep. 512.

3. **CONSTRUCTIONS WHICH LEAD TO INTESTACY**, total or partial, are not favored, and therefore such interpretation should, if reasonably possible, be placed upon provisions of will as will prevent that result, and especially should that be done where will evinces intention on part of testator to dispose of his whole estate.—Le Breton vs. Cook, 107 Cal. 410, 416, 40 Pac. Rep. 552.

4. **Of two modes of interpreting a will**, that is to be preferred which will prevent intestacy.—Toland vs. Toland, 123 Cal. 140, 143, 55 Pac. Rep. 681. See Le Breton vs. Cook, 107 Cal. 410, 40 Pac. Rep. 552.

5. **Will should be construed, if possible, to make it effective rather than void.**—Toland vs. Toland, 123 Cal. 140, 143, 55 Pac. Rep. 681; In re Estate Fay, 145 Cal. 82, 78 Pac. Rep. 340.

6. **DEVISES OF PROPERTIES AND ESTATES SHOULD NOT BE DEFEATED** by acute speculations about what might possibly occur after death of devisee.—In re Estate Murphy, 104 Cal. 554, 568, 38 Pac. Rep. 543.

7. **TESTATOR'S EXPRESS INTENT WILL NOT BE VARIED** under guise of correction because testator misapprehended its legal effect; if legal effect of his express intent is intestacy, it will be presumed that he designed that result. It is not what did he mean, but what did his words mean?—In re Estate Young, 128 Cal. 337, 344, 55 Pac. Rep. 1011. See Ala. Abercrombie vs. Abercrombie, 27 Ala. 489. Ill. Bingel vs. Volz, 142 Ill. 214, 34 Am. St. Rep. 64, 31 N. W. Rep. 18, 16 L. R. A. 321. Ky. Caldwell vs. Caldwell, 7 Bush 515. N. Y. Arthur vs. Arthur, 10 Barb. 9; Sturges vs. Cargill, 1 Sand. Ch. 218. S. C. Rosborough vs. Hemphill, 5 Rich. Eq. 95.

§ 1327. **EFFECT OF TECHNICAL WORDS.** Technical words in a will are to be taken in their technical sense, unless the context clearly indicates a contrary intention, or unless it satisfactorily appears that the will was drawn solely by the testator, and that he was unacquainted with such technical sense.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 403, held unconstitutional, see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXLVIII, p. 606.

1. Applied, cited, construed, referred to, etc.
2. Effect of testator's ignorance of meaning.

1. **Applied, cited, construed, referred to, etc.,** in: In re Estate Reinhardt, 74 Cal. 365, 368, 16 Pac. Rep. 18 (applied).

2. **Words of a will should not be given a different sense** because of the fact that testator was ignorant of their meaning.—In re Estate Reinhardt, 74 Cal. 365, 368, 16 Pac. Rep. 18.

§ 1328. **TECHNICAL WORDS NOT NECESSARY.** Technical words are not necessary to give effect to any species of disposition by a will.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Non-user, or misapplication of technical terms.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc.**, in: *Colton vs. Colton*, 127 U. S. 800, 312, bk. 82 L. ed. 138, 8 Sup. Ct. Rep. 1164 (referred to with other sections).

2. **Intention of a testator, in testamentary**

disposition of his estate, which is not inconsistent with rules of law and is ascertainable by examination of will itself, will not be defeated because from ignorance and want of proper legal advice testator had not used usual technical language of declaring such intent, or had misapplied legal terms.—*Parks vs. Parks*, 9 Paige Ch. (N. Y.) 107.

§ 1329. CERTAIN WORDS NOT NECESSARY TO PASS A FEE. The term "heirs," or other words of inheritance, are not requisite to devise a fee, and a devise of real property passes all the estate of the testator, unless otherwise limited.

History: Enacted March 21, 1872.

Construction of word "heirs."—See post § 1334.

As to meaning of "children," see note by Robert Desty, 8 L. R. A. 740.

As to meaning of word "heirs," see notes by Robert Desty, 2 L. R. A. 457; 8 L. R. A. 740; 13 L. R. A. 721.

As to meaning of "issue," see notes by Robert Desty, 4 L. R. A. 117; 11 L. R. A. 305.

As to meaning of "next of kin," see note by B. A. Rich, 15 L. R. A. 300.

Words of inheritance or succession not necessary to pass a fee.—See ante § 1072.

§ 1330. POWER TO DEVISE, HOW EXECUTED BY TERMS OF WILL. Real or personal property embraced in a power to devise, passes by a will purporting to devise all the real or personal property of the testator.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Construction.
- 3, 4. Donee of power has no interest in land.
5. Executor may be donee and execute power.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc.**, in: *Morrifew vs. San Francisco & S. R. R. Co.*, 107 Cal. 587, 598, 40 Pac. Rep. 810 (applied); In re Estate Fair, 132 Cal. 523, 558, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000 (construed and applied).

2. **CONSTRUCTION.**—"Section 1330 refers to a power to devise. It assumes existence of power and states one case in which power shall be deemed executed. Not word in section can be construed as authorizing such power. These provisions existed when table was in code and should have gone with it, if repeal of that section was to be deemed abolition of powers. If, on other hand, repeal merely did away with restriction upon right to create powers, they are still properly in code, and have their proper use."—In re Estate Fair, 132

Cal. 523, 558, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000 (dis. op. of Temple, J.).

3. **DONEE OF POWER HAS NO ESTATE OR INTEREST IN LAND**, legal or equitable, and there need be no equitable estate in any one, either in creation or execution of power.—In re Estate Fair, 132 Cal. 523, 558, 60 Pac. Rep. 442, 64 Id. 1000.

4. **Power is not real property**, and in instrument creating power no interest is conveyed to donee of power.—In re Estate Fair, 132 Cal. 523, 558, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

5. **EXECUTOR MAY BE DONEE OF A POWER** to sell land, and may execute it, but no equitable estate need be created in any one.—In re Estate Fair, 132 Cal. 523, 558, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000; *Morrifew vs. San Francisco & S. R. R. Co.*, 107 Cal. 587, 598, 40 Pac. Rep. 810.

Devise including absolute power of disposition necessarily vests an estate in fee.—See note 28 Am. Rep. 4.

§ 1331. DEVISE OR BEQUEST OF ALL REAL OR ALL PERSONAL PROPERTY, OR BOTH. A devise or bequest of all the testator's real or personal property, in express terms, or in any other terms denoting his intent to dispose of all his real or personal property, passes all the real or personal property which he was entitled to dispose of by will at the time of his death.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
- 2, 3. Community property—When disposed of.
4. Conditional legatees.
5. Homestead on separate property—When disposed of.
6. "Money" includes personal and real estate.
7. Vested future interest.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc.**, in: In re Estate Gilmore, 81 Cal. 240, 242, 22 Pac. Rep. 855 (applied).

2. **COMMUNITY PROPERTY**—When disposed of.—Husband's will disposing of "all my estate" held, in view of language of will and circumstances under which it was made, that

it was intention of testator to dispose of whole community property by will.—Estate of Stewart, 74 Cal. 98, 103, 15 Pac. Rep. 445.

3. Devise "of all my property of which I may die possessed," and not of specific property, applies only to his moiety of community property, and not to portion thereof of which he had no power of testamentary disposition.—In re Estate Gilmore, 81 Cal. 240, 243, 32 Pac. Rep. 655.

4. **CONDITIONAL LEGATEES.**—Devise of property, real, personal, and mixed, by words "to have, use, and expend as she may see fit," and providing in will that after death of devisee certain legacies should be paid from any money remaining, does not confine devisee to mere use of property, and where trust deed had been executed by devisee, no vested interest arises in favor of subsequent conditional legatees.—Hovey vs. Walbank, 100 Cal. 192, 198, 34 Pac. Rep. 650.

5. **HOMESTEAD ON HIS SEPARATE PROPERTY IS INCLUDED** in devise of all and singular testator's property, real and personal, wherever situated.—Etcheborne vs. Auzeurs, 45 Cal. 121, 125.

§ 1332. **RESIDUARY CLAUSES.** A devise of the residue of the testator's real property passes all the real property which he was entitled to devise at the time of his death, not otherwise effectually devised by his will.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 234.

1. Applied, cited, construed, referred to, etc.
2. "All the rest and residue" construed.
3. "All that remains" construed.
4. "Balance of my money" construed.
5. Homestead—When included in "residue."
6. Residuary legatee—How constituted.
- 7, 8. Same—Lapsed and void bequests go to.
- 9-11. "Residue" construed.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in:** Le Breton vs. Cook, 107 Cal. 410, 416, 40 Pac. Rep. 552 (applied); In re Estate Upham, 127 Cal. 90, 92, 59 Pac. Rep. 315 (construed and applied).

2. **"ALL THE REST AND RESIDUE" CONSTRUED.**—Will bequeathing all of rest and residue of testator's estate to his daughter, bequeaths to her all of estate not otherwise devised in will, and is not limited by clause in will declaring all of estate to be separate property of testator.—In re Estate Granniss, 142 Cal. 1, 4, 75 Pac. Rep. 324.

3. **"ALL THAT REMAINS" CONSTRUED.**—Will giving to testator's wife for her sole use and benefit and for rearing, nurture, and education of testator's children, and also stating that it is testator's wish and bequest that at his wife's death all that remains of property so devised shall fall to and be owned by testator's certain heirs, naming them, gives to widow merely life estate, and on her death becomes absolutely property of so named heirs.—Williams vs. McKinney, 34 Kan. 514, 9 Pac. Rep. 265.

4. **"BALANCE OF MY MONEY" CONSTRUED.**—Will devising all of testator's estate, "real, personal, or mixed," then following

6. **"MONEY" WHEN USED IN A WILL MAY INCLUDE** both personal and real estate of testator if such was his intention.—In re Estate Miller, 48 Cal. 165, 171, 17 Am. Rep. 442. See Jenkins vs. Fowler, 63 N. H. 246; Smith vs. Burch, 92 N. Y. 228, 232; Sweet vs. Burnett, 136 N. Y. 204, 208, 32 N. E. Rep. 628; Gillen vs. Kimball, 34 Ohio St. 352.

7. **VESTED FUTURE INTEREST.**—Devise to testator's children of all of his real property, but directing that same "shall be kept and shall remain intact and undivided and undisturbed until my youngest son shall have attained age of twenty-one years," gives vested future interest in lands of testator on his decease, which is subject to be transferred or encumbered as if it were estate in possession.—Dunn vs. Schell, 122 Cal. 626, 627, 55 Pac. Rep. 595.

As to general and specific legacies, see post § 1357.

Effect of conveyance of property previously disposed of by will.—See ante § 1303.

Estate passing by devise of land.—See ante § 1311.

Passing of after-acquired title.—See ante § 1312.

six legacies of specific sums of money to different persons and institutions, followed by "7th and lastly, that my mother receive balance of my money for her benefit so long as she lives and for her heirs after," expresses intention of testator that his mother should have balance of his property, real and personal, after payment of legacies thereinbefore mentioned.—In re Estate Miller, 48 Cal. 165, 171.

5. **HOMESTEAD—When included in "residue."**—Where will devised homestead to trustees and directed them to deliver possession to testatrix's sister, and that she be allowed to occupy and use same until her death free of rent, and further provided that upon her death, or in case she do not die until ten years have elapsed from and after death of testatrix, then all residue of said estate then remaining in hands of trustees is to be by them sold and converted into money and disposed of as provided in will. The court held that as to homestead testatrix did not die intestate, but that homestead was to be included in residue in hands of trustees to be sold and disposed of.—Le Breton vs. Cook, 107 Cal. 410, 422, 40 Pac. Rep. 522.

6. **RESIDUARY LEGATEE—How constituted.**—No particular mode of expression is necessary to constitute residuary legatee.—In re Estate Upham, 127 Cal. 90, 98, 59 Pac. Rep. 315. See Morton vs. Woodbury, 153 N. Y. 243, 47 N. E. Rep. 232.

7. **Lapsed or void bequests go to.**—Sections 1332 and 1333 abrogate old common-law distinction between devises of real property and bequests of personal property, to effect that de-

vise speaks from date of will and bequest from death of testator, and according to which distinction it was generally held that property mentioned in void or lapsed devise did not go to residuary devisee.—In re Estate Upham, 127 Cal. 90, 92, 59 Pac. Rep. 315.

8. Lapsed bequests go to the residuary legatee, and not to heirs.—In re Estate Upham, 127 Cal. 90, 93, 59 Pac. Rep. 315.

9. "RESIDUE" CONSTRUED.—If any particular property is prima facie within meaning of word "residue" as used in will, it will be held to pass by it, irrespective of question as to whether or not testator could be supposed to have had it actually in his contemplation when he framed devise or bequest.—Le Breton vs. Cook, 107 Cal. 410, 416, 40 Pac. Rep. 552.

10. Devise or bequest of "residue" of testator's property passes all property which he was entitled to devise or bequeath at time of

his death not otherwise effectually devised or bequeathed by his will.—Le Breton vs. Cook, 107 Cal. 410, 416, 40 Pac. Rep. 552.

11. Where it is manifest from context or from provisions of will that testator used word "residue" in some more restricted sense, it will be given meaning in which it is clear testator used it; it is not sufficient, however, for purpose of limiting meaning of word to show that testator did not foresee precisely how his will would operate or what property in contingencies which might happen would pass by use of that word.—Le Breton vs. Cook, 107 Cal. 410, 416, 40 Pac. Rep. 552.

As to what passes under residuary clause, see notes by Robert Desty, 5 L. R. A. 104; 9 L. R. A. 200.

Residuary legacy defined.—See post § 1357 subd. 4.

§ 1333. SAME. [BEQUEST OF RESIDUE, EFFECT.] A bequest of the residue of the testator's personal property, passes all the personal property which he was entitled to bequeath at the time of his death, not otherwise effectually bequeathed by his will.

History: Enacted March 21, 1872; repealed March 30, 1874, Code Amtda. 1873-4, p. 234.

Applied, cited, construed, referred to, etc., in: Le Breton vs. Cook, 107 Cal. 410, 416, 40 Pac. Rep. 552 (cited); In re Estate Upham, 127

Cal. 90, 92, 59 Pac. Rep. 315 (construed in connection with § 1333).

See notes under § 1332.

§ 1334. "HEIRS," "RELATIVES," "ISSUE," "DESCENDANTS," ETC. A testamentary disposition to "heirs," "relations," "nearest relations," "representatives," "legal representatives," or "personal representatives," or "family," "issue," "descendants," "nearest" or "next of kin," of any person, without other words of qualification, and when the terms are used as words of donation, and not of limitation, vests the property in those who would be entitled to succeed to the property of such person, according to the provisions of the title on succession, in this code.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
- 2-7. "Children" may include grandchildren.
8. "Children," "grandchildren," "nephew," "niece," "cousin"—Use of.
9. "Heirs" as used in will—Import of.
10. "Heirs" necessary before code.
11. "Issue"—meaning of.
- 12, 13. "Their heirs" construed.
14. Wife as heir.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: In re Burdick's Estate (Cal. April 2, 1895), 40 Pac. Rep. 35 (applied).

2. "CHILDREN" MAY INCLUDE GRANDCHILDREN.—Will devising property to "children of my deceased sister," said sister having died forty-two years and last of her children seven years before testator made his will, held in view of surrounding facts and circumstances and of language of will taken as a whole that testator intended grandchildren of his deceased sister to take by representation in place of their parents under said will.—In re Estate Schedel, 73 Cal. 594, 598, 15 Pac. Rep. 297.

3. "Children" in will has been held to include all descendants of person named; and it

has been held that grandchildren and great-grandchildren will take under bequest to children, whenever that is necessary in order to give effect to words of will, or such appears to have been evident intention of testator.—In re Estate Schedel, 73 Cal. 594, 597, 15 Pac. Rep. 297.

4. "Children" when used in will may include grandchildren where testator has clearly shown by use of other words that he used word "children" as synonymous with descendants or issue, or to designate or include illegitimate offspring, grandchildren, or stepchildren.—In re Estate Schedel, 73 Cal. 594, 597, 15 Pac. Rep. 297.

5. Where it appears there were no persons in existence who would answer to description of children, in ordinary sense of word, at time of making will or where there could not be any such at time or in event contemplated by testator.—In re Estate Schedel, 73 Cal. 594, 597, 15 Pac. Rep. 297.

6. Where from construction of a whole clause in will it can be made to appear that testator meant by "children" to include children and issue of such children as were de-

ceased, that construction will be adopted.—In re Estate Schedel, 73 Cal. 594, 597, 15 Pac. Rep. 297.

7. Where term "children" in will has received larger and more extended construction as synonymous with "issue," it has generally been based upon something in will, unless it resulted from fact that there were no children in existence, and where from construction of whole clause it can be made to appear that testator meant by "children" to include children and issue of such children as were deceased, that construction will be adopted.—In re Estate Schedel, 73 Cal. 594, 597, 15 Pac. Rep. 297.

8. "CHILDREN" OR "GRANDCHILDREN," "NEPHEW," "NIECE," "COUSIN," or any similar term must ordinarily be presumed to have been used in its primary and natural sense, and this sense cannot be enlarged or qualified unless there be something on face of will clearly indicating such intent in mind of testator at time of making will. In gathering this intent necessity of enlarging or modifying terms of this character in order to give effect and operation to will is consideration not to be overlooked.—Rhoton vs. Blevin, 99 Cal. 645, 648, 34 Pac. Rep. 513.

9. "HEIRS" AS USED IN WILL.—Import of.—By use of word "heirs" in will it is legitimate to suppose that testatrix meant it should have its settled legal effect as associated with essential words of devise which she used.—Norris vs. Hensley, 27 Cal. 439, 450.

10. "Heirs" necessary before code.—To pass estate of inheritance, or estate in fee simple, absolute by will it was necessary, before code,

to use word "heirs," or its equivalent; or if land was given to man forever, or to him and his assigns forever, without use of word "heirs," it vested in him only life estate.—Norris vs. Hensley, 27 Cal. 439, 450.

11. "ISSUE" ORDINARILY MEANS DESCENDANTS TO ANY DEGREE.—In re Estate Cavarly, 119 Cal. 406, 410, 51 Pac. Rep. 629.

12. "THEIR HEIRS" CONSTRUED.—Will bequeathing one third to each of three devisees, "each and all of them to have and to hold their lifetime and then to go to their heirs and assigns, but never to sell it," do not manifest clear and unequivocal intention on part of testatrix to give to devisees merely life estate in premises; nor does it appear that words "their heirs" were intended as designation of particular persons who should take estate in lands mentioned otherwise than by descent as heirs of their respective ancestor—the first takers under the will.—Norris vs. Hensley, 27 Cal. 439, 450.

13. The words "their heirs" in devise to three persons to have and to hold their lifetime and then to go to their heirs and assigns, do not designate particular persons, but is a nomen collectivum, comprehending whole succession of heirs, lineal and collateral, of three devisees.—Norris vs. Hensley, 27 Cal. 439, 447.

14. WIFE AS HEIR.—Additional right to half of the community property acquired by wife upon the death of her husband is that of an heir.—In re Burdick's Estate (Cal. April 2, 1895), 40 Pac. Rep. 35.

§ 1335. WORDS OF DONATION AND OF LIMITATION. The terms mentioned in the last section are used as words of donation, and not of limitation, when the property is given to the person so designated, directly, and not as a qualification of an estate given to the ancestor of such person.

History: Enacted March 21, 1872.

1. "Heirs and assigns" carries fee.
2-6. Rule in Shelley's case—Applicability.

1. "HEIRS AND ASSIGNS" CARRIES FEE.—Will devising land "to have and to hold their lifetime and then to go to their heirs and assigns," but never to sell it, devises property in fee simple, and words "to have and to hold their lifetime," coupled with "but never to sell it," would not avoid such consequence.—Norris vs. Hensley, 27 Cal. 439, 451.

2. RULE IN SHELLEY'S CASE—Applicability.—Rule in Shelley's case does not govern in this state.—See ante § 779.

3. "Issue" has been sometimes held to operate in wills like the word "heirs," but only in those cases in which it is used as synonymous with latter word, and if by "issue" it appears that testator meant "children," rule in Shelley's case has no application.—Estate of Utz, 43 Cal. 200, 204.

4. Rule in Shelley's case is not applicable to a devise to a daughter and her "children."—Estate of Utz, 43 Cal. 200, 204.

5. Rule in Shelley's case when applied to wills is confined to cases in which, after freehold interest is devised to one, remainder is to go in turn to heirs of first taker. In such cases word "heirs" is considered as importing limitation upon estate of first taker only, and not as denoting that latter are themselves to take as purchasers.—Estate of Utz, 43 Cal. 200, 204.

6. While rule in Shelley's case is inflexible whenever words used indicate that those who are named to take after estate, take it as heirs, yet when rule is contrary to evident intention of testator it will be applied only where it must be.—Estate McDonnell, Myrick's Prob. Rep. 94, 96.

§ 1336. TO WHAT TIME WORDS REFER. Words in a will referring to death or survivorship, simply, relate to the time of the testator's death, unless possession is actually postponed, when they must be referred to the time of possession.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Continuous publication.
3. Construction—General rule.
4. Same—Same—Latter clause not in conflict with.
5. Same—Intent of testator governs period of survivorship.
6. Same—Language refers to date of will.
7. Same—Possession of legacies postponed to sale.
8. Same—When previous life estate is given.
9. Same—Will speaks from date of codicil.
10. Same—Words construed to fix time, and not quantity.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc.,** in: In re Estate Winter, 114 Cal. 186, 190, 45 Pac. Rep. 1063 (construed and applied).

2. **CONTINUOUS PUBLICATION.**—There is continuous publication of will from time of its execution to death of testator; which is in harmony with this section.—In re Estate Crooks, Myrick's Prob. Rep. 247, 250.

3. **CONSTRUCTION.**—General rule of construction is that if legacy be given to two or more, to be equally divided between them or survivors of them, survivorship must be referred to period of division.—In re Estate Winter, 114 Cal. 186, 190, 45 Pac. Rep. 1063.

4. **Latter clause of this section is not in conflict with general rule of construction given.**—In re Estate Winter, 114 Cal. 186, 190, 45 Pac. Rep. 1063.

5. **INTENT OF TESTATOR GOVERNS.**—Question of what period survivorship is to relate must depend upon apparent intention of testator rather than upon any rigid rule or

technical words; and this intention is to be collected either from particular disposition or legal context of will.—In re Estate Winter, 114 Cal. 186, 188, 45 Pac. Rep. 1063.

6. **LANGUAGE USED BY TESTATOR IN HIS WILL,** in order to arrive at its intention, must be held to refer to date thereof, and not to that of his death, for reason that he refers therein to actually existing state of things.—In re Estate Pearsons, 99 Cal. 30, 34, 33 Pac. Rep. 751.

7. **POSSESSION OF LEGACIES POSTPONED TO SALE.**—Possession of legacies (in money) being postponed until sale of certain real property, words in will referring to survivorship relate to time of such sale.—In re Estate Winter, 114 Cal. 186, 189, 45 Pac. Rep. 1063.

8. **When previous life estate is given, then period of division is death of tenant for life, and survivors at that time take whole.**—In re Estate Winter, 114 Cal. 186, 190, 45 Pac. Rep. 1063.

9. **WILL SPEAKS FROM THE DATE OF THE CODICIL** for some purposes, but this is true only so far as codicil requires that it should so speak.—In re Estate McCauley, 138 Cal. 432, 436, 71 Pac. Rep. 512.

10. **Words in will "to have and to hold in trust during lives of"** construed to be used to fix time when trustees should make a conveyance, and not used to fix quantum of estate of trustees.—In re Estate Fair, 132 Cal. 523, 545, 34 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

As to time to which bequest relates, see note by Robert Desty, 9 L. R. A. 211.

§ 1337. **DEVISE OR BEQUEST TO A CLASS.** A testamentary disposition to a class includes every person answering the description at the testator's death; but when the possession is postponed to a future period, it includes also all persons coming within the description before the time to which possession is postponed.

History: Enacted March 21, 1872.

1. Child born during father's life but after will.
2. Construction of "those of" and "who have attained."
3. Devise to class, possession postponed.
4. Gift to class includes whom.
5. Same—When possession postponed.
6. When devisees take as class.

1. **CHILD BORN DURING FATHER'S LIFE BUT AFTER WILL.**—Under will devising fourth part of estate to testator's nephew during his life, and after his decease then to his present wife (if she be then living) during such time as she shall remain his widow, and after that event then in trust for his child or children by her in equal shares, who shall attain the age of twenty-one years or marry, an after-born child who came into existence during her father's life would take an interest under will, as she was one of the class mentioned in it, vested in right when she was born, and in possession contingent upon her attaining acquired age or marrying.—Goldtree vs. Thompson, 79 Cal. 613, 624, 22 Pac. Rep. 50.

2. **CONSTRUCTION OF "THOSE OF" AND**

"WHO HAVE ATTAINED."—In will providing that trustees shall pay after testator's decease certain sum of money "to those of before-mentioned children who have attained age of twenty-one years," words "those of" and "who have attained" are words of discrimination, and refer to a class.—In re Estate Crooks, Myrick's Prob. Rep. 247, 250.

3. **DEVISE TO CLASS, POSSESSION POSTPONED.**—Will bequeathing property in trust for testator's children to divide income among said children until the youngest son shall and would if living reach age of thirty years, and at expiration of such time to divide estate in equal shares to such children as may then be living and issue of any deceased child per stirpes, shows intention to grant an absolute estate and to postpone right of possession and enjoyment for certain time.—In re Estate Cavarly, 119 Cal. 406, 411, 51 Pac. Rep. 629.

4. **GIFT TO CLASS INCLUDES ONLY THOSE** who are in existence at time of distribution.—In re Estate Cavarly, 119 Cal. 406, 410, 51 Pac. Rep. 629.

5. When possession postponed.—When testamentary disposition is made for class and possession is postponed it includes all persons within class at time to which possession is postponed.—In re Estate Cavarly, 119 Cal. 406, 410, 51 Pac. Rep. 629.

6. WHEN DEVISEES TAKE AS CLASS.—When property is left in trust by will which

provided that after certain time from testator's death property should go to the De Laurencels and De Booms, devise is one to them as a class, and as such they are entitled to share equally.—De Laurencel vs. De Boom, 67 Cal. 362, 7 Pac. Rep. 758.

As to posthumous children, see § 1339.

§ 1338. WHEN CONVERSION TAKES EFFECT. When a will directs the conversion of real property into money, such property and all its proceeds must be deemed personal property from the time of the testator's death.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Construction—Conversion of realty into personalty.
3. Same—Applicable only when time of sale not designated.
4. Same—Time for sale postponed—Effect of.
5. Same—No conversion until time of sale.
- 6-8. Equitable conversion—Doctrine of.
9. Same—Necessity for imperative direction in will.
10. Same—Will operates as, when.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Bank of Ukiah vs. Rice, 143 Cal. 265, 270, 101 Am. St. Rep. 118, 76 Pac. Rep. 1020 (construed and applied); In re Estate Pforr, 144 Cal. 121, 127, 77 Pac. Rep. 325 (construed and applied).

2. Construction.—Direction of executor to sell land after termination of life estate created in his will, and divide the proceeds equally between certain children, vests them with entire interest therein by reason of their being sole beneficiaries thereof, and beneficiaries may be deemed legatees rather than devisees, as effect of testator's direction is to convert land into personalty.—Bank of Ukiah vs. Rice, 143 Cal. 265, 270, 101 Am. St. Rep. 118, 76 Pac. Rep. 1020.

3. Provision of this section that proceeds of sale directed in will must be deemed personal property "from time of testator's death" is applicable only when will merely directs sale to be made without limiting or designating time at which it is to be made.—Bank of Ukiah vs. Rice, 143 Cal. 265, 270, 101 Am. St. Rep. 118, 76 Pac. Rep. 1020.

4. If the will postpones the time of sale directed therein to be made until the happening of some future event or until some fixed date, conversion is likewise postponed.—Bank of Ukiah vs. Rice, 143 Cal. 265, 270, 101 Am. St. Rep. 118, 76 Pac. Rep. 1020.

5. There can be no conversion until the executor shall have power to make sale.—Bank

of Ukiah vs. Rice, 143 Cal. 265, 270, 101 Am. St. Rep. 118, 76 Pac. Rep. 1020.

6. CONVERSION OF REAL ESTATE INTO PERSONALTY IS NOT EFFECTED by mere power contained in will to sell such real estate.—Fahnestock vs. Fahnestock, 152 Pa. St. 58, 34 Am. St. Rep. 623, 25 Atl. Rep. 313.

7. DIRECTION IN A WILL TO CONVERT LAND INTO MONEY, or money into land, is for benefit of those for whose use conversion is intended to be made, and as to them it is deemed to have been made from death of testator; such direction, however, does not affect title to or character of property so far as legatees or heirs are concerned.—Fatjo vs. Swasey, 111 Cal. 628, 638, 44 Pac. Rep. 225.

8. EQUITABLE CONVERSION is where there is mandate to sell at future time, equity, upon principle of regarding that done which ought to be done will, for certain purposes and in aid of justice, consider conversion as effected at time when sale ought to take place, whether land be then really sold or not. But whenever direction is for future sale, up to time fixed land is governed by law of real estate.—In re Estate Walkerly, 108 Cal. 627, 652, 48 Am. St. Rep. 97, 41 Pac. Rep. 772.

9. Equitable conversion does not occur unless there is imperative direction in testament that property shall be converted.—Ducker vs. Burnham, 146 Ill. 9, 37 Am. St. Rep. 135, 34 N. E. Rep. 558.

10. PROVISION IN WILL FOR SALE OF PROPERTY and distribution of its proceeds among beneficiaries, operates as equitable conversion of real estate into personalty; this result is not overcome by reason of testator having used words "I desire" instead of "I direct" in authorizing sale.—In re Estate Pforr, 144 Cal. 121, 127, 77 Pac. Rep. 325.

As to equitable conversion of real estate into personal and personal estate into real by will, see monographic note 5 Am. St. Rep. 141-148; notes by Robert Desty, 1 L. R. A. 837; 3 L. R. A. 145; 5 L. R. A. 104.

§ 1339. WHEN CHILD BORN AFTER TESTATOR'S DEATH TAKES UNDER WILL. A child conceived before, but not born until after a testator's death, or any other period when a disposition to a class vests in right or in possession, takes, if answering to the description of the class.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Doctrine in general.

3. Presumption—Will of mother made shortly before birth.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *In re Estate Fair*, 132 Cal. 523, 580, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000 (cited with § 29 in discussion).

2. **IN GENERAL**.—Where estate is granted to one for life and to such of his children as shall be living after his death, present right to future possession vests at once in such children as are living, subject to be opened to let in after-born children, and to be devised as to those who shall die without issue.—*In re Estate Fair*, 132 Cal. 523, 578, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000. See *McArthur vs. Scott*, 113 U. S. 340, 380, bk. 28 L. ed. 1015, 5 Sup. Ct. Rep. 652; *Gilman vs. Reddington*, 24 N. Y. 9.

3. **MOTHER MAKING WILL WITHIN SIX DAYS OF BIRTH** of child will be presumed to have made such will with knowledge of legal effect that after birth of child would have upon terms of will, and if she makes no mention of child in will child will inherit as if she had made no will.—*In re Estate Smith*, 145 Cal. 118, 124, 78 Pac. Rep. 369.

4. All devisees therein must contribute, in proportion to value, to make up share of such child.—*Ibid*.

Rights of child conceived but not yet born.—See ante § 29 and note thereto.

Rights of child born after making will.—See ante § 1306.

As to provision in will for after-born children, see monographic note 15 Am. St. Rep. 592.

§ 1340. **MISTAKES AND OMISSIONS.** When, applying a will, it is found that there is an imperfect description, or that no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the will or from extrinsic evidence; but evidence of the declarations of the testator as to his intentions cannot be received.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
- 2, 3. In general.
4. Modification.
5. Parol evidence to vary.
6. Presumption.
7. Reformation.
8. Section does not apply, when.
- 9, 10. Supplying omissions.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *In re Estate Walkerly*, 108 Cal. 627, 659, 49 Am. St. Rep. 97, 41 Pac. Rep. 772 (cited with § 1318 in discussion); *In re Estate Callaghan*, 119 Cal. 571, 575, 51 Pac. Rep. 860, 39 L. R. A. 689 (construed and applied); *In re Estate Young*, 123 Cal. 337, 340, 55 Pac. Rep. 1011 (applied).

2. **IN GENERAL**.—Mistake in will cannot be corrected nor can will be reformed or remodeled after death of testator.—*In re Estate Callaghan*, 119 Cal. 571, 575, 51 Pac. Rep. 860, 39 L. R. A. 689. See *Patch vs. White*, 117 U. S. 210, 219, bk. 29 L. ed. 860, where it is held that court cannot reform will after death of testator so as to make it speak his intentions.

3. Court is not justified in speculating over what may have been in testator's mind, and in substituting what it may believe to have been his intent in place of directions which he has actually employed, when it may be assumed he did not understand legal effect which would follow compliance with his will.—*In re Estate Young*, 123 Cal. 337, 344, 55 Pac. Rep. 1011.

4. **MODIFICATION**.—Courts cannot modify or vary language used by testator, where certain provisions of his will are invalid, so as to create for him new and valid instrument.—*In re Estate Walkerly*, 108 Cal. 627, 653, 49 Am. St. Rep. 97, 41 Pac. Rep. 772.

5. **PAROL EVIDENCE IS NO MORE ADMISSIBLE TO VARY TERMS OF WILL THAN any other writing**; intention of testator must be deduced from face of will, or bequest of devise fails.—*In re Estate Young*, 123 Cal. 337, 342, 55 Pac. Rep. 1011.

6. **PRESUMPTION**.—Where a holographic will, after leaving certain bequests of personal property to friends, concluded with residuary clause mentioning therein no devisee or legatee, but underneath signature of testatrix, at end of said clause and to left of paper where words "my husband, Thomas Stratton," it will be presumed that it was the intention of testatrix to constitute her said husband her residuary legatee.—*In re Estate Stratton*, 112 Cal. 513, 518, 44 Pac. Rep. 1023.

7. **REFORMATION**.—Courts cannot reform will so as to make it speak really the intentions of testator, but where in will there is imperfect description of either person or property, description may be made more certain when it can be done either from context of instrument or from extrinsic evidence.—*In re Estate Callaghan*, 119 Cal. 571, 575, 51 Pac. Rep. 860, 39 L. R. A. 689.

8. **SECTION DOES NOT APPLY, WHEN**.—Where will leaves certain tract of land to testator's grandchildren, and it appears that testator did not at time of making said will, or at any time thereafter, own said tract of land, this section does not apply, as it is not case of imperfect description, or one where no person or property exactly answers description.—*In re Estate Callaghan*, 119 Cal. 571, 575, 51 Pac. Rep. 860, 39 L. R. A. 689.

9. **SUPPLYING OMISSIONS**.—Court will supply obviously omitted words in will, wherever word omitted is apparent and no other word will supply defect.—*Mitchell vs. Donohue*, 100 Cal. 202, 203, 38 Am. St. Rep. 279, 34 Pac. Rep. 614; *In re Estate Stratton*, 112 Cal. 513, 518, 44 Pac. Rep. 1023.

10. **Word manifestly omitted from will**, and is essential to an understanding of intention of the testator, will be supplied.—*In re Estate Stratton*, 112 Cal. 513, 518, 44 Pac. Rep. 1023. See *Mitchell vs. Donohue*, 100 Cal. 202, 38 Am. St. Rep. 279, 34 Pac. Rep. 614.

As to parol evidence to explain or identify

subject of beneficiary will, see monographic note 8 Am. Rep. 669-673.

As to correction of mistakes in wills, see monographic note 40 Am. Rep. 292.

As to admissibility of declarations of testator, see note 59 Am. Rep. 399.

When will lost, spoliated, or destroyed after death.—See 5 Prob. Rep. An. 552.

§ 1341. WHEN DEVISES AND BEQUESTS VEST. Testamentary dispositions, including devises and bequests to a person on attaining majority, are presumed to vest at the testator's death.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Absolute devise, but future distribution.
3. Income bequeathed—When to commence.
4. Same—Interest.
5. Law favors vesting.
6. Legacy to be divided between legatees or survivors.
7. Legatees not existing at testator's death.
8. Previous life estate—Effect of.
- 9, 10. Time for payment of legacies.
- 11-15. Time of vesting.
- 16-21. Same—Of future estates.
22. When postponement of right of enjoyment is void.
23. Will takes effect, when.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Williams vs. Williams, 73 Cal. 99, 102, 14 Pac. Rep. 394 (applied); Dunn vs. Schell, 122 Cal. 626, 627, 55 Pac. Rep. 595 (applied); In re Estate Fair, 132 Cal. 523, 578, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000 (construed and applied); Martinovich vs. Marsicano, 137 Cal. 354, 355, 70 Pac. Rep. 459 (applied).

2. ABSOLUTE DEVISE—But future distribution.—Devise made to person absolutely, but to be distributed at future time, creates vested interest in fee, enjoyment of which is merely postponed.—Williams vs. Williams, 73 Cal. 99, 102, 14 Pac. Rep. 394.

3. INCOME BEQUEATHED—When to commence.—Where testator absolutely gives beneficiary given income, and merely indicates in his will source from which it is to be obtained, general rule is that income in such case is to be estimated from death of testator; but where bequest is only of income to be obtained from certain specified fund, beneficiary can receive only natural income when received from such fund.—In re Estate Brown, 143 Cal. 450, 455, 77 Pac. Rep. 160.

4. Interest.—Gift of income from certain fund is not annuity, and interest does not begin thereon until one year from date of death of deceased.—In re Estate Brown, 143 Cal. 450, 455, 77 Pac. Rep. 160. See Bartlett vs. Slater, 53 Conn. 102, 55 Am. Rep. 73, 22 Atl. Rep. 678; Booth vs. Ammerman, 4 Bradf. (N. Y.) 129.

5. LAW FAVORS VESTING OF INTEREST, and every interest will be presumed to be vested unless contrary intention is clearly manifested.—Williams vs. Williams, 73 Cal. 99, 102, 14 Pac. Rep. 394.

6. LEGACY TO BE DIVIDED BETWEEN LEGATEES OR SURVIVORS.—If legacy be given to two or more to be equally divided between them, or survivor or survivors of them, survivorship must be referred to period

of division.—In re Estate Winter, 114 Cal. 186, 190, 45 Pac. Rep. 1063.

7. LEGATEE NOT EXISTING AT TESTATOR'S DEATH.—Legacy bequeathed to organization, conditioned that if at time of testator's death such organization had ceased to exist, legacy was to go to benefit society, benefit society will take in event of organization having ceased to exist at time of testator's death, notwithstanding that it was subsequently reincorporated.—Estate of Nell, Myrick's Prob. Rep. 79, 80.

8. PREVIOUS LIFE ESTATE—Effect of.—If previous life estate be given by will, then period of division is death of tenant for life, and survivors at that time take whole.—In re Estate Winter, 114 Cal. 186, 190, 45 Pac. Rep. 1063.

9. TIME FOR PAYMENT OF LEGACIES.—Provision in will that "upon sale of property of my estate I desire that all legacies then unpaid be paid at once in full," only fixes time for payment of legacies then unpaid, but does not direct or empower executor to apply or dispose of proceeds of sale in their payment, nor could they be required to pay these legacies without order of court therefor.—Bennalack vs. Richards, 116 Cal. 405, 409, 48 Pac. Rep. 622.

10. Where will bequeathed money legacy to testator's son, to be paid to him when he is thirty-five years of age, and provided that in case of death of first son, without issue or wife, legacy left to him should go to his brother, and first son dies, brother would not be entitled to legacy until time that first son would have arrived at age of thirty-five years, had he lived.—In re Estate Fair, 103 Cal. 342, 348, 37 Pac. Rep. 406.

11. TIME OF VESTING.—Legacies vest at time of testator's death, and not at time of distribution of estate by court.—In re Estate Pearsons, 113 Cal. 577, 589, 45 Pac. Rep. 849.

12. Clause in will containing trust to convey is void, and property attempted to be conveyed vested at death of testator in heirs at law.—In re Estate Pichoir, 139 Cal. 682, 685, 73 Pac. Rep. 606; following In re Estate Fair, 132 Cal. 523, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

13. On death of testator, interest in his estate devised to his widow vests in her immediately, subject to right of executors to possession of same for purposes of administration.—Martinovich vs. Marsicano, 137 Cal. 354, 355, 70 Pac. Rep. 459.

14. Will providing that devisee may each "take out" one half of his share when he

comes of age, and other half not until all other children come of age, vests title to property in devisees upon death of testator.—*Fitch vs. Miller*, 20 Cal. 352, 386.

15. Will providing that balance of money in bank should be divided between testatrix's husband and Katrina Muhr, and that "her portion of money in German Savings Bank shall remain on interest until she is fifty years old," makes to Katrina Muhr present gift vesting immediately, time of payment of which only was deferred.—*In re Estate Young*, 123 Cal. 337, 346, 55 Pac. Rep. 1011.

16. Of future estates.—Devise of legacy of money to grandson, to be paid to him only after death of testator's wife, if she survived testator, income to be paid said devisee from time he is fifteen years old until he be twenty-one years old, then he to be paid half legacy; from time he is twenty-one until he is twenty-five years old to receive income from remaining half of legacy, and at twenty-five years old to be paid balance of legacy, and if said grandson die before arriving at ages before named, then remaining or unpaid amounts to be distributed to testator's brothers and sisters and his wife's brothers and sisters, share and share alike, vests in grandson, not at time of testator's death, but at times named for its payment, and on grandson's death before arriving at age of twenty-five years his heirs are not entitled to remaining unpaid portions of said legacy.—*In re Estate Rogers*, 94 Cal. 526, 533, 29 Pac. Rep. 962.

17. Legacy given to person to be paid at future time vests immediately; but where it is not given until certain future time, it does not vest until that time; and if legatee dies before, it is lost.—*In re Estate Rogers*, 94 Cal. 526, 530, 29 Pac. Rep. 962. See *Reed's Appeal*, 118 Pa. St. 215, 4 Am. St. Rep. 583, 11 Atl. Rep. 787.

18. Legacy given, payable or to be paid when legatee attains age of twenty-one years, vests immediately upon death of testator; but where time is annexed, not to payment only but to gift itself, as where legacy is given to legatee at twenty-one "if" or "when" he attains age of twenty-one, legacy does not vest until legatee attains that age.—*In re Estate Rogers*, 94 Cal. 526, 531, 29 Pac. Rep. 962. See *Williams vs. Williams*, 78 Cal. 99, 102, 14 Pac. Rep. 394.

19. Purchaser at foreclosure sale of mortgage of vested future interest in lands devised to several co-devisees, takes only share and interest in estate of decedent which mortgagor himself would have taken, and provisions of will imposing duty upon the co-devisees of

keeping property intact until youngest shall have attained his majority, cannot be affected by mortgage.—*Dunn vs. Schell*, 122 Cal. 626, 627, 55 Pac. Rep. 595.

20. Where estate is granted to person for life and to such of his children as shall be living after his death, present right to future possession vests at once in such children as are living, subject to open and let in after-born children, and to be devested to those who shall die without issue.—*In re Estate Fair*, 132 Cal. 523, 578, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

21. When devise of lands is to remain intact and undivided until youngest of several co-devisees attains majority, latter acquires vested future interest, which is subject to be transferred or encumbered by him in like manner as if it were estate in possession.—*Dunn vs. Schell*, 122 Cal. 626, 627, 55 Pac. Rep. 595.

22. WHEN POSTPONEMENT OF RIGHT OF ENJOYMENT IS VOID.—When absolute estate is granted but right of possession and enjoyment is postponed solely for express benefit of grantee, such postponement is void.—*In re Estate Cavarly*, 119 Cal. 406, 410, 51 Pac. Rep. 629.

23. WILL TAKES EFFECT, WHEN.—Will is regarded by courts of England and United States as conveyance, and takes effect as deed on proof of its execution, unless there be some express statute requiring it to be probated.—*Castro vs. Castro*, 6 Cal. 158, 161.

Limitations which may be put upon future estates.—See ante § 767 and note.

Future estate not defeated by determination of precedent estate.—See ante § 742.

Rights of children born after making of will.—See ante § 1306 and note, and ante § 29 and note.

Rights of child conceived before but born after testator's death.—See ante § 1339 and note.

Vesting of devise or legacy depending on condition precedent.—See post § 1347 and note.

As to vesting of legacies.—When vested and when contingent.—See monographic note 10 Am. St. Rep. 471.

As to vesting of legacy notwithstanding failure to perform conditions, see monographic note 78 Am. Dec. 234.

As to when legacies are vested and contingent, see note 37 Am. St. Rep. 147.

As to vesting of estates under wills, see notes by Robert Desty, 1 L. R. A. 551; 3 L. R. A. 316; 9 L. R. A. 211.

§ 1342. WHEN CANNOT BE DEVESTED. A testamentary disposition, when vested, cannot be devested unless upon the occurrence of the precise contingency prescribed by the testator for that purpose.

History: Enacted March 21, 1872.

§ 1343. DEATH OF DEVISEE OR LEGATEE. If a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless

an intention appears to substitute some other in his place, except as provided in section thirteen hundred and ten.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 234; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 403, held unconstitutional, see history, § 4 ante.

1. Applied, cited, construed, referred to, etc.
2. Construction—Object of section.
3. Same—Not limitation on testamentary power.
- 4-6. Lapse of legacy on death of legatee.
7. Legatee dying after testator but before vesting of legacy.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: In re Estate Pearsons, 98 Cal. 603, 606, 33 Pac. Rep. 451 (applied); In re Estate Bennett, 134 Cal. 320, 324, 66 Pac. Rep. 370 (construed); In re Estate Sutro, 139 Cal. 87, 89, 72 Pac. Rep. 827 (construed).

2. **CONSTRUCTION—Object of section.**—This section contains nothing which aids or was intended to aid in construction of a will; it provides that legacies given in apt words and leaving no room for play of interpretation shall lapse if legatee dies before testator.—In re Estate Sutro, 139 Cal. 87, 89, 72 Pac. Rep. 827.

3. **Not limitation on testamentary power.**—This section only declares effect of death of legatee, in case testator makes no provision for such contingency, but is not to be construed as limitation upon power of testator to make such provision.—In re Estate Bennett, 134 Cal. 320, 324, 66 Pac. Rep. 370.

4. **LAPSE OF LEGACY ON DEATH OF LEGATEE.**—Devise of real and personal property to two devisees named, creates tenancy in common, and upon death of one of devisees

before testator, devise lapses and goes to heirs of testator.—In re Estate Hittell, 141 Cal. 432, 436, 75 Pac. Rep. 53.

5. Legacy given in will for purpose of recompensing legatee for slanderous words used toward him by testator lapses upon death of legatee before testator.—In re Estate Sutro, 139 Cal. 87, 89, 72 Pac. Rep. 827.

6. Under statutes 1850, p. 179, § 20, where testatrix had left legacy of four thousand dollars to son of her deceased husband by former wife, and died, after death of her stepson, daughter of stepson could not inherit said legacy.—In re Estate Pfuelb, 48 Cal. 643, 644.

7. **LEGATEES DYING AFTER TESTATOR BUT BEFORE VESTING OF LEGACY.**—Where testator bequeathed to his wife certain real estate for her life, then to be sold and proceeds to be divided equally between his surviving brothers and sisters, will is to be construed to mean brothers and sisters surviving at time of death of testator's wife and not at death of testator, and issue of children dying after testator and before death of testator's wife are not entitled to take.—In re Estate Winter, 114 Cal. 186, 190, 45 Pac. Rep. 1063.

As to effect of death of devisees before testator, see monographic note 94 Am. Dec. 156.

As to lapse of devise or bequest by death of beneficiary before testator, see note 28 Am. St. Rep. 360.

§ 1344. **INTERESTS IN REMAINDER ARE NOT AFFECTED.** The death of a devisee or legatee of a limited interest before the testator's death does not defeat the interests of persons in remainder, who survive the testator.

History: Enacted March 21, 1872.

1. Remainder—How created and distributed.
2. Same—When not created.

1. **REMAINDER—How created and distributed.**—Under will leaving property to testator's wife, to have rents, use and profits thereof during term of her natural life, but without power of selling said property, and providing that should she die leaving her surviving any children of herself and testator, then property to go on her death to such child or children, but if none of said children be alive at her death, said property to go to testator's daughter, property should be distributed; life estate to wife with remainder

in fee to such of children of herself and testator, if any, as shall survive, with additional remainder to daughter and her then surviving children, if no children of testator and his wife shall survive wife.—Estate of McDonnell, Myrick's Prob. Rep. 94, 96.

2. **When not created.**—Will devising estate to trustees, and authorizing them at certain time and in case of certain contingencies to transfer and convey estate to certain persons therein named, does not devise estate in remainder.—In re Estate Fair, 132 Cal. 523, 529, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000.

§ 1345. **CONDITIONAL DEVISES AND BEQUESTS.** A conditional disposition is one which depends upon the occurrence of some uncertain event, by which it is either to take effect or be defeated.

History: Enacted March 21, 1872.

- 1-3. Validity of conditions.
- 4, 5. What constitutes conditional legacy.

1. **VALIDITY OF CONDITIONS.**—Condition in will that each of testator's daughters

shall receive certain bequest in event of becoming widow, or otherwise lawfully separated from her husband, is not void as being against public policy.—*Born vs. Horstmann*, 80 Cal. 452, 459, 22 Pac. Rep. 169, 338, 5 L. R. A. 577.

2. Condition is void that devisee shall not dispute or contest will, under penalty of forfeiture of his devise, and will not result in such forfeiture, unless it is provided in instrument that devise shall go to another person on breach of condition mentioned.—*Mallet vs. Smith*, 6 Rich. (S. C.) Eq. 12, 60 Am. Dec. 107.

3. Legacy to testator's wife of money, payment thereof deferred until certain land be sold as provided for in testator's will, such legacy to be charge upon said property, vests upon death of testator, and if condition deferring the time of its payment is repugnant to it, as being impossible upon its face, condition is void.—*In re Estate Walkerly*, 108 Cal. 627, 645, 48 Am. St. Rep. 97, 41 Pac. Rep. 772.

4. **WHAT CONSTITUTES CONDITIONAL LEGACY.**—Bequest of money to be paid in instalments when legatee shall have attained certain age, and that if he should die before

arriving at that age legacy was to be distributed as other portions of estate, is conditional one, and if legatee dies before having attained age mentioned legacy does not vest in him nor pass to his heir.—*In re Estate Rogers*, 94 Cal. 526, 532, 29 Pac. Rep. 962.

5. Bequest by testator to his wife, of money, on payment of which she to relinquish all further claims to testator's estate, is to be construed as conditional on relinquishment of wife's claim of allowance for maintenance.—*In re Estate Lufkin*, 131 Cal. 291, 293, 63 Pac. Rep. 469.

As to conditions of ownership, see ante § 707 et seq. and notes.

As to conditional obligation, see post § 1434 et seq. and notes.

As to validity of conditions in devises and bequests, see § 1281 and note.

As to conditions in will preventing legatee from contesting will upon pain of forfeiture, see monographic note 60 Am. Dec. 113.

As to distinction between words of limitation and condition, see note by Robert Desty, 9 L. R. A. 165.

As to occurrences of contingencies, see note by Robert Desty, 10 L. R. A. 816.

§ 1346. CONDITION PRECEDENT, WHAT. A condition precedent in a will is one which is required to be fulfilled before a particular disposition takes effect.

History: Enacted March 21, 1872.

As to certain conditions precedent being void, see ante § 709 and note.

As to conditions precedent, see notes by Robert Desty, 1 L. R. A. 837; 9 L. R. A. 165.

§ 1347. EFFECT OF CONDITION PRECEDENT. Where a testamentary disposition is made upon a condition precedent, nothing vests until the condition is fulfilled, except where such fulfilment is impossible, in which case the disposition vests, unless the condition was the sole motive thereof, and the impossibility was unknown to the testator, or arose from an unavoidable event subsequent to the execution of the will.

History: Enacted March 21, 1872.

As to conditions precedent and subsequent in wills, and impossibility of performance, see

monographic note 70 Am. St. Rep. 333 et seq.

§ 1348. CONDITIONS PRECEDENT, WHEN DEEMED PERFORMED. A condition precedent in a will is to be deemed performed when the testator's intention has been substantially, though not literally, complied with.

History: Enacted March 21, 1872.

§ 1349. CONDITIONS SUBSEQUENT, WHAT. A condition subsequent is where an estate or interest is so given as to vest immediately, subject only to be divested by some subsequent act or event.

History: Enacted March 21, 1872.

As to conditions subsequent in will; impossibility of performance, see monographic note 70 Am. St. Rep. 333 et seq.; see ante §§ 707, 708.

As to conditions subsequent, see notes by Robert Desty, 1 L. R. A. 837; 9 L. R. A. 165.

As to conditions in wills in restraint of marriage, see note by Robert Desty, 1 L. R. A. 837.

As to devise during widowhood, see notes by Robert Desty, 1 L. R. A. 432; 9 L. R. A. 573.

I. IN GENERAL.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: In re Estate Neistrath, 66 Cal. 330, 331, 332, 5 Pac. Rep. 507 (cited); In re Estate Apple, 66 Cal. 432, 437, 439, 440, 6 Pac. Rep. 7 (construed); In re Estate Mackay, 107 Cal. 303, 308, 40 Pac. Rep. 558 (construed); In re Estate Williams, 112 Cal. 521, 526, 53 Am. St. Rep. 224, 44 Pac. Rep. 308 (construed); Crew vs. Pratt, 119 Cal. 131, 136, 51 Pac. Rep. 44 (cited); In re Estate Brown, 143 Cal. 450, 453, 77 Pac. Rep. 160 (cited); In re Estate Smith, 145 Cal. 118, 121, 78 Pac. Rep. 369 (referred to).

2. ADEMPMENT OF LEGACIES—Definition and distinctions as respects general and specific legacies.—"Without going into refinements in respect of definition of word 'ademption,' it may be said to be extinction or withdrawal of legacy in consequence of some act of testator equivalent to its revocation, or clearly indicative of an intention to revoke. Satisfaction of general legacy depends on intention of testator as inferred from his acts, but ademption of specific legacy is effected by extinction of thing or fund bequeathed, and intention that legacy should fail is presumed."—Kenaday vs. Sinnott, 179 U. S. 606, 617, 618, bk. 45 L. ed. 339, 21 Sup. Ct. Rep. 233.

3. "Legacy" and "bequest" defined.—In their strict legal application, terms "legacy" and "bequest" refer to gifts by will of personal estate, and "devise," in legal usage, is properly used to denote gift by will of real property to one who is called "devisee"; but words "legacy" and "bequest" are not always used by legislature in their strictly legal sense, and where intention to include gifts by will of land is apparent such words will be construed to include such gifts, rule being that statutes are to be construed with reference to objects to be accomplished by them.—Logan vs. Logan, 11 Colo. 44, 17 Pac. Rep. 99.

II. SPECIFIC LEGACIES AND DEVISES.

4. CONSTRUCTION OF WILL IN FAVOR OF LEGATEE.—In case of doubt upon question whether legacy is specific or general, inasmuch as legacy, if specific, is lost in case subject of it is disposed of by testator, or is extinguished by payment or otherwise in his lifetime, court proceeds upon presumption that testator intended real benefit to legatee, and inclines to consider legacies as general rather than specific where language of bequest will admit of that construction.—In re Estate Woodworth, 31 Cal. 595, 603. See *Md. Gelbach vs. Shively*, 67 Md. 498, 10 Atl. Rep. 247. *N. Y. Tift vs. Porter*, 8 N. Y. 516; *Giddings vs. Seward*, 16 N. Y. 365. *Pa. Ballet's Appeal*, 14 Pa. St. 451, 461. *Fed. Kenaday vs. Sinnott*, 179 U. S. 606, 619, bk. 45 L. ed. 339, 21 Sup. Ct. Rep. 233.

5. CRITERION OF SPECIFIC LEGACY.—Liability to ademption.—Ordinary criterion of specific legacy is that it is liable to ademption; that if thing bequeathed is once gone it is lost to legatee.—In re Estate Woodworth, 31 Cal. 595, 607. See *N. Y. De Nottebeck vs. Astor*, 13 N. Y. 98, 104. *Fed. Georgia Infirmary vs. Jones*, 37 Fed. Rep. 750. *Eng. Parrott vs. Worsfold*, 1 Jac. & W. 594, 595, 21 Rev. Rep.

348. *Howe vs. Earl of Dartmouth*, 7 Ves. 137, 147.

As to liability of legacies to ademption, see par. 2 this note.

6. DEFINITION OF SPECIFIC LEGACY.—Specific legacy, as its term imports, is bequest of particular article or articles capable of being designated and identified.—In re Estate Woodworth, 31 Cal. 595, 601. *Ala. Kelly vs. Richardson*, 100 Ala. 584, 13 So. Rep. 755. *Me. Bradford vs. Haynes*, 30 Me. 108. *N. Y. Tift vs. Porter*, 8 N. Y. 516, 518. *Fed. Kenaday vs. Sinnott*, 179 U. S. 606, 618, bk. 45 L. ed. 339, 21 Sup. Ct. Rep. 233; *Georgia Infirmary vs. Jones*, 37 Fed. Rep. 750. *Eng. See Pierce vs. Snaplin*, Atk. 503.

7. ENCUMBRANCES MUST BE REMOVED BY EXECUTOR.—Commissioners' note says: "Legatee may insist on encumbrances being removed by executor."

See post §1359 and note.

8. ILLUSTRATIONS OF SPECIFIC LEGACIES—Corporate stock—Proceeds of.—Where testator directs designated bank stock to be sold and proceeds to be distributed in certain proportions legacies are specific.—In re Estate Zelle, 74 Cal. 125, 130, 15 Pac. Rep. 455. See *Tomlinson vs. Bury*, 145 Mass. 346, 1 Am. St. Rep. 464, 14 N. E. Rep. 137. *Walton vs. Walton*, 7 John. Ch. (N. Y.) 253, 11 Am. Dec. 456.

9. Deposit in bank.—Legacy of whatever sum may be on deposit in named bank is specific.—*Towle vs. Swasey*, 106 Mass. 100, 106.

10. Money payable out of specified fund.—Where will directs amount collected upon specified claims against the United States, if it be less than two hundred thousand dollars, to be divided into four equal parts and distributed to testator's four children, and that out of residue collected upon such claims one thousand dollars, if so much may remain, and if not, whatever balance may remain, shall be divided equally for certain charitable objects specified, legacies for charitable objects are specific and are payable exclusively out of amount to be collected upon such claims.—*Georgia Infirmary vs. Jones*, 37 Fed. Rep. 750, 753.

11. Mortgage deed and note.—Where intent is to bequeath certain sum, and circumstance that it is then out on mortgage or any other security is incidental merely, and does not constitute ingredient in gift, legacy is general. But if gift be of sum due upon mortgage of particular premises or upon certain note described, legacy is specific.—*Farnum vs. Bascom*, 122 Mass. 282, 285. See *Mass. Towle vs. Swasey*, 106 Mass. 100. *N. J. Stout vs. Hart*, N. J. L. (2 Hal.) 414. *N. Y. Giddings vs. Seward*, 16 N. Y. 365. *Eng. Le Grice vs. Finch*, Mer. 50, 17 Rev. Rep. 10; *Sidebotham vs. Watson*, 11 Hare 170; *Chaworth vs. Beech*, 4 Ves. 555; *Innes vs. Johnson*, 4 Ves. 563; *Gillaume vs. Adderley*, 15 Ves. 384.

12. Numerous articles.—Bequest is none the less specific because it includes numerous articles, e. g., bequest of all horses which testator may own, of all his plate, of all books in his library, or of all his horses, cattle, or tools on particular farm or farms, is specific.

—*Tomlinson vs. Bury*, 145 Mass. 346, 1 Am. St. Rep. 464, 14 N. E. Rep. 137. See *Borden vs. Jenks*, 140 Mass. 562, 54 Am. Rep. 507, 5 N. E. Rep. 623; *Stephenson vs. Dowson*, 3 Beav. 342, 43 Eng. Ch. 342.

13. **Wearing apparel.**—Where testatrix bequeaths all her wearing apparel unto her sisters S and M, share and share alike, legacies are specific.—*Farnum vs. Bascom*, 122 Mass. 282, 285.

14. **Devise of is specific.**—Every devise of land, whether in particular or general terms, must of necessity be specific, because man can devise only what he has at time of devising.—In re *Estate Woodworth*, 31 Cal. 595, 610. See *Kelly vs. Richardson*, 100 Ala. 584, 13 So. Rep. 785; *Forrester vs. Lord Lee*, 1 Amb. 173; *Clifton vs. Burt*, 1 P. Wms. 679; *Howe vs. Earl of Dartmouth*, 7 Ves. 137, 147, per Lord Eldon; *Milnes vs. Slater*, 3 Ves. 295, 305.

15. **Residuary devise is specific** when will intends land then held by testator, because it is to be assumed that testator had residue of land then held by him in his mind, and to have intended it to go to residuary devisee as specifically as he had intended lands particularly described to go to other devisees. But it is otherwise where will includes after-acquired property.—*Kelly vs. Richardson*, 100 Ala. 584, 13 So. Rep. 785. See *Farnum vs. Bascom*, 122 Mass. 282, 286.

16. **Use and improvement of specified lot of land.**—Devise of use and improvement of certain lot of land for term of devisee's natural life is specific.—*Farnum vs. Bascom*, 122 Mass. 282, 286.

III. DEMONSTRATIVE LEGACIES.

17. **DEFINITION.**—"Demonstrative legacy is bequest of sum of money payable out of particular fund or thing. It is pecuniary legacy, given generally, but with demonstration of particular fund as source of its payment. It is therefore equivalent to, or in nature of, devise or bequest of so much or such part of fund or thing specified."—See *Ala. Kelly vs. Richardson*, 100 Ala. 584, 13 So. Rep. 785. *Md. Gelbach vs. Shively*, 67 Md. 498, 10 Atl. Rep. 247. *N. H. Wallace vs. Wallace*, 23 N. H. 154. *N. Y. De Nottebeck vs. Astor*, 13 N. Y. 98, 106; *Giddings vs. Seward*, 16 N. Y. 365. *Pa. Balliet's Appeal*, 14 Pa. St. 461. *Va. Corbin vs. Miller*, 19 Gratt. 438. *Fed. Kenaday vs. Sinnott*, 179 U. S. 606, 618, bk. 45 L. ed. 339, 31 Sup. Ct. Rep. 233; *Georgia Infirmary vs. Jones*, 37 Fed. Rep. 750.

See 9 Am. & Eng. Encyc. of L. (2d ed.) 218, 219.

18. **DISTINCTION BETWEEN DEMONSTRATIVE AND SPECIFIC LEGACIES.**—Demonstrative legacy is so far general, and differs in effect so far from one properly specific, that if fund be called in or fail, legatee will not be deprived of his legacy, but will be permitted to receive it out of general legacies.—*Balliet's Appeal*, 14 Pa. St. 461, 461.

IV. ANNUITIES.

19. **DEFINITION.**—Commissioners' note says that annuity "is grant of sum of money to be paid annually, unless otherwise provided in will, for life, term of years, or in perpetuity, and generally regarded as mere personality."

20. **Distinction between annuity and legacy for life as respects commencement.**—See post § 1368 and note.

21. **INCOME FROM FUND IS NOT ANNUITY.**—Where testator directs fixed amount to be invested by trustees and twenty dollars to be paid monthly from income, bequest is not annuity, for reason that amount to be paid monthly is not certain, as it may be twenty dollars or less than twenty dollars.—In re *Estate Brown*, 143 Cal. 450, 453, 77 Pac. Rep. 160. See *Bartlett vs. Slater*, 53 Conn. 102, 55 Am. Rep. 73, 22 Atl. Rep. 678; In re *Dewey's Estate*, 153 N. Y. 63, 46 N. E. Rep. 1039.

22. **"LEGACY FOR MAINTENANCE" DISTINGUISHED FROM ANNUITY.**—Where testator bequeaths in trust sum of money and directs it to be invested and proceeds to be paid to his housekeeper during her life, and only evidence as to circumstances under which this clause of will was made, outside of testator's oral declarations, is to effect that housekeeper had been supported by testator for number of years next before his death, will does not create annuity, because it is not, in language of subd. 3, "bequest of certain specified sums periodically," but provision creates "legacy for maintenance," and will gives her nothing directly from estate, but merely entitles her to payment by trustees of income of specific fund after distribution of such fund to them, and court has no power to direct money to be paid to beneficiary out of funds of estate.—In re *Estate Mackay*, 107 Cal. 303, 306-308, 40 Pac. Rep. 558.

23. **Money paid by testator during life, but not for support.**—Where testator leaves sum of money in trust and directs named sum to be paid monthly out of income to one to whom he had made monthly payments during his life, and who was cripple, but it does not appear that payments made during testator's life were for support of beneficiary, and specific facts found by court do not necessarily show that legacy was for maintenance, and there is no bill of exceptions showing evidence on appeal, court will not disturb finding that legacy was neither annuity nor for maintenance.—In re *Estate Brown*, 143 Cal. 450, 454, 77 Pac. Rep. 160 (distinguishing In re *Estate Mackay*, 107 Cal. 303, 308, 40 Pac. Rep. 558).

V. RESIDUARY LEGACIES.

24. **COMMISSIONERS' NOTE** says: "Bequest of all personal estate is not residuary, . . . but all at particular place is; so, also, when there is specification of residue on almost every other limitation. Text of this section, however, confines or limits it to residue after all the bequests of the will are discharged."

25. **ONLY ONE RESIDUUM.**—There can be but one residuum, to wit, what remains after all other legacies have been paid, and provision that legacy shall be paid out of residue does not make such legacy residuary.—In re *Estate Williams*, 112 Cal. 521, 526, 53 Am. St. Rep. 224, 44 Pac. Rep. 808.

VI. GENERAL LEGACIES AND DEVISES.

26. **DEFINITION OF GENERAL LEGACIES.**—Legacy is general when it is so given as not to amount to bequest of particular thing or

money of testator distinguished from all others of same kind.—*Tift vs. Porter*, 8 N. Y. 516, 518. See *Ala. Kelly vs. Richardson*, 100 Ala. 584, 13 So. Rep. 785. *Pa. Walker's Estate*, 3 Rawle 230. *Eng. Parrott vs. Worsfold*, 1 Jac. & W. 594, 595, 21 Rev. Rep. 248; *Howe vs. Earl of Dartmouth*, 7 Ves. 137, 147.

27. ILLUSTRATIONS—All personal estate.—Bequest of all testator's personal estate is general bequest.—In re *Estate Woodworth*, 31 Cal. 595, 603. See *Kelly vs. Richardson*, 100 Ala. 584, 13 So. Rep. 785; *Blake vs. Lord Wallscot*, 1 Ball & B. 312.

28. Corporate stock.—Where testator bequeaths specified number of shares of corporate stock in designated corporation without expressly designating particular shares or using such language as "my shares," or any other equivalent designation, legacy is general, even though testator at date of will had such stock as that bequeathed of equal or larger amount than that named in legacy.—*N. Y. Tift vs. Porter*, 8 N. Y. 516, 518. *N. C. Davis*

vs. Cain, 1 Ired. Eq. 309. *Eng. Robinson vs. Addison*, 2 Beav. 515, 17 Eng. Ch. 515; *Partridge vs. Partridge*, Cas. Temp. Talb. 226; *Sibley vs. Perry*, 7 Ves. 522, 524, 6 Rev. Rep. 183; *Simmonds vs. Vallance*, 4 Bro. C. C. 345.

29. General devise.—Where testator devises all or portion, e. g. one half of property of which he may die seized, devise is not specific, but general, and devisees takes merely what remains, or designated portion thereof, after payment of debts and expenses of administration.—*Abila vs. Burnett*, 33 Cal. 653, 667.

30. Money.—Ordinarily legacy of sum of money is general legacy.—*Gelbach vs. Shively*, 67 Md. 498, 10 Atl. Rep. 247.

31. Quantitative legacy.—Legacy of quantity is ordinarily general; but there are legacies of quantity in nature of specific legacies, as of so much money with reference to particular fund for payment.—*Balliet's Appeal*, 14 Pa. St. 451, 461.

§ 1358. ESTATES CHARGEABLE. When a person dies intestate, all his property, real and personal, without any distinction between them, is chargeable with the payment of his debts, except as otherwise provided in this code and the Code of Civil Procedure.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 234.

1. Applied, cited, construed, referred to, etc.
2. Amendment of original section by Act 1874.
3. Burden of proof on creditors to show that heirs took assets.
4. Commissioners' note.
5. Common-law rule.
6. "Debts"—What constitute.
7. Same—"Claim" and "demand" synonymous.
- 8, 9. Funeral expenses—Monument over grave.
10. Maturity of debt after distribution to heirs.
11. Mortgage executed by heirs—Foreclosure before settlement of estate.
12. Personal liability of heirs—Action not maintainable against heir for debt of ancestor.
13. Same—Heir expressly named in bond.
14. Same—Is measured by extent of inheritance.
15. Same—Use and occupation by ancestor.
16. Primary right of creditors to payment.
17. Theory of system—Lien for payment of debts.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: In re *Estate Apple*, 66 Cal. 432, 439, 6 Pac. Rep. 7 (cited); In re *Estate Swain*, 67 Cal. 637, 639, 8 Pac. Rep. 497 (cited in connection with Code Civ. Proc. § 1516).

2. AMENDMENT OF ORIGINAL SECTION.—By this section as originally enacted property of intestate had to be resorted to for payment of debts in certain named order, but it was amended by Act of March 30, 1874, so as to read as above.—In re *Estate Apple*, 66 Cal. 432, 439, 6 Pac. Rep. 7.

3. BURDEN OF PROOF ON CREDITORS TO SHOW THAT HEIRS TOOK ASSETS.—If party's action for debts or obligations of heirs, burden is upon him to show they inherited assets from

ancestor's estate.—*Bacon vs. Thornton*, 16 Utah 138, 51 Pac. Rep. 153.

4. COMMISSIONERS' NOTE refers to Code Civil Procedure § 1516; and to *Lomas vs. Wright*, 2 Myl. & K. 769, 39 Rev. Rep. 350, in support of proposition that debts and claims valid against testator must all be paid before legacies.

5. COMMON-LAW RULE.—At common law land of deceased person was not ordinarily asset to pay personal debt.—*Falley vs. Gibling*, 128 Ind. 110, 26 N. E. Rep. 794.

6. "DEBTS"—What constitute.—Debt in order to be valid claim against estate must have been debt contracted by intestate during his lifetime or resulting directly from contracts made or liabilities assumed during life.—*Fallon vs. Butler*, 21 Cal. 24, 32, 81 Am. Dec. 143; *Booth vs. Pendola*, 33 Cal. 36, 43, 23 Pac. Rep. 200, 25 Id. 1101. See *Gray vs. Palmer*, 9 Cal. 616, 636; *Carr vs. Caldwell*, 10 Cal. 330, 335, 70 Am. Dec. 740; In re *Estate McCausland*, 52 Cal. 568, 577; In re *Estate Swain*, 67 Cal. 637, 641, 8 Pac. Rep. 497; *Stuttmeister vs. Superior Court*, 72 Cal. 487, 489, 14 Pac. Rep. 35. *Cole. Lusk vs. Patterson*, 2 Colo. App. 306, 311, 39 Pac. Rep. 253. *N. Y. Godding vs. Porter*, 17 Abb. Pr. 374. *Oreg. Weill vs. Clark's Estate*, 9 Oreg. 387, 391.

See Code Civ. Proc. §§ 1448, 1467, 1494, 1497, 1510, 1643 and notes.

7. "Claim" and "demand" synonymous.—Words "claim" and "demand" as used in Code Civil Procedure with reference to decedent's debts are used synonymously.—*Gray vs. Palmer*, 9 Cal. 616, 636; In re *Estate McCausland*, 52 Cal. 568, 576, 577. See *Fallon vs. Butler*, 21

Cal. 24, 31, 33, 31 Am. Dec. 143; *Stuttmeister vs. Superior Court*, 72 Cal. 487, 489, 14 Pac. Rep. 35.

8. **FUNERAL EXPENSES** are authorized to be paid out of decedent's estate.—*Van Emon vs. Superior Court*, 76 Cal. 589, 590, 9 Am. St. Rep. 258, 18 Pac. Rep. 877.

See post § 1373 and note; and Code Civ. Proc. §§ 1643, 1646 and notes.

9. **Monument over grave.**—Sums paid for tombstones, monuments, etc., are considered as part of funeral expenses.—*Van Emon vs. Superior Court*, 76 Cal. 589, 590, 9 Am. St. Rep. 258, 18 Pac. Rep. 877. See *In re Estate Werlinger*, 100 Cal. 345, 347, 34 Pac. Rep. 825. See *Ala. Bendall vs. Bendall*, 24 Ala. 295, 60 Am. Dec. 469. *Conn. Fairman's Appeal*, 30 Conn. 205, 209. *N. Y. Ferrin vs. Myrick*, 41 N. Y. 316, 325. *Pa. McGlinsey's Appeal*, 14 Serg. & R. 64.

10. **MATURITY OF DEBT AFTER DISTRIBUTION TO HEIRS.**—Although by common law heirs are not bound by covenant of warranty of their ancestors, unless expressly named therein, and then only to extent of assets received by descent, yet, when after all assets have been converted into money, and distributed to heirs, an obligation of ancestor matures, such heirs may be compelled to refund to claimant so much of what they have received as shall be sufficient to satisfy obligation.—*Rohrbaugh vs. Hamblin*, 57 Kan. 393, 57 Am. St. Rep. 334, 46 Pac. Rep. 705 (wherein suit in equity against heirs was declared to be proper remedy).

11. **MORTGAGE EXECUTED BY HEIRS.**—**Foreclosure before settlement of estate.**—Where heirs mortgage land which they inherited, foreclosure thereof does not divest or injuriously affect prior rights of creditors of decedent, as purchaser at foreclosure sale will acquire no greater or higher right in the premises than mortgagors had, and property in hands of purchaser will be subject to probate as fully in all respects as if mortgage had not been foreclosed.—*Cook vs. De la Guerra*, 24 Cal. 237, 241 (declaring that saving clause in decree preserving rights and liens of executors was unnecessary).

12. **PERSONAL LIABILITY OF HEIRS.**—**Action not maintainable against heir for debt of ancestor.**—No action can be maintained against heir for any debt of ancestor, whether

especially or otherwise, and every claim against estate must be presented to executor or administrator as required by Code of Civil Procedure § 1493 or it will be barred.—*In re Estate Crosby*, 55 Cal. 574, 583, 584; *McDonald vs. McElroy*, 60 Cal. 484, 495, 496.

See Code Civ. Proc. § 1493 and note.

13. **Heir expressly named in bond.**—At common law to make heir responsible it is essential that he be expressly named in bond or covenant of ancestor, and in action against him as heir averment is necessary that he was so named; and in this state, with certain exceptions relative to covenants running with land, heir is not liable for covenants or obligations of ancestor, and ancestor's obligations must be enforced through machinery of probate court.—*McDonald vs. McElroy*, 60 Cal. 484, 496; *Maynard vs. Polhemus*, 74 Cal. 141, 143, 15 Pac. Rep. 461.

As to covenants running with land, see post §§ 1460-1466 and notes.

14. **Is measured by extent of inheritance.**—Heirs are not bound to pay debts or discharge obligations of ancestors unless they have received property from the estate, and, if they have received assets, they are responsible for such debts and obligations only to extent of their inheritance.—*Bacon vs. Thornton*, 16 Utah 133, 51 Pac. Rep. 153.

15. **Use and occupation by ancestor.**—Persons in possession of lands, claiming as heirs at law of deceased person, are not liable personally for rents and profits received by their ancestor, under whom they claim, when there is no showing that any portion of such rents and profits has come into their possession.—*Noble vs. Douglass*, 56 Kan. 97, 42 Pac. Rep. 323.

16. **PRIMARY RIGHT OF CREDITORS TO PAYMENT.**—Creditors whose claims have been established have primary right to have them first paid before property goes to heirs.—*Beckett vs. Selover*, 7 Cal. 215, 229, 68 Am. Dec. 237. See *Whitsett vs. Kershow*, 4 Colo. 419, 432.

17. **THEORY OF SYSTEM** is that estate of ancestor, personal and real, vests in heir, subject to possession and lien of administrator for payments of debts and expense of administration.—*Gray vs. Palmer*, 9 Cal. 616, 637; *Cook vs. De la Guerra*, 24 Cal. 237, 241.

§ 1359. **ORDER OF RESORT TO ESTATE FOR DEBTS.** The property of a testator, except as otherwise specially provided in this code and the Code of Civil Procedure, must be resorted to for the payment of debts, in the following order:

1. The property which is expressly appropriated by the will for the payment of the debts;
2. Property not disposed of by the will;
3. Property which is devised or bequeathed to a residuary legatee;
4. Property which is not specifically devised or bequeathed; and,
5. All other property ratably. Before any debts are paid, the expenses of the administration, and the allowance to the family, must be paid or provided for.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, pp. 234-235.

1. Applied, cited, construed, referred to, etc.
2. Abatement between legacies and devisees.
3. Change of order by testator.
4. Same—Express charge does not exempt property from debts not charged.
5. Common-law rule—Commissioners' note.
6. Same—Marshaling assets for payment of debts.
7. Same—Same—Debts charged upon land by mortgage or encumbrance.
8. Election of widow not to take under will.
9. Intestacy as to part of estate.
10. Mortgage on specific devise paid out of residuary estate.
11. Same—Appeal by executor from order requiring redemption.
12. Partnership property subject to payment of partnership debts.
13. Rents applied before sale of real estate.
14. "Residuary clause" defined.
15. Residuary legacy or devise must be first resorted to.
16. Same—Presumption that residuum was insufficient.
17. Specific devisees and legacies favored.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc.**, in: In re Estate Nelstrath, 66 Cal. 330, 331, 5 Pac. Rep. 507 (referred to); In re Estate Apple, 66 Cal. 432, 439, 440, 6 Pac. Rep. 7 (cited); In re Estate Thayer, 142 Cal. 453, 456 (citing § 1360 erroneously instead of this section), 76 Pac. Rep. 41 (citing this section); In re Estate Traver, 145 Cal. 508, 509, 510, 78 Pac. Rep. 1058 (referred to).

2. **Abatement between legacies and devisees.**—See post § 1362 and note.

3. **CHANGE OF ORDER BY TESTATOR.**—Both at common law and under statute testator may change order in which his property shall be taken for payment of debts.—In re Estate Woodworth, 31 Cal. 595, 606. See Ky. Trumbo vs. Sorrencoy, 3 T. B. Mon. 284, 16 Am. Dec. 103. Wash. Newport vs. Newport, 5 Wash. 114, 31 Pac. Rep. 428. Fed. Morgan vs. Huggins, 48 Fed. Rep. 3, 5.

Direction in will for payment of debts.—See post § 1377 and note.

4. **Express charge does not exempt property from debts not charged.**—Although testator may expressly charge certain property with payment of debts, etc., he does not thereby exempt it from its primary liability for other debts not so expressly imposed upon it.—Kelly vs. Richardson, 100 Ala. 584, 13 So. Rep. 785. See Trent vs. Trent, Gilm. (Va.) 174, 9 Am. Dec. 594.

5. **COMMON-LAW RULE.**—Commissioners' note says: "At common law, where no different order is prescribed by the will, the assets of the decedent will be marshaled, and the debts paid out of them, in following order: 1. Personal estate not specifically bequeathed, or expressly or by implication excepted. 2. Lands expressly devised for payment of debts. 3. Lands descended to the heirs; and, 4. Lands devised.—In re Woodworth's Estate, 31 Cal. 595. Personal estate to be first exhausted to pay debts, even those secured by mortgage, if personal debts of testator.—In re Woodworth's Estate, 31 Cal. 595. Specific bequest indicates

intention to discharge property so bequeathed from payment of debts.—In re Woodworth's Estate, 31 Cal. 595." And it is added that it will appear from authority cited, taken in connection with Code Civil Procedure §§ 1563, 1564, that "text makes but little change in statutes."

6. **Marshaling assets for payment of debts.**—"Under common law, where no different order is prescribed or indicated in will, as between executors, devisees, and heirs, the assets of deceased, for purpose of paying debts of estate, will be marshaled, and debts paid out of them, in following order: First—The general personal estate—that is to say, personal estate not specifically bequeathed, or expressly, or by implication excepted. Secondly—Lands expressly devised for payment of debts. Thirdly—Lands descended to the heir; and, Fourthly—Lands devised."—In re Estate Woodworth, 31 Cal. 595, 599, 600.

7. **Debts charged upon land by mortgage or encumbrance.**—"This order is not to be disturbed by the fact that lands are devised subject to mortgage or encumbrance thereon. Personal estate is first to be applied and exhausted, even for payment of debts charged upon real estate by mortgage, or other encumbrance, if debt so charged upon it was personal debt of testator; for mortgage is regarded as merely collateral security for personal obligation. And when testator devises lands expressly subject to mortgage, he is considered as using terms merely as descriptive of encumbered condition of property, and not for purpose of subjecting his devisees to burden."—In re Estate Woodworth, 31 Cal. 595, 600, 603.

8. **Election of widow not to take under will.**—See post § 1377 and note par. 5; also 11 Am. & Eng. Encyc. of L. (2d ed.) 81.

9. **INTESTACY AS TO PART OF ESTATE.**—Where will makes no provision for payment of debts, etc., and does not dispose of part of testator's property, debts, etc., should be paid out of property as to which he died intestate before charging same upon property devised.—In re Estate Traver, 145 Cal. 508, 511, 78 Pac. Rep. 1058. See Code Civ. Proc. §§ 1560, 1562 and notes.

10. **MORTGAGE ON SPECIFIC DEVISE PAID OUT OF RESIDUARY ESTATE.**—Specific devise of land which is subject to mortgage will be exonerated from mortgage by payment of debt secured out of other assets of estate where terms of will and surrounding circumstances clearly show that testator intended that such course should be pursued.—In re Estate Heydenfeldt, 106 Cal. 434, 437-440, 39 Pac. Rep. 788.

11. **Appeal by executor from order requiring redemption.**—Where court makes order requiring executors to redeem land from foreclosure sale, administrator is party aggrieved and entitled to appeal.—In re Estate Heydenfeldt, 117 Cal. 551, 552-554, 49 Pac. Rep. 713 (citing Roach vs. Coffey, 73 Cal. 281, 14 Pac. Rep. 840, and limiting Bates vs. Ryberg, 49 Cal. 463, and disproving expressions to contrary in latter case).

12. PARTNERSHIP PROPERTY SUBJECT TO PAYMENT OF PARTNERSHIP DEBTS.—

Where testator gives his interest in goods and store building of partnership of which he is member, making no mention in terms of moneys and credits belonging to firm, and indebtedness of firm exceeds amount of money in credits, entire partnership assets are subject to payment of partnership debts and then to adjustment of interests of partners; it is duty of surviving partner to apply partnership money on hand and funds collected to payments of partnership debts and to pay deficiency out of proceeds of partnership goods; and whatever remains is subject to division, and portion belonging to testator's estate passes to beneficiary. Beneficiaries have no right to have testator's individual property applied to payment of partnership debts.—*Brady vs. Foley*, 59 Kan. 778, 53 Pac. Rep. 761. See *Gray vs. Palmer*, 9 Cal. 616, 637.

13. RENTS APPLIED BEFORE SALE OF REAL ESTATE.—

Where statute authorizes personal representative to take possession of real property and receive rents and profits therefor until estate is settled up, if required to pay debts, as between creditors and heirs or devisees, rents received after death of testator should be applied before sale of real estate; but it does not follow that as between general legatee of personal estate and devisee of real estate, rents do not belong to devisee; but on contrary it would seem that as title vests in devisee at moment of death of testator, rents belong to devisee subject to payment

of debts in order prescribed and that rents are to be marshaled as belonging to realty from which derived.—*In re Estate Woodworth*, 31 Cal. 595, 605.

14. "RESIDUARY CLAUSE" DEFINED.—

Term "residuary clause" seems to contemplate former provision in will to carry into effect wishes of testator as to disposition of his estate, and this expression is used to cover all that remains after such former dispositions of property have been carried out.—*Morgan vs. Huggins*, 48 Fed. Rep. 3, 5.

15. RESIDUARY LEGACY OR DEVISE MUST BE FIRST RESORTED TO AND EXHAUSTED, for payments of debts, before specific devises or bequests are taken for that purpose.—

Abila vs. Burnett, 33 Cal. 658, 667.

16. Presumption that residuum was insufficient will be indulged in absence of showing to contrary where special bequest has been devoted to payment of debts.—*In re Estate Moulton*, 48 Cal. 191, 193.

17. SPECIFIC DEVISES AND LEGACIES FAVORED.—

Where there are both general and specific devises and legacies, those which are general must first be used for payments of debts, even if they are thus entirely abated, before resort can be had to those which are specific. It is presumed intention of testator that legatee shall receive specific thing bequeathed.—*In re Estate Woodworth*, 31 Cal. 595, 601; *Abila vs. Burnett*, 33 Cal. 658, 667; *In re Estate Moulton*, 48 Cal. 191, 193. See *Farnum vs. Bascom*, 122 Mass. 282, 285.

§ 1360. SAME. [FOR LEGACIES.] The property of a testator, except as otherwise specially provided in this code and the Code of Civil Procedure, must be resorted to for the payment of legacies, in the following order:

1. The property which is expressly appropriated by the will for the payment of the legacies.
2. Property not disposed of by the will.
3. Property which is devised or bequeathed to a residuary legatee.
4. Property which is specifically devised or bequeathed.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 235.

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| <ol style="list-style-type: none"> 1. Applied, cited, construed, referred to, etc. 2. Abatement between legacies and devises. 3. Annuity payable out of assets as well as revenues. 4. Construction—"Not" omitted in subdivision four. 5. Converse of order in which legacies are charged—Commissioners' note. 6. Demonstrative legacies abate, when—Commissioners' note. 7. Devise charged with legacy—Personal liability of devisee—Election. 8. General devises not chargeable against residuary devisee. 9. Same—Parol evidence of extrinsic circumstances. 10. Intention of testator governs. 11. Same—Contrary intention must be obvious. 12, 13. Partnership assets—Special legacy by partner indebted to partnership. | <ol style="list-style-type: none"> 14. Payment of legacy out of residuary. 15. Rents and profits—Legacy payable out of—Insurance money. 16. Sale of assets for payment of legacies. 17. Specific devises and bequests favored. 18. Same—Preferred over land descended. 19. Substituted legacy payable out of same property as original legacy. 20. Same—Contrary intention manifested by testator. <p>1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: <i>In re Estate Neistrath</i>, 66 Cal. 330, 331, 332, 5 Pac. Rep. 507 (construed); <i>In re Estate Apple</i>, 66 Cal. 432, 438, 439, 440, 6 Pac. Rep. 7 (referred to); <i>In re Estate Thayer</i>, 142 Cal. 453, 456 (citing this section erroneously instead of § 1359), 76 Pac. Rep. 41 (citing § 1359).</p> <p>2. Abatement between legacies and devises.—See post § 1362 and note.</p> |
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3. ANNUITY PAYABLE OUT OF ASSETS AS WELL AS REVENUES.—Where testator leaves property in trust with directions to pay annuitants semiannually and directs that one of them, his widow, shall be paid first instalment as soon after his death as sufficient funds for purpose shall come into trustees' possession, and remaining annuitants at end of every six months afterwards, and annuities are classified and some of them made subordinate to others, which are made first charge upon any money that may come into hands of said trustees, it is not required that widow's annuity shall be charge upon revenue for each year, but she and the other annuitants are entitled to payment of specific sums given them so long as income of property or assets of estate are adequate to that end.—*Crew vs. Pratt*, 119 Cal. 131, 134, 135, 136, 51 Pac. Rep. 44.

4. CONSTRUCTION—"Not" omitted in subdivision 4.—In comparing this section with others, particularly § 1359, subd. 4, it would seem that legislature may have inadvertently omitted word "not" in subd. 4, but court cannot so hold.—In *re Estate Nelstrath*, 66 Cal. 330, 331, 5 Pac. Rep. 507 (court saying: "It may very properly be supposed that the legislature intended to say that property specifically devised or bequeathed may be resorted to for the payment of legacies; but it can be resorted to only when abatement takes place, and abatement takes place only for the purpose of equalizing legacies of a class, and not for the purpose of equalizing all legacies of every kind").

5. CONVERSE OF ORDER IN WHICH LEGACIES ARE CHARGED.—Commissioners' note says that "rule for abatement of legacies is converse of their order as charges upon estate."

6. DEMONSTRATIVE LEGACIES ABATE, WHEN.—Commissioners' note says: "Demonstrative legacies are to be abated only when demonstrative fund is exhausted and remainder becomes general legacy."

7. DEVISE CHARGED WITH LEGACY.—Personal liability of devisee.—Election.—Where testator bequeaths money and charges it upon land devised, but gives devisee option to convey land to legatee in lieu of bequest, and devisee accepts devise, it becomes his duty to exercise his election within reasonable time, and if he does not do so he is personally liable to pay legacies.—*Dunne vs. Dunne*, 66 Cal. 157, 160, 4 Pac. Rep. 441, 1152.

As to charging devisee with compound interest, see post § 1369 and note par. 5.

8. GENERAL LEGACIES NOT CHARGEABLE AGAINST RESIDUARY DEVISEE.—Where in will general legacies are given, followed by gift of all rest and residue of real and personal property of testator by residuary clause in usual form, and nothing more, it is established rule that language of will alone, unaided by extrinsic circumstances, is sufficient to charge legacies upon lands included in residuary devise.—*Brill vs. Wright*, 112 N. Y. 129, 8 Am. St. Rep. 717, 19 N. E. Rep. 628. See *Lupton vs. Lupton*, 2 John. Ch. (N. Y.) 614; *Brudnell vs. Boughton*, 2 Atk. 268.

9. Parol evidence of extrinsic circumstances.—Gift of general legacy, followed by general residuary clause, is not inconsistent with intention on part of testator to charge legacies on land, and extrinsic circumstances may be considered for purpose of ascertaining intention of testator, and if, by reading language of will in light of such circumstances, intention to charge legacies on land is inferable, court will give effect to such intention, although language of will, considered independently, would not alone justify such inference.—*Brill vs. Wright*, 112 N. Y. 129, 8 Am. St. Rep. 717, 19 N. E. Rep. 628.

10. INTENTION OF TESTATOR GOVERNS.—If chances of deficiency are anticipated and provided for by terms of will, then directions of testator will govern, and loss must be borne by those on whom he places it. It is always a question of intention, and relations of several legatees, in respect to their legal claims upon testator for support, should be taken into account in determining whether general rule of abatement should be departed from.—*Mass. Towle vs. Swasey*, 106 Mass. 100, 105. Pa. In *re Denis' Estate*, 169 Pa. St. 493, 32 Atl. Rep. 436. Utah. In *re Estate Sears*, 18 Utah 193, 55 Pac. Rep. 33.

11. Contrary intention must be obvious.—Exemption of specific devise is only warranted when obvious intention of testator in relation to it would be defeated if contribution were required, and such obvious intention must appear from language in which specific devise is created or from general terms of will.—In *re Estate Ross*, 140 Cal. 282, 293, 73 Pac. Rep. 976; In *re Estate Smith*, 145 Cal. 118, 121, 122, 78 Pac. Rep. 369.

12. PARTNERSHIP ASSETS.—Special legacy by partner indebted to partnership.—Where deceased partner makes special legacy to surviving partner and is indebted to partnership, surviving partner must pursue course prescribed by Code Civ. Proc. § 1585, and settle firm's business before accounting with executor or administrator, and he cannot treat tangible assets as his own and render account thereof and thereupon sue executor to recover decedent's indebtedness to partnership.—*Painter vs. Estate Painter*, 68 Cal. 395, 397, 398, 9 Pac. Rep. 450.

13. Official report of this case has appended to it head-note which states that surviving partner "cannot collect from general assets of estate of decedent debt due by him to firm, if interest of deceased in assets of firm is sufficient to pay it." This extraordinary syllabus, it is submitted, does not accurately state the law and is not borne out by court's opinion. Headnote in Pacific Reporter correctly states decision.

14. PAYMENT OF LEGACY OUT OF RESIDUARY.—Provision that legacy shall be paid out of residue denotes intent that bequests not so qualified shall be first paid, and not be held liable for contribution until qualified legacies are exhausted.—In *re Estate Williams*, 112 Cal. 521, 526, 53 Am. St. Rep. 224, 44 Pac. Rep. 808.

As to residuary legacies, see ante § 1357 and note pars. 24, 25.

"Residuary clause" defined.—See ante § 1359 and note par. 14.

15. **RENTS AND PROFITS**—Legacy payable out of—**Insurance money**.—Where evident intention of testator was that annuity and education of children should be paid out of the rents and profits of real estate, and that money legacies should be paid out of other property which he left, and such other property is sufficient for that purpose, executor should not use insurance money collected for building which has burned, for purpose of paying such money legacies, but may use it to rebuild so as to increase rents which may be devoted to payment of such annuity and education of children.—In re Estate Radovich, 54 Cal. 540, 541, 542.

16. **Sale of assets for payment of legacies**.—See post § 1377 and note par. 10.

17. **SPECIFIC DEVISES AND BEQUESTS FAVORED**.—Where property subject to distribution among general pecuniary legatees is insufficient, under subd. 4 of this section court cannot resort for purpose of paying them to property specifically devised and bequeathed.—In re Estate Nelstrath, 66 Cal. 330, 331, 332, 5 Pac. Rep. 507.

18. **Preferred over land descended**.—Gift by will of specific thing is sufficient manifestation of intention of testator to exempt personal estate to that extent as against land not pro-

vided for by will and which descended to heirs.—Trumbo vs. Sorrencey, 3 T. B. Mon. (Ky.) 384, 16 Am. Dec. 103.

19. **SUBSTITUTED LEGACY PAYABLE OUT OF SAME PROPERTY AS ORIGINAL LEGACY**.—As general rule substituted or additional legacy is prima facie payable out of same funds as original legacy, whether result is or is not advantageous to legatee.—In re Estate Laveaga, 119 Cal. 651, 653-655, 51 Pac. Rep. 1074. See Condict vs. King, 13 N. J. Eq. (2 Beas.) 375; Leacroft vs. Maynard, 1 Ves. Jr. 279, 3 Bro. Ch. 233; Cooper vs. Day, 3 Mer. 154; Earl of Shaftesbury vs. Duke of Marlborough, 7 Sim. 237, 10 Eng. 36.

20. **Contrary intention manifested by testator**.—Where testator bequeaths sums of money charged exclusively upon ranch in California and devises to another ranch in Mexico, and legatee dies and thereafter by codicil testator directs "amount he did bequest" to deceased beneficiary to be paid to one whom he had previously named as devisee of ranch in Mexico, and makes different disposition of such ranch, sum of money bequeathed is charged upon ranch in California and is not payable out of general assets, because peculiar phraseology of codicil manifests intention on part of testator to substitute legatee named in codicil for legatee named in original will.—In re Estate Laveaga, 119 Cal. 651, 655-658, 51 Pac. Rep. 1074.

§ 1361. **SAME. [LEGACIES TO KINDRED.]** Legacies to husband, widow, or kindred of any class are chargeable only after legacies to persons not related to the testator.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Commissioners' note.
3. Common-law rule changed.
4. Kindred, etc., given preference merely as respects debts.

1. **Applied, cited, construed, referred to, etc.**, in: In re Estate Apple, 66 Cal. 432, 433, 439, 441, 6 Pac. Rep. 7 (construed).

2. **Commissioners' note says**: "Rule of text seems to be so well founded in natural justice, and to accord so nearly with that which is presumed to be the natural inclination of the testator, that approbation is accorded to it, notwithstanding the converse is laid down in Red. Wills (ed. 1866) 552, where, too, it is conceded that in all probability other legacies would not have been made if the testator could have supposed that the legacies to those naturally dependent on him would have from any cause failed. When a widow receives in lieu of her dower, the legacy is preferred as a

consideration; and so may a legacy be exempt from abatement, made to a wife or child destitute of other provision. This was so held in Duncan vs. Alt, 3 Pa. St. 382, Gibson, C. J."

3. **Common-law rule changed**.—Ordinary rule is that "fact of mere relationship of dependents or of meritorious character of objects to which legacy is to be applied is not enough to exempt it from abatement," and that "bequest to wife, child, sister, old servant, or charities, abate"; but such rule is changed by this section.—2 Am. & Eng. Encyc. of L. (2d ed.) 46-48.

4. **Kindred, etc., given preference merely as respects debts**.—This section declares that legacies to kindred are chargeable "for debts" only after legacies to persons not related to testator, and no preference is given such legacies over other legacies when none of the legacies are resorted to for payment of debts.—In re Estate Apple, 66 Cal. 432, 433-441, 6 Pac. Rep. 7.

§ 1362. **ABATEMENT**. Abatement takes place in any class only as between legacies of that class, unless a different intention is expressed in the will.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. After-born child—Contribution for share of.
3. Commissioners' note.
4. Definition of abatement.
5. Demonstrative legacies on equality.
- 6, 7. Devises and legacies abate proportionately.
8. Same—General bequest and general devise.
9. Specific devises—Contribution.

10. Same—Devise in payment of indebtedness.
11. Specific legacies contribute.
12. Same—Remedy of legatee.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: In re Estate Neistrath, 66 Cal. 330, 331, 5 Pac. Rep. 507 (construed and applied); In re Estate Apple, 66 Cal. 432, 437, 438, 439, 6 Pac. Rep. 7 (referred to).

2. **AFTER-BORN CHILD**—Contribution for share of.—See ante § 1308 and note.

3. **COMMISSIONERS' NOTE** says that section declares "manifestly proper rule."

4. **DEFINITION OF ABATEMENT**.—"Reduction of legacy, general or specific, on account of insufficiency of estate of testator to pay his debts and legacies."—In re Estate Neistrath, 66 Cal. 330, 331, 5 Pac. Rep. 507 (quoting Bouv. Law Dict.).

Abatement of legacies in case of deficiency of assets of estate.—See 8 Am. St. Rep. 720-725.

5. **ALL DEMONSTRATIVE LEGACIES ON EQUALITY**.—No question as to payment of debts being involved, all demonstrative legacies stand upon equality under this section and §§ 1357, 1359, and 1360.—In re Estate Apple, 66 Cal. 432, 437-441, 6 Pac. Rep. 7.

See ante §§ 1359, 1360, 1362 and notes.

6. **DEVISES AND LEGACIES ABATE PROPORTIONATELY**.—Where testator indicates intention that each beneficiary shall have that which is specifically devised or bequeathed, and to some extent bounty must fail, gifts of land and personalities stand on same footing and abate in proportion to their value.—In re Estate Montgomery, 60 Cal. 645, 647. See In re Estate Ross, 140 Cal. 282, 293, 73 Pac. Rep. 976; In re Estate Smith, 145 Cal. 118, 121, 122, 78 Pac. Rep. 369. Ala. Kelly vs. Richardson, 100 Ala. 584, 13 So. Rep. 735. Mass. Farnum vs. Bascom, 122 Mass. 282, 287. Md. Chase vs. Lockerman, 11 Gill & J. 185. Pa. Loomis' Appeal, 10 Pa. St. 387; Cryder's Appeal, 11 Pa. St. 72. Eng. Gervis vs. Gervis, 14 Sim. 654; 37

Eng. Ch. 654; Long vs. Short, 1 P. Wms. 403; Tombs vs. Roch, 2 Coll. 490; Thompson vs. Lawley, 2 Bos. & P. 303, 5 Rev. Rep. 595; Young vs. Hassard, 1 J. & La T. 466.

7. **Compare**: Gregory vs. McPherson, 13 Cal. 562, 576; Haynes vs. Meeks, 20 Cal. 238, 313; Abila vs. Burnett, 33 Cal. 658, 667; In re Estate Miller, 48 Cal. 165, 170, 17 Am. Rep. 422; In re Estate Moulton, 48 Cal. 191, 193 (decided under Probate Act, Act May 1, 1851, Hlt. Gen. Laws 1850 to 1864, p. 835); Rogers vs. Rogers, 1 Paige Ch. (N. Y.) 188.

8. **General bequest and general devise**.—Lands and personalty both being estates in hands of executor, liable to all the debts, when land is devised generally and chattels are bequeathed generally, land and chattels stand upon same footing, and must contribute pro rata to payment of debts, in proportion to value or amount of the several devises or legacies.—In re Estate Woodworth, 31 Cal. 595, 613-615.

9. **SPECIFIC DEVISES — Contribution**.—Where several parcels of land are given to two or more devisees each parcel must contribute to payment of debts, etc.—In re Estate Thayer, 142 Cal. 453, 455, 456, 76 Pac. Rep. 41.

10. **Devise in payment of indebtedness**.—This rule is not affected by fact that devise to one devisee is made in payment of indebtedness due from testator to devisee, there being no such exception made in statute.—In re Estate Thayer, 142 Cal. 453, 456, 76 Pac. Rep. 41.

11. **SPECIFIC LEGACIES CONTRIBUTE**.—Specific legacies are held to contribute proportionately to charges on estate.—Tomlinson vs. Bury, 145 Mass. 346, 1 Am. St. Rep. 464, 14 N. E. Rep. 137.

12. **Remedy of legatee**.—If special bequest is applied to payment of debt and there are other bequests, remedy of legatee whose bequest was so applied is to seek contribution from the others.—In re Estate Moulton, 48 Cal. 191, 192.

§ 1363. SPECIFIC DEVISES AND LEGACIES. In a specific devise or legacy, the title passes by the will, but possession can only be obtained from the personal representative; and he may be authorized by the superior court to sell the property devised and bequeathed in the cases herein provided.

History: Enacted March 21, 1872; amended April 6, 1880, Code Amdts. 1880 (C. C. pt.), p. 8.

1. Action at law and suit in equity to recover legacy.—At common law.
2. Assent of executor to legatee's possession necessary.
3. Same.—Form of assent not prescribed.
4. Commissioners' note.
5. Common-law rule—Land free from control of personal representative.
6. Contingency must happen before delivery to devisee by executor.
7. Conveyance of title to land—Executor or administrator not entitled to.
8. Detinue is maintainable by executor.
9. Ejectment—By executor or administrator.
10. Same.—F forcible entry by grantee of devisee.
11. Same.—By devisee or heir—Against executor or administrator.
- 12, 13. Same—Same—Against third person.
14. Same.—Right of action accrues, when.
15. Execution of will dependent on death of testator.
16. Partnership assets—Disposition by surviving partner.
17. Same.—Share of decedent constitutes asset of estate.
18. Possession—Devisee or heir entitled to as against stranger.
19. Same.—Executor or administrator entitled to possession for purposes of administration.
20. Same.—Same—Delay in making distribution.

21. Same—Same—Devisee who is executrix—Nature of possession.
22. Same—Same—In behalf of devisee or heir.
23. Same—Same—Probate not essential to right.
24. Same—Same—Purposes of administration accomplished.
25. Same—Same—Termination of possessory right.
26. Possessory action is maintainable by executor or administrator.
27. Power given executor to sell without probate.
28. Quietting title—Action maintainable by devisee against stranger.
29. Same—Executor not suable by devisee.
30. Same—Grantee of devisee may maintain action.
31. Rents and profits from land assets in hands of executor.
32. Restitution upon reversal of decree of distribution.
33. Time when legacies and annuities become due.
34. Title vests in devisees and heirs, when—At moment of testator's death.
35. Same—Corporation or association subsequently organized.
36. Same—Direction to pay in futuro.
37. Same—Distribution not origin of title.
38. Same—Infancy—Will controlling use during.
39. Same—Judgment lien against devisee pending administration.
40. Same—Postponement of enjoyment of estate.
41. Same—Postponement of legacy until happening of condition.
42. Same—Same—Remainder subject to contingency or condition subsequent.
43. Same—Same—Repugnant condition.
44. Same—Subject to administration.
45. Same—Same—Prior contracts made by decedent affecting title.
46. Trespass maintainable by heir or devisee.
47. Trust enforceable by executor.
- 48, 49. Vacancy in administration—Right of devisee or heir to recover possession.

1. ACTION AT LAW AND SUIT IN EQUITY TO RECOVER LEGACY.—At common law action at law lies for legacy on promise to pay, there being sufficiency of assets, and trover will lie for specific legacy after assent of executor, but because of executor's liability for debts he has right to refuse legacy until he has ascertained whether there are assets, and if he refuses to pay it is necessary to go into equity where there will be account and discovery of assets and decree of payment if they are found sufficient.—*Andrews vs. Hunneman*, 23 Mass. (6 Pick.) 126, 129. See *In re Estate Ricaud*, 57 Cal. 421, 423; *Atkins vs. Hill*, 1 Cowp. 284, 288.

2. ASSENT OF EXECUTOR TO LEGATEE'S POSSESSION.—Acquisition of perfect title dependent upon.—Legatee, whether legacy be general or specific, and whether it embraces chattels real or personal, must first obtain executor's assent to legacy before his title can become perfect. He has no authority to take

possession of legacy without such assent, although testator by will expressly directs that he shall do so; for, if this were permitted, testator might appoint all his effects to be thus taken, in fraud of creditors.—*McClanahan vs. Davis*, 49 U. S. (8 How.) 170, 178, bk. 12 L. ed. 1033.

3. Form of assent not prescribed.—Law has prescribed no particular form by which executor's assent shall be given; and it may therefore be expressed or implied. It may be inferred from indirect expressions or particular acts; and such constructive presumption is equally available.—*McClanahan vs. Davis*, 49 U. S. (8 How.) 170, 178, bk. 12 L. ed. 1033.

4. COMMISSIONERS' NOTE says: "Executor should collect things specifically bequeathed, as well as other portions of the estate, and dispose of them by delivery to the legatees, unless absolutely required for the payment of debts."—*Clarke vs. Ormonde*, Jacob 108, 23 Rev. Rep. 8, 143. In what language will must be couched to be construed as a deed.—*Norris vs. Hensley*, 27 Cal. 439; *Bruck vs. Tucker*, 32 Cal. 425; *In re Estate Woodworth*, 31 Cal. 595."

5. COMMON-LAW RULE—Land free from control of personal representative.—At common law real estate went directly to heir, and executor and administrator had no control over it, for payments of debts. If creditors pursued it in the hands of heir, it was incumbent on them to establish affirmatively the validity of their demands, and a judgment against administrator was not prima facie evidence.—*In re Estate Schroeder*, 46 Cal. 304, 318 (per Crockett, J.).

6. CONTINGENCY MUST HAPPEN BEFORE DELIVERY TO DEVISEE BY EXECUTOR.—Executor has no power to deliver possession of property before contingency named in will has occurred and an attempt to do so is void because in violation of manifest intention of testator.—*Price vs. Sessions*, 44 U. S. (3 How.) 624, 634, 635, bk. 11 L. ed. 755.

7. CONVEYANCE OF TITLE TO LAND.—Executor or administrator not entitled to.—Personal representative is not proper party to bring action to establish trust and to compel defendant to convey legal title to real estate to him, although he can maintain action for recovery of possession of such property.—*Janes vs. Throckmorton*, 57 Cal. 368, 387, 388. See Code Civ. Proc. §§1452, 1581 and notes.

8. DETINUE IS MAINTAINABLE BY EXECUTOR to recover chattels belonging to testator's estate.—*Arnold vs. Arnold*, 13 Ired. L. (N. C.) 174, 55 Am. Dec. 434.

9. EJECTMENT.—By executor or administrator.—Ejectment is maintainable by personal representative.—*Page vs. Tucker*, 54 Cal. 121, 122, 123.

10. Forceful entry by grantee of devisee.—Personal representative may maintain ejectment against grantee of devisee where such grantee has forcibly dispossessed plaintiff.—*Page vs. Tucker*, 54 Cal. 121, 123.

11. By devisee or heir against executor or administrator.—Statute does not authorize dev-

isee or heir to maintain ejectment against executor or administrator.—Page vs. Tucker, 54 Cal. 121, 122. See Harper vs. Struts, 53 Cal. 655, 656.

12. Same.—Against third person ejectment is maintainable as well as by executor under Code Civ. Proc. §§1452, 1581, as possession of executor is that of heir or devisee.—Page vs. Tucker, 54 Cal. 121, 122; Colton vs. Onderdonk, 69 Cal. 155, 158, 58 Am. Rep. 556, 10 Pac. Rep. 395; Jordan vs. Fay, 98 Cal. 264, 266, 32 Pac. Rep. 95. See Blythe vs. Hinckley, 84 Fed. Rep. 246, 256 (case arising in California).

13. Compare: Meeks vs. Hahn, 20 Cal. 620, 627, 628; Chapman vs. Hollister, 42 Cal. 462, 463, 464; Meeks vs. Kirby, 47 Cal. 168, 169, 170; McCrea vs. Haraszthy, 51 Cal. 146, 151 (decided order prior statute).

As to ejectment when there is vacancy in administration, see par. 49 this note.

As to right of devisee to bring action to quiet title, see pars. 28, 29 this note.

14. Right of action accrues, when.—Executor or administrator is not to be kept out of possession until court has settled his accounts, but has right of action immediately upon issuance of his letters.—Page vs. Tucker, 54 Cal. 121, 123.

15. EXECUTION OF WILL DEPENDENT UPON DEATH OF TESTATOR.—Will is not executed nor does it take effect until death of testator.—Grimes' Estate vs. Norris, 6 Cal. 621, 625, 66 Am. Dec. 546.

16. PARTNERSHIP ASSETS.—Disposition by surviving partner.—Upon death of one partner possession in partnership interests vests exclusively in surviving partner, who has absolute power of control and disposition of assets of partnership, but he must account to executor and pay over such balance as may from time to time be payable to latter in right of his testator.—People ex rel. Allen vs. Hill, 16 Cal. 113, 118; Theller vs. Such, 57 Cal. 447, 459; Painter vs. Estate of Painter, 68 Cal. 395, 396, 9 Pac. Rep. 450. See McGorray vs. O'Connor, 79 Fed. Rep. 861, 864 (case arising in California).

17. Share of decedent constitutes asset of estate.—When partner dies any balance which may be decreed by court of equity in favor of representatives of estate of decedent as against surviving partner belongs "potentially" to decedent's estate from date of his death, but such balance must be ascertained, not in probate court, but in ordinary action in like manner as if suit were brought for dissolution and accounting between living partners.—Theller vs. Such, 57 Cal. 447, 459, 460.

As to procedure where testator indebted to partnership with interest in assets to surviving partner, see ante §1360 and note par. 12.

18. POSSESSION.—Devisee or heir entitled to as against stranger.—As against strangers devisee or heir is entitled to possession of land belonging to estate.—See Berry vs. Eyraud, 134 Cal. 82, 83, 66 Pac. Rep. 74.

See post §1384 and note; and Code Civ. Proc. §§1452, 1581 and notes.

19. Executor or administrator entitled to possession for purposes of administration.—

Executor or administrator is vested with right to possession of real estate of decedent as well as personal, and his duties and liabilities in respect thereto are of same general character.—Gray vs. Palmer, 9 Cal. 616, 637; Walls vs. Walker, 37 Cal. 424, 431, 99 Am. Dec. 290; Chapman vs. Hollister, 42 Cal. 462, 463; Meeks vs. Kirby, 47 Cal. 168, 169, 170; In re Estate Miller, 48 Cal. 165, 170, 17 Am. Rep. 422; Page vs. Tucker, 54 Cal. 121, 123; Jones vs. Throckmorton, 57 Cal. 368, 387; Colton vs. Onderdonk, 69 Cal. 155, 157, 158, 58 Am. Rep. 556, 10 Pac. Rep. 395; Washington vs. Black, 83 Cal. 290, 295, 23 Pac. Rep. 300; Martinovich vs. Marsicano, 137 Cal. 354, 355, 70 Pac. Rep. 459; See Beckett vs. Selover, 7 Cal. 215, 229, 68 Am. Dec. 237; McCrea vs. Haraszthy, 51 Cal. 146, 151; De Greayer vs. Superior Court, 117 Cal. 640, 645, 59 Am. St. Rep. 220, 224, 49 Pac. Rep. 983; Berry vs. Eyraud, 134 Cal. 82, 83, 66 Pac. Rep. 74; Arnold vs. Arnold, 13 Ired. L. (N. C.) 174, 55 Am. Dec. 434; Price vs. Sessions, 44 U. S. (3 How.) 624, 634, bk. 11 L. ed. 755; McClanahan vs. Davis, 49 U. S. (8 How.) 170, 178, bk. 12 L. ed. 1033; Thorpe vs. Sampson, 84 Fed. Rep. 63, 65 (case arising in California).

20. Delay in making distribution.—Ordinarily right of devisee or heir when administration has been accomplished and estate is ready for distribution is to force settlement and distribution, but he cannot oust personal representative from possession upon ground that he unduly delays to close administration.—Berry vs. Eyraud, 134 Cal. 82, 83, 66 Pac. Rep. 74. See In re Estate Crosby, 55 Cal. 574, 581.

21. Devisee who is executrix.—Nature of possession.—Where widow is executrix property which comes into her possession is not taken by her as widow or devisee, but is considered as having come into her possession as coexecutrix and as constituting part of estate, subject to administration.—Abila vs. Burnett, 33 Cal. 653, 667.

22. In behalf of devisee or heir.—Possession of executor or administrator is that of heir or devisee.—Colton vs. Onderdonk, 69 Cal. 155, 158, 58 Am. Rep. 556, 10 Pac. Rep. 395.

23. Probate not essential to right.—Executor has right to possession and may sue to recover property of testator before getting letters testamentary.—Arnold vs. Arnold, 13 Ired. L. (N. C.) 174, 55 Am. Dec. 434. See Graysbrook vs. Fox, 1 Plow. 280 (wherein Dyer cites case in point); Wankford vs. Wankford, 1 Salk. 299 (per Lord Holt).

24. Purposes of administration accomplished.—If estate has not been distributed, right of personal representative to possession is not lost because purposes of administration have been accomplished and estate is ready for distribution.—Berry vs. Eyraud, 134 Cal. 82, 83, 66 Pac. Rep. 74.

25. Termination of personal representative's possessory right.—Right of possession exists in executor or administrator until estate is settled or delivered over to heirs by order of court; and when either of these events happens his possessory right terminates.—Meeks vs. Hahn, 20 Cal. 620, 627.

26. POSSESSORY ACTION IS MAINTAIN-

ABLE BY EXECUTOR OR ADMINISTRATOR for recovery of all property belonging to decedent's estate, real and personal, during administration.—*Janes vs. Throckmorton*, 57 Cal. 363, 387.

As to *detinue*, see par. 8 this note.

As to *ejectment*, see pars. 9, 10 this note.

27. **Power given executor to sell without probate.**—See post § 1373 and note par. 5.

28. **QUIETING TITLE—Action maintainable by devisee against stranger.**—Devisee pending administration under Code Civ. Proc. § 1452 may maintain action to quiet title against stranger.—*Jordan vs. Fay*, 98 Cal. 264, 266, 33 Pac. Rep. 95.

See Code Civ. Proc. § 1452 and note.

As to *right of devisee to maintain ejectment*, see pars. 5, 12, 13 this note.

29. **Executor not suable.**—Action not maintainable by devisee against executor.—*Harper vs. Strutz*, 53 Cal. 655, 656 (action by heir against administrator *c. t. a.*). See *Thorpe vs. Sampson*, 84 Fed. Rep. 63, 65, 66 (case arising in California; action by heir against administrator).

30. **Grantee of devise may maintain action.**—One who has acquired devisee's title has same right as devisee would have had to maintain action to quiet title.—*Jordan vs. Fay*, 98 Cal. 264, 266, 33 Pac. Rep. 95 (*distinguishing* *Page vs. Tucker*, 54 Cal. 121, 122, wherein it was held that action may be brought by administrator to recover possession of real property which grantee of devisee has taken possession of).

31. **RENTS AND PROFITS ARISING FROM REAL ESTATE** constitute part of assets of estate and executor or administrator is entitled to receive.—*Page vs. Tucker*, 54 Cal. 121, 123; *Washington vs. Black*, 83 Cal. 290, 295, 23 Pac. Rep. 300 (*distinguishing* *In re Estate Woodworth*, 31 Cal. 595, holding that rents and profits of real estate are to be regarded as real estate and not resorted to for payments of debts in exoneration of general personalty, but not holding that such rents and profits are not assets for payment of debts).

32. **RESTITUTION UPON REVERSAL OF DECREE OF DISTRIBUTION.**—Where devisee and legatee is given possession of property pursuant to decree of distribution, and such decree is reversed upon appeal, upon filing remittitur executors are entitled, on filing petition in probate court, to have property restored, and answer denying that property was received from executors as property of estate distributed is sham and frivolous.—*Heydenfeldt vs. Superior Court*, 117 Cal. 348, 349-351, 49 Pac. Rep. 210.

33. **Time when legacies and annuities become due.**—See post § 1363 and note.

34. **TITLE VESTS IN DEVISEES AND HEIRS, WHEN.**—At moment of death of testator, or intestate, title vests in heirs and devisees, subject only to lien of executor or administrator, for payment of debts and expenses of administration, with the right in administrator of present possession, which continues till estate is settled or delivered over to parties entitled by order of court.—*Meeks*

vs. Hahn, 20 Cal. 620, 627; *Fitch vs. Miller*, 20 Cal. 352, 385; *In re Estate Woodworth*, 31 Cal. 595, 604; *Chapman vs. Hollister*, 42 Cal. 462, 463; *Colton vs. Onderdonk*, 69 Cal. 155, 158, 53 Am. Rep. 556, 10 Pac. Rep. 395; *Jordan vs. Fay*, 98 Cal. 264, 266, 33 Pac. Rep. 95; *Bates vs. Howard*, 105 Cal. 173, 183, 33 Pac. Rep. 715; *In re Estate Pearson*, 113 Cal. 577, 589, 45 Pac. Rep. 349; *Dunn vs. Schell*, 122 Cal. 626, 627, 55 Pac. Rep. 595; *In re Estate Young*, 123 Cal. 337, 346, 55 Pac. Rep. 1011; *In re Estate Packer*, 125 Cal. 396, 398, 399, 73 Am. St. Rep. 53, 58 Pac. Rep. 59; *Martinovich vs. Marsicano*, 137 Cal. 354, 355, 70 Pac. Rep. 459; *In re Estate Newlove*, 143 Cal. 377, 379, 75 Pac. Rep. 1083. See *Beckett vs. Selover*, 7 Cal. 215, 229, 68 Am. Dec. 237. III. *Ducker vs. Burnham*, 146 Ill. 9, 37 Am. St. Rep. 135, 34 N. E. Rep. 553. *Mass. Towle vs. Swasey*, 106 Mass. 100, 107. *Fed. McClanahan vs. Davis*, 49 U. S. (8 How.) 170, 178, bk. 12 L. ed. 1033.

See ante § 1341 and note.

35. **Corporation or association subsequently organized.**—Where testator gives legacies to orphan asylums rights vest at time of testator's death and asylums which have been organized thereafter and which are maintained at time of distribution take nothing.—*In re Estate Pearsons*, 113 Cal. 577, 589, 45 Pac. Rep. 349.

36. **Direction to pay in futuro.**—General rule is that when legacy is given to legatee to be paid at future time it vests immediately.—*In re Estate Rogers*, 94 Cal. 526, 531, 29 Pac. Rep. 962. See *Read's Appeal*, 118 Pa. St. 215, 4 Am. St. Rep. 588, 11 Atl. Rep. 787.

37. **Distribution not origin of title.**—Title of heir does not originate in decree of distribution, but comes to him from ancestor, and settlement of estate in probate court and final decree of distribution in that court only serves to release property from conditions to which as estate of deceased person it was subject.—*Bates vs. Howard*, 105 Cal. 173, 183, 33 Pac. Rep. 715.

38. **Infancy—Will controlling use during.**—Where provision of will is that devisee may "take out" one half of his share when he comes of age and other half not until all testator's other children come of age, whatever effect this provision may have in controlling use of property until devisee is entitled to take its control, title to property vests in devisee upon death of testator, and infant has estate such as may be sold under a statute authorizing sale of estate of any person under guardianship when necessary or when for his benefit in certain cases.—*Fitch vs. Miller*, 20 Cal. 352, 385, 386.

39. **Judgment lien against devisee.**—Upon docketing judgment recovered against devisee pending administration of testator's estate judgment becomes lien upon property devised.—*Martinovich vs. Marsicano*, 137 Cal. 354, 355, 70 Pac. Rep. 459.

40. **Postponement of enjoyment of estate.**—Where testator directs that property devised shall be kept intact and remain undisturbed, etc., until youngest son shall have attained the age of twenty-one years, nevertheless on

death of testator devisee acquires under will vested future interest.—*Dunn vs. Schell*, 123 Cal. 626, 627, 55 Pac. Rep. 595. See *Ducker vs. Burnham*, 146 Ill. 9, 24, 37 Am. St. Rep. 135, 34 N. E. Rep. 558.

Postponement to future period.—Devise or legacy to class.—See ante § 1337 and note.

41. **Postponement of legacy until happening of condition.**—Where legacy is not given in present, but is dependent upon happening of event and is conditional, legacy does not vest immediately, but is postponed until happening of event, and if legatee dies before it is lost, e. g. where will provides that legacy shall be paid in instalments upon arrival of legatee at certain ages, and that it shall be paid only after death of testator's wife, if legatee dies before arriving at either of ages named, leaving testator's wife surviving him, legacy does not vest and does not go to legatee's heirs.—In re Estate Rogers, 94 Cal. 526, 530-533, 29 Pac. Rep. 962. See *Ducker vs. Burnham*, 146 Ill. 9, 24, 37 Am. St. Rep. 135, 34 N. E. Rep. 558; *Reed's Appeal*, 118 Pa. St. 215, 4 Am. St. Rep. 588, 11 Atl. Rep. 787.

42. **Remainder subject to contingency or condition subsequent.**—Where will gives estate in remainder, subject to subsequent and not precedent contingency or condition, estate vests immediately, subject to be defeated by happening of condition.—*Ducker vs. Burnham*, 146 Ill. 9, 24, 37 Am. St. Rep. 135, 34 N. E. Rep. 558.

43. **Same.—Repugnant condition deferring time of payment.**—If condition deferring time of payment is repugnant to gift, condition and not gift is void, and gift being present gift, it vests immediately.—In re Estate Young, 123 Cal. 337, 346, 55 Pac. Rep. 1011.

44. **Subject to administration.**—On death of ancestor his title to real estate passes to devisee or heir, subject, however, to right of

possession of executor or administrator for payments of debts.—*James vs. Throckmorton*, 57 Cal. 368, 387. See *Beckett vs. Selover*, 7 Cal. 215, 229, 68 Am. Dec. 237; *Burchinell vs. Butters*, 7 Colo. App. 294, 43 Pac. Rep. 459; *Hyde vs. Heller*, 10 Wash. 586, 39 Pac. Rep. 249.

45. **Prior contracts made by decedent affecting title.**—Devisee cannot take anything more than deviser had at time of his death, and title of devisee is subject to claims that have attached pursuant to contract made by testator before his death.—*Hyde vs. Heller*, 10 Wash. 586, 39 Pac. Rep. 249.

46. **Trespass maintainable by heir or devisee.**—Since possession of executor is that of devisee, devisee may maintain trespass against third person, and where devisee who is executor is in possession, even though estate has not been distributed, he may maintain trespass in individual capacity.—*Colton vs. Onderdonk*, 69 Cal. 155, 158, 58 Am. Rep. 556, 10 Pac. Rep. 895.

47. **Trust enforceable by executor.**—See par. 7 this note.

48. **VACANCY IN ADMINISTRATION.—No administration.**—Devisee or heir may maintain action to recover possession of property if there is no administration upon estate.—*Udegaff vs. Trask*, 18 Cal. 458, 459. See *Beckett vs. Selover*, 7 Cal. 215, 68 Am. Dec. 237; *Chapman vs. Hollister*, 42 Cal. 462, 463 (decided before adoption of code); *Bufford vs. Holliman*, 10 Tex. 560, 60 Am. Dec. 223.

As to rule under Code, see par. 12 this note.

49. **Temporary vacancy.**—If administration is pending and temporary vacancy in office of executor or administrator remains unclosed, heir or devisee is not entitled to possession and cannot maintain action during such vacancy.—*Chapman vs. Hollister*, 42 Cal. 462, 464 (decided before adoption of Code).

§ 1364. HEIR'S CONVEYANCE GOOD, UNLESS WILL IS PROVED WITHIN FOUR YEARS. The rights of a purchaser or encumbrancer of real property, in good faith and for value, derived from any person claiming the same by succession, are not impaired by any devise made by the decedent from whom succession is claimed, unless within four years after the deviser's death, the instrument containing such devise is duly proved as a will, and recorded in the office of the clerk of the superior court having jurisdiction thereof, or written notice of such devise is filed with the clerk of the county where the real property is situated.

History: Enacted March 21, 1872; amended April 6, 1880, Code Amdts. 1880 (C. C. pt.), p. 8; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 404, held unconstitutional, see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXLVIII, pp. 606, 607.

1. Bona fide purchaser from distributee under invalid will.
2. Commissioners' note.
3. Deed by devisee or heir before distribution—Contracts and deeds valid.
4. Same.—Postponement of enjoyment of estate.
5. Effect of subsequent decree of distribution.
6. Grantee entitled to distribution.
7. Same.—Issue taken as to conveyance by heir.
8. Mortgage by devisee is valid.

9. Same.—Family allowance where land is mortgaged to procure support for family.
10. Same.—Mortgagee not entitled to distribution.
11. Same.—Mortgagee of vested future interest.
12. Title of grantee.
13. Same.—Caveat emptor applies.

1. **BONA FIDE PURCHASER FROM DISTRIBUTEE UNDER INVALID WILL.**—Where probate of will has been annulled upon con-

test initiated by heir subsequent to entry of decree of distribution, heir may pursue property, and perhaps its proceeds, in hands of distributee, but he cannot follow property into hands of one who bought in good faith and for value from executor, administrator or distributee prior to revocation and at time when proceedings appeared to be valid and binding.—*Thompson vs. Samson*, 64 Cal. 330, 333, 334, 30 Pac. Rep. 980.

2. COMMISSIONERS' NOTE says: "Recording written notice of devise is intended to obviate any delays in recording the will occasioned by contesting its probate, as, in the absence of any restriction in the will, the legatee would be authorized to take in many cases of protracted contests long prior to admission of the will to probate; one year being ordinarily allowed in which to ascertain indebtedness and pay legacies, in accordance with amount of assets."

3. DEED BY DEVISEE OR HEIR BEFORE DISTRIBUTION—Contracts and deeds valid.—Devisee or heir may contract concerning or convey title which law casts upon him on death of ancestor.—*Chever vs. Ching Hong Poy*, 82 Cal. 68, 71, 22 Pac. Rep. 1081; *In re Estate Vaughn*, 92 Cal. 192, 193, 28 Pac. Rep. 221; *Jordan vs. Fay*, 98 Cal. 264, 266, 33 Pac. Rep. 95. See *Bates vs. Howard*, 105 Cal. 173, 183, 38 Pac. Rep. 715; *William Hill Co. vs. Lawler*, 116 Cal. 359, 363, 48 Pac. Rep. 323; *Dunn vs. Schell*, 122 Cal. 626, 627, 55 Pac. Rep. 595.

4. Postponement of enjoyment of estate.—Where will provides that property devised shall remain intact and undivided and undisturbed until youngest son shall attain the age of twenty-one years, nevertheless on death of testator devisee acquires vested future interest which is subject to be transferred or encumbered by him in like manner as if it were an estate in possession.—*Dunn vs. Schell*, 122 Cal. 626, 627, 55 Pac. Rep. 595.

5. EFFECT OF SUBSEQUENT DECREE OF DISTRIBUTION.—Validity or force of heir's contract or deed is not affected by subsequent decree of distribution asserting heirship and title to be valid, as such decree does not affect rights of others than the parties who were before court upon issues pertaining to distribution.—*Chever vs. Ching Hong Poy*, 82 Cal. 68, 71, 72, 22 Pac. Rep. 1081. See *Bath vs. Valdez*, 70 Cal. 350, 361, 11 Pac. Rep. 724; *Barnard vs. Wilson*, 74 Cal. 512, 517, 16 Pac. Rep. 307.

6. GRANTEE ENTITLED TO DISTRIBUTION.—Where heir conveys all his personal interest in real property which he has taken by descent, and upon final distribution all parties interested are served and no one makes opposition to petition by grantee to have property distributed to him, court should distribute property according to such petition and consent of parties, and not to heir.—*In re Estate Vaughn*, 92 Cal. 192, 193, 194, 28 Pac. Rep. 221 (distinguishing *Chever vs. Ching Hong Poy*, 82 Cal. 68, 71, 22 Pac. Rep. 1081, in which case grantee was not before court). See *In re Estate Burton*, 93 Cal. 459, 464, 29 Pac. Rep. 36; *William Hill Co. vs. Lawler*, 116 Cal. 359, 361-364, 48 Pac. Rep. 323.

7. Issue taken as to conveyance by heir.—If grantee files petition and asks to have land involved distributed to him, and heirs take issue upon averments of such petition that land was conveyed to petitioner, court must determine such issue, and its decision thereon is conclusive upon petitioner as well as upon heir.—See *William Hill Co. vs. Lawler*, 116 Cal. 359, 363, 48 Pac. Rep. 323.

8. MORTGAGE BY DEVISEE IS VALID, but such mortgage is made subject to orders and proceedings of court in administering estate, and purchaser at foreclosure sale acquires no greater or higher right in mortgaged premises than devisee had.—*Cook vs. De la Guerra*, 24 Cal. 287, 241. See *Wood vs. Curran*, 99 Cal. 137, 141, 33 Pac. Rep. 774; *Dunn vs. Schell*, 122 Cal. 626, 627, 55 Pac. Rep. 595.

MORTGAGE EXECUTED BY HEIRS—Foreclosure before settlement of estate.—See post § 1377.

9. Family allowance where land is mortgaged to procure support for family.—Where testator provides that property shall be kept intact and undisturbed for specified time, and that in mean time income of real estate shall be paid widow for support and maintenance of herself and children, and income being insufficient for that purpose, widow, as devisee, mortgages property to secure money advanced for purpose of supporting family, and thereafter widow obtains order authorizing sale of land for purpose of paying family allowance, suppressing fact that she had mortgaged premises, equity at suit of mortgagee will set aside such order and grant general relief, as widow, under name of family allowance, is not entitled to proceeds of sale of same property on which she has already obtained money for support of family.—*Curtis vs. Schell*, 129 Cal. 208, 214-221, 79 Am. St. Rep. 107, 61 Pac. Rep. 951.

10. Mortgagee not entitled to distribution.—Where devisee mortgages property which he takes under will, mortgagee is not entitled to appear upon final distribution and ask to have mortgaged premises set off to him, but at most the court can only distribute property to mortgager subject to mortgage.—*In re Estate Crooks*, 125 Cal. 459, 461, 53 Pac. Rep. 89.

11. Mortgagee of vested future interest.—Where testator directs that property devised shall be kept intact and undisturbed until his youngest son arrives at age of twenty-one years, and one of devisees mortgages his vested future interest in lands of testator, purchaser at foreclosure sale will take only share and interest in property of testator which, but for mortgage and foreclosure, mortgager himself would have taken, and therefore "intact" quality which testator desired to impress on his real estate for period mentioned is not affected by mortgage or foreclosure sale.—*Dunn vs. Schell*, 122 Cal. 626, 627, 55 Pac. Rep. 595.

12. TITLE OF GRANTEE.—If devisee or heir conveys his interest in estate or any part thereof, he conveys only such interest as will remain to him after satisfying expenses of administration and paying debts of decedent,

and such conveyance is also subject to order of court providing support for family and setting apart homestead.—Cook vs. De la Guerra, 24 Cal. 237, 241; In re Estate Moore, 57 Cal. 437, 442; Dunn vs. Schell, 122 Cal. 626, 627, 55 Pac. Rep. 595; Curtis vs. Schell, 129 Cal. 208, 214, 79 Am. St. Rep. 107, 61 Pac. Rep. 951. See Wood vs. Curran, 99 Cal. 137, 141, 33 Pac. Rep. 774; Phelan vs. Smith, 100 Cal. 158, 164, 165, 34 Pac. Rep. 667; Burchinell vs. Butters, 7 Colo. App. 294, 43 Pac. Rep. 459.

As to title passing by mortgage, see par. § this note.

12. *Caveat emptor applies.*—Where inchoate or imperfect title is obtained under Mexican land grant, and after death of grantee persons who erroneously supposed themselves to be his heirs perfect the title and convey the land to another, the purchaser will be held to be trustee for true heirs.—Wilson vs. Castro, 31 Cal. 420, 434.

§ 1365. **POSSESSION OF LEGATEES.** Where specific legacies are for life only, the first legatee must sign and deliver to the second legatee, or, if there is none, to the personal representative, an inventory of the property, expressing that the same is in his custody for life only, and that, on his decease, it is to be delivered and to remain to the use and for the benefit of the second legatee, or to the personal representative, as the case may be.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Common-law rule re-enacted as respects specific legacies.

1. *Applied, cited, construed, referred to, etc.* in: In re Estate Garrity, 108 Cal. 463, 470, 38 Pac. Rep. 628, 41 Id. 485 (cited).

2. *Common-law rule re-enacted as respects specific legacies.*—At early day life tenant, before he could demand delivery to him of property bequeathed to him for life, was required to give security to executor, but later this rule was modified to such extent as to require life tenant merely to deliver to remainderman inventory that property was held by him for life only; but this later rule has been made applicable in this state only to bequest for life

of specific legacies. If will is silent concerning disposition of corpus of legacy during continuance of life estate, general rule in equity is that legatee for life is not entitled to demand from executor possession of legacy, unless he gives security to executor, and that remainderman may require that tenant for life, before receiving property bequeathed to him, shall give such security; but, in order that remainderman may demand that such security be given, he must make it appear that there is some danger that estate will be impaired or suffer waste if left in possession of life tenant.—In re Estate Garrity, 108 Cal. 463, 470, 471, 38 Pac. Rep. 628, 41 Id. 485. See Healey vs. Toppan, 45 N. H. 243, 36 Am. Dec. 159.

§ 1366. **BEQUEST OF INTEREST.** In case of a bequest of the interest or income of a certain sum or fund, the income accrues from the testator's death.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Accumulations.
3. Annuities commence at testator's decease.
4. Trust fund—Income does not accrue from testator's death.

1. *APPLIED, CITED, CONSTRUED, REFERRED TO, etc.* in: In re Estate Brown, 143 Cal. 450, 454, 77 Pac. Rep. 160 (construed and held inapplicable).

2. *Accumulations.*—See ante §§ 722-726 and notes.

3. *Annuities commence at testator's decease.*—See post § 1368 and note.

4. **TRUST FUND**—Income does not accrue from testator's death.—Where testator does not direct income to be paid by executors, but gives specified sum to testators and directs payments to be made monthly out of income, beneficiary is not entitled to income from testator's death, because necessarily trustees can not begin payment until they receive fund and invest it so as to produce income; and payments are not to begin until fund is distributed to trustees.—In re Estate Brown, 143 Cal. 450, 455, 77 Pac. Rep. 160.

Interest begins, when.—In re Estate Brown, supra; Bartlett vs. Slater, 53 Conn. 102.

§ 1367. **SATISFACTION.** A legacy, or a gift in contemplation, fear, or peril of death, may be satisfied before death.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 235.

1. Contemplation, fear, or peril of death.
2. Nuncupative wills.
3. Revocation of gift causa mortis.

1. *Contemplation, fear, or peril of death.*—See ante § 1149 and note.

2. *Nuncupative wills.*—See ante § 1338, subd. 3 and note.

3. *Revocation of gift causa mortis.*—See ante § 1151 and note.

§ 1368. LEGACIES, WHEN DUE. Legacies are due and deliverable at the expiration of one year after the testator's decease. Annuities commence at the testator's decease.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Accounting must precede payment of legacy.
3. Annuity—Distinction between annuity and legacy for life.
4. Same—Time of commencement.
5. Appointment pursuant to power contained in prior will.
6. Before expiration of year—After final settlement of account.
7. Same—Discretion of executor to make.
8. Same—Income belongs to legatee.
9. Bequest over upon death of legatee—Death before arrival at age designated.
10. Common-law rule re-enacted as to legacies.
11. Contingent legacies.
12. Convenience foundation of rule.
13. Debts unpaid immaterial if assets sufficient.
14. Directions in will regarded.
15. Disposition of proceeds of sale by executor.
16. Inability of executor to pay at end of year.
17. "Legacy for maintenance"—Interest from testator's decease to date of distribution.
18. Object of statute.
19. Partial distribution on application of executor.
20. Presumption that money is earning something.
21. Restitution upon reversal of decree of distribution.
22. Trust fund—Income does not accrue from testator's death.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Dunne vs. Mastick*, 50 Cal. 244, 246, 247 (referred to); in *re Estate Mackay*, 107 Cal. 303, 309, 40 Pac. Rep. 558 (cited); in *re Estate Williams*, 112 Cal. 521, 524, 527, 53 Am. St. Rep. 224, 44 Pac. Rep. 808 (cited); *Crew vs. Pratt*, 119 Cal. 131, 135, 51 Pac. Rep. 44 (cited); in *re Estate Brown*, 143 Cal. 450, 456, 77 Pac. Rep. 160 (construed in department in opinion not upheld in bank).

2. **ACCOUNTING MUST PRECEDE PAYMENT OF LEGACY**.—Upon general principles payment of legacy should not be decreed until court has discovered by an account or otherwise that executor has actually in hand sufficient assets, real or personal, to pay legacy.—In *re Estate Ricaud*, 57 Cal. 421, 423. See *Andrews vs. Hunneman*, 23 Mass. (6 Pick.) 126, 129.

3. **ANNUITY**—Distinction between annuity and legacy for life.—If an annuity is given, the first payment is payable at end of year from death, but if legacy is given for life, with remainder over, no interest is due till end of two years. It is only the interest of the legacy; and till the legacy is payable there is no fund to produce interest.—Per Lord Eldon in *Gibson vs. Bott*, 7 Ves. 89, 95, 6 Rev. Rep. 87 (quoted in *Bartlett vs. Slater*, 53 Conn. 102, 55 Am. Rep. 73, 22 Atl. Rep. 678; and there said to have "been cited in every thoroughly considered case since").

4. **Time of commencement**.—Where testator directs trustees to provide and turn over to P C. C.—70

sum specified each year for following seven years, intention is that annuity shall commence at date of death, and clause of will relating to time of payment is not to be construed as manifesting contrary intent.—*Crew vs. Pratt*, 119 Cal. 131, 134, 135, 51 Pac. Rep. 44.

5. **APPOINTMENT PURSUANT TO POWER CONTAINED IN PRIOR WILL**.—Where testator directs that his wife shall have power by her will to appoint distribution of certain sum from his estate, and she survives him three years and dies leaving will by which she appoints distribution of sum provided by his will, husband's will not having fixed time for payment of such sum, payment is demandable by wife's appointees immediately after probate of her will, and they are not required to wait lapse of one year from her death.—*Ashton vs. Wilkinson*, 53 N. J. Eq. (3 Dick.) 227, 30 Atl. Rep. 395, 35 Id. 1130.

As to appointment by will, see post § 1369 and note par. 3.

6. **BEFORE EXPIRATION OF YEAR**.—After final settlement of account.—After final account of administrator c. t. a. has been rendered and duly settled and allowed, sole devisee of entire estate is entitled to decree for distribution under Code Civ. Proc. § 1665, which peremptorily and without qualification commands such course, even though year has not elapsed since will was probated.—In *re Estate Pritchett*, 51 Cal. 568, 569, 570, 52 Cal. 94, 95, 96 (identical reports of same opinion). See Code Civ. Proc. § 1665; and consult **KERR'S SYNTHETICAL INDEX** to this work.

7. **Discretion of executor to make**.—Executor, although he is not compellable to do so, may pay legacy within the twelve months.—*Sullivan vs. Winthrop*, 1 Sumn. C. C. 1, 23 Fed. Cas. 371; *Pearson vs. Pearson*, 1 Sch. & L. 10, 12, 9 Rev. Rep. 1; *Angerstein vs. Martin*, 1 Turn. & R. 232, 241, 24 Rev. Rep. 82 (per Lord Eldon).

8. **Income belongs to legatee**.—In case of payment within year directly to legatee subsequent income of sum so paid belongs to legatee, and whatever interest accrues within year does not fall within residuum.—*Sullivan vs. Winthrop*, 1 Sumn. C. C. 1, 23 Fed. Cas. 371.

9. **BEQUEST OVER UPON DEATH OF LEGATEE**.—Death before arrival at age designated.—Where will bequeaths money to son to be paid when he arrives at certain age, and provides that in case he dies without wife or lawful issue surviving him, the portion allotted to him shall be paid to another son, if living, and if not living, to others, if son to whom such legacy is given in first instance dies without issue, etc., before arriving at age designated, other son is not entitled to take immediately, but must wait until arrival of time at which if deceased son had lived he would have been of the age designated.—In *re Estate Fair*, 108 Cal. 342, 346-349, 37 Pac. Rep. 406.

As to time when legacy vests when direction is to pay in future or upon condition, see ante § 1363 and note pars. 36, 40-43.

10. COMMON LAW RE-ENACTED AS TO LEGACIES.—"Code rule is common-law rule, which was induced partly by reason of public policy. A pecuniary legacy is a debt due from estate—not claim against testator which must be proved and paid in due course of administration—but claim against estate imposed by will. One year is allowed to estate, during which time executors ought to be able to collect and realize assets, and be in readiness to discharge obligations imposed upon estate by will."—*In re Estate Williams*, 112 Cal. 521, 524, 53 Am. St. Rep. 224, 44 Pac. Rep. 808. See *Conn. Bartlett vs. Slater*, 53 Conn. 102, 55 Am. Rep. 73, 22 Atl. Rep. 678. *N. J. Ashton vs. Wilkinson*, 53 N. J. Eq. (8 Dick.) 227, 30 Atl. Rep. 895, 35 Id. 1130. *N. Y. Wheeler vs. Ruthven*, 74 N. Y. 428, 30 Am. Rep. 315. *Eng. Sitwell vs. Bernard*, 6 Ves. 520, 539, 5 Rev. Rep. 374; *Pearson vs. Pearson*, 1 Sch. & L. 10, 9 Rev. Rep. 1.

11. CONTINGENT LEGACIES.—If legacy be payable after happening of contingency, such as death of tenant for life, it is demandable, when contingency happens, after year from testator's death.—*Ashton vs. Wilkinson*, 53 N. J. Eq. (8 Dick.) 227, 30 Atl. Rep. 895, 35 Id. 1130. See *N. J. Bonham vs. Bonham*, 38 N. J. Eq. (11 Stew.) 419. *N. Y. Miller vs. Philip*, 5 Paige Ch. 573. *Eng. Laundry vs. Williams*, 2 P. Wms. 481.

12. CONVENIENCE FOUNDATION OF RULE.—Rule that general legacy given without assigning any time for payment is payable upon expiration of year after death of testator has been established for convenience, and is founded upon presumption that within that time executor will have been able to ascertain condition of estate, to collect assets, and be prepared to pay legacies.—*Wheeler vs. Ruthven*, 74 N. Y. 428, 30 Am. Rep. 315.

13. DEBTS UNPAID IMMATERIAL IF ASSETS SUFFICIENT.—Fact that debts have not been paid is no defense to recovery of principal or interest, there being no allegation of insufficiency of assets.—*Kent vs. Dunham*, 106 Mass. 586, 590.

14. DIRECTIONS IN WILL REGARDED.—Will is to govern where it speaks upon subject, and time of payment may be accelerated or postponed at will of testator. But rule does not yield to doubtful indications in will of intention of testator at variance with it.—*Wheeler vs. Ruthven*, 74 N. Y. 428, 30 Am. Rep. 315. See *Kent vs. Dunham*, 106 Mass. 586, 591.

Discretionary power given to executor as to time of payment.—See post § 1369 and note par. 11.

15. DISPOSITION OF PROCEEDS OF SALE BY EXECUTOR.—Where will empowers executors after expiration of two years from testator's death to sell estate, and does not direct them to make any application or disposition of proceeds of sale, but merely provides that upon sale being made "all legacies then unpaid be paid at once in full," such provision fixes time for payment of legacies then unpaid, but does not direct or empower executors to apply or dispose of proceeds in payment of legacies, nor can they be required to pay such legacies without an order of court therefor.—*Bennalack vs. Richards*, 116 Cal. 405, 409, 48 Pac. Rep. 622.

16. Inability of executor to pay at end of year.—See post § 1369 and note.

17. "LEGACY FOR MAINTENANCE"—Interest from testator's decease to date of distribution.—See post § 1369 and note par. 30.

18. OBJECT OF STATUTE is to authorize executor to refuse payment of legacies when due, and it is because they are due upon decedent's death that it was necessary so to provide.—*In re Estate Williams*, 112 Cal. 521, 527, 53 Am. St. Rep. 224, 44 Pac. Rep. 808.

19. PARTIAL DISTRIBUTION ON APPLICATION OF EXECUTOR.—Under Code Civ. Proc. § 1658 court at any time after lapse of four months from issuance of letters testamentary or of administration on petition of "heir, devisee, or legatee," may decree partial distribution upon bonds being given by distributees; but such distribution is not proper upon petition of executor.—*In re Estate Letellier*, 74 Cal. 311, 312, 15 Pac. Rep. 847.

Partial distribution before final settlement.—See Code Civ. Proc. §§ 1658-1663 and notes.

20. PRESUMPTION THAT MONEY IS EARNING SOMETHING.—"It is presumed that money is earning something for estate, which residuary legatee ought not to be able to get at expense of special legatee. To allow this would often involve delay in administration of estates in interest of residuary."—*In re Estate Williams*, 112 Cal. 521, 525, 53 Am. St. Rep. 224, 44 Pac. Rep. 808.

21. Restitution upon reversal of decree of distribution.—See ante § 1363 and note.

22. Trust fund—Income does not accrue from testator's death.—See ante § 1366 and note.

§ 1369. **INTEREST.** Legacies bear interest from the time when they are due and payable, except that legacies for maintenance, or to the testator's widow, bear interest from the testator's decease.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Annuity—Distinction between annuity and legacy for life.
3. Appointment by will out of trust fund.
4. Common-law rule declared.
5. Compound interest not allowable.

6. Same—Not chargeable against devisee.
7. Constitutionality of statute as respects legacies previously vested.
8. Debts unpaid immaterial if assets sufficient.
9. Delay in executing trust agreement after legacy payable.

10. Demand of payment is not necessary.
11. Discretionary power given executor as to time of payment.
12. Excuses for non-payment of legacy at earlier date immaterial.
13. Same—Delay caused by legatee.
14. In absence of statute interest not allowable.
15. Inability of executor to pay at end of year.
16. Incident to principal demand.
17. Infant having no guardian entitled to interest.
18. Intention of testator governs.
19. Same—Debts and funeral expenses directed to be first paid.
20. Same—Exemption of legacy from interest.
21. Same—Payment directed when practicable.
22. Legacy for maintenance of infant child.
23. Order of probate court not necessary.
24. Preference of debts over legacies immaterial.
25. Remainder owned by testator charged with legacies.
26. Residuary legacy does not bear interest.
27. Retention and misuse of funds by personal representative.
28. Retroactive effect—Statute does not have.
29. Tender by executor—Deposit in bank insufficient.
20. Trust fund bears interest.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Dunne vs. Mastick*, 50 Cal. 244, 247 (construed); *In re Estate Mackay*, 107 Cal. 303, 308, 309, sub nom. *Mackay vs. Mackay*, 40 Pac. Rep. 558 (construed); *In re Estate Williams*, 112 Cal. 521, 524, 527, 53 Am. St. Rep. 224, 44 Pac. Rep. 808 (construed and applied); *In re Estate Blake*, 137 Cal. 429, 431, 70 Pac. Rep. 303 (construed and applied); *In re Estate Brown*, 143 Cal. 450, 454 (referred to), 456, 457 (construed in department in opinion not upheld in bank), 77 Pac. Rep. 160.

2. **ANNUITY**—Distinction between annuity and legacy for life.—See ante § 1368 and note par. 3.

3. **APPOINTMENT BY WILL OUT OF TRUST FUND**.—Where fund is held by trustee under marriage settlement, subject to wife's power of appointment by will upon happening of certain contingency, rule that interest does not run upon legacies until expiration of one year from death of testatrix applies to legacies which she appointed out of trust fund.—*Tathan vs. Drummond*, 2 Hen. & M. (Va.) 262.

As to appointment pursuant to power contained in prior will, see ante § 1368 and note par. 5.

4. **COMMON-LAW RULE DECLARED**.—This section is merely declaratory of rule of common law. It is legitimate consequence of an omission by executor to pay legacy when payment is due, that legacy should bear interest from that time, as compensation for delay; and therefore time when legacy is payable determines time from which interest commences.—*Wheeler vs. Ruthven*, 74 N. Y. 428, 30 Am. Rep. 315. See *N. Y. Campbell vs. Cowdrey*, 31 How. Pr. 172. *Fed. Sullivan vs. Winthrop*, 1 Sumn. C. C. 1, 23 Fed. Cas. 371. *Eng. Beckford vs. Tobin*, 1 Ves. Sr. 308 (per Lord Hardwick); *Pearson vs. Pearson*, 1 Sch. & L. 10, 9 Rev. Rep. 1 (per Lord Redsdale).

5. **COMPOUND INTEREST NOT ALLOWABLE** under ordinary circumstances, if ever.—*Kent vs. Dunham*, 106 Mass. 586, 592.

6. **Not chargeable against devisee**.—Compound interest is not chargeable against devisee, whose devise is charged with payment of legacy, in favor of legatee, but he should be charged with simple interest.—*Dunne vs. Dunne*, 66 Cal. 157, 160, 161, 4 Pac. Rep. 441, 1152 (wherein court looked at whole case and considered condition of estate of decedent, claims against it, and action of devisee with respect thereto).

7. **CONSTITUTIONALITY OF STATUTE AS RESPECTS LEGACIES PREVIOUSLY VESTED**.—Statute which imposes interest upon legacy due when statute went into operation from date of its enactment is constitutional, and is not retrospective, since it operates only on future rights of parties.—*Dunne vs. Mastick*, 50 Cal. 244, 247. See *Cummings vs. Howard*, 63 Cal. 503, 505.

8. **Debts unpaid immaterial if assets sufficient**.—See ante § 1368 and note par. 13.

9. **DELAY IN EXECUTING TRUST AGREEMENT AFTER LEGACY PAYABLE**.—Where after legacy left in trust becomes payable and is ordered to be paid, and trust agreement is prepaid and signed by executors and presented to trustees for signature, but they delay in signing it for several months, their delay is no reason for not allowing interest during period covered by such delay.—*In re Estate Blake*, 137 Cal. 429, 431, 432, 70 Pac. Rep. 303.

10. **DEMAND OF PAYMENT IS NOT NECESSARY** to entitle legatee to interest from date fixed by law.—*Kent vs. Dunham*, 106 Mass. 586, 590.

11. **DISCRETIONARY POWER GIVEN EXECUTOR AS TO TIME OF PAYMENT**.—Where will bequeaths sum of money in trust to pay income arising therefrom, or such portion as trustee may consider best, to B during her natural life, and such bequest is made payable to trustee by executor within one year after death of testator at convenience of executor, trustee is not entitled to interest from death of testator, but only from end of one year thereafter.—*Bartlett vs. Slater*, 53 Conn. 102, 55 Am. Rep. 73, 22 Atl. Rep. 678.

12. **EXCUSES FOR NON-PAYMENT OF LEGACY AT EARLIER DATE ARE IMMATERIAL** upon question of right of legatee to interest from date when legacy became due and payable, and evidence thereof is inadmissible.—*Kent vs. Dunham*, 106 Mass. 586, 590.

13. **Delay caused by legatee by unjustifiable proceedings, embarrassing executors in settlement of estate, does not disentitle legatee to interest from time fixed by law**.—*Kent vs. Dunham*, 106 Mass. 586, 590.

14. **IN ABSENCE OF STATUTE INTEREST IS NOT PAYABLE UPON LEGACIES**, and ordinary statute relative to interest intended to prohibit interest when not provided for by written contract except in cases mentioned is not applicable.—*Dunne vs. Mastick*, 50 Cal. 244, 247.

15. INABILITY OF EXECUTOR TO PAY AT END OF YEAR.—Legacy, according to general rule, will be payable and bear interest after year from testator's death, although, by reason of deficiency of assets, inability of executor to collect debts or other accidental circumstances, payment at that time may be impracticable.—*Wheeler vs. Ruthven*, 74 N. Y. 428, 30 Am. Rep. 315. See *Sullivan vs. Winthrop*, 1 Sumn. C. C. 1, 23 Fed. Cas. 371; *Pearson vs. Pearson*, 1 Sch. & L. 10, 12, 9 Rev. Rep. 1.

16. INCIDENT TO PRINCIPAL DEMAND.—Interest is payable upon pecuniary legacies from time when, by terms of will or by rules of law, they become due and ought to be paid. It is incident to principal demand, and not imposed upon executor for his neglect.—*Kent vs. Dunham*, 106 Mass. 586, 590.

17. INFANT HAVING NO GUARDIAN ENTITLED TO INTEREST.—Fact that legatee was minor, having no guardian authorized to receive his legacy at time it became payable, does not of itself deprive him of right to have interest from that time.—*Kent vs. Dunham*, 106 Mass. 586, 591.

18. INTENTION OF TESTATOR GOVERNS.—Under this section and next succeeding one testator may direct interest to be paid at an earlier or later time than that prescribed.—*In re Estate James*, 65 Cal. 25, 26, 2 Pac. Rep. 494; *Sullivan vs. Winthrop*, 1 Sumn. C. C. 1, 23 Fed. Cas. 371.

19. Debts and funeral expenses directed to be first paid.—Where express intention of testator is that legacy shall not become due and payable until after debts and funeral expenses have been paid, interest does not begin to run at expiration of one year after decedent's death if debts and funeral expenses have not then been paid.—*In re Estate James*, 65 Cal. 25, 26, 2 Pac. Rep. 494.

20. Exemption of legacy from interest.—Legatee is not entitled to interest when will provides that executors shall not be charged with interest upon any bequest therein made.—*In re Estate Brown*, 143 Cal. 450, 455, 77 Pac. Rep. 160.

21. Payment directed when practicable.—In face of provision that executors need not pay legatees until it is practicable, having regard to beneficial management of estate, court will conclude that it is practicable and convenient to pay at end of year, and accordingly legacy bears interest after expiration of one year from testator's decease.—*In re Estate Williams*, 112 Cal. 521, 524, 525, 53 Am. St. Rep. 224, 44 Pac. Rep. 303.

22. LEGACY FOR MAINTENANCE OF INFANT CHILD.—When legacy is given by parent to infant child, who is otherwise unprovided for, upon presumed intention of parent to fulfil his moral obligation to maintain his child, interest will be allowed from death of testator as maintenance for child, where no other fund is applicable for such maintenance.—*Sullivan vs. Winthrop*, 1 Sumn. C. C. 1, 23 Fed. Cas. 371 (per Story, J.).

23. ORDER OF PROBATE COURT NOT NECESSARY.—Construing this section and

the next preceding one together, interest runs after lapse of one year, even though legacy has not been ordered paid by probate court.—*In re Estate Williams*, 112 Cal. 521, 527, 53 Am. St. Rep. 224, 44 Pac. Rep. 303.

24. PREFERENCE OF DEBTS OVER LEGACIES IMMATERIAL.—Provision for payment of legacies "next after my lawful debts," and "as soon as the same can be conveniently done from sales and collections of my property without sacrifice," relates to order of preference, and not to time of payment, and does not affect time when interest begins to run.—*Kent vs. Dunham*, 106 Mass. 586, 590.

25. REMAINDER OWNED BY TESTATOR CHARGED WITH LEGACIES.—Where estate of testator consists of remainder subject to life estate in another, and life tenant survives testator, legacies charged upon such remainder do not bear interest during time elapsing between death of testator and death of life tenant.—*Wheeler vs. Ruthven*, 74 N. Y. 428, 30 Am. Rep. 315.

26. RESIDUARY LEGACY DOES NOT BEAR INTEREST, for there can be no fund from which interest can be paid.—*In re Estate Williams*, 112 Cal. 521, 526, 53 Am. St. Rep. 224, 44 Pac. Rep. 303.

27. RETENTION OF FUNDS FOR UNREASONABLE LENGTH OF TIME.—If personal representative uses funds of estate in his private business or retains them in his hands for unreasonable length of time to prejudice of heirs and creditors he is chargeable with interest.—*Walls vs. Walker*, 37 Cal. 424, 429, 99 Am. Dec. 290.

28. RETROACTIVE EFFECT.—Statute does not have.—Since, prior to adoption of code no provision was made for interest upon legacies, where testator died before adoption of code interest is not allowable for time before his death and adoption of code, but commences to run only after its adoption.—*Dunne vs. Mastick*, 50 Cal. 244, 247.

29. TENDER.—Money deposited in bank before execution of trust agreement.—Where money is left in trust and is ordered by court to be paid, and executors deposit fund in bank with knowledge of one or more of persons named as trustees before execution of trust agreement directed by will to be made, there is no such tender as will preclude allowance of interest between time when legacy was payable and execution of trust agreement.—*In re Estate Blake*, 137 Cal. 429, 432, 70 Pac. Rep. 303.

30. TRUST FUND BEARS INTEREST.—It is not necessary that legacy, to bear interest, should be made directly to beneficiary; and where specified sum in gross is left to trustees, income of which is to be paid to another, and will creates "legacy for maintenance," interest runs from death of testator, and it is duty of court in distributing fund to trustees to distribute to them such interest as shall have accrued upon fund to date of distribution; and construing this section with §1368 such interest, when distributed to trustees, should be deemed to be in lieu of income specified in legacy, up to date of dis-

tribution, and should therefore be paid by trustees to beneficiary as income accrued at that date.—In re Estate Mackay, 107 Cal. 302, 308, 309, 40 Pac. Rep. 553.

§ 1370. CONSTRUCTION OF THESE RULES. The four preceding sections are in all cases to be controlled by a testator's express intention.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Commissioners' note.
3. Intention of testator governs.
4. Interest may be controlled by testator.
5. Order in which legacies shall be paid controllable by testator.
6. Power given executor to sell without probate.
7. Will must express intention.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: In re Estate Williams, 112 Cal. 521, 524, 53 Am. St. Rep. 224, 44 Pac. Rep. 808 (construed and applied).

2. COMMISSIONERS' NOTE says: "This is on the general principle set forth in § 1317, ante, and the note thereto, that a will must be construed 'according to the intention of the testator.'"

3. INTENTION OF TESTATOR GOVERNS, and, it would seem, that this section has been

inserted merely out of abundance of caution or as declaratory of rule which otherwise would have prevailed.—See Norris vs. Harris, 15 Cal. 226; Payne vs. Payne, 18 Cal. 291, 303; Larco vs. Casaneuava, 30 Cal. 560, 567, 568; In re Estate James, 65 Cal. 25, 26, 2 Pac. Rep. 494.

4. Interest may be controlled by testator.—See ante § 1369 and note pars. 18-21.

5. Order in which legacies shall be paid controllable by testator.—See ante § 1360 and note pars. 10, 11.

6. Power given to executor to sell without probate.—See post § 1373, note par. 5.

7. Will must express intention.—To prevent application of statutory rule, intention of testator must be expressed in will.—In re Estate Williams, 112 Cal. 521, 524, 53 Am. St. Rep. 224, 44 Pac. Rep. 808.

§ 1371. EXECUTOR ACCORDING TO THE TENOR. Where it appears, by the terms of a will, that it was the intention of the testator to commit the execution thereof and the administration of his estate to any person as executor, such person, although not named executor, is entitled to letters testamentary in like manner as if he had been named executor.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Appointment of attorney for estate.
3. Declaratory statute.
4. Full charge of estate given to named person.
5. Trustee given control of estate.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: In re Estate Ogier, 101 Cal. 381, 386, 40 Am. St. Rep. 61, 35 Pac. Rep. 900 (construed); Morfiew vs. San Francisco & S. R. R. Co., 107 Cal. 587, 591, 40 Pac. Rep. 810 (referred to); In re Estate Ringot, 124 Cal. 45, 47, 56 Pac. Rep. 781 (applied).

2. APPOINTMENT OF ATTORNEY FOR ESTATE.—Where will declares that testator selects "as attorney of my estate M, and direct my executrix to consult and employ him in all matters pertaining to distribution of my estate and requirements of this my last will," and provides that certain sales shall be made if said executrix and said attorney deem them advisable, etc., no power to act as executor is given to attorney, and it is not incumbent upon court to direct letters testamentary to be issued to him.—In re Estate Ogier, 101 Cal. 381, 386, 387, 40 Am. St. Rep. 61, 35 Pac. Rep. 900.

3. DECLARATORY STATUTE.—It would

seem that statute is merely declaratory of principle which courts usually apply.—See Hartnett vs. Wandell, 60 N. Y. 346, 19 Am. Rep. 194; Bayeaux vs. Bayeaux, 8 Paige Ch. (N. Y.) 333.

4. FULL CHARGE OF ESTATE GIVEN TO NAMED PERSON.—Where will expresses testator's desire that named person shall settle his estate, and codicil declares that testator wants another named person to have full charge of his estate, and such codicil says "This is a part of my will," court is justified in granting letters testamentary to person named in codicil, and this construction is not defeated by condition in codicil specifying period of seven years for services of person therein named and providing for his compensation.—In re Estate Ringot, 124 Cal. 45, 47, 48, 56 Pac. Rep. 781.

5. TRUSTEE GIVEN CONTROL OF ESTATE.—Where all property of testator is given to his widow in trust, etc., and testator expresses wish and desire that she shall have control of estate during her life, will expresses apparent intent that letters testamentary should be issued to her.—See Morfiew vs. San Francisco & S. R. R. Co., 107 Cal. 587, 590, 591, 40 Pac. Rep. 810.

§ 1372. POWER TO APPOINT IS INVALID. An authority to an executor to appoint an executor is void.

History: Enacted March 21, 1872.

COMMON LAW RE-ENACTED.—This statute is merely declaratory of principles which obtain independently of statute, rule being that appointment of executor may be either express or constructive, and that it may be

an immediate designation or appointment by others by authority of will.—*Hartnett vs. Wandell*, 60 N. Y. 346, 19 Am. Rep. 194. See *Drane vs. Drane*, 1 Humph. (Tenn.) 174. See Code Civ. Proc. § 1353 and note.

§ 1373. EXECUTOR NOT TO ACT TILL QUALIFIED. No person has any power, as an executor, until he qualifies, except that, before letters have been issued, he may pay funeral charges and take necessary measures for the preservation of the estate.

History: Enacted March 21, 1872.

1. Application for letters insufficient.
2. De facto executor or administrator—Recognition by court does not constitute.
3. Disclaimer of trust.
4. Executors de son tort not recognized.
5. Power given executor to sell without probate.
6. Sale before qualification is void.

1. APPLICATION FOR LETTERS INSUFFICIENT.—Fact that one who is named in will as executor actually applies for letters testamentary is insufficient to constitute him a trustee for testator's estate unless he takes further steps and qualifies.—*Bowden vs. Pierce*, 73 Cal. 459, 463, 14 Pac. Rep. 302.

2. DE FACTO EXECUTOR OR ADMINISTRATOR—RECOGNITION BY COURT DOES NOT CONSTITUTE.—Where no letters testamentary or of administration are issued and personal representative has not qualified as such no recognition of him by court will make him an executor or administrator de facto so as to render his act operative.—*Pryor vs. Downey*, 50 Cal. 388, 399, 19 Am. Rep. 656.

3. DISCLAIMER OF TRUST.—If executor refuses or neglects to qualify, his refusal or neglect amounts to disclaimer of trust.—*Bowden vs. Pierce*, 73 Cal. 459, 463, 14 Pac. Rep. 302.

4. EXECUTORS DE SON TORT NOT REC-

OGNIZED.—There is no such officer recognized under probate practice of this state as de son tort.—*Bowden vs. Pierce*, 73 Cal. 459, 463, 14 Pac. Rep. 302, 15 Id. 64. See *Valencia vs. Bernal*, 26 Cal. 328, 335; *In re Estate Hamilton*, 84 Cal. 464, 468; *Pryor vs. Downey*, 50 Cal. 388, 399, 19 Am. Rep. 656; *Aldrich vs. Willis*, 55 Cal. 81, 85; *Rozelle vs. Harmon*, 29 Mo. App. 569.

5. POWER GIVEN EXECUTOR TO SELL WITHOUT PROBATE.—Where will empowers executor to sell all testator's property for benefit of devisee without obtaining any order of any court and without giving bonds, etc., sale by executor is valid, although he did not qualify as such and did not obtain any order of court authorizing the sale or confirming it.—*Larco vs. Casaneuva*, 30 Cal. 560, 567, 568.

6. SALE BEFORE QUALIFICATION VOID.—Sale by executor or administrator before issuance of letters testamentary or of administration and before he has qualified as such is inoperative to transfer title to purchaser; and he will not be recognized as personal representative de facto or de son tort, an executor de son tort being an executor only for the purpose of being sued or being made liable for assets which he has intermeddled.—*Pryor vs. Downey*, 50 Cal. 388, 399, 400, 19 Am. Rep. 656.

§ 1374. PROVISIONS AS TO REVOCATIONS. The provisions of this title in relation to the revocation of wills apply to all wills made by any testator living at the expiration of one year from the time it takes effect.

History: Enacted March 21, 1872.

§ 1375. EXECUTION AND CONSTRUCTION OF PRIOR WILLS NOT AFFECTED. The provisions of this title do not impair the validity of the execution of any will made before it takes effect, or affect the construction of any such will.

History: Enacted March 21, 1872.

Estate of decedents governed by law in operation at time of death.—Estate of persons who die prior to passage of statute, whether testate or intestate, whether leaving adult or minor heirs, are not within operation of such statute but are governed by law in force at time of decedent's death.—*Coppinger vs. Rice*, 33 Cal. 408, 423. See *Grimes' Estate vs. Norris*, 6 Cal. 621, 624, 625, 65 Am. Dec. 545; *Ryder*

vs. Cohn, 37 Cal. 69, 89; *In re Estate Pfuelb*, 48 Cal. 643, 644; *Dunne vs. Mastick*, 50 Cal. 244, 247; *McNeil vs. First Congregational Soc.*, 66 Cal. 105, 108, 4 Pac. Rep. 1096; *Adams vs. Norris*, 64 U. S. (23 How.) 353, bk. 16 L. ed. 539.

Compare: *People ex rel. Vantine vs. Senter*, 28 Cal. 502, 506.

§ 1376. LAW GOVERNING VALIDITY AND INTERPRETATION OF WILLS. The validity and interpretation of wills, wherever made, are governed, when re-

lating to property within this state, by the law of this state, except as provided in section twelve hundred and eighty-five.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 235; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 404, held unconstitutional, see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXLVIII, p. 607.

1. Foreign laws, presumed same.
2. Law of decedent's domicile governs personal property.
3. Statute not retroactive.

1. **Foreign laws, presumed same.**—In absence of proof as to law of sister state court will presume existence of common law and be governed by its principles where such state was originally one of the colonies or was established in territory acquired since Revolution, where such territory was not at time of its acquisition occupied by organized and civilized community; but it is otherwise as to Florida, Louisiana, and Texas, which had laws of their own when they entered the Union, and as to them it will be presumed in absence of proof that their laws are same as those of California.—*Norris vs. Harris*, 15 Cal. 226, 252, 253.

2. **Law of decedent's domicile governs personal property.**—None of the codes provide that personal property situated in this state, of decedent whose domicile at time of his death was in another state, shall be distributed in accordance with laws of this state, when no question as to rights of creditors is involved, and accordingly in such case distribution must be made in accordance with law of decedent's domicile.—In re Estate Apple, 66 Cal. 432, 436, 437, 441, 6 Pac. Rep. 7. See *Fox vs. Tay*, 89 Cal. 339, 350, 23 Am. St. Rep. 474, 24 Pac. Rep. 855, 26 Id. 897; *Whitney vs. Dodge*, 105 Cal. 192, 197-199, 38 Pac. Rep. 636; *McCully vs. Cooper*, 114 Cal. 258, 261, 262, 55 Am. St. Rep. 66, 46 Pac. Rep. 82, 35 L. R. A. 492.

3. **Statute not retroactive.**—See ante § 1375 and note.

§ 1377. **LIABILITY OF BENEFICIARIES FOR TESTATOR'S OBLIGATIONS.** Those to whom property is given by will are liable for the obligations of the testator in the cases and to the extent prescribed by the Code of Civil Procedure.

History: Enacted March 21, 1872.

1. Commissioners' note.
2. Common-law rule.
3. "Debts"—What constitute.
4. Direction in will for payment of debts.
5. Election of widow not to take under will.
6. Intestate's property liable for debts.
7. Maturity of debt after distribution to heirs.
8. Order of resort to property for payment of debts.
9. Primary right of creditor to payment.
10. Sale of assets for payment of legacies.

1. **COMMISSIONERS' NOTE** says: "The three chapters comprising title on wills embrace all the laws of our state relating to the subject not contained in title XI of the Code of Civil Procedure."

2. **Common-law rule.**—See ante § 1358 and note par. 5.

3. **"DEBTS"—What constitute.**—See ante § 1358 and note pars. 6, 7.

4. **DIRECTIONS IN WILL FOR PAYMENTS OF DEBTS** are as formal and meaningless as the pious phrases with which many wills are prefaced except when they express a special testamentary intent and directions as to the order in which property shall be resorted to for that purpose.—In re Estate Heydenfeldt, 106 Cal. 434, 438, 39 Pac. Rep. 788.

5. **ELECTION OF WIDOW NOT TO TAKE UNDER WILL.**—Where widow renounces deceased husband's will she takes her legal moiety, not as dower and not in lieu of dower, but in lieu of provisions of will, and she is not entitled to take what law gives her as

her absolute property free and clear of all debts and claims against estate.—*Hanna vs. Palmer*, 6 Colo. 156, 161.

6. **Intestate's property liable for debts.**—See ante § 1358 note.

7. **Maturity of debt after distribution to heirs.**—See ante § 1358 and note par. 10.

8. **Order of resort to property for payment of debt.**—See ante § 1359 and note.

9. **PRIMARY RIGHT OF CREDITOR TO PAYMENT.**—Where claims have been established creditors have right primarily to have them first paid before property is taken by devisees or legatees.—In re Estate Hale, 121 Cal. 125, 130, 53 Pac. Rep. 429; In re Estate Moore, 57 Cal. 437, 442; *McDonald vs. McElroy*, 60 Cal. 484, 495; In re Estate Thayer, 142 Cal. 453, 455, 456, 76 Pac. Rep. 41. See In re Estate Schroeder, 46 Cal. 304, 318; In re Estate Ricaud, 57 Cal. 421, 423; In re Estate Loshe, 62 Cal. 413, 415. *Colo. Hanna vs. Palmer*, 6 Colo. 156, 161. *Ky. Trumbo vs. Sorrencey*, 3 T. B. Mon. 284, 16 Am. Dec. 103, 107. *Mass. Andrews vs. Hunneman*, 23 Mass. (6 Pick.) 126, 129.

See ante § 1358 and note par. 16.

10. **SALE OF ASSETS FOR PAYMENT OF LEGACIES.**—Whether court is bound to decree sale of assets of estate for payment of legacies depends upon condition of estate and property to be sold. If all debts and charges against estate, including expense of administration, have been fully paid, and there is in hands of executor or administrator ascertained balance of assets subject to distribution, estate is ready for distribution, and

distribution cannot be delayed; it being then duty of court under Code Civ. Proc. §§ 1543, 1665, to proceed to make distribution, and statute is, under such circumstances, per-

emptory.—In re Estate Ricaud, 57 Cal. 421, 422. See In re Estate Pritchett, 51 Cal. 568, 569, 570, 52 Cal. 94, 95, 96 (identical reports of same opinion).

TITLE VII.

SUCCESSION.

- § 1383. Succession defined.
- § 1384. Intestate's estate, to whom passes.
- § 1385. Personal representatives (repealed).
- § 1386. Succession to and distribution of property of deceased person.
- § 1387. Illegitimate children to inherit in certain events.
- § 1388. Property of illegitimate child is succeeded to, when and how.
- § 1389. Degrees of kindred, how computed.
- § 1390. Same. [Collateral line.]
- § 1391. Same. [Ascending and descending direct line.]
- § 1392. Same. [Degrees in direct line.]
- § 1393. Same. [Degrees in collateral line.]
- § 1394. Relatives of the half-blood.
- § 1395. Advancements constitute part of distributive share.
- § 1396. Advancements, when too much, or not enough.
- § 1397. What are advancements.
- § 1398. Value of advancements, how determined.

- § 1399. When heir, advanced to, dies before decedent.
- § 1400. Inheritance of husband and wife from each other.
- § 1401. Distribution of common property on death of wife.
- § 1402. Distribution of common property on death of the husband.
- § 1403. Inheritance by representation.
- § 1404. Aliens may inherit, when and how.
- § 1405. Succession not claimed, attorney-general to cause to be sold, and proceeds deposited with state treasurer.
- § 1406. When the property and estate escheat to the state.
- § 1407. Property escheated subject to charges as other property.
- § 1408. Successor liable for decedent's obligations.
- § 1409. Persons convicted of murder of decedent not to succeed.

§ 1383. **SUCCESSION DEFINED.** Succession is the coming in of another to take the property of one who dies without disposing of it by will.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Code uses "succession" instead of "descent."
3. Commissioners' note.
- 4, 5. Construction.
6. Same—"Inheritance," meaning of.
7. Same—"Succeed," meaning of.
8. Same—Will devised to son by, not inheritance.
9. Same—Patent to widow and children of decedent.
10. State does not take by succession.
11. "Succession" not applicable to community property.
12. Upon death, law casts descent.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO,** etc., in: In re Estate Headen, 52 Cal. 294, 298 (cited); Smith vs. Olmstead, 88 Cal. 582, 586, 22 Am. St. Rep. 336, 26 Pac. Rep. 521, 12 L. R. A. 46 (cited); In re Burdick's Estate (Cal. April 2, 1895), 40 Pac. Rep. 35 (cited); In re Estate Burdick, 112 Cal. 387, 394, 399, 44 Pac. Rep. 734 (construed and applied); In re Estate Fath, 132 Cal. 609, 612, 64 Pac. Rep. 995 (cited); In re Estate Wakefield, 136 Cal. 110, 112, 68 Pac. Rep. 499 (cited); In re Estate Miner, 143 Cal. 194, 198, 76 Pac. Rep. 968 (cited).

2. **CODE HAS USED THE WORD "SUCCESSION"** in place of the word "descent," which had been employed in the statutes prior to the codes.—In re Estate Headen, 52 Cal. 294, 298.

2. **COMMISSIONERS' NOTE** says: "It will be observed that the term 'succession' has been substituted for that of 'descents and distributions,' so familiar to all. This has not been done without sufficient grounds. The term 'descents' and 'distributions' hitherto used in this state to denote devolution of inheritance was derived from ancient principle of English law, that an inheritance could never ascend or pass from son to father, but must descend, or pass to descendant. But as the American law allows property to pass in both ways, there arises an incongruity in continuing this use of the term; an incongruity which causes practical embarrassment, since word 'descendants' must still be confined to its strict meaning, and cannot embrace all those who may take by our statute of descents, so called, and the word 'descend' must often be used in same view and in contradistinction to devolution of property in ascending line. The term 'succession' is more appropriate phrase of civil law, and this, already in common use among us, has been adopted to denote transmission of property of decedent, by operation of law."

4. **CONSTRUCTION.**—Section follows provisions in regard to wills, and means that only other mode of coming to estate of deceased person is by succession—and must be construed as applying to all cases which language is broad enough to cover.—In re Estate Burdick, 112 Cal. 387, 394, 44 Pac. Rep. 734.

5. Construction of this section to effect that only property which deceased owner might have disposed of by will can be inherited is erroneous.—In re Estate Burdick, 112 Cal. 387, 394, 44 Pac. Rep. 734.

6. Estate by inheritance is one that has descended to heir and been cast upon him by simple operation of law; but property devised is acquired by purchase and not by descent.—In re Estate Donahue, 36 Cal. 329, 332.

Estate is taken by purchase, not by descent, where property is devised by a father to his children or heirs; if a devisee dies intestate the share goes to his mother, brothers, and sisters.—In re Estate Donahue, *supra*; Gage vs. Downey, 94 Cal. 241, 250, 29 Pac. Rep. 639; Bates vs. Howard, 105 Cal. 173, 183, 38 Pac. Rep. 715. See Burke vs. Burke, 34 Mich. 451, 455; In re Estate Fort, 14 Wash. 10, 14, sub nom. Fort vs. West, 44 Pac. Rep. 104.

7. Meaning of the word "succeed" as used in § 1385 of Code of Civil Procedure is made plain by § 1383 of Civil Code to refer to persons who take property by operation of law, i. e. by descent, by succession.—In re Estate Wakefield, 136 Cal. 110, 112, 68 Pac. Rep. 499.

8. ESTATE DEVISED BY WILL OF FATHER TO SON does not come to latter by

inheritance, but is acquired by purchase.—In re Estate Donahue, 36 Cal. 329, 332.

See par. 6 this note.

9. PATENT TO WIDOW AND CHILDREN OF DECLARANT, where father had filed declaratory statement with the United States land department for pre-emption of certain land, and died before obtaining a patent therefor, and afterwards patent was issued to his widow and children, such widow and children do not take by inheritance through husband and father, but by purchase directly from the government.—Wittenbrock vs. Wheadon, 128 Cal. 150, 153, 79 Am. St. Rep. 32, 60 Pac. Rep. 664.

10. STATE DOES NOT COME IN BY WAY OF SUCCESSION.—In re Estate Miner, 143 Cal. 194, 198, 76 Pac. Rep. 968.

11. "SUCCESSION" BY TERMS OF THIS SECTION, can be applied only to case where property succeeded to belonged to decedent, and cannot be applied in case of community property.—In re Estate Burdick, 112 Cal. 387, 399, 44 Pac. Rep. 734.

12. Upon death of party law casts descent or makes distribution of all property or interests in or right of enjoyment of property on some one.—Grover vs. Hawley, 5 Cal. 485, 486.

§ 1384. **INTESTATE'S ESTATE, TO WHOM PASSES.** The property, both real and personal, of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the probate court, and to the possession of any administrator appointed by that court, for the purposes of administration.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 236.

I. In General.

1. Applied, cited, construed, referred to, etc.
2. "Heirs"—Designates what.
3. Same—How determined.
- 4, 5. Same—Legislature—Power of as to.
6. Same—Source of title.
- 7-9. Purposes of administration—Construction of.
10. Right of possession may descend.
11. Section declaratory of the law.

II. Control of Probate Court and Possession of Administrator.

12. Construction, prospective only.
13. Same—Heirs' rights subject to administration.
- 14-21. Same—Same—And to debts and possession of administrator.

III. Under Mexican Law.

- 22, 23. Estates vested under prior to California statutes.
24. Grant by Mexican government—Descends, how.
25. Heirs succeeded immediately—Responsible for debts.

I. IN GENERAL.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Watson vs. Sutro, 86 Cal. 500, 527, 22 Pac. Rep. 172, 25 Id. 64 (construed); Smith vs. Olmstead, 88 Cal. 532, 536, 538, 22 Am. St. Rep. 336, 26 Pac. Rep. 521, 13 L.

R. A. 46 (construed); Phelan vs. Smith, 100 Cal. 153, 164, 34 Pac. Rep. 667 (construed); Bates vs. Howard, 105 Cal. 173, 183, 38 Pac. Rep. 715 (construed); In re Burdick's Estate (Cal. April 2, 1895), 40 Pac. Rep. 35 (applied); Maddock vs. Russell, 109 Cal. 417, 422, 42 Pac. Rep. 139 (applied); Murphy vs. Clayton, 114 Cal. 526, 528, 43 Pac. Rep. 613, 46 Id. 460 (applied); Hochstein vs. Berghauser, 123 Cal. 631, 637, 56 Pac. Rep. 547 (cited); Trubody vs. Trubody, 137 Cal. 172, 174, 69 Pac. Rep. 968 (applied); In re Estate Miner, 143 Cal. 194, 198, 76 Pac. Rep. 968 (cited).

2. "HEIRS," WHEN UNEXPLAINED, and uncontrolled by context, is to be construed according to its strict technical import, in which sense it designates persons who would by statute succeed to real estate in case of intestacy.—Hochstein vs. Berghauser, 123 Cal. 631, 637, 56 Pac. Rep. 547.

3. Heirs of person to whom, under § 1384 of this code, his estate passes when not disposed of by will, are determined by provisions of § 1386, and use of term "heirs" in instrument of conveyance to designate persons to whom estate granted is to vest will, in absence of any qualifying terms, be construed to mean his heirs as those ascertained.—Hochstein vs. Berghauser, 123 Cal. 631, 637, 56 Pac. Rep. 547.

4. Legislature may provide that heir shall take subject to certain burdens, as payment

of debts of deceased and right of court to appropriate some portion of estate for support of family of decedent during administration.—*Brenham vs. Story*, 39 Cal. 179, 185.

5. Right of heir to inheritance depends upon positive law, and is not natural or absolute right; it is competent for legislature to change rule of inheritance.—*Brenham vs. Story*, 39 Cal. 179, 185.

6. Title of heirs by descent does not originate in decree of distribution, but comes to them from their ancestors.—*Bates vs. Howard*, 105 Cal. 173, 183, 38 Pac. Rep. 715.

7. "PURPOSES OF ADMINISTRATION" ARE THOSE MENTIONED IN § 1402 and also the objects for which court is authorized by § 1356 Code Civil Procedure to direct sale of property of decedent (concurring opinion).—*Smith vs. Olmstead*, 88 Cal. 582, 588, 22 Am. St. Rep. 336, 26 Pac. Rep. 521, 12 L. R. A. 46.

8. Embrace payment of expenses of administration, family allowance, and debts of decedent.—*Murphy vs. Clayton*, 114 Cal. 526, 528, 43 Pac. Rep. 613, 46 Id. 460.

9. See discussion in *In re Estate Moore*, 57 Cal. 437.

10. RIGHT OF ENJOYMENT OF POSSESSION to public lands may descend among effects of deceased person to executor or administrator, and right of deceased be conveyed by regular sale to another.—*Grover vs. Hawley*, 5 Cal. 485, 486.

11. SECTION WAS ADOPTED IN ITS PRESENT FORM IN 1884, but it is declarative of law as previously interpreted by this court.—*Bates vs. Howard*, 105 Cal. 173, 183, 38 Pac. Rep. 715. See *Brenham vs. Story*, 39 Cal. 179; *In re Estate Donahue*, 36 Cal. 329; *In re Estate Woodworth*, 31 Cal. 595, 604; *Chapman vs. Hollister*, 42 Cal. 462, 463.

II. CONTROL OF PROBATE COURT AND POSSESSION OF ADMINISTRATOR.

12. CONSTRUCTION PROSPECTIVE ONLY.—Statute which gives possession and control of real property belonging to intestates to administrator until administration of estate and distribution thereof are had, applies only to cases arising since statute passed.—*Coppinger vs. Rice*, 33 Cal. 408, 423. See *Soto vs. Kroder*, 19 Cal. 87, 95; *Downer vs. Smith*, 24 Cal. 114, 123; *People vs. Senter*, 28 Cal. 502, 505; *Wilson vs. Castro*, 31 Cal. 420.

14. Upon ancestor's death heir at once becomes vested with full property, subject to administration.—*Phelan vs. Dunne*, 72 Cal. 229, 230, 13 Pac. Rep. 662; *Spotts vs. Hanley*, 85 Cal. 155, 167, 24 Pac. Rep. 738; *Bates vs. Howard*, 105 Cal. 173, 183, 38 Pac. Rep. 715; *Elder vs. Horseshoe Min. & M. Co.*, 9 S. D. 636, 642, 62 Am. St. Rep. 895, 70 N. W. Rep. 1060.

15. On death of the ancestor heirs become vested at once with full property, subject to liens, debts, expenses of administration and temporary right of possession of administrator.—*In re Estate Packer*, 125 Cal. 396, 398, 73 Am. St. Rep. 58, 58 Pac. Rep. 59; *In re Estate Porter*, 129 Cal. 86, 89, 79 Am. St. Rep. 78, 61 Pac. Rep. 659; *Martinovich vs. Marsicano*, 137 Cal. 354, 355, 70 Pac. Rep. 459.

16. On death of ancestor his title to real estate passes to heir, subject, however, to right of possession of executor or administrator for payment of debts.—*Chapman vs. Hollister*, 42 Cal. 462, 463.

17. Estate of person dying intestate descends and vests immediately in his heirs, subject only to payment of debts of decedents, expenses of administration, and family allowance.—*Brenham vs. Story*, 39 Cal. 179, 183; *Smith vs. Olmstead*, 88 Cal. 582, 586, 22 Am. St. Rep. 336, 26 Pac. Rep. 521, 12 L. R. A. 46.

18. Property of person dying intestate passes to his heirs, but it passes to them subject to control of probate court and to possession of the administrator for purposes of administration.—*Murphy vs. Clayton*, 114 Cal. 526, 528, 43 Pac. Rep. 613, 46 Id. 460.

19. Title to personal property, under statute of descents and distributions, vests in heir, but administrator is entitled to possession until disposed of in course of administration.—*Jahns vs. Nolting*, 29 Cal. 507, 510.

20. Title to property at the death of intestate is in heirs, subject to lien of administrator for payment of debts and expenses of administration, with right in administrator of present possession until estate is settled.—*Estate of Woodworth*, 31 Cal. 595, 604.

21. PERSON TAKING BY SUCCESSION IS HEIR, and his right is subject to control of probate court and possession of administrator.—*In re Burdick's Estate* (Cal. April 2, 1895), 40 Pac. Rep. 35.

III. UNDER MEXICAN LAW.

22. ESTATES OF PERSONS WHO DIED PRIOR TO PASSAGE OF STATUTES of this state were not within operation of such statutes, but same were regarded as having vested in heirs under Mexican law.—*Coppinger vs. Rice*, 33 Cal. 408, 423.

23. Heirs of one who died in 1845 took estate, and are proper parties to sue for recovery of premises.—*Soto vs. Kroder*, 19 Cal. 87, 97.

24. GRANT BY MEXICAN GOVERNMENT OF LAND IN CALIFORNIA vested in grantee, named property described as his separate property, and passed upon his dying intestate to his heirs at law.—*Wilson vs. Castro*, 31 Cal. 420, 433.

25. Under the Mexican law the heirs succeeded immediately to estate and became personally responsible for debts of deceased.—*De la Guerra vs. Packard*, 17 Cal. 182, 193; *Coppinger vs. Rice*, 33 Cal. 408, 424; *McNeill vs. Congregational Soc.*, 66 Cal. 105, 108, 4 Pac. Rep. 1096. See *Downer vs. Smith*, 24 Cal. 114; *People ex rel. Vantine vs. Senter*, 28 Cal. 502; *Wilson vs. Castro*, 31 Cal. 420.

Absence of heirs, to whom intestate's estate passes.—See post § 1386, subd. 10, and note; Code Civ. Proc., §§ 1452, 1581 and note; Pol. Code, § 474 and note.

Administrator and executor are entitled to possession.—See Code Civ. Proc. § 1452 and notes.

Determination of heirship, by whom made.—See Code Civ. Proc. § 1664 and notes.

§ 1385. PERSONAL REPRESENTATIVES (repealed).

History: Enacted March 21, 1872; repealed March 30, 1874, Code Amdts. 1873-4, p. 236.

§ 1386. SUCCESSION TO AND DISTRIBUTION OF PROPERTY OF DECEASED PERSON. When any person having title to any estate not otherwise limited by marriage contract, dies without disposing thereof by will, it is succeeded to and must be distributed, unless otherwise expressly provided in this code and the Code of Civil Procedure, subject to the payment of his debts, in the following manner:

1. If the decedent leaves a surviving husband or wife, and only one child, or the lawful issue of one child, in equal shares to the surviving husband, or wife and child, or issue of such child. If the decedent leaves a surviving husband or wife, and more than one child living, or one child living and the lawful issue of one or more deceased children, one third to the surviving husband or wife, and the remainder in equal shares to his children and to the lawful issue of any deceased child, by right of representation; but if there is no child of decedent living at his death, the remainder goes to all of his lineal descendants; and if all of the descendants are in the same degree of kindred to the decedent, they share equally, otherwise they take according to the right of representation. If the decedent leaves no surviving husband or wife, but leaves issue, the whole estate goes to such issue; and if such issue consists of more than one child living, or one child living and the lawful issue of one or more deceased children, then the estate goes in equal shares to the children living, or to the child living and the issue of the deceased child or children by right of representation;

2. If the decedent leaves no issue, the estate goes one half to the surviving husband or wife, and the other half to the decedent's father and mother in equal shares, and if either is dead the whole of said half goes to the other. If there is no father or mother, then one half goes in equal shares to the brothers and sisters of decedent and to the children or grandchildren of any deceased brother or sister by right of representation. If the decedent leaves no issue, nor husband nor wife, the estate must go to his father and mother in equal shares, or if either is dead then to the other;

3. If there is neither issue, husband, wife, father, nor mother then in equal shares to the brothers and sisters of decedent and to the children or grandchildren of any deceased brother or sister, by right of representation;

4. If the decedent leaves a surviving husband or wife, and neither issue, father, mother, brother, sister, nor the children or grandchildren of a deceased brother or sister, the whole estate goes to the surviving husband or wife;

5. If the decedent leaves neither issue, husband, wife, father, mother, brother, nor sister, the estate must go to the next of kin, in equal degree, excepting that, when there are two or more collateral kindred, in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor must be preferred to those claiming through an ancestor more remote;

6. If the decedent leaves several children, or one child and the issue of one or more children, and any such surviving child dies under age, and not having been married, all the estate that came to the deceased child by inheritance from such decedent descends in equal shares to the other children of the same parent and to the issue of any such other children who are dead, by right of representation;

7. If, at the death of such child, who dies under age, not having been married, all the other children of his parents are also dead, and any of them has left issue, the estate that came to such child by inheritance from his parent descends to the issue of all other children of the same parent; and if all the issue are in the same degree of kindred to the child, they share the estate equally, otherwise they take according to the right of representation;

8. If the decedent is a widow or widower, and leaves no issue, and the estate or any portion thereof was common property of such decedent and his or her deceased spouse, while such spouse was living, or was separate property of his or her deceased spouse, while such spouse was living, such property goes to the children of such deceased spouse and the descendants thereof, and if none, then to the father of such deceased spouse, or if he is dead, to the mother. If there is no father nor mother, then such property goes to the brothers and sisters of such deceased spouse, in equal shares, and to the lawful issue of any deceased brother or sister of such deceased spouse by right of representation;

9. If the decedent leaves no husband, wife, or kindred, and there are no heirs to take his estate or any portion thereof, under subdivision eight of this section, the same escheats to the state for the support of the common schools.

History: Enacted March 21, 1872; amended March 30, 1874, Code Amdts. 1873-4, p. 236; April 23, 1880, Code Amdts. 1880 (C. C. pt.), p. 14; by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 404, held unconstitutional, see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXLIX, pp. 607, 608.

I. In General.

1. Applied, cited, construed, referred to, etc.
- 2-4. Construction—Adopted child may inherit.
5. Same—Children of disinherited daughter.
6. Same—Conflict of sections.
- 7, 8. Same—Damages for death—Succession to.
9. Same—Equitable estate—Succession to.
10. Same—"Heir"—To whom applied.
11. Same—Inherit—Who may.
- 12-14. Same—Inheritance—Law regulating.
15. Same—Same—Homestead.
16. Same—Same—Kindred of whole-blood.
17. Same—Same—"Kindred" includes, what.
18. Same—Marriage settlement, effect of.
19. Same—Mexican law of descents governs, when.
- 20-22. Same—Object of section.
- 23-25. Same—Personal property, law governing succession.
26. Same—Rights of half brothers and sisters.
27. Same—Real property—Law governing succession.
28. Same—Read as a whole.

II. Subdivision One.

29. Adopted child.
30. Same—By acknowledgment.
31. Homestead.
32. Insurance on life of wife.
33. Illegitimate children.
34. Same—Adopted by father.
35. "Issue"—Effect of as used.
36. Remainder undisposed of by will.

III. Subdivision Two.

37. "Brothers and sisters"—Construed.
38. Same—Includes half-blood.
39. "Children"—Construed.

40-43. Half-brothers and half-sisters—Right to inherit.

44, 45. Inheritance by father.

46. Inheritance by mother.

47. Same—By mother and brothers and sisters.

48-50. Inheritance by nephews and nieces.

51. Inheritance by cousins.

IV. Subdivision Three.

52, 53. Inheritance by brothers and sisters.

V. Subdivision Five.

54-56. Inheritance by husband.

57. Inheritance by wife.

VI. Subdivision Six.

58. Estate of inheritance defined.

59. Rule not changed by § 1394.

60. Uncles and aunts next of kin.

VII. Construction of Subdivision Seven.

61. Surviving brother or sister inherits before father.

VIII. Subdivision Nine.

62, 63. Common property defined.

64, 65. Nieces of husband—When heirs of his widow.

IX. Subdivision Ten.

66, 67. Escheat not succession.

I. IN GENERAL.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO,** etc., in: In re Estate Magee, 63 Cal. 414, 416, 417 (construed); Beck vs. Soward, 76 Cal. 527, 531, 18 Pac. Rep. 650 (applied); In re Estate Ingram, 78 Cal. 586, 537 (construing subd. 5), 588 (construing subd. 2), 12 Am. St. Rep. 30, 21 Pac. Rep. 435; In re Estate Jessup,

81 Cal. 408, 438, 21 Pac. Rep. 976, 22 Id. 742, 1028, 6 L. R. A. 594 (construed and applied); *O'Callaghan vs. Bode*, 84 Cal. 489, 495, 24 Pac. Rep. 269 (subd. 2 construed and applied); *Smith vs. Olmstead*, 88 Cal. 582, 586, 22 Am. St. Rep. 336, 26 Pac. Rep. 521, 12 L. R. A. 46 (construed with other sections); *In re Estate Carmody*, 88 Cal. 616, 620, 26 Pac. Rep. 373 (construing subd. 5); *In re Estate Pearsons*, 110 Cal. 524, 526, 527 (construed with § 1394), 42 Pac. Rep. 960 (subd. 6 construed and applied); *In re Estate Eggers*, 114 Cal. 464, 465, 46 Pac. Rep. 380 (subds. 2 and 3 construed); *In re Estate Wilmerding*, 117 Cal. 281, 285, 286, 49 Pac. Rep. 181 (construed and applied); *Knott vs. McGilvray*, 124 Cal. 128, 129, 56 Pac. Rep. 789 (subd. 5 construed); *Byrne vs. McGrath*, 130 Cal. 316, 322, 80 Am. St. Rep. 127, 62 Pac. Rep. 559 (applied); *In re Estate Smith*, 131 Cal. 433, 435, 82 Am. St. Rep. 358, 63 Pac. Rep. 729 (construed); *In re Estate Fair*, 132 Cal. 523, 526, 84 Am. St. Rep. 70, 60 Pac. Rep. 442, 64 Id. 1000 (referred to); *In re Estate Fath*, 132 Cal. 609, 612, 613, 64 Pac. Rep. 995 (applied); *In re Estate Wakefield*, 136 Cal. 110, 112, 68 Pac. Rep. 499 (cited); *In re Estate McCauley*, 138 Cal. 546, 548 (referred to), 549 (subd. 9 construed and applied), 550 (construed and applied), 71 Pac. Rep. 458; *In re Estate Miner*, 143 Cal. 194, 197 (construed), 198 (construed), 202, 205, 207 (cited in dis. op.), 76 Pac. Rep. 968.

2. ADOPTED CHILD MAY INHERIT.—Wife may unite with her husband in adopting child, and by so doing adopted child becomes heir of both of them.—*In re Estate Williams*, 102 Cal. 70, 79, 41 Am. St. Rep. 163, 36 Pac. Rep. 407.

3. Adoption in accordance with laws of this state, so far as relates to rights of inheritance in this state, gives to adopted the status of child of adopter.—*In re Estate Williams*, 102 Cal. 70, 82, 41 Am. St. Rep. 163, 36 Pac. Rep. 407.

4. "Issue" in this section does not limit right of inheritance to natural children only, but is there used in same sense as words "child" and "children."—*In re Estate Newman*, 75 Cal. 213, 219, 7 Am. St. Rep. 146, 16 Pac. Rep. 887.

5. The children of disinherited daughter, she being alive at time that will was made, do not inherit any of estate of grandfather who made will.—*In re Estate Barter*, 86 Cal. 441, 444, 25 Pac. Rep. 15.

6. CONFLICT OF SECTIONS.—This section and § 1394 in nowise conflict, but together prescribe system not only complete and harmonious but also equitable.—*In re Estate Smith*, 131 Cal. 433, 435, 82 Am. St. Rep. 358, 63 Pac. Rep. 729.

7. DAMAGES FOR DEATH OF WIFE do not pass to husband under statute relating to succession or inheritance of property.—*Redfield vs. Oakland Consol. S. R. Co.*, 110 Cal. 277, 290, 42 Pac. Rep. 822.

8. Damages recovered by reason of wrongful death of woman are for injury inflicted upon those entitled to damages, and not for injuries inflicted upon person injured, and

word "heirs" in statute is intended to limit right of recovery to class of persons who, because of their relation to deceased, are supposed to be injured by her death.—*Redfield vs. Oakland Consol. S. R. Co.*, 110 Cal. 277, 290, 42 Pac. Rep. 822.

9. Equitable estate in land is real property, and must descend in case of intestacy as legal estate.—*Watson vs. Sutro*, 86 Cal. 500, 527, 24 Pac. Rep. 172, 25 Id. 64. See *Grover vs. Hawley*, 5 Cal. 485, 486; *Everson vs. Mayhew*, 57 Cal. 144.

10. "HEIR," while frequently used to denote person to whom estate of inheritance has descended from his immediate ancestor, may also apply to one to whom estate has descended through one or more successive descents.—*Castro vs. Tennent*, 44 Cal. 253, 262.

11. INHERIT, WHO MAY.—After acquisition of California by United States, any one might inherit who was not expressly prohibited.—*People ex rel. Attorney-General vs. Folsom*, 5 Cal. 373, 379.

12. Inheritance is regulated by law in force at time of death.—*Coppinger vs. Rice*, 33 Cal. 408, 424; *Rich vs. Tubbs*, 41 Cal. 34, 37.

13. Heirs of person to whom under § 1284 of Civil Code his estate passes, when not disposed of by will, are determined by provisions of this section.—*Hochstein vs. Berghauser*, 123 Cal. 681, 687, 56 Pac. Rep. 547.

14. Law governing.—For purpose of determining who are heirs of deceased, resort is to be had to laws of state under which descent is cast.—*Wittenbrock vs. Wheadon*, 128 Cal. 150, 153, 79 Am. St. Rep. 32, 60 Pac. Rep. 664.

15. HOMESTEAD.—Under fourth section of homestead act of 1860 children take same interest in homestead property by inheritance from their deceased father or mother, but they do not take any such interest under homestead act of 1862.—*Rich vs. Tubbs*, 41 Cal. 34, 36.

16. KINDRED OF WHOLE-BLOOD, if next of kin, share in all of estate of decedent, no matter from what source it came.—*In re Estate Pearsons*, 110 Cal. 524, 527, 42 Pac. Rep. 960.

17. "Kindred" used in statute include, by rules of common law, only those who are legitimate, unless different intention is clearly manifest.—*In re Estate Magee*, 63 Cal. 414, 416.

18. MARRIAGE SETTLEMENT PROVIDING THAT SURVIVOR SHALL TAKE ALL separate property which first one dying shall leave, except reduction prescribed by law in case of descendants or ascendants surviving first deceased spouse, does not govern distribution of property left by surviving spouse, but same will be distributed in courts with statute of descent and distributions.—*In re Estate Baubichon*, 49 Cal. 18, 28.

19. MEXICAN LAW OF DESCENTS.—Property of one who died in this state, after organization of state government, but before there was any legislation by state regulating administration, descent and distribution of estates of persons dying intestate within state, descended and was subject to operation of

Mexican law in existence at time of cession of California to United States.—*McNeil vs. Congregational Soc.*, 66 Cal. 105, 107, 4 Pac. Rep. 1096.

20. OBJECT OF SECTION.—This section does not purport to be legislation for heirs of intestate, or to make classification of heirs with reference to any legislative object. Subject-matter to which legislation is directed by this section, and for which section was enacted, is estate of person dying intestate and designation of person who shall succeed thereto, under various conditions liable to exist at his death.—*In re Estate Wilmerding*, 117 Cal. 281, 286, 49 Pac. Rep. 181.

21. This section prescribes rule of inheritance.—*In re Estate Newman*, 75 Cal. 213, 219, 7 Am. St. Rep. 146, 16 Pac. Rep. 887; *In re Estate Fath*, 132 Cal. 609, 612, 613, 64 Pac. Rep. 995.

22. This section provides for course of succession among legitimates, but has no application to illegitimates; §§ 1387 and 1388 refer to illegitimates and provide for course of succession as to them; and each provision is complete so far as legislature has seen fit to declare.—*In re Estate Magee*, 63 Cal. 414, 417.

23. PERSONAL PROPERTY.—Law governing.—In absence of positive law to contrary, distribution of decedent's personal estate will be governed by law of his actual domicile at time of his death.—*In re Estate Apple*, 66 Cal. 432, 434, 6 Pac. Rep. 7; *De Laurencel vs. De Boom*, 67 Cal. 362, 363, 7 Pac. Rep. 758. See *Fox vs. Tay*, 89 Cal. 839, 850, 23 Am. St. Rep. 474, 24 Pac. Rep. 855, 26 Id. 897; *Whitney vs. Dodge*, 105 Cal. 192, 198, 38 Pac. Rep. 636; *McCully vs. Cooper*, 114 Cal. 258, 261, 55 Am. St. Rep. 66, 46 Pac. Rep. 82, 35 L. R. A. 492.

24. California law does not govern, when.—Nowhere in either of the codes of California is it provided that personal property situated here, of decedent's, whose actual domicile at time of his death was in another state, shall be distributed in accordance with laws of California.—*In re Estate Apple*, 66 Cal. 432, 434, 6 Pac. Rep. 7.

25. Estate of person dying in Austria, whose domicile at time of his death was in Nevada, and who owned personal property in Nevada and California, should be distributed, in so far as personal property is concerned, under law of Nevada.—*In re Estate Apple*, 66 Cal. 432, 434, 6 Pac. Rep. 7.

26. RIGHTS OF HALF BROTHERS AND SISTERS of intestate are conferred upon them by this section, and are but limited by § 1394 in particular therein specified.—*In re Estate Lynch*, 132 Cal. 214, 217, 64 Pac. Rep. 284.

27. REAL PROPERTY.—Succession to—Is determined by law of its situation.—*De Laurencel vs. De Boom*, 67 Cal. 362, 363, 7 Pac. Rep. 758.

28. Section must be read as a whole.—*In re Estate Wilmerding*, 117 Cal. 281, 286, 49 Pac. Rep. 181.

As to rights of succession of pretermitted children, see § 1307 and note.

As to who entitled to succeed to estates of

inheritance, see monographic note 12 Am. St. Rep. 81-113.

As to who are "heirs" and meaning of word, see notes by Robert Desty, 8 L. R. A. 732, 747, 12 Id. 721, 13 Id. 46; within meaning of insurance policy, note by B. A. Rich, 30 Id. 593.

II. SUBDIVISION ONE.

29. ADOPTED CHILD IS ENTITLED TO SUCCEED by inheritance to estate of adopted parent under provisions of this subdivision.—*In re Estate Newman*, 75 Cal. 213, 219, 7 Am. St. Rep. 146, 16 Pac. Rep. 887.

30. By acknowledgment.—Adopted child inherits under provisions of this section, although adopted by father by public acknowledgment.—*In re Estate Jessup*, 81 Cal. 408, 438, 21 Pac. Rep. 976, 22 Id. 742, 1028, 6 L. R. A. 594.

31. HOMESTEAD CARVED OUT OF SEPARATE PROPERTY OF WIFE, upon her death, leaving husband and more than one child surviving, descends one third to husband and remaining two thirds in equal shares to children, as provided in § 1386 of Civil Code.—*Beck vs. Soward*, 76 Cal. 527, 531, 18 Pac. Rep. 650.

32. INSURANCE ON LIFE OF WIFE.—Husband is entitled to one third of proceeds of insurance policy upon life of his wife taken out in her name, upon her death, as one of her heirs.—*In re Estate Dobbel*, 104 Cal. 432, 436, 43 Am. St. Rep. 123, 33 Pac. Rep. 87.

33. ILLEGITIMATE CHILDREN ARE NOT INCLUDED in provision of this section; their rights are derived only from §§ 1387, 1388. This section provides for course of succession among legitimates only.—*In re Estate Magee*, 63 Cal. 414, 417.

34. Illegitimate child adopted by father inherits under this section.—*In re Estate Jessup*, 81 Cal. 408, 438, 21 Pac. Rep. 976, 22 Id. 742, 1028, 6 L. R. A. 594.

35. "ISSUE" AS USED IN SECOND LINE OF THIS SUBDIVISION does not limit right of inheritance to natural children only, but is used in same sense as words "child" and "children."—*In re Estate Newman*, 75 Cal. 213, 219, 7 Am. St. Rep. 146, 16 Pac. Rep. 887.

36. REMAINDER OF ESTATE, UNDISPOSED OF BY WILL, of wife who dies, leaving husband and children, will pass by succession, one third to the father and two thirds to children.—*Byrne vs. McGrath*, 130 Cal. 316, 322, 30 Am. St. Rep. 127, 62 Pac. Rep. 559.

III. SUBDIVISION TWO.

37. "BROTHERS AND SISTERS" IN THIS SECTION in proper sense and according to approved usage of language.—*In re Estate Smith*, 131 Cal. 433, 435, 32 Am. St. Rep. 353, 63 Pac. Rep. 729.

38. "Brothers and sisters" as used in this clause includes half-brothers and half-sisters.—*In re Estate Lynch*, 132 Cal. 214, 216, 64 Pac. Rep. 284.

39. "CHILDREN" AS USED IN THIS CLAUSE has reference to immediate offspring of brother or sister of deceased.—*In re Estate Curry*, 39 Cal. 529, 531; *In re Estate Chapoton*,

104 Mich. 11, 53 Am. St. Rep. 454, 455, 61 N. W. Rep. 892; *Peeler vs. Peeler*, 68 Miss. 141, 8 So. Rep. 392.

40. HALF-BROTHERS AND HALF-SISTERS HAVE RIGHTS OF INHERITANCE under this section in all respects equal to those of brothers and sisters of full-blood, except where inheritance came to be intestate by descent, devise, or gift of some one of his ancestors, as provided in § 1394.—In re Estate Lynch, 132 Cal. 214, 216, 217, 64 Pac. Rep. 284.

41. Where there are surviving brothers and sisters of half-blood and children of deceased brothers and sisters of full-blood they take as brothers and sisters by right of representation under this section.—In re Estate Lynch, 132 Cal. 214, 215, 216, 64 Pac. Rep. 284.

As to inheritance by kindred of half-blood, see post § 1394 and note.

42. Intestate inherited property from her father and died, leaving surviving her her husband and two half-sisters on mother's side; in such case property descends one half to husband and one half to sisters.—In re Estate Smith, 131 Cal. 432, 436, 82 Am. St. Rep. 358, 63 Pac. Rep. 729.

43. Where intestate dies, leaving widow, no father and mother nor issue, but leaving two brothers and one sister, all of half-blood, and two sets of children of deceased brother and sister of full-blood, half-brothers and half-sisters are not barred because decedent left no kindred of whole-blood in same degree from inheriting their share, nor are nephews or nieces so barred because decedent left no brother or sister of whole-blood.—In re Estate Lynch, 132 Cal. 214, 216, 64 Pac. Rep. 284.

44. INHERITANCE BY FATHER.—Upon death of one leaving father and mother, with no wife or issue, property descends to father, notwithstanding that he had expressed desire shortly before his death that it should go to mother, to which desire father had assented.—*Hardenbergh vs. Bacon*, 33 Cal. 356, 380.

45. Father does not inherit son's portion of mother's estate when son dies under age and not having been married and leaves surviving sister. Sister inherits brother's share under subd. 7 of this section.—In re Estate De Castro vs. Barry, 18 Cal. 96, 101.

46. INHERITANCE BY MOTHER.—Under subd. 2, this section, where deceased left neither wife, issue, nor father surviving him, his mother is his sole heir.—*O'Callaghan vs. Bode*, 84 Cal. 489, 495, 24 Pac. Rep. 269.

47. By mother and brothers and sisters.—Estate devised to minor son by will of father, upon death of devisee, leaving no wife and no issue, but leaving mother and brothers and sisters, goes in equal shares to surviving brothers and sisters and mother, and to children of any deceased brother or sister by right of representation.—In re Estate Donahue, 36 Cal. 329, 332.

48. INHERITANCES BY NEPHEWS AND NIECES.—By the provisions of second sentence in this subdivision, children of deceased brother or sister under certain contingencies succeed to estate in connection with surviving

husband or wife.—In re Estate Wilmerding, 117 Cal. 281, 286, 49 Pac. Rep. 181.

49. In order that children of deceased brother or sister may take by right of representation under this subdivision, there must be surviving brother and sister, and children of deceased sister would not be entitled to have any share in estate when there is not any surviving brother or sister.—In re Estate Ingram, 78 Cal. 586, 588, 12 Am. St. Rep. 80, 21 Pac. Rep. 435 (*distinguished* in In re Estate Lynch, 132 Cal. 214, 215, 64 Pac. Rep. 284; cited in In re Estate McCauley, 138 Cal. 546, 550, 71 Pac. Rep. 458, holding this construction inapplicable to subd. 9).

50. The provision in this subdivision that if there are no issue, and "if there be no father or mother, then one half goes in equal shares to brothers and sisters of decedent, and to children of any deceased brother or sister," does not mean that unless there are brothers and sisters of full-blood children of deceased brother of full-blood cannot inherit.—In re Estate Lynch, 132 Cal. 214, 217, 64 Pac. Rep. 284.

51. Inheritance by cousins.—Where father and brother survive deceased, second cousin is not entitled to succeed to any portion of personal estate of deceased.—In re Estate Eggers, 114 Cal. 464, 465, 466, 46 Pac. Rep. 380.

IV. SUBDIVISION THREE.

52. INHERITANCE BY BROTHERS AND SISTERS.—Estate inherited by one who dies leaving no husband or wife, nor father, descends to his brothers and sisters, and issue of any such brothers and sisters by right of representation, provided such property is inherited from parent who is mother or father of said children.—In re Estate Donahue, 36 Cal. 329, 332.

53. Where one of children, heirs of estate, dies minor, intestate and without issue, pending administration of estate, his interest passes to his brothers and sisters in equal shares.—*Gage vs. Downey*, 94 Cal. 241, 250, 23 Pac. Rep. 635.

V. SUBDIVISION FIVE.

54. INHERITANCE BY HUSBAND.—Husband is one of the heirs who succeeds to estate of wife dying intestate.—In re Estate Dobbel, 104 Cal. 432, 436, 43 Am. St. Rep. 123, 33 Pac. Rep. 87; *Hochstein vs. Berghauser*, 123 Cal. 681, 688, 56 Pac. Rep. 547.

55. Wife dying leaving husband but no issue, and no surviving father or mother, brother or sister, but leaving surviving certain children and grandchildren of deceased sister, her entire estate descends to her husband.—In re Estate Ingram, 78 Cal. 586, 588, 12 Am. St. Rep. 80, 21 Pac. Rep. 435.

56. Wife dying leaving surviving her husband and children of a deceased sister, but no issue, father, mother, brother, or sister, her estate descends entirely to husband, to the exclusion of the children of her deceased sister.—In re Estate Carmody, 88 Cal. 616, 620, 26 Pac. Rep. 373.

57. INHERITANCE BY WIFE.—Surviving wife is an heir of deceased husband, and by

law of succession where decedent leaves neither issue, father, mother, brother, nor sister, whole estate goes to her.—*Knott vs. McGill-vray*, 124 Cal. 128, 129, 56 Pac. Rep. 789.

VI. SUBDIVISION SIX.

58. ESTATE ACQUIRED BY INHERITANCE is one that has descended to heir and been cast upon him by single operation of law. An estate conferred by devise is not an inheritance.—In re Estate Donahue, 86 Cal. 329, 332.

59. Rule of descent or inheritance produced by this subdivision is not changed by the provisions of § 1394, as that section deals entirely with case of kindred of half-blood. Rights of kindred of whole-blood are fixed by § 1386.—In re Estate Pearsons, 110 Cal. 524, 527, 42 Pac. Rep. 960.

60. Under this subdivision next of kin are aunts and uncles of decedent, in equal degree, and will inherit in equal parts.—In re Estate Pearsons, 110 Cal. 524, 526, 42 Pac. Rep. 960.

As to inheritance by kindred of half-blood, see post § 1394 and note.

VII. SUBDIVISION SEVEN.

61. UNDER STATUTE OF DESCENTS AND DISTRIBUTIONS (Wood's Dig., 423), where woman dies, leaving husband and two minor children, and one of minor children afterwards dies unmarried and without issue, that share of mother's estate which would have gone to deceased child descends to other child, and father does not participate therein. In such case descent is governed by seventh clause of said section.—In re Estate De Castro vs. Barry, 18 Cal. 96, 101.

VIII. SUBDIVISION NINE.

62. "COMMON PROPERTY" OF WIFE MEANS only such common property as was not disposed of at time of death of her husband, and would not include such as had been deeded to her by him prior to his death, thus becoming her separate property.—In re Estate McCauley, 138 Cal. 546, 549, 71 Pac. Rep. 458.

63. This subdivision does not mean property that was common property at time while decedent spouse was living, but means such as remains common property at time of decedent's death.—In re Estate McCauley, 138 Cal. 546, 549, 71 Pac. Rep. 458.

64. NIECES OF DECEASED HUSBAND ARE HEIRS of his widow, within meaning of this subdivision, as to community property.—In re Estate McCauley, 138 Cal. 546, 550, 71 Pac. Rep. 458.

65. Nieces of deceased husband are not heirs of his widow, within the meaning of §§ 1313 and 1386, as to her separate property.—In re Estate McCauley, 138 Cal. 546, 550, 71 Pac. Rep. 458.

IX. SUBDIVISION TEN.

66. ESCHEAT IS NOT SUCCESSION, but the very opposite of it. It is what happens when there is no succession (dis. op.).—In re Estate Miner, 143 Cal. 194, 207, 76 Pac. Rep. 968.

67. UNDER THIS SUBDIVISION ESTATE DOES NOT COME IN BY WAY OF SUCCESSION, but in event of absence of all who are entitled to come in by succession, whether property be real or personal, it goes to state by escheat.—In re Estate Miner, 143 Cal. 194, 198, 76 Pac. Rep. 968.

See also post § 1406 note.

§ 1387. ILLEGITIMATE CHILDREN TO INHERIT IN CERTAIN EVENTS.

Every illegitimate child is an heir of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child; and in all cases is an heir of his mother; and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he does not represent his father or mother by inheriting any part of the estate of his or her kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried, and his father, after such marriage, acknowledges him as his child, or adopts him into his family; in which case such child and all the legitimate children are considered brothers and sisters, and on the death of either of them, intestate, and without issue, the others inherit his estate, and are heirs, as hereinbefore provided, in like manner as if all the children had been legitimate; saving to the father and mother, respectively, their rights in the estates of all the children in like manner as if all had been legitimate. The issue of all marriages null in law, or dissolved by divorce, are legitimate.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 405, held unconstitutional, see history, § 4 ante.

1. Applied, cited, construed, referred to, etc.
- 2-4. Construction—"Acknowledge."
5. Same—Acknowledgment—No stated form.
6. Same—Applicable to non-resident alien.
7. Same—Based upon former statute.

8. Same—*Blythe vs. Ayres*, 96 Cal. 532, followed.

9. Same—"Credible witnesses."

- 10, 11. Same—"Kindred," meaning of.

12. Same—Liberal construction, meaning of

13. Same—Not void as contravening treaty.
14. 15. Same—Object of statute.
16. Same—Should be liberally construed.
- 17, 18. Same—Contra.
- 19-22. Inheritance from or through mother.
- 23-25. Letters—Effect of.
26. Null and void marriage, children of are heirs.
- 27-32. Sufficiency of acts of acknowledgment.
- 33-39. Sufficiency of written acknowledgment.
40. Same—Inheritance from father's brother.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in:** In re Estate Pico, 52 Cal. 84, 87 (applied); In re Estate Wardell, 57 Cal. 484, 491, 492 (applied); In re Estate Magee, 63 Cal. 414, 415, 416 (construed and applied); In re Estate Jessup, 81 Cal. 408, 421, 422, 447, 21 Pac. Rep. 976, 22 Id. 742, 1028, 6 L. R. A. 594 (construed and applied); Blythe vs. Ayres, 96 Cal. 532, 582, 31 Pac. Rep. 915, 19 L. R. A. 40 (construed); Blythe vs. Ayres, 102 Cal. 254, 262, 263, 36 Pac. Rep. 522 (construed); In re Burdick's Estate (Cal. April 2, 1895), 40 Pac. Rep. 35 (referred to); In re Estate Blythe, 112 Cal. 689, 693, 45 Pac. Rep. 6 (construed); Blythe vs. Hinckley, 127 Cal. 431, 434, 59 Pac. Rep. 787 (applied); Blythe vs. Hinckley, 173 U. S. 501, 504, 43 L. ed. 783; Blythe vs. Hinckley, 180 U. S. 333, 334, 335, 45 L. ed. 557, 21 Sup. Ct. Rep. 390.

2. **"ACKNOWLEDGE" IS USED IN THIS SECTION IN ITS ORDINARY ACCEPTATION,** and does not prescribe stated form of acknowledgment, nor require that it should be specifically prepared for sole purpose of making illegitimate child heir of its father, nor that acknowledgment shall state fact of child's illegitimacy, nor does it prescribe that witness in whose presence acknowledgment is signed must be subscribing witness.—Blythe vs. Ayres, 96 Cal. 532, 582, 31 Pac. Rep. 915, 19 L. R. A. 40.

3. **"ACKNOWLEDGE" IS USED IN THIS SECTION IN EXACTLY SAME SENSE AS IT IS IN § 230.**—Blythe vs. Ayres, 96 Cal. 532, 582, 31 Pac. Rep. 915, 19 L. R. A. 40.

4. **Much is due to word "acknowledged" in connection in which it is used;** it implies formal doing of act for purpose of availing one's self of beneficial provisions of statute; it may not be indispensable, but doubtless other words may be employed, provided whole instrument shows it to be acknowledgment made for purpose of elevating illegitimate to position of heir of its father, and this purpose must clearly appear from instrument.—Pina vs. Peck, 31 Cal. 359, 364.

5. **Acts required to constitute acknowledgment of an illegitimate child are not laid down in this section;** no stated form of acknowledgment is there found by which court may be guided.—Blythe vs. Ayres, 96 Cal. 532, 582, 31 Pac. Rep. 915, 19 L. R. A. 40.

6. **Section is applicable to non-resident alien who has never been within jurisdiction of United States or of state of California,** in absence of treaty provision between United States and country of such alien extending to such non-resident alien's right to inherit real estate within territorial domain.—Blythe vs. Hinckley, 127 Cal. 431, 434, 59 Pac. Rep. 787.

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7. **Based on former statute.**—Section is based upon former provision of statute requiring adoption to be in manner therein indicated.—In re Estate Jessup, 81 Cal. 408, 447, 21 Pac. Rep. 976, 22 Id. 742, 1028, 6 L. R. A. 594.

8. **Approved and following Blythe vs. Ayres,** 96 Cal. 532, 31 Pac. Rep. 915, 19 L. R. A. 40; as to the construction of this section Blythe vs. Ayres, 102 Cal. 254, 262, 36 Pac. Rep. 522.

9. **"Credible witnesses" is synonymous with "competent witnesses";** such persons as are not legally disqualified in courts of justice by reason of mental incapacity, interest, or commission of crime or other cause excluding them from testifying generally, or rendering them incompetent in respect to particular subject-matter are competent witnesses.—Blythe vs. Ayres, 96 Cal. 532, 586, 31 Pac. Rep. 915, 19 L. R. A. 40.

10. **"Kindred" used in this section relates to kindred referred to in § 1386,** meaning lawful kindred, and is for purpose of qualifying general words used in § 1387, and excluding illegitimate from inheriting, through mother, estate of other relatives.—In re Estate Magee, 63 Cal. 414, 416.

11. **"Kindred."**—When using word "kindred" in this section legislature intended to preclude from general words preceding it construction that illegitimate might by representation inherit from those whom common law, or § 1386, acknowledges as kindred, but did not intend to prevent legitimate son from inheriting through his mother (an illegitimate daughter), nor from being her heir.—In re Estate Magee, 63 Cal. 414, 416.

12. **Liberal or strict.**—Statutes as to adoption of illegitimate children must be strictly construed.—Pina vs. Peck, 31 Cal. 359, 362; In re Estate Jessup, 81 Cal. 408, 417, 420, 422, 21 Pac. Rep. 976, 22 Id. 742, 1028, 6 L. R. A. 594.

Distinguished and held that rule as to construction of code sections is changed, and that § 1387 is to be liberally construed without interpolation or elimination of any term.—Blythe vs. Ayres, 96 Cal. 532, 582, 590, 591, 31 Pac. Rep. 915, 19 L. R. A. 40. See In re Estate Blythe, 112 Cal. 689, 693, 45 Pac. Rep. 6; monographic note 56 Am. Dec. 262.

13. **Liberal construction does not mean that section is to be construed to be retroactive.**—In re Estate Jessup, 81 Cal. 408, 422, 21 Pac. Rep. 976, 22 Id. 742, 1028, 6 L. R. A. 594.

14. **Not void.**—Section is not void as contravening any treaty between England and United States, or as being an invasion of treaty-making powers of United States government.—Blythe vs. Hinckley, 127 Cal. 431, 434, 59 Pac. Rep. 787.

15. **Object of statute was not to enable an illegitimate child to become heir of his father,** when it is satisfactorily shown who is his father, but it was to empower father to constitute his illegitimate child his heir, if he desired so to do.—Pina vs. Peck, 31 Cal. 359, 364 (construing statute which existed prior to enactment of code substantially identical with this section).

16. **The obvious purpose and intent of legis-**

lature in enacting this section was to entitle illegitimate children to inherit their father's estate same as legitimate children.—*Blythe vs. Ayres*, 96 Cal. 532, 533, 31 Pac. Rep. 915, 19 L. R. A. 40.

17. With reference to §230.—This section should not be construed as limitation upon §230, Civil Code.—In re Estate Jessup, 81 Cal. 408, 421, 21 Pac. Rep. 976, 22 Id. 742, 1028, 6 L. R. A. 594.

18. This section provides method by which illegitimate child of any age may be legitimized for certain purposes, while §230 can only be invoked in case of minor illegitimate child.—In re Estate Pico, 52 Cal. 84, 87.

19. INHERITANCE FROM OR THROUGH MOTHER.—Relation which mother bears toward her illegitimate children, not being in doubt, reasons of policy, which would always preclude such children from claiming inheritance of any one upon ground that he is their father, do not apply to property of mother.—In re Estate Wardell, 57 Cal. 484, 492.

20. Illegitimate child, endowed with inheritable blood, though never legitimized, possesses same heritable rights as heir of her mother as if born in lawful wedlock.—In re Estate Wardell, 57 Cal. 484, 492.

21. An illegitimate child unintentionally omitted from will of her mother inherits by descent as though her mother had died intestate, in same manner as if legitimate.—In re Estate Wardell, 57 Cal. 484, 492.

22. Same—Sabra Magee, common ancestor, had two legitimate daughters, Eliza and Susan; descendants of Eliza were all legitimate, but Susan had two illegitimate daughters, Elizabeth and Suez. Suez died intestate and without issue; Susan, her mother, had died before her; the court held that the property of Suez descended to legitimate son of Elizabeth through their common mother, Susan, and not to descendants of Eliza.—In re Estate Magee, 63 Cal. 414, 416.

23. LETTERS—Effect of.—A letter from a father to illegitimate child containing such expression as "you are my own darling child," "I am your father; you shall be baptized in my name and loved, cherished and protected always," is sufficient acknowledgment to entitle child to inheritance under this section.—*Blythe vs. Ayres*, 96 Cal. 532, 533, 31 Pac. Rep. 915, 19 L. R. A. 40.

24. Letters from father to illegitimate child stating fact of paternity of such, signed by him in presence of competent witness, are sufficient to constitute acknowledgment within meaning of this section.—*Blythe vs. Ayres*, 96 Cal. 532, 533, 31 Pac. Rep. 915, 19 L. R. A. 40; *Blythe vs. Ayres*, 102 Cal. 254, 262, 36 Pac. Rep. 522; In re Estate Blythe, 112 Cal. 639, 693, 45 Pac. Rep. 6.

25. Letters from mother to nurse of illegitimate child are incompetent and inadmissible to prove paternity.—In re Estate Jessup, 81 Cal. 408, 417, 21 Pac. Rep. 976, 22 Id. 742, 1028, 6 L. R. A. 594.

26. NULL AND VOID MARRIAGES.—Children being issue of marriage which is null

and void, are, under §2 of the act to regulate descents and distributions, heirs of father.—*Graham vs. Bennet*, 2 Cal. 503, 506. See In re Estate Wardell, 57 Cal. 484, 491.

27. SUFFICIENCY OF ACTS OF ACKNOWLEDGMENT.—Illegitimate child cannot claim to be heir of father by reason of having been acknowledged as his child, unless such acknowledgment is so clear and explicit as to bear but one interpretation.—In re Estate Sandford, 4 Cal. 12, 14.

28. Evidence of adoption of illegitimate son by his father in order to make such illegitimate son inheritable as to father's estate must show that father publicly acknowledged child as his own or received it into his family or otherwise treated it as if it were legitimate child.—In re Estate Jessup, 81 Cal. 408, 424, 21 Pac. Rep. 976, 22 Id. 742, 1028, 6 L. R. A. 594.

29. Prior to 1870 illegitimate minor child could not have been adopted by his father, or given capacity of inheritance from him, except by acknowledgment in writing in presence of competent witness.—In re Estate Jessup, 81 Cal. 408, 422, 21 Pac. Rep. 976, 22 Id. 742, 1028, 6 L. R. A. 594.

30. Under statutes 1850, p. 220, §2, neither oral admission nor proof (otherwise than by written acknowledgment) of fact of paternity will constitute illegitimate child an heir.—In re Estate Jessup, 81 Cal. 408, 420, 21 Pac. Rep. 976, 22 Id. 742, 1028, 6 L. R. A. 594.

31. From March 31, 1870, to January 1, 1873, an illegitimate minor could have been so adopted and given such capacity either by acknowledgment in writing as before or by his father having treated, received, or acknowledged him publicly as his own legitimate child.—In re Estate Jessup, 81 Cal. 408, 422, 21 Pac. Rep. 976, 22 Id. 742, 1028, 6 L. R. A. 594.

32. Father of illegitimate child, in order to adopt him as legitimate, must not only publicly acknowledge him as his, but he must receive him into his family, and if he have wife, with her consent.—In re Estate De Laveaga, 142 Cal. 158, 159, 75 Pac. Rep. 790; In re Estate Jessup, 81 Cal. 408, 21 Pac. Rep. 976, 22 Id. 742, 1028, 6 L. R. A. 594, and *Blythe vs. Ayres*, 96 Cal. 532, 557, 31 Pac. Rep. 915, 19 L. R. A. 40, overruled in so far as antagonistic to the above.

33. SUFFICIENCY OF WRITTEN ACKNOWLEDGMENT.—Father's acknowledgment of an illegitimate child in writing in order to make such child his heir must state that such child is illegitimate and must be complete in itself, so that court can determine such fact and that person signing instrument acknowledging it to be his child without aid of parol testimony.—*Pina vs. Peck*, 31 Cal. 359, 363 (doubted and denied; see next paragraph).

34. Written acknowledgment of illegitimate child, under this section, need not be complete in itself, i. e. it need not show upon its face that child is illegitimate child, and that it was signed in presence of competent witness.—*Blythe vs. Ayres*, 96 Cal. 532, 533, 31 Pac. Rep. 915, 19 L. R. A. 40. (Doubted and denied; *Pina vs. Peck*, 31 Cal. 359.)

35. Instrument that was plainly and unmistakably executed for another purpose, although it contains all matters required by statute for acknowledgment of illegitimate child, cannot be regarded as statutory acknowledgment of paternity of such child.—*Pina vs. Peck*, 31 Cal. 359, 363.

36. Acknowledgment in last will.—This section is essentially a statute of inheritance, and there is no more fitting place for father to recognize moral duty enjoined upon him towards his illegitimate offspring than by acknowledging that child in his last will and testament, in accordance with provisions of this section, and fact that acknowledgment was subsidiary to main object and purpose of testator in making document would not thereby weaken effect of writing as an acknowledgment.—*Blythe vs. Ayres*, 96 Cal. 532, 585, 31 Pac. Rep. 915, 19 L. R. A. 40.

37. Acknowledgment of illegitimate child need not be writing specially prepared for sole purpose of making illegitimate child heir of father.—*Blythe vs. Ayres*, 96 Cal. 532, 584, 31 Pac. Rep. 915, 19 L. R. A. 40.

38. Merely designating party "my daughter" in instrument is not such acknowledgment

of illegitimate child as will enable her to inherit under statute of descents and distributions.—*Pina vs. Peck*, 31 Cal. 359, 363.

39. It is not necessary that witness of written acknowledgment by father of his illegitimate child should be subscribing or attesting witness.—*Blythe vs. Ayres*, 96 Cal. 532, 586, 31 Pac. Rep. 915, 19 L. R. A. 40.

40. Inheritance from father's brother.—Illegitimate child was always acknowledged by his father to be his child, and was placed by father in family of a physician, where he was educated and reared, and expenses thereof, and for his support, paid by father, but was never taken to father's home and never lived with father, who, however, by written instrument acknowledged him to be his son, which instrument was sufficient under § 1387, does not acquire right to represent his father by inheriting any part of estate of his father's brother.—*In re Estate De Laveaga*, 142 Cal. 158, 171, 75 Pac. Rep. 790.

Illegitimate children.—See ante §§ 84, 215, 224, 227, 228, 230 and notes.

As to succession by or through illegitimate children, see monographic note 12 Am. St. Rep. 101.

§ 1388. PROPERTY OF ILLEGITIMATE CHILD IS SUCCEEDED TO, WHEN AND HOW. The estate of an illegitimate child, who has been legitimated by the subsequent marriage of its parents, or adopted by the father as provided by section two hundred and thirty, and who dies intestate, is succeeded to as if he were born in lawful wedlock. If such child has not been so legitimated or adopted, his estate goes to his lawful issue, or, if he leaves no issue, to his mother, or in case of her decease, to her heirs at law.

History: Enacted March 21, 1872; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 406, held unconstitutional, see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXLIX, p. 609.

1. Applied, cited, construed, referred to, etc.
2, 3. Inheritance by children of illegitimates.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *In re Estate Magee*, 65 Cal. 414, 415, 417 (applied); *In re Burdick's Estate* (Cal. April 2, 1895), 40 Pac. Rep. 35, 36 (referred to with other sections in discussion).

2. INHERITANCE BY CHILDREN OF ILLEGITIMATES.—The son of an illegitimate daughter inherits from his mother's mother

by right of representation, under provisions of this section and § 1366.—*In re Estate Magee*, 65 Cal. 414, 417.

3. Proper construction of §§ 1386, 1387, and 1388 would entitle the son of one of two illegitimate daughters to inherit estate of other illegitimate daughter as against descendants of sister of mother of two illegitimate daughters, where his mother and her mother were deceased before death of one from whom he claimed to inherit.—*In re Estate Magee*, 65 Cal. 414, 416.

§ 1389. DEGREE OF KINDRED, HOW COMPUTED. The degree of kindred is established by the number of generations, and each generation is called a degree.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2, 3. Civil or common law.
4. Children.
5. First cousins german.

1. Applied, cited, construed, referred to, etc., in: *In re Burdick's Estate* (Cal. April 2, 1895), 40 Pac. Rep. 35, 36 (referred to with other section in discussion).

2. Civil or common law—Degrees of con-

sanguinity are computed according to the rules of common law, except in cases relating to descent and distribution.—*People ex rel. Carrillo vs. De la Guerra*, 24 Cal. 73, 76.

Distinguished: *In Robinson vs. Southern Pac. Co.*, 105 Cal. 526, 558, 38 Pac. Rep. 94, 722, 28 L. R. A. 773.

3. In statutes relating to descent and distribution rule of computation as to consanguinity which prevails under civil law has

been adopted.—*People ex rel. Carrille vs. De la Guerra*, 24 Cal. 73, 76.

4. "Children" as used in third subdivision of first section of statute of descents and distributions does not include grandchildren.—*In re Estate Curry*, 39 Cal. 529, 531. See *Peeler vs. Peeler*, 68 Miss. 141, 8 So. Rep. 392.

5. First cousins german are not related within third degree.—*Robinson vs. Southern*

Pac. Co., 105 Cal. 526, 557, 33 Pac. Rep. 94, 722, 23 L. R. A. 773.

As to who are next of kin, see monographic note 12 Am. St. Rep. 107; note by B. A. Rich, 15 L. R. A. 300.

As to degrees of consanguinity and affinity—How computed for purposes of succession, see note 56 Am. Dec. 293.

§ 1390. **SAME. [COLLATERAL LINE.]** The series of degrees forms the line; the series of degrees between persons who descend from one another is called direct or lineal consanguinity; and the series of degrees between persons who do not descend from one another, but spring from a common ancestor, is called the collateral line or collateral consanguinity.

History: Enacted March 21, 1872, founded upon Louisiana Civil Code, art. 886.

Applied, cited, construed, referred to, etc., in: *In re Burdick's Estate* (Cal. April 2, 1895), 40 Pac. Rep. 35, 36 (referred to with other sections in discussion).

As to kindred of the collateral blood, see monographic note 12 Am. St. Rep. 110.

See notes 56 Am. Dec. 293; 61 Am. Dec. 665; 13 Am. St. Rep. 32.

§ 1391. **SAME. [ASCENDING AND DESCENDING DIRECT LINE.]** The direct line is divided into a direct line descending and a direct line ascending. The first is that which connects the ancestors with those who descend from him. The second is that which connects a person with those from whom he descends.

History: Enacted March 21, 1872, founded upon Louisiana Civil Code, art. 886.

1. Applied, cited, construed, referred to, etc.
2. Descendants does not include ascending line.

1. Applied, cited, construed, referred to, etc., in: *In re Burdick's Estate* (Cal. April 2, 1895), 40 Pac. Rep. 35, 36 (referred to with other sections in discussion).

2. Descendants under act of 1850, § 11, as amended in 1861 (Stats. 1861, p. 310), does not include ascending line; the term "descendants" is opposed to that of "ascendants," in the line of inheritance.—*Jewell vs. Jewell*, 23 Cal. 232, 236.

§ 1392. **SAME. [DEGREES IN DIRECT LINE.]** In the direct line there are as many degrees as there are generations. Thus, the son is, with regard to the father, in the first degree; the grandson in the second; and vice versa with regard to the father and grandfather toward the sons and grandsons.

History: Enacted March 21, 1872, founded upon Louisiana Civil Code, art. 887.

Applied, cited, construed, referred to, etc., in: *In re Burdick's Estate* (Cal. April 2, 1895),

40 Pac. Rep. 35, 36 (referred to with other sections in discussion).

§ 1393. **SAME. [DEGREES IN COLLATERAL LINE.]** In the collateral line the degrees are counted by generations, from one of the relations up to the common ancestor, and from the common ancestor to the other relations. In such computation the decedent is excluded, the relative included, and the ancestor counted but once. Thus, brothers are related in the second degree; uncle and nephew in the third degree; cousins german in the fourth, and so on.

History: Enacted March 21, 1872, founded upon Louisiana Civil Code, art. 888; *Montesq. Esprit des Lois*, liv. 27.

1. Applied, cited, construed, referred to, etc.
2. Construction.
3. First cousin or cousin german.

1. Applied, cited, construed, referred to, etc., in: *Robinson vs. Southern Pac. Co.*, 105 Cal. 526, 557, 558, 33 Pac. Rep. 94, 722, 23 L. R. A. 773 (construed); *In re Burdick's Estate*

(Cal. April 2, 1895), 40 Pac. Rep. 35, 36 (referred to with other sections in discussion).

2. Construction.—Section must be taken as establishing degrees of relationship by consanguinity or affinity, and other sections of codes referring to such degrees must be construed as passed in view of this section.—

Robinson vs. Southern Pac. Co., 105 Cal. 526, 558, 33 Pac. Rep. 94, 722, 28 L. R. A. 773.

3. First cousins or cousins german.—Relation by marriage of first cousin, or cousin

german, is not within third degree, prohibiting a judge from acting.—Robinson vs. Southern Pac. Co., 105 Cal. 526, 557, 33 Pac. Rep. 94, 722, 28 L. R. A. 773.

§ 1394. RELATIVES OF THE HALF-BLOOD. Kindred of the half-blood inherit equally with those of the whole-blood in the same degree, unless the inheritance come to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestors must be excluded from such inheritance.

History: Enacted March 21, 1872, founded upon § 4 Act April 13, 1850, Stats. 1850, p. 221.

1. Applied, cited, construed, referred to, etc.
2. Common-law rule.
3. "Brothers and sisters."
4. "Blood of first purchaser."
- 5, 6. Construction—Discrimination against half-blood.
- 7, 8. Same—Half-blood inherit, when.
9. Same—Half-blood, who are.
10. Same—Last clause applies to, what.
- 11, 12. Same—With § 1386.
13. Same—With § 1384.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: In re Burdick's Estate (Cal. April 2, 1895), 40 Pac. Rep. 35, 36 (referred to with other sections in discussion); In re Estate Pearsons, 110 Cal. 524, 527 (construed and applied), 42 Pac. Rep. 960; In re Estate Smith, 131 Cal. 433, 434, 435, 436, 82 Am. St. Rep. 358 (construed and applied), 63 Pac. Rep. 729; In re Estate Lynch, 132 Cal. 214, 216 (applied), 217 (applied), 64 Pac. Rep. 234.

2. COMMON-LAW RULE WHICH EXCLUDED HALF-BLOOD FROM INHERITING really did not do so on ground that half-brothers of ancestor were not his brothers, but because they were not presumptively of blood of first feudatory from whom estate was originally derived.—In re Estate Lynch, 132 Cal. 214, 216, 64 Pac. Rep. 234.

3. "Brothers and sisters."—Where term "brothers and sisters" is used without limitation it includes half-brothers and half-sisters.—In re Estate Lynch, 132 Cal. 214, 216, 64 Pac. Rep. 234.

4. "Blood of first purchaser."—Our code has no allusion to "blood of first purchaser," and makes no attempt at any distinction founded upon sources from which estate of decedent may have been derived except in single instance of kindred of half-blood.—In re Estate Pearsons, 110 Cal. 524, 526, 42 Pac. Rep. 960.

5. CONSTRUCTION—Discrimination against half-blood.—Construction would be unreasonable which would postpone rights of kindred of half-blood until after there was failure of all kindred of intestate who have blood of ancestor from whom estate descended, however remote in degree.—In re Estate Smith, 131 Cal. 433, 435, 82 Am. St. Rep. 358, 63 Pac. Rep. 729.

6. Discrimination against the half-blood is the exception, and is not to be extended be-

yond obvious intent; half-bloods are only excluded when there are others in same statutory class who are to be preferred by reason of being of blood of ancestor from whom estate came to intestate.—In re Estate Smith, 131 Cal. 433, 436, 82 Am. St. Rep. 358, 63 Pac. Rep. 729.

7. Half-bloods inherit, when.—If next of kin of equal degree of intestate be some of whole-blood and some of half-blood of intestate, half-bloods shall not inherit if they are not of blood of person from whom intestate inherited property to be distributed, but if all be kin of whole-blood of intestate, or if half-bloods be of bloods of ancestors, then all share alike.—In re Estate Pearsons, 110 Cal. 524, 527, 42 Pac. Rep. 960.

8. Same—"All those" are words which refer to their antecedents in the sentence "kindred of the half-blood"; kindred of the half-blood being subject to main proposition of section, is necessarily subject of exception which follows word "unless"; section means that kindred of half-blood shall inherit equally with those of whole-blood, except in certain case and in that case kindred of half-blood shall not inherit.—In re Estate Pearsons, 110 Cal. 524, 526, 527, 42 Pac. Rep. 960.

9. Kindred of the half-blood are kindred of half-blood of decedent within meaning of this section.—In re Estate Pearsons, 110 Cal. 524, 526, 527, 42 Pac. Rep. 910.

10. Last clause in this section can apply only to class described in first, or, in other words, to class from which it constitutes exception which is kindred "in same degree."—In re Estate Smith, 131 Cal. 433, 434, 82 Am. St. Rep. 358, 63 Pac. Rep. 729.

11. With § 1386.—Section is limitation of rights of half brothers and sisters of intestate conferred upon them by § 1386, together with brethren of whole-blood, only as in case specifically set forth therein.—In re Estate Lynch, 132 Cal. 214, 217, 64 Pac. Rep. 234.

12. This section does not affect or change rule laid down in § 1386, as it deals entirely with case of kindred of "half-blood," and not with kindred of whole-blood, whose rights are fixed by § 1386.—In re Estate Pearsons, 110 Cal. 524, 527, 42 Pac. Rep. 960.

13. With § 1384.—Sections 1384 and 1394 in no wise conflict, but together prescribe a system complete, harmonious, and equitable, and in accordance with general sentiments of

mankind.—In re Estate Smith, 131 Cal. 433, 435, 82 Am. St. Rep. 358, 63 Pac. Rep. 739.

Kindred of half-blood as administrators.—See Code Civ. Proc. § 1366.

See note to § 1386.

As to inheritance by half-blood, see monographic note 61 Am. Dec. 655; by Ernest Watts, 29 L. R. A. 541, 567.

§ 1395. ADVANCEMENTS CONSTITUTE PART OF DISTRIBUTIVE SHARE.

Any estate, real or personal, given by the decedent in his lifetime as an advancement to any child, or other heir, is a part of the estate of the decedent for the purposes of division and distribution thereof among his heirs, and must be taken by such child, or other heir, toward his share of the estate of the decedent.

History: Enacted March 21, 1872, founded upon § 5 Act April 13, 1850, Stats. 1850, p. 221; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 406, held unconstitutional, see history, § 4 ante; amendment re-enacted March 21, 1905, c. CDXLIX, p. 609.

1. Applied, cited, construed, referred to, etc.
2. Commissioners' note.
3. Does not cover subsequent legacy.

1. **Applied, cited, construed, referred to, etc., in:** In re Estate Zelle, 74 Cal. 125, 132, 15 Pac. Rep. 455 (cited in discussion); In re Burdick's Estate (Cal. April 2, 1895), 40 Pac. Rep. 35, 36 (referred to in discussion).

2. **Commissioners' note.**—The Commissioners cite statutes 1850, p. 221, § 5, and add: "If father, during his lifetime, on occasion of marriage or settlement in life or otherwise,

has made any advancements to any of his children towards their distributive share in his estate, this must be regarded in making distribution. See § 1686 (par. 273), Code of Civil Procedure."

3. "Advancement" does not of itself either in its technical or popular sense cover a subsequent legacy.—In re Estate Zelle, 74 Cal. 125, 141, 15 Pac. Rep. 455.

See note to § 1397.

As to doctrine of advancements to heirs, see note by Robert Desty, 12 L. R. A. 566.

§ 1396. ADVANCEMENTS, WHEN TOO MUCH, OR NOT ENOUGH. If the amount of such advancement exceeds the share of the heir receiving the same, he must be excluded from any further portion in the division and distribution of the estate, but he must not be required to refund any part of such advancement; and if the amount so received is less than his share, he is entitled to so much more as will give him his full share of the estate of the decedent.

History: Enacted March 21, 1872, founded upon § 6 Act April 13, 1850, Stats. 1850, p. 221.

Applied, cited, construed, referred to, etc., in: In re Burdick's Estate (Cal. April 2, 1895), 40 Pac. Rep. 35, 36 (referred to in discussion); In re Estate Zelle, 74 Cal. 125, 132, 15 Pac. Rep. 455 (cited with other sections in discussion).

See note to §§ 1395, 1397.

As to interest on advancements to equalize, see note by B. A. Rich, 14 L. R. A. 716.

As to valuation of, see note 80 Am. Dec. 564.

§ 1397. WHAT ARE ADVANCEMENTS. All gifts and grants are made as advancements, if expressed in the gift or grant to be so made; or if charged in writing by the decedent as an advancement, or acknowledged in writing as such, by the child or other successor or heir.

History: Enacted March 21, 1872, founded upon § 7 Act April 13, 1850, Stats. 1850, p. 221.

1. Applied, cited, construed, referred to, etc.
2. Meaning of word prior to code.
3. Presumption as to use of word.
4. Purchase in name of child.

1. **Applied, cited, construed, referred to, etc., in:** In re Burdick's Estate (Cal. April 2, 1895), 40 Pac. Rep. 35, 36 (referred to in discussion); In re Estate Zelle, 74 Cal. 125, 132, 15 Pac. Rep. 455 (cited with other sections in discussion).

2. **Meaning prior to code.**—Prior to our

codes term "advancements" was applied to gifts by parent in his lifetime to child of whole or part of what it is supposed child will inherit from parent; sometimes also to such gifts by one standing in loco parentis. By Civil Code term is explained so as to include like gifts by ancestor of child or other lineal descendant.—In re Estate Zelle, 74 Cal. 125, 132, 15 Pac. Rep. 455.

3. **Presumption as to use of word.**—Testator is not presumed to have used the word "advancements" in sense differing both from

its technical and popular signification.—In re Estate Zelle, 74 Cal. 125, 134, 15 Pac. Rep. 455.

4. Purchase of property by parent in name of child is to be regarded, prima facie, as an

advancement.—Russ vs. Meblus, 16 Cal. 350, 356.

As to advancements, what constitute, see note 80 Am. Dec. 559.

§ 1398. VALUE OF ADVANCEMENTS, HOW DETERMINED. If the value of the estate so advanced is expressed in the conveyance, or in the charge thereof made by the decedent, or in the acknowledgment of the party receiving it, it must be held as of that value in the division and distribution of the estate; otherwise, it must be estimated according to its value when given, as nearly as the same can be ascertained.

History: Enacted March 21, 1872, founded upon § 8 Act April 13, 1850, Stats. 1850, p. 221.

Applied, cited, construed, referred to, etc., in: In re Burdick's Estate (Cal. April 2, 1895), 40 Pac. Rep. 35, 36 (referred to in discussion);

In re Estate Zelle, 74 Cal. 125, 132, 15 Pac. Rep. 455 (cited with other sections in discussion).

§ 1399. WHEN HEIR, ADVANCED TO, DIES BEFORE DECEDENT. If any child, or other heir receiving advancement, dies before the decedent, leaving heirs, the advancement must be taken into consideration in the division and distribution of the estate, and the amount thereof must be allowed accordingly by the representatives of the heirs receiving the advancement, in like manner as if the advancement had been made directly to them.

History: Enacted March 21, 1872, founded upon § 9 Act April 13, 1850, Stats. 1850, p. 221; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 406, held unconstitutional, see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXLIX, p. 609.

Applied, cited, construed, referred to, etc., in: In re Estate Zelle, 74 Cal. 125, 132, 15 Pac. Rep. 455 (cited with other sections in discussion); In re Burdick's Estate (Cal. April

2, 1895), 40 Pac. Rep. 35, 36 (referred to in discussion).

"Advancements."—See ante §§ 1309, 1351 and 1395 and notes.

§ 1400. INHERITANCE OF HUSBAND AND WIFE FROM EACH OTHER. The provisions of the preceding sections of this title, as to the inheritance of the husband and wife from each other, apply only to the separate property of the decedents.

History: Enacted March 21, 1872, founded upon § 10 Act April 13, 1850, Stats. 1850, p. 221.

1. Applied, cited, construed, referred to, etc.

2. Implication.

3. Mexican law—Rights of survivor.

4. "Shall go" means "shall vest."

5-7. Succession as between husband and wife.

1. Applied, cited, construed, referred to, etc., in: In re Burdick's Estate (Cal. April 2, 1895), 40 Pac. Rep. 35, 36 (cited); In re Estate Burdick, 112 Cal. 387, 394, 44 Pac. Rep. 734 (construed).

2. Implication.—This section clearly implies other succeeding sections which apply to property of husband and wife which is not their separate property.—In re Estate Burdick, 112 Cal. 387, 394, 44 Pac. Rep. 734.

3. Mexican law—Rights of survivor.—Under Spanish or Mexican law, marriage being dissolved by death of either husband or wife, survivor may freely dispose of the gananciales or community property, although he or she may enter into a second or third marriage, and

children of first marriage being living, without being obliged to reserve for such children either property or proceeds thereof.—Panaud vs. Jones, 1 Cal. 488, 515.

4. "Shall go" as used in act of 1850, § 11, defining rights of husband and wife in community property, on death of either, means "shall vest," and is equally applicable to descendants of deceased husband or wife named in said section.—Broad vs. Broad, 40 Cal. 493, 496.

5. Upon death of husband one half of community property goes to wife, and upon death of wife entire community property goes to husband.—Hollister vs. Cordero, 76 Cal. 649, 651, 18 Pac. Rep. 855.

6. Surviving husband or wife to be entitled to whole of common property, it must be affirmatively shown that there are no descendants of deceased.—Cummings vs. Chevrier, 10 Cal. 519, 520.

7. Community property previous to amendment of 1869, upon dissolution of community by death of husband or wife, went one half to survivor and other half to descendants of deceased, and if there were no descendants

of the deceased, then to survivor.—*Jewell vs. Jewell*, 28 Cal. 232, 237.

As to succession of husband and wife to each other, see monographic note 12 Am. St. Rep. 82.

§ 1401. DISTRIBUTION OF COMMUNITY PROPERTY ON DEATH OF WIFE. Upon the death of the wife, the entire community property, without administration, belongs to the surviving husband, except such portion thereof as may have been set apart to her by judicial decree, for her support and maintenance, which portion is subject to her testamentary disposition, and in the absence of such disposition, goes to her descendants, or heirs, exclusive of her husband.

History: Enacted March 21, 1872, founded upon § 1 Act April 17, 1850, Stats. 1850, p. 255, as amended April 4, 1864, Stats. 1863-4, p. 363; amended April 30, 1874, Code Amdts. 1873-4, p. 238.

1. Applied, cited, construed, referred to, etc.
2. Authority of probate court over community estate.
- 3-5. Children's succession on wife's death.
6. Damages for wife's death no part of estate.
7. Descends subject to community debts.
8. Husband's succession on wife's death.
9. Husband's title, being divested, descends, how.
- 10-12. Husband's title—Nature of.
- 14, 15. Same—Under Mexican law.
16. Power of legislature.
17. Property purchased with separate funds.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Moore vs. Jones*, 63 Cal. 12, 14 (cited in discussion); *In re Estate Rowland*, 74 Cal. 523, 525, 5 Am. St. Rep. 464, 16 Pac. Rep. 315 (construed and applied); *In re Estate Ackerman*, 80 Cal. 208, 209, 13 Am. St. Rep. 116, 22 Pac. Rep. 141 (applied); *Dean vs. Parker*, 88 Cal. 283, 287, 26 Pac. Rep. 91 (applied); *In re Burdick's Estate* (Cal. April 2, 1895), 40 Pac. Rep. 85 (cited); *Redfield vs. Oakland Consol. St. R. Co.*, 110 Cal. 277, 290, 42 Pac. Rep. 822 (held not applicable); *In re Estate Burdick*, 112 Cal. 387, 395, 44 Pac. Rep. 734 (construed); *Yoakam vs. Kingery*, 126 Cal. 30, 33, 58 Pac. Rep. 324 (applied); *Bollinger vs. Wright*, 143 Cal. 292, 295, 76 Pac. Rep. 1108 (applied).

2. **AUTHORITY OF PROBATE COURT OVER COMMUNITY ESTATE.**—Community being dissolved by death of wife, probate court which administered her estate has no jurisdiction to community property.—*In re Estate Rowland*, 74 Cal. 523, 525, 5 Am. St. Rep. 464, 16 Pac. Rep. 315. See *In re Burdick's Estate* (Cal. April 2, 1895), 40 Pac. Rep. 85.

3. **CHILDREN'S SUCCESSION ON WIFE'S DEATH.**—Community property upon divorce of husband and wife, under decree that it should be equally divided between them, is held by them thereafter as tenants in common eo nomine, and on death of wife her half will descend to her children.—*McLeran vs. Benton*, 31 Cal. 29, 33.

4. **Community property upon death of wife** vests one half in her surviving children, husband being still living.—*Broad vs. Murray*, 44 Cal. 228, 229.

5. On death of wife community property descends one half to her only child.—*Everson vs. Mayhew*, 57 Cal. 144.

6. **DAMAGES FOR DEATH OF WIFE.**—Husband's right to recover damages for injuries suffered by his wife which caused her death, is not based upon supposition that such damages were part of her estate, which existed even moment before her death, and which passed to him under statutes relating to succession or inheritance of property.—*Redfield vs. Oakland Consol. St. R. Co.*, 110 Cal. 277, 290, 42 Pac. Rep. 822.

7. **DESCENDS SUBJECT TO COMMUNITY DEBTS.**—Community property under act of 1850, upon death of wife, descends subject to payment of community debts.—*Johnston vs. Savings Union*, 75 Cal. 134, 142, 16 Pac. Rep. 753.

8. **HUSBAND'S SUCCESSION.**—Community property, upon death of wife, belongs, without administration, to surviving husband, who has the right to dispose of it.—*Moore vs. Jones*, 63 Cal. 12, 14; *In re Estate Rowlands*, 74 Cal. 523, 525, 5 Am. St. Rep. 464, 16 Pac. Rep. 315; *Dean vs. Parker*, 88 Cal. 283, 287, 26 Pac. Rep. 91; *In re Estate Burdick*, 112 Cal. 387, 395, 44 Pac. Rep. 734; *Yoakam vs. Kingery*, 126 Cal. 30, 33, 58 Pac. Rep. 324; *Bollinger vs. Wright*, 143 Cal. 292, 295, 76 Pac. Rep. 1108.

9. **HUSBAND'S TITLE BEING DEVESTED.** Interest of wife in common property while her husband lives is intangible, and does not constitute an estate, but if upon death of wife title of husband is divested as to any portion of common property, such title passes directly to descendants of wife.—*Packard vs. Arellanes*, 17 Cal. 525, 538.

10. **HUSBAND'S TITLE, NATURE OF.**—Community property upon death of wife is not subject to administration, but goes directly to husband in his capacity of survivor to administer it for purpose of settling the community.—*Packard vs. Arellanes*, 17 Cal. 525, 538.

11. Husband holds community property after death of wife not as owner, but as surviving partner and as trustee to pay community debts and for heirs.—*Ord vs. De la Guerra*, 18 Cal. 67, 75.

12. Under the amendment of 1874 contained in Civil Code, § 1401, as to community prop-

erty, husband does not upon death of wife take by succession as upon that event estate of wife is deemed never to have existed.—Estate of Rowland, 74 Cal. 523, 525, 16 Pac. Rep. 315.

12. Community property upon death of wife goes to surviving husband without administration, but so much of it as was at time impressed with character of homestead went to survivor not merely as community property but as homestead.—In re Estate Ackerman, 80 Cal. 208, 209, 13 Am. St. Rep. 116, 22 Pac. Rep. 141.

14. Under Mexican law, upon the death of wife husband continued in possession of common property and could sell or dispose of it in liquidation of community debts.—Ord vs. De la Guerra, 18 Cal. 67, 74.

15. Under Mexican law, after death of wife, husband had entire control and right of disposition of whole gananciales or community

property, so no estate vested in children in one half of common property on decease of mother.—Panaud vs. Jones, 1 Cal. 488, 515.

16. POWER OF LEGISLATURE.—Legislature possessed power to provide mode in which wife's expectancy should be passed to husband; it might have done this by creating right by survivorship as incident to estate, but it has done this by providing for succession.—In re Estate Burdick, 112 Cal. 387, 396, 44 Pac. Rep. 734.

17. PROPERTY PURCHASED WITH SEPARATE FUNDS.—Purchase of realty conveyed to married woman for money consideration made with her separate money is her separate property, and after her death title would not vest in husband.—Moore vs. Jones, 63 Cal. 12, 14.

See note to §1402 infra.

As to succession to community property, see monographic note 12 Am. St. Rep. 90.

§ 1402. DISTRIBUTION OF COMMON PROPERTY ON DEATH OF THE HUSBAND. Upon the death of the husband, one half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition, goes to his descendants, equally, if such descendants are in the same degree of kindred to the decedent; otherwise, according to the right of representation; and in the absence of both such disposition and such descendants, is subject to distribution in the same manner as the separate property of the husband. In case of the dissolution of the community by the death of the husband, the entire community property is equally subject to his debts, the family allowance, and the charges and expenses of administration.

History: Enacted March 21, 1872, founded upon § 11 Act April 17, 1850, Stats. 1850, p. 255, as amended April 4, 1864, Stats. 1863-4, p. 363.

I. In General.

1. Applied, cited, construed, referred to, etc.
2. Construction—"Descendants" not ascending line.
3. Children—Rights vest on husband's death.
- 4, 5. Community homestead vests in wife.
6. Homestead, claims of minor child as to.
7. Same—Temporary use as, by widow's family.

II. Succession.

- 8-12. Succession—In general.
13. Same—Of wife—When succeeds to all.
14. Same—Same—When succeeds to three fourths.
- 15-17. Same—Same—When succeeds to one half.
- 18, 19. Same—Same—Not affected by husband's testament.
- 20-23. Same—Same—Effect of electing to take under husband's will.
- 24-30. Same—Same—Nature of wife's title.
31. Same—Same—Power of legislature to determine.
- 32-37. Same—Liability of estate for debts.
- 38-40. Same—Under Mexican law.

III. Community Property.

41. Husband—Knowledge of law presumed.
- 42, 43. Same—Power to dispose before Act of 1850.

44-46. Same—Under Act of 1850.

47-50. Same—Extent of testamentary disposition.

51. Same—Construction of will.

52. Testamentary capacity—How affected by decree of divorce.

53-57. Wife—Doctrine of election—Acceptance—Intention.

58, 59. Same—Effect of election.

60-63. Same—Estoppel to assert or deny will.

64-66. Same—When not put to election.

67. Husband—Right of surviving, to direct sale for payment of debts.

I. IN GENERAL.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: In re Estate Gwin, 77 Cal. 313, 314, 19 Pac. Rep. 527 (applied); In re Estate Gilmore, 81 Cal. 240, 242 (applied), 243 (applied), 22 Pac. Rep. 655; Smith vs. Olmstead, 38 Cal. 582, 586 (cited with other sections in discussion), 588 (applied), 22 Am. St. Rep. 336, 26 Pac. Rep. 521, 12 L. R. A. 46; Phelan vs. Smith, 100 Cal. 158, 163 (cited in discussion), 164 (applied), 34 Pac. Rep. 667; Frankel vs. Boyd, 106 Cal. 608, 612, 39 Pac. Rep. 939 (applied); In re Burdick's Estate (Cal. April 2, 1895), 40 Pac. Rep. 35, 36 (applied); In re Estate Burdick, 112 Cal. 387,

§95 (construed and applied), 396 (cited), 399 (construed and applied), 44 Pac. Rep. 734; In re Estate Boody, 113 Cal. 682, 688, 45 Pac. Rep. 858 (applied); In re Estate Still, 117 Cal. 509, 515, 49 Pac. Rep. 463 (applied); Sharp vs. Loupe, 120 Cal. 89, 92, 52 Pac. Rep. 134, 536 (applied).

2. CONSTRUCTION.—"Descendants" of a person are the children and grandchildren of such person and their children to the remotest degree. Term "descendants" as used in this section does not include the descending line.—Jewell vs. Jewell, 28 Cal. 232, 237.

3. CHILDREN—Rights vest on husband's death.—Inasmuch as it is the settled rule that right of surviving wife to her half of the community property vests in her immediately on the death of the husband, it must also be held that the right of the children to their half of the same property vests in them at the same time.—Smith vs. Olmstead, 88 Cal. 582, 588, 22 Am. St. Rep. 336, 26 Pac. Rep. 521, 12 L. R. A. 46.

4. COMMUNITY HOMESTEAD, UPON THE DEATH OF THE HUSBAND, immediately vests in the surviving wife.—Sanders vs. Russell, 86 Cal. 119, 120, 21 Am. St. Rep. 26, 24 Pac. Rep. 852. See Mawson vs. Mawson, 50 Cal. 539; In re Estate Headen, 52 Cal. 295; Gagliardo vs. Dumont, 54 Cal. 496; Herrold vs. Reen, 58 Cal. 443.

5. COMMUNITY PROPERTY UPON WHICH A HOMESTEAD EXISTS, upon the death of the husband vests absolutely in the widow.—Sheehy vs. Miles, 93 Cal. 288, 295, 28 Pac. Rep. 1046.

6. HOMESTEAD—Claims of minor child as to.—Rights of widow as successor to one half of community property are subject to claims of the minor child to have a homestead carved out of community property.—In re Estate Still, 117 Cal. 509, 515, 49 Pac. Rep. 463.

7. Temporary use as, by widow's family.—Community property upon death of husband vests according to this section regulating succession to such community property, subject, however, to a temporary use as a homestead by the family of the widow.—In re Estate Gilmore, 81 Cal. 240, 243, 22 Pac. Rep. 655.

II. SUCCESSION.

8. SUCCESSION IN GENERAL.—Community property, in name of intestate, on death of husband descends one half to his widow and other half to his children in equal degree.—Gage vs. Downey, 79 Cal. 140, 157, 21 Pac. Rep. 527, 855; Gage vs. Downey, 94 Cal. 241, 250, 29 Pac. Rep. 635.

9. Community property, on death of husband, under act of 1850, § 11, goes one half to wife absolutely and remaining half to descendants of deceased husband, i. e. to particular class of his heirs, if not made by him subject of testamentary disposition.—Payne vs. Payne, 18 Cal. 291, 301.

10. Real property conveyed to wife during coverture, by deeds of bargain and sale, belong to community existing between herself and husband, and upon his death she succeeded as

his survivor to one undivided one half interest therein, remaining interest descending to his heirs.—Hart vs. Robertson, 21 Cal. 346, 348.

11. Community property, under second clause, § 1, of act to regulate descents and distributions, as amended in 1862, upon death of husband, not being disposed of by his will, he leaving no descendants, goes to surviving wife and father of deceased, one half to each, of husband's half of common property.—Jewell vs. Jewell, 28 Cal. 232, 237.

12. Act of 1850, § 11, as amended 1861, limited right of surviving wife in community property to her half, without regard to whether or not deceased husband left descendants, and converted husband's half into separate estate of husband and as such made it subject to his disposal by will, and in absence of such disposition directed it to be distributed according to statute of descents and distributions.—Jewell vs. Jewell, 28 Cal. 232, 237.

13. Of wife—When succeeds to all.—Community property devised by husband to his wife, there being three children, descends entirely to wife, one half by virtue of will and other half by virtue of her right, as community property under act 1850, § 11.—Payne vs. Payne, 18 Cal. 291, 301.

14. When succeeds to three fourths.—Wife is entitled to succeed to three fourths of community property upon death of her husband without descendants, and this estate at her death passes to her heirs.—In re Estate Boody, 113 Cal. 682, 688, 45 Pac. Rep. 858. See Jewell vs. Jewell, 28 Cal. 232, 236.

15. When succeeds to one half.—Definite and certain interest to one half of community property is vested in wife, which becomes absolute at her husband's death.—Beard vs. Knox, 5 Cal. 252, 256, 63 Am. Dec. 125; In re Buchanan's Estate, 8 Cal. 507, 510; Scott vs. Ward, 13 Cal. 458, 469.

16. Community property, upon death of husband, by both the Mexican and law of California, becomes vested in wife to extent of one half.—Scott vs. Ward, 13 Cal. 458, 469.

17. On death of husband one half of community property goes to widow.—In re Estate Gwin, 77 Cal. 313, 314, 19 Pac. Rep. 527.

18. Not affected by husband's testament.—Upon death of husband one half of common property vests in his surviving wife, unaffected by any disposition he may have made of it by will.—Morrison vs. Bowman, 29 Cal. 337, 346; In re Estate Silvey, 42 Cal. 210, 212; In re Estate Frey, 52 Cal. 658, 661; Smith vs. Olmstead, 88 Cal. 582, 588, 22 Am. St. Rep. 336, 26 Pac. Rep. 521, 12 L. R. A. 46.

19. Common property is not subject to testamentary disposition of husband to such an extent as will defeat rights of surviving wife.—Beard vs. Knox, 5 Cal. 252, 257, 63 Am. Dec. 125; In re Buchanan's Estate, 8 Cal. 507, 510; Smith vs. Smith, 12 Cal. 216, 225, 73 Am. Dec. 533; Scott vs. Ward, 13 Cal. 458, 469, 470; Payne vs. Payne, 18 Cal. 291, 301; De Godey vs. Godey, 39 Cal. 157, 164; In re Estate Silvey, 42 Cal. 210, 213; Greiner vs. Greiner, 58 Cal. 115, 119.

20. Effect of electing to take under hus-

band's will fact that wife takes a beneficial interest under the will, does not estop her from asserting her title to one half of community property.—*Beard vs. Knox*, 5 Cal. 252, 257, 63 Am. Dec. 125; *In re Estate Silvey*, 42 Cal. 210, 212; *In re Estate Frey*, 52 Cal. 658, 661; *In re Estate Gwin*, 77 Cal. 313, 315, 19 Pac. Rep. 527; *In re Estate Gilmore*, 81 Cal. 240, 243, 22 Pac. Rep. 655; *In re Estate Wickersham*, 138 Cal. 355, 362, 70 Pac. Rep. 1076.

21. Wife, by accepting provisions of her husband's will, thereby elects to release and surrender her right to one half of the common property, and by implication divests herself of her title to such half, unless from such will it appears that testator did not intend to dispose of wife's share of common property.—*Morrison vs. Bowman*, 29 Cal. 337, 343.

22. Wife's acceptance of a bequest or devise under a will will not operate as an election to relinquish her right to one half of community property if, by a just construction of instrument, it appears that her husband did not intend to dispose of her share of such property.—*Morrison vs. Bowman*, 29 Cal. 337, 343. See *Noe vs. Spilvalo*, 54 Cal. 207, 209; *In re Estate Stewart*, 74 Cal. 98, 104, 15 Pac. Rep. 445; *In re Estate Gilmore*, 81 Cal. 240, 243, 22 Pac. Rep. 655; *In re Estate Redfield*, 116 Cal. 637, 643, 43 Pac. Rep. 794.

23. There being no manifest intent to devise more than one half of community property, wife may claim and take both what law gives her in community property, and also what is given her by will of her husband, in that proportion thereof subject to his testamentary disposition.—*Beard vs. Knox*, 5 Cal. 252, 254, 63 Am. Dec. 125; *Payne vs. Payne*, 18 Cal. 291, 301; *In re Estate Silvey*, 42 Cal. 210, 212; *King vs. Lagrange*, 50 Cal. 328, 332; *In re Estate Frey*, 52 Cal. 658, 660; *In re Estate Gilmore*, 81 Cal. 240, 243, 22 Pac. Rep. 655.

24. NATURE OF WIFE'S TITLE.—Wife acquires her right to absolute property in one half of community property, upon the death of her husband, by inheritance.—*In re Burdick's Estate* (Cal. April 2, 1895), 40 Pac. Rep. 35, 36.

25. Plain intent that title of wife to one half of community property shall be administered as part of estate of husband places this matter beyond all doubt as to whether or not wife takes by succession.—*In re Estate Burdick*, 112 Cal. 387, 396, 44 Pac. Rep. 734 (per Temple, J.).

26. Section 1274 is express legislative declaration that disposition of community property made in §§ 1401 and 1402 is succession.—*In re Estate Burdick*, 112 Cal. 387, 396, 44 Pac. Rep. 734 (per Temple, J.).

27. Upon death of husband entire community property is subject to control of court for purposes of administration, and at close of administration wife receives, in same manner and at same time as does heir, her share of community property—one half of surplus after paying debts and expenses of administration; she receives it, however, not as heir of her husband, but in her own right as her half of property which was acquired by herself

and her husband during coverture.—*In re Estate Burdick*, 112 Cal. 387, 400, 44 Pac. Rep. 734 (per Harrison, J.).

28. It is misapplication of term to say that property which wife acquired during marriage by her skill or labor is inherited from her husband.—*In re Estate Burdick*, 112 Cal. 387, 399, 44 Pac. Rep. 734 (per Harrison, J., who, while concurring in main decision, disagrees with majority decisions that wife takes community property by succession).

29. Surviving widow takes her share of the community property by "succession" from her husband and whatever rights she may have in estate of which he died seized is to be ascertained by same means as is right of any claimant to his estate, whether by succession or by will.—*Cunha vs. Hughes*, 122 Cal. 111, 112, 63 Am. St. Rep. 27, 54 Pac. Rep. 535.

30. Interest of the surviving widow in the community property is that of an heir, and her title to one half of the community property is to be administered as part of the estate of the husband.—*Sharp vs. Loupe*, 120 Cal. 89, 93, 52 Pac. Rep. 134, 586.

31. Same—Power of legislature to determine.—Right of surviving widow in community property is such as statute has made it, and same authority which declares extent of her rights can also declare time when, as well as mode in which, they shall be ascertained and placed under her control.—*Sharp vs. Loupe*, 120 Cal. 89, 91, 52 Pac. Rep. 134, 586.

32. Liability for debts.—Upon decease of husband, whole of common property becomes assets of estate of deceased husband, to be administered by his personal representatives and subject to payment of his debts.—*In re Estate Tompkins*, 12 Cal. 114, 125.

33. Estate in law consists of residue after all debts are paid and all of community property is liable for such debts.—*Panaud vs. Jones*, 1 Cal. 488, 516. See *Packard vs. Arelanes*, 17 Cal. 525, 537; *Johnston vs. San Francisco Savings Union*, 75 Cal. 134, 143, 7 Am. St. Rep. 129, 16 Pac. Rep. 753; *Frankel vs. Boyd*, 106 Cal. 608, 613, 39 Pac. Rep. 939.

Distinguished in *In re Estate Tompkins*, 12 Cal. 114, 125.

34. Rule expressed in this section that community property on death of husband is equally subject to debts, family allowance, and charges and expenses of administration, is same as that expressed in different terms in § 1516.—*Sharp vs. Loupe*, 120 Cal. 89, 92, 52 Pac. Rep. 134, 586.

35. Title to one half of community property under §§ 1384 and 1402 of the Civil Code, upon the death of a husband who dies an intestate, at once vests in the surviving wife, subject to the payment of debts, etc., and subject to the exercise by the probate court of the powers over it vested in that court, and qualified or subject to be qualified by the exercise of those powers.—*Phelan vs. Smith*, 100 Cal. 158, 164, 34 Pac. Rep. 667.

36. Surviving widow is not entitled to undivided portion of each piece of community property of which her husband died seized, but only to one half of residue of his estate

which shall remain after paying debts, family allowances and charges and expenses of administration.—*Sharp vs. Loupe*, 120 Cal. 39, 93, 52 Pac. Rep. 184, 536.

37. Wife's right to one half of community property is postponed to payment of debts of community.—*Morrison vs. Bowman*, 29 Cal. 337, 346. See *Packard vs. Arellanes*, 17 Cal. 525, 537.

38. Under the Spanish or Mexican law, after husband's death, property acquired during marriage is transferred to wife as absolute owner of half which he left.—*Panaud vs. Jones*, 1 Cal. 488, 515.

39. Community property, under the Mexican law, upon death of husband immediately descended to and became vested in widow and children without necessity of any administration.—*Lataillade vs. Orena*, 91 Cal. 565, 579, 25 Am. St. Rep. 219, 27 Pac. Rep. 924.

40. Under the Mexican law husband had power of disposition of community property while living, but not by will.—In re *Buchanan's Estate*, 8 Cal. 507, 510.

Wife takes community as heir on death of husband.—See ante § 1334 and note.

Community property defined.—See ante §§ 162 and 164 and notes.

See ante § 1401 and note.

As to husband or wife's power of testamentary disposition of community property, see ante § 172 and note.

As to succession to community property, see monographic note 12 Am. St. Rep. 90.

III. COMMUNITY PROPERTY.

41. HUSBAND PRESUMED TO KNOW LAW APPLICABLE to disposition of property by will; therefore to have known that he had no power to dispose, by will, of his wife's interest in community property.—In re *Estate Gilmore*, 81 Cal. 240, 242, 22 Pac. Rep. 655. See *Morrison vs. Bowman*, 29 Cal. 337, 347; In re *Estate Silvey*, 42 Cal. 210, 212; *King vs. Lagrange*, 50 Cal. 328, 332; In re *Estate Frey*, 52 Cal. 658, 660.

42. Devise of common property under act 1850 could not be made by husband so as to defeat rights of wife, although it was provided that husband should have entire control of such property, with absolute power to dispose of it.—*Beard vs. Knox*, 5 Cal. 252, 256, 63 Am. Dec. 135; *Payne vs. Payne*, 18 Cal. 291, 301.

43. TESTAMENTARY DISPOSITION BY HUSBAND OF COMMUNITY PROPERTY invalid under law of Mexico in force prior to act 1850, under which, upon death of husband, widow took one half.—In re *Estate Buchanan*, 8 Cal. 507, 510; *Scott vs. Ward*, 13 Cal. 458, 470.

44. Husband had testamentary capacity as to one half of community under act 1850, as amended in 1861, in case of his death, leaving no descendants.—*Jewell vs. Jewell*, 28 Cal. 232, 236, 237. See *Payne vs. Payne*, 18 Cal. 291, 301.

45. Husband had no testamentary capacity as to community property under act 1850, prior to its amendment in 1861, original statute providing that upon death of either spouse one half of common property should go to survivor

and other half to descendants of decedent.—*Jewell*, 28 Cal. 232, 236, 237.

46. Husband had no testamentary capacity as to community property under act 1850, as amended in 1861, where he died leaving wife and descendants, § 11 providing that in such event one half should go to surviving wife and other to his descendants.—*Jewell vs. Jewell*, 28 Cal. 232, 236, 237.

47. Testamentary capacity of husband extends to only one half of community.—In re *Estate Burdick*, 112 Cal. 387, 397, 44 Pac. Rep. 734.

48. Husband has not testamentary capacity as to wife's moiety in community property.—*Morrison vs. Bowman*, 29 Cal. 337, 346; *Greiner vs. Greiner*, 58 Cal. 115, 119; In re *Estate Gilmore*, 81 Cal. 240, 242, 22 Pac. Rep. 655; *Painter vs. Painter*, 113 Cal. 371, 376, 45 Pac. Rep. 689; *Spreckels vs. Spreckels*, 116 Cal. 339, 344, 58 Am. St. Rep. 170, 48 Pac. Rep. 228, 36 L. R. A. 497; In re *Estate Wickersham*, 138 Cal. 355, 363, 70 Pac. Rep. 1076.

49. No testamentary capacity in husband by which he can deprive the wife of her interest.—*De Godey vs. Godey*, 39 Cal. 157, 164.

50. Husband has no testamentary capacity as to one half of community property, which vests in surviving wife upon his death.—In re *Estate Silvey*, 42 Cal. 210, 213.

51. CONSTRUCTION OF WILL.—Where testator has separate property, consisting in part of what was his separate property before death of his wife and in part of community property of himself and such wife, and by one item of his will devised "all of rest, residue and remainder of my estate, both real and personal, and wherever situated," and by another item decrees that all his estate "herein devised is my separate property, and is community property of my wife and myself," such residuary devise applies as well to his separate estate not formed of community property of himself and wife as to what was originally his separate property.—In re *Estate Granniss*, 142 Cal. 1, 6, 7, 75 Pac. Rep. 324.

52. DECREE OF DIVORCE MAKING HUSBAND TRUSTEE as to undivided one third interest in community property, gives husband no testamentary capacity as to such undivided one third, as trust is personal one.—*Blanckenburg vs. Jordan*, 86 Cal. 171, 175, 24 Pac. Rep. 1061. See *Berghauser vs. Blanckenburg*, 86 Cal. 216, 220, 24 Pac. Rep. 1062.

53. WIFE IS PUT TO ELECTION WHEN WILL DEALS WITH PROPERTY OF HUSBAND, as if testator were sole owner.—In re *Estate Stewart*, 74 Cal. 98, 103, 104, 15 Pac. Rep. 445; In re *Estate Smith*, 103 Cal. 115, 119, 49 Pac. Rep. 1037.

54. Acceptance by wife of devise or bequest will not amount to election to surrender her right, unless, by just construction of will, it appears that it was intention of testator to make disposition of her share as well as his own; or unless, when such intention is not manifest, her acceptance of benefit conferred by will could not subsist consistently with disposition made by testator.—*Morrison vs.*

Bowman, 29 Cal. 337, 343. See *Church vs. Bull*, 2 Den. (N. Y.) 430, 43 Am. Dec. 754; *Bull vs. Church*, 5 Hill (N. Y.) 207; *Fuller vs. Yates*, 3 Paige Ch. (N. Y.) 325, 328; *Sanford vs. Jackson*, 10 Paige Ch. (N. Y.) 266.

55. Acceptance by party of devise is confirmation of disposition made by will.—*Morrison vs. Bowman*, 29 Cal. 337, 347, 348; *Noe vs. Splivalo*, 54 Cal. 207, 209; *Aldrich vs. Willis*, 55 Cal. 81, 87.

56. It is only where there is such clear manifestation of intent to devise whole community property as to overcome those presumptions with regard to his knowledge of law and his intention to devise only such property as that over which he had testamentary disposition, that wife can be put to her election, either to take under will or to take what she is entitled to by law.—*Morrison vs. Bowman*, 29 Cal. 337, 347, 348; *Noe vs. Splivalo*, 54 Cal. 207, 209; *In re Estate Stewart*, 74 Cal. 98, 100, 15 Pac. Rep. 445; *In re Estate Gilmore*, 81 Cal. 240, 243, 22 Pac. Rep. 655.

57. Devise of residue of his estate does not put her to election, and she may take legacy and also interest upon her community rights.—*Beard vs. Knox*, 5 Cal. 252, 253, 256, 257, 63 Am. Dec. 125; *Payne vs. Payne*, 18 Cal. 291, 301; *In re Estate Gilmore*, 81 Cal. 240, 243, 243, 22 Pac. Rep. 655.

58. EFFECT OF ELECTING AND RENOUNCING COMMUNITY RIGHTS by widow is not to make gift or conveyance to other legatee.—*In re Estate Wickersham*, 133 Cal. 355, 362, 363, 70 Pac. Rep. 1076.

59. ELECTION MADE UNDER MISAPPREHENSION and under proof that she was put to election, when in fact she was not, does not affect her title to one half of community property.—*In re Estate Wickersham*, 133 Cal. 355, 363, 70 Pac. Rep. 1076.

60. Estoppel to assert—By causing will of her husband to be probated, and by becoming testatrix thereof, widow is not estopped to make election to take under law.—*In re Estate Gwin*, 77 Cal. 313, 314, 19 Pac. Rep. 527.

61. Unless by former acts in dealing with property she is estopped from making election, widow may elect to take her half of common property upon distribution of estate; such for-

mer actions constituting previous election will be tested by rules of estoppel.—*In re Estate Smith*, 108 Cal. 115, 120, 40 Pac. Rep. 1037.

62. Widow's election to take under will estops her from denying validity thereof, but such election does not estop her from insisting on proper interpretation of will nor from questioning validity of trusts which it attempts to create.—*In re Estate Walkerly*, 108 Cal. 627, 659, 49 Am. St. Rep. 97, 41 Pac. Rep. 772.

63. Declaration of widow that she wishes will to stand, referring to will which disposes of all property of community, is without weight or value as election to take under will, unless it be further shown that she had full knowledge of facts concerning the property and of her right to election at time she made statement.—*In re Estate Smith*, 108 Cal. 115, 121, 122, 40 Pac. Rep. 1037.

64. Widow is not put to election when testator dies leaving nothing but community property, and he devises certain real and personal property to her, and "remainder of my estate" to be divided between her equally and all children except one, to whom he had made advancement.—*In re Estate Wickersham*, 133 Cal. 355, 363, 70 Pac. Rep. 1076.

65. ELECTION—Devise of all property of which testator "might die seized" in B county to his sons, when testator had no property in such county except community property, does not put widow to her election.—*In re Estate Gwin*, 77 Cal. 313, 314, 315, 19 Pac. Rep. 527.

66. Devise "of all my property of which I may die possessed" will not be construed as manifesting an intent to devise whole community property of which testator was possessed so as to put wife to her election.—*In re Estate Gilmore*, 81 Cal. 240, 243, 22 Pac. Rep. 655.

67. SURVIVING HUSBAND MAY DIRECT SALE FOR PAYMENT OF DEBTS in his will, under act 1850, and may include not only such debts as were contracted during continuance of marriage, but also such as were contracted by him after dissolution of marriage by death of wife, and such will is valid as against his surviving children.—*Panaud vs. Jones*, 1 Cal. 483, 513-517.

§ 1403. INHERITANCE BY REPRESENTATION. Inheritance or succession "by right of representation" takes place when the descendants of any deceased heir take the same share or right in the estate of another person that their parents would have taken if living. Posthumous children are considered as living at the death of their parents.

History: Enacted March 21, 1872, founded upon § 11 Act April 13, 1850, Stats. 1850, p. 221.

Descent or hereditary succession is title whereby man on death of his ancestor acquires his estate by right of representation as

his heir at law.—*In re Estate Donahue*, 36 Cal. 329, 332.

§ 1404. ALIENS MAY INHERIT, WHEN, AND HOW. Resident aliens may take in all cases by succession as citizens; and no person capable of succeeding under the provisions of this title is precluded from such succession by reason of the

alienage of any relative; but no non-resident foreigner can take by succession unless he appears and claims such succession within five years after the death of the decedent to whom he claims succession.

History: Enacted March 21, 1872, founded upon Const. 1849, art. I, § 17, and § 1 Act April 19, 1856, Stats. 1856, p. 137.

1. Applied, cited, construed, referred to, etc.
- 2-8. Constitutional provisions.
- 9, 10. Constitutionality of statute.
- 11-13. Disability of non-resident alien to inherit.
14. Same—At common law.
15. Same—May be removed by treaty.
- 16, 17. Non-resident aliens may now inherit.
18. Same—Under Mexican law.
19. Same—Object of code provisions.
20. Same—May appear by attorney.
- 21, 22. Same—Effect of failure to claim estate within five years.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc.**, in: In re Estate Porter, 129 Cal. 86, 90, 79 Am. St. Rep. 78, 61 Pac. Rep. 659 (cited); In re Estate Pendergast, 143 Cal. 135, 140, 76 Pac. Rep. 962 (applied).

2. **CONSTITUTIONAL PROVISIONS.**—Aliens by the common law cannot take property by descent, and constitution 1849 only removes the disability in this respect from those who are bona fide residents within the state.—Norris vs. Hoyt, 18 Cal. 217, 219.

3. **Constitution of California 1849, art. 1**, in providing that "aliens who are or may become bona fide residents of this state shall be entitled to enjoy same rights in respect to possession, enjoyment, and inheritance of property as native-born citizens," negatives any supposed right which non-resident alien heirs would otherwise have to inherit.—Siemssen vs. Bofer, 6 Cal. 250, 254.

4. **Constitution 1849 removes the disability of alienage to inherit only as to such foreigners as are bona fide residents of state**; it leaves right of non-resident foreigners in respect to inheriting real property as it exists at common law.—Farrell vs. Enright, 12 Cal. 450, 456.

5. **Constitution 1879, § 4, art. IX**, does not limit power of legislature to declare that aliens may be heirs.—State vs. Smith, 70 Cal. 153, 157, 12 Pac. Rep. 121.

6. **Art. I, § 17**, prohibits legislature from depriving resident foreigners of any of rights enjoyed by native-born citizens with respect to the inheritance of property.—State vs. Smith, 70 Cal. 153, 155, 12 Pac. Rep. 121.

7. **Neither the constitution of 1849 nor that of 1879 inhibited legislature rendering non-resident alien capable of inheriting property in this state.**—In re Estate Billings, 65 Cal. 593, 595, 4 Pac. Rep. 639.

8. **Right of state to declare an alien capable of inheriting property, and holding same, within its borders, in absence of treaty between United States and alien's country, is not precluded by United States constitution, art. I, par. 10, declaring that no state shall enter into any treaty, alliance or confederation.**—Blythe vs. Hinckley, 180 U. S. 333, bk. 45 L. ed. 563, 21 Sup. Ct. Rep. 390.

See par. 15 this note.

9. CONSTITUTIONALITY OF STATUTE—

The provisions of codes which give right to inherit to foreigners who are not bona fide residents are not inconsistent with provisions of § 17, art. I, constitution of California.—Lyons vs. State, 67 Cal. 380, 382, 7 Pac. Rep. 763 (approved in Carrasco vs. State, 67 Cal. 385, 386, sub nom. State vs. Carrasco, 7 Pac. Rep. 766, following State vs. Rogers, 13 Cal. 159; In re Estate Billings, 64 Cal. 427, 1 Pac. Rep. 791).

10. **Act April 19, 1856, entitled "An act relative to escheated estate"** (Stats. 1856, 137), giving non-resident aliens right to inherit same as native-born citizens, is not unconstitutional.—State vs. Rogers, 13 Cal. 159, 165.

11. **THE DISABILITY OF NON-RESIDENT ALIENS TO INHERIT.**—Non-resident aliens cannot inherit under the laws of California.—Siemssen vs. Bofer, 6 Cal. 250, 254.

12. **Resident of Canada at the time of death of resident of California of whom she was heir, could not inherit from him, although shortly after his death she removed from Canada to California.**—Farrell vs. Enright, 12 Cal. 450, 456.

13. **Alien, at common law, was not of inheritable blood, and that disability attaches in this case unless it has been removed by express law.**—Blythe vs. Hinckley, 127 Cal. 431, 435, 59 Pac. Rep. 787.

14. **At common law aliens could not take property by descent or through mere operation of law.**—Farrell vs. Enright, 12 Cal. 450, 456; Lick vs. Stockdale, 18 Cal. 219; Carrasco vs. State, 67 Cal. 385, 386, sub nom. State vs. Carrasco, 7 Pac. Rep. 766; Blythe vs. Hinckley, supra.

15. **May be removed by treaty.**—Disability of aliens to inherit may be removed by treaty between United States and foreign countries.—People ex rel. Attorney-General vs. Clark, 5 Cal. 381, 385.

See par. 8 this note.

16. **NON-RESIDENT ALIENS MAY NOW INHERIT.**—Under provisions of this section, non-resident aliens may inherit property in California equally with heirs of same degree resident therein.—In re Estate Billings, 65 Cal. 593, 595, 4 Pac. Rep. 639.

17. **Provisions of section are clear and unambiguous and clearly imply that upon the death of deceased estate vests as a conditional estate in non-resident alien heir, subject only to contingency that if he fails to appear and claim within five years his right ceases.**—In re Estate Pendergast, 143 Cal. 135, 140, 76 Pac. Rep. 962.

18. **Under laws of Mexico aliens could inherit real estate.**—McNeill vs. Polk, 57 Cal. 323, 324. See Ramirez vs. Kent, 2 Cal. 552, 560; People vs. Folsom, 5 Cal. 373; Merle vs. Mathews, 26 Cal. 455, 477; Racouillat vs. Sansvain, 32 Cal. 376, 386.

19. Object of the provisions of codes was to give non-resident aliens substantially same rights in succession to property of deceased relative as are secured to resident aliens by constitution.—*Carrasco vs. State*, 67 Cal. 385, 386, sub nom. *State vs. Carrasco*, 7 Pac. Rep. 766.

20. May appear by attorney.—Under this section it is not necessary that non-residents, in order to inherit property in this state, should come to this state in person to file their petition and claim property; they may appear by attorney.—*Lyons vs. State*, 67 Cal. 380, 384, 7 Pac. Rep. 763.

21. Effect of failure to claim estate within five years.—Share in estate of non-resident alien who is barred from taking by succession by reason of fact that he does not claim within five years does not revert to estate to be inherited by other heirs.—*In re Estate Pendergast*, 143 Cal. 135, 140, 76 Pac. Rep. 962.

22. Failure to administer estate of deceased until after lapse of twenty-three years will

not entitle non-resident aliens to claim who did not appear until after five years after death of ancestor from whom they would inherit.—*In re Estate Pendergast*, 143 Cal. 135, 141, 76 Pac. Rep. 962.

Aliens may take by succession.—See ante §§ 671 and 672 and notes.

See also notes under following §§ 1405, 1406.

As to rights of aliens to transmit or receive an inheritance, see monographic note 12 Am. St. Rep. 93.

As to who are aliens, see monographic note 34 Am. Dec. 210.

As to alien's right to inherit, see monographic note by Ernest Watts, 31 L. R. A. 177.

As to effect of state constitutions and statutes upon question of inheritance by or from an alien, see monographic notes by Ernest Watts, 31 L. R. A. 85, 146.

As to effect of treaties upon an alien's rights to inherit, see monographic note by Ernest Watts, 32 L. R. A. 177-189.

§ 1405. SUCCESSION NOT CLAIMED, ATTORNEY-GENERAL TO CAUSE TO BE SOLD, AND PROCEEDS DEPOSITED WITH STATE TREASURER.

When succession is not claimed as provided in the preceding section, the superior court, on information, must direct the attorney-general to reduce the property to his possession or that of the state, or to cause it to be sold, and it or its proceeds to be deposited in the state treasury for the benefit of the person entitled thereto, to be paid to him, if, within five years after such deposit, he appears in the court in which such information was filed and asks for a judgment or order entitling him thereto.

History: Enacted March 21, 1872, founded upon § 1 Act April 19, 1856, Stats. 1856, p. 137; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 406, held unconstitutional, see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXLIX, p. 609.

1. Applied, cited, construed, referred to, etc.
2, 3. Construction.—Time to commence escheat proceedings.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *People ex rel. Attorney-General vs. Roach*, 76 Cal. 294, 297 (cited), 298 (construed), 18 Pac. Rep. 407; *In re Estate Porter*, 129 Cal. 86, 90, 79 Am. St. Rep. 78, 61 Pac. Rep. 659 (cited).

2. CONSTRUCTION.—Time to commence escheat proceedings.—Presumption of law is that every intestate has left some one on earth entitled to claim as his heir, however remote,

and legislature did not intend that proceeding to escheat estate should be begun before expiration of five years.—*People ex rel. Attorney-General vs. Roach*, 76 Cal. 294, 297, 18 Pac. Rep. 407.

3. This section seems to imply that it is only when succession is not claimed within five years after death of decedent that proceedings may be commenced to reduce property to possession of state.—*People ex rel. Attorney-General vs. Roach*, 76 Cal. 294, 298, 18 Pac. Rep. 407.

When property escheats.—See ante § 1386 subd. 10, post § 1406.

§ 1406. WHEN THE PROPERTY AND ESTATE ESHEAT TO THE STATE.

When such judgment or order is obtained, a certified copy thereof must be filed with the state treasurer as his voucher. Thereupon the property must be delivered, or the proceeds paid, to the claimant, on filing his receipt therefor. If no one succeeds to the estate or the proceeds, as herein provided, the property of the decedent devolves and escheats to the people of the state, and must be placed by the state treasurer to the credit of the school fund.

History: Enacted March 21, 1872, founded upon § 1 Act April 19, 1856, Stats. 1856, p. 137; amended by Code Commission, Act March 16, 1901, Stats. and Amdts. 1900-1, p. 407, held unconstitutional, see history, § 4 ante; amendment re-enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXLIX, p. 610.

1. Applied, cited, construed, referred to, etc.
- 2, 3. Escheat is not worked, when.
- 4-6. Property escheats, when.

1. Applied, cited, construed, referred to, etc., in: *People ex rel. Attorney-General vs. Roach*, 76 Cal. 294, 297 (cited), 298 (construed and applied), 18 Pac. Rep. 407; *In re Estate Porter*, 129 Cal. 86, 90, 79 Am. St. Rep. 78, 61 Pac. Rep. 659 (cited).

2. Escheat is not worked, when.—Non-resident alien may assign his right of succession to property in this state without working forfeiture thereof.—*Carrasco vs. State*, 67 Cal. 385, 387, sub nom. *State vs. Carrasco*, 7 Pac. Rep. 766.

3. Deposit of money in state treasury by order of court, being proceeds of estate unclaimed by heirs, does not work escheat to state, and heirs may come in twenty years afterwards and claim such money.—*In re Estate Miner*, 143 Cal. 194, 198, 76 Pac. Rep. 968.

4. Property escheats, when.—If no heirs appear to claim property when administration thereof is in condition to be closed, it

will escheat to state.—*In re Estate Porter*, 129 Cal. 86, 90, 79 Am. St. Rep. 78, 61 Pac. Rep. 659.

5. From this section it would appear that state would take possession of property when no one claims it within five years after death of decedent, but that property will not escheat until five years thereafter. Section 1407 confirms this view.—*People ex rel. Attorney-General vs. Roach*, 76 Cal. 294, 298, 18 Pac. Rep. 407.

6. Where non-resident alien falls within five years from time he is entitled to succession to property of which he is heir to appear and claim property, his share does not go back to estate to be inherited by other heirs, but vests in state, not strictly by escheat for want of heirs, but virtually by effect of statute.—*In re Estate Pendergast*, 143 Cal. 135, 140, 76 Pac. Rep. 962. See *Lyons vs. State*, 67 Cal. 380, 384, 7 Pac. Rep. 763; *State vs. Smith*, 70 Cal. 153, 156, 12 Pac. Rep. 121; *People ex rel. Attorney-General vs. Roach*, 76 Cal. 294, 296, 18 Pac. Rep. 407.

§ 1407. PROPERTY ESCHEATED SUBJECT TO CHARGES AS OTHER PROPERTY. Real property passing to the state under the last section, whether held by the state or its officers, is subject to the same charges and trusts to which it would have been subject if it had passed by succession, and is also subject to all the provisions of title eight, part three, of the Code of Civil Procedure.

History: Enacted March 21, 1872, founded upon Act April 30, 1855, Stats. 1855, pp. 221, 222, as amended by Act February 16, 1870, Stats. 1869-70, pp. 72, 73.

1. Applied, cited, construed, referred to, etc.
2. Escheated property subject to administration.

1. Applied, cited, construed, referred to, etc., in: *People ex rel. Attorney-General vs. Roach*, 76 Cal. 294, 297 (cited in discussion), 298 (cited), 299 (construed), 18 Pac. Rep. 407.

2. Administration is clearly one of the

"charges and trusts" to which property subject to escheat is subject; title eight referred to in this section makes no provision for payment of funeral expenses, expenses of last illness, or debts of decedent.—*People ex rel. Attorney-General vs. Roach*, 76 Cal. 294, 299, 18 Pac. Rep. 407.

§ 1408. SUCCESSOR LIABLE FOR DECEDENT'S OBLIGATIONS. Those who succeed to the property of a decedent are liable for his obligations in the cases and to the extent prescribed by the Code of Civil Procedure.

History: Enacted March 21, 1872.

See ante § 1384 note.

See title XI part III, Code Civ. Proc.

As to debts being paid before distribution, see 8 Prob. Rep. 194.

As to liability of heirs for debts of ancestor, see monographic note 48 Am. Dec. 395; note by B. A. Rich, 21 L. R. A. 89.

§ 1409 PERSON CONVICTED OF MURDER OF DECEDENT, NOT TO SUCCEED. No person who has been convicted of the murder of the decedent shall be entitled to succeed to any portion of his estate; but the portion thereof to which he would otherwise be entitled to succeed descends to the other persons entitled thereto under the provisions of this title.

History: Enacted March 21, 1905, Stats. and Amdts. 1905, c. CDXLIX, p. 610.

1. Legislature may deprive criminals of right to inherit.
2. Prisoner for life cannot inherit.
- 3, 4. Murderer prohibited from taking.
5. Same—When entitled.

1. LEGISLATIVE POWER.—Right of inheritance is a civil right existing only by virtue of the law, and the legislature may make the deprivation of this right a portion of the penalty to be imposed for the co-

mission of a crime.—In re Estate Donnelly, 125 Cal. 417, 419, 73 Am. St. Rep. 62, 58 Pac. Rep. 61.

2. One sentenced to imprisonment for life for a crime cannot inherit property.—In re Estate Donnelly, 125 Cal. 417, 419, 73 Am. St. Rep. 62, 58 Pac. Rep. 61.

3. MURDERER PROHIBITED from taking either by descent or under will from party murdered.—Riggs vs. Palmer, 115 N. Y. 506, 12 Am. St. Rep. 819, 22 N. E. Rep. 188, 5 L. R. A. 340.

As to right of murderer to take by descent, see monographic note by Robert Desty, 5 L. R. A. 340-346.

As to how far statutes will be regarded as having abrogated the maxim that one cannot profit by his own wrong, see monographic note by H. P. Farnham, 25 L. R. A. 564-573.

4. Procuring policy upon life of another payable at death, and then murders him, person not entitled to recover under policy.—New York Mut. L. Ins. Co. vs. Armstrong, 117 U. S. 591, 599, bk. 29 L. ed. 997, 1000, 6 Sup. Ct. Rep. 877.

5. MURDERER ENTITLED to take where statute prohibits attainders working corruption to blood and forfeitures.—Carpenter's Estate, 170 Pa. St. 203, 50 Am. St. Rep. 765, 32 Atl. Rep. 637, 29 L. R. A. 145.

TITLE VIII.

WATER-RIGHTS.

- § 1410. Rights to water may be acquired by appropriation.
- § 1411. Appropriation must be for a useful purpose.
- § 1412. Point of diversion may be changed.
- § 1413. Water may be turned into natural channels.
- § 1414. First in time, first in right.
- § 1415. Notice of appropriation of water; contents. Recording.
- § 1416. Diligence in appropriation of water.
- § 1417. Completion defined.
- § 1418. Doctrine of relation applied.
- § 1419. Forfeiture.
- § 1420. Rights of present claimant.
- § 1421. Recorder to keep book in which to record notice.
- § 1422. Time within which to commence excavation on public reservations.

§ 1410. **RIGHTS TO WATER MAY BE ACQUIRED BY APPROPRIATION.**
The right to the use of running water flowing in a river or stream or down a cañon or ravine may be acquired by appropriation.

History: Enacted March 21, 1872.

I. In General.

- 1. Applied, cited, construed, referred to, etc.
- 2. "Appropriation" has statutory technical meaning.
- 3. Appropriation of more water than needed.
- 4-9. History of doctrine in this state.
- 10-14. Measurement of water and ditch capacity.
- 15. Rights of appropriation arise, how.
- 16. Statutory appropriation not necessary to prescription.
- 17. Surface water may add to value of ditch.
- 18. Unlawful appropriation cannot be authorized.
- 19. Same—Cannot be justified, how.
- 20. Water-right is principal thing.
- 21, 22. Water-right may be transferred.

II. United States Laws Affecting Construction of.

- 23, 24. In general—Act 1866—Water-right covered by.
- 25. Same—Rights before passage of act.
- 26. Same—Under acts of 1866 and 1870.
- 27-29. Same—Vested and accrued rights only are protected by acts.
- 30-34. Ditches and right of way for as affected by acts.

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35-41. Limitation of acts of 1866 and 1870.

42-49. Prior rights recognized and confirmed by said acts.

III. State Laws Affecting.

- 50, 51. Purpose of title eight, Civil Code.
- 52. Section not limited to public lands.
- 53. Statutes do not reserve use of water from grants.
- 54. Statutes 1868—Construction of.
- 55. Title eight operates as grant of servitude, when.

IV. What Is Capable of Appropriation.

- 56. In general, property in water.
- 57. Same—Usufruct in water.
- 58-61. Same—Right to appropriate waters of streams.
- 62. Same—Right includes, what.
- 63, 64. Percolating waters—Right to appropriate.
- 65-68. Right to appropriate after entry of public lands.
- 69, 70. Surplus or waste water.
- 71. Surface water.
- 72, 73. Under Mexican law.
- 74, 75. Waters on private property.
- 76-78. Waters flowing from springs.

V. Who May Appropriate Water.

- 79, 80. Aliens may appropriate.
- 81, 82. Any person may appropriate.

- 83. Miners may appropriate.
- 84. Municipal corporation cannot appropriate, when.
- 85. Private party cannot appropriate, when.
- 86. Occupants of government land may appropriate, when.
- 87, 88. Riparian proprietor may appropriate.
- 89. State legislature, power of.
- VI. Title Acquired by Appropriators.
 - 90, 91. Absolute property to water.
 - 92. Appropriator not owner of "body" of water.
 - 93. Interest acquired is not property.
 - 94. Ownership of water acquired.
 - 95. Power of control is exclusive.
 - 96. Quasi-private proprietorship.
 - 97-100. Right of property is usufructuary.
 - 101. Water not personal property, when.
- VII. Rights of Appropriators, in General.
 - 102. Appropriator's claim to water, extent of.
 - 103. Appropriator cannot waste water.
 - 104. Appropriator's rights to bed of stream.
 - 105. Cannot complain of quality of water, when.
 - 106. Causing to flow irregularly.
 - 107. Depriving of use of water.
 - 108. Ditch-owner's right to have water flow.
 - 109. Enlarging ditch.
 - 110. Injunction against trespasser.
 - 111. Injury by erecting dam.
 - 112-114. Intention of appropriator and nature of use.
 - 115-117. Landowner's rights as affecting appropriators of water.
 - 118-120. May use water at any place.
 - 121-123. Mexican law—Rights acquired under same.
 - 124. Mine-owner's rights as affecting appropriators of water.
 - 125-128. Nature of right as against others.
 - 129-132. Necessary water only can be appropriated.
 - 133-135. Not limited to quantity first used—Exception to rule.
 - 136. Percolating waters—Right to destroy.
 - 137. Presumption as to extent of rights.
 - 138, 139. Protection against throwing refuse into stream.
 - 140, 141. Quantity and quality of water.
 - 142. Right to flow back on public domain.
 - 143. Right to maintain ditch.
 - 144. Right to use water is sufficient for protection.
 - 145-147. Tenants in common—Appropriators are—Each can sue.
- VIII. Rights of Subsequent Appropriators.
 - 148-152. Right to surplus water.
 - 153, 154. Right to use when prior appropriator is not using.
 - 155, 156. Rights not conflicting with prior appropriator.
- IX. Rights as Against Federal or State Grants and Patents.
 - 157. Patent from government not affected by appropriation, when.
 - 158-167. Prior appropriator superior to subsequent purchaser, grantee, or patentee.

168. Prior grantee superior to subsequent appropriator.

X. Relative Rights of Appropriators for Different Purposes.

- 169. As between mills and mines.
- 170. As between miners.
- 171. As between miner and agriculturist.

XI. Duty to Repair Ditches, Etc.

- 172. Appropriator must keep ditch in repair.
- 173-176. Care required as to ditches.
- 177-179. Responsibility for damage by ditches.
- 180. When a ravine is a ditch.

I. IN GENERAL.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Lux vs. Haggin* (Cal. Oct. 27, 1884), 4 Pac. Rep. 919, 924, 925 (applied), 936 (dis. op., construed and applied); *Lux vs. Haggin*, 69 Cal. 255, 368 (applied); 370 (referred to), 371, 372 (construed), 427, 452 (applied), 10 Pac. Rep. 674; *Ely vs. Ferguson*, 91 Cal. 187, 190, 27 Pac. Rep. 587 (construed); *Southern Pac. R. Co. vs. Dufour*, 95 Cal. 615, 616, 30 Pac. Rep. 783, 19 L. R. A. 92 (applied); *Watterson vs. Saldunbehere*, 101 Cal. 107, 112, 35 Pac. Rep. 432 (construed and applied); *Wood vs. Etiwanda Water Co.*, 122 Cal. 152, 153, 54 Pac. Rep. 736 (applied).

2. **"APPROPRIATION," AS APPLIED TO THE ACQUIREMENT AND RIGHT** to use of water, has, in this state, statutory technical meaning, and simple act of appropriation under statute will not of itself defeat or extinguish any prior right.—*Alta L. & W. Co. vs. Hancock*, 85 Cal. 219, 223, 20 Am. St. Rep. 217, 24 Pac. Rep. 645.

3. **APPROPRIATION OF MORE WATER THAN THEY USE FOR BENEFICIAL PURPOSES**, or if they wilfully waste it, court has power to give proper relief; but to allow other parties to give them certain number of inches in lieu of amount they have right to as prior appropriators, would be to introduce new rule as to water-rights in this state.—*Bledsoe vs. Decrow*, 132 Cal. 312, 315, 64 Pac. Rep. 397.

4. **HISTORY OF DOCTRINE IN THIS STATE**.—Absence of legislation on the subject of appropriation of waters has devolved on the courts of California necessity of framing rules for protection of mining and other great interests.—*Hoffman vs. Stone*, 7 Cal. 46, 48.

5. As respects use of water for mining purposes doctrine of the common law declaratory of rights of riparian owners was at an early day, after the discovery of gold, found to be inapplicable, or applicable only in very limited extent, to necessities of miners, and inadequate to their protection.—*Atchison vs. Peterson*, 87 U. S. (20 Wall.) 507, 514, bk. 23 L. ed. 414.

6. **Doctrine of appropriation is not the doctrine of the common law**.—*Lux vs. Haggin*, 69 Cal. 255, 387, 10 Pac. Rep. 674.

7. Fact early manifested itself that mines of state could not be successfully worked without proprietorship in waters; and to protect those who by their energy, industry, and capital, had constructed canals and races car-

rying water for miles into parts of country which must otherwise have remained unfruitful and undeveloped, it was held that first appropriator acquired special property in waters thus appropriated.—*Hoffman vs. Stone*, 7 Cal. 46, 49.

8. Former decisions of this court in cases involving the right of parties to appropriate waters for mining and other purposes have been based upon wants of community and peculiar condition of things in this state (for which there is no precedent) rather than an absolute rule of law governing such cases.—*Hoffman vs. Stone*, 7 Cal. 46, 48.

9. Ever since the case of *Tartar vs. Spring Creek W. & Min. Co.*, 5 Cal. 395, 397, decided in 1855, it has been held generally throughout the Pacific states and territories that right to water by prior appropriation for any beneficial purpose is entitled to protection.—*Basey vs. Gallagher*, 87 U. S. (20 Wall.) 670, bk. 22 L. ed. 452.

10. MEASUREMENT OF WATER AND DITCH CAPACITY.—Capacity of appropriation ditch, making due allowance for evaporation, seepage, etc., is amount of water it will carry from point of diversion to point of use.—*Union M. & Min. Co. vs. Dangberg*, 81 Fed. Rep. 73. See *Posachane Water Co. vs. Standart*, 97 Cal. 476, 477, 32 Pac. Rep. 532.

11. It is usually the case that amount of water to which several appropriators claiming its use are entitled, is measured by inches, according to miner's measurement, or by capacity of ditches through which it is conducted from the stream; but there is no reason why the amount may not be measured in some other mode.—*Smith vs. O'Hara*, 43 Cal. 371, 376.

12. Quantity of water appropriated is generally to be measured by capacity of the ditch or flume at its smallest point, e. g. at point where least water can be carried through it.—*Union M. & Min. Co. vs. Dangberg*, 81 Fed. Rep. 73. See *Barnes vs. Sabron*, 10 Nev. 217, 224.

13. It does not follow from fact that ditch has dimension to divert 1,000 inches from stream that its dimension will carry that quantity, or any part of it, to place of use.—*River-side W. Co. vs. Sargent*, 112 Cal. 230, 234, 44 Pac. Rep. 560.

14. There is no difference in principle between appropriation of waters measured by time and those measured by volume.—*Smith O'Hara*, 43 Cal. 371, 376. See *Santa Paula W. W. vs. Peralta*, 113 Cal. 33, 44, 45 Pac. Rep. 168; *Barnes vs. Sabron*, 10 Nev. 245.

15. RIGHTS OF APPROPRIATION ARISE OUT OF SOME LAW OR AGREEMENT OR GRANT OR PRESUMPTION of grant, or by operation of statute of limitations.—*Lux vs. Haggin* (Cal. Oct. 27, 1884), 4 Pac. Rep. 919, 922.

16. STATUTORY APPROPRIATION IS NOT NECESSARY TO PRESCRIPTION, but it gives to one who seeks to acquire right by prescription advantage that it gives to prior claimant's notice that his user is adverse and under claim of right, and sets statute in motion against such prior claimant.—*Alta L.*

& *W. Co. vs. Hancock*, 85 Cal. 319, 323, 20 Am. St. Rep. 217, 24 Pac. Rep. 645.

17. SURFACE WATER FROM RAINS AND MELTED SNOW which naturally drain into appropriate ditch, to extent to which it adds to quantity of water received into ditch, may add to value of ditch and its loss may cause injury.—*Jacob vs. Lorenz*, 98 Cal. 332, 339, 33 Pac. Rep. 119.

18. UNLAWFUL APPROPRIATION OF WATER CANNOT BE AUTHORIZED by an upper riparian proprietor as against lower proprietor.—*Heilbron vs. F. S. Canal Co.*, 75 Cal. 426, 432, 7 Am. St. Rep. 183, 17 Pac. Rep. 335.

19. Unlawful appropriation of water cannot be justified on ground that injury inflicted thereby is inconsiderable.—*Heilbron vs. F. S. Canal Co.*, 75 Cal. 426, 431, 7 Am. St. Rep. 183, 17 Pac. Rep. 335.

20. WATER-RIGHT, NOT DITCH, IS PRINCIPAL THING, and if either is appurtenant to other, ditch is appurtenant to water-right.—*Jacob vs. Lorenz*, 98 Cal. 332, 341, 33 Pac. Rep. 119.

21. WATER-RIGHTS ACQUIRED BY APPROPRIATION MAY BE TRANSFERRED like other property.—*McDonald vs. Bear River, A. W. & M. Co.*, 13 Cal. 220, 233. See *Hindman vs. Risor*, 21 Oreg. 112, 118, 27 Pac. Rep. 13.

22. Where title of water appropriator originated prior to 1852, it is not material at what time it was conveyed to party claiming under it, providing that right accrued before riparian rights attached.—*Jacob vs. Lorenz*, 98 Cal. 332, 341, 33 Pac. Rep. 119.

IL UNITED STATES LAWS AFFECTING.

23. ACT OF JULY, 1866, AND AMENDATORY ACT OF JULY 9, 1870, APPLY, not only to water-rights accruing prior to the former act, but also to such rights acquired after passage of acts.—*Jacob vs. Lorenz*, 98 Cal. 332, 336, 33 Pac. Rep. 119. See *Hobart vs. Ford*, 6 Nev. 77; *Barnes vs. Sabron*, 10 Nev. 217.

24. ACT OF CONGRESS OF 1866 RECOGNIZES RIGHT TO WATER by prior appropriation for agricultural and manufacturing purposes as well as for mining.—*Basey vs. Gallagher*, 87 U. S. (20 Wall.) 670, bk. 22 L. ed. 452.

25. Rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, in region where such artificial use of water was absolute necessity, are rights which government had by its conduct recognized and encouraged and was bound to protect before passage of act of 1866.—*Broder vs. Natoma W. & Min. Co.*, 101 U. S. 274, 275, bk. 25 L. ed. 790.

26. UNDER ACT OF CONGRESS JULY 26, 1866, AND JULY 9, 1870, riparian rights of homestead claimant are subject and subordinate to prior appropriation of water.—*South Yuba W. & Min. Co. vs. Rosa*, 80 Cal. 333, 337, 22 Pac. Rep. 222.

27. Vested and accrued rights only are protected by acts.—It is only vested and accrued

rights to the use of waters which are reserved by the operation of the acts of Congress of 1866 and 1870 (now embodied in §§ 2339 and 2340, U. S. Rev. Stats.), from interest that without those provisions would vest in the homestead claimant.—*McGuire vs. Brown*, 106 Cal. 660, 667, 39 Pac. Rep. 1060, 30 L. R. A. 384.

28. Section 2339, U. S. Rev. Stats., merely provides for protecting rights to use of water vested and accrued by priority of possession and as are recognized and acknowledged by local customs, laws, and decisions of courts.—*Taylor vs. Abbott*, 103 Cal. 421, 424, 37 Pac. Rep. 408.

29. Section 9 of the act of Congress of 1866 and § 17 of the act of Congress of 1870 refer only to the interests of those who have gone upon public domain and done acts of ownership there which government, as proprietor, could have prevented, but in which it acquiesced.—*Cave vs. Tyler*, 133 Cal. 566, 569, 65 Pac. Rep. 1089.

30. DITCHES AND RIGHT OF WAY FOR AS AFFECTED BY ACTS.—Act of Congress of 1866 (U. S. Rev. Stats. § 2339) operated as grant by United States of water appropriated and diverted upon public lands of United States of right of way for ditches and canals by which water is conveyed and by § 2340 "all patents granted, or pre-emptions or homesteads allowed, shall be subject to any vested and accrued water-rights or rights to ditches and reservoirs used in accordance with such water-rights as may have been acquired or recognized by the preceding section."—*Wood vs. Etiwanda W. Co.*, 122 Cal. 152, 158, 54 Pac. Rep. 726.

31. Clause in ninth section of act of Congress of 1866, "and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed," cannot be construed to enlarge grant to ditch owners so as to include right not "recognized and acknowledged by the local customs, laws, and decisions of the courts."—*Titcomb vs. Kirk*, 51 Cal. 288, 294.

32. Prior appropriator of water on public land who had acquired right to use of water which was "recognized and acknowledged by the local customs, laws, and decisions of courts" prior to act of Congress of July 26, 1866, was granted by that act right of way and ditch through which water was running at date of passage of act.—*Broder vs. Natoma W. & Min. Co.*, 50 Cal. 621, 623. See *Farley vs. Spring V. Min. & Irr. Co.*, 58 Cal. 142, 144.

33. Proviso of act of Congress of 1866 does not authorize construction of ditch or canal across mining claim by another.—*Titcomb vs. Kirk*, 51 Cal. 288, 294.

34. While rights of rival claimant and appropriators as between themselves had for long time been recognized and adjusted both by mining customs and adjudication in state courts, it was not until 1866 that they met with federal cognizance and sanction. In that year United States conferred upon those who had or who might thereafter appropriate water and conduct same over public lands license to do so, and further provided that all patents

granted or pre-emptions or homesteads allowed should be subject to any such vested and accrued water-rights and to rights to ditches and reservoirs used in accordance with such water-rights as might have been acquired under or recognized by act (U. S. Rev. Stats. §§ 2339, 2340).—*Smith vs. Hawkins*, 110 Cal. 122, 125, 42 Pac. Rep. 453.

35. LIMITATION OF ACTS OF 1866 AND 1870.—Act of Congress of 1866 as amended by act of Congress of 1870 was not intended to apply to appropriation of water made on private land, or on land after it had ceased to be government land, or to authorize such appropriation, but merely preserved rights of appropriators to appropriations of water made when land was public land after it had ceased to be such.—*Cave vs. Tyler*, 133 Cal. 566, 569, 65 Pac. Rep. 1089.

36. Act of Congress, July 26, 1866, now § 2339 U. S. Rev. Stats., and act of Congress, July 9, 1870, now § 2340 U. S. Rev. Stats., construed and held not to authorize appropriation of water-rights on public land after same has been entered by homestead settler.—*McGuire vs. Brown*, 106 Cal. 660, 667, 39 Pac. Rep. 1060, 30 L. R. A. 384.

37. Act of Congress of 1866, granting right of way to ditch and canal owners over public lands and for other purposes, is prospective in its operation, and cannot be construed so as to devise part of an estate granted before its passage.—*Union M. & Min. Co. vs. Ferris*, 3 Sawy. C. C. 176, 34 Fed. Cas. 594.

38. *Broder vs. Natoma W. & Min. Co.*, 101 U. S. 274, bk. 25 L. ed. 790, and *Osgood vs. Water Co.*, 56 Cal. 571, are authority for statement that one who has acquired title to riparian lands from United States prior to act of July 26, 1866, could not (in absence of reservation in his grant) be deprived of his common-law rights to flow of stream by one who appropriated its waters after passage of that act.—*Lux vs. Haggin*, 69 Cal. 255, 248, 10 Pac. Rep. 674.

39. Ninth section, act of Congress of 1866, does not subordinate miner's right to possess and enjoy his mining claim to rights of water appropriator to construct his ditch.—*Titcomb vs. Kirk*, 51 Cal. 288, 294.

40. Proviso of § 9 of act of Congress of July, 1866, that any person who shall in construction of any ditch or canal, injure or damage possession of any settler on public domain, shall be liable to party injured, does not grant rights of way where none existed before, nor confer additional rights upon owners of ditches subsequently constructed.—*McGuire vs. Brown*, 106 Cal. 660, 668, 39 Pac. Rep. 1060, 10 L. R. A. 384. See *Robertson vs. Smith*, 1 Mont. 411; *Jennison vs. Kirk*, 98 U. S. 453, 460, bk. 25 L. ed. 240.

41. Section 2339, U. S. Rev. Stats., does not confer the right to enter upon lands in possession of another for purpose of securing water thereon or of completing attempted diversion of water, even though person seeking so to enter had at some previous time manifested his intention to secure water-right thereon.—*Taylor vs. Abbott*, 103 Cal. 421, 422,

37 Pac. Rep. 408; *McGuire vs. Brown*, 106 Cal. 660, 668, 39 Pac. Rep. 1060, 30 L. R. A. 384.

42. PRIOR RIGHTS RECOGNIZED AND CONFIRMED BY ACTS.—Act of Congress, 1866, confirmed water-rights initiated and maintained by appropriation and confirmed rights to waters appropriated for agricultural purposes.—*Cave vs. Crafts*, 53 Cal. 135, 138; *South Yuba W. & Min. Co. vs. Rosa*, 80 Cal. 333, 337, 22 Pac. Rep. 222.

43. Amendment act of Congress of July 9, 1870, was enacted for purpose of recognizing pre-existing rights to use of water rather than establishing new rights.—*Wells vs. Mantes*, 99 Cal. 583, 585, 34 Pac. Rep. 324; *Broder vs. Natoma W. & Min. Co.*, 101 U. S. 274, 276, bk. 25 L. ed. 790. See *Watterson vs. Saldunbehre*, 101 Cal. 107, 112, 35 Pac. Rep. 432; *Taylor vs. Abbott*, 103 Cal. 421, 423, 37 Pac. Rep. 408; *McGuire vs. Brown*, 106 Cal. 660, 672, 39 Pac. Rep. 1060, 30 L. R. A. 384; *Murray vs. Tingley*, 20 Mont. 260, 266, 268, 50 Pac. Rep. 723.

44. Congress by enactment of act of 1866 intended to recognize as valid customary law with respect to use of water which had grown up among occupants of public land under peculiar necessities of their condition.—*Basey vs. Gallagher*, 87 U. S. (20 Wall.) 670, bk. 22 L. ed. 452.

45. From earliest time in this state it has been customary to divert water on to public lands for mining, agricultural, and other purposes, and this right was, in 1866, confirmed and approved by act of Congress.—*Ely vs. Ferguson*, 91 Cal. 187, 190, 27 Pac. Rep. 587. See *De Necochea vs. Curtis*, 80 Cal. 397, 20 Pac. Rep. 563, 22 Id. 198.

46. Object of act of Congress of July 16, 1866, as amended by act of July 9, 1870, was to give sanction of United States to possessory acts which had previously rested solely upon local customs, laws, and decisions of courts, and to prevent such rights from being lost on sale of lands.—*De Necochea vs. Curtis*, 80 Cal. 397, 406, 20 Pac. Rep. 563, 22 Id. 198. See *Jennison vs. Kirk*, 98 U. S. 453, 456, bk. 25 L. ed. 240; *Broder vs. Natoma W. & Min. Co.*, 101 U. S. 274, 276, bk. 25 L. ed. 790.

47. Principle of prior appropriation of water on public lands in California, where it is artificially used for mining and other like purposes, and is absolutely essential, which has all along been recognized, was sanctioned by supreme court of United States in *Broder vs. Natoma W. & Min. Co.*, 101 U. S. 274, 275, bk. 25 L. ed. 790, and also by act of Congress of 1866, and the amendment of 1870.—*Osgood vs. El Dorado W. & D. G. M. Co.*, 56 Cal. 571, 580.

48. Provisions of act of Congress of 1866, granting right of way to ditch and canal owners, and act amendatory thereof of 1870, and of act of Congress of 1872, to promote development of mineral resources of United States, should be considered and construed together, and it is apparent that it was purpose of legislation taken as whole to recognize in and confirm to respective classes of licensees same rights which were accorded

to them by state courts prior to passage of said acts.—*Titcomb vs. Kirk*, 51 Cal. 288, 294.

49. Rights acquired by appropriation of waters on government land prior to sale of land by government were confirmed by act of Congress of July 26, 1866, granting right of way to ditch and canal owners over public lands, which confer rights to waters appropriated for agricultural purposes.—*Cave vs. Crafts*, 53 Cal. 135, 138. See *South Yuba W. & Min. Co. vs. Rosa*, 80 Cal. 333, 337, 22 Pac. Rep. 222.

III. STATE LAWS AFFECTING—CONSTRUCTION OF.

50. **PURPOSE OF TITLE EIGHT.**—Scope and purposes of all of provisions of chapter on water-rights was to establish procedure for claims of right to use water, whereby certain definite time might be established as date at which their titles should accrue.—*Wells vs. Mantes*, 99 Cal. 583, 586, 34 Pac. Rep. 324. See *De Necochea vs. Curtis*, 80 Cal. 397, 20 Pac. Rep. 563, 22 Id. 198.

51. Title eight as whole, read in view of legislative and judicial history of state, shows manifest purpose of legislature that rule should be same, whether applied to mere occupants of lands of state or of United States.—*Lux vs. Haggin*, 69 Cal. 255, 376, 10 Pac. Rep. 674.

52. Section is not limited in its application to public lands, but subject to saving or reservation clause of § 1422. This section declares law applicable throughout state.—*Lux vs. Haggin*, 69 Cal. 255, 371, 10 Pac. Rep. 674.

53. **STATUTES OF STATE CANNOT PROPERLY BE CONSTRUED AS RESERVING** from grants of state land use of waters flowing thereon, for benefit of those who shall subsequently take or appropriate them, either on or off said lands.—*Lux vs. Haggin*, 69 Cal. 255, 374, 10 Pac. Rep. 674.

54. **STATUTES 1868 DO NOT CONFER UPON BOARD OF WATER COMMISSIONERS** right to take away interest which prior appropriator has in waters of stream.—*Lakeside Ditch Co. vs. Crane*, 80 Cal. 181, 185, 22 Pac. Rep. 76. See *Alta L. & W. Co. vs. Hancock*, 85 Cal. 219, 20 Am. St. Rep. 217, 24 Pac. Rep. 645; *Reno Smelting M. & R. Works vs. Stevenson*, 20 Nev. 269, 19 Am. St. Rep. 364, 21 Pac. Rep. 317.

55. **TITLE EIGHT, CIVIL CODE**, so far as it relates to waters flowing through lands of state, is more than acknowledgment of doctrine of prior appropriation on public lands. It is plainly concession to those who may comply with its conditions which operates as grant of servitude when conditions are fully performed relating to date of commencement to perform.—*Lux vs. Haggin*, 69 Cal. 255, 379, 10 Pac. Rep. 674.

IV. WHAT IS CAPABLE OF APPROPRIATION.

56. **AS GENERAL RULE, PROPERTY IN WATER CANNOT BE ACQUIRED BY APPROPRIATION**, but only by grant of prescription, being an incident of the soil, the use of which passes with a transfer thereof.—*Crandall vs.*

Woods, 8 Cal. 136, 141. See Vansickle vs. Haines, 7 Nev. 267.

57. **Usufruct in water.**—Since the case of *Irwin vs. Phillips*, 5 Cal. 140, was decided special property has been recognized in water, not in sense in which word "property" is ordinarily used, but courts have held that right to water as usufruct may be acquired by appropriation as against subsequent appropriator who shows no title to soil; and that by appropriation of water and construction of canal party acquires easement or franchise which he may enjoy and protect.—*Crandall vs. Woods*, 8 Cal. 136, 141.

58. **Right to appropriate waters of streams.**—It has been many times decided by supreme court of California as well as by supreme court of United States that waters of un-navigable running streams in California may be acquired by appropriation for certain purposes.—*Doyle vs. San Diego L. & T. Co.*, 46 Fed. Rep. 709. See *Irwin vs. Phillips*, 5 Cal. 140, 63 Am. Dec. 118; *Ortman vs. Dixon*, 13 Cal. 33, 38; *McDonald vs. Bear River & A. W. & Min. Co.*, 15 Cal. 145; *McKinney vs. Smith*, 21 Cal. 374, 381; *Nevada Co. & S. C. Co. vs. Kidd*, 37 Cal. 282, 314; *Atchison vs. Peterson*, 87 U. S. (20 Wall.) 507, 511, bk. 22 L. ed. 414; *Basey vs. Gallagher*, 37 U. S. (20 Wall.) 670, 682, bk. 22 L. ed. 452.

59. **Right to running water exists in this state, without private ownership of soil, upon ground of prior location upon land or prior appropriation and use of water.**—*Hill vs. Newman*, 5 Cal. 445, 446, 63 Am. Dec. 140.

60. **Right to appropriate waters of streams of this state for mining and other purposes has been too long settled to admit of any doubt.**—*Hill vs. King*, 8 Cal. 336, 338.

61. **Right to water flowing in public stream may be acquired by actual appropriation of water for beneficial use.**—*Hewitt vs. Story*, 64 Fed. Rep. 510, 30 L. R. A. 265; *Union M. & Min. Co. vs. Dangberg*, 81 Fed. Rep. 73.

62. **Right includes, what.**—Appropriator of water on government land can take nothing as incidental to such appropriation except what is reasonably necessary to its enjoyment, and while this may include site of his dam and right to maintain it and to flood land above it, it does not include exclusive right to watercourse above dam and below head of slack water.—*Natoma W. & Min. Co. vs. Hancock*, 101 Cal. 42, 56, 35 Pac. Rep. 334.

63. **PERCOLATING WATERS CANNOT BE APPROPRIATED** under the code.—*Southern Pac. R. Co. vs. Dufour*, 95 Cal. 615, 618, 30 Pac. Rep. 783, 19 L. R. A. 92. See *Hanson vs. McCue*, 42 Cal. 303, 10 Am. Rep. 299; *Cross vs. Kitts*, 69 Cal. 217, 222, 58 Am. Rep. 558, 10 Pac. Rep. 409; *Painter vs. Pasadena L. & W. Co.*, 91 Cal. 74, 82, 27 Pac. Rep. 539; *Gould vs. Eaton*, 111 Cal. 639, 644, 52 Am. St. Rep. 201, 44 Pac. Rep. 319.

64. **Percolating waters, collected or gathered in stream, running in defined channel, are such property as may be acquired by appropriation, and when rights in them are thus acquired appropriator cannot be divested**

of his rights by wrongful acts of another.—*Cross vs. Kitts*, 69 Cal. 217, 222, 58 Am. Rep. 558, 10 Pac. Rep. 409; *Ely vs. Ferguson*, 91 Cal. 187, 190, 27 Pac. Rep. 587; *Boyle vs. San Diego L. & T. Co.*, 46 Fed. Rep. 709, 711.

65. **RIGHT TO APPROPRIATE AFTER ENTRY OF PUBLIC LAND.**—Appropriation of water cannot be made on public lands after they have been entered by another at land office, and certificate of entry obtained, and pending proceedings for consummation of his interest thus initiated.—*McGuire vs. Brown*, 106 Cal. 660, 666, 39 Pac. Rep. 1060, 30 L. R. A. 384. See *Sturr vs. Beck*, 133 U. S. 541, 547, 549, bk. 33 L. ed. 761, 10 Sup. Ct. Rep. 350 (holding that plaintiff in that case had "no right to enter upon prior possession of defendant under his homestead entry for purpose of appropriating any portion of running streams and creeks thereon").

66. In so far as cases of *Osgood vs. El Dorado W. & D. G. Min. Co.*, 56 Cal. 571; *Farley vs. Spring Valley M. & I. Co.*, 58 Cal. 142, and other cases decided by the California supreme court, support proposition that interests of settler on public lands, under pre-emption or homestead laws, attaches as against the appropriators of water-rights on his tract only as of time of his final proof or obtaining patent they appear to be in conflict with opinion of the federal supreme court in *Sturr vs. Beck*, 133 U. S. 541, 547, 549, bk. 33 L. ed. 761, 10 Sup. Ct. Rep. 350, and views of that court must prevail.—*McGuire vs. Brown*, 106 Cal. 660, 671, 39 Pac. Rep. 1060, 30 L. R. A. 384. See *Faull vs. Cooke*, 19 Oreg. 455, 20 Am. St. Rep. 836, 26 Pac. Rep. 662.

67. **Right of appropriation does not exist to water on land selected by state in lieu of school section, which has been listed and location approved by surveyor-general, on which application to purchase has been made and formally approved, provided that patent afterwards issued from state to applicant, as patent will relate back to date of application to purchase, and cut out rights of any intervening appropriator.**—*Shenandoah M. & Min. Co. vs. Morgan*, 106 Cal. 409, 416, 39 Pac. Rep. 802.

68. While opinion in *Osgood vs. El Dorado W. & D. G. Min. Co.*, 56 Cal. 576, supports contention that water-right by appropriation might be acquired on public lands of United States before patent issued, notwithstanding it was occupied by claimant who had made application to purchase, it is not clear that it was necessary to decision, and it was not accepted as law in *Lux vs. Haggin*, 69 Cal. 255, 10 Pac. Rep. 674, and in case of *Howell vs. Slauson*, 83 Cal. 539, 23 Pac. Rep. 692, it was held that where, by reason of loss of school sections selection is made by state of other lands in lieu thereof, list of such lands to state conveys legal title as effectually as patent would have done and that title so transferred relates back to the date where selection was made and reported to local land office, and cuts off all subsequent claimants.—*Shenandoah M. & Min. Co. vs. Morgan*, 106 Cal. 409, 416, 39 Pac. Rep. 802.

69. **SURPLUS OF WASTE OF WATER OF**

STREAM MAY BE APPROPRIATED subject to rights of prior appropriators, and such appropriator is entitled to use all such waters.—*Hewitt vs. Story*, 64 Fed. Rep. 510, 30 L. R. A. 265; *Union M. & Min. Co. vs. Dangterg*, 81 Fed. Rep. 73.

70. Second appropriators have right to appropriate surplus (by any lawful means of diversion) not used by first appropriators.—*Natoma W. & Min. Co. vs. Hancock*, 101 Cal. 42, 43, 35 Pac. Rep. 334.

71. Surface water from rains and melted snow is not subject of appropriation.—*Jacob vs. Lorenz*, 93 Cal. 332, 339, 33 Pac. Rep. 119.

72. UNDER MEXICAN LAW, running water is capable of appropriation as private property, independent of any common use, where quantity of water is so small as to be incapable of being fully enjoyed without exclusive possession.—*Lux vs. Haggin*, 69 Cal. 255, 320, 10 Pac. Rep. 674.

73. But subject to common right by natural law where it is capable of being fully enjoyed without exclusive possession.—*Lux vs. Haggin*, 69 Cal. 255, 319, 10 Pac. Rep. 674.

74. WATER-RIGHTS CANNOT BE ACQUIRED BY APPROPRIATION WHERE the water is on private property.—*City of Santa Cruz vs. Enright*, 95 Cal. 105, 113, 30 Pac. Rep. 197; *Ball vs. Kehl*, 95 Cal. 606, 613, 30 Pac. Rep. 780; *Lux vs. Haggin* (Cal. Oct. 27, 1884), 4 Pac. Rep. 919, 929. See *Wimer vs. Simmons*, 27 Oreg. 1, 19, 50 Am. St. Rep. 697, 39 Pac. Rep. 6; *Union Mill & Min. Co. vs. Dangberg*, 31 Fed. Rep. 73, 91.

75. Presumption cannot be indulged in favor of party claiming water-rights by appropriation that lands were public lands of United States, but burden of proof is on party claiming such rights to prove that lands are public lands.—*City of Santa Cruz vs. Enright*, 95 Cal. 105, 113, 30 Pac. Rep. 197.

76. WATERS FLOWING FROM SPRINGS.—Appropriation can be had of waters of natural stream flowing from spring.—*Ely vs. Ferguson*, 91 Cal. 187, 190, 27 Pac. Rep. 587; *Southern Pac. R. Co. vs. Dufour*, 95 Cal. 615, 620, 30 Pac. Rep. 783, 19 L. R. A. 92. See *Williams vs. Harter*, 121 Cal. 47, 50, 53 Pac. Rep. 405.

77. Section 1410 does not limit appropriation so that water flowing from springs cannot be appropriated.—*Ely vs. Ferguson*, 91 Cal. 187, 190, 27 Pac. Rep. 587.

78. Water flowing from springs on public lands may be diverted to other public lands and there used for irrigation or other necessary purposes, and right to same acquired as against any one who subsequently obtains title to land upon which springs are situated.—*Ely vs. Ferguson*, 91 Cal. 187, 190, 27 Pac. Rep. 587; *Williams vs. Harter*, 121 Cal. 47, 50, 53 Pac. Rep. 405. See *De Necochea vs. Curtis*, 30 Cal. 397, 20 Pac. Rep. 563, 22 Id. 198.

V. WHO MAY APPROPRIATE WATER.

79. ALIENS MAY APPROPRIATE.—Aliens could appropriate water on government land both before and after act of Congress July 26, 1866, test of such appropriation being merely priority of possession and beneficial use.—

Santa Paula W. W. vs. Peralta, 113 Cal. 38, 43, 45 Pac. Rep. 168. See *Maeris vs. Bicknell*, 7 Cal. 261, 68 Am. Dec. 257; *Davis vs. Gale*, 32 Cal. 26, 91 Am. Dec. 554; *De Necochea vs. Curtis*, 30 Cal. 397, 20 Pac. Rep. 563, 22 Id. 198.

80. Since prior appropriation of water is mode of acquiring right in real property by purchase, alienage of appropriator is matter between him and government, and private individuals would not be at liberty to treat his appropriation as void, or water itself as still open to another taker.—*Santa Paula Water Works vs. Peralta*, 113 Cal. 38, 43, 45 Pac. Rep. 168. See *Norris vs. Hoyt*, 18 Cal. 217; *Recoullat vs. Sansevalin*, 32 Cal. 376.

81. ANY PERSON MAY APPROPRIATE.—Right to appropriate water is franchise, and every one who wishes to attain it has license from state to do so, provided prior rights of others are not interrupted.—*Conger vs. Weaver*, 6 Cal. 548, 558, 65 Am. Dec. 528. See *Merced Min. Co. vs. Fremont*, 7 Cal. 317, 327, 68 Am. Dec. 262; *Hill vs. King*, 8 Cal. 336, 338; *Lux vs. Haggin*, 69 Cal. 255, 355, 10 Pac. Rep. 674.

82. Civil Code authorizes any person for purposes useful to himself alone, or for benefit of himself and others, to divert waters of stream, rights of riparian proprietors not being affected.—*Lux vs. Haggin*, 69 Cal. 255, 307, 10 Pac. Rep. 674.

83. This court has in several cases recognized right of miners to appropriate water and to divert it from its natural channel, where no riparian rights intervene, and to be protected in its use in its pure and natural condition against all subsequent efforts to divert or injure it.—*Conger vs. Weaver*, 6 Cal. 548, 558, 65 Am. Dec. 528.

84. MUNICIPAL CORPORATION HAS NO POWER TO APPROPRIATE WATER to sell to outside consumers for profit.—*Vernon Irr. Co. vs. City of Los Angeles*, 106 Cal. 237, 244, 39 Pac. Rep. 762.

85. Where whole of waters of river had been claimed by city for long number of years and such claim had been universally acquiesced in, all of said water being necessary for uses of such city, no part thereof can be appropriated by private party.—*Feliz vs. City of Los Angeles*, 58 Cal. 73, 80.

But city cannot dispose of water outside of its limits, to injury of riparian proprietors.—*Ibid*, *Vernon Irr. Co. vs. Los Angeles*, 106 Cal. 237, 250, 39 Pac. Rep. 762. See *Platte Water Co. vs. Northern Colo. Irr. Co.*, 12 Colo. 525, 533, 21 Pac. Rep. 711.

86. All water in stream flowing through government land after leaving lands of riparian proprietor can be appropriated by occupants of government land.—*Alhambra Add. W. Co. vs. Mayberry*, 38 Cal. 63, 74, 25 Pac. Rep. 1101.

87. PRIOR APPROPRIATOR WHO IS ALSO RIPARIAN PROPRIETOR may take all water of stream.—*Healy vs. Woodruff*, 97 Cal. 464, 467, 32 Pac. Rep. 528.

88. Riparian proprietor on stream may acquire water from stream by appropriation.—

Healy vs. Woodruff, 37 Cal. 464, 466, 32 Pac. Rep. 528.

88. State legislature has had power to authorize the diversion of waters from state lands either by private persons, owners of lands above, or by private persons on public lands of United States lying above, and from date of such general authorization grantee of land from state would take subject to appropriations of water actually made, and, if statutes were broad enough, would take subject to subsequent appropriations.—Lux vs. Haggin, 69 Cal. 255, 373, 10 Pac. Rep. 674.

VI. TITLE ACQUIRED BY APPROPRIATORS.

89. **ABSOLUTE PROPERTY TO WATER MAY PASS BY APPROPRIATION** as it would pass by grant.—Ortman vs. Dixon, 13 Cal. 33, 38. See McDonald vs. Askew, 29 Cal. 200, 206; Nevada Co. & S. C. Co. vs. Kidd, 37 Cal. 282, 311.

91. **Absolute title not acquired.**—Any reasonable construction of appropriation, or other right which party may claim in water, can only extend to necessary or proper use for purposes for which water was appropriated, and is not absolute right to water for any other purpose.—Shenandoah M. & Min. Co. vs. Morgan, 106 Cal. 409, 418, 39 Pac. Rep. 802. See Riverside Water Co. vs. Sargent, 112 Cal. 230, 235, 44 Pac. Rep. 560.

92. **APPROPRIATOR IS NOT OWNER OF "VERY BODY OF THE WATER"** until it passes into appliance he has provided for its reception; before he is thus possessed of it he has mere right to its continued flow so that he may impound it, but stream itself flowing in its natural course is part of land over which it flows.—Riverside W. Co. vs. Gage, 89 Cal. 410, 418, 26 Pac. Rep. 889; McGuire vs. Brown, 106 Cal. 660, 669, 39 Pac. Rep. 1060, 30 L. R. A. 384. See Parks C. & M. Co. vs. Hoyt, 57 Cal. 44, 46; Nevada Co. & S. C. Co. vs. Kidd, 37 Cal. 282, 310, 311.

93. **INTEREST ACQUIRED BY APPROPRIATORS TO WATER FOR USE** in moving machinery is not property in water as such, but right to momentum of its fall at necessary point, and to flow of water in its natural course above as subservient to that end.—McDonald vs. Askew, 29 Cal. 200, 206. See Kelly vs. Natoma Water Co., 6 Cal. 105, 108; Alder Gulch Consol. Min. Co. vs. Hayes, 6 Mont. 31, 38, 9 Pac. Rep. 581.

94. **OWNERSHIP OF WATER AS SUBSTANTIVE AND VALUABLE PROPERTY** distinct from land through which it flows has been recognized by our courts, and is right accruing from appropriation.—McDonald vs. Bear River & A. W. & M. Co., 13 Cal. 220, 232. See note 43 Am. Dec. 279.

95. **POWER OF CONTROL AND RIGHT OF ENJOYMENT** of appropriator of water are exclusive and absolute, but are strictly usufructuary.—Kidd vs. Laird, 15 Cal. 161, 180, 76 Am. Dec. 472.

96. **QUASI-PRIVATE PROPRIETORSHIP.**—Prior appropriation of water to steady individual purposes establishes quasi-private proprietorship.—Tartar vs. Spring Creek W. & M. Co., 5 Cal. 395, 399.

97. **RIGHT OF PROPERTY IN WATER IS USUFRUCTUARY**, and consists not so much of fluid itself as advantage of its use.—Eddy vs. Simpson, 3 Cal. 249, 252, 58 Am. Dec. 408.

98. **Running water**, so long as it continues to flow in its natural course, is not and cannot be made subject of private ownership. A right may be acquired to its use which will be regarded and protected as property; but this right carries with it no specific property in water itself.—Kidd vs. Laird, 15 Cal. 161, 179, 76 Am. Dec. 472. See McDonald vs. Askew, 29 Cal. 206; Strickler vs. Colorado Springs, 16 Colo. 61, 68, 70, 25 Am. St. Rep. 248, 26 Pac. Rep. 313.

99. **Title, or right to acquire title in place of intended use**, has never been necessary element in ownership of appropriated water.—Santa Paula W. W. vs. Peralta, 113 Cal. 33, 43, 45 Pac. Rep. 168.

100. **Water-right is only acquired by actual appropriation of use of water.** The property is not in the corpus of water, but is only in use.—Nevada Co. & S. C. Co. vs. Kidd, 37 Cal. 282, 310. See Eddy vs. Simpson, 3 Cal. 249, 58 Am. Dec. 408; Kidd vs. Laird, 15 Cal. 161, 179, 76 Am. Dec. 472; McDonald vs. Askew, 29 Cal. 200, 206.

101. **Water in stream above appropriator's ditch is not his personal property.**—Parks C. & Min. Co. vs. Hoyt, 57 Cal. 44, 46.

VII. RIGHTS OF APPROPRIATORS, IN GENERAL.

102. **APPROPRIATOR CAN HAVE NO LAW-FUL CLAIM TO MORE WATER** than had means to divert.—Riverside W. Co. vs. Sargent, 112 Cal. 230, 234, 44 Pac. Rep. 560.

103. **APPROPRIATION DOES NOT CONFER SUCH AN ABSOLUTE RIGHT** to body of water diverted that owner can allow it, after its diversion, to run to waste and prevent others from using it for mining or other legitimate purposes, nor does it confer such right that he can insist upon flow of water without deterioration in quality, where such deterioration does not defeat nor impair uses to which water is applied.—Atchison vs. Peterson, 37 U. S. (20 Wall.) 507, 514, bk. 22 L. ed. 414.

104. **Appropriation of waters by diverting them into dry bed of gulch** does not give appropriators exclusive use of bed of stream; it may be used by others so long as it does not interfere with other rights.—Hoffman vs. Stone, 7 Cal. 48, 49.

105. **CANNOT COMPLAIN OF QUALITY OF WATER, WHEN.**—Locators of ditch who have diverted water of stream to their homes a mile or more away cannot be heard to complain that water continues after their diversion as it was before, nauseous to senses and unfit for domestic use.—Conrad vs. Arrowhead Hotel Co., 103 Cal. 399, 403, 37 Pac. Rep. 386.

106. **CAUSING TO FLOW IRREGULARLY.**—Prior appropriators cannot be deprived of their water by miners holding water back, causing it to flow irregularly.—Natoma W. & Min. Co. vs. McCoy, 23 Cal. 491, 493.

107. **DEPRIVING OF USE OF WATER.**—Prior appropriator cannot be deprived of use

of his water by large number of persons mining on small stream, although injury accruing from any one of such individual persons may be imperceptible, if combined result of acts of all may render water utterly unfit for further use.—*Hill vs. Smith*, 32 Cal. 166, 168.

108. Ditch-owner is entitled to have water flow without material interruption in its natural channel.—*Bear River & A. W. & Min. Co. vs. New York Min. Co.*, 8 Cal. 327, 336, 68 Am. Dec. 325.

109. ENLARGING DITCH.—If parties are entitled to all water, fact that they enlarged their ditch cannot be complained of.—*James vs. Williams*, 31 Cal. 211, 214.

110. INJUNCTION AGAINST TRESPASSER.—Lawful appropriator is entitled to injunction against trespasser.—*Lytle Creek W. Co. vs. Perdew*, 65 Cal. 447, 452, 4 Pac. Rep. 426.

111. Injuring the rights of prior appropriator by erection of dam cannot be justified by fact that dam is of relatively more value than injuries occasioned thereby.—*Weaver vs. Eureka Lake Co.*, 15 Cal. 271, 274.

112. INTENTION OF APPROPRIATOR AND NATURE OF USE.—Intention of appropriator, his object and purpose in making appropriation, his acts and conduct in regard thereto, quantity and character of land owned by him, his necessities, ability, and surroundings, must be considered in connection with extent of his actual appropriation and use in determining and defining his rights.—*Hewitt vs. Story*, 64 Fed. Rep. 510, 30 L. R. A. 265; *Union M. & Min. Co. vs. Dangberg*, 81 Fed. Rep. 73.

113. Measure of right, as to extent, follows nature of appropriation or uses for which it is taken. Intent to take and appropriate and outward act go together.—*Ortman vs. Dixon*, 13 Cal. 33, 38.

114. Rights acquired by appropriator must be exercised with reference to general condition of miner and necessities of community, and measured in its extent by actual needs of particular purpose for which appropriation is made, and not for purpose of obtaining monopoly of water so as to prevent its use for beneficial purpose by other persons.—*Hewitt vs. Story*, 64 Fed. Rep. 510, 30 L. R. A. 265; *Union M. & Min. Co. vs. Dangberg*, 81 Fed. Rep. 73.

115. LANDOWNERS' RIGHTS AS AFFECTING APPROPRIATORS OF WATER.—Appropriation of land carries with it usufruct in water.—*Crandall vs. Woods*, 8 Cal. 136, 143.

116. After land where diversion is made has ceased, by reason of lawful appropriation thereof, to be public land, and passed into private occupancy, occupant of land is owner of the stream in the same sense that he is owner of the land, until it comes into possession of appropriator, and may justly repel any attempt to interfere with such ownership at any place except that where diversion was affected when his rights to land attached.—*McGuire vs. Brown*, 106 Cal. 660, 670, 39 Pac. Rep. 1060, 30 L. R. A. 384.

117. Riparian proprietor has no concern with any use or diversion of water after it has passed his land.—*Hargrave vs. Cook*, 108 Cal.

73, 78, 41 Pac. Rep. 18, 30 L. R. A. 390. See *Lux vs. Haggin*, 69 Cal. 255, 10 Pac. Rep. 674.

118. MAY USE WATER AT ANY PLACE.—Party having obtained prior right to use of given quantity of water is not restricted in such right to use or place to which it was first applied.—*Union M. & Min. Co. vs. Dangberg*, 81 Fed. Rep. 73.

119. Right to water acquired by prior appropriation is not dependent upon place where water is used.—*Union M. & Min. Co. vs. Dangberg*, 81 Fed. Rep. 73.

120. Upon making appropriation, party becomes entitled to use of quantity which he has appropriated at any place where he may choose to convey it, and for any useful and beneficial purpose to which he may choose to apply it.—*Davis vs. Gale*, 32 Cal. 26, 34, 91 Am. Dec. 554.

121. MEXICAN LAW.—Under Mexican law, one appropriating water had no right in or to water until he had complied with conditions which authorized him to appropriate it. Every one of such who complied with conditions and appropriated water acquired vested right in such water, at least while he continued to use it, except in single case where he acquired right, merely conditional, under laws which reserved power in agents of state or municipality to deprive him of it without indemnification.—*Lux vs. Haggin*, 69 Cal. 255, 325, 10 Pac. Rep. 674.

122. Under Mexican law, those who appropriated and diverted the waters of unnavigable river in accordance with laws obstructed pro tanto its common use, but they acquired exclusive right to use of that which they diverted.—*Lux vs. Haggin*, 69 Cal. 255, 322, 10 Pac. Rep. 674.

123. Rights acquired under secure.—One who had acquired right to exclusive use to portion of waters of river under Mexican regime could not be deprived of his rights by law of California.—*Lux vs. Haggin*, 69 Cal. 255, 323, 10 Pac. Rep. 674.

124. MINE-OWNERS' RIGHTS AS AFFECTING APPROPRIATORS OF WATER.—Prior locators of mining claims upon bank of creek or stream may use water bed of said stream for purpose of working their claims, and any subsequent erection, dam, or embankment which will turn water back upon such claims or hinder them from being worked with flumes or other necessary means or appliances is encroachment upon rights of said parties.—*Sims vs. Smith*, 7 Cal. 148, 150, 68 Am. Dec. 233.

125. NATURE OF RIGHT AS AGAINST OTHERS.—Appropriator of water is entitled to quantity of water reasonably necessary for uses named in his notice, provided that quantity would naturally flow in stream at point of his diversion, as against all above him on same stream, subject to single exception of rights antecedently acquired.—*Senior vs. Anderson*, 130 Cal. 290, 297, 62 Pac. Rep. 563. See *Crandall vs. Woods*, 8 Cal. 136.

126. Appropriator's actual and peaceful enjoyment of water is sufficient as against any one having no better right.—*Cardoza vs. Calkins*, 117 Cal. 106, 112, 48 Pac. Rep. 1010.

127. It is settled law, so far as this state is concerned, that property in water of stream upon public lands may be acquired by mere appropriation for mining or other beneficial purposes, and that first appropriator is to extent of his appropriation owner as against all the world except government.—*Lux vs. Haggin* (Cal. Oct. 27, 1884), 4 Pac. Rep. 919, 928.

128. Party appropriating water has the sole and exclusive right to use same for purpose for which it was appropriated.—*Hoffman vs. Stone*, 7 Cal. 46, 49.

129. NECESSARY WATER ONLY CAN BE APPROPRIATED.—If appropriated water is used for irrigation appropriator is only entitled to amount of water that is necessary to irrigate his land by making reasonable use of water.—*Hewitt vs. Story*, 64 Fed. Rep. 510, 30 L. R. A. 265; *Union M. & Min. Co. vs. Dangberg*, 81 Fed. Rep. 73.

130. If capacity of flume, ditch, canal, or other aqueduct by means of which appropriated water is conducted is greater than is necessary to irrigate lands of appropriator he will be restricted to quantity of water needed for purposes of irrigation, for watering his stock, and for domestic use; and same rule applies to appropriation for any other use or purpose.—*Hewitt vs. Story*, 64 Fed. Rep. 510, 30 L. R. A. 265; *Union M. & Min. Co. vs. Dangberg*, 81 Fed. Rep. 73.

131. No person can, by virtue of his appropriation, acquire right to any more water than is necessary for purposes of his appropriation.—*Hewitt vs. Story*, 64 Fed. Rep. 510, 30 L. R. A. 265; *Union M. & Min. Co. vs. Dangberg*, 81 Fed. Rep. 73.

132. No person, whether appropriator or riparian proprietor, should be allowed to be extravagantly prodigal in dealing with this peculiar bounty of nature. Use should be economic and reasonable. Maxim of law which he is bound to respect while availing himself of his right is "sic utere tuo ut alienum non laedas."—*Union M. & Min. Co. vs. Dangberg*, 81 Fed. Rep. 73.

133. NOT LIMITED TO QUANTITY FIRST USED.—Appropriators of water are not limited to quantity they have turned into their ditch in first instance, unless by general plan, size, and grade of ditch it was not capable of carrying more water than was diverted. If by reason of boulders or stones in sides and bottom of ditch or irregularity in grade at that time it was not capable of conveying as much water as its general size would indicate, they would have reasonable time to adjust grade and remove such obstructions and then fill ditch to its capacity.—*White vs. Todd's Valley W. Co.*, 8 Cal. 443, 444, 68 Am. Dec. 338.

134. If water is used for purpose of irrigating lands owned by appropriator, right is not confined to amount of water used at time appropriation is made; he would be entitled not only to his needs and necessities at that time, but to such other and further amount of water within capacity of his ditch as would be required for future improvement and extended cultivation of his lands if right is otherwise kept up.—*Hewitt vs. Story*, 64 Fed.

Rep. 510, 30 L. R. A. 265; *Union M. & Min. Co. vs. Dangberg*, 81 Fed. Rep. 73.

135. Exception to rule.—If appropriators of water continue to divert quantity only that they originally turned into their ditch for sufficient length of time to indicate that they only intended to divert that amount, or fall for unreasonable length of time to remove any obstructions in ditch or adjust its grade, they would be limited to amount thus diverted.—*White vs. Todd's Valley W. Co.*, 8 Cal. 443, 444, 68 Am. Dec. 338.

136. PERCOLATING WATERS—Right to destroy.—Where waters in stream flowing from spring are appropriated, owner of land around spring cannot be prevented from digging into his own land, although by so doing he may destroy percolations of water and spring, and thus destroy stream from which water was appropriated.—*Southern Pac. R. Co. vs. Dufour*, 95 Cal. 615, 620, 30 Pac. Rep. 733, 19 L. R. A. 92. See *Hanson vs. McCue*, 42 Cal. 303, 305, 10 Am. Rep. 299; *Mosier vs. Caldwell*, 7 Nev. 363; *Delhi vs. Youmans*, 50 Barb. (N. Y.) 816.

137. PRESUMPTION AS TO EXTENT OF RIGHTS.—From mere fact of appropriation and enjoyment to certain extent and in particular manner no presumption of law arises that right is more extensive than is indicated by actual appropriation and mode of enjoyment.—*Nevada W. Co. vs. Powell*, 34 Cal. 109, 119, 91 Am. Dec. 685.

138. PROTECTION AGAINST THROWING REFUSE INTO STREAM.—Prior appropriators are entitled to be protected against throwing of sawdust and refuse bark into stream which, although it does not diminish quantity of water in stream, yet materially diminishes quantity that appropriators are able to take from stream and use for their mining purposes.—*Phoenix Water Co. vs. Fletcher*, 23 Cal. 481, 482, 486.

139. Prior appropriator is entitled to protection against acts which tend to materially diminish quantity of water to which he is entitled, or to deteriorate its quality for uses to which he wishes to apply it.—*Phoenix Water Co. vs. Fletcher*, 23 Cal. 481, 482, 486.

140. QUANTITY AND QUALITY OF WATER.—Prior appropriator is entitled to water so undiminished in quantity as to leave sufficient to fill his ditch as it existed at time locations were made above. As to deterioration in quality, injury should be considered as injury without consequent damage.—*Bear River & A. W. & Min. Co. vs. New York Min. Co.*, 8 Cal. 327, 336, 68 Am. Dec. 325.

141. What diminution of quantity or deterioration in quality will constitute an invasion of rights of first appropriator will depend upon circumstances of each case considered with reference to uses for which water is applied.—*Atchison vs. Peterson*, 37 U. S. (20 Wall.) 507, 514, bk. 22 L. ed. 414.

142. RIGHT TO FLOW BACK ON PUBLIC DOMAIN.—Prior appropriator has right to complete and maintain its dam and to flow back the water to any extent upon public domain necessary to fill its ditch in reasonable

manner.—*Natoma W. & Min. Co. vs. Hancock*, 101 Cal. 42, 60, 35 Pac. Rep. 334.

142. RIGHT TO MAINTAIN DITCH.—Prior appropriator, by construction of ditch and appropriation and user of water of stream tapped by ditch, acquires, as against owner of land, as complete and perfect right to maintain his ditch and have water flow in, to, and through it as though such right and easement had vested in him by grant.—*Ware vs. Walker*, 70 Cal. 591, 595, 12 Pac. Rep. 475.

144. RIGHT TO USE WATER IS SUFFICIENT FOR PROTECTION.—If an appropriator has the right to use and enjoyment of certain quantity of water, that alone is sufficient to have his right protected against invasion by another, and he need not show that he is in position to use water he has, or that he is in any position which gives him right to furnish water to others.—*Moore vs. Clear Lake W. W.*, 68 Cal. 146, 150, 3 Pac. Rep. 816.

145. TENANTS IN COMMON.—Owners of ditch for appropriation of water are tenants in common.—*Bradley vs. Harkness*, 26 Cal. 69, 78.

146. Where several parties appropriate water for purpose of irrigating their several farms by one act of appropriation, they are cotenants as to such water, and when outsider diverts any from them, or any one of them, he is injuring all and each one of them.—*Lytle Creek W. Co. vs. Perdew*, 65 Cal. 447, 454, 4 Pac. Rep. 426.

147. Each can sue.—And in such case each can recover or take the necessary steps to protect whole against acts of wrong-doer.—*Lytle Creek W. Co. vs. Perdew*, 65 Cal. 447, 452, 4 Pac. Rep. 426.

VIII. RIGHTS OF SUBSEQUENT APPROPRIATORS.

148. RIGHT TO SURPLUS WATER.—If first appropriator of waters of stream only appropriates part, another person may appropriate part or whole of residue, and when appropriated by him his right thereto is as perfect and entitled to same protection as that of first appropriator to portion appropriated by him.—*Smith vs. O'Hara*, 43 Cal. 371, 375.

149. Party may divert surplus water which was not used and not appropriated by prior appropriator.—*Higgins vs. Barker*, 42 Cal. 233, 235; *Edgar vs. Stevenson*, 70 Cal. 286, 290, 11 Pac. Rep. 704. See *Brown vs. Smith*, 10 Cal. 508, 510; *Ortman vs. Dixon*, 13 Cal. 33, 39; *McKinney vs. Smith*, 21 Cal. 374; *Nevada Co. & S. C. Co. vs. Kidd*, 37 Cal. 282, 313; *Smith vs. O'Hara*, 43 Cal. 371, 375, 376.

150. If one erects mill on running stream this shows appropriation of water for mill, but if he suffers portion of water or body of it after running mill to go down its accustomed course, persons below may appropriate this residuum as well as first party could appropriate first use.—*Ortman vs. Dixon*, 13 Cal. 33, 38.

151. Prior appropriator's rights are not injured where subsequent appropriator uses water after it is again conducted into first appropriator's ditch and used by him, as it would have been used but for diversion by second

appropriator.—*Yankee Jim's Union Water Co. vs. Cray*, 25 Cal. 504, 511, 35 Am. Dec. 145.

152. Water taken for mill is not taken as article of merchandise, but merely as motive power, and after it passes mill and subserves its purposes, may be used as aid to working of mines, but this last use must not be inconsistent with prior right acquired by mill-owner so far as necessary use is concerned.—*McDonald vs. Bear River & A. W. & M. Co.*, 13 Cal. 220, 232.

153. IF PRIOR APPROPRIATOR APPROPRIATES WATER DURING CERTAIN DAYS OF WEEK, OR DURING CERTAIN PERIODS, SECOND APPROPRIATOR MAY USE WATER DURING OTHER DAYS OR PERIODS.—*Smith vs. O'Hara*, 43 Cal. 371, 376.

154. Providing prior appropriator's rights are not interfered with.—*Santa Paula W. W. vs. Peralta*, 113 Cal. 38, 44, 45 Pac. Rep. 168.

155. TO EXTENT OF ITS CAPACITY FIRST APPROPRIATOR HAS RIGHT TO HAVE ALL OF WATERS FLOWING INTO HIS DITCH, BUT SUBJECT TO THAT RIGHT SUBSEQUENT APPROPRIATOR MAY LAWFULLY DIVERT WATERS FROM CREEK FEEDING FIRST APPROPRIATOR'S DITCH.—*Junkans vs. Bergin*, 67 Cal. 267, 269, 7 Pac. Rep. 684.

156. WATER-RIGHT IS LIMITED TO GENERAL OBJECT FOR WHICH IT IS ACQUIRED and another party may acquire another right for similar or other objects not in conflict with prior right.—*Nevada Co. & S. C. Co. vs. Kidd*, 37 Cal. 282, 315. See *Hoffman vs. Stone*, 7 Cal. 49; *O'Kelfe vs. Cunningham*, 9 Cal. 589, 590.

IX. RIGHTS AS AGAINST FEDERAL OR STATE GRANTS AND PATENTS.

157. PATENT FROM GOVERNMENT NOT AFFECTED BY APPROPRIATION, WHEN.—Before title to lands was acquired from government of United States, no occupancy or appropriation of water, no state or territorial legislation, or rule of decision established by state courts, in controversies between occupants of public land, without title from government, can in any manner qualify, limit, restrict, or affect operation of government patent.—*Union M. & Min. Co. vs. Ferris*, 2 Sawy. C. C., 176, 24 Fed. Cas. 594.

158. PRIOR APPROPRIATOR SUPERIOR TO SUBSEQUENT PURCHASER, GRANTEE, OR PATENTEE.—Appropriator of water, while land which he subjects to his necessary uses continues to be part of public domain, is licensee of general government; but when such part of public domain passes into private ownership it is burdened by easement granted by United States to appropriator, who holds his rights against this land under express grant; in this respect appropriation differs from prescription.—*Smith vs. Hawkins*, 110 Cal. 123, 125, 42 Pac. Rep. 453.

159. Appropriator's rights acquired prior to issuance of patent are superior to those of patentee, provided appropriation is valid and proper notice of intention to appropriate has been given and when prosecuted with reasonable diligence.—*Osgood vs. El Dorado W. & D. G. M. Co.*, 56 Cal. 571, 581.

160. If appropriation was made while state was owner of lands on which water was appropriated, appropriator's rights to water would

be superior to those of subsequent purchasers of said lands.—*Lux vs. Haggin* (Cal. Oct. 27, 1884), 4 Pac. Rep. 919, 925.

161. If when act of Congress of 1866 was passed appropriator had such right by priority of possession as that act contemplates, that right is confirmed to him and he is entitled to protection as against one claiming as riparian proprietor merely through patent issued afterwards, when no right had vested in patentee before act became law; statute is in effect incorporated into such patent, and operates as exception out of estate granted by patent.—*Union M. & Min. Co. vs. Ferris*, 2 Sawy. C. C. 176, 24 Fed. Cas. 594.

162. It is settled law that right to use of water flowing in stream may be acquired by appropriation, and when appropriation has been made upon public land of United States for some useful or beneficial purpose, right so acquired will be recognized and protected as against another person who subsequently obtains title to land from government.—*Ramelli vs. Irish*, 98 Cal. 214, 216, 31 Pac. Rep. 41. See *De Necochea vs. Curtis*, 80 Cal. 397, 20 Pac. Rep. 563, 22 Id. 198.

163. One who since act of Congress 1866 and 1870 receives grant of portion of public lands of United States without special or implied reservation takes subject only to appropriations of water made or initiated prior to his grant.—*Lux vs. Haggin*, 69 Cal. 255, 372, 10 Pac. Rep. 674.

164. Prior appropriator or his grantees has right to use of water as against subsequent homestead settler.—*McGuire vs. Brown*, 106 Cal. 660, 672, 39 Pac. Rep. 1060, 10 L. R. A. 384. See *De Necochea vs. Curtis*, 80 Cal. 397, 20 Pac. Rep. 563, 22 Id. 198; *Wells vs. Mantes*, 99 Cal. 583, 34 Pac. Rep. 324.

165. Purchasers of land from United States or this state, after whole or some part of water of natural water running through such land has been appropriated by some one else under act of Congress July 26, 1866, or under provisions of title eight of Civil Code of this state, take subject to rights acquired by such prior appropriator.—*Lux vs. Haggin* (Cal. Oct. 27, 1884), 4 Pac. Rep. 919, 924.

166. Section 1410 et seq. confers right to acquire use of water flowing in river or stream or down cañon or ravine by appropriation without any reservation, protecting riparian rights of state attached to its lands then remaining unsold, and from time Civil Code took effect prior appropriator acquired good right to water to extent provided as against subsequent purchaser from state of lands lying upon stream below point of diversion.—*Wood vs. Etiwanda W. Co.*, 122 Cal. 152, 158, 54 Pac. Rep. 726. See *Lux vs. Haggin*, 69 Cal. 255, 374, 376, 10 Pac. Rep. 674.

167. Upper proprietors have no right to even reasonable use of water if such use causes any positive or sensible injury to prior appropriator below.—*Phoenix Water Co. vs. Fletcher*, 23 Cal. 481, 482, 486.

168. PRIOR GRANTEE SUPERIOR TO SUBSEQUENT APPROPRIATION. — It has never been held by supreme court of United

States, or by supreme court of this state, that appropriation of water on public lands of United States (made after act of Congress July 26, 1866, or amendatory acts of 1870) gave to appropriator right to water appropriated as against grantee of riparian lands under grant made or issued prior to act of 1866, except in case where water so subsequently appropriated was reserved by terms of such grants.—*Lux vs. Haggin*, 69 Cal. 255, 344, 10 Pac. Rep. 674.

X. RELATIVE RIGHTS OF APPROPRIATION FOR DIFFERENT PURPOSES.

169. APPROPRIATION OF WATER FOR USES OF MILL stands on same footing as appropriation for use of mines.—*McDonald vs. Bear River & A. W. & M. Co.*, 13 Cal. 220, 233.

170. EACH PERSON MINING IN SAME STREAM is entitled to use in proper and reasonable manner both channel of stream and water flowing thereon, and where from situation of different claims working of same will necessarily result in injury to others, if injury be natural and necessary consequence of exercise of this right it will be damnum absque injuria.—*Esmond vs. Chew*, 15 Cal. 137, 142.

171. MINERS HAVE RIGHT TO REASONABLE USE OF WATER on public lands with which to conduct their mining operations, which use must be with just respect to rights of agriculturist.—*Clark vs. Duval*, 15 Cal. 85, 88.

XI. DUTY TO REPAIR DITCHES, ETC.

172. APPROPRIATOR IS BOUND TO KEEP HIS DITCH IN GOOD REPAIR, so that water will not overflow or break through its bank and destroy or damage lands of other parties.—*Richardson vs. Kier*, 34 Cal. 63, 74, 91 Am. Dec. 681, 37 Cal. 263, 266.

173. Required to use ordinary care in maintenance of their ditch, such as prudent man would exercise under the circumstances.—*Wolf vs. St. Louis I. W. Co.*, 10 Cal. 541, 543.

174. Responsible for due care in management of ditches used therefor, and are liable for negligence whereby property of others is injured.—*Turner vs. Tuolumne Co. Water Co.*, 25 Cal. 397, 403.

175. Bound to use such care and management in their ditches as prudent persons employ in conduct of their own affairs.—*Campbell vs. Bear River & A. W. & M. Co.*, 35 Cal. 679, 683. See *Hoffman vs. Tuolumne W. Co.*, 10 Cal. 413; *Wolf vs. St. Louis I. W. Co.*, 10 Cal. 541, 544; *Richardson vs. Kier*, 34 Cal. 63, 91 Am. Dec. 681.

176. Bound to use his ditch so as not to injure another's land, irrespective of question as to which has older right or title.—*Richardson vs. Kier*, 34 Cal. 63, 74, 91 Am. Dec. 681.

177. RESPONSIBILITY FOR DAMAGE BY DITCHES.—If appropriator's ditch is filled with sediment or gravel, such ditch being situated in ravine; and in heavy floods natural waters of ravine throw out and carry this sediment and gravel from ditch on land of others, appropriator is responsible.—*Richardson vs. Kier*, 37 Cal. 263, 265.

178. Where water appropriator's ditch runs

through natural bed of ravine and ravine becomes flooded by waters other than those contributed to it by such ditch, appropriator is not responsible; but if waters contributed to such ravine by such ditch occasioned overflow appropriator is responsible.—*Richardson vs. Kier*, 37 Cal. 263, 266.

179. Where ravine or natural watercourse is taken or adopted by ditch-owner as part of his line of ditch, he is to be understood as doing so only to extent of capacity of his ditch, and if there is natural water running in ravine so adopted, he is not responsible for overflow, as it may have resulted from water not discharged into ravine or watercourse by him.—*Richardson vs. Kier*, 34 Cal. 63, 74, 91 Am. Dec. 681.

180. WHEN A RAVINE IS A DITCH.—Appropriator's ditch running in its course through natural bed of ravine, renders ravine so used for purpose of conducting water just as much part of ditch as though it had been dug for conveying water.—*Richardson vs. Kier*, 37 Cal. 263, 264.

As to abandonment of water-rights, see § 1411 and note.

As to relative rights of prior and subsequent appropriators, see § 1414 and note.

As to posting notice, see post § 1415 et seq.

As to duty of owners or users of any canal, flume, etc., crossing highway to construct and keep in repair bridge across same, see ante § 551.

As to acquisition of water-rights by prescription or adverse enjoyment, see Code Civil Proc. §§ 815-828.

As to drainage, see tit. "Drainage" in General Statutes, and Pol. Code § 3446 and note.

As to acts relating to irrigation, see General Laws, tit. "Irrigation."

As to water commissioners, see that tit. in General Statutes.

See United States Revised Statutes, §§ 2339, 2340, confirming to owner of water-rights on public lands of United States same rights which held under local customs, laws, and decisions prior to enactment of section.

As to general subject of right of prior appropriation of water, see monographic note by H. P. Farnham, 30 L. R. A. 665.

As to appropriation of percolating waters on public lands, see note by H. P. Farnham, 30 L. R. A. 186.

As to periodical appropriation of water, see note by H. P. Farnham, 46 L. R. A. 175.

§ 1411. **APPROPRIATION MUST BE FOR A USEFUL PURPOSE.** The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose, the right ceases.

History: Enacted March 21, 1872.

I. In General.

1. Applied, cited, construed, referred to, etc.
2. Appropriation, use and non-use are the tests of right.
- 3, 4. Beneficial—Use must be.
- 5, 6. Necessary water only acquired.
7. Object had in view must be considered.
8. Uses to which water may be appropriated.

II. Appropriation—What Constitutes.

- 9-15. Appropriation must be for useful or beneficial purpose.
- 16, 17. Same—Within reasonable time.
- 18, 19. Diverting for drainage not appropriation.
20. Extent of appropriation not enlarged by subsequent use.
- 21, 22. Purpose and use test of appropriation.

III. Adverse Possession.

23. Right may be lost by.
- 24, 25. What constitutes.

IV. Abandonment—What Constitutes.

- 26, 27. Abandonment is question of fact.
28. Abandonment will not be presumed from lapse of time.
29. Abandonment must be continued.
- 30-32. Acts constituting abandonment.
- 33-39. Acts not amounting to abandonment.
40. Concurrence of act and intent.
- 41, 42. Intention or non-user not sufficient of itself.
43. Verbal sale works abandonment.

V. Abandonment—Effect of.

44. New appropriation—Subject to.

45. Obtain no rights by using abandoned ditch.

46. Right to change water-right lost by.
- 47-49. Rights cease and determine.

VI. Forfeiture by Non-User.

50. Appropriation for mining purposes at various points.
51. Continuous non-user for five years.
52. Non-user forced by dry weather.
53. Section deals with forfeiture.

VII. Must Prevent Waste.

- 54, 55. Ditches, flumes, etc., must be so kept to prevent waste.
- 56, 57. Must take proceedings to prevent waste.

I. IN GENERAL.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Lux vs. Haggin*, 69 Cal. 355, 307 (cited), 369, 452 (dis. op.), 10 Pac. Rep. 674 (cited in connection with other sections); *Perego vs. McKissick*, 79 Cal. 572, 574, 21 Pac. Rep. 967 (applied); *Barrows vs. Fox* (Cal. Aug. 6, 1892), 30 Pac. Rep. 768 (applied); *Barrows vs. Fox*, 98 Cal. 63, 66, 32 Pac. Rep. 811 (applied); *Smith vs. Hawkins*, 110 Cal. 122, 126, 127, 42 Pac. Rep. 453 (construed and applied); *Smith vs. Hawkins*, 120 Cal. 86, 87, 52 Pac. Rep. 139 (construed and applied).

2. APPROPRIATION, USE AND NON-USE ARE TESTS of appropriator's right, and place of use and character of use are not.—*Davis vs. Gale*, 32 Cal. 26, 34, 91 Am. Dec. 554; *Mitchell vs. Amador C. & Min. Co.*, 75 Cal. 464, 482, 17 Pac. Rep. 246. See *Hewitt vs. Story*, 64 Fed.

Rep. 510, 515, 30 L. R. A. 265; Union M. & Min. Co. vs. Dangberg, 81 Fed. Rep. 73, 95; Nevada Ditch Co. vs. Bennett, 30 Oreg. 59, 60 Am. St. Rep. 777, 45 Pac. Rep. 472.

2. BENEFICIAL.—Use must be.—Extent of appropriation is limited not by quantity of water diverted, but by quantity which is, or which may be, applied by appropriator to beneficial use, and as to any surplus, riparian proprietor, below point of diversion, has right to demand that it should flow in stream as it has been accustomed to flow.—Barrows vs. Fox, 98 Cal. 63, 66, 32 Pac. Rep. 811. See Peregoy vs. McKissick, 79 Cal. 572, 21 Pac. Rep. 967.

4. It would be most mischievous perpetuity which would allow one who has made appropriation of stream to retain indefinitely as against other appropriator right to water therein while failing to apply same to some useful or beneficial purpose.—Smith vs. Hawkins, 110 Cal. 122, 127, 42 Pac. Rep. 453. See Integral Q. Min. Co. vs. Altoona Q. Min. Co., 75 Fed. Rep. 379, 381, 382.

5. NECESSARY WATER ONLY ACQUIRED.—Act of appropriation means use to carry out purpose, and use made of water will qualify right of appropriation to taking for specific purpose, or to so much as necessary for it.—Ortman vs. Dixon, 13 Cal. 33, 38. See McKinney vs. Smith, 21 Cal. 374, 381, 383, Nevada Co. & S. C. Co. vs. Kidd, 37 Cal. 282, 313; Smith vs. O'Hara, 43 Cal. 371, 375, 376; Lux vs. Hagglin, 69 Cal. 255, 447, 10 Pac. Rep. 674; Edgar vs. Stevenson, 70 Cal. 286, 290, 291, 11 Pac. Rep. 704; De Necochea vs. Curtis, 80 Cal. 397, 405, 20 Pac. Rep. 563, 22 Id. 198; Ball vs. Kehl, 95 Cal. 606, 614, 30 Pac. Rep. 780. Cele. New Mercer Ditch Co. vs. Armstrong, 21 Colo. 367, 365, 40 Pac. Rep. 989. Mont. Thorp vs. Freed, 1 Mont. 651, 658; Gassert vs. Noyes, 13 Mont. 216, 222, 44 Pac. Rep. 959. Nev. Lobdell vs. Simpson, 2 Nev. 274, 277, 90 Am. Dec. 537, 539. Oreg. Simmons vs. Winters, 21 Oreg. 35, 42, 28 Am. St. Rep. 727, 731, 27 Pac. Rep. 7. Fed. Atchison vs. Peterson, 87 U. S. (20 Wall.) 507, 514, 679, bk. 22 L. ed. 414; Doyle vs. San Diego L. & T. Co., 46 Fed. Rep. 709, 711; Hewitt vs. Story, 64 Fed. Rep. 510, 515, 30 L. R. A. 265; Union M. & Min. Co. vs. Dangberg, 81 Fed. Rep. 73, 95, 106.

6. Taking up water of stream to run mill is appropriation of only so much of the water as necessary for that purpose, and does not secure right to all water at that point if there was more than enough for that purpose.—McKinney vs. Smith, 21 Cal. 374, 382.

7. OBJECT HAD IN VIEW AT TIME OF APPROPRIATION and diversion of water is to be construed in connection with extent and right of appropriation.—Hewitt vs. Story, 64 Fed. Rep. 510, 30 L. R. A. 265; Union M. & Min. Co. vs. Dangberg, 81 Fed. Rep. 73.

8. USES TO WHICH WATER MAY BE APPROPRIATED are, first, to supply natural wants, such as to quench thirst, to water cattle, for household or culinary purposes, and, in some countries, for the purpose of irrigation. These must be first supplied before water can be applied to satisfaction of artificial

wants, such as mills, manufactories, and the like.—Crandall vs. Woods, 8 Cal. 186, 141.

II. APPROPRIATION—WHAT CONSTITUTES.

9. APPROPRIATION MUST BE FOR USEFUL OR BENEFICIAL PURPOSE.—Appropriation of water must be actual, and must be for some useful purpose allowed by law.—Maeris vs. Bicknell, 7 Cal. 261, 262, 68 Am. Dec. 257; Bledsoe vs. Decrow, 132 Cal. 312, 315, 64 Pac. Rep. 397.

10. Appropriation of water is intent to take, accompanied by some open physical demonstration of intent, and for some valuable use.—McDonald vs. Bear River & A. W. & Min. Co., 13 Cal. 220, 232.

11. Appropriation of water by means of ditch is not measured by capacity of ditch through which appropriation is made, but is limited to such quantity not exceeding capacity of ditch as appropriator may put to useful purpose.—Smith vs. Hawkins, 120 Cal. 86, 88, 52 Pac. Rep. 139; Senior vs. Anderson, 115 Cal. 496, 47 Pac. Rep. 454.

12. Appropriator can hold as against one subsequent in right only maximum quantity of water which he shall have devoted to beneficial use at same time, within period by which his right would otherwise be debarred for non-user.—Smith vs. Hawkins, 120 Cal. 86, 88, 52 Pac. Rep. 139.

13. Diversion of water ripens into valid appropriation only where it is utilized by appropriator for beneficial use.—Hewitt vs. Story, 64 Fed. Rep. 510, 30 L. R. A. 265; Union M. & Min. Co. vs. Dangberg, 81 Fed. Rep. 73.

14. One is not appropriator who has never used water attempted to be appropriated for beneficial purpose.—Peregoy vs. McKissick, 79 Cal. 572, 574, 21 Pac. Rep. 967; Vernon Irr. Co. vs. City of Los Angeles, 106 Cal. 237, 243, 39 Pac. Rep. 762.

15. Water to which appropriator is entitled is not quantity he diverts, but quantity which is or may be applied to beneficial use.—Riverside W. Co. vs. Sargent, 112 Cal. 230, 234, 44 Pac. Rep. 560.

16. Within reasonable time.—Appropriator's right is not limited by quantity of water he could put to useful purpose upon his land first or second year, but to such quantity as he could put to useful use upon his land within reasonable time by use of reasonable diligence.—Senior vs. Anderson, 115 Cal. 496, 504, 47 Pac. Rep. 454. See Barnes vs. Sabron, 10 Nev. 217, 243; Simmons vs. Winters, 21 Oreg. 35, 28 Am. St. Rep. 727, 27 Pac. Rep. 7; Cole vs. Logan, 24 Oreg. 304, 33 Pac. Rep. 568.

17. True test of extent of appropriator's rights in and to waters of stream in all cases is actual amount applied, without waste, to some beneficial use within reasonable time after he has given notice of his intention to appropriate the water.—Union M. & Min. Co. vs. Dangberg, 81 Fed. Rep. 73.

18. DIVERSION OF WATER FROM ITS CHANNEL FOR PURPOSE OF DRAINAGE SIMPLY, is not such appropriation as to give right against others who wish to appropriate the water for useful purposes.—Maeris vs

Bicknell, 7 Cal. 261, 262, 68 Am. Dec. 257; McKinney vs. Smith, 21 Cal. 374, 382.

19. Cannot claim water as appropriated as against other parties who afterwards commenced their ditch in good faith with intent to appropriate the water and before any actual appropriation by first parties for such purpose, as second parties thereby gained priority over first parties and all persons holding under them.—Maeris vs. Bicknell, 7 Cal. 261, 263, 68 Am. Dec. 257.

20. **EXTENT OF APPROPRIATION IS NOT ENLARGED BY SUBSEQUENT USE** of water appropriated upon other lands, but must be determined by use upon lands for which the water was appropriated.—Senior vs. Anderson, 115 Cal. 496, 501, 47 Pac. Rep. 454.

21. **PURPOSES OF DIVERSION AND USE OF WATER DIVERTED** are general tests of valid appropriation as well as of quantity appropriated.—Senior vs. Anderson, supra.

22. **RIGHT TO WATER BY PRIOR APPROPRIATION ON MINERAL LANDS** of public domain is limited in every case in quantity and quality by uses for which appropriation is made.—Atchison vs. Peterson, 87 U. S. (20 Wall.) 507, 514, bk. 22 L. ed. 414.

III. ADVERSE POSSESSION.

23. **RIGHT OF THE FIRST APPROPRIATORS MAY BE LOST** in whole or in some limited portions by the adverse possession of another.—Union Water Co. vs. Crary, 25 Cal. 504, 509, 85 Am. Dec. 145; Davis vs. Gale, 32 Cal. 26, 35, 91 Am. Dec. 554; Faulkner vs. Rondini, 104 Cal. 140, 146, 37 Pac. Rep. 883.

24. **WHAT CONSTITUTES.**—Adverse possession cannot be claimed against a prior appropriator so long as he received the quantity of water to which he was entitled.—Faulkner vs. Rondini, 104 Cal. 140, 147, 37 Pac. Rep. 883.

25. In order to constitute a right by prescription as against a prior appropriator of water there must have been such an invasion of the rights of the party against whom it is claimed that he would have had grounds of action against the intruder.—Faulkner vs. Rondini, 104 Cal. 140, 146, 37 Pac. Rep. 883. See Anaheim W. Co. vs. Semi-Tropic W. Co., 64 Cal. 185, 80 Pac. Rep. 623; Alta L. & W. Co. vs. Hancock, 85 Cal. 219, 20 Am. St. Rep. 217, 24 Pac. Rep. 645.

IV. ABANDONMENT—WHAT CONSTITUTES.

26. **ABANDONMENT IS A QUESTION OF FACT.**—Yielding up possession and non-user are evidences of abandonment, and under many circumstances sufficient to warrant deduction of ultimate fact of abandonment; but it may be rebutted by evidence which shows that notwithstanding such non-user of want of possession, owners did not intend to abandon.—Integral Q. Min. Co. vs. Altoona Q. Min. Co., 75 Fed. Rep. 379.

27. Abandonment is a question of fact to be determined by a jury or the court sitting as such.—Utt vs. Frey, 106 Cal. 392, 397, 39 Pac. Rep. 807.

28. **Abandonment of a water-ditch will not be presumed from lapse of time.**—Partridge vs. McKinney, 10 Cal. 181, 183.

29. **Abandonment must be continual.**—Right of second appropriators to use of water and tailings abandoned by first appropriators is contingent upon fact of continual abandonment of the water and tailings by first appropriators (what constitutes continual abandonment not decided).—Dougherty vs. Creary, 30 Cal. 290, 299, 89 Am. Dec. 116.

30. **ACTS CONSTITUTING ABANDONMENT.**—Abandonment of water-right is to relinquish possession thereof without any present intention to repossess.—Utt vs. Frey, 106 Cal. 392, 397, 39 Pac. Rep. 807.

31. **Ceasing to use it for beneficial purposes.**—Peregoy vs. McKissick, 79 Cal. 572, 574, 21 Pac. Rep. 967.

32. Where certain parties constructed ditch for appropriation of water and afterwards joined with certain other parties who were owners of another ditch under arrangement by which waters of second ditch were diverted by means of first ditch, all of said parties sharing in use of said waters in certain agreed proportions, location of first ditch being changed twice with consent of its constructors, such condition of affairs existing for number of years, such act worked abandonment of first ditch and rights secured thereby by parties who constructed it.—Hewitt vs. Story, 64 Fed. Rep. 510, 30 L. R. A. 265.

33. **ACTS NOT AMOUNTING TO ABANDONMENT.**—Abandonment is not shown where property is in state of "innocuous desuetude," mill partially dismantled, ditch and turbine wheel only used occasionally for time and then its use stopped, machinery of mill removed, and where appropriator admitted that he would not rebuild until question concerning the water-rights was settled and determined, such non-use of the mill and water-power not having continued for five years.—Union M. & Min. Co. vs. Dangberg, 81 Fed. Rep. 73.

34. Is not worked where but little water was used from ditch for irrigation, and ditch became so obstructed by debris and vegetable matter that it would conduct but small quantity of water, but was used all along to convey water for domestic purposes and to some extent for purposes of irrigation.—Utt vs. Frey, 106 Cal. 392, 398, 39 Pac. Rep. 807.

35. Is not worked by mingling water of canal with those of creek used as connecting link between canal and ditch.—Butte C. & D. Co. vs. Vaughn, 11 Cal. 143, 152, 70 Am. Dec. 769. See Hoffman vs. Stone, 7 Cal. 46, 49; Merced Min. Co. vs. Fremont, 7 Cal. 317, 325, 68 Am. Dec. 262, 270; Nevada Co. & S. C. Co. vs. Kidd, 37 Cal. 282, 315; Paige vs. Rocky F. C. & Irr. Co., 83 Cal. 84, 94, 21 Pac. Rep. 1102, 23 Id. 875.

Distinguished in Schulz vs. Sweeny, 19 Nev. 259, 362, 3 Am. St. Rep. 890, 11 Pac. Rep. 253.

36. Appropriators of water may use the dry bed of ravine, gulch, or cañon as connecting link in carrying water without such usage working an abandonment by them of the water.—Hoffman vs. Stone, 7 Cal. 46 48

37. Fact that appropriator of water chooses to apply water which he had right to use in whole or in part in sawing timber, to grinding wheat, is no abandonment of his title to water (dictum).—*McDonald vs. Bear River & A. W. & Min. Co.*, 13 Cal. 220, 237.

38. Where water is appropriated by two partners an abandonment is not worked by one party selling out to the other.—*Kimball vs. Gearhart*, 12 Cal. 27, 48.

39. Where prior appropriator unlawfully changes place of his diversion, and constructs new ditch at place of change, ceasing to use old ditch and using new one instead, he does not by that circumstance alone lose all prior right to flow of water itself, and such circumstance does not show intent to abandon his interest in water.—*McGuire vs. Brown*, 106 Cal. 660, 672, 39 Pac. Rep. 1060, 80 L. R. A. 384.

40. CONCURRENCE OF ACT AND INTENT.—To constitute abandonment there must be concurrence of act and intent, e. g. leaving premises or property vacant, so that it may be appropriated by next comer, and intention of not returning.—*Utt vs. Frey*, 106 Cal. 392, 397, 39 Pac. Rep. 807. See *Richardson vs. McNulty*, 24 Cal. 339, 345; *St. John vs. Kidd*, 26 Cal. 263, 272; *Willson vs. Cleaveland*, 30 Cal. 192; *Bell vs. Bed Rock T. & Min. Co.*, 36 Cal. 214; *Moon vs. Rollins*, 36 Cal. 333, 95 Am. Dec. 181; *Judson vs. Malloy*, 40 Cal. 299.

41. INTENTION OR NON-USER NOT SUFFICIENT OF ITSELF.—Abandonment of water-right acquired by appropriation consists in relinquishing possession thereof without any present intention to repossess. To constitute such abandonment there must be concurrence of act and intent, i. e. the act of leaving premises or property vacant, so that it may be appropriated by next comer, and intending not to return. The mere intention to abandon, if not coupled with yielding up possession or cessation of non-user is not sufficient; nor will the non-user without intention to abandon be held to amount to an abandonment.—*Integral Q. Min. Co. vs. Altoona Q. Min. Co.*, 75 Fed. Rep. 379.

42. Mere intention to abandon, if not coupled with yielding up possession with succession of user, is not sufficient nor will non-user alone, without intention to abandon, be held to amount to abandonment.—*Utt vs. Frey*, 106 Cal. 392, 397, 39 Pac. Rep. 807.

43. Verbal sale of appropriator's rights to use water is nugatory and works an abandonment, and vendee takes his rights simply as appropriator in his regular order with subsequent appropriators.—*Griseza vs. Terwilliger*, 144 Cal. 456, 461, 462, 77 Pac. Rep. 1034, distinguishing *Flickinger vs. Shaw*, 37 Cal. 126, 22 Am. St. Rep. 234, 25 Pac. Rep. 263, 11 L. R. A. 134 (in matter of evidence).

V. ABANDONMENT—EFFECT OF.

44. NEW APPROPRIATION.—Subject to.—Appropriator's right to water depends upon continued use, and upon abandonment of use to any part of the water that part is subject to new appropriation.—*Smith vs. Green*, 109 Cal. 228, 235, 41 Pac. Rep. 1023.

45. OBTAIN NO RIGHT BY USING ABANDONED DITCH.—Where water appropriation has been long abandoned and ditch constructed therefor disused throughout, parties cannot claim any rights under original appropriation proceedings or by using such abandoned ditch.—*Kirman vs. Hunnewill*, 93 Cal. 519, 530, 29 Pac. Rep. 124.

46. RIGHT TO CHANGE WATER-RIGHT LOST BY.—While water-right may be changed both as to point of diversion and place of use, after it has been destroyed by abandonment there is nothing left to change.—*Kirman vs. Hunnewill*, 93 Cal. 519, 530, 29 Pac. Rep. 124. See *Davis vs. Gale*, 32 Cal. 26, 27, 91 Am. Dec. 554.

47. RIGHTS CEASE AND DETERMINE.—If an appropriator has in fact abandoned his rights, it would not matter for how long a time he had ceased to use water, for moment that abandonment itself was complete, his rights would cease and determine.—*Smith vs. Hawkins*, 110 Cal. 122, 126, 42 Pac. Rep. 453.

48. Party acquires right to given quantity of water by appropriation and use, and he loses that right by non-use or abandonment.—*Davis vs. Gale*, 32 Cal. 26, 84, 91 Am. Dec. 554.

49. Right which is acquired to use of water by appropriation will be lost by abandonment.—*Utt vs. Frey*, 106 Cal. 392, 397, 39 Pac. Rep. 807.

VI. FORFEITURE BY NON-USER.

50. APPROPRIATION OF WATER MADE FOR MINING PURPOSES GENERALLY TO BE USED AT VARIOUS POINTS, rule that right to use of water for mining purposes ceases with exhaustion of mine for which it was appropriated, has no application.—*Lowden vs. Frey*, 67 Cal. 474, 477, 8 Pac. Rep. 31.

51. CONTINUOUS NON-USER FOR FIVE YEARS will forfeit right to use water and also rights of way for ditches, and like, which are incidental to primary use.—*Smith vs. Hawkins*, 110 Cal. 122, 127, 42 Pac. Rep. 453; 120 Cal. 86, 87, 52 Pac. Rep. 139.

52. NON-USER COMPELLED BY DRY WEATHER.—Appropriator of water does not lose right to use same by reason of fact that he has been compelled to stop using it on account of its having ceased to flow, owing to dry weather and a severe drought.—*City of Santa Barbara vs. Gould*, 143 Cal. 421, 423, 77 Pac. Rep. 151.

53. Section deals with forfeiture of right by non-user alone as distinguished from abandonment.—*Smith vs. Hawkins*, 110 Cal. 122, 126, 42 Pac. Rep. 453.

VII. MUST PREVENT WASTE.

54. DITCHES, FLUMES, ETC., MUST BE SO KEPT AS TO PREVENT WASTE of the surplus water after being used by him, and if his flume or ditch becomes in such condition as to waste such water he may be compelled to mend it or to replace said flume or ditch by pipe.—*Barrows vs. Fox* (Cal. Aug. 6, 1892), 30 Pac. Rep. 768, 769.

55. Ditches and flumes are usual and ordinary means of diverting water in this state,

and parties who have made their appropriations by such means cannot be compelled to substitute iron pipe, though they may be compelled to keep their flumes and ditches in good repair so as to prevent any unnecessary waste.—*Barrows vs. Fox*, 98 Cal. 63, 67, 32 Pac. Rep. 811.

56. MUST TAKE PROCEEDINGS TO PREVENT WASTE.—Prior appropriator is bound to use reasonable care in diverting sufficient water to fill its ditch so as not to occasion unnecessary waste of surplus water, and to do this it must raise its dam to a head sufficient to fill its ditch whenever the stage of the water renders it necessary to do so.—*Natoma W. & Min. Co. vs. Hancock*, 101 Cal. 42, 60, 35 Pac. Rep. 334.

57. Right to water by prior appropriation is limited in every case in quantity and quality by uses for which appropriation is made. A different use of water subsequently, does not affect right; that is subject to same limitations, whatever use. Appropriation does not confer such absolute right to body of the water diverted that owner can allow it after its diversion to run to waste and prevent

others from using it for mining or other legitimate purposes.—*Senior vs. Anderson*, 115 Cal. 496, 533, 47 Pac. Rep. 454; *Atchison vs. Peterson*, 87 U. S. (20 Wall.) 507, 514, bk. 23 L. ed. 414. See *Barnes vs. Sabron*, 10 Nev. 217, 243; *Simmons vs. Winters*, 21 Oreg. 85, 28 Am. St. Rep. 727, 27 Pac. Rep. 7; *Hindman vs. Rizer*, 31 Oreg. 113, 27 Pac. Rep. 13.

As to amount of property appropriated and notice of appropriation, see post § 415.

As to necessary physical acts to complete appropriation, see post § 1416.

As to right of appropriation of water for irrigation purposes, see monographic note 98 Am. Dec. 543.

As to abandonment or loss of rights of prior appropriators of water, see monographic note by H. P. Farnham, 30 L. R. A. 265.

As to appropriation of water for mining purposes, see note by H. P. Farnham, 24 L. R. A. 66.

As to for what purpose appropriation of water is permissible, see monographic note by H. P. Farnham, 30 L. R. A. 674.

As to abandonment of water-rights, see monographic note 45 C. C. A. Rep. 190.

§ 1412. POINT OF DIVERSION MAY BE CHANGED. The person entitled to the use may change the place of diversion, if others are not injured by such change, and may extend the ditch, flume, pipe, or aqueduct by which the diversion is made to places beyond that where the first use was made.

History: Enacted March 31, 1872.

I. In General.

1. Applied, cited, construed, referred to, etc.
2. Restriction imposed by section.
3. Right to raise dam, etc.

II. Change of Place of Diversion.

- 4-9. Right to change place and mode of diversion and use.
- 10-12. Same—Change of place of use.
13. Same—Cannot thereby increase or diminish water.
14. Same—Conditions rendering change impossible.
15. Same—Cannot object to change, when.
16. Same—Cannot enter upon homestead claim to make change.
17. Same—Cannot change to prejudice of others.
18. Same—Immaterial from what ditch water taken.
19. Same—*Kidd vs. Laird*—Holding in.
20. Same—Rights of appropriator in making change.
21. Right to extend flume.

III. Substitution of Pipe for Ditch or Flume.

22. Appropriator cannot be compelled to use pipe.
- 23, 24. Appropriator cannot change ditch to pipe line.

I. IN GENERAL.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Lux vs. Haggin*, 69 Cal. 255, 369, 452 (dis. op.) (cited in connection with other sections), 10 Pac. Rep. 674; *Ramelli vs. Irish*, 96 Cal. 214, 217, 31 Pac. Rep. 41 (applied);

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Jacob vs. Lorenz, 98 Cal. 332, 340, 33 Pac. Rep. 119 (construed and applied); *McGuire vs. Brown*, 106 Cal. 660, 665, 668, 39 Pac. Rep. 1060, 30 L. R. A. 384 (applied); *Hargrave vs. Cook*, 108 Cal. 72, 81, 41 Pac. Rep. 13, 30 L. R. A. 390 (applied); *San Luis W. Co. vs. Estrada*, 117 Cal. 168, 183, 184, 48 Pac. Rep. 1075 (applied); *Byers vs. Colonial Irr. Co.*, 134 Cal. 553, 555, 66 Pac. Rep. 732 (applied).

2. Restriction imposed by section is matter of defense.—*Jacob vs. Lorenz*, 98 Cal. 332, 340, 33 Pac. Rep. 119.

3. RIGHT TO RAISE DAM, ETC.—Where one appropriated portion of waters of creek and diverted it by means of dam or ditch sufficient for purpose at time in natural condition of stream as it then existed, it does not follow that he thereby acquired right to raise dam higher and higher, as occasion might require, to obviate obstructions to its use, in manner originally appropriated, occasioned by physical changes in condition of stream, not anticipated, whether arising from natural or artificial causes.—*Nevada W. Co. vs. Powell*, 34 Cal. 109, 118, 31 Am. Dec. 685.

II. CHANGE OF PLACE OF DIVERSION.

4. RIGHT TO CHANGE PLACE OF DIVERSION of water providing rights of others are not injuriously affected thereby.—*Smith vs. Corbit*, 116 Cal. 587, 593, 48 Pac. Rep. 725; *Byers vs. Colonial Irr. Co.*, 134 Cal. 553, 555, 66 Pac. Rep. 732. See *Kidd vs. Laird*, 15 Cal. 161, 162, 76 Am. Dec. 472; *Ramelli vs. Irish*, 96 Cal. 214, 31 Pac. Rep. 41.

5. And if necessary enter upon servient ten-

ement when others are not injured by change.—*San Luis W. Co. vs. Estrada*, 117 Cal. 168, 183, 48 Pac. Rep. 1075.

6. Person entitled to divert given quantity of water from a stream may take same out at any point on stream, and may change point of diversion at pleasure, if rights of others are not injuriously affected by the change.—*Kidd vs. Laird*, 15 Cal. 161, 179, 76 Am. Dec. 472; *Junkans vs. Bergin*, 67 Cal. 267, 270, 7 Pac. Rep. 684.

7. Prior appropriator of water may change at pleasure place or mode of his diversion so long as others are not injured by such change.—*Charnock vs. Higuerra*, 111 Cal. 473, 477, 52 Am. St. Rep. 195, 44 Pac. Rep. 171, 32 L. R. A. 190.

8. One entitled to use of water appropriated may change place of diversion or place where it is used, or use to which it was first applied, if others are not injured by such change.—*Ramelli vs. Irish*, 96 Cal. 214, 217, 31 Pac. Rep. 41; *Gallagher vs. Montecito V. W. Co.*, 101 Cal. 242, 246, 35 Pac. Rep. 770. See *Kidd vs. Laird*, 15 Cal. 161, 162, 76 Am. Dec. 472; *Davis vs. Gale*, 32 Cal. 26, 27, 91 Am. Dec. 554.

9. Person entitled to given quantity of water of stream may take same out at any point on stream and may change point of diversion at pleasure, and may also change character of its use, if rights of others be not affected thereby.—*Union M. & Min. Co. vs. Dangberg*, 81 Fed. Rep. 73. See *Kidd vs. Laird*, 15 Cal. 161, 162, 180, 76 Am. Dec. 472; *Davis vs. Gale*, 32 Cal. 26, 91 Am. Dec. 554; *Junkans vs. Bergin*, 67 Cal. 267, 7 Pac. Rep. 684; *Ramelli vs. Irish*, 96 Cal. 214, 31 Pac. Rep. 41. *Cole. Coffin vs. Ditch Co.*, 6 Colo. 443, 444; *Sieber vs. Frink*, 7 Colo. 148, 3 Pac. Rep. 901; *Strickler vs. Colorado Springs*, 16 Colo. 61, 62, 68, 25 Am. St. Rep. 245, 26 Pac. Rep. 313. *Mont. Woolman vs. Garringer*, 1 Mont. 535. *Nev. Hobart vs. Wicks*, 15 Nev. 418.

10. Change of place of use.—Prior appropriator of water may change the place of its use without losing that priority as against those whose rights have attached before the change.—*Maeris vs. Bicknell*, 7 Cal. 261, 263, 68 Am. Dec. 257.

11. But cannot thereby increase the quantity of flow to which he is entitled.—*Santa Paula W. W. vs. Peralta*, 113 Cal. 33, 45, 45 Pac. Rep. 168.

12. Appropriator of water for mining purposes may, after mines have been worked out and abandoned for which water was appropriated, change use of such water and carry it to other mines without working abandonment of his first appropriation.—*Davis vs. Gale*, 32 Cal. 26, 34, 91 Am. Dec. 554.

13. Cannot thereby increase or diminish water.—Owner of water-right, by changing the place of diversion, cannot increase or diminish share of water which he was entitled to divert.—*Santa Paula W. W. vs. Peralta*, 113 Cal. 33, 45, 45 Pac. Rep. 168; *Smith vs. Corbit*, 116 Cal. 587, 592, 48 Pac. Rep. 725.

14. Conditions rendering change impossible.—While an appropriator of water has privilege of changing the point of diversion if he could

do so without injury to others, such privilege is different thing from vested and accrued right to the use of water, and it is not part of right, and condition upon which it can be exercised to any material extent becomes impossible, when another person has made lawful settlement on land affected, and has taken proceedings in good faith, under homestead laws, to perfect his title.—*McGuire vs. Brown*, 106 Cal. 660, 668, 39 Pac. Rep. 1060, 30 L. R. A. 384.

15. Cannot object to change, when it does not diminish water to which parties are entitled.—*Jacob vs. Lorenz*, 98 Cal. 332, 340, 33 Pac. Rep. 119.

16. Prior appropriator has no right to enter upon homestead claim of settler for purpose of materially changing point of diversion and constructing new waterways through the land.—*McGuire vs. Brown*, 106 Cal. 660, 665, 39 Pac. Rep. 1060, 30 L. R. A. 384.

17. Person appropriating and diverting water of stream at given point cannot afterwards change point of diversion to prejudice of subsequent appropriator.—*Butte T. M. Co. vs. Morgan*, 19 Cal. 609, 616; *Hargrave vs. Cook*, 108 Cal. 72, 78, 41 Pac. Rep. 18, 30 L. R. A. 390.

18. Immaterial in what ditch water taken.—Where one owns the right to quantity of water to be diverted from creek, it is immaterial in what ditch this water taken when he acquired the right. Place of diversion or of use or of purpose to which use was applied, could be changed.—*Jacob vs. Lorenz*, 98 Cal. 332, 340, 33 Pac. Rep. 119. See *Ramelli vs. Irish*, 96 Cal. 214, 217, 31 Pac. Rep. 41.

19. *Kidd vs. Laird*, 15 Cal. 161, does not hold that person appropriating and diverting water of stream at given point has absolute right to change point of diversion without regard to rights of others.—*Butte T. M. Co. vs. Morgan*, 19 Cal. 609, 616.

20. Rights of appropriator of water from government land are rights of grantee of easement, and extend in manner of changing point of diversion no further than boundaries of servient tenement, and he is under obligation only to make reasonable changes with reasonable care, and also to repair so far as possible whatever damage his laborers may have occasioned; and as to lands other than those subject to his easement, and as to other claims and owners, he can make no change at all which injuriously affects them or their rights.—*Hargrave vs. Cook*, 108 Cal. 72, 81, 41 Pac. Rep. 18, 30 L. R. A. 390.

21. PRIOR APPROPRIATORS HAVE THE RIGHT TO EXTEND FLUME, although by so doing it cuts off use of water by second appropriator, and there is some question whether such extension is beneficial to first appropriators.—*Correa vs. Frietas*, 42 Cal. 339, 345.

III. SUBSTITUTION OF PIPE FOR DITCH OR FLUME.

22. APPROPRIATORS OF WATER WHO HAVE ACQUIRED RIGHT TO USE FLUME or ditch cannot be compelled, by decree, to use pipe, and such users of water cannot be limited to a three-quarter-inch pipe.—*Barrows vs. Fox*, 98 Cal. 63, 66, 32 Pac. Rep. 311.

23. APPROPRIATORS OF WATER BY MEANS OF DITCH HAVE NO RIGHT TO CHANGE said ditch into pipe line.—*Oliver vs. Agasse*, 132 Cal. 297, 300, 64 Pac. Rep. 401.

24. Appropriators of water by means of a ditch or flume have no right to substitute a pipe in place thereof, on the lands of other parties through which their ditch is shown to extend.—*Barrows vs. Fox*, 98 Cal. 63, 66, 32

Pac. Rep. 311. See *Allen vs. San Jose L. & W. Co.*, 92 Cal. 133, 28 Pac. Rep. 215, 15 L. R. A. 92.

As to change of use of channel of water appropriated, see monographic note by H. P. Farnham, 30 L. R. A. 384.

As to changing channels of artificial bodies of water, see monographic note by H. P. Farnham, 50 L. R. A. 344.

§ 1413. WATER MAY BE TURNED INTO NATURAL CHANNELS. The water appropriated may be turned into the channel of another stream and mingled with its water, and then reclaimed; but in reclaiming it the water already appropriated by another must not be diminished.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2, 3. Right to divert water into a stream and reclaim it.

4. Water turned into creek without intention to recapture.

1. Applied, cited, construed, referred to, etc., in: *Lux vs. Haggin*, 69 Cal. 255, 369, 453, 10 Pac. Rep. 674 (dis. op.), (cited in connection with other sections); *Byers vs. Colonial Irr. Co.*, 134 Cal. 553, 555, 66 Pac. Rep. 732 (applied).

2. Appropriators of water have the right to connect their water in canal with ditch by means of flowing creek, providing they do not take any more water from creek than they

flowed into it.—*Butte C. & D. Co. vs. Vaughn*, 11 Cal. 143, 152, 70 Am. Dec. 769; *Paige vs. Rocky Ford C. Co.*, 83 Cal. 84, 94, 31 Pac. Rep. 1102, 23 Id. 875.

3. Parties bringing water from foreign sources and emptying it into stream may divert the quantity from stream, but cannot by so doing diminish quantity of water in such stream to which prior appropriator was entitled.—*Burnett vs. Whitesides*, 15 Cal. 35, 36; *Bledsoe vs. Decrow*, 123 Cal. 312, 315, 64 Pac. Rep. 397.

4. Water of appropriator turned into creek without any intention of recapture, becomes publici juris.—*Davis vs. Gale*, 32 Cal. 26, 35, 91 Am. Dec. 554.

§ 1414. FIRST IN TIME, FIRST IN RIGHT. As between appropriators, the one first in time is the first in right.

History: Enacted March 21, 1872.

I. In General.

1. Applied, cited, construed, referred to, etc.
2. Appropriation not constructive.
3. As between appropriator of land and water.
4. Controversies between prior and subsequent appropriators.
5. No "dog in the manger" business.
6. No mutuality of right.
7. Possession test of priority.
8. Question for jury.
9. Question of injury to water-rights—How determined.
10. Taking another ditch—Date of appropriation.

II. Rights of Prior Appropriator.

11. Breaking of ditch—Effect of.
12. Defective appliances for diverting water.
13. Ditch-owners' rights.
14. Does not lose right by sale of water.
15. Effect of diversion of surplus.
16. First appropriator has better right.
17. First appropriator's rights—Limitations of.
18. Same—Of water for mill purposes.
19. Same—Entitled to protection above and below.
- 20, 21. First appropriator cannot interfere with second.
22. Infringement forbidden.
23. Least possible injury no defense.

24. Miner cannot interfere with prior appropriator.
25. Prior appropriation does not affect right to surplus waters.
26. Right of prior appropriators is superior.
27. Right of first appropriator is fixed by his appropriation.
28. Right of first appropriator enforced.
29. Where subsequent appropriators entitled to excess.

III. Right of Subsequent Appropriator.

30. Appropriator of surplus—Right of.
31. Cannot use water, when.
- 32-36. May appropriate waste water.
- 37-41. May use first appropriator's water, when.
42. Necessary lowering.
43. Relative rights.
44. Second appropriator takes residuum.
45. Subsequent appropriators no right to fill dam, when.
- 46-48. Takes subject to higher rights.

IV. As Between Different Uses.

- 49, 50. Irrigation and mining.
51. Miners' rights not paramount.
- 52, 53. No distinction between different uses.

I. IN GENERAL.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Lux vs. Haggin*, 69 Cal. 255, 469, 453, 10 Pac. Rep. 674 (cited in connection with other sections).

2. APPROPRIATION OF WATER CANNOT BE CONSTRUCTIVE.—*Kelly vs. Natoma W. Co.*, 6 Cal. 105, 108.

3. AS BETWEEN APPROPRIATOR OF LAND AND WATER.—Although right to appropriate water on public lands, and that of occupant of portions of such lands, are derived from implied consent of owner, and as between appropriation of land or water first possessor has better right, the two rights stand upon equal footing, and when they conflict they must be decided by fact of priority.—*Lux vs. Haggins*, 69 Cal. 255, 355, 10 Pac. Rep. 674. See *Irwin vs. Phillips*, 5 Cal. 140, 63 Am. Dec. 113.

4. CONTROVERSIES BETWEEN PRIOR AND SUBSEQUENT APPROPRIATORS of water, question generally is, whether use and enjoyment of water for purposes to which applied by prior appropriator have been in any manner impaired by acts of subsequent appropriator.—*Hewitt vs. Story*, 64 Pac. Rep. 510, 30 L. R. A. 285; *Union M. & Min. Co. vs. Dangberg*, 81 Fed. Rep. 73.

5. No "dog in the manger" business in appropriation of water by either party to interfere with rights of others, when no beneficial use of water can be made by party causing such interference.—*Union M. & Min. Co. vs. Dangberg*, 81 Fed. Rep. 73.

6. No mutuality of right in case of appropriators of running water; their titles or rights are not coextensive as to time or equal in rank.—*Conrad vs. Arrowhead Hotel Co.*, 103 Cal. 399, 403, 37 Pac. Rep. 386.

7. Possession or actual appropriation must be test of priority in all claims to use of water, whenever such claims are not dependent upon ownership of land through which the water flows.—*Kelly vs. Natoma W. Co.*, 6 Cal. 105, 108.

8. Question as to what is extent of right originally acquired by first appropriator to which all subsequently acquired rights must be subordinate, is one of fact for jury.—*Nevada W. Co. vs. Powell*, 34 Cal. 109, 113, 31 Am. Dec. 635.

9. Question as to whether prior appropriator's water-rights have been injuriously affected by subsequent diversion, must be determined in view of use to which water is applied, and other circumstances of case, and is for jury.—*Hill vs. Smith*, 27 Cal. 476, 483.

10. TAKING ANOTHER DITCH—Date of appropriation.—Where one appropriates water for useful purpose and afterwards dies, stranger that takes possession of ditch and continues to divert such water can thereby, as against subsequent appropriator or riparian owner, obtain title to such water which he can convey; in such case date of his appropriation will be deemed to have commenced from time when he took possession of ditch and continued diversion of water, and not from date of original appropriation by man who died.—*Utt vs. Frey*, 106 Cal. 392, 396, 39 Pac. Rep. 807.

II. RIGHTS OF PRIOR APPROPRIATOR.

11. BREAKING OF DITCH—EFFECT OF.—Fact that prior appropriator's ditch broke before water reached land intended to be irri-

gated, and thus enabled subsequent appropriator to apply water on his land, does not affect rights of prior appropriator; in such case prior appropriator will be allowed to show why his ditch broke and why it was not sooner repaired.—*Wells vs. Kroyenhagen*, 117 Cal. 329, 331, 49 Pac. Rep. 123.

12. DEFECTIVE APPLIANCES FOR DIVERTING WATER.—Prior appropriator whose means of diversion become insufficient for his purposes by reason of their inherent defects when surplus is diverted above him, must take usual and reasonable measures to perfect such means.—*Natoma W. & Min. Co. vs. Hancock*, 101 Cal. 42, 53, 35 Pac. Rep. 334.

13. DITCH-OWNER'S RIGHTS.—It has been held by supreme court that owners of water ditch were entitled to exclusive use of waters of stream as against all subsequent locators on stream below ditch, and that ditch appropriator was equally entitled to exclusive use of water pure and undiminished as well against subsequent locator above as below ditch.—*Bear River & A. W. & M. Co. vs. New York Min. Co.*, 3 Cal. 327, 334, 68 Am. Dec. 325.

14. Does not lose right by sale of water.—Prior appropriator of water for mill purposes does not lose his right of priority, as against lower subsequent appropriator, by sale of water to upper proprietor.—*McDonald vs. Askew*, 29 Cal. 200, 209.

15. Effect of diversion of surplus.—Prior appropriator, who will require for irrigation and other useful purposes all water diverted by him, has, as against subsequent proprietor, an undoubted right to continue such diversion unmolested and undisturbed, except in so far as lawful appropriation or diversion of surplus at point above may involve necessity of gathering and procuring appliances which have thus far proved sufficient to fill ditch.—*Natoma W. & Min. Co. vs. Hancock*, 101 Cal. 42, 45, 35 Pac. Rep. 334.

16. FIRST APPROPRIATOR HAS BETTER RIGHT.—By customary advantages obtained by miners in Pacific states and territories, where mining for precious metals is had on public lands of United States, first appropriator of mines or of waters in streams on said lands for mining purposes, is held to have better right than others to work mines or use waters.—*Atchison vs. Peterson*, 37 U. S. (10 Wall.) 507, 514, bk. 22 L. ed. 414.

17. First appropriators of waters of stream for mining purposes have no right to erect on claim of second appropriator below them flumes and structures for purpose of depositing thereon tailings from claims above.—*Esmond vs. Chew*, 15 Cal. 137, 143.

18. First appropriators of water for mill purposes are entitled to it to extent appropriated, and for those purposes to exclusion of any subsequent appropriation of it for same or any other use.—*Ortman vs. Dixon*, 13 Cal. 33, 33.

19. First locator or appropriator of water is entitled to protection equally from those above him as those below him.—*Hill vs. King*, 3 Cal. 336, 339.

20. First appropriator cannot interfere with second.—When right has once vested in

second appropriator first appropriator is no more justified by extending his own claim or changing means of appropriation in interfering with full enjoyment of right vested in second appropriators than second appropriators would have in encroaching upon prior rights of first appropriator.—*Nevada W. Co. vs. Powell*, 34 Cal. 109, 119, 91 Am. Dec. 685.

21. When rights of subsequent appropriator once attach, prior appropriator cannot encroach upon them by extending his rights beyond first appropriation.—*Nevada W. Co. vs. Powell*, 34 Cal. 109, 119, 91 Am. Dec. 685.

22. **INFRINGEMENT FORBIDDEN.**—Appropriation of water of stream to apply to some useful purpose secures right which cannot be infringed upon by subsequent appropriation of water by others.—*McKinney vs. Smith*, 21 Cal. 374, 381.

23. **Least possible injury no defense.**—Fact that miner had studiously conducted his mining operations in such manner as to cause least possible injury to water-rights of prior appropriator, is no defense if in fact such rights were injured.—*Hill vs. Smith*, 27 Cal. 476, 481.

24. **Miner has no right to use water in working his mine** in such manner as to interfere with prior appropriator's rights in such water. If by such use of water it becomes thickened by addition of mud or mineral substances when it returns to first appropriator, such use is infringement upon first appropriator's rights.—*Hill vs. Smith*, 27 Cal. 476, 481.

25. **PRIOR APPROPRIATION DOES NOT AFFECT RIGHT TO SURPLUS WATER.**—Prior appropriators having appropriated a portion of the water of a river, and diverted it by cuts in high banks and by ditches, only acquire right to appropriate and use such portions of water to extent necessary to irrigate amount of land they then owned, and such appropriation would not impair rights of subsequent appropriator who acquired right to then surplus water of river in its bed or banks to extent that would not interfere with such rights as prior appropriators had previously acquired.—*Union M. & Min. Co. vs. Dangberg*, 81 Fed. Rep. 73.

26. **RIGHT OF PRIOR APPROPRIATORS IS SUPERIOR TO THAT OF SUBSEQUENT APPROPRIATORS**, and subsequent appropriator is not entitled to divert his water to such extent that sufficient amount thereof will not flow to supply prior appropriators amount of water by them appropriated before appropriation made by subsequent appropriators.—*Stein Canal Co. vs. Kern I. Irr. Co.*, 53 Cal. 563, 565.

27. **Right of the first appropriator is fixed by his appropriation**, and when others locate upon his stream or appropriate water he cannot enlarge his original appropriation or make any change in channel to their injury. Each subsequent locator or appropriator is entitled to have water flow in same manner as when he located, and may insist that prior appropriators shall be confined to what is actually appropriated or necessary for purposes for which they intended to use the water.—*Union M. & Min. Co. vs. Dangberg*, 81 Fed. Rep. 73.

28. **Right of first appropriator enforced.**—Water is diverted to propel machinery in flour mills and saw mills and to irrigate land for cultivation as well as to enable miners to work their mining claims, and in all such cases right of first appropriator exercised within reasonable limits is respected and enforced.—*Basey vs. Gallagher*, 87 U. S. (20 Wall.) 670, bk. 22 L. ed. 452.

29. **Where subsequent appropriators are entitled to excess of water**, its use by prior appropriator should be carefully restricted to what is necessary.—*Shenandoah M. & Min. Co. vs. Morgan*, 106 Cal. 409, 419, 39 Pac. Rep. 802.

III. RIGHT OF SUBSEQUENT APPROPRIATORS.

30. **APPROPRIATOR OF SURPLUS—Rights of.**—Person appropriating water-right on stream already partly appropriated, acquires right to surplus or residuum he appropriates, and those who acquire prior rights, whether above or below him on stream, can in no way change or extend their use of water to his prejudice, but are limited to rights enjoyed by them when he secured his.—*Union M. & Min. Co. vs. Dangberg*, 81 Fed. Rep. 73. See *Butte Canal & D. Co. vs. Vaughn*, 11 Cal. 143, 153, 70 Am. Dec. 769; *Ortman vs. Dixon*, 18 Cal. 33, 34, 38; *McKinney vs. Smith*, 21 Cal. 374; *Nevada W. Co. vs. Powell*, 34 Cal. 109, 119, 91 Am. Dec. 685; *Edgar vs. Stevenson*, 70 Cal. 286, 290, 11 Pac. Rep. 704; *Byrne vs. Crafts*, 73 Cal. 641, 15 Pac. Rep. 300; *Mitchell vs. Amador C. & Min. Co.*, 75 Cal. 464, 483, 17 Pac. Rep. 246. *Colo. Rominger vs. Squires*, 9 Colo. 321, 12 Pac. Rep. 213. *Mont. Alder Gulch Con. Min. Co. vs. Hayes*, 6 Mont. 31, 9 Pac. Rep. 581. *Nev. Lobdell vs. Simpson*, 2 Nev. 274, 90 Am. Dec. 537; *Proctor vs. Jennings*, 6 Nev. 83, 3 Am. Rep. 240; *Barnes vs. Sanbron*, 10 Nev. 217. *Utah. Salina Creek Irr. Co. vs. Salina Stock Co.*, 7 Utah, 456, 27 Pac. Rep. 578.

31. **Cannot use water, when.**—Where prior appropriator claims right to use water all the time, subsequent appropriator cannot use it any of the time.—*Lytle Creek W. Co. vs. Perdue*, 65 Cal. 447, 454, 4 Pac. Rep. 426.

32. **MAY APPROPRIATE WASTE WATER.**—Where prior appropriator appropriates all water flowing in ravine, subsequent appropriator may appropriate waste water allowed by first appropriator to flow back into ravine, after having used it for irrigation purposes, but is not entitled to any of original flow of waters in said ravine.—*Brown vs. Mullin*, 65 Cal. 89, 90, 3 Pac. Rep. 99.

33. **Second appropriator can take surplus water not used by first appropriator**, either above or below point where first appropriator takes, and may, if necessary, put in dam and ditch, even though such would put it into their power to take all water when stream is low, and thereby drain first appropriator's canal, providing they did not attempt to use such power.—*Natoma W. & Min. Co. vs. Hancock*, 101 Cal. 42, 50, 35 Pac. Rep. 334.

34. **Second appropriator may appropriate surplus water not used by first appropriator**, even though by so doing he would thereby gain power to drain first appropriator's canal, or even if such diversion would compel first

appropriator to raise dam earlier in season of year and to make it tight and efficient oftener than had been accustomed to do.—*Natoma W. & Min. Co. vs. Hancock*, 101 Cal. 42, 48, 35 Pac. Rep. 384.

35. Whatever is left unappropriated by first appropriator at time of his appropriation may be appropriated by others, and conditions existing at time of second appropriation cannot be changed or interfered with by first appropriator.—*Nevada W. Co. vs. Powell*, 34 Cal. 109, 120, 91 Am. Dec. 685.

36. Where prior appropriator diverts water sufficient to fill his ditch and there still remains water undiverted, owners of mining claims located above point of diversion are entitled to use remaining undiverted waters.—*American Co. vs. Bradford*, 27 Cal. 360, 368.

37. **MAY USE FIRST APPROPRIATOR'S WATER, WHEN.**—Until party first commencing can use water himself, i. e. until right attaches to it, anybody else who has ability may do so.—*Nevada Co. & S. C. Co. vs. Kidd*, 37 Cal. 282, 313.

38. Until claimant is himself in position to use water, his right to water or water-right does not exist in such sense that mere diversion and use of water by another is ground of action either to recover water or future damages for diversion.—*Nevada Co. & S. C. Co. vs. Kidd*, 37 Cal. 282, 311. See *Kimball vs. Gearhart*, 12 Cal. 27, 29.

39. Party may to-day take up site for dam and canal and claim waters of river to be diverted at that point, and immediately commence work with view of appropriating water to his use for mining purposes, and though laboring with all diligence, be unable to actually use water for any purpose for years to come, and until he can use it another party may divert whole water and use it, provided he can do so without injury to appropriator's dam or canal or progress of his work.—*Nevada Co. & S. C. Co. vs. Kidd*, 37 Cal. 282, 310.

40. First appropriator of water in time is first in right, but a second appropriator may use water, providing he does not diminish quantity taken by plaintiff.—*McDonald vs. Bear River & A. W. & Min. Co.*, 13 Cal. 220, 239.

41. He who has first diverted waters of stream and appropriated them to his own use or purposes is entitled to exclusive enjoyment of same pure and undiminished, but by this is not meant that those above him cannot use water for any purpose; use must be reasonable one, and injury or diminution small or inconsiderable.—*Hill vs. King*, 8 Cal. 336, 338.

42. **NECESSARY LOWERING OF FIRST APPROPRIATOR'S HEAD OF WATER** by diversion of surplus is *damnum absque injuria*.—*Natoma W. & Min. Co. vs. Hancock*, 101 Cal. 42, 50, 35 Pac. Rep. 384. See *Barrows vs. Fox*, 98 Cal. 63, 32 Pac. Rep. 811.

43. **RELATIVE RIGHTS.**—First appropriator of water of stream passing through public lands in this state has right to insist that water shall be subject to his use and enjoyment to extent of his original appropriation, and that its quality shall not be impaired

so as to defeat purpose of its appropriation. To this extent his rights go, and no further. In subordination to these rights subsequent appropriators may make such use of channel of stream as they think proper, and they may mingle with its waters other waters and divert an equal quantity as often as they choose.—*Butte Canal & D. Co. vs. Vaughn*, 11 Cal. 143, 154, 70 Am. Dec. 769.

44. Second appropriator merely takes *residuum* in quantity, subject to changed conditions existing by reason of former user.—*Conrad vs. Arrowhead Hotel Co.*, 103 Cal. 399, 403, 37 Pac. Rep. 336.

45. Subsequent appropriators have no right to fill up prior appropriator's dam or ditch, or to materially diminish quantity or deteriorate quality of his water.—*Junkans vs. Bergin*, 67 Cal. 267, 269, 7 Pac. Rep. 684.

46. Taker subject to higher rights.—As between appropriators of water only test is priority of location; and whether party locates above or below claim of another right depends or originates on appropriation alone. He must take subject to higher right of those who were first in point of time to appropriate.—*Hill vs. King*, 8 Cal. 336, 338.

47. Locators and appropriators of waters of stream have no rights antecedent to date of their location. If others have prior to their location decreased quantity of water flowing in such stream or caused deterioration of its quality subsequent locator cannot complain.—*Conrad vs. Arrowhead Hotel Co.*, 103 Cal. 399, 402, 37 Pac. Rep. 336.

48. Those who construct water-ditches, will do so with reference to appropriations of public domain that have been previously made, and rights that have been already acquired, with full knowledge of their own rights as against subsequent locators.—*Crandall vs. Woods*, 8 Cal. 136, 144.

IV. AS BETWEEN DIFFERENT USES.

49. **IRRIGATION AND MINING.**—Mining company has no right to appropriate water for use in its mines to injury of prior appropriator who uses it for purpose of irrigating his garden.—*Wixon vs. Bear River & A. W. & Min. Co.*, 24 Cal. 367, 372, 85 Am. Dec. 69.

50. Reservoir erected for purpose of collecting water to be used for irrigating purposes cannot be destroyed by subsequent appropriator of water for mining purposes.—*Rupley vs. Welch*, 23 Cal. 452, 453, 456.

51. Rights of miners and persons owning ditches constructed for mining purposes are not paramount to other water-rights and interests regardless of time or mode of their acquisition or of priority of appropriation.—*Wixon vs. Bear River & A. W. & Min. Co.*, 24 Cal. 367, 373, 85 Am. Dec. 69.

52. **NO DISTINCTION BETWEEN DIFFERENT USES.**—There is no general distinction to be made in cases of appropriation of water for irrigating arable lands or for mining or milling purposes. General rights of each stand upon same plane; both are entitled to due and equal protection of law; both must be protected and both governed by general forms of

law pertaining to water-rights.—Union M. & Min. Co. vs. Dangberg, 81 Fed. Rep. 73.

53. Whether appropriation is for mining or for mills, for irrigation, or for agricultural, horticultural, domestic, or municipal purposes, rights thereby acquired now stand upon same footing, and appropriation or use of water for one of these purposes is not justifiable when it interferes with prior appropriation or location

for another purpose.—Union M. & Min. Co. vs. Dangberg, 81 Fed. Rep. 73.

As to when right begins, see post § 1418.

As to nature of use of water, see ante § 1411 and note.

As to determination of priorities, see monographic note by H. P. Farnham, 30 L. R. A. 677.

§ 1415. NOTICE OF APPROPRIATION OF WATER; CONTENTS. RECORDING. A person desiring to appropriate water must post a notice, in writing, in a conspicuous place at the point of intended diversion, stating therein:

1. That he claims the water there flowing to the extent of (giving the number) inches, measured under a four-inch pressure;
2. The purpose for which he claims it, and the place of intended use;
3. The means by which he intends to divert it, and the size of the flume, ditch, pipe, or aqueduct in which he intends to divert it.

[Notice must be recorded.] A copy of the notice must, within ten days after it is posted, be recorded in the office of the recorder of the county in which it is posted.

After filing such copy for record, the place of intended diversion or the place of intended use or the means by which it is intended to divert the water, may be changed by the person posting said notice or his assigns, if others are not injured by such change. This provision applies to notices already filed as well as to notices hereafter filed.

History: Enacted March 21, 1872; amended March 21, 1903, Stats. and Amdts. 1903, p. 361. In force March 21, 1903.

1. Applied, cited, construed, referred to, etc.
2. Before the code.
3. Contents of notice.
- 4, 5. Effect of notice.
6. Insufficient notice—Effect of.
7. Liberally construed—Must be
8. Question of fact.
9. Relative importance of notice.
10. Sections 1415, 1416 do not stand alone.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc.,** in: *Lux vs. Haggin*, 69 Cal. 255, 369, 10 Pac. Rep. 674 (cited in connection with other sections); *De Necochea vs. Curtis*, 80 Cal. 397, 398, 400, 401, 407, 20 Pac. Rep. 563, 22 Id. 198 (applied); *Burrows vs. Burrows*, 82 Cal. 564, 566, 567, 568, 23 Pac. Rep. 146 (applied in connection with other sections); *Last Chance W. D. Co. vs. Heilbron*, 86 Cal. 1, 11, 26 Pac. Rep. 523 (applied); *Wells vs. Mantes*, 99 Cal. 583, 584, 586, 587, 34 Pac. Rep. 324 (construed and applied in connection with other sections); *Taylor vs. Abbott*, 103 Cal. 421, 423, 37 Pac. Rep. 408 (construed and applied).

2. **NOTICE—Before the code** was not required to be posted or recorded in making appropriation of water; before adoption of code it was sufficient that water was actually appropriated and used for intended purpose before any one else intervened and claimed right to it.—*De Necochea vs. Curtis*, 80 Cal. 397, 406, 20 Pac. Rep. 563, 22 Id. 198.

3. **Contents of notice.**—Appropriation of water for mining, agricultural, or mechanical

purposes, through ditches conducting it away from natural streams of country, is usually preceded by formal location or designation of quantity of water to be claimed; character, size, grade, and extent of ditch, flume, or viaduct through which it is to be connected, all of which specifications afford criterion by which to measure and limit extent and right when consummated by actual appropriation.—*Cox vs. Clough*, 70 Cal. 345, 349, 11 Pac. Rep. 732.

4. **Effect of notice.**—Notice of intention to appropriate waters of a certain stream, while not of itself sufficient evidence of possession, forms one of series of acts which when taken together make right to possession perfect.—*Thompson vs. Lee*, 8 Cal. 275, 280.

5. **Right to water** does not exist when notice is given and it may never vest; most that is in esse is right to acquire by reasonable diligence future right to water.—*Mitchell vs. Amador C. & Min. Co.*, 75 Cal. 464, 482, 17 Pac. Rep. 246. See *Nevada Co. & S. C. Co. vs. Kidd* 37 Cal. 282, 316.

6. **INSUFFICIENT NOTICE—Effect of.**—Notice posted near spring of water upon certain surveyed public lands reading that "he had that day located the spring and water-right and claimed all water in the spring and flowing from it," does not conform with requirements of this section, and right thereto as appropriator cannot be acquired.—*Taylor vs. Abbott*, 103 Cal. 421-423, 37 Pac. Rep. 408.

7. **LIBERALLY CONSTRUED**—Must be.—Notices of intention to appropriate water are to be liberally construed.—*Osgood vs. El Dorado W. & D. G. Min. Co.*, 56 Cal. 571, 579.

8. **QUESTION OF FACT**.—Question of notice is one for jury.—*Osgood vs. El Dorado W. & D. G. Min. Co.*, 56 Cal. 571, 579.

9. **RELATIVE IMPORTANCE OF NOTICE**.—Party contemplating appropriation of water from stream is furnished with more definite information for his guidance, as to character and extent of appropriation, by actual diversion than could possibly be obtained from

notices provided by statute.—*Wells vs. Mantes*, 99 Cal. 583, 586, 34 Pac. Rep. 324.

10. Sections 1415, 1416 do not stand alone.—*De Necochea vs. Curtis*, 80 Cal. 397, 401, 20 Pac. Rep. 563, 22 Id. 198.

As to necessity of compliance with code, see post § 1419 and note.

As to change of place of diversion, see ante § 1412.

As to extent of use, see ante § 1414 and note.

As to what constitutes an appropriation of water, see monographic note 60 Am. St. Rep. 799.

§ 1416. **DILIGENCE IN APPROPRIATION OF WATER.** Within sixty days after the notice is posted, the claimant must commence the excavation or construction of the works in which he intends to divert the water, or the survey, road or trail building, necessarily incident thereto, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted by snows or rain; provided, that if the erection of a dam has been recommended by the California debris commission at or near the place where it is intended to divert the water, the claimant shall have sixty days after the completion of such dam in which to commence the excavation or construction of the works in which he intends to divert the water.

History: Enacted March 21, 1872; amended March 23, 1895, Stats. and Amdts. 1895, p. 70; March 24, 1903, Stats. and Amdts. 1903, p. 396.

1. Applied, cited, construed, referred to, etc.
2. Completion of ditch, etc., necessary.
3. Construction of ditch.
4. Construction without intention to appropriate.
5. Extent of work required.
6. Failure to follow up notice.
7. Question of fact.
8. Series of acts.
9. Use of water during construction.
10. Water may be conducted, how.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO**, etc., in: *Lux vs. Haggis*, 69 Cal. 255, 369, 10 Pac. Rep. 674 (cited in connection with other sections); *Mitchell vs. Amador C. & Min. Co.*, 75 Cal. 464, 486, 17 Pac. Rep. 246 (cited in connection with other sections); *De Necochea vs. Curtis*, 80 Cal. 397, 400, 401, 403, 20 Pac. Rep. 563, 22 Id. 198 (cited in connection with other sections); *Burrows vs. Burrows*, 82 Cal. 564, 566, 568, 23 Pac. Rep. 146 (cited in connection with other sections); *Wells vs. Mantes*, 99 Cal. 583, 587, 34 Pac. Rep. 324 (cited in connection with other sections).

2. **COMPLETION OF DITCH AND DIVERSION OF WATER** are necessary elements in creation of title by appropriation.—*Mitchell vs. Amador C. & Min. Co.*, 75 Cal. 464, 482, 17 Pac. Rep. 246.

3. **CONSTRUCTION OF DITCH**.—In appropriation of water flowing from springs, fact that ditch was constructed up to mouth of largest spring does not affect right to appropriate or validity of proceedings.—*Ely vs. Ferguson*, 91 Cal. 187, 190, 27 Pac. Rep. 587.

4. **Construction without intention to appropriate**.—Mere private construction of ditch and diverting waters of stream will not give

party any priority over others, as there must be actual appropriation or intention to appropriate followed by due diligence.—*Maeris vs. Bicknell*, 7 Cal. 261, 263, 68 Am. Dec. 257.

5. **Extent of work required**.—In appropriating water for irrigation by agriculturists of land adjacent to small stream, no extended works are required, and quantity of water actually appropriated is at first limited to wants of appropriator and gradually expand with increasing demands of owner, which are usually in direct ratio with increased acreage brought under cultivation.—*Cox vs. Clough*, 70 Cal. 345, 349, 11 Pac. Rep. 732.

6. **Failure to follow up priority of notice by actual appropriation of waters** defeats valid appropriation thereto.—*Cardoza vs. Calkins*, 117 Cal. 106, 113, 48 Pac. Rep. 1010.

7. **Question of fact whether parties appropriating water followed up their notice of intention to appropriate with due diligence in the prosecution of the work, and is for the jury**.—*Weaver vs. Eureka Lake Co.*, 15 Cal. 271, 274.

8. **Series of acts**.—Appropriation of water by means of constructive canals, survey of ground, planting stakes along line, and actually commencing and diligently pursuing work is as much possession as nature of subject will admit, and there is series of acts of ownership which must be conclusive of right.—*Conger vs. Weaver*, 6 Cal. 548, 558, 65 Am. Dec. 528.

9. **USE OF WATER DURING CONSTRUCTION**.—Appropriators of water have right to use so much of water as necessary to preserve their flume from injury while in process of construction.—*Weaver vs. Conger*, 10 Cal. 232, 233.

10. **WATER MAY BE CONDUCTED, HOW.**

—Water appropriated may be conducted through ditches, flumes, or pipes.—Bledsoe vs. Decrow, 132 Cal. 312, 315, 64 Pac. Rep. 397.

As to time from which right of appropriation becomes vested, see post § 1418.

§ 1417. COMPLETION DEFINED. By "completion" is meant conducting the waters to the place of intended use.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Provisions of code conclusive.

Cal. 464, 487, 17 Pac. Rep. 246 (cited in connection with other sections).

1. Applied, cited, construed, referred to, etc., in: *Lux vs. Haggin*, 69 Cal. 255, 369, 10 Pac. Rep. 674 (cited in connection with other sections); *Mitchell vs. Amador C. & Min. Co.*, 75

2. Provisions of code, with reference to compliance therewith by an appropriator of water after giving notice, is conclusive.—*Mitchell vs. Amador C. & Min. Co.*, 75 Cal. 464, 486, 17 Pac. Rep. 246.

§ 1418. DOCTRINE OF RELATION APPLIED. By a compliance with the above rules the claimant's right to the the use of the water relates back to the time the notice was posted.

History: Enacted March 21, 1872.

1. Applied, cited, construed, referred to, etc.
2. Doctrine of relation.
- 4, 5. Same—Reasonable diligence required.
6. Same—Purpose of legislature.

but applying doctrine of relation fixes it as of time when he begins his dam or ditch or flume or other appliance, by means of which appropriation is effected, provided enterprise is prosecuted with reasonable diligence.—*Union M. & Min. Co. vs. Dangberg*, 81 Fed. Rep. 73, 109. See *Kimball vs. Gearhart*, 12 Cal. 27, 28; *Nevada Co. & S. C. Co. vs. Kidd*, 37 Cal. 282, 283, 311; *Osgood vs. El Dorado W. & D. G. Min. Co.*, 56 Cal. 571, 578. *Colo. Sieber vs. Frink*, 7 Colo. 143, 149, 154, 2 Pac. Rep. 901. *Mont. Woolman vs. Garringer*, 1 Mont. 535. *Nev. Ophir S. Min. Co. vs. Carpenter*, 4 Nev. 534, 544; *Irwin vs. Straitt*, 18 Nev. 436, 4 Pac. Rep. 1215.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: *Lux vs. Haggin*, 69 Cal. 255, 370, 10 Pac. Rep. 674 (cited in connection with other sections); *De Necochea vs. Curtis*, 80 Cal. 397, 401, 407, 408, 20 Pac. Rep. 563, 22 Id. 198 (construed and applied in connection with other sections); *Burrows vs. Burrows*, 82 Cal. 564, 569, 23 Pac. Rep. 146 (construed and applied in connection with other sections); *Wells vs. Mantes*, 99 Cal. 583, 586, 587, 34 Pac. Rep. 324 (construed and applied in connection with other sections).

2. DOCTRINE OF RELATION.—Commencement in good faith to appropriate water does not confer power of enjoyment upon appropriators until its completion, yet their rights as against others would bear relation to time of commencement.—*Kelly vs. Natoma W. Co.*, 6 Cal. 105, 109; *Maeris vs. Bicknell*, 7 Cal. 261, 263, 68 Am. Dec. 257; *Kimball vs. Gearhart*, 12 Cal. 27, 49; *Nevada Co. & S. C. Co. vs. Kidd*, 37 Cal. 282, 313.

3. If appropriators gave sufficient notice and prosecuted work with reasonable diligence on completion of work their rights related back at least to commencement of work.—*Osgood vs. El Dorado W. & D. G. Min. Co.*, 56 Cal. 571, 581.

4. Reasonable diligence required.—In determining question of time when right to water by appropriation commences, law does not restrict appropriator to date of his use of water,

5. Preliminary inchoate right to acquire in future right to water which, when it becomes procured and fully vested, will date by relation to first act, for purposes of priority may be lost by want of diligence in pursuing work and perfecting right so that another party more diligent, although commencing subsequently, may obtain first right by actual appropriation and possession of water.—*Nevada Co. & S. C. Co. vs. Kidd*, 37 Cal. 282, 313. See *Kimball vs. Gearhart*, 12 Cal. 27, 29; *White vs. Todd's Valley W. Co.*, 8 Cal. 443, 444, 68 Am. Dec. 338; *Weaver vs. Eureka Lake Co.*, 15 Cal. 271, 272.

6. Purpose and object of legislature in requiring compliance with §§ 1415 and 1416 is merely to define with precision conditions upon which appropriator of water could have all advantages of familiar doctrine of relation.—*De Necochea vs. Curtis*, 80 Cal. 397, 401, 20 Pac. Rep. 563, 22 Id. 198; *Burrows vs. Burrows*, 82 Cal. 564, 569, 23 Pac. Rep. 146; *Wells vs. Mantes*, 99 Cal. 583, 586, 34 Pac. Rep. 324.

§ 1419. FORFEITURE. A failure to comply with such rules deprives the claimants of the right to the use of the water as against a subsequent claimant who complies therewith.

History: Enacted March 21, 1872.

I. In General.

1. Applied, cited, construed, referred to, etc.
2. Actual divertive right.
3. Cannot go outside of notice and proceedings.

4. Effect of completing incomplete appropriation.

5. Effect of departing from notice.

6. Failure of partner to pay expenses.

7. Insufficient appropriation.

8. Law and decisions must be followed.
9. Parties must have ability to complete.

II. Construction of Section.

10. "Claimant" refers to, what.
11. Language of section implies, what.
12. "Right to the use of water"—Meaning of.
13. Section does not refer to appropriator by actual diversion.

III. Intention Must Be Executed.

- 14, 15. Act of commencing and intention not sufficient.
16. Intention must be executed.
17. Title comes from effectual prosecution of purpose.
18. Uncompleted diversion.
19. Same—Action amounting to.
20. Until actual appropriation, no complete right.

IV. Necessity of Compliance with Code.

- 21-24. Code need not be complied with.
- 25-26. Notice need not be given.

I. IN GENERAL.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO,** etc., in: *Lux vs. Haggin*, 69 Cal. 255, 370, 10 Pac. Rep. 874 (cited in connection with other sections); *De Necochea vs. Curtis*, 80 Cal. 397, 401, 403, 407, 408, 20 Pac. Rep. 563, 22 Id. 198 (construed and applied in connection with other sections); *Burrows vs. Burrows*, 82 Cal. 564, 569, 23 Pac. Rep. 146 (construed and applied); *Wells vs. Mantes*, 99 Cal. 583, 587, 34 Pac. Rep. 324 (construed in connection with other sections).

2. **ACTUAL DIVERTIVE RIGHTS.**—Diverter of water upon public unoccupied lands of United States from its natural course who conveys it through ditches and flumes to distant point and uses it for irrigation, mining, or manufacturing purposes, both before and after code, has perfect right to water actually appropriated as against all the world except owner of soil and those claiming adversely who have complied with law.—*De Necochea vs. Curtis*, 80 Cal. 397, 402, 20 Pac. Rep. 563, 22 Id. 198.

3. **CANNOT GO OUTSIDE OF NOTICE AND PROCEEDINGS.**—Appropriator of water must be confined to his own rights under his notice and appropriation proceedings; he cannot go outside of this and attempt to increase his supply of water by tapping streams of riparian owner at other places than where he has made his appropriation.—*Last Chance W. D. Co. vs. Hellbron*, 86 Cal. 1, 11, 26 Pac. Rep. 533.

4. **EFFECT OF COMPLETING INCOMPLETE APPROPRIATION.**—Where parties intending to appropriate water partly constructed ditch but did not have funds sufficient to complete its construction, ditch being intended as substitute for another ditch owned by said appropriators, and such work being afterwards taken up and carried to completion by other parties, but in different manner, and carrying water to different places than contemplated by first parties, such appropriation cannot be construed to be same as original appropriation, and does not preserve any rights obtained by original appropriation.—

Mitchell vs. Amador C. & Min. Co., 75 Cal. 464, 486, 17 Pac. Rep. 246.

5. **THE EFFECT OF DEPARTING FROM NOTICE.**—Where one attempts to appropriate water by giving notice that he intends to appropriate by means of several different-sized pipes, one of which is one-and-one-half-inch pipe, and in completing appropriation proceedings only uses one-and-one-half-inch pipe, he must be deemed to have abandoned proceedings as far as other pipes are concerned.—*Conkling vs. Pacific Impr. Co.*, 87 Cal. 296, 304, 25 Pac. Rep. 399.

6. **FAILURE OF ONE OF TWO PARTNERS** in appropriation of water to pay his portion of expenses or of debts of concern does not forfeit his rights in such appropriation.—*Kimball vs. Gearhart*, 12 Cal. 27, 47.

7. **INSUFFICIENT APPROPRIATION.**—The posting of notice at spring claiming waters thereof as prior appropriator, but which notice did not conform to requirements of § 1415, and subsequent purchase of pipe and causing it to be hauled to point toward said spring several hundred feet distant therefrom, and making an excavation in spring about three feet square and three feet in depth, for purpose of marking place of intended diversion, which acts were not followed up by completion of appropriation, do not give any right as against one who eleven days afterwards went upon land where spring was located, took possession thereof, and built house and moved his family into it and afterwards filed an affidavit in conformity with requirement of possessory act of April 20, 1852.—*Taylor vs. Abbott*, 103 Cal. 421, 423, 37 Pac. Rep. 408.

8. **LAWS AND DECISIONS MUST BE FOLLOWED.**—In order to acquire vested right by appropriation to use of waters, or to water ditch upon public lands of United States in sense of ninth section of act of Congress of 1866, such water must have been appropriated and such ditch constructed in manner recognized by laws or decisions of the courts of this state.—*Himes vs. Johnson*, 61 Cal. 259, 262.

9. **PARTIES PROSECUTING THE WORK TO APPROPRIATE WATER MUST HAVE ABILITY** to complete work within reasonable time, and pecuniary inability to complete work within such time cannot be urged as excuse for not prosecuting work.—*Mitchell vs. Amador C. & Min. Co.*, 75 Cal. 464, 482, 17 Pac. Rep. 246. See *Kimball vs. Gearhart*, 12 Cal. 27, 28.

II. CONSTRUCTION OF SECTION.

10. **"CLAIMANT" AS USED IN SECTION REFERS** to party posting and recording notices required by provisions of § 1415, and does not apply to appropriator by actual diversion.—*Wells vs. Mantes*, 99 Cal. 583, 587, 34 Pac. Rep. 324.

11. **LANGUAGE OF SECTION CLEARLY AND NECESSARILY IMPLIES** that there is right to use of running water, acknowledged by legislature, and cognizable by courts, which is good against all the world except claimant who has complied with rules prescribed in §§ 1415 and 1416.—*De Necochea vs. Curtis*, 80 Cal. 397, 401, 20 Pac. Rep. 563, 22 Pac. Rep. 198.

12. **"RIGHT TO THE USE OF THE WATER,"** referred to in § 1419, is right of one

who has fully completed diversion of running water, and applied it to beneficial use before initiation of adverse right of appropriation under the law, or acquisition of adverse right in land to be affected by the diversion.—*De Necochea vs. Curtis*, 80 Cal. 397, 401, 20 Pac. Rep. 563, 22 Id. 193.

13. SECTION DOES NOT REFER TO AN APPROPRIATOR BY ACTUAL DIVERSION, but only to claimants seeking right to use of water under provisions of this chapter of code.—*Wells vs. Mantes*, 99 Cal. 532, 536, 34 Pac. Rep. 324.

III. INTENTION MUST BE EXECUTED.

14. MERE ACT OF COMMENCING DITCH WITH INTENTION OF APPROPRIATING WATER of itself gives no right to water of stream; right depends upon effectual prosecution of work.—*Mitchell vs. Amador C. & Min. Co.*, 75 Cal. 464, 482, 17 Pac. Rep. 246.

15. Gives no right to water unless this purpose and intention are carried out by reasonable diligence and effectual prosecution of work to final completion of ditch and diversion of water to some beneficial use.—*Hewitt vs. Story*, 64 Fed. Rep. 510, 30 L. R. A. 265; *Union M. & Min. Co. vs. Dangberg*, 81 Fed. Rep. 73.

16. Intention must be executed.—It is not the intention to possess but actual possession which gives rights under appropriation of water; intention must be executed.—*Kelly vs. Natoma W. Co.*, 6 Cal. 105, 106, 108.

17. TITLE TO WATER SOUGHT TO BE APPROPRIATED does not arise from manifestation of purpose to take, but from effectual prosecution of that purpose.—*Kimball vs. Gearhart*, 12 Cal. 27, 50.

18. UNCOMPLETED DIVERSION.—"We do not hold that an uncompleted diversion without compliance with statute gives any right to complete or continue diversion as against intervening right of pre-emption."—*De Necochea vs. Curtis*, 80 Cal. 397, 403, 20 Pac. Rep. 563, 22 Id. 193.

19. Acts amounting to.—Where one attempted to appropriate water, but failed to follow up filing of his notice by actual appropriation of waters, and never constructed his contemplated ditch, and never, except in two or three instances, took any water, which he did in fugitive manner by tapping another party's ditch, some eight or ten years after filing of his notice, his attempted appropriation was never completed and he acquired no title to water.—*Cardoza vs. Calkins*, 117 Cal. 106, 113, 48 Pac. Rep. 1010.

20. UNTIL ACTUAL APPROPRIATION THERE CAN EXIST NO COMPLETE RIGHT to use of water.—*Maeris vs. Bicknell*, 7 Cal. 261, 263, 68 Am. Dec. 257.

IV. NECESSITY OF COMPLIANCE WITH CODE.

21. CODE NEED NOT BE COMPLIED WITH.—Actual appropriation of water may be made and right to it acquired without following course laid down in code.—*Watterson vs. Saldunbehere*, 101 Cal. 107, 112, 35 Pac. Rep. 432; *De Necochea vs. Curtis*, 80 Cal. 397, 401, 20 Pac. Rep. 563, 22 Id. 193; *Burrows vs. Burrows*, 82 Cal. 564, 569, 23 Pac. Rep. 146; *Wells vs. Mantes*, 99 Cal. 532, 536, 34 Pac. Rep. 324.

22. Actual diversion and appropriation of water will give right to use thereof as against claimant who subsequently posts his notices upon stream in accordance with § 1415 and proceeds thereafter as required by statutes to perfect his rights.—*Wells vs. Mantes*, 99 Cal. 532, 534, 34 Pac. Rep. 324.

23. Diversion of water without compliance with statute gives right to continue diversion against pre-emptor whose right of purchase vests after diversion is fully completed, but only to extent and in manner of such actual and complete diversion.—*De Necochea vs. Curtis*, 80 Cal. 397, 403, 20 Pac. Rep. 563, 22 Id. 193.

24. Verbal sale of appropriated water-right confers no title on vendee, but the subsequent use by him and his associates and their successors of water is appropriation of whatever water vendor was entitled to prior to sale.—*Griseza vs. Terwilliger*, 144 Cal. 456, 462, 77 Pac. Rep. 1034.

25. NOTICE NEED NOT BE GIVEN.—As against pre-emption of government land, prior appropriator acquires superior title by diversion of water thereon, notwithstanding he never posted or recorded notice of his attempted appropriation as required by § 1415 (*Burrows vs. Burrows*, 82 Cal. 564, 567, 23 Pac. Rep. 146), and notwithstanding pre-emptor reddiverted water back to her own land, she not having on her part complied with provisions of code in so doing.—*De Necochea vs. Curtis*, 80 Cal. 397, 407, 20 Pac. Rep. 563, 22 Id. 193.

26. Valid appropriation of water may be made without giving notice specified in § 1415.—*Senior vs. Anderson*, 115 Cal. 496, 499, 47 Pac. Rep. 454.

As to abandonment, see ante § 1411 and note.

§ 1420. RIGHTS OF PRESENT CLAIMANT. Persons who have heretofore claimed the right to water, and who have not constructed works in which to divert it, and who have not diverted nor applied it to some useful purpose, must, after this title takes effect, and within twenty days thereafter, proceed as in this title provided, or their right ceases.

History: Enacted March 21, 1872.

Applied, cited, construed, referred to, etc., in: *Lux vs. Haggin* (Cal. Oct. 27, 1884), 4 Pac.

Rep. 919, 924 (applied in connection with other sections); *Lux vs. Haggin*, 69 Cal. 255,

376, 453, 10 Pac. Rep. 674 (dis. op., cited in connection with other sections); Mitchell vs. Amador C. & Min. Co., 75 Cal. 464, 487, 17 Pac. Rep. 246 (cited in connection with other sections).

§ 1421. RECORDER TO KEEP BOOK IN WHICH TO RECORD NOTICES.

The recorder of each county must keep a book, in which he must record the notices provided for in this title.

History: Enacted March 21, 1872.

Applied, cited, construed, referred to, etc., in: Lux vs. Haggin, 69 Cal. 255, 370, 10 Pac. Rep. 674 (cited in connection with other sections).

§ 1422. TIME WITHIN WHICH TO COMMENCE EXCAVATION ON PUBLIC RESERVATIONS. If the place of intended diversion or any part of the route of intended conveyance of water so claimed, be within, and a part of, any national park, forest reservation, or other public reservation, and be so shown in the notice of appropriation of said water, then the claimant shall have sixty days, after the grant of authority to occupy and use such park or reservation for such intended purpose, within which to commence the excavation or construction of said works; provided, that within sixty days after the posting of said notice of appropriation, as provided in section fourteen hundred and fifteen of the Civil Code, the claimant shall in good faith commence (and thereafter diligently and continuously, except when temporarily interrupted by snow or rain, prosecute to completion) such surveys and other work as under the regulations governing such park or reservation, may be required as preliminary to, or for use with, an application for such authority; and provided also that the claimant shall in good faith on completion of said survey and preliminary work, apply to the officer, board, or body, having charge of such park or reservation, for such authority, and shall thereafter, prosecute said application with reasonable diligence.

History: Enacted March 21, 1872; repealed March 15, 1887, Stats. and Amdts. 1887, p. 114; present act, which is entirely new, passed March 24, 1903, Stats. and Amdts. 1903, p. 397. For statutes on subject of irrigation, see HENNING'S GENERAL LAWS, tit. Irrigation.

I. Construction in General.

1. Applied, cited, construed, referred to, etc.
2. Construction not to deprive of constitutional rights.
- 3, 4. Declaratory of pre-existing law.
5. Effect of section.
6. Riparian rights before and after code protected.
- 7, 8. Water-rights not reserved to state.

II. Who Protected.

9. Appropriator not superior to private owner.
10. Class of persons protected.
11. No appropriation on private land.
12. Prescription, only made against riparian proprietors.
13. Prior appropriator cannot enjoin, when.
14. Riparian right may be asserted, when.
- 15, 16. Riparian rights protected.
17. Riparian proprietors not affected.
18. State and United States excluded.

III. Protection of Section Unnecessary, to Whom.

19. Grantee of United States or riparian proprietor.
20. Protection necessary, to whom.

1. CONSTRUCTION, IN GENERAL.

1. APPLIED, CITED, CONSTRUED, REFERRED TO, etc., in: Lux vs. Haggin (Cal. Oct. 27, 1884), 4 Pac. Rep. 919, 924, 925, 935 (dis. op.), 936 (dis. op.) (construed and applied in connection with other sections); Lux vs. Haggin, 69 Cal. 255, 300, 368, 370-376, 378, 379, 426-428, 439, 451 (dis. op.), 453 (dis. op.), 10 Pac. Rep. 674 (construed and applied in connection with other sections); Hargrave vs. Cook, 108 Cal. 72, 78, 41 Pac. Rep. 13, 30 L. R. A. 390 (applied).

2. CONSTRUCTION NOT TO DEPRIVE OF CONSTITUTIONAL RIGHTS.—As language of section will bear reasonable interpretation which will render it applicable everywhere within limits of state, and to all classes of riparian proprietors, it ought not to be construed so that if enforced with respect to all it would deprive any man of his constitutional right.—Lux vs. Haggin, 69 Cal. 255, 376, 10 Pac. Rep. 674.

3. IS DECLARATORY OF PRE-EXISTING LAW.—Section was intended to be declaratory of pre-existing law in so far as it announces protection of all private persons who had acquired riparian rights from any source before

provisions of code went into operation.—Lux vs. Haggin, 69 Cal. 255, 375, 10 Pac. Rep. 674.

4. Section so far as it applies to riparian lands, not those of state, is declaratory of pre-existing law, and was not intended to limit operation to those private persons who had then acquired riparian rights from United States or from Spain or Mexico, or to deprive subsequent grantees of such or other riparian rights.—Lux vs. Haggin, 69 Cal. 255, 375, 10 Pac. Rep. 674.

5. EFFECT OF SECTION.—Section declares in effect, that those appropriating water under previous sections shall not acquire right to deprive of flow of stream those who shall have obtained from state title to or right of possession in riparian lands before proceedings leading to appropriation shall be taken.—Lux vs. Haggin, 69 Cal. 255, 374, 10 Pac. Rep. 674.

6. RIPARIAN RIGHTS ACQUIRED BEFORE AND AFTER CODE PROTECTED.—Section is protective not only of riparian rights existing when code was adopted, but also of riparian rights of those who acquired title to land from state after adoption of act, and before appropriation of water in accordance with code provisions.—Lux vs. Haggin, 69 Cal. 255, 368, 439, 10 Pac. Rep. 674.

7. WATER-RIGHTS NOT RESERVED TO STATE.—Use of present tense in section—"the rights of riparian proprietors are in effect"—is not sufficient to justify finding of reservation by state of all of its waters.—Lux vs. Haggin, 69 Cal. 255, 375, 10 Pac. Rep. 674.

8. Water-rights of state as riparian owner are not reserved to state by section.—Lux vs. Haggin, 69 Cal. 255, 368, 10 Pac. Rep. 674.

II. WHO PROTECTED.

9. APPROPRIATOR NOT SUPERIOR TO PRIVATE OWNER.—Appropriator of waters flowing over land, which at time of appropriation was part of public domain, acquires no right superior to or in derogation of those attaching to lands riparian to same stream, which at time of appropriation were held in private ownership.—Hargrave vs. Cook, 108 Cal. 72, 78, 41 Pac. Rep. 18, 30 L. R. A. 390.

10. CLASS OF PERSONS WHOSE RIGHTS ARE PROTECTED BY SECTION includes only those who may become riparian appropriators at any time before appropriation of water is actually made in accordance with provisions of Civil Code.—Lux vs. Haggin, 69 Cal. 255, 428, 10 Pac. Rep. 674.

11. NO APPROPRIATION ON PRIVATE LANDS.—Diversion of water flowing in natural stream over private lands cannot be justified on ground that it was diverted by virtue of appropriation made subsequent to plaintiff's purchase of said lands from state; unless previously appropriated, water so flowing over such lands at date of their purchase could not afterwards be diverted without affecting their rights as riparian proprietors.—Lux vs. Haggin (Cal. Oct. 27, 1884), 4 Pac. Rep. 919, 925.

12. PRESCRIPTION ONLY MODE AGAINST RIPARIAN PROPRIETORS.—Right to use of water by appropriation cannot be acquired

against riparian proprietors otherwise than by prescription.—Rice vs. Meiners, 136 Cal. 292, 293, 68 Pac. Rep. 817. See Lux vs. Haggin, 69 Cal. 255, 376, 10 Pac. Rep. 674.

13. Prior appropriator cannot enjoin the riparian owner from using water where it appears that prior appropriator is but nominally damaged, and where it does not appear that he first used water for beneficial purposes.—Perego vs. McKissick, 79 Cal. 572, 573, 21 Pac. Rep. 967.

14. RIPARIAN RIGHT MAY BE ASSERTED, WHEN.—As between occupant of riparian land (part of public lands of United States) and a subsequent appropriator of waters of stream, former may assert riparian right.—Lux vs. Haggin, 69 Cal. 255, 357, 10 Pac. Rep. 674. See Crandall vs. Woods, 8 Cal. 136, 143, 144.

15. Riparian rights of owners of private land are fully protected by section.—Hargrave vs. Cook, 108 Cal. 72, 78, 41 Pac. Rep. 18, 30 L. R. A. 390.

16. Section saves and protects the riparian rights of all those who under land laws of state shall have acquired from state right of possession to tract of riparian land prior to initiation of proceedings to appropriate water in accordance with provisions of code.—Lux vs. Haggin, 69 Cal. 255, 376, 10 Pac. Rep. 674.

17. Riparian proprietors not affected.—Provisions of Civil Code in respect to appropriation of water must be limited to that which flows over lands owned by this state or by United States, and cannot affect rights of riparian proprietors.—Lux vs. Haggin (Cal. Oct. 27, 1884), 4 Pac. Rep. 919, 923, 925.

18. STATE AND UNFITTED STATES EXCLUDED.—Legislative intent was to exclude as well state as United States from protection which is extended to riparian proprietors by section.—Lux vs. Haggin, 69 Cal. 255, 376, 378, 428, 10 Pac. Rep. 674.

III. PROTECTION OF SECTION UNNECESSARY, TO WHOM.

19. NEITHER GRANTEE OF UNITED STATES NOR GRANTEE OF PRIVATE PERSON who was riparian owner when code was adopted need rely for protection on section. Such persons are protected by constitutional principles.—Lux vs. Haggin, 69 Cal. 255, 368, 10 Pac. Rep. 674.

20. ONLY PERSONS WHO CAN FIND IT NECESSARY TO RESORT TO SECTION as to protection of their right to flow of running waters are state (as owner of lands granted to it by United States), and grantees from state, unless it be where adverse parties are merely occupants of land and are respectively on public lands of United States or of state.—Lux vs. Haggin, 69 Cal. 255, 373, 10 Pac. Rep. 674.

The annotations to this section are to the section as it originally stood before its repeal, and not to the present section.

As to acts relating to irrigation, see General Laws, tit. "Irrigation."

As to respective rights of appropriators and riparian owners, see monographic note 43 Am. Dec. 269.

TITLE IX.

HYDRAULIC MINING.

§ 1424. Where hydraulic mining can be carried on. § 1425. Meaning of hydraulic mining.

§ 1424. **WHERE HYDRAULIC MINING CAN BE CARRIED ON.** The business of hydraulic mining may be carried on within the state of California wherever and whenever the same can be carried on without material injury to the navigable streams, or the lands adjacent thereto.

History: Enacted March 24, 1893, Stats. and Amdts. 1893, p. 337.

1. Act of Congress of 1893—Construction.
2. Same—Act mandatory and constitutional.
3. Same—Hydraulic mining prohibited, when.
4. Hydraulic mining—When lawful.
- 5-7. Same—When unlawful.

1. **ACT OF CONGRESS OF 1893—CONSTRUCTION.**—Real intent and meaning of the act of Congress entitled "An act to create California Debris Commission and regulate hydraulic mining in state of California," approved March 1, 1893, is to prohibit and make unlawful any and all hydraulic mining in territory drained by Sacramento and San Joaquin river systems, in state of California, directly or indirectly injuring navigability of said river system, and to permit it in all cases where work can be prosecuted without such injury to navigability of said river systems or to lands adjacent thereto.—United States vs. North Bloomfield G. M. Co., 81 Fed. Rep. 243, 251.

2. Such act is mandatory and constitutional.—North Bloomfield G. M. Co. vs. United States, 88 Fed. Rep. 664, 672.

3. **Hydraulic mining prohibited, when.**—And under its provisions hydraulic mining is prohibited in territory drained by Sacramento and San Joaquin river systems in state of

California unless terms and conditions imposed by such provisions are complied with.—United States vs. North Bloomfield G. M. Co., 81 Fed. Rep. 243, 251; North Bloomfield G. M. Co. vs. United States, 88 Fed. Rep. 664, 672.

4. **Hydraulic mining lawful when properly conducted.**—County of Yuba vs. Cloke, 79 Cal. 239, 243, 21 Pac. Rep. 740.

5. **Unlawful if so conducted as to create nuisance.**—People vs. Gold Run D. & M. Co., 66 Cal. 138, 151, 56 Am. Rep. 80, 4 Pac. Rep. 1150.

6. **Hydraulic mining is not within itself unlawful or necessarily injurious to others; its unlawful nature results from manner in which it is carried on, and neglect of parties engaged therein to properly care for debris resulting therefrom, whereby it is allowed to fall in stream and eventually causes injury to property situated below.**—County of Yuba vs. Cloke, 79 Cal. 239, 243, 21 Pac. Rep. 740.

7. **And when injurious to navigable rivers or private property, is not authorized by any valid custom or usage or by any valid law, statute, or otherwise of state of California or United States.**—Woodruff vs. North Bloomfield G. M. Co., 18 Fed. Rep. 753, 755.

§ 1425. **MEANING OF HYDRAULIC MINING.** Hydraulic mining, within the meaning of this title, is mining by means of the application of water, under pressure, through a nozzle, against a natural bank.

History: Enacted March 24, 1893, Stats. and Amdts. 1893, p. 337.

1. Applied, cited, construed, referred to, etc.
2. Definition of hydraulic mining.
3. Essential to practical conduct.
4. Ditch operation—As a nuisance.
- 5, 6. Drain—Quartz or drift mine.
- 7-9. Easements—Character and limitation.
10. Evidence—Mining rules and customs.
- 11-13. Usage—Issue—Extent of rule.
- 14-16. Water—Not superfluous.

1. **APPLIED, CITED, CONSTRUED, REFERRED TO, etc.**, in: Jacob vs. Day, 111 Cal. 571, 576, 44 Pac. Rep. 243 (applied).

2. **DEFINITION.**—Hydraulic mining is process by which bank of gold-bearing earth and rock is excavated by jet of water, discharged through convergent nozzle of pipe under great pressure, earth and debris being carried away by same water through sluices, and discharged on lower levels into natural streams and water-

courses below.—Woodruff vs. North Bloomfield G. M. Co., 18 Fed. Rep. 753, 756.

3. **ESSENTIALS TO PRACTICAL CONDUCT** consist of (1) water, quantities, (2) carried under pressure to disintegrate and wash down natural bank, (3) reservoirs, ditches, etc., indispensable, (4) soil and gravel carried by gravity through cuts, etc., (5) resulting wash matter carried away.—Jacob vs. Day, 111 Cal. 571, 576, 44 Pac. Rep. 243.

4. **DITCH OPERATION.**—Owners have no right to operate as nuisance or so as to destroy the servient tenement.—Jacob vs. Day, 111 Cal. 571, 579, 44 Pac. Rep. 243; North Fork W. Co. vs. Edwards, 121 Cal. 662, 667, 54 Pac. Rep. 69.

5. **To drain is to rid of superfluous moisture.**—Jacob vs. Day, 111 Cal. 571, 576, 44 Pac. Rep. 243.

6. Quarts or drift mine.—Term "drainage" appropriate as applied to means by which water is met and disposed of.—*Jacob vs. Day*, 111 Cal. 571, 575, 44 Pac. Rep. 243.

7. EASEMENT RESTRICTION UPON RIGHT OF PROPERTY of owner of servient tenement, and no alteration can be made in mode of enjoyment by owner of dominant tenement, effect of which will be to increase such restriction.—*North Fork W. Co. vs. Edwards*, 121 Cal. 662, 667, 54 Pac. Rep. 69; *Oliver vs. Agasse*, 132 Cal. 297, 300, 64 Pac. Rep. 401.

8. Character and extent of easement claimed by prescription are determined by uses under which it is gained.—*North Fork W. Co. vs. Edwards*, 121 Cal. 662, 667, 54 Pac. Rep. 69; *Strong vs. Baldwin*, 137 Cal. 482, 440, 70 Pac. Rep. 288.

9. Right must be limited by amount of enjoyment proved to have been had.—*North Fork W. Co. vs. Edwards*, 121 Cal. 662, 667, 54 Pac. Rep. 69; *Oliver vs. Agasse*, 132 Cal. 297, 300, 64 Pac. Rep. 401.

10. EVIDENCE.—Mining rules and customs may be given without averment of such rules and customs.—*Jacob vs. Day*, 111 Cal. 571, 576,

44 Pac. Rep. 243. See *Colman vs. Clements*, 23 Cal. 245, 247.

11. USAGE—May regulate conduct quite as well as formally promulgated rules.—*Hewitt vs. San Jacinto & P. V. Irr. Dist.*, 124 Cal. 186, 190, 56 Pac. Rep. 392.

12. Issue—Concerning regulations broad enough to include usages confirming mode of business.—*Hewitt vs. San Jacinto & P. V. Irr. Dist.*, 124 Cal. 186, 190, 56 Pac. Rep. 392.

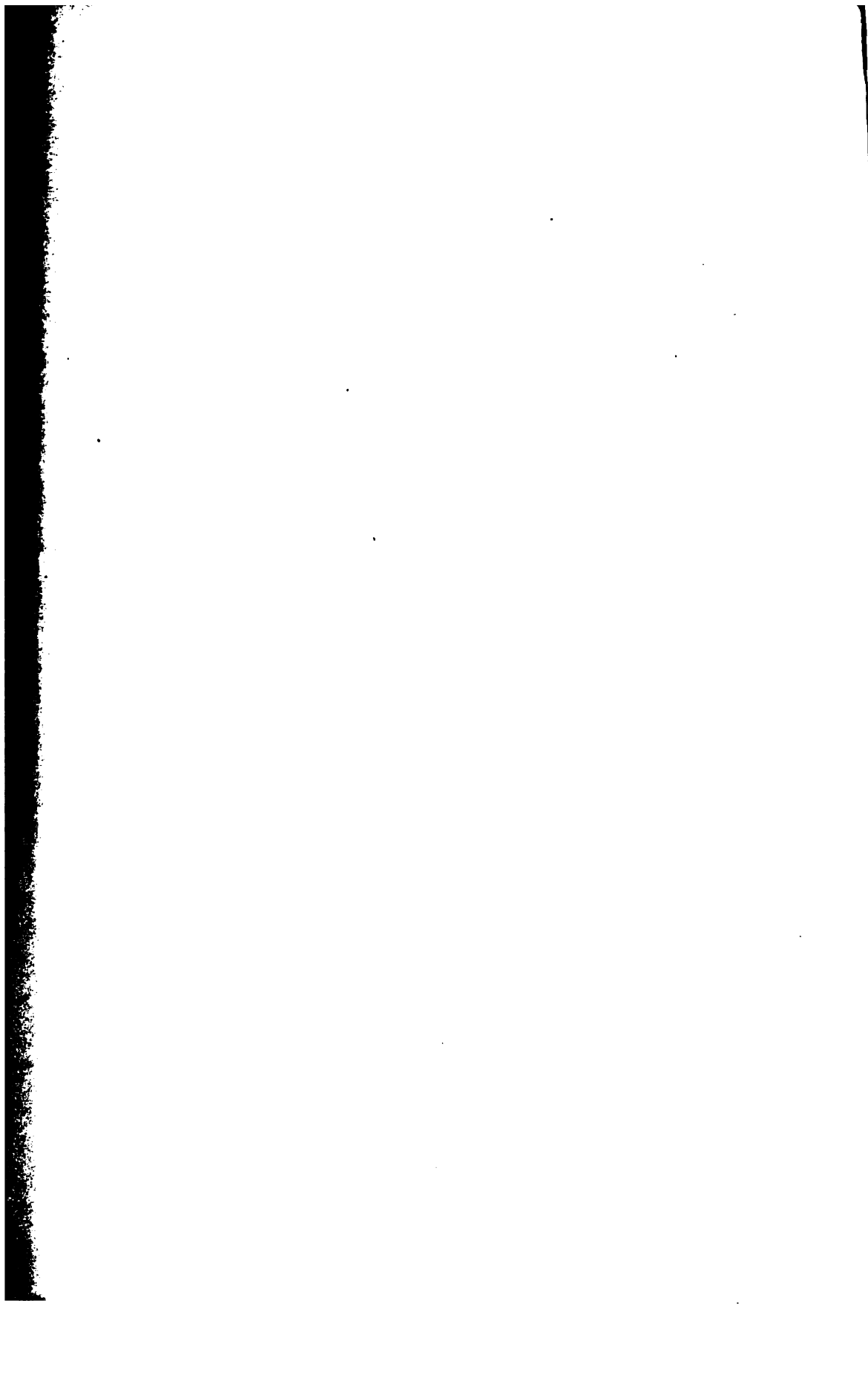
13. Compare: *Colman vs. Clements*, 23 Cal. 245; *Jacob vs. Day*, 111 Cal. 571, 576, 44 Pac. Rep. 243.

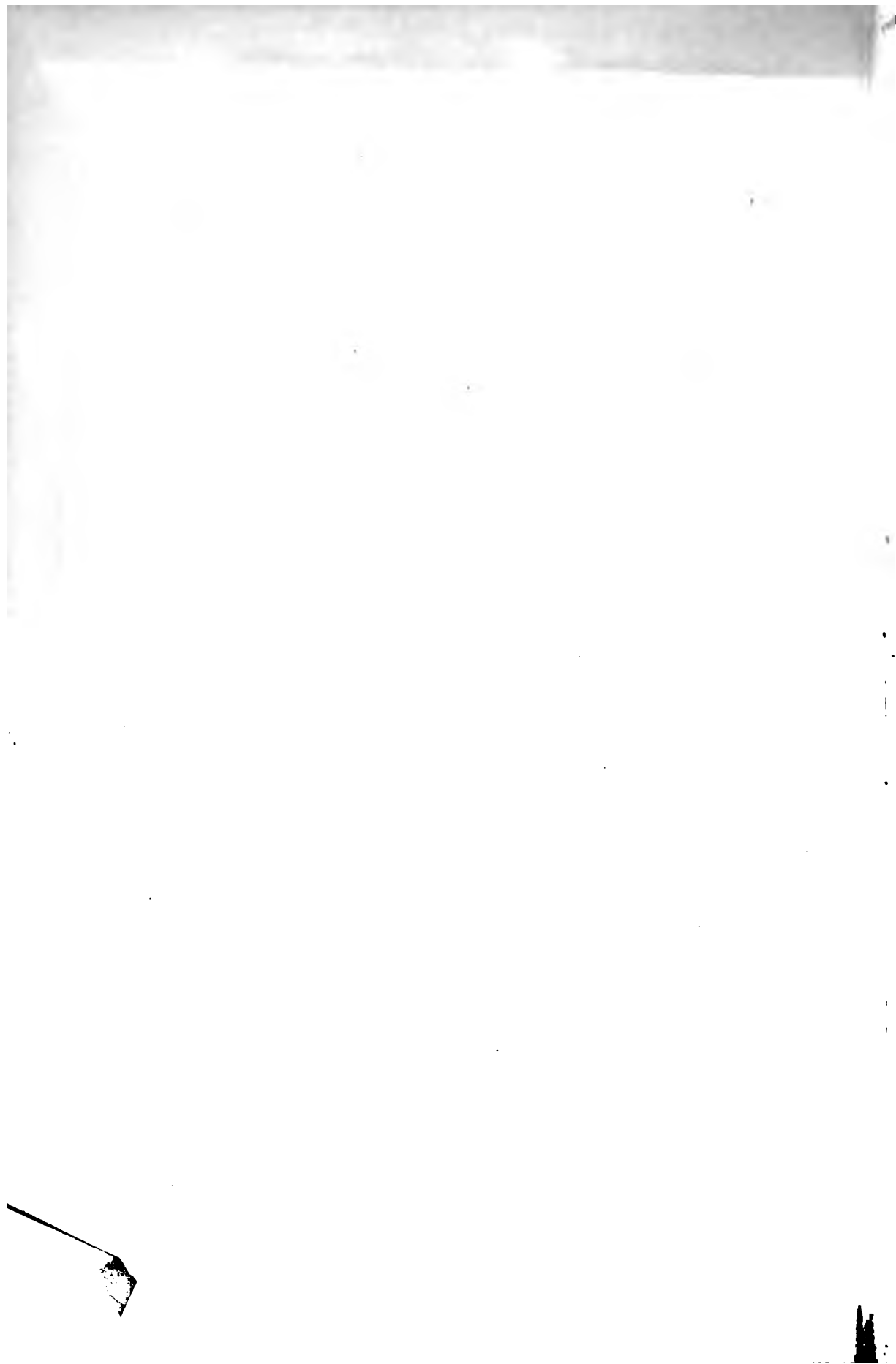
14. WATER NOT SUPERFLUOUS; essence of work.—*Jacob vs. Day*, 111 Cal. 571, 576, 44 Pac. Rep. 243.

15. Not superfluous as aiding extraction of last particle of gold, clearing ground for further operations.—*Jacob vs. Day*, 111 Cal. 571, 576, 44 Pac. Rep. 243.

16. No loss of utility or impediment to miner, but of high utility and absolute necessity. Inaccurate to call it waste or superfluous moisture, or to describe it carrying tailings as drainage of mine.—*Jacob vs. Day*, 111 Cal. 571, 575, 44 Pac. Rep. 243.

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